

## **Circumventing the “True Threat” Standard in Campus Hate Speech Codes**

**by  
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We face many challenges when dealing with the issue of freedom of expression on campuses. Where and when is our speech protected by the First Amendment and when is it not protected? What is the difference between freedom of expression and academic freedom? In 1969, in *Tinker v. Des Moines School District*, the Supreme Court ruled that students do not lose their First Amendment rights at the school house door. Does that mean that students are free to protest anywhere on campus? What rights do they have in the classroom?

Hate speech is a pervasive problem suffered particularly by ethnic and sexual minorities. It can undermine self esteem, cause isolation, and result in violence. Words can be damaging and<sup>1</sup> words can reinforce social inequality in the classroom, in the workplace, and in social settings. Yet the First Amendment of the Constitution protects freedom of expression, thereby guaranteeing protection for speech unless it presents a clear and present danger, is obscene, libelous, slanderous, or an imminent, “true” threat.

This “true threat” standard presents campus officials with a difficult dilemma. Officials must protect all speech not regulated by time, place and manner “content neutral” restraints, unless it can be shown that the speech presents a “true threat.”<sup>2</sup> That raises questions to what constitutes a true threat and which time, place and manner restraints can be placed on a campus. For example, at Pearce College, just up the road in Woodland Hills, the free speech area is limited to a very small patch of land. A student who was trying to hand out Spanish translation of the Constitution outside that area was stopped and reprimanded. The student presented no “true threat” and was well within the boundaries set out in the *Tinker* case. The Pearce administration replies that no advocacy or paper distribution is allowed outside its free speech zone. The case is under review and will

determine how restrictive a campus can be. Some judges have ruled that campuses are tantamount to public parks, while other judges have ruled that as long as the restrictions do not apply to content, campus are within their rights because they are not public forums and they must protect their learning environments.

My purpose today is to review the status of the law regarding these questions. First, I will define the difference between academic freedom and freedom of expression, and what that means to you in the classroom. Second, I will review the campus policies on and the status of hate speech rulings on campuses. Third, I will examine how social media complicate this situation. Fourth, I will suggest some policy guidelines based on my analysis. And finally, I then hope to open this forum to questions. So like your students, take lots of notes.

### **Academic Freedom**

I begin with academic freedom, which protects the right to develop and explore ideas in an arena free from political, cultural, or organizational intimidation. Freedom of expression, on the other hand, as defined by First Amendment precedents protects individual scholars and students from their own academic institutions.<sup>3</sup> These precedents have generally recognized the special nature of the academic community where faculty members operate as partners and colleagues to instill knowledge in students.<sup>4</sup> Perhaps no where else on earth are the purposes of free speech pursued with more vigor than on our campuses: we hope to embody John Stuart Mill's free marketplace of ideas so that truth can be pursued; we hope to promote Thomas Emerson's goal of providing a place where individuals can express themselves creatively; we hope to propagate Alexander Meickeljohn's notion that free speech is essential to self government. The Supreme Court has ruled that the freedom to disseminate information and ideas is a “special concern of the First Amendment.”<sup>5</sup> But there is a difference between what restrictions can be imposed by private institutions and what restrictions can be applied by public institutions. The unique treatment by the courts of the rights of private colleges and universities was first evidenced in the *Dartmouth College* case of 1819.<sup>6</sup> Attorney Daniel Webster supported the need for a public policy to protect the freedom and independence of academic institutions. The *Dartmouth College* case was important because the

Supreme Court recognized that the academic institution was something special -- something more than other organizations, or businesses, something that served its purpose only when free from political interference or threat of external intervention.<sup>7</sup> But, despite the *Dartmouth College* case, the rights of private colleges and universities were slow in evolving into a clear doctrine of academic freedom. What did evolve was a constitutionally-based protection for the rights of individuals within academic institutions. These guarantees not only protect students and professors in public institutions from the federal government, they also protect them from their state governments. In *Gitlow v. New York* (1925) the Supreme Court held that First Amendment protections of academic freedom could be applied to the states through the Fourteenth Amendment.<sup>8</sup>

Because of the McCarthy era, the 1950's witnessed a wave of decisions that recognized the importance of freedom of expression in educational institutions. In *Slochower v. Board of Higher Education of New York City*,<sup>9</sup> the Court considered whether a tenured teacher in a public college could be discharged without notice or hearing because he refused to answer a legislative committee's question concerning his earlier membership in the Communist Party. In holding that Professor Slochower's constitutional rights had been violated, the Court ruled that while city authorities were permitted to scrutinize a person's fitness to be a professor, they could not do so without affording procedural protections. Professor Slochower's refusal to answer questions was "wholly unrelated to his college functions"<sup>10</sup> and provided no permissible basis under which he could be discharged from his academic appointment.

Shortly thereafter, in *Sweezy v. New Hampshire*,<sup>11</sup> the Court was faced with the question of whether the Attorney General of New Hampshire could prosecute an individual for refusal to answer questions about a lecture delivered at the state university concerning the Progressive Party of the United States. The Attorney General had a clear grant of Legislative authority to compel testimony because the laws in question passed by the New Hampshire Legislature in 1951 provided for a comprehensive scheme of regulation of "subversive activities." "Subversive persons" were made ineligible for employment by the state government, including public educational institutions. The Court held that the Attorney General of New

Hampshire had exceeded his authority in questioning Sweezy and, therefore his ruling had violated the Fourteenth Amendment's due process clause. In holding for the teacher, the Court weighed the state's interests against Sweezy's First Amendment right to "academic freedom" and "political expression." The Court stressed the "essentiality of freedom in the community of American universities," and warned against "imposing any strait jacket upon the intellectual leaders in our colleges and universities."<sup>12</sup>

The Supreme Court's most significant pronouncement on academic freedom in the 1960's came in its decision in *Keyishian v. Board of Regents of the University of the State of New York*.<sup>13</sup> The *Keyishian* case involved faculty members whose jobs were endangered when they refused to sign loyalty certificates and sought declaratory and injunctive relief from the Supreme Court. The certificates were part of an intricate statutory and regulatory scheme aimed at preventing state employment of "subversive" persons. The Court held the New York scheme unconstitutionally vague. The ruled:

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.<sup>14</sup>

The doctrine of academic freedom evolved further in the 1970's. In *Regents of the University of California v. Bakke*,<sup>15</sup> a white male, Allan Bakke, who had been denied entry to medical school sued the University of California, claiming that the school's affirmative action quotas discriminated against him on the basis of race. The Court concluded that the specific affirmative action program of the medical school violated Title VI of the Civil Rights Act of 1964. However, the Court said this about academic freedom:

Academic freedom . . . long has been viewed as a *special concern of the First Amendment*. The freedom of a university to make its own judgments as to education includes the selection of its student body. . . . In arguing that its universities must be accorded the right to select those students who will contribute First Amendment interest.<sup>16</sup> (emphasis mine).

At issue was academic freedom in the context of an institution's right to self-governance rather than the more traditional individual's personal liberties in teaching, speaking, and scholarship. Justice Frankfurter listed the "four essential freedoms" of a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>17</sup> But please note that these essential freedoms for the institution may limit the freedom of its professors and students.

#### Limits to Academic Freedom

So let me be clear that academic freedom is narrower than freedom of expression. Freedom of expression is protected in public forums but not in the classroom, which because it is a learning environment, is subject to restrictions of time, place and manner that advance learning. Students are not freedom to interrupt teachers; and teachers are not free to violate their syllabi or impose their extra-curricular views on students. In *Waters v. Churchill* (1994), Justice Sandra Day O'Connor wrote, "When someone who is paid a salary so that she will contribute to an agency's effective operation . . . says things that detract from the agency's effective operation, the government employer must have some power to restrain her."<sup>18</sup> In short, by a 7 to 2 margin, the Court ruled that persons who affect the morale of operations at public institutions are subject to dismissal if they do not complain through proper channels and if they do not stop complaining on the job site once the issue is resolved. For example, once a tenure decision has been resolved, faculty members would be wise not to complain about it on the campus since such complaints undermine the tenure procedure and can prove divisive to the workplace.

This reinforcement of institutional powers was recently strengthened in the Garcetti Ruling. In this case, an employee of the city attorney's office complained about its operation. the Supreme Court held that public employees have no First Amendment protection for statements they make in the course of their professional duties. The case concerned a deputy district attorney, Richard Ceballos, who objected to misstatements made in an affidavit for a search warrant. Ceballos brought his concerns to his supervisors; when they decided to proceed with the case anyway, he spoke to the defense attorneys in the case, and defense counsel subpoenaed him to testify. In response, his

supervisors in the district attorney's office retaliated against him, denying him a promotion and transferring him to a distant location. Ceballos sued, losing in district court but prevailing on appeal to the Ninth Circuit Court. The case then went to the Supreme Court, which in 2006 reversed the findings of the Ninth Circuit, concluding that public employees are not protected when they speak "pursuant to their official duties." The bottom line is that when professors talk about such official duties as hiring, promoting or tenuring, their speech is not protected by the First Amendment.

But let us return for a moment to the kinds of things we can do and say in our classroom. In *West Virginia v. Barnette*, Justice Robert Jackson speaking for the majority wrote that "If there is a 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." The right to freely pursue knowledge within the realm of course content and our own research agendas is not unlimited. But we can protect what we have to say by making sure our syllabi are clear. Remember that most courts have held that your syllabus in your contract with your students. If you violate that contract, you subject to reprimand and eventually dismissal as the United States Court of Appeals for the Sixth Circuit, *Bonnell v. Lorenzo*.<sup>19</sup> John Bonnell, a instructor of English literature at Macomb Community College in Michigan used words not "germane" to the subject matter. After several student complaints and a warning from the administration, Bonnell continued this practice and was suspended. He sued claiming his First Amendment rights had been violated and was upheld by the district court. But the Court of Appeals reversed on the grounds that the classroom is a learning environment with time, place and manner restrictions, including adhering to the syllabus. The appeals court defended a "student's right to learn in a hostile-free environment."

As these and other cases indicate, context creates meaning and may provide a new way remedy cases of indoctrination or intimidation. By using the context to help determine the meaning of words uttered or written – for example, proving there was a hostile work environment – policy can transcend specific language – though it would still be used as evidence – and move instead to specific situations. For example, in the famous 1942 case of Chaplinski v.

New Hampshire, Chaplinski's conviction for physical assault was overturned because in the context in which the words were spoken, he was deemed to have been attacked first. Twenty-three years earlier, Justice Holmes used a similar standard in his famous ruling in *Schenck v. United States*:

[T]he character of every act depends upon the circumstances in which it was done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and cause a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force.<sup>20</sup>

In *Hill v. Colorado*, the Supreme Court ruled that one of the determinants of context is whether the audience is being held captive in some fashion: "[T]he protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."<sup>21</sup>

So here is a warning for you. Be very careful about the context you establish in your classroom. The Fifth Circuit in *Martin v. Parrish* took into account the unique context in which a college professor speaks such that his students are a "captive audience" who may find themselves intimidated by the person who has the ability to give them grades.<sup>22</sup> Specifically, the court held in this case that the teacher's "language is unprotected [speech]. . . because, taken in context, it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose of justification."<sup>23</sup>

A safer route for us to follow is to adhere to the guidelines set out by the AAUP. In 1915, the newly formed American Association of University Professors set out its definition of academic freedom which guaranteed protection for freedom of inquiry and research, freedom to teach subject matter in the university, and freedom to speak out on public issues outside the university. Universities are obligated to promote inquiry and critical thinking in the process of developing new knowledge and review accumulated knowledge. They are to provide instruction to students. Often this injunction means that a university will be a haven from the storm of opinion generated by an uneducated public. It means that faculty and students may publish their research and defend it. The 1915 AAUP declaration also holds faculty responsible for purging 'its ranks of the incompetent and

unworthy, or to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship. . . ." That means that there is a free marketplace of ideas on campuses where rational and civil discourse refines what is believed to be knowledge. But it also means we must police ourselves to prevent dogma, incompetence, intimidation, and indoctrination. That is a tough call and writing rules and procedures for it is very difficult.

### Campus Speech Codes

Just as difficult is the attempt by campuses to suppress hate speech. The efforts have been largely unsuccessful. In its pamphlets On Freedom of Expression and Campus Speech Codes (1992) and Sexual Harassment: Suggested Policy and Procedures for Handling Complaints (1995), the AAUP condemns speech codes and harassment rules that target speech on the basis of viewpoint or message. Along side the AAUP's warnings are a handful of court rulings that have struck down campus speech codes. One example is *Doe v. University of Michigan*.<sup>24</sup> In 1989, a federal district court held that the University's "Policy on Discrimination and Discriminatory Harassment of Students in the University Environment" was unconstitutional because it was too vague and over broad. The policy prohibited any behavior, verbal or physical, that stigmatized or victimized an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or veteran status, and proscribed verbal or physical conduct that stigmatized or victimized an individual on the basis of sex or sexual orientation. The policy was brought down by a biology graduate student who insisted on his right to discuss certain controversial theories positing biologically based differences between sexes and races. The court ruled that the "University could not . . . establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages . . . to be conveyed."<sup>25</sup>

In 1988 the University of Connecticut at Storrs expelled a junior named Nin Wu from the dormitories for taping a poster to her door which listed types of persons who should be "shot on sight." The list included "bimbos," "preppies," "racists," and "homos." The

federal district court in Hartford reinstated Wu arguing her First Amendment rights had been violated. Her dorm room door was public forum since other dorm room doors had messages posted on them. Furthermore, restricting her poster was not content neutral, instead the university could have banned all posters or messages from being posted.

In 1991 another federal district court stopped George Mason University in Virginia from imposing any discipline on a fraternity for engaging in expressive conduct that perpetuated racial and sexual stereotypes.<sup>26</sup> In this instance fraternity members dressed up as "ugly women" using black face, pillows, and other articles of apparel that suggested racial stereotypes. The court said, "The First Amendment does not recognize exceptions or ideas or matters some may deem trivial, vulgar or profane . . . . [A] state university may not hinder the exercise of First Amendment rights simply because it feels that exposure to a given group's ideas may be somehow harmful to certain students."<sup>27</sup> In February of 1995, the California Supreme Court found the Stanford University code to be "overbroad" . Similar rulings occurred in the cases of Zeta Beta Tau fraternity at California State University at Northridge and Phi Kappa Sigma at the University of California at Riverside. And in the latter case, responsible members of the administration at Riverside were required to take courses educating them on First Amendment law.

### The Problem of Hate Speech on the Internet

While private online systems have the right to censor and ban a user's speech,<sup>28</sup> the case is murkier for universities that are publicly funded. Their rules must be content neutral under First Amendment precedents, particularly those set in "hate speech" cases wherein judges found codes to be overly broad and vague, and thus open to arbitrary and capricious application.

Two cases in this area deserve mention. The first involves a two million dollar lawsuit for damages to his career by a graduate student at the University of Texas, Dallas. The student, Gregory Steshko, was deprived of e-mail privileges by the university because he was using his account to broadcast political messages critical of Russian Premier Boris Yeltsin's alleged sexual predilections. Since the University of Texas is government supported, it must answer to the

charge that its restrictions on e-mail violate the First Amendment protection of content on a public forum. Since an e-mail account an automatic right for graduate students, it is an open forum protected by the First Amendment.<sup>29</sup>

A second case serves to clarify the courts' position. It involves a University of Michigan student who exchanged e-mails with a man in Canada describing their mutual sexual interest in violence against women and girls.<sup>30</sup> Additionally, the student posted a story to an Internet news group describing violent sexual acts. The female character in the story bore the name of one of his classmates. The district judge dismissed the charges against the student because the communications failed to create a "true threat" as required by First Amendment jurisprudence. The district judge noted that the First Amendment requirements must be met regardless of the mode of communication or disturbing content. To pose a "true threat" the communication must call for imminent action, cause endangerment against specific persons, and the communicator or his or her audience must be capable of carrying out the threat. (*Brandenburg v. Ohio*, 1969). The Court reinforced this standard in *Black v. Virginia*. A true threat is imminent, personal, and possible. That is a very difficulty burden of proof to meet.

Cyberbullying and on-line harassment present more problems. One of the pivotal cases is that of Tyler Clementi, who committed suicide at the age 18 after his roommate spied on him having homosexual sex and posted the video on the internet. While the lower court in New Jersey convicted the roommate of bias intimidation, that is, cyberbullying, the appeals court in 2016 overruled, and suggested a new trial based on invasion of privacy. The roommate then pled guilty to one count of invasion of privacy.

### Hate Speech as Harassment: The Question of Context

Such decisions allow us to turn to rulings on sexual harassment that might be used to create an analogue for hate speech. In *Meritor Savings Bank v. Vinson*<sup>31</sup> the Supreme Court unanimously ruled that illegal sex discrimination is "not limited to economic or tangible discrimination";<sup>32</sup> it also covers harassment that creates a "hostile environment." To put it another way, the *Meritor Savings* case translated Title VII of the Civil Rights Act of 1964 as making

employers liable in terms of compensation for actions or words that interfere with an employee's ability to *perform work, or that create an intimidating or hostile work environment.*

*Meritor* was extended to campuses in *Franklin v. Gwinnett County Public Schools* where in the Court ruled that school districts are liable under Title IX for damages for teacher harassment of pupils.<sup>33</sup>

These decisions resolved a tension that exists between protection of freedom of expression and protection from sexual, ethnic, or racial harassment. In *Teresa Harris v. Forklift Systems*, the Supreme Court clarified what constituted harassment. In November of 1993, the Court ruled 9-0 that Harris did not need to prove that she suffered psychological harm; her burden was to prove that the harassment was frequent, severe, humiliating, and an unreasonable interference with her performance in *the context of her work place.* The decision written by Justice Sandra Day O'Connor who asked whether a "reasonable person" would have viewed Harris' workplace as a "hostile or abusive work environment."<sup>34</sup>

Seizing the moment, the Department of Education of the U. S. Government issued guidelines for determining if harassment had taken place on a campus: "In order to give rise to a complaint . . . sexual harassment must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment."

The Supreme Court then followed up. In *Oncale v. Sundowner*, the Court held that sexual harassment on the job is parallel to racial harassment.

The Court next ruled that students who are victims of sexual discrimination or harassment may be entitled to damages from their campuses. In *Christine Franklin v. Gwinnett County Schools* (1992), the Court handed down a unanimous decision that allowed an Atlanta woman to seek damages beyond back pay and prospective relief from her high school under Title IX of the 1980 Education Act. Until this decision, schools or colleges found to have violated Title IX were threatened only with a loss of federal funds.

## Solutions

How do we generate policies on campus to deal with these problems?

First, be as careful as possible when composing a syllabus to understand that it is your contract with your students. Since they are a captive audience, you may not intimidate or indoctrinate them, and your speech is not protected by the First Amendment. If you wander from the syllabus, you can be held accountable. However, you are protected by Academic Freedom to pursue the subject matter of course in ways you see fit, including making it relevant to your students.

Second, when acting in an official capacity, whether you are staff, faculty, or student, your speech is not protected by the First Amendment. You are responsible to the authority of your official duties, whether that be the program review officer, the chair of the tenure committee, or the dean.

Third, when not in the class and not acting in an official capacity, most of your communication is protected by the First Amendment. As long as such activity or communication is legal, it is protected and cannot be used against you in terms of promotion or firing.

Fourth, based on this analysis of case law, campuses can proscribe repeated hate speech by using the context driven workplace model. Students in the classroom or other work places, such as the library, could be classified as a captive audience. They are required to enter these work spaces to meet graduation requirements. Thus, according to the courts, students are a captive audience, and those who address them enjoy less protection under the First Amendment. In *Resident Advisory Board v. Rizzo*<sup>35</sup> the court ruled that employees were a captive audience because they could not avoid being subjected to unseemly language without walking off the job. As we have seen, students fall into this same category.

Furthermore, *Meritor Savings* opened the way to protect employees in the workplace from "unwelcome . . . verbal . . . conduct of a sexual nature. . . [that] has the purpose or effect of unreasonably interfering with an individual work performance. . ."<sup>36</sup> It is not a large step to translate that into a regulation that prohibits interfering with a student's educational performance in their workplaces, that is, on the

campus including classrooms, lockerrooms, cafeterias, libraries, and other places of study.

The *Harris* ruling reinforces the framework for such regulations by pointing out that behavior that is "sufficiently severe or pervasive" to create a hostile work (read "learning") environment violates Title VII.<sup>37</sup> If one were to apply the *Harris* formulation to the academic environment, one would have to prove that the words or behavior detracted from the student's performance, encouraged the student to leave the classroom or other academic environment, or kept them from completing the class or the degree. To meet this burden of proof, students could supply evidence of how they were hampered in their studies, how their grades had dropped, how their self-esteem had suffered, how they felt intimidated, and so forth, all of which were *accepted as evidence* in the *Harris* case to re-construct the context.

Fifth, campuses should create a forum where free speech is encouraged and sometimes answered. This notion flows the theory that more speech rather than restrictions do a better job of dealing with the problem of offensive speech. It should be possible to warn that what is said in the open may be offensive and that those saying it may be recorded. Providing this kind of outlet allows campus authorities to identify hate speakers, racists, etc. It is better to know who these people are than to force them underground by providing no outlet for their rhetoric. Such a location would surface the intolerant, the bigoted, and the problematic for further scrutiny, which is perfectly constitutional under the *Davis v. Monroe County Board of Education* ruling of 1999. That ruling sets strict standards for the restriction of hate speech. To be considered "harassment" that could be restricted, the speech in question must be discriminatory and targeted against a specific person or persons (i.e., not a race or gender). Also, it must be "so severe, pervasive, and objectively offensive" that it interferes with the learning environment depriving the victim of access to educational opportunities.

Sixth, it remains important to define and condemn hate speech with moral force. While some hate speech will always be protected, a campus can build a context in which it is condemned if not punished by peers and supervisors. The power of moral suasion should be particularly attractive to communication scholars who are familiar with the influence of modeling, peer pressure, and societal sanctions. It is

possible that some who engage in hate speech "don't know any better" because of the places from which they have come. Part of the learning experience in the new campus environment socialization into societal norms.

Seventh, along the lines of sexual harassment, establish records of sustained patterns of hate speech which create a hostile learning environment and punish those guilty of creating such environment. In other words, if one could argue that a record of hate speech interferes with a student's ability to gain an education, do his or her homework, attend class, etc., it would no longer be protected speech. Establishing a record of sustained patterns that create a hostile environment might allow the university to create a points system, not unlike some states use for drivers licenses. Should the offender take a workshop on tolerance, he or she would might have their record cleared. Such a system would have the advantage of encouraging offenders to participate in educational programs that might help them overcome their biases while avoiding other legal sanctions.

Eighth, relying on *Mitchell v. Wisconsin*, officials could allow for the imposition of stiffer penalties when a campus offense is committed in the context of hate speech. Because freedom of expression has rightly been given priority over many other rights and is constitutionally protected, it is difficult to restrict. Even the National Board of the ACLU has been divided on the constitutionality of enhancing penalties for crimes where the guilty party has uttered hate speech. The Supreme Court on the other hand has stood by its decision allowing high penalties for crime committed by those who engage in hate speech. As we have seen, the court requires that the context be clear and the case that hate speech was uttered be made cleanly under the "reasonable person" standard. Since in the case of other crimes, such as murder, the penalties can be enhanced when the circumstances surrounding the crime are taken into account, the Court reasons that hate speech can be considered by judges in the same way. Thus, a campus could develop a code against hate speech that read in part that anyone being penalized for any violations on the campus could have their penalties enhanced if in the commission of the violation they engaged in hate speech.

## Endnotes

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1. Samuel Walker, Hate Speech: The History of American Controversy (1994) Walker includes a chapter on "The Campus Speech Codes," which is relevant to the present study.
2. This position is supported by a number scholars. See for example, Kingsley E. Browne, "Title VII as Censorship: Hostile-Environment Harassment and the First Amendment," Ohio State Law Journal, 52 (1991): 481-99; Jules B. Gerard, "The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment," Notre Dame Law Review, 68 (1993): 1003-1021; Larry Alexander, "Banning Hate Speech and the Sticks and Stones Defense," Constitutional Commentary, 13 (1996): 71-92; Walker, 141ff.
3. The most recent example of this protection is a law passed in the state of California (SB 1115) which prohibits colleges and universities from punishing students for filing lawsuits charging universities or colleges with unjustly abridging the students right to freedom of speech. The law went into effect on January 1, 1993.
4. See Robert Ladenson, "Is Academic Freedom Necessary?," Law and Philosophy, 5(1986), pp. 59-87; Josiah Royce, "The Freedom of Teaching," The Overland Monthly n.s. 2(1883), pp. 235-40; John Dewey, "Academic Freedom," Educational Review (January, 1902), p. 3; David Mathews, "A Symposium on Freedom and Ideology: The Debate about Political Correctness," Civic Arts Review (Winter, 1992), p. 4; Sidney Hook, "Communists, McCarthy and American Universities," Minerva (Autumn, 1987), p. 344.
- 5.. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); see also *Whitehill v. Elkins*, 389 U.S. 54, 59-60 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Grisold* U.S. 360, 368-369 (1964); *Shelton v. Tucker*, 364 U.S. 470, 487 (1960); *Barenblatt v. United States*, 369 U.S. 109, 112 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 195-198 (1952); *Adler v. Board of Educ.*, 342 U.S. 485, 497, 508 (1952) (Black, dissenting; Douglas, dissenting); see infra notes 122-58 and accompanying text.
- 6.. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819).
- 7.. For an analysis tracing the roots of this case, see Campbell, 70 Kentucky Law Journal 643, especially at 704-705 (1981-1982). "Simply stated, the Dartmouth College Doctrine was that the federal contracts clause protected private religious, quasi-religious, and secular corporations from arbitrary state legislative attack. The Court thus partially established for the first time the constitutional principle of associational freedom and integrity in the context of the religiously and politically diverse and highly competitive early 19th Century American Society."
8. 268 U.S. 652.
- 9.. 350 U.S. 551 (1956).
- 10.. *Ibid.*, at 558.
- 11.. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).
- 12.. *Ibid.*, at 261-262.
- 13.. *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967).
- 14.. *Ibid.*, at 603.
- 15.. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
- 16.. *Ibid.*, 312-313.
- 17.. *Ibid.*, at 263.
18. 128 L.Ed. 2d 699. This decision was reinforced in November of 1994 in *Harleston v. Jeffries*, 94-112. (See page 1 above for circumstances of case.)



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19. Electronic Citation: 2001 FED App. 0057p (6<sup>th</sup> Cir.).
20. 249 U.S. 47, 52 (1919).
21. 530 U.S. 703 (2000).
22. 805 F.2d 583, 584-85 (5<sup>th</sup> Cir., 1995). Martin had put down his students and their work with such otherwise protected epithets as “bullshit,” “hell,” “damn,” and “sucks.”
23. 805 F.2d 583, 585 (5<sup>th</sup> Cir., 1995). The Sixth Circuit then followed suit in Drambrot v. Central Michigan U., 55 F. 3d 1177, in a case where a coach used the word “nigger” to motivate his players during a locker room speech.
24. See John Hulshizer, "Securing Freedom from Harassment without Reducing Freedom of Speech: Doe v. University of Michigan," Iowa Law Review (January, 1991), pp. 392-98. See also Richard Delgado, "Campus Anti-Racism Rules: Constitutional Narratives in Collusion," Northwestern University Law Review (Winter, 1991), pp. 375-378; J. Peter Byrne, "Racial Insults and Free Speech Within the University," Georgetown Law Journal (February, 1991), pp. 425-30; Rodney A. Smolla, "Academic Freedom, Hate Speech, and the Idea of a University," Law and Contemporary Problems (Summer, 1990), pp. 211-16.
25. 721 F.Supp. 863 (E.D. Mich. 1989).
26. *Iota XI Chapter of Sigma Chi Fraternity v. George Mason University* 733 F.Supp. 792 (E.D. Va. 1991).
27. *Ibid.*, at 793. See also *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*.
28. The issue of privacy on these system is addressed in the Electronic Communication Privacy Act of 1986.
29. See also D. L. Wilson, "Suit Over Network Access," Chronicle of Higher Education (November 24, 1993), pp. A16-17.
30. *U.S. v. Baker*, No. 95-80106 (E.D. Mich June 21, 1995).
31. See particularly 477 U.S. 57, 60 (1986).
32. 477 U.S. 57, 64 (1986).
33. 503 U.S. 60, 75 (1992).
34. 510 U.S. 17, 21 (1993).

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35. 503 F. Supp. 383 (E.D. Pa. 1976), modified, 564 F. 2d 126 (3d Cir. 1977), and cert. denied, 435 U.S. 908 (1978).
36. at 65.
37. at 21-22.