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CLASSIC JUSTIFICATIONS FOR FREE SPEECH

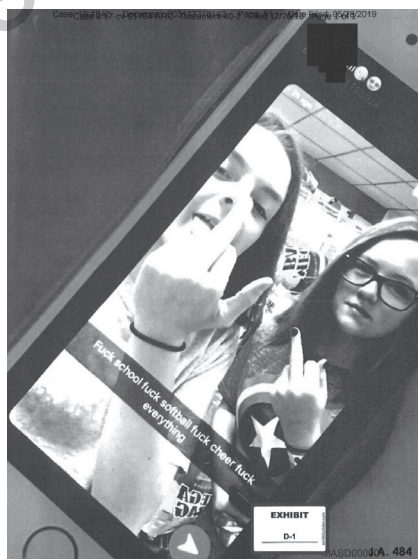
INTRODUCTION

Brandi Levy's first year of high school didn't quite end as she had hoped.¹ After trying out for the varsity cheerleading squad, she failed to make the team and was instead offered a position on the junior varsity squad, where she was already a member. To add to her disappointment, she also failed to secure the right fielder spot she wanted on her local softball team.

Unhappy with this turn of events, Levy posted several stories on Snapchat while she and a friend were at a local convenience store one Saturday. One was a photo of her and her friend raising their middle fingers, with the caption: "Fuck school fuck softball fuck cheer fuck everything." Another expressed her frustration about being rejected from the varsity squad when a rising freshman made the team: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else? ☹️"

As you may know, Snaps disappear after 24 hours—in this case, on a Sunday, when school was not in session. But one of the cheerleaders saw Levy's posts and shared screenshots with her mother, who happened to be a cheerleading coach. It didn't take long for the images to circulate throughout the school, "visibly" upsetting several other cheerleaders, who raised their concerns with the coaches. The posts also became a topic of discussion during an Algebra class taught by one of the coaches.

Believing that Levy's Snaps violated the school's cheerleading rules (which Levy had agreed to follow)—to respect coaches and other cheerleaders and to refrain from "foul language and inappropriate gestures"—the coaches



One of Brandi Levy's Snaps that led to her suspension from the junior varsity cheerleading squad.

Source: Appendix at 20, *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021) [No. 20-255].

suspended Levy from the junior varsity squad for one year, saying the punishment was needed to “avoid chaos.”

Did the coaches do the right thing by punishing Levy for her expression? Whatever your answer, it seems possible, even likely, that you immediately went to the U.S. Constitution’s First Amendment—as in, “Levy has a First Amendment right to say whatever she wants, especially off campus” or “Levy may have a First Amendment right to speech, but that doesn’t give her the right to insult and disrupt her school.”

These are natural responses to questions about speech, including the propriety of the school’s response to Levy’s post; Americans tend to equate free speech with the First Amendment. And it’s certainly not an incorrect response. The First Amendment forbids government from abridging freedom of speech. That guarantee—or, more accurately, the Supreme Court’s interpretation of that guarantee—matters a lot in thinking through speech controversies like Levy’s.

We will see as much in the next chapter. But for now, let’s take a step back, asking not what the First Amendment says or what the Court has said about it but rather about the very nature of free speech. Why should we protect free speech? What is its value? What functions does it serve in our society? Under what circumstances should we allow speech to flow freely and under what circumstances should we allow regulators to limit it?

These questions are not new. To the contrary, they have engaged commentators, scholars, and even Supreme Court justices from time immemorial. In order to begin forming responses to these age-old questions, it will be helpful to consider five of the most influential justifications that have traditionally been offered for the protection of free speech and to think about how they might shape our analysis: (1) discovering truth by testing speech in the famous “marketplace of ideas,” (2) facilitating participation in a democracy, (3) assuring individual self-fulfillment, (4) creating a more adaptable and stable society (the “safety valve”), and (5) promoting tolerance.

Most of these justifications for protecting speech are quite old—for example, the first, the idea of truth emerging through a competition of ideas, traces at least back to the 1600s. Yet, they remain relevant to contemporary controversies. In fact, when Brandi Levy’s case reached the Supreme Court, the majority opinion referenced this very “truth” rationale:

America’s public schools are the nurseries of democracy. Our representative democracy only works if we protect the “marketplace of ideas.”²

In nearly every situation, it is impossible to analyze contemporary speech controversies fully without reflecting on core questions about *why* we value speech. So, as you read the theories to follow, ask yourself about their relative strengths and weaknesses. Also, consider their application to Levy’s situation: Would one or more of the rationales

bear on the question of whether the school was justified in its decision to suspend her as punishment for her expression?

At the chapter's end, you will have a chance to consider another contemporary controversy over expression: whether universities should allow white supremacists to speak on campus. We will ask you to consider the five justifications as you analyze whether exclusion of such speakers based on their views would be tolerated by the principle of freedom of speech.

1. DISCOVERING TRUTH THROUGH THE "MARKETPLACE OF IDEAS"

Of all the justifications for free speech, this one is probably the most famous. The principal idea is that free expression aids in the discovery of truth, as unfettered speakers will contest for public acceptance of their positions and the best will win out. (Note: Throughout this book, we use the words "free speech" and "free expression" interchangeably.)

This justification has deep roots. In a pamphlet written in 1644,³ the English author and poet John Milton (of "Paradise Lost" fame) condemned his country's licensing law, which prohibited people from printing any material unless they received a license from the government to do so. As a practical matter, the law prevented anything from being published in England without prior approval. Milton vehemently condemned the law, arguing that its effect "will be primely to the discouragement of all learning, and the stop of truth, not only by disexercising and blunting our abilities in what we know already, but by hindering and cropping the discovery that might be yet further made both in religious and civil wisdom."⁴ He thus objected that requiring government licenses to speak would impoverish the marketplace of ideas and so blunt the ability of the people to acquire knowledge.

John Stuart Mill, an English philosopher and economist, picked up on the theme of speech's value in pursuit of truth in his equally famous essay, "On Liberty" (published in 1859).⁵ Railing against government control of expression, he wrote:

[T]he peculiar evil of silencing the expression of an opinion [robs] the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

However influential Milton and Mill were—and are—it was Oliver Wendell Holmes, a U.S. Supreme Court justice, who popularized the idea of free speech in

service of the discovery of truth. His most celebrated writing on the subject came in a dissenting opinion in the 1919 case *Abrams v. United States*.⁶

Abrams concerned the plight of five well-educated Russian immigrants, all of whom adhered to anarchist, revolutionary, or socialist philosophies at odds with mainstream American political thought. In October 1918, they published and distributed leaflets, written in English and Yiddish, criticizing President Woodrow Wilson's decision to send U.S. troops into Russia and calling for a general strike to protest that policy. The leaflets were written in language characteristic of the rhetoric of the Russian Revolution: "Workers of the World! Awake! Rise! Put down your enemy and mine!" and "Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM." They described the government of the United States as a "hypocritical," "cowardly," and "capitalistic" enemy. The protesters branded President Wilson a "kaiser."

The government charged Abrams and the others with intending "to incite, provoke and encourage resistance to the United States" in its war with Germany in violation of the Espionage Act of 1917, based on their distribution of the leaflets. The trial court found them guilty and sentenced them to prison terms of fifteen to twenty years.

When the case reached the Supreme Court, the majority upheld the convictions. To the justices, Abrams's words were punishable because of the supposedly evil consequences that they could produce: "Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States."⁷

The Court's failure to distinguish between any actual danger of Abrams's speech and the mere political ideas expressed in his leaflets drew the ire of Justice Holmes. Joined by Justice Louis Brandeis, he wrote a vigorous dissent that contained the seeds of free-speech doctrine as it would develop in the twentieth century. We excerpt it in Box 1-1.

BOX 1-1 EXCERPT OF JUSTICE HOLMES (JOINED BY JUSTICE BRANDEIS), DISSENTING IN ABRAMS V. UNITED STATES (1919)

I do not doubt for a moment that . . . the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly

cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.

[...]

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Passages in the excerpt are reminiscent of Milton and Mill (in fact, Holmes re-read “On Liberty” before writing the dissent). But Holmes made it his own in this famous line:

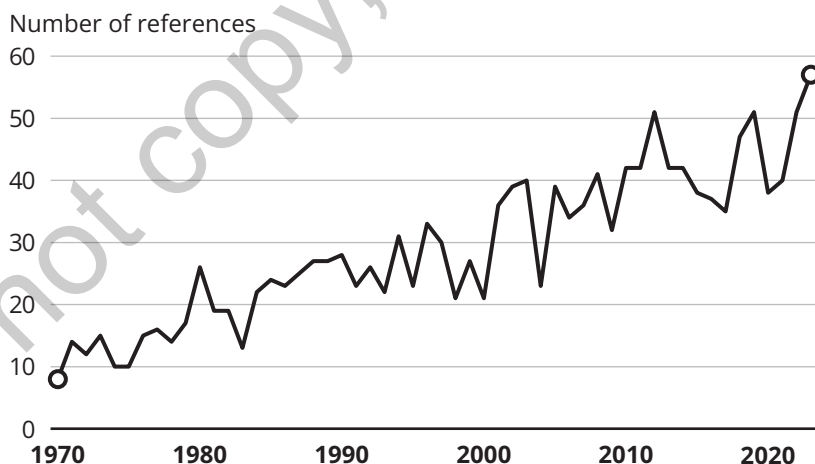
[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that *the best test of truth is the power of the thought to get itself accepted in the competition of the market...* (emphasis added)

These words indicate that, like Milton and Mill, Holmes believed that free expression aids in the discovery of truth if an “uninhibited marketplace of ideas”⁸ exists—that is, a market in which government (mostly) stays out of the business of regulating speech and lets ideas compete for acceptance. Under Holmes’s justification for speech, we should allow—want—ideas to be thrown out into the world even if they seem to be evil, silly, nasty, or false. Those flawed ideas will not survive the competition; they will be trumped by “truth.”

Notice that Holmes placed an important limit on his hands-off approach. Although generally disapproving of government attempts to suppress speech so that the marketplace of ideas would flourish, he made an exception for expressions that “so imminently threaten immediate interference with the lawful and pressing purposes of the law” that government suppression of the words may be “required to save the country.” Clearly Holmes did not think that Abrams’s “surreptitious publishing of a silly leaflet . . . without more” presented such “immediate danger.” But what would fall into that category remains contested.

Even with lingering questions about the nature of “imminent threats,” the metaphor of testing ideas through a competition in the marketplace has become so ingrained in the American psyche that Holmes’s framing appears everywhere⁹—in scholarly writings, commentary, blogs, and social media posts.¹⁰ And, if anything, Holmes’s justification has only grown in currency over time, as Figure 1-1 suggests. There we show the number of court cases referencing the marketplace rationale.¹¹ Just consider that the average number in the 1970s was 13; in the 2020s, it increased over three-fold,

FIGURE 1-1 ■ References to the “Marketplace of Ideas” Justification for Free Speech in Federal and State Court Decisions, 1970–2023



Note: We searched in Lexis for “marketplace of ideas” or “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” We included all court decisions, state and federal.

to 47. All but one member of the contemporary Supreme Court has written or joined an opinion citing the rationale. Not bad for a 1919 dissenting opinion!

Why the Holmesian approach to speech has become so popular is not much of a mystery. For one thing, it enlists the core idea of free enterprise, an economic system that most Americans view positively.¹² Under a free-enterprise (sometimes called a free-market) rationale, economic growth is best served through market competition mostly unfettered by government intervention. Substitute the word “truth” for “economic growth” and (some argue) you have Holmes. Moreover, the marketplace approach appears to solve many free speech problems, especially in modern-day America.¹³ To be sure, people today do not often distribute pamphlets, as Abrams did. But social media has become a huge marketplace of virtually unlimited ideas. With a single tap on her cell phone, Brandi Levy was able to reach her 250 Snapchat friends in seconds. It took Abrams and his colleagues weeks to print and distribute their flyers, at least some of which they threw out of an apartment window to help with distribution.

Still, however powerful and prominent Holmes’s marketplace justification for protecting speech, it is not without critics in modern times. One concern is that it assumes “truth” must emerge from a competition among diverse ideas. While that assumption sometimes holds, it is not at all guaranteed. Again consider Levy’s posts to illustrate. Perhaps there was something to her complaints about the way cheerleaders were selected. Had the school not silenced her, maybe others would have agreed or challenged her, thus promoting a competition of ideas with some sort of “truth” ultimately emerging.

But often the assumption that truth *must* materialize seems off. As the law scholar Frederick Schauer pointed out, some “ideas” or “beliefs” are simply facts. People may believe, for example, that former president “Obama was born in Kenya” or that the Holocaust is “a myth fabricated by Zionists and their supporters,”¹⁴ but these beliefs are “false—plainly, demonstrably, and factually false,” as Schauer wrote. So why do they need to be tested in the marketplace? That is, why protect such expressions from censorship when there is no doubt that they are *not* contributing to truth?

A related problem is that even for ideas tested and eventually proven false, prolonged competition in the marketplace can still cause lasting harm. This is particularly concerning in today’s era of misinformation. Consider, as an example, the long-standing myth that humans only use 10 percent of their brains. Despite scientists repeatedly debunking this claim,¹⁵ it continues to appear in advertisements, movies, and classrooms. The danger of allowing this false narrative to persist is that it undermines understanding of how the brain actually works and spreads misinformation about human potential and even about the severity of head injuries. The same could be said of hateful stereotypes that falsely smear various groups with alleged qualities that invite harassment, threats, and violence against them.

The example of brain usage shores up yet a third concern with the Holmesian rationale: the very idea that the marketplace always and ultimately produces truth is doubtful because people have differential levels of influence in that market.¹⁶ To be

sure, “[t]he internet has lowered if not eliminated the barriers to entry so that everyone can have a voice, not just the most powerful or the very rich.”¹⁷ However, substantial disparities remain in who actually gets heard. Celebrities or politicians, for example, may have multiple millions of followers on Instagram, while the median number is closer to 200; Brandi Levy’s account was slightly above that figure, at 250 followers.

These sorts of gaps suggest that the competition among ideas is rarely, if ever, fought on a level playing field. For this reason, Professor Mary-Rose Papandrea suggests that “the marketplace of ideas analogy . . . might actually support government intervention to make sure this marketplace is ‘fair’.”¹⁸

Papandrea may have a point. To prolong the metaphor, it seems reasonably well accepted that government intervention in markets is acceptable to ameliorate a “market failure,” such as monopoly power, inequality in distribution, or lack of information. Indeed, in today’s America, speech seems far *less* regulated than economic markets—despite the popularity of free enterprise—partly to prevent the rich and powerful from monopolizing sectors of the economy. This difference led one scholar to ask, “Why do we have a . . . laissez-faire principle for speech but not for economic markets?”¹⁹ Why indeed, especially in an era when celebrities and those with economic and political power can so dominate social media that they distort the marketplace of ideas.²⁰ Relatedly, while information is widely available through the vast reach of the internet, many individuals find themselves in information silos where information is curated for them by filters and algorithms and, perhaps even unknowingly, fail to be exposed to a full airing of opinions or ideas that could theoretically be in competition with one another.²¹ It is worth considering, therefore, what a “market failure” for speech would look like and what kinds of government intervention might be appropriate to respond to it.

As you think about that question, you should also consider whether letting the government regulate what people say may be a cure worse than the disease. It is not hard to imagine government efforts to silence critics or people who hold unpopular views in the name of regulating the marketplace of ideas.

A related concern also implicates power and authority; namely, the marketplace-of-ideas model assumes that each of us is responsible for independently evaluating any claims or thoughts through observation, experience, or collecting information. But that is a very demanding expectation. It presumes that we all possess “the capacity to listen and to engage in self-evaluation, as well as a commitment to the conventions of reason, which, in turn, entail aspirations toward objectivity, disinterest, civility, and mutual respect.”²² These are indeed fine aspirations—and ones we hope you will appreciate even more after you finish this book. But they remain aspirations in today’s America, especially in light of extreme political polarization and entrenchment of beliefs.

Yet another concern about the “marketplace” actually arose shortly after *Abrams*. Holmes, recall, thought the majority had overestimated the degree of risk posed by the distribution of “silly” pamphlets by an “unknown man.” But one scholarly

commentator, John Henry Wigmore, asserted that it was Holmes who had minimized the harms of too much liberty at the cost of preserving order.²³ As Wigmore put it, “the danger now is . . . that this misplaced reverence for freedom of speech should lead us to minimize or ignore other fundamentals which in today’s conditions are far more in need of reverence and protection. Let us show some sense of proportion in weighing the several fundamentals.”²⁴

Wigmore was likely referencing “conditions” in the United States and elsewhere in the wake of World War I. But his more general point remains relevant today: that perhaps the marketplace justification weighs free speech too heavily relative to other values that Americans regard as fundamental, including equality, safety, privacy, and religion.²⁵ How to get the “right” balance between speech and competing values remains a question to this day—and one that you will have a chance to consider in the case study at the chapter’s end.

One final concern with the marketplace approach—and, indeed, with all the justifications we examine in this chapter—is that, while they may sound reasonable, they are rarely tested with empirical data. As a result, we have little understanding of whether these theories hold up in practice. In the case of the marketplace justification specifically, there has been a great deal of commentary and many supplementary theories, but little “solid empirical grounding” exists to support or refute the views of Holmes and others who champion this approach.²⁶ Put simply, we do not know if the remedy for bad speech—what Justice Brandeis once called “falsehoods and fallacies”—is truly “more speech, not enforced silence.”²⁷

We revisit this lack of empirical testing in Chapter 3. For now, we encourage you, as you continue to read about various justifications for free speech, to test them against your own experience, asking whether they seem plausible to you.

2. FACILITATING PARTICIPATION IN A DEMOCRACY

The “search for truth” rationale offers an important justification for protecting free expression, as the chapters to follow attest. It is joined by a second justification that has gained prominence, centering on the importance of expression for the maintenance of a democratic system of government. This rationale for free speech protection suggests that free speech on matters of public concern is essential for democracy to work.

This justification is sometimes called “self-governance” because it follows from a series of lectures delivered by Alexander Meiklejohn,²⁸ eventually turned into a book called *Free Speech and Its Relation to Self-Government* (1948).²⁹ Meiklejohn was not a lawyer; he earned a PhD in philosophy and spent his career in academics, as a professor, a dean, and president of Amherst College. But he was perhaps most famous for his advocacy and writings on free speech, with his book on self-government a signal achievement.

Meiklejohn's central argument is that the primary value of free speech lies not in its capacity to uncover the truth but in its necessity for a functioning democracy. In his theory, in a democracy, the people are sovereign; they hold the power, or, as he put it, "A government of free [people] can properly be controlled only by itself."³⁰ For the people to govern themselves effectively, he argued, they must be able to acquire and express the knowledge necessary to engage in political deliberation, cast votes, and make other political decisions without fear of government reprisal. On his view, the principle of free speech is not anchored in an individual right but in the "necessities of self-government by universal suffrage."³¹

To illustrate his theory, Meiklejohn used the procedures of a "traditional American town meeting," in which a community comes together to decide on matters of public policy. Box 1-2 provides an excerpt from his book on how, ideally, the meeting would proceed.

The notion of town members meeting face-to-face to vote on matters of public policy may seem quaint. These days "town hall" meetings are often held virtually, with a leader, say, the president of a university, taking questions over Zoom—not asking for students to vote on matters of campus concern.

BOX 1-2 EXCERPT FROM MEIKLEJOHN'S FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948): THE TOWN MEETING³²

In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others . . .

[Suppose, for example,] a meeting is called to discuss [the question of] shall there be a school? Where shall it be located? Who shall teach? What shall be taught? The community has agreed that such questions as these shall be freely discussed and that, when the discussion is ended, decision upon them will be made by vote of the citizens. Now, in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another. As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged.

And yet, like Holmes's marketplace justification, Meiklejohn's self-governance rationale—town-meeting model and all—continues to have resonance in constitutional analysis. Meiklejohn himself won the Presidential Medal of Freedom for his work on free speech, numerous scholars have built on his theory,³³ and *Free Speech and Its Relation to Self-Government* has generated over 2,600 cites in Google Scholar—and counting. It also has been cited in court cases by justices as ideologically opposite as the very conservative Samuel Alito³⁴ and the ultra-liberal William O. Douglas.³⁵

What accounts for the enduring prominence of Meiklejohn's self-governance justification? The answer may lie in the clarity of his reasoning on two key questions: what speech is covered and what role government should play. Then again, while he is clear on both, neither answer is without its challenges, as we shall see.

Starting with the speech itself, it follows from Meiklejohn's logic that speech directly or indirectly related to issues voters must address—matters of public interest—should be protected. Call it public or political speech. But the theory does not support protecting what Meiklejohn calls “private speech.” This is expression where people advocate for their “own private interests, private privileges, private possessions,” which, he argues, serve only individual, not communal, welfare. For Meiklejohn, even at a town meeting, it mattered not that every individual had an opportunity to speak as they wished, but only that “everything worth saying” in aid of the collective decision-making process “shall be said.”³⁶ The nature of the message, then, is key to how much protection it will receive from censorship.

If one is chiefly interested, as was Meiklejohn, in promoting democratic deliberation on matters of collective decision-making, then the line he draws between the political and the private makes sense. But in practice, how well does it work? Return to Brandi Levy. Would Meiklejohn label her Snaps “private” or “political”? On the one hand, they would seem to be private, a venting of her own personal concerns about cheerleading selection. On the other hand, could you make a case that expressing her concerns could lead to better governance at her school and so are precisely the kinds of *public* words that Meiklejohn would want to protect?

The Supreme Court itself struggled with this distinction. “Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which [Levy] forms a part,” Justice Stephen Breyer wrote for the majority.

Questions of this sort animate two critiques of Meiklejohn's emphasis on public speech. One is simply this: it is very difficult to come up with a definition to separate political from private speech. Is Levy's speech public or private? What about picketing by labor unions against private employers? Or a work of art that illustrates the devastation of drug addiction? It is clear that the line between private and public issues is not at all a bright one. Meiklejohn understood that sorting out the public-private distinction would be a “crucial task” but conceded that it “would go far beyond the limits of the inquiry” in his book.³⁷

The second critique of Meiklejohn follows from the first: even assuming public and private speech are separable, why cover only political speech? If we are concerned about ensuring effective democratic deliberation, it would make sense to protect messages that may fall on the “private” side of the line but have important public implications. For example, consider a privately administered website advertising a new vaccine approved by the U.S. Food and Drug Administration (the agency responsible for ensuring the safety of vaccines). Such an advertisement might amount to private (commercial) speech under Meiklejohn’s rationale, but is its informational value to democratic deliberation so much less than a town-hall discussion? The prominent First Amendment scholar, Robert Post, thinks not. In his view, protections for free expression should extend to private speech that contributes to public dialogues and the formation of public opinion.³⁸

Although the distinction between public and private speech is hard to articulate, this division has become deeply embedded in the public’s understanding of free speech—and, as we suggested earlier, in court decisions as well. Even in contemporary America, where many kinds of expression receive First Amendment protection, the political-versus-private distinction persists, with political speech claiming special status. Take, for example, a Supreme Court case involving high school student Joseph Frederick, who displayed a large banner reading “BONG HiTS 4 JESUS” at a school-sanctioned event. When the school suspended him, Frederick challenged the decision as a violation of his First Amendment rights.

The Supreme Court upheld the suspension but hinted that the outcome might have been different if the banner had conveyed a political message:

[T]he dissent emphasizes the importance of political speech and the need to foster “national debate about a serious issue,” as if to suggest that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent’s suggestion, this is plainly not a case about political debate over the criminalization of drug use or possession.³⁹

The dissenting opinion did indeed suggest that the banner’s message constituted political speech designed to express the “minority’s viewpoint” in “the national debate about a serious issue.”⁴⁰ How would Meiklejohn have come down?

There is another dimension of Meiklejohn’s theory that is worth considering. It involves the role of government—be it the U.S. Congress, the elected chair of the town-hall meeting, the principal at a public school, the president of a public university, and so on. According to Meiklejohn’s justification for protecting speech to facilitate self-government, the job of these government actors must be to support the process of self-government by giving political speech free rein. This theory suggests that government should never suppress political speech, even if it is said to pose an “imminent

threat,” as Holmes wrote in *Abrams*, or is capable of causing a “clear and present danger” of bringing about the “substantive evils that [government] has a right to prevent,” as Holmes put it in another case.⁴¹ In fact, Meiklejohn believed that “some preventions are more evil than the evils from which they would save us.”⁴² He reasoned that when the government attempts to limit political speech, it undercuts the collective decision-making process essential for democracy to thrive.⁴³ And the government is most likely to seek to impose such limits, to perceive such threats, when people are engaged in criticism of government itself. Supreme Court Justice William J. Brennan, seemingly taking a page out of Meiklejohn, put it this way:

[There is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.⁴⁴

For Meiklejohn, the only proper role of the government is to facilitate and regulate the deliberative process so that people can make informed decisions, not to censor their views as dangerous. Again, he illustrates the point using the example of a town meeting, wherein the moderator is “the government”:

A chairman or moderator is, or has been, chosen. He “calls the meeting to order.” . . . The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed.

Except as he is overruled by the meeting as a whole, he will enforce those rules. His business on its negative side is to abridge speech. For example, it is usually agreed that no one shall speak unless “recognized by the chair.” Also, debaters must confine their remarks to “the question before the house.” If one man “has the floor,” no one else may interrupt him except as provided by the rules. The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done.

And the talking must be regulated and abridged as the doing of the business under actual conditions may require. If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared “out of order” . . . and must then stop speaking . . . And if he persists in breaking the rules, [the moderator may] . . . in the last resort, “throw out” the speaker from the meeting.⁴⁵

This, to Meiklejohn, is the model of self-governance: while the government (here, the moderator) may not censor anyone’s speech based on the content of that speech or the views it expresses—even if it thinks the speech is dangerous or detrimental—it can force people to play by the rules in service of promoting deliberation.

Does the town-meeting model work on the ground? Return to Brandi Levy's posts and recall that she was critical of the way the coaches selected cheerleaders. From the school's perspective, those posts violated the cheerleaders' code of conduct, which prohibited disrespect toward the school and its staff—rules Levy had agreed to follow.

Assume for a moment that Levy's speech was indeed political. What would Meiklejohn make of the government's (in this case, the school's) decision to suspend her because of her posts? One possible response is that Meiklejohn would have disapproved because the government was suppressing speech critical of it. Had Levy praised the coaches, it is hard to imagine that they would have suspended her. Then again, under Meiklejohn's rationale, the government sets the rules; and like the errant speaker in Meiklejohn's town meeting, Levy agreed to the rules but did not abide by them, thus providing the school with a reason to kick her out of cheerleading for a year, just as the moderator could throw out a speaker.

But what happens when the rules themselves are not neutral? It is one thing to say that the moderator will follow Robert's Rules of Order, a traditional procedural guide, at a town meeting, but it is quite another to say that the moderator will disallow speech critical of a particular person or policy—as did Levy's high school. So, is Meiklejohn's rationale contingent on formulating neutral rules?

3. ASSURING INDIVIDUAL SELF-FULFILLMENT

A third rationale for protecting speech focuses on the value of speech for individual fulfillment, development, and autonomy.⁴⁶ If you think this sounds inconsistent with Meiklejohn's view, you would have a point.⁴⁷ Whereas Meiklejohn emphasized the importance of speech to democratic deliberation—a *collective* enterprise—the self-fulfillment rationale focuses on speech as a mechanism for people to express themselves, listen, think, and form their own opinion—an *individual project*.⁴⁸

This view finds its roots in the 1600s in the works of John Locke and even Milton. But it was Thomas I. Emerson, writing nearly 400 years later, who brought it to prominence as a justification for free speech under the U.S. Constitution. A constitutional lawyer and Yale Law School professor—whose students included Clarence Thomas and Bill and Hillary Clinton—Emerson made his mark on First Amendment thinking with his 1963 article, "Toward a General Theory of the First Amendment," followed by a 1970 book, *The System of Freedom of Expression*. In these works, Emerson set out the "values sought by society in protecting the right to freedom of expression."⁴⁹ Two of those values were already well-established: discovering the truth (advocated by Holmes) and facilitating participation in a democracy (championed by Meiklejohn). But first on Emerson's list was a relatively new conceptualization of speech: as a mechanism for assuring individual self-fulfillment.

Box 1-3 provides an excerpt of Emerson's views on the topic. Note that for him, free speech is crucial to our development as human beings because it allows us to express

ourselves, think, create, learn, and listen. Seen in this way, expression becomes an aspect of human dignity, such that when government attempts to suppress speech it disrespects our self-worth.

BOX 1-3 EXCERPT FROM EMERSON'S "TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT"⁵⁰

The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.

[. . .]

From this it follows that every man—in the development of his own personality—has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.

Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.[. . .]

The right to freedom of expression derives, secondly, from basic Western notions of the role of the individual in his capacity as a member of society. Man is a social animal, necessarily and probably willingly so. He lives in company with his fellow men; he joins with them in creating a common culture; he is subject to the necessary controls of society and particularly of the state. His right to express his beliefs and opinions, in this role as a member of his community, follows from two fundamental principles. One is that the purpose of society, and of its more formal aspect the state, is to promote the welfare of the individual. Society and the state are not ends in themselves; they exist to serve the individual. The second is the principle of equality, formulated as the proposition that every individual is entitled to equal opportunity to share in common decisions which affect him.

From these concepts there follows the right of the individual to access to knowledge; to shape his own views; to communicate his needs, preferences and judgments; in short, to participate in formulating the aims and achievements of his society and his state. To cut off his search for truth, or his expression of it, is thus to elevate society and the state to a despotic command and to reduce the individual to the arbitrary control of others. The individual, in short, owes an obligation to cooperate with his fellow men, but that responsibility carries with it the right to freedom in expressing himself.

Two basic implications of the theory need to be emphasized. The First is that . . . freedom of expression, while not the sole or sufficient end of society, is a good in itself. . . . The society may seek to achieve other or more inclusive ends—such as virtue, justice, equality. . . . But, as a general proposition, the society may not seek to solve them by suppressing the beliefs or opinions of individual members. To achieve these other goals it must rely upon other methods: the use of counter-expression and the regulation or control of conduct which is not expression.

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(Continued)

Hence the right to control individual expression, on the ground that it is judged to promote good or evil, justice or injustice, equality or inequality, is not, speaking generally, within the competence of the good society.

The second implication, in a sense a corollary of the first, is that the theory rests upon a fundamental distinction between belief, opinion and communication of ideas on the one hand, and different forms of conduct on the other. For short-hand purposes we refer to this distinction hereafter as one between “expression” and “action.” . . . [I]n order to achieve its desired goals, a society or the state is entitled to exercise control over action—whether by prohibiting or compelling it—on an entirely different and vastly more extensive basis. But expression occupies a specially protected position. In this sector of human conduct, the social right of suppression or compulsion is at its lowest point, in most respects non-existent.

Emerson’s rationale appears to provide broad protection to expression, certainly broader than Meiklejohn’s “self-governance” justification for speech, because one can imagine almost any topic or idea being central to some person’s sense of self. While Meiklejohn limits protected speech to that in service of democratic deliberation, Emerson’s focus on the individual would seem to provide a basis for protecting political speech, yes, but also the full spectrum of human communication—art, advertising, music, computer code, videos, literature, and more. Emerson went so far as to write that society’s right to compel or suppress speech is virtually “non-existent”—even in pursuit of noble goals, such as justice or equality.

Still, Emerson’s “self-fulfillment” justification does not privilege all forms of human behavior. He drew a distinction between “expression” and “action” (conduct), asserting that while the former should enjoy broad protection, the government may exercise far greater control over the latter.

Once again, we are presented with a line-drawing challenge, here between expression and action. Think about Brandi Levy’s posts. At first glance, they might seem exactly like the kind of private expression—criticizing the school’s cheerleader selection process—that Emerson’s rationale would protect against government suppression, as she is venting her own frustration and articulating her own sense of fairness. Note, though, that her posts were more than just text: they included a photo of her and a friend flipping their middle fingers. Does that image cross into the realm of conduct, even though it is conduct clearly intended to convey a message? Would the self-fulfillment justification protect the caption in Levy’s Snap but not the accompanying photo? (If you’re unsure, you’re not alone—this question has puzzled even the Supreme Court, as we’ll explore in Chapter 2.)

Although it may be difficult to distinguish conduct and expression, keep in mind that the self-fulfillment rationale does seem to grant wide latitude for protecting political and private speech. Does it protect too much? Emerson explicitly rejects the idea that speech can never be suppressed in order to achieve other values that governments

might want to pursue for the good of society. It is not entirely clear, however, why or when “an individual’s interest in self-expression ought to be trumped by other interests geared toward the common good.”⁵¹

Take creativity. Emerson suggests that it is an important “power,” which his theory of free expression allows people to cultivate. But this can cut both ways. Does his rationale leave room for Congress to enact copyright laws (a power granted to it in the U.S. Constitution⁵²), which protect original work and so are aimed at encouraging innovation and creativity? To be sure, copyright protects the author but also restricts others from treading too close to a copyrighted work in their own creative endeavors, for fear or uncertainty about violating the law.

This is but one example of how protection of some values can end up undermining others. In the material to come, we encounter other such situations, including university policies against hate speech, which may prohibit expression that stigmatizes or victimizes people based on characteristics such as their race, ethnicity, and gender identity. These policies are aimed at ensuring equity and inclusion—important values to many universities. But at the same time, they suppress certain forms of expression in ways that Emerson would likely veto. Should universities or governments always trade off other values in favor of speech, as the self-fulfillment rationale suggests, or should they strike a more equitable balance?

Consider a further complication: Emerson’s privileging of speech over action. Why are the values of individual fulfillment, development, and autonomy “better served by freedom of speech and communication” than by the many other activities from which people derive satisfaction or that help them develop as a person?⁵³ The former law professor and judge, Robert H. Bork, vividly makes this point:

An individual may develop his faculties or derive pleasure from trading on the stock market . . . working as a [bartender], engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. . . . These functions or benefits of speech are . . . indistinguishable from the functions or benefits of all other human activity. [Why] choose to protect speech . . . more than . . . any other claimed freedom[?]⁵⁴

Or, as another First Amendment expert put it, why must speech be “special”?⁵⁵ Based on your reading of Emerson’s excerpt, does he offer an answer? Do you have one?

4. CREATING A MORE ADAPTABLE AND STABLE SOCIETY (THE “SAFETY VALVE”)

The fourth justification also treats speech as special, building on the idea that free speech is one of the few values that acts as a “safety valve” by giving people, especially dissenters and other alienated people, an outlet for airing their grievances.⁵⁶ The theory

posits that if we are not allowed to express our views freely, real societal problems could fester, leading to terrorism and other forms of violence, and even revolution.⁵⁷ Put another way, countries that allow people to vent will be more stable because they are less likely to face revolution from within.

Louis Brandeis, often rated among the best justices to ever serve on the Supreme Court,⁵⁸ gave voice to this view in a famous concurring opinion:

[The framers] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.⁵⁹

Robert Jackson, another highly regarded Supreme Court justice especially known for his elegant writing, concurred with Brandeis—but when he was Mr. Jackson, not Justice Jackson. And his agreement came not in a court decision but in a letter, excerpted in Box 1-4.

BOX 1-4 ROBERT H. JACKSON'S LETTER TO THE MAYOR OF JAMESTOWN

On a Saturday evening in March 1919, attorney Robert H. Jackson, age 27, attended a lecture at Jamestown (New York) City Hall. [Robert H. Jackson went on to serve as U.S. Solicitor General, U.S. Attorney General, U.S. Supreme Court Justice, and Chief U.S. Prosecutor of the International Military Tribunal in Nuremberg.]

The lecturer, a lawyer named Winter Russell, was a somewhat prominent American Socialist. The lecture occurred in a period of global turmoil, devastation caused by the just-concluded [World War I] and, in the United States, ideological clashes, violence, law enforcement excesses and widespread unease.

Jackson, who had just completed a short term as Jamestown's corporation counsel and was building a private law practice, attended Russell's lecture by assignment. Jamestown's mayor had appointed Jackson and other lawyers to serve on a committee that evening to "censor" the lecture. It was anticipated, at least by some Jamestown leaders, that Russell's speech might cause disruption and need to be shut down.

Russell delivered a scathing speech. He attacked the U.S. government for its recent prosecutions of Socialist Party leaders Eugene V. Debs and Victor L. Berger for claimed crimes that really were, as Russell saw things, right principles and human ideals. Russell criticized the federal judges who had sentenced Debs and Berger to prison. But no censorship occurred—Jackson and his colleagues watched, listened and, at the end of the evening, returned to their homes.

Jackson stewed, then wrote. On Monday, he delivered this letter to the mayor, who was his mentor and friend, and to the Jamestown newspapers.

Here's the letter:

Dear Mayor:

According to the duty which you thrust upon me, I attended the Socialist meeting last Saturday night addressed by Winter Russell, and desire to report to you that so far as I observed, there was no infraction of the letter or the spirit of our laws, and I desire to take this opportunity to decline any further service upon committees of this character and to respectfully suggest that they be discontinued.

The speech at this meeting consisted of a bitter attack upon the government for prosecuting, and upon the courts for convicting Eugene V. Debs for his attacks upon President Wilson and his policy. He [Mr. Russell] denounced it as an attack upon free speech and complained that Debs was serving a long term in jail, while Theodore Roosevelt had not been prosecuted tho he called the president's policy "treasonable," and other attacks by richer and more influential men had passed unnoticed. He [Russell] concluded with the usual dreamy nonsense about the time when four hours shall constitute a working day. He predicted that if the government continued its policy of imprisoning men like Debs and Berger, it would bring on a revolution.

I see nothing illegal in any of this. That we have a right to criticize a conviction was pretty thoroughly established when the whole North arose in indignation at the conviction of John Brown, and when Abraham Lincoln made bitter attacks upon the Supreme Court of the United States because of the *Dred Scott* decision. I suppose there is nothing treasonable in dreaming about a four-hour day, that is merely moonshine.

I must admit that I never understood why men like Roosevelt and [Senator Henry Cabot] Lodge are immune from laws which condemned Debs and Berger. Not that I believe Roosevelt and Lodge should be prosecuted, but I believe that a Socialist has as good a right to criticize a Democratic president as a Republican has. In fact, Mr. Mayor, the whole speech was very moderate compared with those attacks upon the government which I have been reading at the hands of eminent senators and gentlemen.

It is useless for us to have a cold chill every time the Socialists have a meeting. We have embarked upon a policy as a government of imprisoning people who oppose the government. Many of our eminent and well-meaning citizens are rubbing their hands and saying, "Now that we have Debs in jail and Berger convicted, Socialism will die out." So said the Czar when he saw his political enemies exiled to Siberia; so said Louis the Fourteenth before the French Revolution; so said the Sanhedrin when they thought to kill out Christianity by crucifying Christ; so said the priesthood when they thought to kill out the Reformation by inquisitions.

Indignation meetings are the natural result of conviction of men like Debs and Berger, one several times a candidate for president of the United States who polled 897,000 votes in 1912, the last time he ran, and the other elected by the people of his district to represent them in Congress. I have read somewhat of history, and I just now fail to recall any government which has set

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about the suppression of unrest by putting popular citizens or class leaders in jail which has not stirred up a revolution, and I do not expect the United States to be any exception to a rule so universal. The prosecution of Debs and Berger is a tragic blunder. Sound law perhaps, but bad state policy, provoking class hatred and social unrest.

Mr. Mayor, I am opposed to Socialism and its insidious and vicious policy but I am equally opposed to those short-sighted people who expect to stamp it out by persecution. I am opposed to spying upon and persecuting and prosecuting and searching the Socialists, for they thrive on it. No doctrine of military necessity now requires suppressing opposition to the draft. All that is past. Appointing smelling committees to go to these meetings merely advertises the meeting. I think half the joy that the Socialists found in the Winter Russell meeting was in the knowledge that they were being watched, which proved to them that they had finally got under somebody's sensitive skin and after I had heard the speech, I confess I felt a little ridiculous and I looked at the other members and they looked as ridiculous as I felt. Mr. Mayor, it is quite time that we quit letting these Socialists make fools of us.

Our forefathers were a canny crowd. They knew that free speech and a free press constitute the greatest safety valve that can be devised. They provided for it in this country, that is they thought they did, so that people who have grievances can meet and discuss them and solicit votes and carry on their opposition peaceably. The inevitable result of suppressing public gatherings and free speech is private gatherings and covert acts of violence and then the mob and then revolution. In every country which is now suffering from Bolshevism the government has for years tried stamping it out by suppressing free speech, exiling, and imprisoning labor leaders and radicals, preventing public gatherings, and in general adopting the very measures which seem to be getting some standing in respectable circles in the United States. We cannot adopt one half so drastic a measure against the Socialists as Russia did nor one half so effective, yet Russia failed, as we shall fail if we attempt similar methods. Bolshevism has gained the least ground in the countries allowing the greatest freedom of discussion and the most ground where most oppressed and penalized.

When Civilization is in convulsions, it seems to me not only petty but rather dangerous to be sitting on the safety valve. I think that our assumption of the right to censor what shall be said in these workingmen's meetings is like our conviction of their leaders in that it seems to add to the hatred and bitterness already existing between capital and labor, and that if we desire these two great forces to co-operate we should cease to do these things which provoke antagonism and arouse slumbering hatred.

Very respectfully yours,
Robert Jackson

John Q. Barrett, "Free Speech as Safety Valve," *The Jackson List* (2011): 2-5. Also available at <https://thejacksonlist.com/wp-content/uploads/2014/02/20110317-Free-Speech-as-Safety-Valve-1919.pdf>.

Brandeis and Jackson eloquently express the strengths of one virtue of the “safety-valve” view: tamping down the possibility of violence and revolution, thereby creating a more stable society. But supporters often highlight a second benefit: because dissenting views can be aired, they inform government about the kinds of policies to adopt in response, along with the sorts of serious threats that society may confront; and there is some evidence that this is an effective approach. One study, for example, finds that free expression “is unambiguously associated with less terrorism in democracies.”⁶⁰

Despite these virtues, like all the other justifications for free speech, the safety-valve rationale, too, has its critics. Some agree that, for the reasons given by Brandeis and Jackson, censoring disaffected groups is not a good policy, but argue that neither is legitimizing them. In fact, it may be even more dangerous. To take racist hate speech as an example, scholars have pointed to its harms:

[I]t is an assault on the dignity of people of color; it humiliates and causes emotional distress, sometimes with physical manifestations; it helps spread racial prejudice, not only stigmatizing people of color in the eyes of the societally dominant race but also in the eyes of [many of] the victims themselves, inspiring self-hatred, isolation, and . . . finally, it frequently creates the conditions for violence.⁶¹

In this context, allowing people to “vent” racial hatred could have exactly the opposite effect that Brandeis and Jackson hypothesized, ultimately spurring violence. Perhaps for this reason, the United Nations suggests not only “monitoring and analyzing” hate speech to blunt its pernicious effects, but also “[a]ddressing and countering” it.⁶²

A second critique of the “safety-valve” theory of free speech focuses on contemporary realities: some speakers use social media intentionally to achieve ends specifically designed to destabilize, not stabilize, society, such as when known terrorists deploy various platforms to recruit members or when instigators attempt to interfere with elections. It is difficult to see how freedom to speak in these ways contributes to the stability of society, as the safety-valve theory posits. To be sure, various media platforms have developed policies to guard against the posting of nefarious material. Snap, for example, prohibits “terrorist organizations, violent extremists, and hate groups” from using its platform, stating that “We have no tolerance for content that advocates or advances terrorism or violent extremism.”⁶³ But some critics say that such self-monitoring is insufficient; that government intervention to suppress such harmful speech is necessary.⁶⁴ They make essentially an empirical claim that freedom to air grievances in the age of social media will cause more harm, through incitement, than it prevents through harmless release of pressure. How do you think Justice Jackson would have come down?

A final concern with the safety-valve justification is that it focuses on the welfare of society at a fairly high level of abstraction and pays no heed to individual needs or motivation. It generalizes that, overall, society will be better off if grievances are allowed to air rather than fester. Return to Brandi Levy. Jackson’s logic would seem to counsel against punishing her on the theory that censoring her “venting” would only

drive Levy and people like her to take less public, and perhaps less peaceful, methods of expressing their views, ultimately affecting the school's stability. Although this perspective works in Levy's favor—and against the school's claim that it suspended her to “avoid chaos”—it does so without consideration of Levy herself, her own fulfillment, or the value of her freedom to choose her mode of communicating her views.

5. PROMOTING TOLERANCE

The final of our five justifications for protecting speech—promoting tolerance—suggests that tolerating unwelcome speech has individual and collective benefits. The protection of speech inspires listeners to exercise self-restraint in the face of disagreeable speech, opening us up to new ideas and promoting a more tolerant society overall. Note the emphasis here is less on the speakers than on the listeners.

Like some of the other rationales we've considered, this one too has old roots,⁶⁵ but it received modern-day expression in a 1986 book by Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America*. Bollinger, a former president of the University of Michigan and Columbia University, writes widely on topics related to free expression but *The Tolerant Society* might be his most famous contribution.

As its subtitle suggests, Bollinger's book focuses on extremist speech, with particular emphasis on an event in the late 1970s that generated heated public debate: whether the village of Skokie, Illinois—home to hundreds of Holocaust survivors—should allow American neo-Nazis to march in its streets wearing uniforms with swastikas and carrying banners proclaiming, “Free Speech for White People.” Bollinger's words still have relevance today:

Free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.

I have chosen the term *tolerance* to describe this capacity sought, as well as the term *intolerance* to describe an incapacity. [By tolerant, I mean] “showing understanding or leniency for conduct or ideas . . . conflicting with one's own.” . . .

This [tolerance] perspective sees the social benefits of free speech as involving not simply the acquisition of the truth but the development of intellectual attitudes, which are important to the operation of a variety of social institutions—the spirit of compromise basic to our politics and the capacity to distance ourselves from our beliefs, which is so important to various disciplines and professional roles.⁶⁶ . . .

I claim that the practice of toleration of verbal acts under free speech may help inculcate what I call the tolerance ethic. What I have in mind is the development of a general disposition . . . to restrain our wants and beliefs in the exercise of social power.⁶⁷

Despite his belief in the “valuable benefits to us, as individuals and as a community” that tolerating disagreeable expression can bring, Bollinger—like the other theorists we have considered—acknowledges that sometimes speech must be regulated. The problem, as he also recognizes, is “finding the right balance, which, of course, requires that *we* make a judgment” (emphasis added).⁶⁸

But who is the “we”? Bollinger advises that judges are well poised to make decisions over when speech should and should not be regulated. In exercising their judgment, however, judges should not be bound by rigid and clear rules (some of which we review in the next chapter). Instead, according to Bollinger, judges should follow “abstract . . . indeed . . . conscientiously ambiguous” standards so that they can assess the possible harms of allowing the speech in any given situation at any given time.⁶⁹ Litigation also has the added attraction of providing “the framework, the occasion, for the community to think about the things free speech is intended to raise for thought.”

Such was the case, Bollinger suggests, with the Nazis who wanted to march in Skokie, Illinois. After the village attempted to block the march, the American Civil Liberties Union took up the Nazis’ case, arguing that they had a First Amendment right to demonstrate.⁷⁰ The ensuing litigation did indeed prompt discussion and debate in the nation’s classrooms and beyond about the value, or lack thereof, of tolerating speech that promotes racist ideas. (By the way: The courts ruled in favor of the Nazis, but they decided to move the demonstration to downtown Chicago.)

As with the first four we considered, “promoting tolerance” has made its way into the canon of the most influential justifications for free speech.⁷¹ But also like the others, it has its share of detractors.

One critique centers on Bollinger’s emphasis on courts and litigation. Though it may sound reasonable to give judges flexibility to resolve specific free speech controversies, a lack of clear rules can be difficult for governments who must set policy to govern a range of disputes. Again, consider Brandi Levy. If the courts had established a clear rule that schools cannot punish off-campus speech, then both Levy and the coaches would have known that suspending her from the cheerleading team was off limits. But in the face of unclear rules about when schools can punish such speech, both administrators and students remain uncertain unless and until judges get involved in each individual dispute. On the flipside, giving judges so much discretion and power is to deny power to the community—in this case, the school—and its members—students, faculty, and staff—to help shape rules that best fit their culture and values.⁷²

Yet another critique comes from Professor David Strauss, an influential constitutional law scholar:

[T]he empirical psychological premises underlying [Bollinger’s] theory are not obviously true. It is not at all clear that people who are forced to tolerate speech they abhor will become more tolerant in other contexts; they might easily become *less* tolerant, in which case Bollinger’s theory would collapse. Indeed, it would become an argument for suppression.⁷³

Bollinger's own example of the Nazis provides a case in point. As one writer put it,

The American Civil Liberties Union's decision to support the Nazi group led to massive defections from its ranks and a corresponding financial loss of over \$500,000. If the impulse toward intolerance can be exposed within the country's most forceful, articulate, and organized advocate of individual rights, is it plausible that judicial declarations in favor of extremist expression will wear down the deeper and broader base of intolerance among the general public? The evidence seems to be overwhelmingly against such a possibility.⁷⁴

Perhaps the meaning and value of what we mean by "tolerance" are not widely agreed upon. Consider this critique from Professor Jeremy Waldron, a well-regarded political theorist and philosopher:

Maybe we should admire some [ACLU] lawyer who says he hates what the racist says but defends to the death his right to say it, but . . . [t]he [real] question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials?⁷⁵

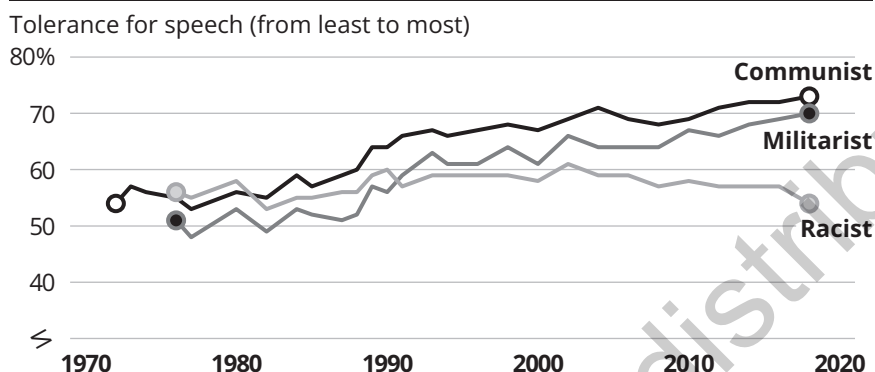
Waldron suggests that the public order achieved by true tolerance means more than just the absence of fighting; it "conveys a principle of inclusion" that may be incompatible with the "exclusion and banishment" that may come from hate speech.⁷⁶

More generally, despite increasing attention to free speech in the media, in scholarly writings, and in the courts,⁷⁷ public tolerance of "racist slurs, epithets, and other forms of expression that demean social identities" is actually on the decline, not on the rise as Bollinger might have predicted. Figure 1-2 underscores this point, showing the results of survey data on Americans' tolerance toward speakers with controversial and unpopular views. Note that while Americans have grown more tolerant of allowing advocates of military rule and communists to, say, teach at a university, they have grown *less* tolerant of allowing white supremacists to teach.⁷⁸ As we will explore in Chapter 3, this is especially true of Americans who had previously been among the most reliably tolerant—Democrats and liberals.⁷⁹

Whatever you think of "promoting tolerance," you will have a chance to evaluate this and other rationales at the end of the chapter. There we invite you to consider contemporary controversies over how universities should treat white supremacists who want to speak on campus. In thinking through the possible responses, try to apply the various justifications for free speech. Do they lead to the same or different answers?

Just one last matter before you turn to the case-controversies: what happened to Brandi Levy? Well, she decided to challenge her suspension in federal court. She won in the lower courts and later in the U.S. Supreme Court. But the Court did not establish a clear rule. While it held that schools sometimes can regulate off-campus speech—for example, to

FIGURE 1-2 ■ Americans' Tolerance Toward Racist, Militarist, and Communist Speech, from Least to Most Tolerant



Source: Dennis Chong, Jack Citrin, and Morris Levy, "The Realignment of Political Tolerance in the United States," *Perspectives on Politics* 22, no. 1 (2024): 131-152. Licensed under Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0>).

Note: The data combine survey questions that ask Americans whether a [racist, militarist, communist] should be allowed to give a speech in their community and to teach in a college or university and whether a book they wrote to promote their beliefs should be permitted to circulate in a public library. "Racist" is a speaker who believes in Black racial inferiority, and "Militarist" is a speaker who advocates military rule. These descriptions and the data are from Chong, Citrin, and Levy, "The Realignment of Political Tolerance in the United States."

prevent substantial disruption of the school's educational mission—those exceptions did not apply to Levy's off-campus speech, which was protected by the First Amendment.

We will have more to say about the Levy case in the next chapter. There is an excerpt of the Court's decision on the book's website.

YOU DECIDE: THE CASE OF WHITE SUPREMACIST SPEAKERS

The following are two case studies, both concerning a white supremacist, Richard Spencer, who was scheduled to speak on a college campus.

We ask you to read the case studies below. Next, review the five justifications you just read, and consider how each would treat Spencer's speech and the universities' responses. We also suggest that you visit the book's website, at <https://CampusFreeSpeechToolkit.WashU.edu> for supplementary material related to the two case studies. This material includes links to videos and various opinion pieces.

Case Study #1 (University of Florida)

In September 2017, white supremacist Richard Spencer was scheduled to speak at the University of Florida. In August 2017, the University's President, Kent Fuchs, cancelled

the event citing “serious concerns” about safety in the wake of a recent white supremacist rally in Charlottesville, Virginia that had turned violent. According to Fuchs,

I find the racist rhetoric of Richard Spencer and white nationalism repugnant and counter to everything the university and this nation stands for. That said, the University of Florida remains unwaveringly dedicated to free speech and the spirit of public discourse. However, the First Amendment does not require a public institution to risk imminent violence to students and others. The likelihood of violence and potential injury—not the words or ideas—has caused us to take this action.

In response, a First Amendment lawyer said, “I think that is the sort of decision that the white supremacists will use to their advantage to try to criticize the university for stopping them from speaking.” He added,

There obviously was a very serious incident in Charlottesville, but then to conclude from that that [an] awful controversial view is not going to be allowed to speak in the future is a very difficult position to sustain. . . . It will be unfortunate if this does exacerbate the tensions that already exist.

A month later, President Fuchs, in a statement to the university community, announced that Spencer would speak on campus on October 19. He further wrote,⁸⁰

No one at our university invited Mr. Spencer, nor is anyone at UF sponsoring this event. UF has been clear and consistent in its denunciation of all hate speech and racism, and in particular the racist speech and white-nationalist values of Mr. Spencer. I personally find the doctrine of white supremacy abhorrent and denounce all forms of racism and hate.

If you are like me, I expect you are surprised and even shocked to learn that UF is required by law to allow Mr. Spencer to speak his racist views on our campus, and that we are not allowed by law to bill him for the full costs of keeping our campus safe, which exceed more than a half million dollars.

He then urged the community “to do two things:”

First, do not provide Mr. Spencer and his followers the spotlight they are seeking. They are intending to attract crowds and provoke a reaction in order to draw the media. I urge everyone to stay away from Mr. Spencer and his followers and the Phillips Center where he will speak and the media will be assembled on October 19. By shunning him and his followers we will block his attempt for further visibility.

Second, although I urge you to avoid the Spencer event, I ask that you not let Mr. Spencer's message of hate and racism go unchallenged. Speak up for your values and the values of our university. Make it clear that messages of hate on our campus are contrary to those values. Mr. Spencer's message is disproportionately hurtful to members of our Gator community who are targets of hate and violence simply because of their skin color, religion, culture, sexual orientation or beliefs. Those of us in the majority must speak up for those in the minority and make our voice of love and support heard.

In the days leading up to Spencer's speech, the governor of Florida declared a state of emergency in the county where the University was located in an effort to ensure the community's safety. On the day of the speech, there were protests—the vast majority of which opposed Spencer—and heckling during his speech. But only one arrest and five relatively minor injuries were reported.⁸¹

Case Study #2 (Michigan State University)

In the Fall of 2018, white nationalist Richard Spencer requested permission to speak at Michigan State University (MSU). Initially the University rejected his request fearing violence but later changed its position. MSU's president released a statement summarizing the University's position:

Last fall, a white nationalist group sought to hold an event at MSU shortly after tragic violence at a rally in Charlottesville, Va. We declined to allow the event at that time, not because of their hateful views, but because public safety is our first obligation.

Michigan State is wholly dedicated to freedom of speech, not just as a public institution, but as an institution of higher education. Here, ideas—not people—are meant to clash and to be evaluated based on their merits. As I noted in a long-standing statement on freedom of speech, “Without this freedom, effective sifting and testing of ideas cease, and research, teaching, and learning are stifled.”

So this week, MSU agreed to allow the group to hold an event, during spring break, at the MSU Pavilion for Agriculture and Livestock Education on March 5, from 4:30-6:30 p.m. [Authors' Note: This is a university-owned property removed from the central campus. i.e., about 1.7 miles from the Political Science Department and 1.5 miles from the Law School.] This agreement was based on the university's requirement that the event occur on a date and at a venue that minimizes the risk of violence or disruption to campus. The security of our campus community remains our top priority and all appropriate security measures will be taken in connection with the event.

Michigan State rejects this group's divisive and racist messages and remains committed to maintaining a diverse campus and supporting an inclusive, just and democratic society.⁸²

ENDNOTES

1. We draw these facts from the briefs and opinions in *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021), as well as the lower court's decision, at 376 F. Supp. 3d 429 (2019). See also "First Amendment—Free Speech—Public Schools—*Mahanoy v. B.L.*," *Harvard Law Review* 135 (2021): 353. An excerpt of *B. L.* is on our book's website, <https://CampusFreeSpeechToolkit.WashU.edu>.
2. *Mahanoy*, 594 U.S. at 190.
3. The pamphlet was called *AREOPAGITICA: A Speech for the Liberty of Unlicensed Printing to the Parliament of England*. It's available on our book's website and here: <https://www.gutenberg.org/files/608/608-h/608-h.htm>.
4. John Milton, *AREOPAGITICA: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (The Project Gutenberg, 2013), <https://www.gutenberg.org/files/608/608-h/608-h.htm>
5. The essay is available on the book's website and here: <https://www.gutenberg.org/files/34901/34901-h/34901-h.htm>.
6. 250 U.S. 616 (1919).
7. *Id.* at 617-18, 620-22.
8. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).
9. This is so even though Holmes himself did not use the term "marketplace of ideas;" he referred to "the competition of the market."
10. E.g., a search for "marketplace of ideas" in Google scholar in August 2024 produces nearly 57,000 results.
11. We searched in Lexis for "marketplace of ideas" or "the best test of truth is the power of the thought to get itself accepted in the competition of the market." We included all court decisions, state and federal.
12. See, e.g., Jeffrey M. Jones, *Socialism, Capitalism Ratings in U.S. Unchanged*, Gallup, December 26, 2021, <https://news.gallup.com/poll/357755/socialism-capitalism-ratings-unchanged.aspx> (showing that 84 percent of Americans have a positive image of "free enterprise.").
13. See, e.g., Mary-Rose Papandrea, "The Missing Marketplace of Ideas Theory," *Notre Dame Law Review* 94, no. 4 (2019): 1725.
14. Frederick Schauer, "Facts and the First Amendment," *UCLA Law Review* 57, no. 897 (2010): 897-98.
15. Stephen L. Chew, *Myth: We Only Use 10% of Our Brains*, Association for Psychological Science, <https://www.psychologicalscience.org/uncategorized/myth-we-only-use-10-of-our-brains.html>.
16. See Vincent Blasi, "Holmes and the Marketplace of Ideas," *The Supreme Court Review* 2004 (2004): 1-46.
17. Papandrea, "Missing Marketplace," 1726.

18. *Id.* at 1727.
19. Kathleen M. Sullivan, *Free Speech and Unfree Markets*, *UCLA Law Review* 42 (1995): 949-951.
20. See generally Owen M. Fiss, "Free Speech and Social Structure," *Iowa Law Review* 71 (1986): 1405-1425.
21. See generally Erin Miller, "Media Power Through Epistemic Funnel," *Georgetown Journal of Law & Public Policy* 20 (2022): 873-879.
22. Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence," *California Law Review* 88 (2000): 2353-2365.
23. Wigmore is best known as a scholar of evidence. His remarks on *Abrams* were recovered by Lee C. Bollinger, in his book *The Tolerant Society: Freedom Of Speech And Extremist Speech In America* (Oxford University Press, 1986), which we discuss near the end of this chapter.
24. John Henry Wigmore, "*Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*," *Illinois Law Review* 14 (1920): 539-559.
25. See Chapter 4, where we consider Americans' opinions on speech.
26. One of the few exceptions finds mixed support. Daniel E. Ho and Frederick Schauer, "Testing the Marketplace of Ideas," *NYU Law Review* 90 (2015): 1160-1228.
27. Justice Brandeis, concurring in *Whitney v. California*, 274 U.S. 357, at 377 (1927).
28. Pronounced "mickeljohn".
29. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Brothers, 1948) is available online, at: <https://search.library.wisc.edu/digital/ACQJRL3HHCHP678U>.
30. Meiklejohn, *Free Speech*, 12.
31. Meiklejohn, *Free Speech*, 93-94.
32. Meiklejohn, *Free Speech*, 24-25. Note that Meiklejohn's writing, in the excerpt and other quotes in this chapter, is quite gendered. We have not changed his language here or elsewhere in the chapter.
33. See, e.g., Fiss, "Free Speech and Social Structure"; James Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine," *Virginia Law Review* 97 (2011): 491. Though these and other works build on Meiklejohn, they are also critical of aspects of his approach. We discuss some of the critiques momentarily.
34. *Fulton v. City of Philadelphia*, 593 U.S. 522, 566-67 (2021) (Alito, J., concurring in the judgment).
35. *Pittsburgh Press Co. v. Pittsburgh Comm'n. on Human Rels.*, 413 U.S. 376, 399 (1973) (William, J., dissenting).
36. Meiklejohn, *Free Speech*, 25.
37. Meiklejohn, *Free Speech*, 99.
38. Robert Post, "Participatory Democracy and Free Speech," *Virginia Law Review* 97(2011): 477.
39. *Morse v. Frederick*, 551 U.S. 393, 402-03 (2007). We discuss this case in more detail in Chapter 2.
40. *Morse v. Frederick*, 448 (Stevens, J., joined by Souter and Ginsburg, J. J., dissenting).
41. *Schenck v. United States*, 249 U.S. 47, 52 (1919). We discuss the "clear and present danger" test in more detail in Chapter 2.

42. Meiklejohn, *Free Speech*, 48.
43. See Alexander Meiklejohn, *Political Freedom* (Harper & Brothers, 1960).
44. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
45. Meiklejohn, *Free Speech*, 22-23.
46. Martin H. Redish, "The Value of Free Speech", 130 *University of Pennsylvania Law Review* 130, no. 591 (1982): 593-594, (Redish suggests that the term "self-realization" subsumes self-fulfillment and development on the one side and autonomy on the other). For our purposes, we treat all these terms as all part and parcel of framing the right to free speech as an individual project, as opposed to Meiklejohn's collective view.
47. Then again, several scholars have attempted to reconcile the collective and the individual. Redish, for example, asserts that the values thought by others to be fostered by free speech—[such as Meiklejohn's] "political process" and "marketplace-of-ideas"—"are in reality subvalues of self-realization." Redish, "The Value of Free Speech," 594.
48. Some commentators differentiate among expressing, listening, thinking, and so on. Compare, e.g., Redish, "The Value of Free Speech" ; Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1 (1972): 204; and Seana Valentine Shiffrin, "A Thinker-Based Approach to Freedom of Speech," *Constitutional Commentary* 27 (2011): 283. Our focus is not on their differences but their similarities, which all trace to the importance of freedom of speech to individual development.
49. Thomas I. Emerson, "Toward a General Theory of the First Amendment," *Yale Law Journal* 72 (1963): 877-878.
50. Emerson, "Toward a General Theory of the First Amendment," 879-881. Emerson's writing, like Meiklejohn's, is gendered, referring to "man," "his," and "he." We have not changed his language.
51. David S. Han, "The Value of First Amendment Theory," *University of Illinois Law Review* 2015 (2015): 87-90.
52. Article 1, Section 8 of the U.S. Constitution (sometimes called the "Intellectual Property" or "Patent and Copyright" Clause) gives Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."
53. Eric Barend, "Thoughts on a Thinker-Based Approach to Freedom of Speech," *Law and Philosophy* 38 (2019): 481-484.
54. Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1-25.
55. Frederick Schauer, "Must Speech Be Special?," *Northwestern University Law Review* 78 (1983): 1287.
56. See, e.g., Mark L. Rienzi, "Safety Valve Closed: The Removal of Non Violent Outlets for Dissent and the Onset of Anti-Abortion Violence," *Harvard Law Review* 113 (2000): 1210.
57. For a review of literature on this argument, see Lasse Skjoldager Eskildsen and Christian Bjørnskov, "Does Freedom of Expression Cause Less Terrorism?," *Political Studies* 70 (2022): 131.
58. E.g., Bernard Schwartz, "Supreme Court Superstars: The Ten Greatest Justices," *Tulsa Law Journal* 31 (1995): 93-94.
59. *Whitney v. California*, 274 U.S. 357, 375 (1927).

60. Eskildsen and Bjørnskov, “Does Freedom of Expression Cause Less Terrorism?” 131.
61. Steven H. Shiffrin, “Hate Speech, Legitimacy, and the Foundational Principles of Government,” *Constitutional Commentary* 32 (2017): 675-677.
62. “Why Tackle Hate Speech,” *United Nations* (last visited Oct. 12, 2024) <https://www.un.org/en/hate-speech/impact-and-prevention/why-tackle-hate-speech>. As we’ll consider in Chapter 3, despite claims for (and against) restrictions on hate speech, very little empirical data exists to support the efficacy of such restrictions.
63. “Community Guidelines,” *Snap*, <https://values.snap.com/policy/policy-community-guidelines> (last visited April 21, 2025).
64. A complication here, as we will see in the next chapter, is that the First Amendment’s guarantee of free speech forbids only government, not private actors, from abridging speech.
65. Including John Stuart Mill’s “On Liberty.”
66. Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford University Press, 1986), 10-141.
67. Lee C. Bollinger, “The Tolerant Society: A Response to Critics,” *Columbia Law Review* 90 (1990): 979-984.
68. Bollinger, “The Tolerant Society: A Response to Critics,” 73.
69. Bollinger, “The Tolerant Society: A Response to Critics,” 192-195.
70. For an account of the case by one of the ACLU’s lawyers, see David Goldberger, “The Skokie Case: How I Came to Represent the Free Speech Rights of Nazis,” *ACLU*, March 2, 2020, <https://www.aclu.org/issues/free-speech/skokie-case-how-i-came-represent-free-speech-rights-nazis>.
71. See, e.g., Kent Greenawalt, “Free Speech Justifications,” *Columbia Law Review* 89 (1989): 119; Jeffrey W. Howard, “Freedom of Speech,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta and Uri Nodelman (Spring 2024), <https://plato.stanford.edu/archives/spr2024/entries/freedom-speech>.
72. See generally Paul Brest, “How Free Do We Want to Be?,” *New York Times*, June 8, 1986.
73. David A. Strauss, “Why Be Tolerant?,” *University of Chicago Law Review* 53 (1986): 1485-1499.
74. James Magee, “The Tolerant Society: Freedom of Speech and Extremist Speech in America,” *Constitutional Commentary* 4 (1987): 422-430.
75. Jeremy Waldron, “Free Speech and the Menace of Hysteria,” *New York Review of Books*, May 29, 2008, www.nybooks.com/articles/21452.
76. See Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012), 232.
77. We have more to say about these trends in the chapters to come. For now, suffice it to provide a simple example from the *New York Times*. In the 1950s, and even into the 1960s, the number of articles, editorials, and op-eds that mentioned free speech was well under 300 per year; by 2020, it was over 1,200. Dennis Chong, Jack Citrin, and Morris Levy, “The Realignment of Political Tolerance in the United States,” *Perspectives on Politics* 22 (2024): 131.
78. Chong, Citrin, and Levy, “The Realignment of Political Tolerance,” 132-33.
79. Chong, Citrin, and Levy, “The Realignment of Political Tolerance.”
80. The quotes below are from *Statement from President Fuchs about Richard Spencer Appearance*, October 10, 2017, at: <https://statements.ufl.edu/statements/2017/10/statement-from-president-fuchs-about-richard-spencer-appearance.html>.

81. Eric Levenson, "*Protestors Heckle Richard Spencer at University of Florida Talk*," *CNN*, October 19, 2017, at: <https://www.cnn.com/2017/10/19/us/university-florida-richard-spencer-speech/index.html>.
82. Lou Anna K. Simon, "*Update on Request from National Policy Institute to Speak on Campus*," January 18, 2018, at: <https://msu.edu/issues-statements/2018-01-18-speaker-space-request-update>.

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2

FREE SPEECH IN THE U.S. SUPREME COURT

INTRODUCTION

At Indiana University, Eric Rasmusen, a tenured professor of business economics and public policy, came under fire for certain social media posts. In the posts, Rasmusen expressed opinions on gender, race, and sexual orientation that some members of the Indiana U. community found offensive and discriminatory, as no doubt some of you will too.

In one, reprinted below, Rasmusen shared an article, “Are Women Destroying Academia? Probably,” prefacing the post with this quote:

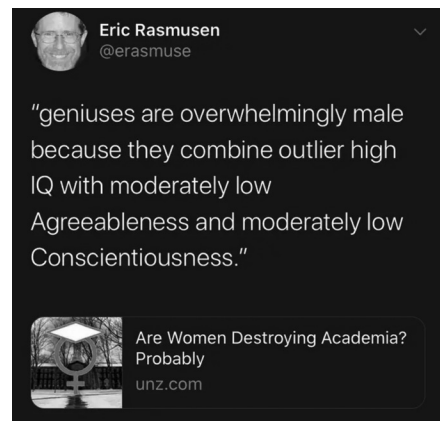
geniuses are overwhelmingly male because they combine outlier high IQ with moderately low Agreeableness and moderately low Conscientiousness.¹

In another, he posted,

I just realized—Women’s Studies and Home Ec are the same thing. They are both meant to teach a woman how to live her life. It’s just that only one of them keeps its promise.²

Other posts asserted that gay men also should not be in academia and that Black students are inferior to white students.³

Not surprisingly, administrators at Indiana U. reported that they were flooded with demands for Rasmusen’s dismissal after his tweets went viral. The words “Fire Eric Rasmusen” were even painted on a bridge at the University.⁴ If administrators acceded to these demands and fired Rasmusen or even, say, suspended him for a year without pay, would it have violated his rights under the U.S. Constitution?



A screenshot of one Eric Rasmusen’s tweets that led to demands that Indiana University fire him.

Source: Eric Rasmusen (@erasmuse), X (Nov. 7, 2019, 3:57 PM), <https://x.com/erasmuse/status/1192591814567563266?lang=en>.

Whenever you are confronted with a question like this—about the *constitutionality* of some action, policy, or behavior—what is the first thing you should do? Consult the Constitution! In the case of Eric Rasmusen, the relevant words are in the First Amendment:

Congress shall make no law . . . 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.

These thirty-three words comprise the free expression guarantees in the Constitution, including the right to free speech. Taken on their face, do they help answer the question of whether the University could punish Rasmusen for his offensive posts?

Start with the first word, “Congress.” Is Indiana University the U.S. “Congress”? It is a university, though a public university, which means it has status as some sort of government entity, but it is not Congress. How about the word “speech”? Are Rasmusen’s tweets “speech”? From a plain-meaning standpoint, maybe not, in that they are written, not spoken. Although tweets may express ideas, most dictionary definitions of speech emphasize “speaking,” as in “the communication or expression of thoughts in *spoken words*”⁵ or simply “Senses relating to the act of *speaking; talk*.”⁶

So, taking the words “Congress” and “speech” on their face, the First Amendment would not appear to protect Rasmusen’s tweets. Therefore, if we read the relevant words in the First Amendment in accord with standard dictionary definitions, and nothing else, it seems that Indiana U. could punish the professor in any way it saw fit for his social media posts, without fear of violating the Constitution.

But should we read the clause that formalistically? In one respect, so doing seems to narrow our freedoms too much. As people living in the 21st century, we know all too well that we communicate in many ways other than by talking—most of which we probably would not expect the government to be able to restrict, such as wearing political buttons, peacefully protesting a university policy on campus, or expressing support for an elected politician on social media.

Does another phrase in the First Amendment—“or of the press”—help Rasmusen? While many people understand that phrase to protect the news media as opposed to individual speakers, some scholars say it was intended to shield the printed word as opposed to oral expression. If that is right, maybe Rasmusen’s tweets are protected after all.⁷

At the same time, a literal reading of the First Amendment could perhaps protect too much speech and lead to chaos. Recall the words: “Congress shall make *no* law” abridging speech. Do we really think that prevents the government from regulating *any* speech (*no* law)? That would mean Congress could not pass a law forbidding people from soliciting someone to commit murder, from lying on the witness stand, from

intentionally placing a person in fear of bodily harm, and many other actions that our experience tells us *should* be subject to control by the government.

Considering these concerns about a modern-day dictionary reading of the words in the First Amendment, the following question emerges: how should we analyze free speech controversies like the one at Indiana University? One approach, which we considered in the last chapter, is to think about how the various theories of free speech would justify protecting (or not) Rasmusen's tweets; for example, does the "marketplace of ideas" approach support Rasmusen, or does it support disallowing his expression?

While we urge you to ask the same question of the other classic justifications for speech, it is important to recognize that, however helpful, they are not the only tools for approaching speech controversies in a principled way. In the chapters to follow we review others, including perspectives from social science and history.

Here we consider how the U.S. Supreme Court has interpreted the freedom of expression embraced in the First Amendment, the case law that makes up the governing doctrine on the topic. We begin with an overview of the doctrine in the form of a chart that poses basic questions, such as the following: "what is speech?" and "who is speaking?" (e.g., the government, students). The sections that follow flesh out this framework, filling in details especially relevant to campus speech. The chapter concludes with a controversy over a university hate-speech policy, which provides an opportunity to apply your knowledge of the Court's doctrine to an issue of some current interest.

Just three notes before we get started. The first reinforces a point we made in the book's introduction: this chapter is not designed to replicate the many casebooks dedicated to the Court's interpretation of the free speech clause.⁸ Our purpose, rather, is to expose you to the foundational concepts found in leading Supreme Court cases so that you will be able to draw on them when you consider real-world campus controversies at your university or other disputes that have yet to (and may never) reach the courts.

Thinking about real-world controversies takes us to the second note. In our consideration of the Rasmusen case, we posed a question: if the University had fired or suspended Rasmusen for a year without pay, would it have violated his First Amendment rights? That question never came before the courts. Although the University placed Rasmusen on a paid leave while it investigated his social media posts, it ultimately decided against firing or suspending him. This is not to say University leaders agreed with Rasmusen's "speech." To the contrary, the provost condemned his speech as "stunningly ignorant, more consistent with someone who lived in the 18th century than the 21st"; and disallowed Rasmusen from teaching mandatory classes in an effort to ensure "that students not add the baggage of bigotry to their learning experience."⁹ But at the same time, the provost wrote that it was "not a close call" to conclude that the First Amendment prohibited the University from dismissing him.¹⁰

The University's response is revealing about free speech doctrine. As we will soon see, the wording of the First Amendment aside, the Court has held that not just

Congress, but all government actors must abide by the Amendment—including public universities like Indiana. The Court has also declared that speech covers more than spoken words, encompassing many other forms of human communication, including social media posts.¹¹

Even so, did Indiana U. reach the right conclusion about Rasmusen's posts, or would it have been permitted to suspend or dismiss him? As you read the material to follow, we ask you to reflect on this question. For while strands of the doctrine are crystal clear—for example, that no government actor, not just Congress, can abridge the free speech right—many others remain open to interpretation and judgment.

This may be especially true in the case of campus speech, since a university is a unique type of public institution, with different responsibilities and purposes compared to other forms of “government.” Relatively few Supreme Court decisions focus explicitly on university students, faculty, and staff, so you will need to consider to what extent doctrine developed for other contexts—such as the burning of a flag in a public park, the delivery of fiery speeches in public auditoriums, or even the wearing of protest symbols in K-12 schools—might be applicable to the university setting.

The final note is related: just as Supreme Court doctrine does not resolve all speech controversies, even the doctrine itself should never be considered to be beyond question. Certainly, governments—including public universities—are expected to follow any clear constitutional rules that the Court has laid down. But that does not preclude thinking critically about what the Court has said or finding ways to distinguish new cases from those the Court has decided. Alexander Meiklejohn, the famous civil libertarian whose writings we discussed in the last chapter, put it this way: “[T]he Supreme Court, like any . . . teacher, may be wrong as well as right, may do harm as well as good.”¹² Meiklejohn continued in a passage that is worth reading:

There is, it is true, a sense in which the court is always right. As Chief Justice Hughes is said to have remarked in the days when he was Governor of the State of New York: “We are under a Constitution; but the Constitution is what the courts say it is.” Now, for the purposes of action at a given time, that dictum is clearly true.

[. . .]

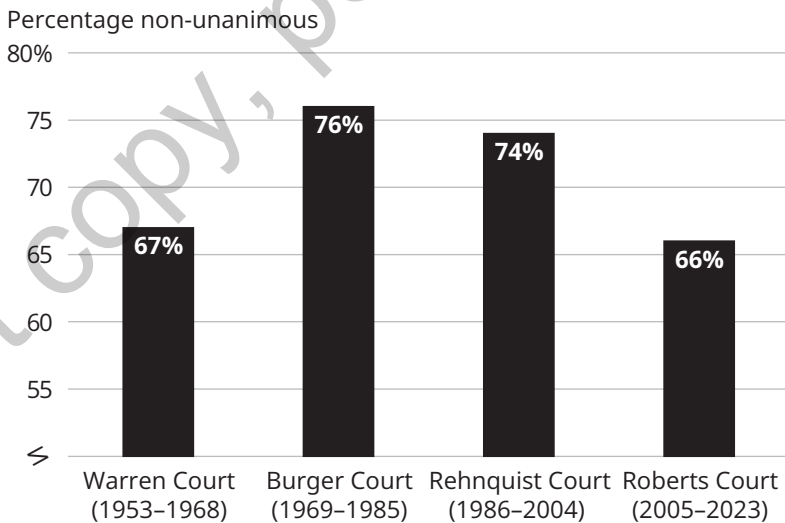
But it is equally true . . . [a]s they study their cases, the members of the Supreme Court are not merely trying to discover what they are going to say. They are trying to decide what, in that situation, it is right to say in fact and principle. And as they grapple with that problem, they are keenly aware of their difficulties, of their lack of success. The individual members recognize frankly their own fallibilities, as well as those of their brethren. They are often puzzled and uncertain. They hand down opposing opinions. From time to time, their judgments are reconsidered and changed.

Granted, then, that on any specific occasion we must, as Mr. Hughes suggests, “abide by” the rulings of the court; it does not follow that we must “agree with” them. Our duty, as free [people], to reflect upon judicial pronouncements is quite as imperative as our duty to submit to their temporary legal authority. Not even our wisest interpreters, those whom we trust most, can give us final dogmas about self-government. They and we together must still be thinking about what freedom is and how it works.¹³

These words are wise and very much relevant to our inquiries here. Over the last eight decades, from 1953 to 2023, the Court has decided 356 cases implicating the First Amendment’s guarantees of free expression.¹⁴ In only 28 percent did the Court reach a unanimous decision; in the other 72 percent at least one justice dissented—that is, one or more justices disagreed with the majority’s decision to rule in favor of or against the litigant claiming a violation of their speech rights. This is a far higher dissent rate than overall during this period (59 percent), meaning that Meiklejohn is right: in this area of the law, the justices often “hand down opposing opinions.”

Moreover, the dissent rate in free speech cases has been rather constant across the eight decades, spanning the four Chief Justice eras shown in Figure 2-1. Each era—from

FIGURE 2-1 ■ Percentage of Free Expression Decisions with One or More Dissents, by Chief Justice Era



Source: Calculated from the Supreme Court Database at <https://scdb.la.psu.edu>.

Note: The years in parentheses are the terms included in each era. The number of cases is: Warren Court = 60, Burger Court = 136, Rehnquist Court = 102, and Roberts Court = 58.

the liberal Court under Earl Warren to the more conservative-Republican Courts under Warren Burger, William Rehnquist, and John Roberts—issued important free speech decisions, many of which we will consider in the pages to come. But most majority opinions, across the eras, prompted an opposing view, again as Meiklejohn suggested. While we will not cover all of the dissents in the pages to come, you can read some on the book’s website to get a sense of how the cases might have come out had the opposers prevailed and to identify the idea or principle that led them to disagree.

In addition, Meiklejohn was right to note that “from time to time, [the justices’] judgments are reconsidered and changed.” Over the last eight decades, the Court has overruled nine of its prior free speech decisions. One of those decisions, *Brandenburg v. Ohio* (1969),¹⁵ which overruled a 1927 decision,¹⁶ is so significant that we excerpt it in this chapter, and we mention several others in the text. For purposes of learning to think deeply about free speech controversies, therefore, it is important for you to learn from the Court’s opinions and also to consider ways in which the Court may have overlooked important alternative perspectives.

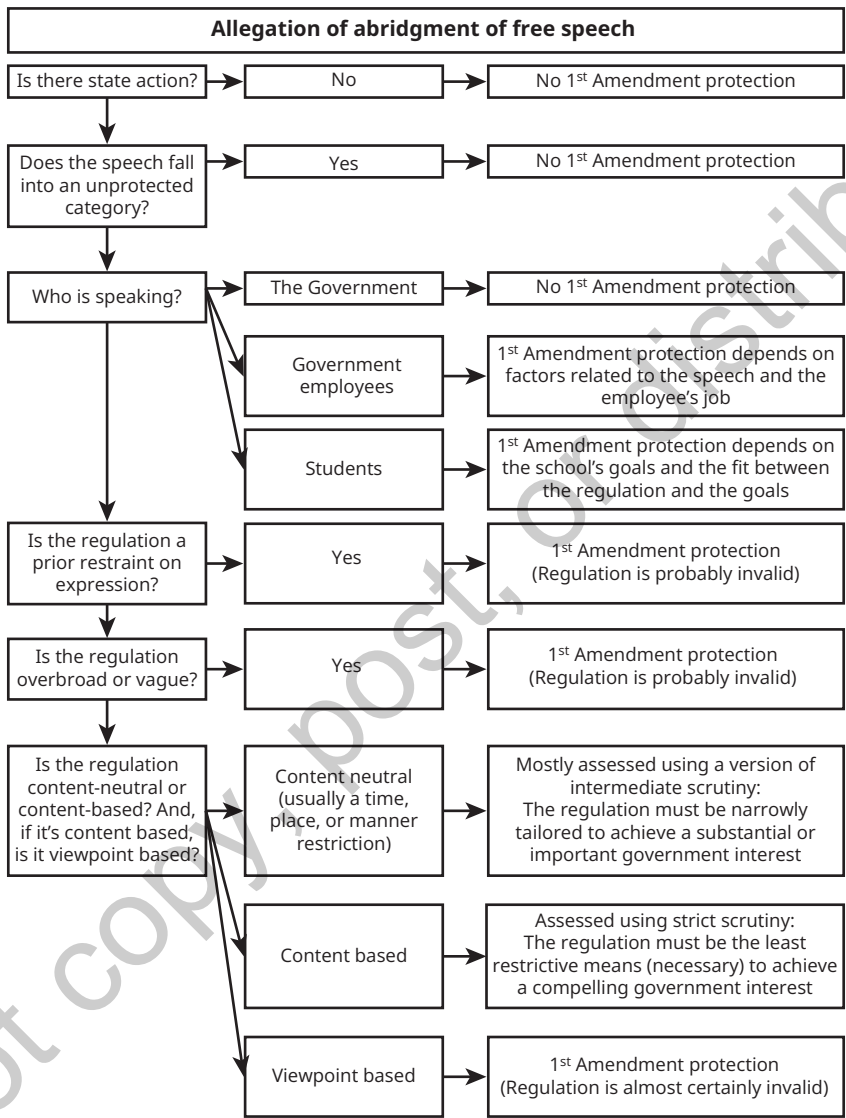
1. AN OVERVIEW OF FREE SPEECH DOCTRINE

The data in Figure 2-1 underscore Meiklejohn’s idea that we should “reflect upon judicial pronouncements,” not just blindly treat them as accepted “dogma.” The data also highlight another interesting feature of First Amendment litigation: the Supreme Court has taken hundreds upon hundreds of decisions to interpret the meaning of those thirty-three words in the First Amendment. In the contemporary era alone—the years since 2005 under the leadership of Chief Justice Roberts—the Court has issued nearly sixty free-speech opinions.¹⁷ That amounts to over three free-speech cases per year, a large number considering that the First Amendment has been around since 1791 (and that the Roberts Court these days decides a total of only about sixty cases each term).

The following chart aims to offer a visual overview of the kinds of considerations that the Court will take into account when deciding whether the government can regulate or even prohibit speech.¹⁸ These include the nature of the speech, the place in which the expression occurs, the interests the government is pursuing by its restrictions, and the kind of regulation the government imposes. Figure 2-2 is organized around the key questions the justices ask. In the text, we discuss each.

The following sections offer you some tools with which to develop doctrinal answers to these framing questions, with particular attention to campus speech problems. Note that in detailing the doctrine, we use narrative, examples, and even hypotheticals but, with only a few exceptions, we do not provide excerpts of the Court’s cases themselves in this volume, although we encourage students to read the original sources. Key excerpts (indicated in **boldface**) from the cases are available on the book’s website.

FIGURE 2-2 ■ Major Questions in Free Speech Cases



2. WHAT IS EXPRESSION?

The top box of Figure 2-2 illustrates that all free speech cases begin with an allegation that the government has abridged someone’s right to expression. The circumstances of such allegations can vary widely, such as students who claim they have been suspended for speech criticizing the school’s administration, a white supremacist who sues

a college that has refused to allow them to speak there, or a student commencement speaker who brings an action against the university president for interrupting their speech because the university objects to its content.

These are straightforward examples of expression. Nonetheless, it is not always clear what the term “free expression” encompasses. If we think of expression as human communication, the most obvious forms falling under the First Amendment are spoken and written words. As we learned in Chapter 1, some justifications for protecting expression would narrow this scope, limiting protected expression to *political* speech and writings.

Although the justices have long regarded “political and ideological speech to be at the core of the First Amendment,”¹⁹ they have not cabined the free speech guarantee to these types of expression. To the contrary, they have said that virtually all kinds of speech and writings fall under the Amendment’s rubric, including plays, movies, computer code, video games, and, yes, social media posts like Eric Rasmusen’s. The Supreme Court has also held that the expression need not be aimed at democratic governance or politics but instead can be in pursuit of a wide variety of “social, economic, educational, religious, and cultural ends.”²⁰ This does not necessarily mean that all speech is beyond government regulation, but it starts the conversation by including most forms of expression under the umbrella of possible First Amendment protection.

Indeed, the Court has even recognized several nonverbal forms of expression to be embraced within the guarantee of free speech. In what follows, we consider three that are especially relevant in school settings: expressive conduct (or symbolic speech), association, and not speaking (sometimes called compelled speech).

2.1 Expressive Conduct

Consider a person uttering the words, “Come in” to a visitor at their doorstep. Now consider that same person instead saying nothing but sweeping their arm toward the home in a welcoming gesture. The latter movement may not contain words, but it would likely be silly to treat it differently from the words that it was clearly designed to replace. Similarly, many campus controversies involve conduct that is designed to communicate. For example, students have at times erected tents on campus grounds, burned tuition bills to protest the administration’s policies, or worn specific symbols on tee shirts to show solidarity with some cause.

In each of these examples, the behavior is intended to communicate, and in that way is perhaps indistinguishable from spoken communication, like the “come in” gesture. But at the same time, it also involves acts—the pitching of a tent, the lighting of a fire, the physical display of a shirt—that fall into a realm of “conduct,” which is typically subject to reasonable regulation when not accompanied by a message. These hybrids, therefore, are referred to as “expressive conduct” to reflect the two facets of such behavior.

Does the First Amendment protect such conduct/speech? It depends. Would it make sense to protect all conduct that is committed for the purpose of communicating a message? What about these examples: “I’ll communicate my disdain for the Greek system by burning down a fraternity house;” or “I’ll express my displeasure with university policies by refusing to pay my tuition.” Or in the true extreme, “I want to show how tyrannical the university’s policies are, so I will assassinate the president just as Brutus assassinated Julius Caesar.” It is obvious that in these examples, the conduct part of the hybrid cannot be embraced in the arms of a First Amendment justification. For this very reason, the Court has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”²¹

But, at the same time, one can imagine situations in which a government might offer conduct-based excuses to punish such hybrid behavior when the government’s motive really is to suppress a message. So, if the conduct is expressive, under what circumstances can the government regulate or even suppress it? In the 1960s and 1970s, when the civil rights movement and the Vietnam War protests (which we will cover in Chapter 4) were active, the Court had an opportunity to answer these questions because events of the day expanded the ways messages were communicated.²² Traditional forms of speech, like distributing pamphlets, gave way to demonstrations, sit-ins, draft card burnings, flag desecration, and other types of conduct designed to convey the protesters’ political messages in a symbolic manner. Not surprisingly, when protesters were arrested or otherwise punished for their attempts at nonverbal communication, they brought First Amendment challenges, some of which reached the Supreme Court.

One of those cases, *Spence v. Washington* (1974),²³ supplied a vehicle for the Court to elaborate on what types of conduct would receive First Amendment protection. At issue was a Washington state law that prohibited flag desecration, defined as placing any “word, figure, mark, picture, design, drawing or advertisement” on an American flag. When Harold Spence, a college student, used tape to make a peace sign on a flag that he owned and hung it upside down from his apartment, he was charged with violating the law.

At his trial, Spence testified that the peace sign on the flag was his way of protesting the Vietnam war and the killing of four student demonstrators at Kent State University by the state national guard, which had occurred a few days prior to his arrest. In his words, “I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America, and I wanted people to know that I thought America stood for peace.”²⁴

To determine whether Spence’s conduct, and expressive conduct more generally, enjoyed First Amendment protection, the Court laid out what has become a two-part test: whether there was (1) an intent to convey a particularized message and (2) a reasonable likelihood that it would be understood as such by those who viewed it. Notice

that this test addresses both the subjective motivation of the actor/speaker and the objective assessment of their action by those likely to witness it.

According to the Court, Spence met this standard: he “displayed [the] flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood.”²⁵ And so the justices ruled in his favor. But the case was a somewhat unusual hybrid of speech and conduct, because it is not clear what harm the conduct itself caused, separately from the ideas Spence was intending to convey. What if Spence had put a peace sign on a flag owned by the government or a neighbor? What about students who declined to pay tuition to express their disdain for university policies? Would they meet the test? Maybe they intended to convey a message, but would observers necessarily understand it as such considering the many other reasons that students might not want to pay tuition?

Although *Spence* answered the question of what type of symbolic speech came under the First Amendment, it did not address the second question: when can the government regulate conduct/speech that meets the *Spence* test? That question moved front and center in *United States v. O'Brien* (1968),²⁶ another case growing out of the Vietnam War era. To express their opposition to the war, David Paul O'Brien and three others publicly burned their draft cards on the steps of a South Boston courthouse. They were eventually convicted for violating a federal law that made it illegal to “destroy or mutilate” draft cards. After a federal appeals court reversed the convictions, finding that their expressive actions were protected by the First Amendment, the U.S. government asked the Supreme Court to hear the case. It argued that burning cards



On March 31, 1966, David O'Brien and three other antiwar protesters demonstrated their opposition to U.S. military action in Vietnam by burning their draft cards on the steps of a South Boston courthouse. Their convictions for violating the Selective Service Act were affirmed in *United States v. O'Brien*.

Bettmann/Bettmann/via Getty Images

amounts to unlawful conduct and thus does not qualify as constitutionally protected speech.

At the outset, the Supreme Court *assumed* that through his conduct O'Brien, like Spence, intended to convey a message that onlookers would understand. But that was not enough to protect O'Brien where, unlike in the *Spence* case, the Court found that harmful conduct was involved. The majority put it this way: "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."²⁷ Notice that this principle seeks to disentangle the two elements of our speech/content hybrid: the government can regulate harmful conduct but must do so with as much respect as possible for the speech aspect of the hybrid behavior.

To implement this vision, the Court set out a four-part test (known as the *O'Brien* test) to determine when the government can regulate expressive conduct. Under this test, a governmental regulation is sufficiently justified

- (1) if it is within the constitutional power of the government;
- (2) if it furthers an important or substantial government interest;
- (3) if the government's interest is unrelated to the suppression of free expression; and
- (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

These are the specifics: part (3) ensures that the conduct is indeed harmful (consider whether the government in the *Spence* case would have satisfied this criterion), while part (4) seeks to protect the speech element as much as possible to ensure that the government does not overreach in regulating speech under the guise of regulating conduct.²⁸

In applying this test to O'Brien's draft-card burning, the Court ruled in favor of the government. First, the justices noted that the Constitution gives Congress the power to raise and support armies, which includes the authority to run a draft. Second, Congress has a strong interest in preventing the destruction of draft cards because they serve important functions, such as proving registration for the draft and ensuring the draft system runs smoothly. Third, these interests are separate from the speech aspect of O'Brien's actions and target only the nonspeech element: the regulations in question were aimed at supporting military needs, not restricting free speech. Finally, the Court found no other way to ensure the availability of draft cards except by enforcing a law that prohibits their intentional destruction.

The O'Brien test is now nearly sixty years old, but it has stood the test of time, almost always making an appearance in expressive conduct cases. Sometimes, as in *O'Brien*, it works against the speech, but not always, as *Texas v. Johnson* (1989) illustrates.²⁹

Like *Spence*, this case involved flag desecration—although a more extreme version, flag burning—and it originated a decade after *Spence*, in the summer of 1984, when the Republican Party held its national convention in Dallas, Texas. While the party was meeting and overwhelmingly endorsed President Ronald Reagan’s reelection bid, a group of demonstrators marched through the city to protest the Reagan administration’s policies. One of the demonstrators removed an American flag hanging in front of a bank building and gave it to Gregory Lee Johnson, a leader of the march. As the march ended, Johnson unfurled the flag, doused it with kerosene, and set it on fire. As it burned, the protesters chanted, “America, the red, white, and blue, we spit on you.”³⁰ Police arrested Johnson, charging him with violating the Texas flag desecration law. He was convicted, sentenced to a one-year prison term, and fined \$2,000.

In deciding this case, the Court brought together the two key questions in expressive conduct cases: what constitutes such conduct for purposes of the First Amendment (*Spence*) and under what circumstances can the government regulate expressive conduct (*O’Brien*). As to the first, the majority had little difficulty finding that Johnson’s flag burning intended to convey a message and that the message was likely understood as such by those who viewed the event. After all, as the Court noted, he burned the flag at “a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President.”³¹ Context, it turns out, matters.

Texas also failed the *O’Brien* test—specifically on the aspects related to the state’s interests. Texas offered two. First, it claimed that it wanted to prevent breaches of the peace, but as the Court noted, “no disturbance of the peace actually occurred or threatened to occur because of Johnson’s burning of the flag.”³² Second, the state asserted an interest in the flag as a symbol of national unity. But this, too, the Court rejected, because the lesson that the “government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.”³³ In other words, the harm that the state was attempting to punish was itself based on the symbolism of the flag, and was thus expressive, in a way that the *O’Brien* test disallowed.

As with so many First Amendment disputes, though, the Court was not of a single mind. Actually, it split 5-4, with one of the Court’s liberal members, John Paul Stevens, dissenting. In his view, this case had an “intangible dimension” that set it apart from other expressive conduct cases, due to the unique, immeasurable value of the flag as a symbol.³⁴ Commentators have long speculated that Stevens’s service in the military as a cryptographer during World War II informed his take on the American flag—which, if true, goes to show how the justices’ biographies inform their decisions (a subject we will consider in the next chapter).

Now that you have read about *Spence* and *O’Brien* and considered *Texas v. Johnson*, an application of that doctrine, return to some of the examples given at the start of this section: students erecting tents on campus to protest university policies, burning tuition bills to express disapproval of the cost of attending college, or wearing specific

symbols on tee shirts to convey solidarity. What would the students need to show to receive First Amendment protection for their conduct? And what would the university need to demonstrate to punish their expression?

2.2 Association as Expression

When Professor Eric Rasmusen tweeted, he was presumably acting alone in conveying his views. But, as a student on a college campus, you know that, in addition to individuals who speak, many groups and organizations engage in expressive activities—from unions to faith-based societies to theater clubs to cultural and ethnic associations.

There is nothing new about the tendency of students and Americans more generally to join together to pursue a common objective. When he traveled the United States in the early nineteenth century, the French aristocrat Alexis de Tocqueville was impressed by the extent to which citizens united for all kinds of political purposes. As he wrote, “In no country in the world has the principle of association been more successfully used, or more unsparingly applied to a multitude of different objects, than in America.”³⁵ He believed that the liberty of association was a protection against tyranny by majorities that might wish to limit opinions of one kind or another.

For its part, the Supreme Court has long regarded the right to join with like-minded individuals to advance mutual goals as essential to the exercise of political and social expression. As the Court put it, “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”³⁶ This is so even though the right of association is not plainly mentioned in the First Amendment. Rather, it follows from “the close nexus between the freedoms of speech and assembly,”³⁷ meaning it is implicit in the First Amendment’s guarantee of free expression that associating with others for the purpose of expressing ideas is part of the right to free speech.

Cases concerning the right to expressive association were fairly common in the mid-20th century. During that era, the Court was confronted with disputes arising from government’s prosecution of people for being members of leftist organizations, notably the Communist Party, on the ground that those organizations held dangerous views (e.g., advocating “the violent overthrow of the government”).³⁸

As you can imagine, when groups claim a right to associate for expressive purposes, their efforts to define themselves sometimes clash with government policies targeting discrimination and exclusion based on impermissible factors. Value conflicts of this sort are common in speech cases; you will have a chance to consider one example, involving hate-speech policies, at the end of this chapter.

Conflicts on campus arise when groups wish to associate with like-minded people but are challenged for excluding others. For example, in line with the First Amendment guarantee of association, could an LGBTQ+ group exclude students who don’t identify as LGBTQ+? How about a devout religious society? Could it argue that members must adhere to “Statements of Faith”? Could a vegan group exclude members who eat meat?

The answer, according to the Supreme Court, is, it depends. On the one side, student groups can write exclusionary policies—admitting only those who are willing to pledge support for LGBTQ+ or religious or vegan principles—if they are willing to forgo official university recognition, because the university may not be party to the exclusion of students from an official group based on the student’s views; that would constitute a violation of the freedom of speech.

On the other side, *if student groups seek official recognition*, then the constitutional requirements imposed on universities will require that they adopt one or both of two related (but distinct) policies that make it difficult for organizations to maintain exclusive membership criteria:

- Adopt “All-Comers Policies.” These require student organizations to allow all enrolled students “to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs.”³⁹
- Follow Nondiscriminatory Policies. These require that membership in student organizations be open to all students without regard to protected characteristics, such as race, sex, religion, gender identity, and sexual orientation.

The Supreme Court has made clear that at least when it comes to “all-comers” policies, universities are entitled to maintain them, even if a student group objects. This holding came in a 2010 case, *Christian Legal Society v. Martinez*, in which the Christian Legal Society (CLS) challenged Hastings Law School’s all-comers policy. The CLS argued that Hastings violated the organization’s First Amendment association rights when it relied on that policy to deny CLS official university recognition because CLS required members to sign a “Statement of Faith” attesting to their belief in “The Bible as the inspired Word of God,” among other statements, and excluded from membership anyone who engaged in “unrepentant homosexual conduct.”⁴⁰

The Court ruled against the CLS for several reasons. Most relevant here is that Hastings did not actually impair CLS’s right to association. The school did not require CLS to admit, for example, a gay student, nor did it restrict the group’s speech. Rather, it merely denied official recognition status to the group because of its exclusions, under the school’s all-comers policy. The Court also noted that Hastings’s all-comers policy was viewpoint neutral, meaning the policy applied to all groups regardless of their message or perspective. Hastings, thus, was not discriminating against CLS simply because of its religious views. Had the policy applied only to religious organizations, the outcome likely would have been different. (We return to the idea of viewpoint neutrality at the end of the chapter.)

But *Christian Legal Society* has not ended the matter.⁴¹ Seemingly in response to CLS, more than a dozen states have sought to carve out exceptions to such all-comers policies for religious-based groups.⁴² For example, Kansas prohibits its universities from denying “a religious student association any benefit available to any other student association based on such association’s requirement that the leaders or members of such

association . . . [a]dhere to the association's sincerely held religious beliefs." To their supporters, these laws protect the ability of religious students to associate for expressive purposes; to their opponents, they amount to a license to discriminate.

We leave it to you to consider *Christian Legal Society* and whether the responses of some states will pass constitutional muster in the Supreme Court. For now, and taking into account what you have learned in this section, consider the questions we raised at the outset. Under what circumstances and policies do you think a university could give full official recognition and funding to the following student organizations: an LGBTQ+ group excluding students who do not identify as LGBTQ+; a devout religious society excluding atheists; or a vegan group requiring all would-be members to become members of PETA (an animal rights organization). Can you identify relevant differences among these three examples?

2.3 The Right Not to Speak (Compelled Speech)

Most First Amendment speech disputes allege that the government has unconstitutionally punished expression—such as disallowing Eric Rasmusen to teach mandatory courses, imposing criminal penalties for burning a flag, or forcing a club to “associate” with particular people if it wants official university recognition.

But government may also attempt to regulate expression in the opposite way—by *requiring* people to speak or write. For example, in some universities, students charged with violating the honor code must either admit guilt or appear before a council to defend themselves, respond to evidence, and answer questions. In other schools, students must submit a written statement if they do not want to appear in person. As citizens, we may be ordered to appear as witnesses before courts, grand juries, or legislative investigating committees. We may be required to take oaths when we become citizens, provide court testimony, or assume public office.

Many Americans consider these regulations to be reasonable requirements relevant to legitimate government functions. But what if individuals do not want to comply with a regulation that requires the expression of ideas with which they disagree? Other than the Fifth Amendment's protection against compelled self-incrimination,⁴³ is there any restraint on the government's authority to *compel* expression? To put it another way, does the First Amendment's guarantee of freedom of speech include the freedom *not* to speak?

Sometimes, societal norms will strongly encourage the expression of an idea; even though not mandatory, people may sense that they are expected to join in a show of patriotism by singing the national anthem at a sporting event, for example. In other cases, that expectation carries the force of law. During World War II, state and local governments often required public school children to salute the American flag and to recite the Pledge of Allegiance.

Although the Court originally upheld those policies against religious objections,⁴⁴ changes in public mood (combined with changes in the Court's lineup) led the justices to reevaluate that position. In *West Virginia Board of Education v. Barnette*

(1943),⁴⁵ the Court considered whether these mandatory acts of national unity violated the freedom of speech, rather than religion. West Virginia required its public schools to teach courses that would increase students' knowledge of the American system of government and foster the spirit of Americanism. In support of this policy, the state board of education required that the American flag be saluted and the Pledge of Allegiance be recited each day in public school classrooms. Students who refused to participate could be expelled—and some were.⁴⁶

The Court invalidated this policy, ruling that the First Amendment prohibits government from compelling individuals to express the state's preferred views; a nation that requires its citizens to be patriotic, the Court suggested, might not have much faith in its ability to inspire voluntary support for its principles. In a powerful and frequently cited passage, Justice Robert Jackson (whose safety-valve justification for free speech was discussed in Chapter 1) wrote,

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.⁴⁷

In striking down the compulsory flag salute law, the Court held that the people have a qualified right to be free of government coercion to express views they disavow. The decision does not go so far as to hold that an individual's First Amendment right can be used to avoid obligations such as testifying in a court, or even a university honor council, but it does prevent certain forms of compelled speech.

Barnette continues to shape the Court's interpretation of free speech rights. In fact, three decades after the decision, the justices reaffirmed the idea when they ruled New Hampshire could not force residents who objected to the state's motto—"Live Free or Die"—to display license plates bearing that phrase. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind,' " the court ruled.⁴⁸

More recently, in *303 Creative LLC v. Elenis* (2023),⁴⁹ the Court resolved a dispute that highlights the growing tension between the competing values of equality and free speech, when it held that Colorado's antidiscrimination law violated the speech rights of a web designer. The law at issue prohibited businesses from refusing service to any customers on the basis of sexual orientation or other protected characteristics. An aspiring wedding website designer successfully complained that if the law required her to create a wedding website for a same-sex couple, that would amount to compelling her to express a message that contradicted her deeply-held belief that marriage is between a man and a woman. In its opinion, the Court invoked *Barnette*, writing "The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands."⁵⁰

Sometimes, though, the Court has sought to distinguish cases like *Barnette*. One example is *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)* (2006).⁵¹ In a rare unanimous First Amendment decision,⁵² the Court upheld a federal law requiring universities to treat recruiters for the U.S. armed forces the same as other recruiting employers on campus. This law was passed to overcome a common faculty objection to hosting the military recruiters on campus as a protest against the military's then-policy of excluding gays and lesbians. The universities likened the hosting requirement to compelled speech because it required them to associate with and promote a message—supporting military service under discriminatory conditions—with which they disagreed. But the Court held otherwise. It distinguished *Barnette* (the flag-salute case) on the ground that here the government was only requiring the school to provide access to military recruiters, not forcing it to endorse the military's policy or any particular message as the government had done by requiring students to salute the flag.

Do you agree? Are there meaningful differences between *West Virginia v. Barnette* and *FAIR*? Has the Court accurately captured what it means to speak a compulsory message? Would viewers of websites for same-sex marriages assume that the web designers endorsed such unions? Whatever your answer, in considering the material in this section, think about another example: Suppose a student chose to take a course at a public university in which the professor based 20 percent of the final grade on class participation. Would this policy amount to compelled speech? If not, why not?

3. IS THERE STATE ACTION?

Once people claim a deprivation of their expression rights, the question becomes, is it the *government* that is doing the depriving? In other words, is there “state action,” a shorthand term to refer to government action? Although the words of the First Amendment start with “Congress,” we noted at the outset that the prohibition applies also to states and localities, including public universities and colleges.

The important principle is that to challenge a restriction on free expression grounds, there must be some action taken by federal, state, or local actors, including university administrators, judges, executives, and legislators.⁵³ Without the involvement of the government in some way, a speech claim is highly unlikely to succeed. For example, a First Amendment challenge to a social media company's decision to remove a post is almost surely doomed because those companies are privately owned, not government actors (although there is some debate over whether social media platforms have become so powerful that the First Amendment should be expanded to cover them⁵⁴).

To see how the state action requirement works on the ground, return to Eric Rasmusen. Because he was a professor at Indiana University, a public school, he could have brought a First Amendment challenge to the university's decision to disallow him from teaching mandatory courses (a form of punishment). But if Rasmusen had been

a professor at almost any private school, prevailing under the First Amendment would be unlikely owing to the lack of state action. (Do be aware, however, that some states, including California, have passed laws extending speech protection to students at private universities in their states, so the outcomes there could be like those at public universities but on nonconstitutional grounds.)

Similarly, if Twitter (now X) had removed Rasmusen's posts on the ground that they violated the platform's policy against hateful references based on race, gender, or sexual orientation,⁵⁵ Rasmusen would have no recourse under the First Amendment because, once again, the Amendment restricts government action, not the action of private companies.

That is the heart of a constitutional-law principle known as the state action doctrine. Note that the doctrine does not answer the question of whether private entities, including colleges and universities, *should* comply with the Supreme Court's reading of the First Amendment. That is a question for you to consider as you read the material to come.

4. DOES THE SPEECH FALL INTO AN UNPROTECTED CATEGORY?

The material presented so far has made clear that the Constitution's guarantee of free expression covers a wide range of human communication. But there is more to learn about the extent to which the government can restrict that communication. As it turns out, the Supreme Court has identified certain *categories* of speech that are largely exempt from First Amendment protection, allowing the government to restrict or prohibit expression that falls within those so-called "unprotected" categories.

In what follows, we consider several unprotected categories especially relevant to campus speech: (1) advocacy intended, and likely, to incite imminent lawless action; (2) speech that provokes listeners to lawlessness ("hostile audience" and "fighting words"); (3) true threats; and (4) speech to a captive audience.⁵⁶

To these categories created by the Supreme Court, we add a fifth for discussion, which is extrapolated from a combination of the first four and is well established in the setting of university campuses and workplaces—discriminatory harassment.

As you read the material to come, keep in mind that the First Amendment itself does not specify that these categories should be excepted from protection. It is the justices over time who have identified certain narrow categories of speech that, based on their own judgment and their consideration of our history and traditions over generations, do not contribute to the values embedded in the First Amendment and thus should not be protected from regulation. As the Court has said, "free speech and thought always protected in our tradition can still thrive, and even be furthered"⁵⁷ without protecting types of speech that do not contribute to the marketplace of ideas, such as the incitement of crime and true threats, which tend to be of "slight social value."⁵⁸

There is a real question as to whether the Court is justified in having relegated some speech to low value and whether it has eliminated too much or too little speech from First Amendment coverage; this is worth considering. There are also important questions about how the unprotected categories should be understood on college campuses, as few of these cases explicitly involve university speech.

One last thought before we start. The question often emerges as to why hate speech—expression that vilifies others on the basis of group identity—does not appear on the list of unprotected categories.⁵⁹ Although the Supreme Court has not addressed the issue specifically, the doctrine we cover in this chapter suggests that the Court would be reluctant to add hate speech to the list. Why? To think about answers to the question, reflect back on the theories underlying free speech and consider whether difficulties in defining such an exception narrowly might threaten public discourse in important ways.

Existing doctrine might also pose obstacles to adding hate speech to the unprotected list. To preview the material to follow, suppose a university hate-speech policy prohibits speech that “stigmatizes” people based on their race, ethnicity, religion, gender, or sexual orientation. Under current doctrine, the justices might find the word “stigmatize” too broad, covering (protected) speech that is “merely offensive,” as well as too vague, forcing members of the university community to guess about whether certain speech is allowed. Policies or laws that are overbroad, vague, or both are highly disfavored by the Court for the reasons we will consider later.

None of this is to say that universities may never protect their communities from certain kinds of stigmatizing and harmful speech. But as you seek to gain intuitions about university speech, you should be aware that any time speech is restricted based on its offensive content, there will be serious concerns about whether the restriction goes too far toward censorship.

At the conclusion of this chapter, you will have the opportunity to test your knowledge of First Amendment doctrine as it applies to a university’s hate speech policy. We will also ask you to return to the justifications for freedom of expression offered in Chapter 1 and think about whether they would or would not support prohibiting hate speech.

4.1 Incitement of Imminent Lawless Activity

Chapter 1 introduced you to two case studies involving a white supremacist, Richard Spencer, who was scheduled to speak at the University of Florida and Michigan State University (MSU). Recall that the schools responded differently: Florida cancelled the speech (though rescheduled it at a later date), and MSU moved it to a remote location and scheduled it during Spring break. But both responses were similar in an important regard. In each, administrators claimed to be concerned about the risk of imminent violence to students and others. Risk of violence can exist due to a friendly audience carrying out the speaker’s own calls for lawless action or due to a hostile audience responding violently against the speaker. Both can present danger to the community,

but the Court has treated them differently, and so do we, taking up the first here and the second in the next section.

In the two case studies centering on Richard Spencer, a key question was whether the risk of violence, either in support of Spencer or against him, justified cancelling or disallowing his speech. The Supreme Court long struggled with a more general form of this question: whether and to what extent the government can prevent speech on the ground that it may incite unlawful activity, advocate the forcible overthrow of the government, or otherwise jeopardize the nation's security.

We saw an example of just this sort of litigation in Chapter 1, in *Abrams v. United States* (1919).⁶⁰ There, the Court considered the conviction of Abrams and four others for publishing and distributing pamphlets that government alleged were designed “to incite, provoke and encourage resistance to the United States” in its war with Germany.⁶¹ The majority upheld the convictions, asserting that Abrams's actions, even though expressive, could have produced an evil consequence: the U.S.'s defeat in the war. In a famous dissent, Justice Holmes disagreed, asserting that,

[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so *imminently threaten* immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.⁶²

Abrams illustrates that questions about the punishment of incitement raise core issues about free expression. But *Abrams* also shows that those questions are not easily answered. On the one hand, democracy requires the free discussion of competing ideas. In the extreme, this view holds that the First Amendment protects nearly all expression, as long as it remains expression and does not cross the line into criminal conduct. Once a person commits a criminal act, they can be punished for that, but not for the speech leading up to it.⁶³

On the other hand, a primary task of government is, in the language of the Constitution, to “insure domestic Tranquility.” Universities, too, have a duty to preserve the “security of our campus community,” as the president of MSU explained in justifying the university's response to Richard Spencer.⁶⁴ And many college documents emphasize the need to keep “campus safe and secure.” These objectives seem to imply that universities and government, more generally, have a special responsibility to prevent even speech *that can lead* to violence, harm, and disruption.

How should courts balance these interests: the desire for security versus the desire to advance liberty and democracy in the form of free speech? Under what circumstances, if any, does the First Amendment protect speech that may incite illegal behavior, and when is such speech beyond the First Amendment's reach?

The Court labored for nearly five decades to devise a constitutional standard that would help to accommodate the competing values of liberty and security in this situation. Many contemporary commentators have more respect for the approach Holmes

took in his 1919 *Abrams* dissent than for the majority decision upholding criminal punishments. Holmes's approach was a variant on a test he set forth earlier that same year, known as the "clear and present danger" test:

[W]hether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.⁶⁵

Notice that what Justice Holmes sought to do with this test was to protect dangerous speech as long as there was time to use the marketplace of ideas to counter it with more speech, perhaps fending off the violent outcome. But at the point where danger became both serious and immediate, he would allow punishment of the speech rather than have to wait until the harm had actually occurred. In the years following, the justices occasionally adopted Holmes's formulation but not always. Sometimes they applied standards that were more speech protective and sometimes less protective.⁶⁶

Finally, fifty years later, in the landmark case of *Brandenburg v. Ohio* (1969), the Court settled on a standard for judging speech advocating illegal behavior—a standard that is still used today. As you read the following excerpt of *Brandenburg*, think about how it differs from, or is similar to, Holmes's approaches. Also consider *Brandenburg*'s relevance to speech on college campuses today.

Under the *Brandenburg* test, government may not forbid people from advocating the use of force, violence, or forms of illegal activity unless the advocacy (1) is directed at inciting or producing *imminent lawless action* and (2) is *likely* to incite or produce such action. Mere abstract teaching is not enough, nor is even the *possibility* of harm; the harm actually must occur (or be at the point of occurring) for government to intervene, and the speaker must have intended it to occur.

This standard would seem to be highly speech-protective, but, nonetheless, room for interpretation exists. For example, would the Court have reached a different decision had *Brandenburg* added the word *NOW* to his speech, as in, "it's possible that there might have to be some revengeance [sic] *NOW*." Would that be advocacy aimed at producing *imminent* lawless action?

The Court has not revisited the *Brandenburg* test, in part because cases centering on the advocacy of illegal activity are rare. Nevertheless, *Brandenburg* has been cited over 1,000 times in the federal and state courts, and its relevance for campus speech is beyond question.

To see the point, return to the controversy at the end of Chapter 1, about white supremacist speakers at universities. Considering the *Brandenburg* test, ask yourself these questions: When would a school be justified in cancelling or disallowing a speech by a white supremacist—or, for that matter, any speaker who could be planning to incite violence? How could universities assess whether this risk exists?

BRANDENBURG V. OHIO, 395 U.S. 444 (1969)

Clarence Brandenburg, the leader of an Ohio affiliate of the Ku Klux Klan, sought to obtain publicity for the group's goals by inviting a television reporter and camera crew to attend a rally held on a farm, just outside of Cincinnati. Local and national television stations later aired some of the footage from the rally, which showed at least a dozen hooded Klansmen gathered around a burning cross. Some were carrying firearms. Brandenburg delivered a speech to the group in which he said, "We're not a revengent organization, but 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 taken."

Based on these films, Ohio authorities arrested Brandenburg for violating Ohio's criminal syndicalism law, which was passed in 1919 to prevent the spread of unpatriotic views. The Ohio act prohibited the advocacy of unlawful means of political reform. After his conviction was upheld by the state supreme court, Brandenburg appealed to the U.S. Supreme Court, arguing that the First Amendment protected his expression.

Note that the justices issued a per curiam opinion, meaning that it was an unsigned opinion of the Court.

PER CURIAM

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "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" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

....

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act [in *Whitney v. California* (1927)], the text of which is quite similar to that of the laws of Ohio. The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later



Clarence Brandenburg, who led a Ku Klux Klan rally in rural Ohio. He was prosecuted for advocating criminal behavior, but the Supreme Court ruled in his favor, since mere advocacy is insufficient to justify punishment.

Associated Press/Anonymous

decisions. These later decisions have fashioned the principle 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. As we [have] said “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action.” A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio’s Criminal Syndicalism Act cannot be sustained. The Act punishes persons who “advocate or teach the duty, necessity, or propriety” of violence “as a means of accomplishing industrial or political reform”; or who publish or circulate or display any book or paper containing such advocacy; or who “justify” the commission of violent acts “with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism”; or who “voluntarily assemble” with a group formed “to teach or advocate the doctrines of criminal syndicalism.” Neither the indictment nor the trial judge’s instructions to the jury in any way refined the statute’s bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California* cannot be supported, and that decision is therefore overruled.

Reversed.

4.2 Speech That Provokes Listeners into Lawlessness

In disputes involving speech that advocates lawlessness (like *Abrams* and *Brandenburg*), the focus is on the people expressing themselves. The central question is whether the government may punish the speakers because their expression advances imminent illegality and there is some likelihood that the audience may *follow* the speaker into lawlessness. In *Abrams*, for instance, the government asserted that if thousands of people followed Abrams’s message urging resistance to the United States’ war with Germany, it could have led to a U.S. defeat.

The cases in this section, by contrast, focus on *listeners*, so disturbed or angered by certain speech that they become violent or otherwise lawless in their reaction *against* the speaker.⁶⁷ Such a breakdown could lead to bodily injury, destruction of property, or impairment of the government’s ability to carry out its responsibilities. What should the government or university do when speech provokes such a disruption? Is it the duty of the government or college officials to protect the speaker? The listeners? At what

point are officials justified in shutting down the *speaker* to prevent violence on the part of the *listeners*?

Two lines of cases address these questions: “hostile audience” and “fighting words.” As we will see, hostile audience cases are usually about groups of listeners, while the Supreme Court now focuses its fighting words doctrine on speech directed at particular individuals.

4.2.1 Hostile Audience

As its name suggests, “hostile audience” doctrine covers circumstances in which speech provokes an aggressive response on the part of a group of listeners. Examples in universities abound. For instance, in 2019 the acting head of the Department of Homeland Security in the first Trump administration, Kevin McAleenan, was scheduled to appear at an event sponsored by a center at Georgetown University Law Center.⁶⁸ As McAleenan took the stage, protesters—who opposed the administration’s policies on immigration—stood up and began shouting phrases like “stand with immigrants” and “hate is not normal.” McAleenan attempted several times to begin his talk, but after a few minutes, he thanked the moderator and left the stage. He never returned.

Hours after the event, the dean of the law school issued a statement to students, faculty, and staff:

We . . . regret that the audience did not get to hear from [McAleenan] and engage in a dialogue through the Q&A session that was scheduled to occur following his remarks. Georgetown Law is committed to free speech and expression and the ability of speakers to be heard and engage in dialogue.

Should administrators have taken action *during* the event, rather than afterward? If so, what should they have done? Should they have shut down the protestors, or escorted them out? Encouraged the speaker to stay and try to deliver his speech? Or something else altogether?

These questions often emerge in university settings because campus protests against speakers are a common occurrence. But the key Supreme Court case on hostile audiences, *Terminiello v. City of Chicago* (1949),⁶⁹ does not involve student speech. It rather centers on a suspended Catholic priest, Father Arthur Terminiello, who, in 1946, addressed a substantial crowd inside a Chicago auditorium. During his speech, Terminiello launched into a tirade directed against Communism and Jews.

Outside the auditorium, an even larger and angry crowd had gathered in opposition to Terminiello. The crowd grew unruly, throwing bricks and bottles at the building and breaking several of the auditorium’s windows. Some protesters attempted to overpower the substantial police presence and break down the door to the building. But it was Terminiello, not the protestors, who was arrested. He was eventually convicted of “breach of the peace,” defined by a city ordinance as action that “stirs

the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.”

In a 5–4 decision, the Court reversed Terminiello’s conviction, holding that Chicago’s ordinance violated the First Amendment as it was applied to him. In a famous passage, Justice Douglas, for the majority, explained that,

[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. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.⁷⁰

Writing in dissent, Justice Robert Jackson (the same Justice Jackson who wrote the majority opinion in the flag-salute case and the “safety-valve” theory of free speech) agreed with the majority’s sentiment “in the abstract,” but went on to note that the court that convicted Terminiello “was not indulging in theory. It was dealing with a riot, and with a speech that provoked a hostile mob [outside] and incited a friendly one [inside], and threatened violence between the two.”⁷¹ In Jackson’s view the majority “fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society’s need for public order.”⁷²

Notwithstanding Jackson’s arguments in favor of keeping the peace, the *Terminiello* majority picked a side in the debate over hostile audiences: a speaker’s right to speak, even provocatively, must be protected even if the listeners threaten the public order in response. Put another way, under *Terminiello*’s logic, the government should not shut down speech due to an audience effort to shout down the speaker, because this would offer a “heckler’s veto” to the unruly listeners. If the government allows or even encourages such vetoes, it would incentivize the disruption and silencing of protected expression.⁷³ Perhaps suppression of the speech would be tolerated in the extreme situation in which, as one commentator noted, “crowd control is *impossible* and a threat to breach of the peace *imminent*.”⁷⁴ The question, of course, is what action the officials should take—stop the speaker or arrest the members of the unruly crowd—who will no doubt have First Amendment claims of their own!

Similar logic could apply in the university context, with an additional consideration: if administrators allow hecklers to disrupt and drown out speakers, only the blandest of messages would be expressed on campus. After all, who would accept an invitation to speak at a university and then make the effort to travel, sometimes a long distance, to campus knowing that faculty and students could shut down the speech? Probably only those speakers with nothing very controversial to say. Put another way, allowing hecklers to express themselves without limit could devolve to mob rule, which could deprive faculty, students, and staff alike of the benefits of free expression that we considered in Chapter 1.

That is the position that many administrators take. Recall the dean of Georgetown's reaction to the heckler-protestors at his school. He essentially regretted that the speaker left but still did not intervene by, say, escorting the hecklers out of the auditorium. The dean at Stanford Law School, Jenny Martínez, was more emphatic in her commitment to protect speakers. After an attempt to shut down a speaker there, she wrote a ten-page letter to the community, which included this passage:

Some students have argued that the disruptive protest of the event was itself constitutionally protected speech. Of course, protests are in some instances protected by the First Amendment, but the First Amendment does not give protestors a "heckler's veto." . . . "Freedom of speech does not protect a right to shout down others so they cannot be heard."⁷⁵

Is Martínez's argument always correct, or might there be times when the hecklers should be permitted to prevail in their efforts to shut down a speaker because concerns about the common good are weightier than *Terminiello* made them out? This, at least, was Jackson's position in his *Terminiello* dissent; and it seemed to resonate with the Court just two years later, in *Feiner v. New York* (1951).⁷⁶ Irving Feiner, a college student, stood on a box and made an impromptu speech on a street corner in Syracuse. He criticized some public officials and encouraged Black people to demand equal rights. A crowd assembled, one large enough to block pedestrian traffic and spill onto the street, and some in the crowd began to threaten Feiner. Two police officers on the scene determined that, to ensure public safety, Feiner should suspend his speech. When he refused, he was arrested.

In this case, the Court upheld the conviction for breach of the peace. What distinguished this case from *Terminiello*, according to the majority, was that, under the circumstances—the danger to pedestrian and vehicular traffic and the threats of violence—the officers were left with little alternative but to protect the peace. They were not, according to the Court, allowing the listeners to exercise a heckler's veto; nor were they punishing a speaker simply because the message irritated listeners.

Do you agree? Is this case sufficiently distinct from *Terminiello*? Justice Douglas, *Terminiello*'s author, seemed to think that they were more alike than dissimilar. In a dissenting opinion, he wrote,

A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of "fighting words." See *Chaplinsky v. New Hampshire*. But this record shows no such extremes. It shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that *speakers need police protection*. If they do not receive it, and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech.⁷⁷

Some commentators agree that, in fact, a disconnect between *Terminiello* and *Feiner* exists⁷⁸—and that disconnect makes hostile audience doctrine more of a gray area than universities emphasizing the rights of speakers let on. Justice Douglas raises a key question about whether even lightning-rod speakers should be protected by the police rather than arrested by them.

Moreover, both *Terminiello* and *Feiner* took place in public spaces. Should their logic apply to university audiences and administrators? What differences about universities might support an approach that is more pro-speaker or more pro-heckler than the way governments generally handle these issues?

4.2.2 Fighting Words

Recall that Eric Rasmusen, the Indiana University professor, used his Twitter account to convey misogynistic, racist, and homophobic messages—including retweeting an article titled “Are Women Destroying Academia? Probably.” Some people would no doubt find these words so incendiary that they might want to fight back, verbally or even physically attacking Rasmusen to stop him from spreading his hateful message.

When speech provokes such a reaction, should it still be protected by the First Amendment? The Supreme Court has wrestled with this question in a doctrine known as “fighting words,” the genesis of which lies in a 1942 Supreme Court case called *Chaplinsky v. New Hampshire*.⁷⁹

The central figure in the dispute was Walter Chaplinsky, a Jehovah’s Witness, who was selling religious pamphlets and literature on a public street in New Hampshire. While he was announcing the sale of his pamphlets, a crowd of about 50 people began to gather. Several took offense at Chaplinsky’s comments critical of organized religion and “racketeer” priests, and complained to the city marshal. The marshal warned Chaplinsky that the people were getting into a foul mood, but Chaplinsky continued to express his religious views and distribute his literature. After one person tried to attack Chaplinsky, the marshal and three of his men intervened and forcibly began to take Chaplinsky to city hall. When a very agitated Chaplinsky demanded to know why they had arrested him and not those in the crowd, one of the officers replied, “Shut up you damn bastard,” and Chaplinsky in turn called the officer a “damned fascist” and “a God damned racketeer.”

For those words, the state charged Chaplinsky with breaking a law prohibiting the use of “any offensive, derisive or annoying word to any other person who is lawfully in any street.” He was convicted and received a fine.

A unanimous Court affirmed Chaplinsky’s conviction. To see why, please read an excerpt from the majority opinion on the next page. As you do, consider whether you find the Court’s logic persuasive. Also consider the Court’s definition of “fighting words,” which the justices proclaimed to be an “unprotected” category of speech—that is, speech that can be prevented and punished. Does the definition strike you as a reasonable balance between protecting too much and too little speech?

JUSTICE FRANK MURPHY'S OPINION FOR THE COURT IN CHAPLINSKY V. NEW HAMPSHIRE (1942)

[I]t 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. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those 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.

...
[T]he state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." It was further said: "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. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . .

The statute . . . does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. . . .

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

Affirmed.

In affirming Chaplinsky's conviction, the Court held that the government may prohibit fighting words, defined as words "which, by their very utterance, inflict injury or tend to incite an immediate breach of peace." To the Court, such expression is not

really speech at all, in the sense that it does not involve a genuine discussion of ideas, and its power is not through debate or persuasion; rather, the Court viewed such words more like the conduct of assaulting another person and inflicting injury.

Although this definition of “fighting words” may seem clear, the word “injury” was a source of confusion. Under *Chaplinsky* the “injury” could be interpreted to include not just physical injury but also emotional or psychological harm. If so, the fighting words doctrine, commentators argue, could be used to suppress all kinds of speech. Simply expressing offensive ideas, even if they do not provoke an immediate violent reaction, could be restricted.

Imagine that, in a Sociology class, a devout Christian student expresses her view that the only true marriage is between a man and a woman. Further, suppose that her comment leads LGBTQ+ students in the class to complain to administrators that they felt injured by the student’s definition of marriage. The devout student, in turn, responds with a complaint of her own: that now *she* feels injured—demeaned and stigmatized—on account of her religious beliefs.

This illustration underscores some of the problems with allowing speech to be censored or punished merely because it causes an immediate emotional reaction—a psychological injury. The worry is that this kind of exception to the free speech principle could become so large as to allow governments almost unlimited power to restrict expression of ideas that could offend someone. This could, in turn, jeopardize many of the goals that we considered in Chapter 1 for the protection of speech in a democracy.

Considering these concerns, the Court has sought to clarify and narrow the fighting words doctrine. In *Cohen v. California* (1971),⁸⁰ at the height of protests against the Vietnam War in 1968, Paul Robert Cohen visited some friends in Los Angeles, his hometown. While they were discussing their opposition to the war, someone scrawled on Cohen’s jacket the words “Fuck the Draft” and “Stop the War.” The next morning, Cohen wore his jacket in the corridors of a Los Angeles County courthouse, knowing it bore these messages.

Although Cohen took off his jacket before entering the courtroom, a police sergeant had observed it in the corridor. The officer asked the judge to cite Cohen for contempt of court. The judge refused, but the officer arrested Cohen anyway, charging him with “maliciously and wilfully disturbing the peace or quiet of any neighborhood or person by offensive conduct.” He was convicted in a California state court.

When the case reached the U.S. Supreme Court, California (among other arguments) cited *Chaplinsky* to contend that Cohen’s “form of protest” was so inherently inflammatory and potentially injurious that it amounted to “fighting words.” The words on the jacket, according to California, could “provoke the average person to retaliation and thereby cause a breach of the peace.”

The justices declined to adopt that interpretation of *Chaplinsky*. Instead, they took the opportunity to cabin the doctrine of fighting words. Here is the relevant portion of the Court’s decision:

This Court has . . . held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called “fighting words,” those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire* (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance, it was clearly not “directed to the person of the hearer.” No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State’s police power to prevent a speaker from intentionally provoking a given group to hostile reaction [as in] *Terminiello v. Chicago* (1949). There is . . . no showing that anyone who saw Cohen was, in fact, violently aroused, or that appellant intended such a result.

Do you spot the clarifications? For the government to classify and punish speech as fighting words, not only must it demonstrate that the words “inflict injury or tend to incite an immediate breach of the peace” (*Chaplinsky*), but under *Cohen*, it must also show that the speech was aimed at someone, that it was a “direct personal insult” intended to “violently arouse” the listener or, as the Court later put it, a direct “invitation to exchange fisticuffs.”⁸¹ In other words, fighting words encompass only face-to-face communication containing a personal insult directed at an individual.

California’s attempt to punish Cohen’s expression did not pass this high bar—he won the case—but what about the other examples we mentioned in this section? The devoutly religious student who said that true marriage is between a man and woman. Or Eric Rasmusen’s retweeting an article titled “Are Women Destroying Academia? Probably.” Or, for that matter, Chaplinsky’s speech? Do any fall into the unprotected category of fighting words given *Cohen*’s clarification?

It is so difficult for the government to punish speech as “fighting words” that the Supreme Court has not upheld a conviction under the doctrine since *Chaplinsky* in 1942.⁸² Nonetheless, “fighting words” still resonates as a possible exception to free speech. Even after *Cohen v. California*, federal and state courts have referenced “fighting words” over 4,000 times—and occasionally have allowed suppression of expression on that ground.

Consider a 2024 dispute out of Kentucky, *Spurlock v. Ashland Independent School Board*.⁸³ After Jerry Spurlock “taunted” school officials at a basketball game, the school district banned him from its facilities. Spurlock, in turn, claimed that the ban violated his free speech rights. A federal district (trial) court disagreed. It upheld the punishment because Spurlock’s “taunting” amounted to unprotected fighting words:

[At the] game, [Spurlock] appeared to threaten the [school principal] and challenged him to “meet him outside.” He dared [another school official] to nothing short of a fist fight before being escorted off the premises by local law

enforcement. “Fighting words” fall well outside of the First Amendment’s bounds. Indeed, “an invitation to exchange fisticuffs” is the very epitome of fighting words.⁸⁴

Notice that the objectionable expression was both aggressive and directed toward specific listeners. Keep this in mind when you reflect on whether or when hate speech can be regulated as “fighting words,” which you will have a chance to do at the end of the chapter.

4.3 True Threats

Consider two examples of expression that would seem to qualify as hate speech, both of which appeared in an interpretive guide to the University of Michigan’s 1988 Policy on Discrimination and Discriminatory Harassment:

- Racist graffiti written on the door of an Asian student’s study carrel
- A Black student who is confronted and racially insulted by two white students in a cafeteria

If the students involved reported to administrators that they felt *threatened* by this conduct, should the administrators punish the violators, or is the violators’ expression covered by the First Amendment?

To begin to develop an answer, consider that the Supreme Court has recognized an additional category of speech that is “unprotected” by the First Amendment: a type of speech qualifying as a “true threat.” The key question, of course, is what constitutes such a threat. A standard dictionary defines “threat” as “an expression of intention to inflict evil, injury, or damage.”⁸⁵ By this definition, the mere utterance of threatening expression could be enough to cause injury, whether physical or otherwise.

But this is not how the Court has defined a “true threat” in the First Amendment context. According to the Court, true threats must go beyond mere threatening words, exaggeration, or casual insults. They instead encompass only those statements that mean “to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁸⁶ Falling into this precise definition are, for example, those forms of intimidation “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”⁸⁷

Virginia v. Black (2003) nicely illustrates the distinction the justices have made between “ordinary” threats/insults and “true” threats. At issue in the case was a Virginia law, which made it illegal

for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.⁸⁸

In other words, Virginia treated all cross burnings as true threats.

To determine the law's constitutionality, the Court combined two cases. In the first, Barry Black had led a Ku Klux Klan rally in Carroll County, Virginia. The meeting took place on a privately owned field near a highway with about thirty people attending, some of whom gave racist speeches. At the end of the rally, a thirty-foot cross was burned while the attendees played "Amazing Grace" over a loudspeaker. Shortly afterwards, a sheriff, who had been watching the rally from the highway, drove to the gathering and arrested Black for violating the Virginia cross-burning law.

In the second case, Richard Elliott and several others had planted a cross and set it on fire in the yard of James Jubilee, a Black man. Jubilee, who had recently moved to Virginia, was Elliott's next-door neighbor. After seeing the cross, Jubilee was "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard . . . tells you that it's just the first round."⁸⁹ Elliot was charged with violating the Virginia law.

Writing for a plurality of the justices, Justice Sandra Day O'Connor, the first woman appointed to the Court, began by acknowledging that "regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a 'symbol of hate.'"⁹⁰

But does burning a cross always constitute a true threat? According to O'Connor, it depends on the burners' intent. Cross burning "carried out with the intent to intimidate" is, indeed, a true threat that can be punished consistent with the First Amendment. Then again, because cross burning "is not always intended to intimidate [but] sometimes . . . is a statement of ideology, a symbol of group solidarity [as it is for the Klan],"⁹¹ the state cannot treat all cross burnings as true threats; it can only outlaw those done with the intent to intimidate.

On this logic, the Court ruled in Black's favor. Although "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,"⁹² the state offered no evidence showing that the cross burning at the Klan rally was a true threat to a particular individual or group of individuals. As for Elliot, his case was returned to the lower court to determine whether his cross-burning met the criteria of a true threat. The Supreme Court of Virginia held that it did.

Notice the important role that the speaker's intent has played in the analysis of unprotected categories. In 2023, the Supreme Court further refined its approach to true threats, in *Counterman v. Colorado*.⁹³ Billy Counterman sent hundreds of messages on social media to a local musician whom he did not know, ranging from bland greetings to creepy stalking. The musician sought to block him and feared that he was threatening her life. Counterman was convicted under a statute making it unlawful to repeatedly communicate with a person "in a manner that would cause a reasonable

person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress,”⁹⁴ and Counterman raised a First Amendment defense on appeal.

The Supreme Court confirmed that there must be subjective intent on the part of the speaker in order to prosecute someone for speech, and held further that, in the case of true threats specifically, a person cannot be prosecuted for making a true threat unless the government can prove that the person acted *recklessly* with regard to whether the conduct would cause harm to another. This “means that the speaker is aware that others could regard his statements as threatening violence and delivers them anyway.”⁹⁵ The Court sent Counterman’s case back to determine whether he met the recklessness standard.

With *Virginia v. Black* and *Counterman v. Colorado* in mind, return to the two examples at the start of this section: Racist graffiti written on the door of an Asian student’s study carrel and a Black student who is confronted and racially insulted by two white students in a cafeteria. Under the Supreme Court’s approach, are either or both “true threats”?

Whatever your answer, you will have another chance to consider the unprotected category of true threats, as it will reappear in the controversy at the chapter’s conclusion on hate speech. You will see that universities sometimes justify prohibiting variants of hate speech on the ground that they are true threats. Examples include not only racist graffiti and confrontation but also a male student remarking in class that “women just aren’t as good in this field as men.” We will ask you to consider whether these and other examples are true threats, at least in the way the Court has defined that term.

4.4 Captive Audience

In *Terminiello*, *Feiner*, and even the Georgetown Law example, the audiences were free to leave; no one was requiring them to listen to the speakers. Likewise, no one forced students to view Professor Rasmusen’s tweets. But what if people do not want to hear or see the expression—and cannot escape or avert their eyes? Does that situation justify more suppression of speech?

The Supreme Court has suggested yes, that under certain circumstances and in certain places, “private speakers cannot . . . foist their speech onto unwilling listeners.”⁹⁶ This is known as the captive audience doctrine, and it allows the government to sometimes suppress expression.

Once again, the key case, *Frisby v. Schultz* (1988), took place not on a college campus but in Brookfield, Wisconsin, a suburb of Milwaukee.⁹⁷ Sandra Schultz and others who opposed abortion decided to picket on a public street outside the home of a doctor who performed abortions. Although the picketing was generally orderly, quiet, and peaceful, it generated a lot of controversy and many complaints.

In response, the town passed an ordinance banning all “picketing before or about the residence or dwelling of any individual in the Town of Brookfield.” A key purpose

of the ban, according to the town, was to assure “that members of the community enjoy in their homes and dwellings a feeling of wellbeing, tranquility, and privacy.”

Believing that the ordinance violated their free speech rights, Schultz and another pro-life protestor filed a lawsuit asking the Supreme Court to invalidate it. For several reasons, the justices declined to take that step. Most relevant here was the Court’s emphasis on protecting the “unwilling residential listener”:

The First Amendment permits the government to prohibit offensive speech as intrusive when the “captive” audience cannot avoid the objectionable speech. The target of the focused picketing banned by the Brookfield ordinance is just such a “captive.” The resident is figuratively, and perhaps literally, trapped within the home, and, because of the unique and subtle impact of such picketing, is left with no ready means of avoiding the unwanted speech. Thus, the “evil” of targeted residential picketing, “the very presence of an unwelcome visitor at the home,” is “created by the medium of expression itself.”⁹⁸

The Court went on to contrast the situation in Brookfield with one we discussed earlier, *Cohen v. California*. In Brookfield, the resident could not avoid the unwanted speech unless he left his home, whereas in *Cohen*, people milling about the courthouse could easily avoid Cohen’s message about the draft by simply averting their eyes—they were not captive.

But is the line so clear? Suppose a student speaker at graduation delivered a speech conveying a fervently pro-choice message (or a pro-life message; take your pick). Should university officials shut down the speech on the theory that attendees at a commencement ceremony are “captive”—trapped—and so should not be forced to listen to a controversial speech? Or is a graduation ceremony different from the situation in *Frisby*? If so, how?

We could pose similar questions about Rasmusen’s tweets. Sure, students could avoid them if they appeared only online. But suppose someone took screenshots of the tweets and plastered them all over Indiana’s dorms in an effort to shame Rasmusen. Might students living in the dorms claim that the tweets should be torn down because the students were now compelled to read the tweets in their homes, that they could no longer avert their eyes? Would *Frisby* support such a claim?

4.5 Discriminatory Harassment

The Supreme Court has never held that speech constituting discriminatory harassment is an unprotected category under the First Amendment. Yet, particular enclaves, like workplaces and universities, have long abided by regulations from the federal government and state authorities prohibiting the practice of discriminatory harassment, which is “unwelcome” conduct based on protected characteristics such as race, religion, sex (including sexual orientation, gender identity, or pregnancy), and national

origin, among others.⁹⁹ More to the point, universities are required to comply with the federal laws governing discriminatory harassment and could lose their federal funding if they do not follow the laws.¹⁰⁰ For this reason, most schools maintain a policy that prohibits “unlawful harassment of students, employees and third parties” based on the protected characteristics.

At first blush, discriminatory harassment appears tangential to constitutional free speech concerns, as many forms of harassment fall into the category of “conduct,” and are, thus, readily able to be regulated; then again, important forms of harassment are achieved through speech and other forms of expression. These applications of antidiscrimination law raise questions about a potential conflict with the First Amendment.

To see the point, consider some forms of discriminatory harassment given by the federal government:

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures.¹⁰¹

These examples might seem to suggest that speech such as Rasmusen’s tweets denigrating women, Black people, and gay people might constitute discriminatory harassment that could be prohibited by a university.

But not so fast. Under Supreme Court precedent, to establish discriminatory harassment, it must be shown that the behavior is

so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.¹⁰²

Notice how the Supreme Court’s words seek to emphasize the experiential aspects of the harassment, and not other concerns, like the offensiveness of the message being conveyed. In other words, to be punished, the harassing behavior, as the Department of Education once put it, “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”¹⁰³

For this reason, universities often qualify their policies against discriminatory harassment with language about free speech, academic freedom, or both. Washington State University, for instance, explicitly attempts to navigate the line between offensive speech and actionable discriminatory harassment:

Hate speech may rise to the level of discriminatory harassment . . . in some cases, but it may also be considered protected speech where the conduct does not constitute discriminatory . . . harassment, or fall into some other category that is not protected [like fighting words or true threats]. Protecting some forms of hate speech is an attempt to balance first amendment rights

with the prevention of harm and the protection of marginalized groups. . . . Determining what constitutes hate speech and where the line should be drawn between protected speech and harmful expression is a complex and often contentious issue with legal and ethical repercussions.¹⁰⁴

Other universities speak in generalities about the difference between protected speech and discriminatory harassment in an effort to carve out a narrow category of punishable behavior from the larger universe of protected expression:

- “The University’s policies and procedures relating to harassment are not intended to inhibit or restrict free speech or the expression of ideas” (Princeton).¹⁰⁵
- “Just as the University is committed to securing for its students, faculty, and staff a safe educational and work environment free of harassment, it is equally committed to maintaining academic freedom . . . and free speech, consistent with Federal and state law . . . The University recognizes that students are exposed to thought-provoking ideas as part of their educational experience, and some of these ideas may challenge their beliefs and may lead a student to claim that an educational experience is offensive. Therefore, allegations of harassment involving elements of speech that arise in the educational context will be considered in keeping with the University’s commitment to academic freedom and free speech” (University of Southern California).¹⁰⁶
- “Balancing the right to a harassment free environment and the right of freedom of expression at CUNY is crucial . . . It is essential to follow guidelines that promote open dialogue without compromising the safety and well-being of our university community. Setting clear boundaries while encouraging open dialogue helps create an environment where individuals feel heard and respected and can attain an education free from harassment or discrimination. It must be remembered that speech which impairs another’s rights may not always be protected speech” (City University of New York).¹⁰⁷

It is clear from these excerpts that distinguishing protected speech, even if hateful, from unprotected expression/conduct is not “as simple as ‘free speech’ on one side and ‘harassment’ on the other.”¹⁰⁸

This complication is evident in the action taken in the early weeks of the second Trump administration. The government insisted, in one case, that the university

immediately shutter all diversity, equity, and inclusion (DEI) programs, offices, committees, positions, and initiatives, under whatever name, and stop all DEI-based policies, including DEI-based disciplinary or speech control policies, under whatever name.¹⁰⁹

This command would presumably invalidate all hate-speech policies. Does it resolve the tension by privileging free speech over antiharassment principles, or does it stifle the free speech of students, faculty, and the university?

More generally, universities have struggled mightily to reconcile their commitments to both free speech and antidiscrimination, as illustrated by the case in Box 2-1, out of the University of Oregon.

BOX 2-1 DISCRIMINATORY HARASSMENT OR PROTECTED SPEECH? THE CASE OF BLACKFACE AT A HALLOWEEN PARTY

In October 2016, a law professor at the University of Oregon, Nancy Shurtz, invited professors, students in two of her courses, and others to a Halloween party at her house.¹¹⁰ At the party, Shurtz, who is white, wore a costume modeled after a then-new memoir entitled “Black Man in a White Coat: a Doctor’s Reflections on Race and Medicine.” She wore a white medical coat and black paint on her face and hands.

Word of Shurtz’s costume, including photos of her in blackface, spread across campus, stunning the community. Shurtz apologized, claiming that her intent was “to provoke a thoughtful discussion on racism” by showcasing the memoir.

Nonetheless, the University placed Shurtz on administrative leave and commissioned a review by a law firm. The report by the firm ultimately concluded that Shurtz had violated the university’s policies against racial harassment. Among other findings, the report noted the following:

- The history of the use of blackface to demean and insult Black people.
- The substantial disruption to the educational environment caused by Shurtz wearing black face: “Actual impacts that we heard from those interviewed included shock, anger, surprise, anxiety, disappointment and discomfort with remaining at the event.” And the effects went beyond the attendees to the entire student body, and included:

outright hostility and division between the students, the environment being described by some as ‘toxic, class time being spent on discussing the event and the students’ reactions, the open forum, minority students feeling that they have become burdened with educating other students about racial issues and racial sensitivity, students using other offensive racially based terminology during class times in the context of discussing this event and broader racial issues, feelings of anxiety and mistrust towards other professors beyond just Shurtz, students now avoiding spending time on campus as a result, and some students who are attempting to transfer to a different law school.

- The balance between free speech and harassment: “The effects of Shurtz’s costume constitute disruption to the university significant enough to outweigh Shurtz’s interests in academic freedom and freedom of speech in the type of speech at issue. In addition, the resulting hostile learning environment and impact upon the academic process renders this particular speech to be speech that the university has a strong interest in preventing.”

(Continued)

(Continued)

In response, the University took disciplinary action against Shurtz. It never released the details, but she was not fired.

Both the University's president and provost issued statements supporting the report's conclusion, while also taking note of potential free speech concerns. As the provost put it, the "resulting impact on students in the law school and university outweighed free speech protections provided under the Constitution and our school's academic freedom policies."¹¹¹ Oregon's president was even more explicit:

[W]hen exactly does offending someone turn into proscribed harassment? Only a small number of legal commentators would say that faculty members should be immune from all harassment charges on academic freedom grounds. Instead, most of us recognize that speech rights are extremely important, but they also fall on a continuum. For whatever it is worth, I personally am fairly close to the end of the spectrum that believes speech should be maximally protected. But even I believe that there are cases when speech or conduct is of relatively minimal value compared to the great harm that it may do to our students—particularly to students who already struggle with isolation and lack of representation. For example, imagine a required class in which a professor repeatedly uses the "N" word for no apparent reason except to elicit a reaction. Could African American students forced to sit through this class have a claim of harassment? I think so. Similarly, imagine a class in which a professor makes repeated, sexually explicit remarks to a student or students for no educational purpose. Free speech principles should not, in my view, prevent the university from taking appropriate actions to make sure these actions stop and do not recur in the future.¹¹²

But some free speech advocates disagreed. Consider the reaction of Erwin Chemerinsky, the dean of Berkeley Law School:

No doubt many were offended by [Shurtz's] actions, but unquestionably she was engaged in speech protected by the First Amendment and any discipline is unconstitutional . . . Professor Shurtz exercised poor judgment in choosing her costume and not realizing that some would be very offended by it. But poor judgment and offending people cannot be a basis for a university punishing speech . . . Likewise, it cannot be that a university can punish a professor's expression on the grounds that it offends students and thereby will make their learning more difficult. That is the primary justification for punishing Professor Shurtz . . . But what campuses never can or should do is punish speech because it is offensive.¹¹³

Now you decide: considering all you have learned so far, should the University have protected Shurtz's "expression," or did it rise to the level of discriminatory harassment? Compare Rasmusen's tweets: discriminatory harassment or protected (even if hate) speech? What role does the speaker's intent play, if any?

5. WHO IS SPEAKING?

So far, we have seen examples of students, professors, and even government and universities expressing their views. But in some instances, they were not speaking in their capacity as, say, students or even about their school. Harold Spence, who put a peace sign on the flag, was a student, but his expressive conduct was not connected to his status as a student; likewise, Irving Feiner, who made an impromptu speech on a street corner, was also a student, but his speech had nothing to do with his school.

In this section, we explore the rules the Court has established for speech by students or government employees, in their capacities as students and government employees. As you'll see, the rules tend to vary by the role the speaker plays, with some speakers receiving greater protection (the government) and some less (pre-college students).

Is this appropriate? As you read the material to follow, consider whether the Court has offered sound reasons to support its differential treatment of different classes of speakers. Or might you argue that there is one First Amendment, and it should apply equally to all speakers?

5.1 The Government

Governments incidentally express certain values by the regulations they pass, but their goal in regulating is to control the behavior of the public. As we have seen, when governments regulate speech, they must follow doctrine governing free speech or risk having their laws invalidated.

But sometimes the government acts not to regulate the speech of private persons but to express a message of its own. For example, a public university might endorse fetal tissue research, or the Department of Education might proclaim that "All K–12 students should obtain a comprehensive and rigorous education," or a town might announce that "You do a lot of good when you recycle." In each of these examples, the government is speaking for itself; it is not forcing anyone to endorse fetal tissue research, a comprehensive education for all students, or recycling.

Government is not permitted to favor one view or another in its regulatory capacity; if this were not the case, it could restrict messages it did not like and thus clearly abridge the free speech rights of dissenters. When a government speaks on its own behalf, however, the Supreme Court has given it a lot of leeway, allowing it "to say what it wishes and to select the views that it wants to express."¹⁴ So, if a public university endorses fetal tissue research, it is expressing a particular viewpoint and is not required to promote the opposite view as well.

Why does the Court allow governments to express any viewpoints they want? The answer is simple: governments are elected to perform certain tasks, and if they could not express their support for their own policies, they could not function effectively. The Court put it this way:

How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?¹¹⁵

The Supreme Court has endorsed this idea by holding that government speech is not “subject to scrutiny under the Free Speech Clause.”¹¹⁶ Challenges to government speech on First Amendment grounds, therefore, will invariably fail.

This much is well-established. Where difficulties arise is in defining what is and what is not government speech, especially where government is providing a platform for private persons to express themselves. For example, if a town allows one group to erect an expressive statue in a public park, is that the speech of the government or the speech of the private group? The answer to that question can make all the difference. Consider these two examples, both disputes that the Supreme Court resolved.

EXAMPLE 1. WALKER V. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS (2015).¹¹⁷

Texas requires that its license plates display identifying numbers and letters along with the state name. But it offers automobile owners a choice between a generic state license plate and a specialty plate. Groups who want to offer a specialty plate with their message on it can submit a proposed design to the Texas Department of Motor Vehicles. If the department approves the proposal, it will make the design available for all licensed vehicles, allowing each individual owner to opt for that design. At the time of this dispute, the department had approved more than 350 designs, proposed by groups including the Boy Scouts, Be a Blood Donor, Mothers Against Drunk Driving, I am a Texas Realtor, the Texas State Rifle Association, the Texas Trophy Hunters Association, World Wildlife Fund, and the YMCA.

In 2009 and again in 2010, the Texas division of the Sons of Confederate Veterans (SCV) submitted a license plate design that incorporated the Confederate battle flag



This is one of the license plate designs proposed by the Sons of Confederate Veterans. After the Texas Department of Motor Vehicles rejected the design, the group sued claiming a violation of their free speech rights.

Walker vs. Texas Division, Sons of Confederate Veterans, Inc. Petition for a Writ of Certiorari. <https://sblog.s3.amazonaws.com/wp-content/uploads/2014/09/14-144-petapp.pdf>.

(depicted in the following photo). After the department rejected the design, the SCV sued, claiming that the denial abridged their members' right to free speech. Texas countered that its license plates are a form of government speech because they are manufactured, issued, and owned by the state, and they assist the state in maintaining its system of automobile registration. Accordingly, while administering its license design program, the state was free to accept designs that promoted certain views while rejecting those that promoted others.

EXAMPLE 2. *MATAL V. TAM* (2017).¹¹⁸

While *Walker* involved license plates, this dispute centered on trademarks. People wishing to register their trademark—a design, words, colors (almost anything can be trademarked¹¹⁹)—apply to the federal government, which can grant or deny the request. A registered trademark, indicated by the symbol ®, has its benefits; for example, it helps guard against counterfeiting and fraud and, in general, prevents others from registering the same mark. The golden arches of McDonald's, the swish on Nike sneakers, and the green mermaid of Starbucks Coffee are all trademarked, for example.

In 2011, Simon Tam filed an application to register the name of his dance-rock band, THE SLANTS, as a trademark. Tam's goal in forming the band was not only to play music but also to express his concern with discrimination against Asian Americans. Calling his band The Slants was his way of transforming a term once used to insult Asian Americans into a "badge of pride" (sometimes called reappropriation). In Tam's words, "We want to take on these stereotypes that people have about us, like the slanted eyes, and own them."

But Tam's application hit an obstacle: the "disparagement clause" in a federal law (the Lanham Act), which allows the government to deny requests to register trademarks that malign or ridicule individuals. Pointing to this clause, trademark officials denied Tam's application because they judged it to be offensive to Asians. Tam, in turn, challenged the denial of his trademark, arguing that the disparagement clause violated his freedom of speech on the ground that it denied him a public



Simon Tam (far left), the leader of the dance-rock band The Slants, sought to register the name of his band as a trademark. After Trademark officials denied his application, Tam filed a First Amendment lawsuit.

Anthony Pidgeon/Redferns/via Getty Images

benefit based on the content of his message.¹²⁰ Like Texas in the *Walker* case, the federal government countered that a trademark is actually government speech, in that by registering and protecting a trademark, the government thereby is understood to have endorsed the mark, and so it has the right to decline to endorse what it considers to be an offensive message.

Consider how you would assess both types of speech, the license plate and the trademark. Is either or both “government speech,” or should the First Amendment challenge succeed?

The Court held that license plates are indeed government speech, but trademarks are not; they are private speech. Among other differences, the Court pointed out that the state’s name appears on license plates, whereas only the trademark symbol, and not the “U.S. government,” appears on trademarked products. As a result, trademarks are not “closely identified in the public mind” with the government, but license plates are.¹²¹ Notice that this test looks to the reaction of the public to the expression and whether the public would understand it as government or private expression.

Objecting to the Court’s conclusion on license plates, Justice Alito raised some questions in his dissent:

The Court holds that all the privately created messages on the many specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct?

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” . . . ¹²²

The Court says that all of these messages are government speech . . . [But] messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech.

A version of this same concern seems to have motivated the majority to go the other way in the *Tam* case: “If private speech could be passed off as government speech by

simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.”¹²³

Neither *Tam* nor *Walker* was about campus expression. So, the question emerges: do they have any bearing on free speech in universities and colleges?

We think they do. Suppose you attend a public university with a strict policy on the use of its logo, which it views as a formal representation of its identity. The policy states that no one may use the logo without prior written approval, and that the university reserves the right to approve or deny requests at its sole discretion.¹²⁴ Further suppose you’re a member of a student organization that wants to create a design combining your group’s insignia and the university’s logo on your website—but the administration rejects your request. You suspect the denial stems from disapproval of your organization’s mission, although the university defends its decision on the ground that its logo constitutes government speech, allowing it to control the messages associated with it.

An even thornier example is the selection of a valedictorian speaker for commencement. If the University discovers that the student it has selected will deliver a speech that the University finds offensive, may it remove the speaker on the ground that the public will understand the speech to be the speech of the University and it has the right to control its own messages? Would a disclaimer suffice to let the public know the student is not speaking for the University?

Based on the readings in this section, which side has the better case in each of these scenarios? Put another way, are they closer to *Walker* or *Tam*?

5.2 Government (Public) Employees

Walker and *Tam* were about speech by the government. What about speech by people the government employs, such as police officers, postal workers, military personnel, and virtually anyone who works at a public school—including professors and administrators? Can they say whatever they wish, as their employer can, without consequence? Put another way, can the government punish public employees for *their* speech?

To answer this question, the Supreme Court established an approach that tries to balance the employees’ right to free speech, which they “enjoy in their capacities as private citizens,” versus their employers’ (the governments’) need to provide public services “efficiently and effectively.”¹²⁵ The latter is the same rationale we saw in the government speech cases, reflecting the Court’s view that

Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.¹²⁶

Following from these ideas, the Court has distinguished between two types of government employee speech: “speech as a citizen” versus “speech as a public employee.” Only in the first case—when government workers speak as citizens—*might* the First Amendment protect their speech.¹²⁷ In the latter—when they “make statements pursuant to their official duties”—the First Amendment does not come into play; it does not, in the words of the Court, “insulate their communications from employer discipline.”¹²⁸

Garcetti v. Ceballos provides an example.¹²⁹ Richard Ceballos, a deputy district attorney employed by Los Angeles County, was approached by a defense lawyer who suspected that police had used a false affidavit to secure a search warrant. After reviewing the case, Ceballos agreed that the affidavit did indeed contain serious misrepresentations. He reported his findings in a memo to his supervisors (*Garcetti et al.*) recommending that they drop the case.

Despite his deputy’s recommendation, the District Attorney (DA) decided to move forward with the prosecution. But during a hearing to challenge the warrant, Ceballos blew the whistle, so to speak, sharing his concerns about the affidavit, but the judge rejected the challenge.

Ceballos claimed that after the hearing, he faced retaliation at work: he was reassigned from his position, moved to a different courthouse, and passed over for a promotion. He ultimately filed suit, claiming that the DA had violated Ceballos’s First Amendment rights by punishing him for his speech regarding the warrant. The trial court ruled in favor of his supervisors, holding that Ceballos’s memo was not protected by the First Amendment because he wrote it as part of his job.

The Supreme Court agreed. In its view, Ceballos wrote his “memo because that is part of what he . . . was employed to do. . . . [H]e did not speak as a citizen by writing [it].”¹³⁰ As such, the First Amendment afforded him no protection; he could be disciplined by his employer just as he could for any other action he took in his job.

With this framework for public employee speech in mind, let’s return to Eric Rasmusen’s tweets. Recall that Rasmusen was a government employee by virtue of his position as a professor at Indiana U., a public school. Also recall that Indiana did not fire him, but the question we raise now is whether it could have done so, consistent with the First Amendment, out of a belief that he was speaking as a government employee and not as a citizen.

What do you think? On the one hand, Rasmusen’s tweets were on his personal Twitter account; no university logo appears. It also seems questionable to claim that posting derogatory messages about women, Black people, and gay people is “pursuant to [his] official duties” as a professor. On the other hand, on his social media account, Rasmusen identifies himself as an “Econ prof” living in Bloomington, Indiana and provides a link to his personal website, which, in turn, links to his CV listing his employment at Indiana U. And although derogatory posts may not align with a professor’s official duties, an underlying rationale of government employee doctrine, recall, is to ensure the smooth operations of government. It is possible and even likely that Rasmusen’s tweets caused some upheaval on campus—or at least enough that the

administration responded. Thus the impact on the workplace could weigh in favor of treating the post as within the scope of his employment.

While you are reflecting on the Rasmusen case, there is a nuance also worthy of consideration: Rasmusen was not a worker in a government office but a professor. Should he enjoy a special status under a concept known as “academic freedom”? This is an amorphous term susceptible to multiple definitions, but a standard dictionary definition describes it as the “freedom to teach or to learn without interference (as by government officials).”¹³¹

We will return to the concept of academic freedom in Chapter 4 (on the role of academic freedom in campus speech) because it has figured prominently in pivotal campus controversies on free speech. For now, it is worth noting “academic freedom” is not specifically recognized by the Constitution, although it is a longstanding principle that would seem to protect all participants in the academic enterprise: it shields the university from undue governmental interference in its academic judgments, it shields professors up to a point in the realm of their academic responsibilities, and it may even protect students who are participating in an academic endeavor of learning. The term “academic freedom” has appeared in some 40 Supreme Court decisions, including passages like this:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.¹³²

A suggestion here is that *perhaps* academic freedom moves public university professors out of the usual “public employee” basket and into a special category that gives them more leeway than other government workers to express themselves in the course of their employment. Justice Souter, in dissent in *Ceballos*, suggested as much. He worried that the Court’s holding—that the First Amendment offers no protection to employees speaking as employees, not citizens—would negatively affect professors and the academic enterprise:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write “pursuant to official duties.”¹³³

The majority opinion in *Ceballos* acknowledged Souter’s concern but left it hanging: “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”¹³⁴

What do you think? Should the standard employee-speech framework apply to professors, or should they enjoy a special status because so much of what they teach and write could be thought of as “speech as government employees,” thereby giving administrators a good deal of leeway in disciplining them for their expression?

5.3 Student Speech

So far we have seen that when the government speaks on behalf of itself, First Amendment challenges will likely fail. As for government workers, the success of a free speech case will depend on whether they are expressing themselves as citizens or as employees.

Where do students fall on this spectrum? This question has been the subject of some debate, with one side claiming schools constitute a special setting that permits greater speech regulation, and the other suggesting that students should (mostly) have the same expression rights as adult speakers in the public realm. As we explain in the following examples, four key cases attempt to settle the matter—*Tinker*, *Bethel*, *Morse*, and *BL*—but do they?

While you ponder this question in the pages to come, also consider this: all four cases are about pre-college students; none focuses on the university setting. Bearing in mind the Court’s logic in these four cases, do you think the justices would apply the same rules to college students? Should they?

With those questions in mind, we begin with *Tinker v. Des Moines Independent Community School District* (1969), the starting point for almost any discussion of student speech rights. This case is so important that you may have learned about it in high school. Even so, we ask you to read the excerpt below.

TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 U.S. 503 (1969)

In December 1965, a group of adults and secondary school students in Des Moines, Iowa, devised two strategies to demonstrate their opposition to the Vietnam War: they would fast on December 16 and New Year’s Day and would wear black armbands every day in between. Principals of the students’ schools learned of the plan and feared the demonstration would be disruptive. As a result, they announced that students wearing the armbands to school would be suspended.

Of the 18,000 children in the school district, all but five complied with the policy. Among those five were John Tinker, Mary Beth Tinker, and Christopher Eckhardt, whose parents allowed them to wear black armbands to school. The three students had a history of participating in other civil rights and antiwar protests. All three were suspended.

Lawyers for a group dedicated to preserving free speech rights, the American Civil Liberties Union, represented the students in their appeal to the Supreme

Court. They argued that The First Amendment protects the right of public school students to free speech in their schools and classrooms; and that in this case, wearing the armbands caused no disturbance or disruption of the school day.



Mary Beth Tinker, pictured here with her mother, Lorena Tinker, and younger brother Paul, took part in a Vietnam War protest by wearing a black armband in school—an action that got Mary Beth and her older brother, John, suspended in 1965. In *Tinker v. Des Moines* (1969), the Supreme Court ruled that the suspensions violated the students' First Amendment rights.

Bettmann/Bettmann/via Getty Images

MR. JUSTICE FORTAS DELIVERED THE OPINION OF THE COURT.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

....

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

....

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

....

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no

disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. . . .

Reversed and remanded.

MR. JUSTICE BLACK, DISSENTING.

[Justice Black began his dissent by noting that, “While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court’s statement that the few armband students did not actually ‘disrupt’ the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students’ minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war.

He continued:]

I deny . . . that . . . “students” and “teachers” take with them into the “schoolhouse gate” constitutional rights to “freedom of speech or expression.” . . . It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases . . .

Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that, after the Court’s holding today, some students in Iowa schools—and, indeed, in all schools—will be ready, able, and willing to defy their teachers on practically all orders.

This case, therefore, wholly without constitutional reasons, in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court’s expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

At the outset we asked you whether, in student speech cases, the Court puts a thumb on the scale for schools or for the students. Clearly, Justice Black’s spirited dissent does the former, expressing concern about students running amok while administrators lack the authority to control them.

But what about Justice Fortas’s majority opinion? This opinion is famous for the line that “Teachers and students do not shed their constitutional rights at the schoolhouse gate,” meaning that the First Amendment’s guarantee applies to them. Under *Tinker*, however, that right is not unlimited. If speech were to “materially disrupt” the functioning of the school and its educational mission, presumably the school could regulate or even prohibit it. To put it in more modern-day terms, public-school administrators can restrict student speech only if they are furthering an important interest of the school, and the restriction is substantially related to that interest.¹³⁵

The schools' principals in *Tinker* argued that they were doing just that: putting in place a policy (a ban on armbands) to limit disruptions to the school's educational mission. But the Court did not accept that explanation. Throughout his opinion, Fortas emphasized that the schools offered no facts to support their "forecast" of a substantial disruption; and, in fact, none seemed to occur (although Justice Black seemed to adopt a narrower view of what is a disruption and thought that even diverting the students' thought toward the war would qualify as a disruption). Perhaps more importantly, Fortas noted that if the schools were so worried about disruption, it seemed odd that they allowed students to wear political buttons and even symbols of Nazism but not black armbands. This led Fortas to suspect that the schools had singled out armbands protesting the war for punishment—not out of fear of disruption but because they disliked the message. If true, that would seem to be the worst transgression a government can make under the First Amendment: singling out a message for punishment simply because they disagree with it.

For all these reasons, and despite its articulation of a way that schools *can* sanction student expression, *Tinker* is held out as a speech-protective decision. This is not true of the next two major school decisions: *Bethel School District No. 403 v. Fraser* (1986)¹³⁶ and *Morse v. Frederick* (2007).¹³⁷

In *Fraser*, the justices allowed Washington state education officials to discipline a high school senior, Matthew Fraser, for a speech he delivered nominating another student for elective office at a school assembly. During the speech, Fraser referred to his candidate in terms of an "elaborate, graphic, and explicit sexual metaphor."¹³⁸ The school suspended Fraser for three days for violating its rule against engaging in "conduct which materially and substantially interferes with the educational process . . . , including the use of obscene, profane language or gestures."

Writing in dissent, Justice Thurgood Marshall asserted that the school failed the *Tinker* test: it provided no evidence to show that Fraser's "remarks were indeed disruptive."

Other than noting that a teacher reported having to forgo her scheduled lesson to discuss the speech in class, the majority did not take issue with this conclusion. It instead distinguished *Tinker* by adding an entire category of student speech that schools can regulate or even prohibit: "indecent," "lewd," or "vulgar" speech uttered on school grounds. The school, according to the majority, had not punished Fraser because it disagreed with the political content of his speech (as Justice Fortas had implied the schools had done in *Tinker*); it was simply ensuring a proper educational environment by upholding a policy that forbade the use of inappropriate language—on *any* topic.

Two decades later, in the *Morse* case, the Court added yet another category of speech that schools may regulate: speech that promotes "illegal drug use." This case had its origins in 2002, in the Olympic Torch Relay that was to pass through Juneau, Alaska, on its way to the Olympic games in Salt Lake City, Utah. As part of an approved school activity, Principal Deborah Morse decided to have the school's staff

and students watch the event. Students were allowed to leave class and observe the relay from either side of the street.

Joseph Frederick, a senior at the high school, joined some friends across the street from the school. As the torch-bearers and television camera crews passed by, Frederick and his friends unfurled a fourteen-foot banner bearing the words “BONG HiTS 4 JESUS” in large letters. Morse immediately crossed the street and ordered the students to lower the banner. All complied except Frederick. Morse suspended Frederick for ten days on the ground that he violated school policy pertaining to the advocacy of illegal drugs.



Joseph Frederick, a high school student, unfurled the banner above at a school event. After he refused to lower it, the school's principal, Deborah Morse, suspended him. The U.S. Supreme Court upheld the suspension.

Clay Good/ZUMA Press, Inc./Alamy Stock Photo

The school superintendent upheld the suspension, stating that it was an appropriate enforcement of school policy at a school-sponsored event. The message on the banner, according to the school, was not political expression and could be reasonably interpreted as supportive of illegal drug use. Morse, however, argued that under *Tinker*, student speech cannot be restricted without showing that it poses a substantial risk of disruption.

A divided Supreme Court agreed with the school. Writing for the majority, Chief Justice Roberts noted: “while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate’ . . . the nature of those rights is what is appropriate for children in school.” Even though Frederick’s banner caused no substantial disruption, Roberts held that “detering drug use by schoolchildren,” is an “important—indeed, perhaps compelling” interest. Drug abuse can cause severe and permanent damage to the health and well-being of young people. . . . The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.”¹³⁹

Roberts also agreed that Frederick’s banner did not convey a political message. As he put it, “this is plainly not a case about political debate over the criminalization of drug use or possession.”¹⁴⁰

The dissenters took issue with that conclusion. Citing Holmes’s dissent in *Abrams* and the majority opinion in *Tinker*, they asserted,

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion

of countervailing views. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.¹⁴¹

Which side has the better case? Do you think the majority would have reached a different conclusion if Frederick's message has been explicitly political, for example, if the banner had read, "Vote to legalize medical marijuana"?

Either way, taken collectively *Tinker*, *Fraser*, and *Morse* tell us a good deal about the rights of pre-college students. To be sure, students have free speech rights after they walk through "the schoolhouse gate." But just as clearly, there are circumstances in which student speech can be regulated, such as "indecent," "lewd," or "vulgar" speech uttered on school grounds (*Fraser*) and speech that promotes "illegal drug use" (*Morse*). Likewise, in *Tinker*, the Court made clear that schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

Notice that the Court identified these "special interests" in cases where the expression occurred at school or during activities under the school's supervision. What about expression that takes place outside of school hours and away from the school's campus—including as social media posts? Can schools regulate such speech or does disciplinary action for off-campus speech *always* violate the First Amendment?

In *Mahanoy Area School District v. B.L.* (2021),¹⁴² the final student speech case worthy of mention, the Court came down somewhere in between. We highlighted this dispute in Chapter 1, and so you may recall that a high school student, Brandi Levy, used vulgar language in a social media post made off-campus and on a weekend to complain about not being chosen as a varsity cheerleader (she made the junior varsity squad instead). After the school suspended her from the JV squad, she filed suit, with her case eventually reaching the Supreme Court.

From Levy's perspective, the case went her way. The Court, in a lopsided 8-1 vote,¹⁴³ held that much off-campus speech is likely beyond the school's reach because "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."¹⁴⁴ Besides, the Court wrote, judges "must be more skeptical about schools' efforts to regulate off-campus speech" as such speech could occur anytime during a 24-hour day. That would chill student speech when, in fact, schools should work to protect it because they are "nurseries of democracy"¹⁴⁵—a play on Holmes's "marketplace of ideas" rationale for free speech.

Nonetheless, the Court did not close the door altogether on the regulation of off-campus student speech. To the contrary, the justices agreed that some off-campus expression may be constitutionally subject to punishment. Although they left the specifics to be sorted out in "future cases," they did make clear—echoing *Tinker*—that schools can restrict off-campus speech that substantially disrupts school activities. The

problem with the cheerleader case was that Levy's expression did not satisfy that criterion. Her posts did upset some cheerleaders; and they became a topic of discussion during a math class, as we noted in Chapter 1. Beyond that, the Court found no evidence of any real disruptive effects and ultimately held that her suspension from the JV squad violated her speech rights.

Perhaps for this reason, media coverage of *B.L.* tended to emphasize the first part of the ruling, that "Supreme Court Says First Amendment Protects Off-Campus Student Free Speech."¹⁴⁶ But it is important to keep in mind the second part: that there are situations in which schools can punish off-campus speech and, in fact, in the wake of *B.L.*, lower courts have upheld some of those punishments, including, for example, for bullying.¹⁴⁷ How the Supreme Court will treat these decisions, considering the "many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications,"¹⁴⁸ remains to be seen.

In light of the Court's pre-college student speech cases, we invite you to return to two key questions they raise. First, how important is the school's interest in preventing substantial disruptions to its educational mission? In *Tinker*, *Fraser*, and *B.L.* there was evidence of some disruption, but in none did it rise to the level of "substantial." Still, is this term sufficiently amorphous that schools could justify a lot of—perhaps too much—suppression of expression under the guise of preventing substantial disruptions of their educational mission? How should schools and the courts determine if, in fact, a substantial disruption was likely or had occurred?

The second question is this: unlike all four cases, which involve students attending K–12 schools, should one or more of their holdings apply to college students? Why, or why not?

Some of the same issues arise in university settings. The following are a couple examples:

- Kimberly Diei, a graduate student at the University of Tennessee, was expelled for "vulgar" and "crude" social media posts, which exposed "her cleavage in a tight dress" and included some "raunchy rap lyrics." The university later reversed its decision, but Diei nonetheless filed a lawsuit claiming that university had violated her right to free expression "for no legitimate pedagogical reason."¹⁴⁹
- Prior to its graduation ceremony, the New College of Florida posted "etiquette expectations," which included "demonstrating respect for fellow graduates, guests, and speakers."¹⁵⁰ Accordingly, after some students booed and chanted expletives directed at the commencement speaker, the school said that it would move forward with disciplinary action against the disrupters.¹⁵¹ According to the school's president, "[r]epercussions could range from withholding degrees until students issue apology letters or take mandatory classes on civil discourse to suspension or expulsion."¹⁵²

So far neither dispute has reached the Supreme Court, but suppose one or both do. Based on the material in this section, how should the Court handle these disputes? Should it draw a clear line between pre-college and college students? Why, or why not?

6. IS THE REGULATION A PRIOR RESTRAINT ON EXPRESSION?

In most of the cases we have considered so far, the government tried to restrict speech by passing a law or adopting a policy that made a type or category of expression unlawful, such that if someone engaged in the proscribed speech, they could be subject to sanctions. *O'Brien*, the dispute involving the draft-card burner, is an example. Only after *O'Brien* burned his draft card in violation of federal law was he arrested.

But there is another way that government can attempt to restrict expression: by preventing it from occurring in the first place. This is known as “prior restraint.”

This can occur in seemingly ordinary speech cases—for example, when students must obtain “prior approval” from administrators for demonstrating on school grounds. And we will consider those at the end of this section. But more typically, prior restraint disputes arise in relation to the First Amendment’s guarantee of freedom of the press—and they have a long history. Recall from Chapter 1 the English licensing laws of the 17th century, which prohibited people from printing any material unless they received a license from the government to do so. This is a form of prior restraint because the law stopped anything from being published in England without prior approval.

Similar attempts at placing prior restraints on the press are not unknown in the United States. In a very famous case, *Near v. Minnesota* (1931),¹⁵³ a county attorney asked a judge to stop the sale of printed and future editions of a newspaper, the *Saturday Press*, under a state law that provided for “the abatement, as a public nuisance, of a ‘malicious, scandalous, and defamatory newspaper, magazine, or other periodical.’” In the attorney’s view, the newspaper, partly owned by Jay Near, was the epitome of a malicious, scandalous, and defamatory publication, and so was a public nuisance.¹⁵⁴ The paper committed itself to exposing corruption, bribery, gambling, and prostitution in Minneapolis, which Near often connected to Jews. The paper attacked specific city officials for being in league with gangsters and chided the established press for refusing to uncover the corruption. Near’s racist, anti-Semitic attitudes colored these attacks.

After the judge agreed, at least temporarily, to halt sale of the *Saturday Press*, Near challenged the state law as a violation of the First Amendment freedom of press guarantee, arguing that the law was tantamount to censorship. He won his case, with the Supreme Court making clear its displeasure with prior restraints by quoting a passage from a noted English judge and scholar, William Blackstone:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.¹⁵⁵

In Blackstone's and the Court's view, disallowing newspapers from publishing certain stories is a form of censorship antithetical to democratic values. Imagine if U.S. presidents had the power to preview all newspaper stories or blog posts about them and prevent those that were critical from seeing the light of day. Were this the case, the guarantees of free speech and press would not mean much.¹⁵⁶

In the years following *Near*, the Court stuck to its position that prior restraints, as a rule, are unconstitutional. It went as far to say that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."¹⁵⁷

Is there a way for governments to overcome that presumption? In *Near*, the Court implied that the government may legitimately prohibit the publication of certain material in times of war that it might not constitutionally regulate in times of peace, suggesting that perhaps an emergency exception could be recognized. But in a subsequent case, the justices suggested that for the government to exercise such a prior restraint, even during war or out of national security concerns, the government must meet a high bar: it must show that the publication would do "direct, immediate, and irreparable damage to our Nation or its people."¹⁵⁸

Although it is not impossible, national security concerns of this magnitude are unlikely to arise in schools. What has come up is whether, considering the Court's concerns about prior restraint, schools can censor student newspapers. The key case along these lines is *Hazelwood School District v. Kuhlmeier* (1988).¹⁵⁹ At issue were a series of articles that a public high school newspaper, *The Spectrum*, planned to publish. The articles offered candid reporting on the impact of divorce and teenage pregnancy on students at the school. Stories featured anonymous interviews that covered, among other things, sexual activity, birth control, and unhappy domestic relationships.

Because *The Spectrum* was produced by students in a journalism class, the journalism teacher typically submitted each edition to the principal just before publication. In this instance, the principal decided to disallow the paper from printing several of the articles, deeming them "inappropriate, personal, sensitive, and unsuitable" for students. The principal's decision to prevent publication—an exercise of prior restraint—eventually made its way to the Supreme Court.

Three of the justices, writing in dissent, would have held for the student journalists. Quoting *Tinker*, they believed that the principal violated the First Amendment's prohibitions against censorship by preventing publication of the stories without showing that their publication would "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others."

But the majority disagreed, giving wider latitude to school officials:

We conclude . . . that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in *school-sponsored expressive activities*, so long as their actions are reasonably related to legitimate pedagogical concerns.¹⁶⁰

Not only does this holding appear to give administrators a great deal of control over student newspapers but also over many other school-sponsored expressive activities. The majority's list included other "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Notice here echoes of prior themes—schools being allowed to decide what is appropriate for their young students, as well as government being allowed to control its own speech, where outsiders might view the speech as that of the school.

The Court's list in *Hazelwood* also highlights a point we made at the outset of this section: although prior restraint is usually associated with the press, it can come into play in other ways—and not just in high schools. In some universities, "prior approval" may be required for holding demonstrations on campus, distributing or posting information, and/or inviting particular speakers. And pre-approval is sometimes required for student commencement speeches before they are delivered.

So far, the Court has not weighed in on these sorts of requirements. But it seems clear, assuming they followed *Hazelwood*, that they would uphold such restrictions as applied to public high schools. But what about universities? Should the justices extend *Hazelwood*'s rationale to universities? Why, or why not?

7. IS THE REGULATION VAGUE OR OVERBROAD (OR BOTH)?

In addition to examining whether a law imposes a prior restraint on speech, courts examine the text of the regulation to determine if it is vague or overbroad. If so, judges are likely to invalidate it.

The problem of vagueness occurs when people of "ordinary intelligence" must guess at a law's meaning, potentially coming to different conclusions about what it prohibits.¹⁶¹ Put another way, if governments wish to regulate speech, they must write sufficiently clear laws to give people fair notice as to what is being restricted. While the requirement of fair notice is true of all laws, it is especially important in the context of speech.

Take a Cincinnati ordinance that made it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and conduct themselves in a manner annoying to persons passing by." When challenged in the Supreme Court, the justices held that the ordinance was unconstitutionally vague.¹⁶² Do you see why? They were troubled by the word "annoying":

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague . . . in the sense that no standard of conduct is specified at all. As a result, people of "common intelligence must necessarily guess at its meaning."¹⁶³

Why do vague laws concern the Court? Part of the answer lies with the would-be speakers. If they must guess at a law's meaning, they might not speak at all out of fear that they could be punished for what they say. In other words, vague laws can discourage ("chill") speech.

The other part of the answer lies in the laws' enforcement. Vague laws give the government—including the police, judges, and university administrators—a lot of discretion over whether and how to enforce them. And with that discretion may come censorship of unpopular views or unpopular speakers.

To see how this could happen, imagine that the "annoying" ordinance was enacted not by Cincinnati but by a public university. Further imagine that two different groups assembled on campus: one devoted to protesting university police and the other devoted to praising them. Under the "annoying" policy, campus police would have agency to shut down the students protesting them but not the group praising them. Police might be "annoyed" by the former, while applauding the latter.

Overbreadth is related. Overbroad laws restrict constitutionally unprotected expression but go farther and encompass protected speech. Again, the Cincinnati ordinance provides an example. In defending it, the city pointed out that the ordinance covers conduct within its power to prohibit—for example, unprotected categories of speech like true threats and fighting words or even conduct like obstructing traffic, littering streets, and committing assaults—any of which could qualify as "annoying."

The problem was that the ordinance also covered protected expression, including the right to assemble for political purposes. And the Court agreed: "The ordinance . . . makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution . . . [It suspends] unconditionally the right of assembly and free speech."¹⁶⁴

This does not mean, of course, that a city cannot outlaw an unprotected category of speech, such as true threats, or conduct, such as littering on its streets. But it must write laws "directed with reasonable specificity toward the conduct to be prohibited."¹⁶⁵ The same rule applies to public universities.

8. IS THE REGULATION CONTENT-NEUTRAL OR CONTENT-BASED/VIEWPOINT-BASED?

As their names suggest, the concepts of "content-neutral," "content-based," and "viewpoint-based" speak to the content of messages that laws seek to regulate—and they figure heavily in the modern Court's free expression doctrine. As we will see, contemporary justices make a sharp distinction between content-neutral and content-based (and viewpoint-based) regulations on expression, sometimes allowing the former but almost never allowing the latter.

In what follows, we provide some of the basics on these concepts and then turn to a case that reached the Supreme Court. The case study will give you a chance to apply what you have learned in this section.

8.1 Content-Neutral Regulations

Content-neutral regulations are restrictions on speech that do not take into account what is said. A public university's policy, for example, that prohibits *all* demonstrations on campus from 9:00 a.m. to 5:00 p.m., when classes are in session, is content neutral. The ban applies to all subjects and all viewpoints: political organizations, the theater club, religious groups, without concern for what is being expressed. A rule of thumb in determining whether a regulation is content-based or content-neutral is this: if you would have to read or hear the speech to know whether it is prohibited under the regulation, it is probably content-based.

Content-neutral regulations come in several forms, but as the “9-5” policy suggests, most common are restrictions on the *time* (when the speech occurs), *place* (where the speech occurs), and *manner* (how the speech occurs). Among these forms, the Court has devoted substantial attention to where the expression occurs, identifying four categories of government-controlled places: traditional public forums, designated public forums, limited public forums, and nonpublic forums. The Court has given the government more or less authority to regulate speech depending on the place (the “forum”).

Governments have the least leeway when it comes to traditional public forums and designated public forums. The first refers to traditionally public property—streets, sidewalks, and parks—which have historically been open to all speakers and where people traditionally gather. A designated public forum is “government property that has not traditionally been regarded as a public forum . . . but is intentionally opened up for that purpose.”¹⁶⁶ For example, a public-school building opened for community use after school hours could be a designated public forum.

If the government seeks to ban all speech from a traditional public forum, it will almost never succeed. The Court will require it to pass its strictest level of scrutiny, whereby it must prove that the ban is necessary to achieve a compelling interest. More common are regulations that limit speech in some way. To evaluate such regulations on expression in traditional and designated public forums, which must always be neutral as to content, the Court usually applies a test called *intermediate* scrutiny, described in Table 2-1.¹⁶⁷ Under this test, the government will have to show that its regulation furthers an important government interest and leaves open adequate alternative avenues for speech. It is important that the law does not burden “substantially more speech than is necessary to further the government’s . . . interests.”¹⁶⁸

Return to our example of a university policy disallowing all campus demonstrations from 9:00 a.m. to 5:00 p.m., and assume, for present purposes, that the restriction covers parts of campus that are designated public forums. Do you think the policy

TABLE 2-1 ■ Tests Used to Evaluate Content-Neutral, Content-Based, and Viewpoint-Based Restrictions on Speech.

Test	Application	Notes
Strict Scrutiny. The regulation must be the <i>least restrictive means</i> (necessary) to achieve a <i>compelling</i> government interest.	Content- and viewpoint-based restrictions (though the latter are sometimes considered invalid <i>per se</i>)	This is the most demanding test for the government to meet, and it usually cannot succeed.
Intermediate Scrutiny. The regulation must be narrowly tailored (drawn) to achieve a substantial or important government interest.	Most (but not all) content-neutral restrictions	This, too, is a demanding test, but it is easier for the government to meet than strict scrutiny.
Reasonable. The regulation must be viewpoint neutral and reasonable, though it “need not be the most reasonable or the only reasonable limitation.” ¹⁶⁹	Restrictions on expression in limited and nonpublic forums	This approach is most deferential to the government, meaning that courts will likely uphold the regulation on expression.

meets the intermediate scrutiny test? Is the university’s interest substantial, and is the policy narrowly tailored to meet it?

The university might argue that it has a substantial interest in preventing disruptions to its educational mission while classes are meeting, hence the 9-5 restriction. Fair enough, but is a ban on *all* demonstrations necessary? What about silent demonstrations where students hold signs to protest a school policy without uttering a word? There is also a counterargument that students studying in a campus library after 5 p.m. might find a loud protest distracting.

For these reasons, might the university more narrowly achieve its goal of nondisruption with a restriction on the noise level? Some schools seem to think so, for rather than banning all demonstrations during school hours, they place noise limits on speech activities. For example, under George Washington University’s policy, participating in a demonstration that “does not produce noise in excess of 80 decibels in the nearest building or is otherwise disruptive to university events” is likely a “permitted expressive activity” but “producing noise that exceeds 80 decibels in the nearest building” is likely prohibited.¹⁷⁰ Similarly, MiraCosta College informs students that “free-speech activities must not exceed a volume of sixty-five decibels at a distance of fifty feet.”¹⁷¹ These are restrictions on speech but neutral as to the content of that speech.

In addition to traditional and designated public forums, the Court’s doctrine covers two other categories of “places”: limited public forums and nonpublic forums. The first are government-owned places that the government has established for a specific purpose—such as a website created by public university for the purpose of allowing

students to post comments about the quality of campus food. Nonpublic forums include government facilities that traditionally have not been locations for the public to exercise its speech rights, including jails, defense plants, polling places, and nuclear facilities.

As Table 2-1 suggests, the Court is far more deferential to the government when it restricts speech in these places. As long as the restrictions are viewpoint neutral and reasonable,¹⁷² the justices have little trouble sustaining them. So, for example, under various Court decisions, candidates for public office can be prevented from campaigning on military bases when the base commander believes it will interfere with discipline or morale.¹⁷³ Students who wish to protest the arrest of their codemonstrators have no right to stage that protest on the grounds of a jail; the state has a safety interest in maintaining jails and can restrict access if it chooses.¹⁷⁴ Airports are not traditional public forums, and so the government may ban solicitations for money there as a way of promoting efficient air travel.¹⁷⁵ In each of these cases, the Court found that the restriction was reasonable, without requiring that it be “the most reasonable or the only reasonable limitation.”¹⁷⁶

These are the basics of the Court’s approach to the *place* of the speech. Although they may appear to be relatively clear, you should know that the doctrine has its gray areas. For example, there has been some confusion as to the differences between designated and limited public forums, but the implications of that difference are not large in any event.¹⁷⁷

More contested is which type of forum is actually involved in particular disputes. While they seem clear on paper, they are not necessarily so in practice. For example, consider *United States v. Kokinda* (1990),¹⁷⁸ in which volunteers for the National Democratic Policy Committee set up a table on a sidewalk near the entrance to a U.S. Post Office to solicit contributions, sell books and subscriptions to the organization’s newspaper, and distribute literature. The volunteers were arrested and later convicted of violating a federal law that prohibits soliciting contributions and campaigning for public office “on postal premises.” Even though sidewalks are often considered the quintessential traditional public forum, most of the justices voted to uphold the ban. Because of this sidewalk’s proximity to the post office, providing the only public access to the building, a majority measured the ban only by the standard of “reasonableness” that applies to nonpublic forums.

8.2 Content-Based and Viewpoint-Based Regulations

Content-based regulations are those that discriminate based on subject matter or the content of the message conveyed. We have already encountered such regulations in our discussion of unprotected categories of speech. For example, governments may outlaw “fighting words,” “true threats,” and speech that advocates imminent lawlessness—all prohibitions on speech based on its content—but only because they fall into a category deemed unprotected by the First Amendment.

It is when content-based restrictions purport to cover speech that does not fall into an unprotected category that First Amendment concerns are triggered. Suppose a university's expressive activities policy allowed demonstrations at any time on any subject *except* demonstrations concerning the university's police force. That would be an ordinance restricting speech based on its subject matter.

An especially egregious form of content discrimination occurs when a regulation is based on the viewpoint expressed, that is, when the government "single[s] out a subset of messages for disfavor based on the views expressed."¹⁷⁹ While the policy allowing demonstrations on all issues except those *concerning* campus police is content-based discrimination, a policy allowing demonstrations on all matters except those in *opposition* to campus police is viewpoint-based discrimination.

When a government regulation is found to discriminate based on its content, the regulation is subject to strict scrutiny, the highest and most demanding standard of judicial oversight (see Table 2-1). The government's interest must be compelling, not merely important or substantial, and the regulation must be necessary—the "least speech-restrictive means"—to advance that interest.

Almost never do restrictions on speech survive this standard; and our example of a public university allowing all demonstrations except on policing shows why. Can you think of a *compelling reason* the university could offer for its content-based policy? Perhaps it could say that it is worried about violence, but then why does it allow *all* other demonstrations, even those where the possibility for violence may also exist? You might also ask yourself whether the university could achieve its goal of preventing violence through other means that perhaps would apply to all demonstrations (that is, content-neutral rules).

Even more disfavored than content-based regulations are those that discriminate on the basis of viewpoint. These are generally treated as simply invalid, with no opportunity for the state to justify them with any state interest. Justice Jackson's opinion in *West Virginia v. Barnette* explains why. Recall his words: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Thus, giving government—including university administrators—the authority to use its powers to privilege only the points of view that it favors, is a hallmark of authoritarianism and just the sort of regulation of speech the First Amendment is designed to protect against.

With *Barnette* in mind, return to the second Trump administration's declaration that all programs promoting DEI are "illegal." Accordingly, it terminated all DEI-related federal contracts and grants. Does this action constitute viewpoint discrimination? A federal judge held, in a preliminary proceeding, that it does, because it seeks to deter messages that the government disagrees with.¹⁸⁰ Should a higher court affirm? Or should it reverse, because no one is entitled to receive federal contracts or grants, and the government has the right to ensure that no one who receives one is discriminating?

8.3 *R.A.V. v. City of St. Paul* (1992)

Now that you know something about content-neutral, content-based, and viewpoint-based restrictions on speech (as well as vagueness and overbreadth), consider an application of these concepts in an important Supreme Court case, *R.A.V. v. City of St. Paul* (1992).¹⁸¹

The ordinance at issue in this case was called the St. Paul Bias-Motivated Crime Ordinance. It was passed by the city of St. Paul, Minnesota and provided that

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹⁸²

After *R.A.V.* and several other teenagers burned a cross on the yard of a Black family, they were charged with violating this ordinance. *R.A.V.*, in response, moved to dismiss the charge on the ground that the ordinance was impermissibly content based and so invalid under the First Amendment.¹⁸³

The Minnesota Supreme Court disagreed. It read the phrase “arouses anger, alarm or resentment in others” to mean that the ordinance outlawed “fighting words” and fighting words only. Because fighting words fall into a category of unprotected speech, the state court reasoned that St. Paul could prohibit them and so upheld the ordinance.

The Supreme Court, with Justice Scalia writing for the majority, however, reversed the state court and invalidated the ordinance. Focusing on the list of characteristics in its last clause (race, color, creed, and so on), Scalia noted,

Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to [arouse anger, alarm, or resentment] in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.¹⁸⁴

But Scalia went even further, holding that the ordinance also discriminated on the basis of viewpoint:

Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender . . . would seemingly be usable *ad libitum* [as one pleases] in the placards of those arguing *in favor* of

racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.¹⁸⁵

Sifting through Justice Scalia's fancy language, the upshot is this: the St. Paul ordinance drew distinctions based on the *type* of "fighting words"—attacks based on race, religion or gender—were punished, while attacks based on political affiliation, union membership, or sexual orientation were not. Thus, even though presumably *all* of these expressions were unprotected as fighting words, still the city was not allowed to pick a side by carving out only some for punishment. This was viewpoint discrimination. Essentially, Scalia's illustration points out that one could insult bigoted people without punishment, but bigots who insult racial or religious groups would be punished under the ordinance.

There are a few other aspects of *R.A.V.* that merit further discussion and will become relevant when you consider university hate-speech policies at the end of the chapter.

1. Recall that the justices apply strict scrutiny to content-based regulations (Table 2-1). Under this standard, the Court presumes that they are unconstitutional, but the government may rebut that presumption by showing that the regulation is necessary to achieve a compelling government interest. St. Paul asserted that it had such an interest: "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."¹⁸⁶

The majority agreed that "these interests are compelling" but declared that the ordinance was not necessary (the least restrictive means) to meet them, and that "adequate content-neutral alternatives" existed.¹⁸⁷

Considering the interest that the city put forward in support of its ordinance, can you devise a content-neutral approach to achieve it? Or one that would be the least restrictive means to achieve the interest?

2. All nine justices agreed that the ordinance was unconstitutional. But some, in concurring opinions, disagreed with Scalia's reasoning. One, for example, suggested that, rather than holding that the law was content-based, the Court should have held that "the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment."¹⁸⁸

Consider whether overbreadth would have been a viable basis for invalidating the ordinance. What expression does it criminalize that would constitute *protected* expression?

3. The justices who concurred in the result also pointed to a flaw—or at least a doctrinal “aberration”—in Scalia’s analysis. As we mentioned earlier, the Minnesota Supreme Court read the ordinance to limit punishable conduct to fighting words. Scalia accepted this reading, stating that it was “bound by the construction given to it by the Minnesota court.”

Considering that *all* fighting words are unprotected speech, does it seem odd that the majority went further and saw viewpoint-based distinctions within the category of fighting words? Justice White, in a concurring opinion, thought so:

It is inconsistent to hold that the government may proscribe an entire category of speech [such as, fighting words] because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is, by definition, worthless and undeserving of constitutional protection.¹⁸⁹

Justice Scalia had a response: lawmakers may not pick and choose among the fighting words they want to criminalize; if they want to criminalize certain fighting words, they must criminalize all.

Do you agree with Justice Scalia or Justice White? Whatever you think, *R.A.V.*’s approach is still controversial, and its analysis not always followed by the Supreme Court. As then-professor (now Justice) Elena Kagan, framed it, “when speech [has] no claim to constitutional protection, government selectivity [makes] no First Amendment difference.”¹⁹⁰

Congratulations! You’ve done it—you’ve mastered the legal foundations that give you the tools to tackle tough questions about free speech on campus. Now it is time to put those tools to work. We invite you to apply your knowledge to assess the constitutionality of a university hate-speech code.

YOU DECIDE: THE CASE OF A UNIVERSITY HATE-SPEECH CODE

The following is a case study of the University of Michigan’s 1988 Policy on Discrimination and Discriminatory Harassment. As you make your way through the controversy, you may want to return to the chart in Figure 2-2 to consider the questions raised there and, ultimately, the constitutionality of Michigan’s policy.

Keep in mind that the U.S. Supreme Court has never ruled on the constitutionality of Michigan’s policy; nor, for that matter, has it ever considered a university speech

code. This means, from a doctrinal perspective, that there is no authoritative answer to whether universities can maintain these hate-speech policies in one form or another.

The lack of a clear ruling on campus hate speech policies allows you to use your judgment, just as university administrators have been forced to use theirs in designing policies that they hope will achieve their goals without contravening constitutional principles.

Whatever conclusion you reach regarding whether the policy violates the Constitution, it is also worthwhile to ask yourself if hate-speech policies *should be* constitutional and, if so, how the doctrine might be changed to accommodate them. In order to settle on any answer, you will need to rely not only on the few cases that exist on the topic but also on the theoretical justifications for free speech covered in Chapter 1.

The Michigan Hate-Speech Policy

In the mid-1980s, incidents of racism rocked the University of Michigan community.¹⁹¹ A partial list includes the following:

- An unknown person or persons distributed an anonymous flyer around the campus that used a series of deeply offensive racial epithets regarding Blacks and declared “open season” on them.
- A student disc jockey at an on-campus radio station allowed racist jokes to be broadcast.
- At a demonstration protesting these incidents, someone suspended a Ku Klux Klan uniform from a dormitory window.

In response, the University ultimately adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment. The policy, which applies to “educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers,” says that people could be disciplined for the following:

1. 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, and that
 - a. Involves an express or implied threat to an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
 - b. Has the purpose or reasonably foreseeable effect of interfering with an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:
 - a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
 - b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
 - c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

Sanctions for violating the policy varied depending on the gravity of the offense, from a formal reprimand to expulsion.

The Interpretive Guide

Shortly after the university adopted the policy, its Office of Affirmative Action issued an interpretive guide called "What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment." The guide purported to be an authoritative interpretation of the policy and provided specific examples of sanctionable conduct:

- A flyer containing racist threats distributed in a residence hall
- Racist graffiti written on the door of an Asian student's study carrel
- A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates
- Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian
- A Black student is confronted and racially insulted by two white students in a cafeteria
- Male students leave pornographic pictures and jokes on the desk of a female graduate student
- Two men demand that their roommate in the residence hall move out and be tested for AIDS

The Lawsuit

A lawsuit was filed challenging the policy by a Michigan graduate student, using the pseudonym "Doe" in the suit. Doe specialized in biopsychology, which he described as

the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities.

Doe believed that certain controversial theories suggesting biologically based differences between sexes and races “might be perceived as ‘sexist’ and ‘racist’” by some students, and so he feared that discussing them might violate the University’s policy. For this reason, he claimed that the policy impermissibly suppressed his speech and asked the court to declare it unconstitutional.

The question in the case was thus whether Michigan’s policy violates the First Amendment’s guarantee of free speech.

With that background, it is time for you to begin your analysis of the Michigan policy. Specifically, to determine its constitutionality, try to answer all the questions posed in Figure 2-2 using the doctrine you learned in this chapter, beginning with whether there is state action and ending with whether the policy is content-neutral or content-based (and if content-based, is it also viewpoint-based?).

We again suggest that you return to the justifications for free speech offered in Chapter 1 and consider if any or all would support prohibitions on hate speech.

In the case brought by Doe, *Doe v. University of Michigan* (1989),¹⁹² a U.S. district judge invalidated those parts of the policy that dealt with verbal behavior or verbal conduct, on two grounds: overbreadth and vagueness.

You can read the decision for yourself; it is on our website. In brief, the judge held that the policy was overbroad because, in addition to covering unprotected speech, it also extended to protected speech, such as a student reading in class an allegedly homophobic limerick. The judge also concluded that the policy suffered from vagueness:

Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct. . . . The operative words . . . required that language must “stigmatize” or “victimize” an individual. However, both of these terms are general and elude precise definition. Moreover . . . the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.¹⁹³

Perhaps because *R.A.V.* had yet to be decided by the Supreme Court, the judge did not delve into whether Michigan’s policy was content- and/or viewpoint-based. Using your analysis of the doctrine, what conclusion would you reach?

Epilogue: The Future of Hate-Speech Codes

Considering the judge's decision in the Michigan case, other lower court decisions invalidating similar hate-speech policies,¹⁹⁴ and the Supreme Court's ruling in *R.A.V.*, among others, public universities have been wary of enacting hate-speech policies that resemble Michigan's.

Many commentators argue that that is a good development.¹⁹⁵ They point out that, among other problems, policies like Michigan's risk discriminatory enforcement—and sometimes in ways that seem contrary to the purpose of the policy.¹⁹⁶ At the U. of Michigan, for example, it appears that most complaints that were brought under the policy were brought by white students charging Black students with offensive speech. Not a single case of allegedly white racist speech was punished.¹⁹⁷

This is just the kind of data that opponents of hate-speech policies use to condemn them. In the extreme, they argue that there is no evidence to show that hate speech policies effectively reduce the targeted behavior, and that, in fact, the evidence suggests they may have the opposite effect.¹⁹⁸

Truth be told, there's no rigorous empirical evidence to support either side, as we will see in the next chapter. But even in the absence of such evidence, other countries have taken a very different approach to hate speech—or at least an approach that likely would not be permitted by the U.S. Supreme Court. Consider this statement, from the European Union, a union of 27 (mostly) European countries:

The European Union is founded on values such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. All forms of hatred and intolerance are incompatible with these fundamental rights and values.

Hatred not only affects the individual victims, it represents a threat to vibrant democracies and a pluralistic society.¹⁹⁹

Accordingly, “hate motivated crime and speech are illegal under EU law.” This means that “public incitement to violence or hatred based on race, colour, religion, descent or national or ethnic origin” is a criminal offense.

Similar policies exist in individual countries, sometimes reflecting society-specific concerns. In Germany, for example, it is illegal

to incite hatred against a national, racial, religious group or a group defined by their ethnic origin, or to violate the human dignity of others by insulting, maliciously maligning or defaming one of the aforementioned groups . . . or individuals on account of their belonging to one of the aforementioned groups . . .²⁰⁰

German law also prohibits publicly denying the Holocaust, making statements (on and off-line) in support of Hitler, and displaying symbols from the Nazi era (like swastikas).

Closer to our concerns with campus speech is a type of regulation on hate speech, the No Platform policy, adopted in 1974 by the National Union of Students in the UK,²⁰¹ and still in effect. Under it,

any individuals or members of organisations or groups . . . holding racist or fascist views shall not be allowed to stand for election to any National Union office, or go to, speak or take part in National Union conferences, meetings or any other National Union events, and Officers, Committee Members and Trustees shall not share a public platform with an individual or member of an organisation or group known to hold racist or fascist views.

Recent events in the United States involving campus speech controversies after Hamas's attack on Israel and Israel's retaliation against Gaza have led U.S. university leaders, at both public and private schools, to condemn "hate" (defined in different ways). Here are a few examples of statements from university leaders:

There is no room on our campus for antisemitism; there is no room for Islamophobia; there is no room for racism and other forms of identity-based hate. Northwestern will not tolerate behavior or speech that harms members of our community.²⁰²—Michael Schill, President of Northwestern (a private school), August 20, 2024

USC publicly and unequivocally denounces antisemitism, Islamophobia, racism, and xenophobia. Hate speech is antithetical to our values and any threats of violence are unacceptable. Anyone who incites violence will be referred immediately to law enforcement for investigation and prosecution.²⁰³—Carol Folt, president of USC (a private school that is bound by state law to First Amendment doctrine), October 31, 2023

We have not and will not tolerate hatred, intimidation or harassment of anyone based on their religious beliefs, nationality or identity.²⁰⁴—Peter J. Mohler, acting president of Ohio State University, November 6, 2023

Taken collectively, the doctrinal material in this section seems to cast doubt on the constitutionality of hate-speech policies like Michigan's. But what the material cannot do is evaluate the desirability of these policies or place them in particular context. That leaves it up to individual judgment as to whether these policies accord with the First Amendment and how the doctrine might change to accommodate their important purposes.

In the next chapter, we offer a third tool to add to your toolkit for the consideration of free speech on campus: social science.

ENDNOTES

1. Eric Rasmusen (@erasmusen), X (Nov. 7, 2019, 3:57 PM), <https://x.com/erasmusen/status/1192591814567563266?lang=en>.
2. Eric Rasmusen (@erasmusen), X (Mar. 1, 2018, 7:10 PM), <https://x.com/erasmusen/status/969409458353909760>.
3. “If They’re Offended, That’s Their Problem’: Indiana University Professor Accused of Sending Racist, Sexist Tweets,” ABC7, Nov. 22, 2019, <https://abc7chicago.com/indiana-university-eric-rasmusen-twitter-professor/5713284>.
4. Sara Kress, “Update: Two Campus Bridges Painted in Protest of Kelley Professor Eric Rasmusen,” *Indiana Daily Student*, Nov. 22, 2019, <https://www.idsnews.com/article/2019/11/two-campus-bridges-painted-in-protest-of-kelley-professor-eric-rasmusen>.
5. Merriam-Webster.com, “speech,” <https://www.merriam-webster.com/dictionary/speech> (emphasis added).
6. oed.com, “speech,” https://www.oed.com/dictionary/speech_n1?tab=meaning_and_use#21339353 (emphasis added).
7. E.g., Eugene Volokh, “Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today,” *University of Pennsylvania Law Review* 160 (2012): 459.
8. E.g., Erwin Chemerinsky, *The First Amendment* (Aspen, 3rd ed., 2024); Laura E. Little, *Examples & Explanations for First Amendment* (Aspen, 2021); Geoffrey R. Stone et al., *The First Amendment* (Aspen, 7th ed., 2024).
9. The University also required Rasmusen to grade student assignments without knowing the students’ identity.
10. The provost’s statement (on November 20, 2019) is no longer available on the University’s website, but it is reprinted on several other sites (e.g., at: Hank Reichman, “On Indiana University’s Response to Professor Rasmusen,” *ACADEME BLOG* (Nov. 22, 2019), <https://academeblog.org/2019/11/22/on-indiana-universitys-response-to-professor-rasmusen>). For a story on the Rasmusen case, see Nicholas Bogel-Burroughs, “Our Professor’s Views Are Vile, University Says. But We Can’t Fire Him,” *New York Times* (Nov. 22, 2019) <https://www.nytimes.com/2019/11/22/us/indiana-university-eric-rasmusen.html>.
11. See, e.g. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (the Court treats the wearing of black arm bands as speech) and *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017) (the Court refers to the usage of social media sites as “speaking and listening in the modern public square”).
12. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Brothers, 1948), 32. This book is available online at <https://search.library.wisc.edu/digital/AC0JRL3HHCHP678U>.
13. Meiklejohn, *Free Speech and Its Relation to Self-Government*, 32-33.
14. We calculated the numbers in this paragraph, the following paragraph, and in Figure 2-1 from the Supreme Court Database (at <https://scdb.la.psu.edu>), using the *lawSupp* variable (First Amendment (association); First Amendment (petition clause); First Amendment (speech, press, and assembly)). The data cover all orally argued cases, including per curiams.
15. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

16. *Whitney v. California*, 274 U.S. 357 (1927).
17. Calculated from the Supreme Court Database.
18. We adapt this chart and some other material in this chapter from Lee Epstein, Kevin McGuire, and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice* (12th ed., Sage/CQ Press, 2025).
19. Victoria L. Killion, Cong. Rsch. Serv., IF11072, *The First Amendment: Categories of Speech* (2024), <https://crsreports.congress.gov/product/pdf/IF/IF11072>.
20. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).
21. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).
22. Although the Court decided many key expressive conduct cases during this era, such disputes were not unknown in early times. For example, in *Stromberg v. California*, 283 U.S. 359 (1931), the justices acknowledged that at least some forms of expressive conduct merit constitutional protection when it reversed the conviction of a camp counselor who had raised a red flag in support of communism, conduct that violated California law.
23. *Spence v. Washington*, 418 U.S. 405 (1974).
24. *Spence v. Washington*, 408.
25. *Spence v. Washington*, 415.
26. *United States v. O'Brien*, 391 U.S. 367 (1968).
27. *United States v. O'Brien*, 376.
28. Would Meiklejohn have approved of this approach? Recall, from Chapter 1, he drew a distinction between “expression” and “action” (conduct), asserting that while the former should enjoy broad protection, the government may exercise far greater control over actions.
29. *Texas v. Johnson*, 491 U.S. 397 (1989).
30. *Texas v. Johnson*, 399.
31. *Texas v. Johnson*, 406.
32. *Texas v. Johnson*, 408.
33. *Texas v. Johnson*, 416.
34. *Texas v. Johnson*, 436 (Stevens, J., dissenting).
35. 1 Alexis de Tocqueville, *Democracy in America* (Henry Reeve trans., New York, George Dearborn & Co. 1838), 170.
36. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).
37. *NAACP*, 357 U.S. 449.
38. *Scales v. United States*, 367 U.S. 203, 220 (1961) provides an example.
39. This is from a public school, Hastings College of Law (now known as University of California College of the Law, San Francisco or UC Law SF). Its policy was the subject of a Supreme Court case, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), which we discuss in the text.
40. *Christian Legal Society v. Martinez*, 561 U.S. 661, 672, 672 n.3 (2010).
41. Also keep in mind that in the *CLS* case, the Court considered only all-comers policies. Whether the Court’s logic in *CLS* also applies to nondiscriminatory policies is an open question.

42. For a list of the state laws, see “*State Laws Protecting Religious Student Groups on Public College Campuses*,” *Christian Legal Society*, Jan. 28, 2020, https://www.christianlegalsociety.org/wp-content/uploads/2022/10/State_Campus_Access_Laws_2020-01-28_CLS_Center_for_Law_and_Religious_Freedom.pdf.
43. Under the Fifth Amendment, no person “shall be compelled in any criminal case to be a witness against himself.”
44. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).
45. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
46. For more details on this case, see David Roger Manwaring, *Render unto Caesar: The Flag-Salute Controversy* (University of Chicago Press eds., 1962).
47. *Barnette*, 319 U.S. at 642.
48. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (internal citation omitted).
49. *303 Creative LLC* at 600 U.S. 570 (2023).
50. *303 Creative LLC* at 603.
51. *Rumsfeld v. Forum for Acad. and Institutional Rights*, 547 U.S. 47 (2006).
52. 8-0. Justice Alito did not participate.
53. Very few exceptions exist to the state action requirement. For one of the few, see *Marsh v. Alabama*, 326 U.S. 501 (1946), holding that a privately owned company town, which exercises the traditional functions of a state, is a government for purposes of the First Amendment and so can’t punish people for distributing literature on its streets.
54. In *Packingham v. North Carolina*, 582 U.S. 98 (2017), Justice Kennedy referred to social media sites as the “modern public square,” seemingly equating “the entirety of the internet with public streets and parks,” as Justice Alito noted. If so, the question arises as to whether social media should be treated as a government for purposes of the First Amendment, but so far the Court has answered in the negative.
55. X’s rules are here: *The X Rules*, X: HELP CENTER, <https://help.x.com/en/rules-and-policies/x-rules>.
56. Other unprotected categories include child pornography, defamation, fraud, obscenity, and speech integral to criminal conduct (e.g., soliciting someone to commit a crime, impersonating a police officer). See *United States v. Alvarez*, 567 U.S. 709 (2012). For a thorough analysis of how the unprotected categories interact with freedom of speech, see Rebecca L. Brown, “*The Harm Principle and Free Speech*,” *Southern California Law Review* 89 (2016): 953.
57. *United States v. Alvarez*, 567 U.S. 709, 718 (2012).
58. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (discussed later in the chapter).
59. Some types of hate speech might fall into the last category of unprotected expression—discriminatory harassment. But, as we’ll see, discriminatory harassment requires more than a demonstration that the speech is simply offensive or aimed at people with particular characteristics or identities.
60. *Abrams v. United States*, 250 U.S. 616 (1919).
61. *Abrams v. United States*, 617.
62. *Abrams v. United States*, 630 (emphasis added).
63. Erwin Chemerinsky makes similar points in *The First Amendment*.

64. Susan Svrluga, "Michigan State Agrees to Let Richard Spencer Give a Speech on Campus," *The Washington Post*, Jan. 18, 2018, <https://www.washingtonpost.com/news/grade-point/wp/2018/01/18/michigan-state-agrees-to-let-richard-spencer-give-a-speech-on-campus>.
65. *Schenck v. United States*, 249 U.S. 47, 52 (1919).
66. A list of the standards used in cases advocating lawless action prior to *Brandenburg* is on the book's website.
67. We adapt this distinction from Chemerinsky, *The First Amendment*, 157.
68. We adopt these facts from Georgetown's Free Speech Project, at Rose Dallimore, "Protesters Shout Down Then-Acting Homeland Security Secretary at Georgetown Law," *Georgetown University Free Speech Project*, Aug. 30, 2020, <https://freespeechproject.georgetown.edu/tracker-entries/protesters-shout-down-then-acting-homeland-security-secretary-at-georgetown-law-2>. A video of the event is available at PBS NewsHour, *Immigration Protesters Disrupt Speech from acting DHS Head McAleenan*, YouTube, Oct. 7, 2019, <https://www.youtube.com/watch?v=TgumFJ-LAHM>.
69. *Terminiello v. Chicago*, 337 U.S. 1 (1949).
70. *Terminiello v. Chicago*, 4.
71. *Terminiello v. Chicago*, 13.
72. *Terminiello v. Chicago*, 14. You might ask yourself if these words align with Jackson's view, discussed in Chapter 1, that expression acts as a "safety valve" giving speakers an outlet for airing their grievances.
73. For the same reason, the Court has expressed skepticism at other mechanisms for restricting or even preventing speech that could prove disruptive, such as rules that allow a government administrator to vary the fee charged to speakers to reflect the estimated cost of maintaining public order. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).
74. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Aspen, 7th ed., 2023), 1106 (emphasis added).
75. The dean's letter is available at "Letter from Jenny Martinez to Stanford Law School Community," Mar. 22, 2023, <https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf>. The quoted sentence in her letter is from Erwin Chemerinsky and Howard Gillman, "Free Speech Doesn't Mean Hecklers Get to Shut Down Campus Debate," *Washington Post*, Mar. 24, 2022, <https://www.washingtonpost.com/opinions/2022/03/24/free-speech-doesnt-mean-hecklers-get-shut-down-campus-debate>.
76. *Feiner v. New York*, 340 U.S. 315 (1951).
77. *Feiner v. New York*, 331 (emphasis added).
78. See e.g., Timothy E.D. Horley, "Rethinking the Heckler's Veto After Charlottesville," *Virginia Law Review* 104 (2018): 8.
79. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
80. *Cohen v. California*, 403 U.S. 15 (1971).
81. *Texas v. Johnson*, 491 U.S. 397, 409 (1989).
82. Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (Yale University Press, 2017), 92.
83. *Spurlock v. Ashland Indep. Sch. Bd.*, No. 23-124-DLB-EBA, 2024 U.S. Dist. LEXIS 135313 (E.D. Ky. July 31, 2024).

84. *Spurlock v. Ashland Indep. Sch. Bd.*, 14.
85. Merriam-Webster.com, “threat,” <https://www.merriam-webster.com/dictionary/threat>.
86. *Virginia v. Black*, 538 U.S. 343, 359 (2003).
87. *Virginia v. Black*, 538 U.S. at 360.
88. VA. CODE ANN. §18.2-423.
89. *Black*, 538 U.S. at 350.
90. *Black* at 357.
91. *Black* at 365-66.
92. *Black* at 366.
93. *Counterman*, 600 U.S. at 66 (2023).
94. *Counterman v. Colorado*, 85.
95. *Counterman v. Colorado*, 79.
96. Carolina Mala Corbin, “*The First Amendment Right Against Compelled Listening*,” *Boston University Law Review* 89 (2009): 939-943.
97. *Frisby v. Schultz*, 487 U.S. 474 (1988). We adopt this account, including the quotes in the next few paragraphs, from the Court’s decision.
98. *Frisby v. Schultz*, 487.
99. U.S. Equal Opportunity Commission, *Harassment*, <https://www.eeoc.gov/harassment> (last visited April 21, 2025).
100. For example, Title IX of the Education Amendments of 1972 reads “No person in the United States shall, on the basis of sex, be excluded from participation, in be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
101. U.S. Equal Opportunity Commission, *Harassment*.
102. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).
103. This language was in a 2003 letter written to universities by the Office of Civil Rights in the Department of Education, at “Letter from Gerald A. Reynolds, Assistant Sec’y, Office for Civil Rights Dep’t. of Educ.” July 28, 2003, <https://www.ed.gov/about/offices/list/ocr/firstamend.html>. As agency policy can change from presidential administration to administration, it’s not clear whether the Office continues to stand by these words.
104. “*Hate Speech and Harassment*,” *Washington State University*, <https://freespeech.wsu.edu/hate-speech-and-harassment>.
105. Office of Institutional Equity and Diversity, *Policy on Discrimination and/or Harassment*, Princeton University, Mar. 2023, <https://inclusive.princeton.edu/addressing-concerns/policies/policy-discrimination-andor-harassment>.
106. *Policy on Prohibited Discrimination, Harassment, and Retaliation*, The University of Southern California, <https://policy.usc.edu/wp-content/uploads/2021/12/Policy-on-Prohibited-Discrimination-Harassment-and-Retaliation-1.pdf>.
107. *A Brief Introduction to Free Speech for the Student Community*, The City University of New York, <https://www.cuny.edu/current-students/student-affairs/our-cuny/free-speech>.

108. Zoë Brockenbrough, *Free Speech or Online Harassment at Colleges and Universities?*, University of North Carolina at Chapel Hill (July 28, 2023), <https://ethicspolicy.unc.edu/news/2023/07/28/free-speech-or-online-harassment-at-colleges-and-universities>.
109. *Letter from U.S. Dep't of Education et al. to President of Harvard University*, April 11, 2025, available at <https://www.harvard.edu/research-funding/wp-content/uploads/sites/16/2025/04/Letter-Sent-to-Harvard-2025-04-11.pdf>. Harvard responded by filing a lawsuit alleging, among other things, that the government had violated its First Amendment rights. <https://www.thecrimson.com/article/2025/4/22/read-harvard-trump-complaint/>.
110. We draw these facts from the report commissioned by the University of Oregon. The report is available here at NBC16, *The Actions Constitute Discriminatory Harassment Under Those Policies*, 16KMTR Eugene Oregon, Dec. 21, 2016, <https://nbc16.com/news/local/the-actions-constitute-discriminatory-harassment-under-those-policies>; Scott Jaschik, “Oregon: Professor in Blackface Violated Anti-Harassment Policy,” *Inside Higher Ed*, Jan. 02, 2017, <https://www.insidehighered.com/news/2017/01/03/university-oregon-finds-professor-who-wore-black-face-party-violated-anti-harassment#>; and Susan Kruth, “Oregon Law Professor Suspended for Blackface at Private Halloween Party,” *FIRE*, Dec. 27, 2016, <https://www.thefire.org/news/oregon-law-professor-suspended-blackface-private-halloween-party>.
111. Scott Coltrane, “Provost Issues Statement and Report Regarding Investigation,” *University of Oregon: Oregon News*, Dec. 21, 2016, <https://news.uoregon.edu/content/provost-issues-statement-and-report-regarding-investigation>.
112. The full text of the president’s message is available at Michael H. Schill, “President Shares Thoughts on Costume Incident, Free Speech,” *University of Oregon: Oregon News*, Jan. 9, 2017, <https://news.uoregon.edu/content/president-shares-thoughts-costume-incident-free-speech#>.
113. Erwin Chemerinsky, Opinion, “Worries About Offensiveness Threaten Free Speech on Campuses,” *Los Angeles Daily News*, Aug. 28, 2017, <https://www.dailynews.com/2017/01/04/worries-about-offensiveness-threaten-free-speech-on-campuses-erwin-chemerinsky>.
114. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009).
115. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207-08 (2015).
116. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).
117. *Walker*, 576 U.S. at 200 (2015).
118. *Matal v. Tam*, 582 U.S. 218 (2017).
119. According to the U.S. Patent and Trademark Office, “A trademark is generally a word, phrase, symbol, or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others.” *What is a Trademark?*, United States Patent and Trademark Office, <https://www.uspto.gov/trademarks/basics/what-trademark>.
120. Under this argument, the law discriminated on the basis of viewpoint; it permitted trademarks that were positive or neutral, but it denied trademarks that were negative.
121. The majority also emphasized that because trademarks are private speech, the government has no right to judge what message it likes or doesn’t like; it can’t disapprove of a message because it finds that message offensive without violating the prohibition on viewpoint discrimination.
122. *Walker*, 576 U.S. at 221-22 (Alito, J., dissenting).
123. *Matal*, 582 U.S. at 235.
124. This is close to UCLA’s policy, which prohibits the use, without prior written approval, of “any use of University Assets by an organization or group with members who are students, faculty, or

staff that have not officially registered as a campus organization or received official recognition by the University.” The policy further states that “Any required approvals may be granted, withheld, or retracted in UCLA’s absolute discretion.” *UCLA Policy 110: Use of the University’s Names, Seals, and UCLA Trademarks*, University of California, Los Angeles, <https://www.adminpolicies.ucla.edu/pdf/110.pdf>.

125. We draw this distinction from *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).
126. *Garcetti*, 547 U.S. at 418.
127. We stress *might* because even in the case of citizen speech, the government could justify “treating the employee differently from any other member of the general public”—with the justification usually focusing on the potential effect the speech could have on government operations. *Garcetti*, 547 U.S. at 418.
128. *Garcetti*, 547 U.S. at 421.
129. See also *Pickering v. Board of Education*, 391 U.S. 563 (1968).
130. *Garcetti*, 547 U.S. at 421, 422.
131. *Merriam-Webster.com*, “*Academic Freedom*,” <https://www.merriam-webster.com/dictionary/academic%20freedom>. In Chapter 4, we consider other definitions, mostly offered by professional associations in their official statements.
132. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).
133. *Garcetti*, 547 U.S. at 438.
134. *Garcetti* at 425.
135. This is a type of means-ends test (here a version of intermediate scrutiny), where the means is the restriction on speech (here, the policy against armbands) and the ends is the school’s interest (limiting disruptions on its educational mission). We return to means-ends tests later in the chapter (see also Table 2-1).
136. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).
137. *Morse v. Frederick*, 551 U.S. 393 (2007).
138. *Fraser*, 478 U.S. at 678. (Justice Stevens, in his dissent, states that “[w]hat the speech does contain is a sexual metaphor.” *Morse v. Frederick*, 694. The full speech is available at L.A. Times Archives, “*Text of Speech Made by Student for Nomination*,” *Los Angeles Times*, March 2, 1986, <https://www.latimes.com/archives/la-xpm-1986-03-02-mn-1388-story.html>).
139. *Morse*, 551 U.S. at 406, 407, 410 (2007). The dissenters disagreed. They claimed that *Tinker* required the school to “establish some likely connection between the armbands and its feared consequences” and so here the school “must show that Frederick’s supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana,” which it did not do. At the other extreme, Justice Thomas expressed the view *Tinker* should be overruled because students have no constitutionally protected expression rights.
140. *Morse*, 551 U.S. at 403.
141. *Morse* at 448 (2007).
142. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021).
143. Only Justice Thomas dissented. As he did in *Morse*, he called for the Court to overrule *Tinker*.
144. *Mahanoy*, 594 U.S. at 189.

145. *Mahanoy*, 190.
146. Evan Gerstmann, “Supreme Court Says First Amendment Protects Off-Campus Student Free Speech,” *Forbes*, June 23, 2021, <https://www.forbes.com/sites/evangerstmann/2021/06/23/supreme-court-says-first-amendment-protects-off-campus-student-free-speech>.
147. For example, in *Doe v. Hopkinton Pub. Schs.* 19 F.4th 493 (2021), a public high school suspended a student for bullying another student, sometimes in off-campus speech in a Snapchat group conversation. A federal appellate upheld the suspension. Then again, in *CI.G v. Siegfried*, 38 F.4th 1270 (2022), another federal appellate court disallowed the one-year expulsion of a student for off-campus, anti-Semitic postings on Snapchat. A more detailed analysis of these cases is available at *Federal Appellate Court Decision Further Complicates School District Authority to Discipline Off-Campus Student Speech*, Atkinson, Andelson Loya, Ruud, & Romo, Aug. 01, 2022, <https://www.aalrr.com/newsroom-alerts-3933>.
148. *Mahanoy*, 594 U.S. at 190.
149. Reported in Anemona Hartocollis, “Students Punished for ‘Vulgar’ Social Media Posts Are Fighting Back,” *New York Times*, Feb. 5, 2021, <https://www.nytimes.com/2021/02/05/us/colleges-social-media-discipline.html>. A federal appeals court reversed a trial judge’s dismissal of the case. *Diei v. Boyd*, 116 F.4th 637 (2024).
150. Aileyahu Shanes, “New College of Florida Students Face Punishment for Commencement Actions,” *WLRN*, March 30, 2024, <https://www.wlrn.org/education/2024-05-30/new-college-of-florida-students-commencement>.
151. Steven Walker, “New College of Florida Graduation: Boos for Joe Ricketts, Cheers for Student President,” *Herald-Tribune*, May 18, 2024, <https://www.heraldtribune.com/story/news/education/2024/05/18/joe-ricketts-boosed-during-new-college-of-florida-commencement-speech-tl-ameritrade/73513816007>.
152. Richard Corcoran, “Protests Couldn’t Stop Graduation at New College of Florida,” *Wall Street Journal*, May 27, 2024, <https://www.wsj.com/articles/protests-couldnt-stop-graduation-at-new-college-of-florida-1a5e22bc>.
153. *Near v. Minnesota*, 283 U.S. 697 (1931).
154. For an in-depth account of this case, see Fred W. Friendly, *Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case that Gave New Meaning to Freedom of the Press* (Random House, 1981).
155. *Near*, 283 U.S. at 713.
156. This does not mean that public officials lack recourse altogether against an allegedly errant press. As Blackstone’s quote suggests, they could take the paper to court *after* the story was published, claiming that they were libeled (another category of unprotected speech). To make that showing, public officials must demonstrate that the *published* statements that were false, damaging, and “made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times v. Sullivan*, 376 U.S. 254, 280 (1931). This is the standard that public officials must meet to claim that they were libeled. The standard for private persons is lower, generally requiring them to show only that the statements were false and damaging.
157. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).
158. *New York Times v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).
159. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

160. *Hazelwood*, 484 U.S. at 273 (emphasis added).
161. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
162. The case is *Coates v. Cincinnati*, 402 U.S. 611 (1971). Although *Coates* is a famous case, the record is slim; not even the briefs are informative. About all we know is that Coates was a student involved in a demonstration, likely concerning labor.
163. *Coates*, 402 U.S. at 614.
164. *Coates*, 616.
165. *Coates*, 614.
166. *Christian Legal Soc’y v. Martinez*. 561 U.S. 661, 679 n.11 (2010).
167. See also Figure 2-2.
168. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (internal citation omitted).
169. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992).
170. *Examples of Likely Permitted and Prohibited Expressive Activities*, *GW Free Expression*, <https://freexpression.gwu.edu/examples-likely-permitted-and-prohibited-expressive-activities>.
171. Mira Costa Community College, *Administrative Procedure §3900: Speech-Time, Place, and Manner*, https://www.miracosta.edu/office-of-the-president/board-of-trustees/_docs/3900AP-Speech-TimePlaceandManner_000.pdf.
172. Consider the example of the university creating a website to gather comments on its food. Because the site was created for a particular purpose, it would be reasonable for the university to remove comments about, say, its football program. What it could not do, however, is remove only those comments critical of its food program; that would be viewpoint discrimination.
173. *Greer v. Spock*, 424 U.S. 828 (1976).
174. *Adderley v. Florida*, 385 U.S. 39 (1966).
175. *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).
176. *Int’l Soc’y for Krishna Consciousness v. Lee*, 683.
177. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37 (1983).
178. *United States v. Kokinda*, 497 U.S. 720 (1990).
179. *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring).
180. *Nat’l Ass’n of Diversity Officers in Higher Ed. v. Trump*, Case 1:23-cv-003330ABA at 50 (D. Md. 2025), avail. at <https://law.justia.com/cases/federal/district-courts/maryland/mddce/1:2025-cv00333/575287/44/>.
181. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).
182. *R.A.V. v. City of St. Paul*, 380.
183. As we’ll discuss soon, *R.A.V.* also claimed that the ordinance was overbroad.
184. *R.A.V.*, 505 U.S. at 391.
185. *R.A.V.*, 391-92.
186. *R.A.V.*, 395.
187. *R.A.V.*

188. *R.A.V.*, 397. The majority claimed that the overbreadth argument, “need not be reached, since the ordinance unconstitutionally prohibits speech on the basis of the subjects the speech addresses.”
189. *R.A.V.*, 401.
190. Elena Kagan, “*The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*,” *Supreme Court Review* 1992 (1992): 29-36.
191. We draw these facts from *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). See also Chemerinsky & Gillman, *supra* note 82, Chapter 4.
192. *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).
193. *Doe v. Univ. of Michigan*, 867.
194. *E.g.*, *UWM Post, Inc. v. Board of Regents of the Univ. of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Corry v. Leland Stanford Junior Univ.*, No. 740309, 1995 WL 18262175, (Cal. Super. Ct. Feb. 27, 1995).
195. See, e.g., the discussion in Chemerinsky and Gillman, *Free Speech on Campus*, Chapter 4.
196. Chemerinsky and Gillman, *Free Speech on Campus*, 99.
197. *Speech on Campus*, ACLU (Dec. 18, 2023), <https://www.aclu.org/documents/speech-campus>.
198. Chemerinsky and Gillman, *Free Speech on Campus*, Chapter 4.
199. *Combating Hate Speech and Hate Crime*, European Commission, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime_en#
200. Section 130 of the German Criminal Code, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.
201. As its name suggests, the National Union of Students is the “national union representing university and college students across the UK.” More information is available on the Union’s website at <https://www.nus.org.uk>.
202. Michael Schill, “*An Update on Summer Work at Northwestern*,” *Northwestern: Leadership Notes*, Aug. 20, 2024, <https://www.northwestern.edu/leadership-notes/2024/an-update-on-summer-work-at-northwestern.html>.
203. Carol L. Folt, Andrew T. Guzman, and Steve Shapiro, “*Update on Campus Hate Speech and New Government Actions Regarding Antisemitism and Islamophobia*,” *USC: Office of The President*, Oct. 31, 2023, <https://www.provost.usc.edu/update-on-campus-hate-speech-and-new-government-actions-regarding-antisemitism-and-islamophobia>.
204. Peter J. Mohler, “*A Message from Acting President Mohler*,” *The Ohio State University: Office of the President*, Nov. 6, 2023, <https://president.osu.edu/story/message-president-mohler>.