Spring 2019

Free speech on public college campuses

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Free Speech on Public College Campuses

An Honors College Project Presented to

the Faculty of the Undergraduate

College of Arts and Letters

James Madison University

by Christopher Emery Gothard
May 2019

Accepted by the faculty of the Department of Political Science, James Madison University, in partial fulfillment of the requirements for the Honors College.

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This work is accepted for presentation, in part or in full, at Madison Union on April 25, 2019 at 3:30pm.

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Acknowledgements:

There are several people that I would like to thank for their assistance with this project and their continuous support. First, Professor Elaine Chisek, the chair of my thesis project, was instrumental in helping me complete this paper. Her legal expertise was crucial in aiding my understanding of new concepts and terms. Her consistent availability and willingness to assist me was also pivotal in the completion of this thesis. Dr. Valerie Sulfaro, one of my readers, also played an essential role in helping me produce a paper that I can be proud of. Her insightful feedback and her skills as a political scientist aided me in creating a solid theoretical framework for this thesis. Professor Lucy Malenke, another one of my readers, was with me from day one. Her support and suggestions aided me in developing my topic and in structuring my paper appropriately. Dr. Hak-Seon Lee, my academic advisor and the head of the political science Honors College colloquium, was critical in my completion of this project. His unwavering support and guidance were key to me staying the course. Last, but certainly not least, I would like to thank my family who encouraged me throughout this entire process and gave me the necessary motivation to complete a work of this magnitude.

Abstract:

The topic of free speech has become increasingly publicized and debated recently. With cases of speech being suppressed coming to light all across the country, it is apparent that there has been a tremendous shift in views on college campuses on the right to free speech. Through trying to balance an inclusive society with the right of all to speak freely, the First Amendment right to free speech and the applicable case law have begun to be inconsistently interpreted, specifically on public college campuses. Whether by imposing security costs on speakers, solely utilizing free speech zones, or allowing the heckler's veto to be effective, schools have repeatedly permitted or taken part in the restriction of peoples' constitutionally guaranteed right to free speech. By reviewing scholarly articles and court cases, this honors project will clarify what limitations, if any, are constitutionally allowed on the First Amendment right to speak freely. Through examining examples of religious, political, and hate speech on public college campuses, this project will demonstrate how inconsistent interpretations of the Constitution and case law by college administrators has resulted in the biggest threat to students' free speech rights.

Literature Review:

The constitutional right to free speech is a foundational principle in America. However, there has been a profound shift in views of this First Amendment right, specifically at public colleges. Previously, colleges had a deep commitment to free speech and free expression on campus (Creeley and Stone 2015). Advertising higher education as the marketplace of ideas, there was a general expectation that contrasting views would be presented to students throughout the course of their time at university (Creeley and Stone 2015). Now, higher education's commitment to free expression has begun to decrease with the implementation of institutional policies and practices that limit free speech in an effort to promote an inclusive and tolerant society (Prager 2017).

Examples of this shift are rampant. Some schools, like UC-Berkeley, have had groups riot in an attempt to prevent speakers with opposing ideologies from giving a speech (Svrluga 2017). Other schools, like Texas Tech University, have recently had their speech policies challenged in court, which helped to clarify what limitations can and cannot be placed on the right to speak freely (Modesti 2018*, Roberts v. Hagan* 2004, *University of Cincinnati Chapter of Young Americans for Liberty v. Williams* 2012). According to experts who testified before Congress, this shift in view has led to a time with immense inconsistencies in the interpretation of the freedom of speech (Prager 2017, Shapiro 2017, Strossen 2017, Zimmerman 2017).

This shift can be seen in a recent nationwide poll conducted by Gallup of just over three thousand students. First, the survey found that 61% of students feel that the campus climate at their university prevents people from saying what they believe (Jones 2018). This illustrates the shift on college campuses- students do not feel comfortable honestly and openly sharing their

viewpoints within the marketplace of ideas that was once a key piece to higher education. Secondly, this poll found that a majority of students believe that hate speech does not deserve First Amendment protections (Chokshi 2018). This directly opposes the Supreme Court's unanimous ruling in *Matal v. Tam* (2017) that hate speech is constitutionally protected speech. Additionally, this poll also found that, when forced to choose between the two, a majority of students valued inclusivity over the right to speak freely (Chokshi 2018). This poll's demonstration of students' preference for inclusion explains why university administrators are hesitant to make revisions and adjustments to their speech policies and practices governing student expression on campus as courts clarify what is permissible.

What is Free Speech?

The First Amendment to the United States Constitution provides an explicit protection for the freedom of speech. It says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This means that the federal legislature cannot craft any legislation that would infringe on the right of citizens to speak freely. Court cases have further defined and clarified the founder's definitions, and while doing so, made apparent that some restrictions are constitutionally allowed, while others are not.

Many cases in the early 1900s focused on specific areas that fall within the overarching category of free speech. Topics like imminent danger, fighting words, and compelled speech were brought before the court. These decisions that were handed down by the Supreme Court worked to apply the First Amendment to a number of narrow issues that arose in the country.

This resulted in definitions that were evolving, having the newest cases alter the definition by superseding previous rulings. These cases led up to some of the most impactful decisions from the Supreme Court on the topic of free speech.

In the case *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court ruled that students' right to free speech was infringed upon when the school system prohibited the wearing of black armbands in protest of the Vietnam War. This decision was important because it took a literal approach to the First Amendment. The opinion written by Justice Fortas, says, "The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says" (*Tinker v. Des Moines Independent Community School District* 1969). This case attempts to clarify the extent of the First Amendment by reinforcing the original intent of the Founders, that the government cannot craft legislation that restricts speech on the basis of its content.

This idea has been repeatedly reaffirmed by the Supreme Court (*Rosenberger v. Rector and Visitors of University of Virginia* 1995). However, the court has upheld specific limitations on the right to free speech that are content-neutral. The most common content-neutral restriction is the time, place, and manner regulation (*Roberts v. Haragan* 2004). For example, a city can prohibit signs from being posted on public utility poles as a manner restriction, as long as there are alternative ways to share the desired message (*Members of City Council of Los Angeles v. Taxpayers for Vincent* 1984). When, where, and how people express their speech can be regulated, as long as speech is not limited on the basis of the content of what is being said.

Brandenburg v. Ohio (1969) is known as a landmark case in American understanding of free speech rights (Hudson, 2009). Brandenburg was an Ohio KKK member who advocated for

violence against the government. Ohio had a law that prohibited advocation of violence, and, through this case, the Supreme Court ruled that law to be unconstitutional. The Supreme Court determined that speech that discusses the need for violence to achieve a certain result is not equivalent to actually preparing people to act violently. This case overturned several previous rulings, including *Schenck v. United States (*1919*)* and *Whitney v. California (*1927*)*, by changing the court's stance on the definition of "clear and present danger" (*Schenck v. United States* 1919). This definition was replaced with the current phrase of "inciting or producing imminent lawlessness" (*Brandenburg v. Ohio* 1969). This restriction on free speech is what makes it illegal to falsely shout "fire" in a theatre.

The Supreme Court also said that obscenity (*Roth v. United States* 1957), defamation (*Beauharnais v. Illinois* 1952), and "fighting words" (*Chaplinsky v. New Hampshire* 1942) can all be limited. Inciting violence, direct threats, and specific harassment incidents are also not protected by the constitution. Therefore, the right to free speech is not exhaustive, and it can be restricted in a few, explicit instances (Lawrence 2017).

Free Speech on College Campuses:

The Free Speech Movement of the 1960's originated at University of California-Berkeley, UC-Berkeley. While attempting to build support for the ongoing Civil Rights Movement, students faced unexpected opposition from the university administration (Cohen, 1985). With the UC-Berkeley Regents being predominately right-wing and against activism on behalf of the Civil Rights Movement, the school administration began enforcing rules that restricted political organizing for off-campus causes (Schrecker, 2003). Many students found this

policy unconstitutionally limiting of their First Amendment right to free speech and took action accordingly (Cohen 1985).

On October 1st, 1964, a UC-Berkeley student, Jack Weinberg, protested the institution's policy by setting up a table to pass out information on racial equality (Eynon 1989). Police enforced the university regulation and arrested Weinberg (Cohen 1985). Once he was placed in the police car, people witnessing the situation took action. Nearly one thousand students surrounded the police car and prevented Weinberg from being taken to jail (Eynon 1989). After this incident, students began organizing other protests on UC-Berkeley's campus and collectively brought about change to the school's policy- the university would not restrict speech or advocacy on the content of the speech (Cohen 1985). This movement took the nation by storm, reaching campuses all across the country creating change similar to what the students at UC-Berkeley were able to achieve. The Free Speech Movement was foundational in cementing the right to free speech being protected on public college campuses (Schrecker 2003).

However, in the current political moment, some university administrations are reverting to the suppression of speech (Lawrence 2017, Shapiro 2017, Strossen 2017). Right now, there are numerous ongoing legal cases and conflicts about the right to free speech on college campuses. Pierce College, UC-Berkeley, the University of Minnesota, and the University of Michigan are just some of the institutions facing challenges in court to their speech policies (Modesti 2018, Svrluga 2017).

One way that institutions are making it challenging for outside speakers to speak freely on campuses to students is by having organizations that invite controversial speakers onto campus foot the bill for security (O'Shaughnessy 2017). Often times, costs can be extremely

high, sometimes high enough to prevent the organization from being able to have their event, due to protests by opposing groups that take place. The Supreme Court has ruled that it is unconstitutional for an institution to impose monetary burdens on specific speakers based on the content of their speech (*Rosenberger v. Visitors and Rectors of University of Virginia*). However, some schools still attempt to bypass the ruling. The University of New Mexico, for example, attempted to charge the College Republicans chapter over three thousand dollars for security costs when they invited Milo Yiannopoulos to speak (O'Shaughnessy 2017). This is just one of many examples out there that try to bypass the Supreme Court's ruling- charging security costs for controversial events is unconstitutional, because it imposes financial burden based on content (*Forsyth County v. Nationalist Movement* 1992).

Another mechanism that universities are using to limit free speech is the implementation of free speech zones on campus (Modesti 2018). Free speech zones are specifically defined areas on campus, usually fairly inaccessible to most student traffic, where students can speak freely on any topic that they wish. Schools with free speech zones, typically, do not allow that same freedom of speech in areas outside of the designated zone, wherein lies the main issue. This concept has been repeatedly struck down as an unconstitutional limitation on free speech (*Roberts v. Haragan* 2004, Modesti 2018, Georgetown Law 2017). This question arose in the court case *Roberts v. Haragan (*2004*)*, where the court ruled that Texas Tech University's free speech zone (a twenty-foot gazebo) was not constitutional. Despite this ruling, free speech zones are still prevalent in public universities across the country (Modesti 2018, Georgetown Law 2017).

The heckler's veto has also become commonplace at institutions nationwide. Defined as "the disruption of a speaker's presentation by audience members who disagree with the message

or messenger," the heckler's veto is being used by student groups to deny the right to free speech to speakers that those groups disagree with (Snyder 2002, 103). Numerous speakers, like Charles Murray, Allison Sanger, and Pete Singer, have unconstitutionally had the heckler's veto utilized to impede their free speech rights (Calvert 2017, LaBossiere 2017). As Justice Douglas wrote in his dissenting opinion in *Feiner v. New York* (1951), the government, the police force in particular, is responsible for protecting the free speech rights of citizens from being suppressed by hecklers. Despite rulings on security fees, free speech zones, and the heckler's veto, methods like these that restrict free speech on campuses are still being deployed.

Usually justifying the limitation as an effort to promote inclusion, administrations have reverted back to placing certain restrictions on what is permitted speech and what language is not allowed (Hentoff 1991, Prager 2017). The shift in views on the right to free speech and the inconsistent interpretations of the right to free speech also stem from the desire to foster tolerance and inclusion. Presently, colleges are creating safe spaces, areas where students can avoid thoughts they find offensive (Prager 2017, Shapiro 2017). According to Prager who provided testimony to Congress, this new practice shelters students from reality and allows them to operate in environments without opposing viewpoints (Prager 2017). Additionally, many on campuses advocate for school policies that prohibit offensive speech (Shapiro 2017, Lawrence 2017). In that effort, some institutions, like Drexel University, have begun requiring trigger warnings (Harris 2016). This is when people have to alert others before they engage in speech that might be found offensive- which can have a chilling effect on some students' conversations in the classroom on controversial issues (Levinovitz 2016). Many times, these new practices are implemented in an effort to combat offensive speech, which includes hate speech, and while

doing so, effectively silence unpopular speech and restrict the right of students to speak freely on college campuses (Strossen 2017).

My Project:

Through reviewing literature and court cases on this issue, this project will work to show the inconsistencies in interpretations and application of the First Amendment on public college campuses among college administrators. It will help students to be familiar with their right to free speech and understand what restrictions can and cannot be placed on it. This project will empower students to stand up to unconstitutional limitations on their right to speak freely. As Frederick Lawrence, a congressional witness representing the Anti-Defamation League (a group that fights anti-Semitism), put in his testimony, "the best means of helping people understand and exercise their First Amendment rights is to educate them," (Lawrence 2017, 8).

This honors capstone project will be a literature review of three different categories of controversial speech—religious speech, political speech, and hate speech. These categories were chosen, because they are the types of speech that are most commonly suppressed on college campuses (Levinovitz 2016). As a result, these categories of speech are the most common cases heard by the judicial system. Additionally, incidents involving religious, political, and hate speech are commonly the stories that are covered by the media, drawing major public attention to these areas.

Through examining specific examples that fall under each of these categories, the reader will be able to understand what speech is protected under the Constitution and what regulations on speech are permissible. The project will conclude with an accessible and easy-to-understand

layout of the unprotected and protected categories of speech that will serve as a resource for students to navigate the complex issues surrounding free speech.

Chapter One: Religious Speech

Introduction:

Religious free speech issues on public college campuses have become more and more prominent in recent years, but the foundational protections of religious speech have a long history. The ability to have a free exchange of ideas and challenge beliefs was essential to the Founder's vision of America. Civil discourse was not just protected for maintaining the ability to govern oneself, but also to arrive at the truth, whatever that may be.

As John Stuart Mill said, prohibiting the freedom of expression "[deprives people] of the opportunity to exchange error for truth (Mill, "On Liberty" Chapter II). He continued his essay by discussing what is lost when speech is suppressed or censored. Mill noted that the viewpoint being silenced could in fact be the true. He also said that ideas should have the opportunity to battle each other, through discussion and free exchanges, so that the truth is reached. While Mill's beliefs ring true in multiple spheres, it is undoubtedly applicable to religious speech.

America has extensive ties to religion. Some of the first groups to come to the colonies from England were fleeing religious persecution. Faced with having to abandon their convictions, many chose to come to America where they could remain true to their beliefs. The new world was a place where people were free to practice their religion in their communities as they saw fit, something that very often involved sharing their beliefs with others.

This respect for freedom of religion, especially in regard to its connection to the freedom of speech, was reinforced in the Bill of Rights of the 1787 United States Constitution. In the same section of the Bill of Rights that the Founders protected free expression, the first amendment, they also protected the freedom to exercise one's religion. While the government

cannot establish a religion for the country, individuals have the liberty to exercise their religious beliefs to the fullest extent.

Modern legal scholars still agree with our Founders on the importance of free speech, specifically in the religious context. Chemerinsky and Gillman, both law school professors in the University of California system, gave their perspective on the topic in their new book, Free Speech on Campus. In it, they recognize that "free societies are premised on freedom of thought and freedom of conscience—the right to have beliefs without risking punishment for the holding of unapproved beliefs and ideas" (Chemerinsky & Gillman, 24). They also assert that this protection is beneficial in preventing conformity and preserving true diversity. Chemerinsky and Gillman note that "there is little value in allowing people to develop their own conscience, their own commitments, and their own identities if the society then criminalizes the ability to express them to others" (25). These respected scholars understand how vital free speech is, including that speech dealing with religion.

In the Supreme Court decision *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), Justice Kennedy wrote:

> "[It is] something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history."

It is clear that protecting the freedom of expression, and also the freedom of conscience, is essential. With this in mind, this paper will look at three recent legal challenges where the right to speak freely on religious matters within a public college campus was heard before the

court. The judiciary worked to apply the protections granted by the First Amendment to each of these cases, despite them bringing different challenges and having their own circumstances.

Shift with College Administrators:

Religious speech enjoyed increased protections as a result of the Free Speech Movement. However, religious speech began facing suppression by college administrators among efforts to limit hate speech on campus. "…Between the late 1980s and early 1990s almost 200 institutions of higher education adopted speech codes to help regulate the 'tension between free speech and the sort of insensitive expression that harms equality, diversity, and civility.' The goal of these speech codes was to prohibit and penalize any student or campus visitor who would offend a fellow student in regard to the listener's…religious affiliation" (Harris & Ray, 2014). Some view certain religious beliefs as offensive for not being inclusive to all people, and this was the motivation for the college administrators' efforts to implement and enforce speech codes. This history relating to religious speech on campus is a major part of the discussion of free speech on college campuses and continues to lead to legal challenges in cases where students believe that their religious speech is being unconstitutionally suppressed.

Uzuegbunam and Bradford v. Preczewski et al.

- Heard in United States District Court—Northern District of Georgia
- Decided on May 25, 2018
- Opinion Authored by Judge Eleanor Ross

Background:

Chike Uzuegbunam was distributing religious literature on the campus of Georgia Gwinnett College (GGC) while a student at the institution. Campus police stopped him, telling him that he was not allowed to leaflet at that location. The officer took Uzuegbunam, at his request, to the Head of Access Services and Information Commons at GGC who explained that the written materials could only be passed out within the two speech areas that require prior reservation.

In August 2016, Uzuegbunam requested, and was approved, access to the speech area for three different days. On his first reserved day, he went to the area where he began "verbally [sharing] his religious views and [distributing] his religious literature" (*Uzuegbunam and Bradford v. Preczewski* 2018). After a brief amount of time—about a half hour—campus police arrived and told him that he could not continue speaking publicly in the speech area due to complaints about his expression received by GGC. The officer at the scene told Uzuegbunam that his speech disturbed the peace and tranquility of those in the vicinity and, therefore, was deemed "disorderly conduct." The other Plaintiff, Joseph Bradford, claims to want to speak publicly and distribute literature like Uzuegbunam, but the college's "policies and practices prevent him from doing so" (*Uzuegbunam and Bradford v. Preczewski* 2018).

Main Policies in Question:

The court looked at the policies in affect at the time of these incidents, referred to as the Prior Speech Zone Policy and the Prior Speech Code Policy. The Prior Speech Zone Policy confined speech to designated speech zones on campus. Those zones were only available at specific times on certain days. Public speech was not permitted on campus without prior reservation with the college and granted permission to use the speech zone. Additionally, the policy "prohibited behavior which disturbed the peace and/or comfort of others" (*Uzuegbunam and Bradford v. Preczewski* 2018).

Plaintiffs allege that the Prior Policies violated their First Amendment rights to free speech and free exercise of religion as well as their Fourteenth Amendment rights to due process and equal protection. Also, Uzuegbunam and Bradford "[sought] declaratory and injunctive relief as well as damages" (*Uzuegbunam and Bradford v. Preczewski* 2018). It is important to note that after the lawsuit was brought against the defendants, GGC made changes to the speech zone and speech code policies by amending them.

The amended speech zone policy included numerous changes. First, students were now permitted to "speak on campus and distribute literature on a person-to-person basis in open outdoor areas of campus" (*Uzuegbunam and Bradford v. Preczewski* 2018). Reservations and approval were changed to apply only to individuals planning to speak to thirty or more people and to all people unaffiliated with GGC, specifically the public. Requests for use of the speech area were changed to only require notice two days prior to use and a response was mandated to be issued within one day of any requests. Also, any rejection of requests was made appealable. Written materials still had to be submitted with the reservation form, but the amended policy made clear that denial of the ability to distribute the materials could not be based on the content of what was included, nor the viewpoint being expressed. The college did reserve the ability to

relocate large groups—groups consisting of thirty or more—to alternate available spaces on campus to minimize disruptions and maintain a safe environment.

Establishment of Standing:

The court first looked to establishing jurisdiction, noting that the court can step in to provide relief in an ongoing situation. Judge Ross then proceeded to review the alleged violations to determine if the claims were moot, beginning with those of Uzuegbunam. Noting that he graduated from the college in August 2017, it was found that it was unlikely that he would have the same injury occur again. This led to the determination that his claims for relief were moot. However, Bradford was still enrolled as a student, so his challenges were heard.

Threshold Requirements:

The court looked at both the Defendant's motion to dismiss and the motion to dismiss for mootness. There are a couple of items that are reviewed to determine if a case is moot. First, it must be decided if it is likely that the alleged violation will not happen again. It must also be decided if it is unlikely "that the challenged practice will resume after the lawsuit is dismissed" (*Uzuegbunam and Bradford v. Preczewski* 2018). In the analysis of those two points there are three factors for consideration—first, whether the change, in this case the new amended policies, comes from considerable deliberation or whether the change is made to elicit a certain decision by the court; second, whether the so-called "challenged conduct" was ended "unambiguously;" and third, whether the government, or GGC in this case, is fully committed to the amended policies.

To determine if it is likely that the alleged violations will not recur, the court looks at the first test of whether there was substantial deliberation. To begin with, there was nothing to suggest

that the deliberation was not significant enough, especially with the policies being approved by the GGC cabinet. Also, the policies were amended ten weeks after the lawsuit was filed. The quick response "counts in [the] Defendants' favor" (*Uzuegbunam and Bradford v. Preczewski* 2018). While the court was uncertain about GGC's motivation for the amendments to the policies, it was still found that the prior policies would not be reenacted.

The court then moved to the second factor of consideration, if the change to the prior policies were unambiguous. This is determined by looking at whether the challenged conduct and alleged violations were ended by the implementation of the new amended policies. If the challenged parts of the prior policy were removed, the amended policy could moot the case.

This analysis of unambiguous change is first applied to the speech zone policy. The prior policy was applicable to both students enrolled at GGC and the general community. It laid out two "free speech expression areas" that restricted availability to certain days and times. A GGC employee had to authorize all usage of the area. Under the prior policy, the requesting party also had to submit a reservation form three days prior to the desired day of use as well as submit any literature or other materials that they wished to distribute to the official. There were fifteen criteria that needed to be met for authorization. After approval, the individuals could speak only in the assigned area at the authorized time.

For the case to be moot, the "gravamen," or the most serious part of the complaint, must be altered in a significant way. The gravamen of the alleged violations in the complaint was two-fold—first, the ability to distribute material required prior approval; second, the ability to speak anywhere on GGC's campus spontaneously was prohibited. Because both of these are now

permitted under the newly amended policies, the gravamen "has been changed in a fundamental respect" (*Uzuegbunam and Bradford v. Preczewski* 2018).

In the challenged speech code policy, there was a provision that disallowed disruptive and uncomfortable behavior. This was struck from the amended policies, thus changing the gravamen in a fundamental respect again.

After determining that the amended policies ended the challenged practices and procedures, Judge Ross looked at whether the end of these policies was unambiguous. There were three things that assured the court that the "termination [of the challenged conduct was] unambiguous" (*Uzuegbunam and Bradford v. Preczewski* 2018). First, GGC steadfastly asserted that there was no intention of reverting back to the prior policies. Second, the challenged provisions in the prior policy were fundamentally changed. Third, the new revised policies, the so-called 'amended policies,' were made public. For these three reasons the court concluded that there was an "unambiguous termination" of the prior policies (*Uzuegbunam and Bradford v. Preczewski* 2018).

The next step of review is to look at GGC's commitment to the amended policies. The amendments to the prior policies had been in place for more than a year when this case was being decided. That, in conjunction with zero evidence to suggest that GGC was going to revert to the prior policies, showed a commitment to the revised policies. Also, the college had already begun measures to implement the new policies, including the training of employees at GGC on the new policies. Because the court found that there was "no reasonable basis to expect that [GGC would] return to [the prior policies]," "the claims for injunctive and declaratory relief [were found to be] moot" (*Uzuegbunam and Bradford v. Preczewski* 2018).

Arguments Rejected by Court:

The final thing for the court to decide was "whether Plaintiff's remaining claim for damages [was] sufficient to support standing and save this case" (*Uzuegbunam and Bradford v. Preczewski* 2018). The Plaintiffs themselves clearly said in the amended filing that they were looking to receive nominal damages, not the compensatory damages that they later claimed. Analogizing the current case with *Flanigan's Enters. Inc, v. City of Sandy Springs, Georgia* (2014), the court decided that this case could not be saved by the last request—the request for nominal damages.

Ruling:

The Motion to Dismiss and the Motion to Dismiss for Mootness submitted by the Defendants were granted and the Motion for Oral Argument submitted by the Plaintiffs was denied.

Why This Case:

This case garnered a lot of public attention, including from the Department of Justice. One of the powers that the Attorney General of the United States has is to issue a statement of interest on behalf of the United States in pending legislation. Noting the importance of the right to free speech, especially on college campuses, the Attorney General claimed that the Plaintiffs had "properly pleaded claims under the First and Fourteenth Amendments" (United States Statement of Interest 2018). Saying that the interest of the United States in this case was to protect free speech rights on campus, especially those dealing with religion, the statement of interest goes through all of the alleged violations while lending the United States' opinion on the complaints. This statement was intended to be a resource for Judge Ross to use as she decided this case.

Additionally, two of the issues most common on college campuses were addressed in this case, free speech zones and prior restraints. GGC had a speech zone policy and a permitting process that was challenged for restricting spontaneous speech. While both of these were resolved to the court's satisfaction in the amended policies, they are questions that are commonly raised in free speech cases.

Also, the outcome of this case distinguishes it from others on the topic of free speech. Judge Ross ruled in favor of the university, but the reasoning behind that is important to note. With the university amending its speech policies, the gravamen of the complaint was changed significantly. This permitted Judge Ross to rule against the students bringing the challenge. However, this goes to show that even if the outcome reached by the court is not in favor of the students, the results of the case very well could be. The policies now in place at GGC better protect the right of students to exercise their First Amendment right to freedom of speech, the very thing the students sued to achieve.

Alpha Delta Chi—Delta Chapter v. Charles B. Reed

- Decision by the 9th Circuit of the United States Court of Appeals
- Decided on August 2, 2011
- Opinion Authored by Judge Pregerson

Background:

Alpha Delta Chi is a Christian sorority that required members to adhere to Christian orthodox beliefs. This sorority applied to become an officially recognized organization at San Diego State University (SDSU), in order to receive the special benefits that official organizations get from the university. Alpha Delta Chi had repeatedly been denied recognition, due to their requirement that all members in their organization be Christians. As a result of those rejections, Alpha Delta Chi did not receive the benefits that stem from being a recognized organization, prompting this court challenge to SDSU's nondiscrimination policy.

The court began their evaluation by giving some established precedent on cases with similar facts. The most closely related case was the Supreme Court decision in *Christian Legal Society v. Martinez* (2010). This case held that constitutionally protected rights are not violated when a school requires student organizations to open membership to all students to become officially recognized by an institution. Known as an all-comers policy, the school can condition student organization recognition with this viewpoint neutral and reasonable provision.

However, *Christian Legal Society* did not answer whether a narrower policy, one that banned restricting membership on "certain specified bases," was permissible (*Alpha Delta Chi v. Reed* 2011). This was the type of policy that SDSU had and what the 9th Circuit set out to decide.

Main Policies in Question:

The Plaintiffs had three arguments. First, they claimed that this nondiscrimination policy required the organization to allow people, namely non-Christians, into their group that would impede their ability to share the message of the organization. Second, the Plaintiffs claimed that the policy also violated their right to expressive association as protected by the First Amendment. Finally, and most important for this analysis, the Plaintiffs argued that the university had violated their free speech by "[excluding] them from an expressive forum on the basis of their religious viewpoint" (*Alpha Delta Chi v. Reed* 2011).

Forum Analysis:

The standard of review was the next source of debate. However, *Christian Legal Society* resolved this in the Supreme Court's determination that the limited-public-forum doctrine was the applicable analysis. This standard was deemed appropriate for all challenges of freedom of speech and freedom of expressive association to a school's rejection of organizational recognition for failing to meet a school's nondiscrimination policy. This standard was best, because it balanced the student group's rights with the school's interest as "a property owner and educational institution" (*Alpha Delta Chi v. Reed* 2011).

A limited-public-forum was defined by *Pleasant Grove City v. Summum* (2009) as government property made available to specific groups or made available for the discussion of specific subjects. *Rosenberger v. Rector and Visitors of the University of Virginia* (1995) set the parameters for restrictions in a limited public forum. "Restrictions that are reasonable in light of the purpose served by the forum" are permitted "so long as the government does not discriminate against speech on the basis of its viewpoint" (*Alpha Delta Chi v. Reed* 2011).

The court then furthered the distinction between limited public forums and designated public forums, all the while justifying the choice to view SDSU's policy as a limited public forum. It is important to note that the Plaintiffs argued that the student organization program at SDSU was better identified as a designated public forum. Citing *Lamb's Chapel v. Center Moriches Union Free School District* (1993), a designated public forum was defined as "government property opened for indiscriminate public use for communicative purposes" (*Alpha Delta Chi v. Reed* 2011). Also, the court has established that a designated public forum subjects speech restrictions to strict scrutiny, meaning the restriction must serve a compelling state interest and the means chosen to do so must be narrowly tailored. Thus, speech in a limited public forum has far less protection than it does in a designated public forum.

The 9th Circuit concluded that there were no substantial differences between the student organization program at SDSU from that in *Christian Legal Society*. Therefore, the court ruled that SDSU's program was also a limited public forum. That is because both programs have restrictions on public use, allowing only student organizations. Additionally, both institutions necessitated university approval for any use of the forum.

Threshold Requirements:

After the student organization program was deemed a limited public forum, the court went on to judge whether the nondiscrimination policy was reasonable in light of the purpose of the forum. The 9th Circuit began by discussing a previous case that they had decided—*Truth v. Kent School District* (2008). This case reviewed a high school's nondiscrimination policy that applied to officially recognized student organizations. The court determined that this restriction was reasonable in light of the purpose of the student organization program at the school.

The judges then looked to the analysis of this "reasonableness" standard put forth in *Truth*. In *Truth*, reasonableness was determined by looking to the program's constitution. Because Kent School District's student organization constitution contained "broad statements of purpose," the court understood the purpose of the program to be "[advancing] the school's basic pedagogical goals" (*Alpha Delta Chi v. Reed* 2011). Also, in the Supreme Court case *Hazelwood School District v. Kuhlmeier* (1988), the justices highlighted that a "part of a school's mission is to instill in students the shared values of a civilized social order" (*Alpha Delta Chi v. Reed* 2011). In *Truth*, they determined that one of these values is that of nondiscrimination.

Following the same procedure as that set forth in *Truth*, the court's first step was to review SDSU's Student Organization Handbook to figure out the purpose of the student organization program. In the section "Principles of Community" in the constitution, it was stated that one goal of the program was to promote nondiscrimination. This constitution was much more explicit than the provisions in *Truth* were, actually noting that one purpose of the program was promoting nondiscrimination. Due to this, the court found SDSU's policy to be reasonable in light of its purpose.

However, there is a second part to the reasonableness test—whether there are "alternative avenues of communication besides the forum from which they have been excluded" (*Alpha Delta Chi v. Reed* 2011). To demonstrate what passes this test, the court again used *Christian Legal Society*. In *Christian Legal Society*, the Plaintiffs still possessed numerous avenues to share their message. While the institution's student organization program was closed to them as an avenue for communication, the creation of social media and other technologies diminished the significance of the program for expressing their message.

Using the same analysis in the review of SDSU, the court noted that just like in *Christian Legal Society*, SDSU permitted unofficial organizations to use its facilities, occupy public areas, and pass out literature. Additionally, the Plaintiffs in this case had the same opportunity to share their views on electronic platforms. Because of these similarities, the court determined that SDSU's policy was as "credit-worthy" as *Christian Legal Society's* policy, and, therefore, SDSU's policy was reasonable in light of the purpose.

The next question for the court to take up was whether SDSU's nondiscrimination policy was viewpoint neutral, as the Plaintiffs had claimed that the policy was not. They also claimed that the nondiscrimination policy, even if it turned out to be viewpoint neutral, was not equally applied to all.

To begin this analysis, the court defined viewpoint neutrality by citing several cases. First, *Rosenberger's* definition of viewpoint discrimination was used, defining it as speech being restricted because of the speaker's ideology. Turning to *Perry Education Association v. Perry Local Educators' Association* (1983), the court noted that restricting speech because a public official objects to the viewpoint is unconstitutional. Furthermore, *Ward v. Rock Against Racism* (1989) said that viewpoint neutral policies that "incidentally burden some speakers" are permissible" (*Alpha Delta Chi v. Reed* 2011). Finally, in *Madsen v. Women's Health Center* (1994), it was said that the main consideration in assessing viewpoint neutrality is the purpose of the government.

The next step taken was to explain how the all-comers policy was viewpoint neutral. Because this nondiscrimination policy did not look at the content of any group's message, but rather applied the same standard to all groups, the policy was deemed to be justified. All groups were

treated the same—they were all expected to accept all members in order for the organization to be recognized.

However, the Plaintiffs argued that the nondiscrimination policy put forth at SDSU differed from *Christian Legal Society* in this respect, and, therefore, the holding in *Christian Legal Society* was not applicable. While the policy in *Christian Legal Society* disallowed all requirements placed on membership, the one in this case disallowed specific requirements placed on membership. The Plaintiffs claimed that this "discriminates on the basis of viewpoint because it allows secular belief-based discrimination while prohibiting religious belief-based discrimination" (*Alpha Delta Chi v. Reed* 2011). The court did not accept this argument, saying that it did not hold after closer scrutiny.

It was accepted by the court that the policy at SDSU did "incidentally burden" those groups that wanted to keep people out due to religion and did not have the same effect on groups that wanted to keep people out for other reasons that were not covered by the policy. Yet, the court found that because the Plaintiffs were unable to provide any evidence of the policy being implemented for the purpose of censoring the viewpoint of the Plaintiff, "this assertion is insufficient to prove viewpoint discrimination" (*Alpha Delta Chi v. Reed* 2011).

The court then went on to look at the purpose of the nondiscrimination policy to ensure that it was in fact viewpoint neutral. SDSU claimed that the policy was instituted to prevent discrimination and to guarantee equal access to all enrolled students. Citing the Supreme Court decision *Roberts v. US Jaycees* (1984), the 9th Circuit maintained that antidiscrimination policies that are designed to ensure equal access are viewpoint neutral. Additionally, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995), a provision in a public

accommodations law that prohibited discrimination on certain bases was found to be viewpoint neutral, noting that the key piece of the restriction was on the discriminatory conduct on specific grounds. Following this reasoning, the court found that SDSU's policy did not discriminate on speech based on its viewpoint, but rather was instituted to remove barriers to historically excluded groups.

Due to facts that were similar to the current case in this area, the court again turned to *Truth*. In *Truth*, the court "held that a high school's student organization program did not discriminate on the basis of viewpoint when it denied access to a religious student group for refusing to comply with a nondiscrimination policy prohibiting exclusion on enumerated grounds" (*Alpha Delta Chi v. Reed* 2011). The court also found that the rejection of the group from the school's student organization program was due to their discriminatory standards for membership, not on the content of their religious message. This determination in *Truth* forced the court to find that SDSU's policy was viewpoint neutral.

After finding that the antidiscrimination policy at SDSU was viewpoint neutral, the court had to review whether this policy unconstitutionally forced the group to allow members who "materially interfere with the message the group wishes to express" as laid out in *Boy Scouts of America v. Dale* (2000) (*Alpha Delta Chi v. Reed* 2011). The justices deciding *Dale* analyzed the Plaintiff's claim under the limited-public-forum doctrine that allows viewpoint neutral and reasonable restrictions. Using the same logic from *Dale*, the court found that SDSU's nondiscrimination policy did not violate the Plaintiff's right to freedom of expressive association by only recognizing organizations that met their viewpoint neutral and reasonable restriction. They reached this conclusion because the Plaintiffs had the liberty to express any message they

desired or determine their membership criteria. However, the Plaintiffs "simply cannot oblige the university to subsidize them as they do so" (*Alpha Delta Chi v. Reed* 2011).

While the court did recognize that the nondiscrimination policy was more burdensome to certain groups, they noted that it was not unconstitutional for having a differential impact on those groups that had "exclusionary membership policies." For these reasons, the 9th Circuit found that the SDSU policy was not materially different from the policy in *Christian Legal Society* and, therefore, was viewpoint neutral as written.

Judge Ripple also discussed this aspect in his concurring opinion, focusing on the unequal burden that religious groups face under SDSU's nondiscrimination policy. He noted that a majority of student organizations were able to exclude those that did not share the same common purpose or mission that the organization did. However, under this policy, religious organizations, and other organizations that are "defined by issues involving protected categories," did not have that same ability (*Alpha Delta Chi v. Reed* 2011). Because religious groups have a shared set of beliefs that are directly correlated with their shared status, religious organizations could not both abide by the nondiscrimination policy and define themselves. Judge Ripple concluded by saying that the result of SDSU's nondiscrimination policy was the marginalization of religious groups, due in large part to the lack of ability they had to exclude membership to those who did not share in their mission and values.

The next item the court reviewed was whether the nondiscrimination policy was uniformly applied. In *Truth*, the plaintiff claimed that the school district allowed certain groups to obtain waivers that exempted them from the nondiscrimination policy while not providing those waivers to other, religious, groups. The court found that this was a triable issue of fact and

remanded this part of the case for further proceedings. The case was remanded to determine the actual reason that these waivers were extended.

Much like in *Truth*, the Plaintiffs in this case also claimed that some exemptions to the nondiscrimination policy were granted to other groups, even some that were religious in nature. The court found this to be a triable issue of fact in this case as well and remanded this part of the case for further proceedings to determine the true reason for why these exemptions were granted.

Items Not Included in This Discussion:

It is important to note that the 9th Circuit also looked at alleged violations to the Plaintiffs' right to free exercise of religion and equal protection, but the discussion and decision are not applicable to this analysis of free speech cases.

Ruling:

In conclusion, the court found that "San Diego State's nondiscrimination policy, as written, [was] viewpoint neutral and reasonable in light of the purpose of the student organization program" (*Alpha Delta Chi v. Reed* 2011). Due to this determination, the court also found that the Plaintiffs' rights to freedom of speech and freedom of expressive association were not violated by the university. Additionally, as previously mentioned, a triable issue of fact did emerge as to the exemption of certain groups from the nondiscrimination policy—this part was remanded for further proceedings.

Why This Case:

This case covered the topic of free speech in a very different manner than the other cases had. Focusing on things like the permissibility of an all-comers policy, this case demonstrated

what is and is not allowed when dealing with criterion for membership. It also discussed how having different impacts on different organizations is allowed, in the scope of this situation. This case helps lay the framework for students looking to understand their rights in the context of the freedom of expressive association and free speech.

Justice for All v. Larry Faulkner

- Decision by the 5th Circuit of the United States Court of Appeals
- Decided on May 27, 2005
- Opinion Authored by Judge Jolly

Background:

The incident in question occurred at the University of Texas-Austin (UT-Austin). The Plaintiff in this case was the organization Justice for All, an anti-abortion student group at UT-Austin. The Plaintiff was challenging the literature policy at the university that required any materials that were to be distributed on campus to have the name of the organization or person who was distributing them. The Plaintiff argued that this literature policy was an "unconstitutional restriction on anonymous speech in a designated public forum" (*Justice for All v. Faulkner* 2005). UT-Austin claimed that this policy was viewpoint neutral and a reasonable restriction on speech in a limited public forum.

Justice for All completed two applications for the use of facilities on campus, asking for permission to display a large photographic exhibit on the main plaza of the university. Both requests were rejected, but the school did allow the group to put up the display at another location on campus twice. One of the times the display was up, officials from the university prohibited the distribution of leaflets by group members—the literature said, "Life is Beautiful—Choose Life" (*Justice for All v. Faulkner* 2005). It was undisputed by either party that the university intervention happened for one reason—the leaflets were not marked, leaving them untethered to Justice for All who was passing them out. After this suit was brought against numerous university policies, many of the policies were altered or removed. Only two remained, and one of them was dismissed during the district court hearing. The one being challenged before

the 5th Circuit was whether the university's literature policy was a permissible restriction on speech conducted anonymously in a designated public forum.

In the district court's ruling, it was found that UT-Austin, and any public institution, was a designated public forum when it came to student expression. The district court also found that the literature policy did not serve a significant state interest and the means chosen were not narrowly tailored.

Main Policies in Question:

The literature policy in question had two components. First, "anonymous publications [were] prohibited" and anyone involved in distributing them had the potential to face disciplinary action (*Justice for All v. Faulkner* 2005). The second part was that "all literature distributed on campus must identify the university person or organization responsible for its distribution" (*Justice for All v. Faulkner* 2005). When in the district court, the university claimed that this policy was put in place to prevent littering on their campus. However, on appeal, the university changed its tune, arguing that the policy was put in place to make sure that non-affiliated people or groups were not distributing material on campus.

In the appeal before the 5th Circuit, Justice for All claimed that the literature policy violated the Plaintiff's First Amendment rights, because it prohibited the anonymous distribution of materials by students on a public university campus. The next step for the court was to determine if anonymous leafletting was a right protected by the First Amendment.

Anonymous Speech:

Citing several cases, the court makes clear that it was an established precedent that anonymous speech falls under the protection of the First Amendment. This was because of the

history and tradition behind anonymous leafletting as a way of advocating or dissenting. The court also noted that restrictions to campus facilities were permissible, and somewhat frequent, at public universities. However, being a student grants access to the campus facilities for many purposes, one of which is speech. Due to this necessary identification, students rarely speak anonymously on public college campuses.

Nevertheless, after shedding the anonymity with university officials, the student does retain some level of anonymity with the other students and many of the school's employees. "This residual anonymity is no less critical to the expression of controversial ideas on university campuses than the right to more complete anonymity is to such expression in traditional public spheres" (*Justice for All v. Faulkner* 2005). After this determination, the court found that anonymous leafletting, like the one banned in the university's literature policy, was protected by the First Amendment.

Forum Analysis:

The court then proceeded to decide what level of scrutiny was applicable to the literature policy in question. Because the policy restricted speech on property owned by the government, it had to be determined what the proper forum classification was for UT-Austin's spaces. The 5th Circuit did this by reviewing Supreme Court precedent.

There are three possible forum classifications. The first is a traditional public forum, which receives the strictest scrutiny. On the other side of the spectrum is nonpublic forums, which "receive the most forgiving" scrutiny (*Justice for All v. Faulkner* 2005). The third, the middle option, is a designated public forum. Because UT-Austin did not fit into the classification of a traditional forum nor a nonpublic forum, the court decided that it must be a designated forum.

It is important to note that a designated public forum can be further broken down into two different forums—a designated forum that entails strict scrutiny or a limited forum that must meet the reasonableness standard. There was a two-part test laid out in *Chiu* for determining whether the intermediate public forum was a designated or limited forum. The first part dealt with the government's intent with the forum. The second part looked at "the nature of the forum and its compatibility with the speech at issue" (*Justice for All v. Faulkner* 2005).

Addressing the conversation on the type of forum, the court cited *Arkansas Educational Television Communication v. Forbes* (1998) which held that a forum can be designated for some and limited to others. The court mentioned this to ease the worries of the university that a finding other than the campus being a limited public forum, would expose all public universities to speech by anyone. After this clarification, the court moved on to *Chiu's* first test.

As *Cornelius* determined, a designated public forum is created only when the government is trying to establish a nontraditional forum for public speech. UT-Austin claimed that by having comprehensive regulations on speech, their intent was to make the campus a limited public forum. Through reviewing the University's Institutional Rules, the court concluded that the university had comprehensive time, place, and manner restrictions on speech that were permissible in any public forum. The University's Institutional Rules also guaranteed "all of the rights that the Constitution provides speakers in traditional public spaces," like only possessing restrictions that are viewpoint and content neutral (*Justice for All v. Faulkner* 2005).

Another tool used by the court to determine intent under *Chiu's* test was to look at a past decision that had no material differences from the UT-Austin regulations, *Hays County Guardian v. Supple* (1992). *Hays County Guardian* had rules that permitted the placement of

reasonable time, place, and manner regulations as long as they were nondiscriminatory. In both cases, the rules established a designated forum that was subject to only time, place, and manner restrictions and a few explicit content-based regulations.

When looking at the second component of *Chiu's* test, the court noted that a university campus was the proper place to speak and share viewpoints on significant issues. The university offered one reason to the contrary and that was that not permitting the anonymous distribution of literature prevented people unaffiliated with the university from leafletting, thus maintaining the campus for only students. However, the court found that this was "an argument that the literature policy serves a significant state interest, and thus survives strict scrutiny, rather than an argument for avoiding strict scrutiny altogether" (*Justice for All v. Faulkner* 2005). Therefore, the court found that the literature policy had to survive strict scrutiny to be permissible.

Strict scrutiny has several factors that must be met. To begin with, the restriction on speech must be content neutral. The restriction must also serve a significant state interest and have means that are narrowly tailored to meet that goal. Finally, ample alternative avenues for expressing one's message must be left open.

As was just mentioned, the University said that the policy was intended to prohibit individuals and groups from anonymously leafletting on campus. Thus, the university argued that the literature policy served a significant state interest by maintaining campus as a place for speech for only students and employees of the institution. Justice for All claimed that the literature policy was underinclusive to meet that goal, as seen by other methods of anonymous speech being protected under the rules of the university. "The space available for distribution of literature by students is reduced to the same extent where a non-affiliated person communicates

via anonymous picketing, as opposed to anonymous leafleting" (*Justice for All v. Faulkner* 2005). Due to the fact that only one of those was prohibited, the court recognized that the basis of the university's argument was "diminished."

The court did, however, note that preserving public college campuses for student use is a significant interest of the government. This led the court to the belief that the literature policy did serve a significant state interest. Also, the court determined that the literature policy maintained ample alternative avenues for communication, as Justice for All even acknowledged.

The main debate about whether the literature policy survived strict scrutiny, therefore, came down to whether the policy was narrowly tailored. Again, citing *Hays County Guardian*, the court defined a narrowly tailored regulation as one that "does not burden substantially more speech than is necessary to further the government's legitimate interest" (*Justice for All v. Faulkner* 2005). The university argued that the policy was narrowly tailored because it defined the campus forum by those eligible to speak. They continued by claiming that revealing the speaker's identity was all that it took to use the forum which made the literature policy narrowly tailored. Yet, the court found that this argument missed the point; the court said that the real question was whether every leaflet needed to reveal the speaker's identity, not whether the university could require a speaker to reveal his identity to use the forum.

The court determined that the literature policy of UT-Austin was not narrowly tailored to further the state's significant interest in preserving the forum. This was because "the literature policy [required] that the speaker identify himself, not just to certain university officials, but to every person who receives the literature being distributed" (*Justice for All v. Faulkner* 2005). The court found that speech could be substantially less burdened if the literature policy only

required the speaker to reveal his identity to university officials, which would also be sufficient in furthering the preservation of the forum.

The court then concluded the first amendment portion of the decision by reiterating that the literature policy was not narrowly tailored, because it "[sacrificed] far more anonymity than [was] necessary to effectively preserve the campus forum for its intended beneficiaries" (*Justice for All v. Faulkner* 2005). For this reason, the literature policy was found unconstitutional under the First Amendment.

Arguments Rejected by the Court:

In response to this finding, the university argued that different policies could produce new challenges for administration. The university had two claims—first, they argued that revealing one's identity to university officials to leaflet on campus could result in "claims of selective enforcement"; second, they argued that revealing one's identity to university officials to leaflet on campus could "increase the frequency of confrontations with university police" (*Justice for All v. Faulkner* 2005).

The court responded to both. As for the first, the court recommended transparency to combat the conception of selective enforcement. The court also made clear that the university must provide even enforcement of all speech regulations. In regard to the university's second claim, the court suggested giving students some choice as to how they reveal their identity, whether that be having a designated officer that can to be notified prior to leafletting or having the opportunity to reveal one's identity at the point of distribution.

Threshold Requirements:

The court was tasked with reviewing the remedy ordered by the district court. While Justice for All requested that the literature policy by found unconstitutional on its face by the district court, the court solely ceased enforcement of the literature policy as it related to the Plaintiffs. For technical reasons, the 5th Circuit could not further the scope of the remedy that the district court ordered. However, the court still made their concerns known.

First, the 5th Circuit noted that the proper decision was made that a facial challenge to UT-Austin's literature policy was "appropriate." In the district court decision, there was no evidence or reasoning for rejecting the facial challenge brought by Justice for All. This resulted in the circuit court questioning "why an as applied invalidation was ordered with this case" (*Justice for All v. Faulkner* 2005).

Second, the circuit court could not find a scenario where the enforcement of the literature policy would end without UT-Austin having to leave the policy completely. Therefore, the court found "that an injunction barring enforcement of the literature policy as applied to Justice for All would operate as a de facto facial invalidation" (*Justice for All v. Faulkner* 2005). For these reasons, the circuit court decided to remand the case back to the district court to make a decision on an injunction that would completely ban the literature policy.

Ruling:

In conclusion, the court found that the literature policy at UT-Austin violated the First Amendment. The court also remanded the case back to the district court to review the scope of their injunction.

Why This Case:

This case focused on the question of anonymous speech. In this ruling, the court reinforced the idea that anonymous speech is constitutionally protected under the First Amendment. By the court making clear the unconstitutionality of policies that prohibit anonymous speech, students can fully understand what restrictions are permitted to be placed on their speech and what restrictions are not permitted in that context.

This case is also unique in the fact that it utilized the *Chiu* test to determine whether an intermediate public forum is a designated forum or a limited forum. This two-part test is important, because what restrictions, if any, are permitted depends on what designation the forum is given.

It is also important to point out why this case falls into the religious speech category. "Justice For All (JFA) is a non-profit educational organization which partners with local church communities to train followers of Christ" to turn their hearts and minds against abortion (Justice For All, 2019). Fighting against abortion through reliance on Christian principles, this organization clearly fits into this category.

Conclusion:

The three cases discussed in this chapter presented many different issues and the judges that decided the cases had different approaches that shaped how they reached their decisions. It is important to look also look across the three cases to understand if the court is making consistent rulings and applying the same tests when dealing with similar situations because that dictates how students should set their expectations in free speech cases.

Main Policies in Question:

While all of these three cases raised First Amendment, free speech challenges in the context of religion, the policies being challenged differed significantly. In *Uzuegbunam and Bradford v. Preczewski et al*, the students questioned the restrictive nature of the free speech zone, the requirement that students get prior authorization to use the zone, and the specific policy that speech cannot disturb the comfort of others. In *Alpha Delta Chi—Delta Chapter v. Charles B. Reed*, the students challenged the school's policies, claiming that an all-comers mandate interfered with their ability to express their message, that that same policy was in conflict with their freedom of expressive association, and that they were excluded from a forum due to their religious viewpoint. In *Justice for All v. Larry Faulkner*, the students challenged the school's policy banning anonymous speech and anonymous distribution of literature.

Establishment of Standing:

The court only addressed the question of the Plaintiffs' standing in *Uzuegbunam*. In that case, the court noted that to have standing, the plaintiff must still be under the jurisdiction of the challenged policies. In short, the court has to be able to provide relief from the policies and that cannot happen when the plaintiff is no longer a student at the university.

Forum Analysis:

The forum designation is a key part to determining whether a violation of rights occurred, because the amount of protection for speech is determined by the classification of the forum. In *Uzuegbunam*, the court did not review the type of forum as they were solely determining if the case was moot. In *Alpha Delta Chi—Delta Chapter v. Reed*, the court did go through the process of designating the forum. Understanding the similarities of this case to *Christian Legal Society,* the court was able to decide that the same designation would be proper—finding it to be a limited public forum. The court also believed that designation to be best, because it balanced the student group's rights with the interests of the institution. This also dictated that the reasonableness test be used in the review of this case.

The court also addressed the proper forum designation in *Justice for All v. Faulkner*. It was determined that the forum would not properly be characterized as a traditional public forum nor a nonpublic forum, thus leaving a designated public forum. Then to decide whether the forum was a limited public forum or a designated public forum, the court used the *Chiu* test, looking at the intent and nature of the forum. After reviewing those pieces, the court ultimately characterized the forum as a designated public forum, thus requiring strict scrutiny to be used in this case.

Threshold Requirements:

The threshold requirements differ significantly depending on what the parties involved are asking the court to review. In *Uzuegbunam*, the defendants submitted a motion to dismiss the case for mootness, because they had made amendments to the policies that were being challenged. That dictated that the court had to review whether the injury was not likely to recur

and whether the institution would not likely revert to the old polices at the conclusion of the case. To review those two questions, the court looked at whether the institution had significant deliberation on the new policies, whether the challenged policies were ended unambiguously, and whether the institution was fully committed to the new policies. A review of a motion to dismiss for mootness also looks at whether the gravamen of the policies in questioned were altered enough that the challenge would be moot.

In *Alpha Delta Chi—Delta Chapter v. Reed*, the standard of review was determined by the forum designation. As mentioned, designating the forum as a limited public forum meant that the case would be using the reasonableness standard. This required the court to look into whether the policies were reasonable in light of the purpose of the forum and whether the policies were viewpoint neutral, which in turn dictated that the court also review whether there were alternate avenues of communication available and whether the policies were uniformly applied.

In *Justice for All v. Faulkner,* the circuit court was tasked with reviewing the district court's remedy. This required the circuit court to go back through the case and determine if the district court's ruling was correct. While the 5th Circuit did come to believe that the scope of the remedy should have been broader, the circuit court did not have the authority to make that change themselves. This resulted in the 5th Circuit remanding the case back to the district court to revisit the remedy they issued.

Conclusion:

All in all, these cases presented very different questions regarding the freedom of speech on public college campuses. While the challenges differed, the court's processes were consistent

throughout the three cases. This consistency is vital to college students being able to fully understand what their free speech rights are in more specific terms.

Chapter Two: Political Speech

Introduction:

The right to freedom of speech is an integral part of America. This is never more true than when looking at the importance of protecting speech that is political in nature. As countless people who proceeded us have made apparent, democracy relies on the right to free speech—democracy is not possible without this guarantee.

Philosopher Alexander Meiklejohn made this abundantly clear through his work in this area. "Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community" (Meiklejohn, 88). He continued by noting that, "the primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life" (Meiklejohn, 88-89). According to Meiklejohn, the public has to be informed on issues pertaining to their government, and these issues cannot be communicated without the protection of free speech. Thus, free speech is necessary for successful self-governance.

John Stuart Mill made similar arguments. In his work, *On Liberty*, Mill presented two premises. First, all speech must be protected, because "the opinion which it is attempted to suppress by authority might be true" (Mill, Chapter II). Second, if an idea "is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth" (Mill, Chapter II). To Mill, in order to arrive at the truth, freedom of speech must be a protected principle. Making decisions based on the truth is necessary for proper self-governance. It is important for the public to have access to the truth in order to make educated decisions about how they are to be governed.

Another great thinker in history and the Father of the Constitution, James Madison, also emphasized the importance of free speech in a democracy. He said, "free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right" (VA Resolutions, 1798). The right to self-government, as he designed in the Constitution, would not be possible without the protection of free speech. The right to self-govern, among other rights, is best protected through the guarantee issued under the First Amendment—the right to freedom of speech.

Modern scholars follow the same logic as these scholars of the past. The book Free Speech on Campus also discusses how imperative free speech is to democracy. "Freedom of speech is essential to democratic self-government because democracy presupposes that the people may freely receive information and opinion on matters of public interest and the actions of government officials" (Chemerinsky & Gillman, 25). Just as Meiklejohn noted, the information necessary to make decisions on issues pertaining to the government is communicated under the protection of the First Amendment right to speak freely. The authors also note that political minorities, including dissidents, rely on the right to free speech to share objections and advocate for viewpoints that are not mainstream.

Despite widespread agreement of the importance of protecting political speech, some in higher education have not applied these principles to their policies and practices. Many of these instances have resulted in a court challenge to address the claimed unconstitutional provisions. Three of these lawsuits are explained and discussed in this chapter.

Shift with College Administrators:

Protection for political speech on campus was very strong at the end of the Free Speech Movement. With the catalyst for this Movement being the Civil Rights Movement, politics, specifically achieving equal rights for people of all races, played a major role in the fight for the freedom to speak freely on political issues. After successfully getting political speech protected from university administrators, students began facing increasing suppression of speech in the years that followed. In the 1970s, students and workers engaged in uprisings to achieve political change that "[damaged the] rapport that administrators had inside the upper echelons of society. Administrators aimed to rebuild this rapport [by] showing that they could have a 'safe and orderly' campus" (Strong, 2013). Order on campus was restored by "limiting political freedoms" of students and suppressing students' free speech rights (Strong, 2013). Efforts to restrict political speech have continued, and this alleged suppression is still a major part of the discussion on free speech on campus.

Shaw v. Burke et al

- Heard in United States District Court—Central District of California
- Decided on January 17, 2018
- Opinion authored by Judge Otis D. Wright, II

Background:

Pierce College is a part of the Los Angeles Community College District. Kevin Shaw, a student at Los Angeles Pierce College, took on both the college and the district with his facial and as-applied challenges to their speech policies. Plaintiff Shaw encountered these policies in November of 2016, when he was handing out Spanish-language versions of the Constitution and having conversations about the speech policies at the college. This all occurred outside of the Free Speech Area—an area that made up 0.003% of Pierce College's campus—leading to a school official informing him that he was violating college's policies. Shaw then filled out the proper permit and continued his activities.

At another time, Shaw was again distributing literature outside the boundaries of the Free Speech Area, but, this time, he was not detected. While engaging in this behavior, Shaw noticed a protest taking shape outside of the Free Speech Area. He claims that this is an example of selective enforcement of the policies by Pierce College. Shaw wanted to speak freely outside of the designated areas at the time the court was reviewing the matter, but he was apprehensive to do so due to the threat of disciplinary actions.

Main Policies in Question:

A few of the rules enacted by the District for colleges in their system, along with rules specific to Pierce College, were explicitly claimed by Shaw as unconstitutional. Those included policies that declared the campus a non-public forum, at least all areas outside of the Free Speech

Area, a policy that permitted the distribution of literature only within the Free Speech Area, a permitting procedure that was required to access the Free Speech Area and to distribute any materials, among other rules. Additionally, all of the rules were not published, causing many students to be unaware of the policies that they had to abide by and also opened the students up to disciplinary measures for not following those rules.

Threshold Requirements:

Shaw sued the institution for violating his First Amendment right to free speech. The defendants, officials at the college, responded by submitting a Motion to Dismiss.

The court discussed the three reasons that can be cause to dismiss a case. "Lack of a cognizable legal theory or insufficient facts pleaded to support an otherwise cognizable legal theory" are two reasons to grant a motion to dismiss (*Shaw v. Burke* 2018). The third reason is if the court lacks "subject matter jurisdiction" (*Shaw v. Burke* 2018). For the case to continue, it must meet the plausibility standard that requires the court to construe all allegations "as true and in the light most favorable to the plaintiff" (*Shaw v. Burke* 2018). Using common sense and past experience, the court must determine if the allegations are plausible on their face.

The Defendants had five claims that they thought merited grounds for dismissal. The court addressed each of them.

Establishment of Standing:

Two of the claims for dismissal dealt with the Plaintiff's standing. Standing typically needs "injury in fact, causation," and that the injury can be relieved by a court decision in the

Plaintiff's favor. The court looked at Shaw's challenges to Pierce's policies as applied and on their face to determine his standing.

Shaw's claim that Pierce officials, when enforcing their speech policies, mandated that he get a permit to continue his activities, was example enough of an injury to establish his standing in his challenges on the policies as applied. His facial challenge was a little more complex due to it being a 'pre-enforcement standing' issue. To evaluate this, the court has three parts to look into. First, there has to be a 'reasonable likelihood' that the policies being evaluated will be enforced. Second, the Plaintiff has to show an intent to violate the policy in question. And lastly, the Plaintiff has to make clear that the policy is applicable to them. The court noted that examples of enforcement of the challenged polices in the past are good indicators of the likelihood of the policy being enforced again in the future.

In regard to the first part of this evaluation, the court determined that based on Shaw's experience when passing out the Spanish-language versions of the Constitution, the likelihood of future enforcement is adequate. For the second part, Shaw had noted in the record and demonstrated through his actions that he intended to disregard the school's policies and continue to behave in a manner that violated the policies. The court determined that he adequately met the second part of the pre-enforcement test. When looking at the final part of this test to determine standing, the court finds that by ruling for the Plaintiff in this case, Shaw will be able to speak freely without the threat of discipline, thus meeting the third part.

Another of the five claims made by the Defendants as grounds for dismissal dealt with Shaw's standing as well. Defendants' claim that the Plaintiff did not "sufficiently allege that Defendants caused Shaw's injury" (*Shaw v. Burke* 2018). However, in the record, Shaw gives

specific examples of injury caused by the Defendants. Also, due to the fact that Shaw is asking the court for injunctive relief, his only requirements are to challenge a policy as unconstitutional and name someone at the school who can provide relief if the court so orders. Again, the court denied the motion to dismiss on these grounds.

Other Claimed Ground for Dismissal:

Another of the claims by the Defendants was that Shaw failed to make a First Amendment claim. The Plaintiff responded by claiming that the Free Speech Area in place at Pierce College does not qualify as a "reasonable time, place, or manner restriction" (*Shaw v. Burke* 2018). Plaintiff also claimed that Pierce College implemented an impermissible prior restraint through their permit policy. To determine how the school can regulate speech, the type of forum must be decided. This decision does contain a discussion of the different fora available and the standards associated with each, which was addressed in the first chapter of this paper.

Forum Analysis:

The Plaintiff claims that Pierce College is a traditional public forum and contends that the most restrictive forum that the college can be is a designated public forum. The Defendants cite the District's rules declaring all campuses in the system to be non-public fora. To determine if the campus is a traditional public forum, there are three items for the court to consider—first, "actual use and purposes of the property"; second, the "physical characteristics" of the property; and third, "the traditional and historic use" of the property and those similar to it (*Shaw v. Burke* 2018). Through looking at the descriptions of the areas on Pierce's campus given to the court, it is determined that the open areas at Pierce College would be properly designated a public forum. While addressing the final part of the criteria to be considered, the court noted the traditional use

of open areas on college campuses and determined that those areas would be correctly labeled as traditional public fora.

The court then looked at whether Pierce College had a significant interest in having these policies. Both parties agree that the school does have a significant interest in having some speech policies. However, the main questions for the court to determine were if the policies were narrowly tailored and if other avenues were open for students to communicate. Defining narrowly tailored as "not [burdening] substantially more speech than is necessary to further the government's legitimate interests," the court decided that the free speech area was too restrictive, specifically in its minimal size (*Shaw v. Burke* 2018). By prohibiting speech across the overwhelming majority of campus, the school was burdening much more speech than was necessary to further the school's interest. In regard to the question of the availability of alternate modes of communication for students, the court looked at the policies regarding the free speech billboard—a place where students could post information. Finding that this does not overcome the restrictive nature of the free speech policies as a whole, the court did not feel that sufficient alternate avenues were open to students for communication. Therefore, the court denied the motion to dismiss on these grounds.

Prior Restraint:

The court then moved to the issue of prior restraint. This brought into question the permissibility of the permitting process required by the school. It is important to note that "prior restraints come with a heavy presumption of invalidity" (*Shaw v. Burke* 2018). Permitting processes that are based on uncontrolled discretion of an official are usually found to be impermissible. Shaw alleged that there were no boundaries on the reviewer of all submitted

permits at Pierce College in making the determination of approval. The Defendants responded by saying the only reason that a permit could be rejected was if the Free Speech Area had already been reserved. With the court having to take the Plaintiff's claims as true and the Defendants being unable to verify their claim, the court found that the permitting process was invalid on its face.

The court also noted that the permitting process was unconstitutional due to it not taking into account the number of speakers. As precedent has established, policies must differentiate between individuals and groups when dealing with a permitting process. Additionally, the court could not make a decision on the question of anonymity due to a lack of information, but it did look into the alleged restriction on spontaneous speech. With spontaneous speech being protected, the court found the permitting regulations to be an impermissible prior restraint.

Damages:

Shaw recognized that monetary damages cannot be claimed against the Defendants in the official capacities, but he did claim damages against them in their individual capacities. However, the court determined that the Defendants had qualified immunity and, therefore, could not have claims for monetary damages levied against them. To not have qualified immunity, the defendant must have violated a right protected by the Constitution and that right must have been "clearly established when viewed in the context of this case" (*Shaw v. Burke* 2018). While the Defendants had been found to have violated Shaw's constitutionally protected rights, the court did not find that the question at hand had been 'clearly established.' The court granted the motion of the Defendants to dismiss claims for monetary damages, "the claim for injunctive relief survived" (*Shaw v. Burke* 2018).

Arguments Rejected by Court:

While discussing the appropriate forum designation, the Defendants claimed that because Pierce College is a community college, the court's decision of a designated public forum was not applicable to them. The court rejects this argument, saying that the similar mission to educate the students and the right of students to freely express themselves on campus should not change due to the fact that it is a community college.

Another argument rejected by the court was one of the claimed grounds for dismissal. The Defendants requested a more definite statement from the Plaintiff on his claims. However, the court found that this request was not addressed by the Defendants in their submitted papers. Also, the court found that Shaw had plead his complaints in a way that the Defendants could properly respond. For those reasons, the court denied the motion for dismissal on that basis.

Ruling:

Overall, the Judge denied all motions to dismiss the claim for injunctive relief. However, the Defendants were granted a dismissal of the monetary claims against them. The request for a more definite statement was also denied.

Why Case?

This case had a lot of public attention drawn to it due to the shockingly minimal size of the free speech zone. The Department of Justice also became aware of the case and submitted a Statement of Interest on behalf of the United States. The Attorney General said that it was the belief of the United States that Shaw had adequately pled his alleged violations of his First

Amendment rights. The statement also addresses the motivation behind the United States getting involved in this case—to protect the First Amendment rights of individuals.

This case is also meaningful, because it adds some new elements that were not covered in the other cases discussed in this paper. One of those newly introduced elements was the criteria for establishing pre-enforcement standing. This idea had not been discussed in other cases, much less utilized in those decisions, so that made this case unique.

Additionally, this was the sole case that made a distinction between individuals and groups when looking at permitting processes. Judge Wright noted that a prior restraint like the one discussed in this case has to take into account the quantity of speakers requesting approval and differentiate between individuals and groups.

Gerlich et al v. Leath et al

- Decision by the 8th Circuit of the United States Court of Appeals
- Decided on February 13, 2017
- Opinion Authored by Judge Murphy

Background:

Iowa State University (ISU) has hundreds of officially recognized student organizations. These groups often publicize a cause or their organization by making products that feature the group's name as well as the university's insignia. Student groups are allowed to include ISU's trademarks on their products, so long as the Trademark Office at ISU finds that it complies with their guidelines on this subject.

One of the officially recognized student groups at ISU is a chapter of the National Organization for the Reform of Marijuana Laws (NORML ISU). This group's mission is to reform both state and federal laws relating to marijuana. NORML ISU submitted a design for a t-shirt that featured the organization's name, ISU insignia, and a cannabis leaf for approval. The design was approved by the Trademark Office.

About a month after the design was submitted and after it had been approved, the president of NORML ISU was quoted in a local newspaper about the efforts being made in Iowa in regard to the legalization of marijuana. In his quote, he mentioned the t-shirt design that had been approved by the university and said that the school had been supportive of his organization. This prompted the public relations office at ISU to release a statement in response to the newspaper article. The statement discussed how official student organizations can use school insignia with approval, while also clarifying that recognition does not translate to support.

With both of these public statements circulating, a staffer of an Iowa state legislator sent a "formal legislative inquiry to ISU" questioning the approval of the t-shirt design (*Gerlich v. Leath* 2017). This was received by university administrators who then decided to discuss the situation at the upcoming presidential cabinet meeting. Outside of meetings, through emails mainly, administrators discussed resolutions to the controversy, including revoking the approval for the design. The governor's office also sent an inquiry about the situation, to which officials replied that they were reviewing the procedure that permitted this design.

Several days after these inquiries were received by the university, NORML ISU submitted the same design for re-authorization for another order of the t-shirts. Approval was held off for a few days until the president's cabinet meeting took place. NORML ISU was the only group to have approvals withheld until after the meeting, and this was the first time any hold had been placed on a group's approval request. At the meeting, it was decided that the guidelines for use of Trademarks had to be altered. The administration then met with members of NORML ISU where they said any design that had both the ISU logo and a cannabis leaf would be rejected. They also instituted a "prior review procedure" that required any designs being submitted to the Trademark office to first be submitted to two members of the administration (*Gerlich v. Leath* 2017). After the meeting, the re-authorization of the first t-shirt design was rejected. The guidelines were amended shortly thereafter as well.

With the new guidelines in place, every design submitted by NORML ISU to the Trademark Office that featured a cannabis leaf was rejected. It is important to note that 'several' designs were approved that did not have an image of a cannabis leaf. It was this sequence that led to a lawsuit against the school being filed, claiming a violation of the freedom of speech had occurred. The district court heard the case and ruled that the Trademark guidelines were applied

in a "viewpoint discriminatory manner," leading ISU to appeal to the Circuit Court (*Gerlich v. Leath* 2017).

Establishment of Standing:

The Defendants claimed that the Plaintiffs lacked standing to bring this case. Just as in the previous case discussed, the plaintiff had to show injury in fact, causation, and that the injury could be relieved by a court decision in the Plaintiff's favor. The Defendants claimed that the first element, an injury in fact, was lacking by the Plaintiffs because they were claiming the offenses injured NORML ISU and not them as individuals. Recognizing that an injury in fact must be suffered by an individual, the court determined that the Plaintiffs' suffered "in their individual capacities" (*Gerlich v. Leath* 2017). After making that decision, the court found that the Plaintiffs had standing to bring this case.

Threshold Requirements:

The court was tasked with reviewing the district court's grant of summary judgement to the Plaintiffs' as-applied claim relating to the First Amendment and addressing the question of qualified immunity for the Defendants from damages claimed.

Forum Analysis:

The court had to first determine whether the Plaintiffs' First Amendment rights were violated by the Defendants. The first step to a decision on that issue was determining what type of forum ISU's trademark process was. The court found that because ISU made their trademarks open to any officially recognized student group, so long as they followed the guidelines laid out, the correct designation would be a limited public forum. This meant that viewpoint discrimination

was impermissible. Using the record, the court determined that the university discriminated against NORML ISU on the basis of their viewpoint—by subjecting them to additional scrutiny with prior approval, by placing their re-authorization on hold while not doing the same to other groups, and by prohibiting any designs with a cannabis leaf while not distancing the university from other groups with a political message.

The Defendants argued that the public backlash from approving the first t-shirt design did not affect the later decisions. The court found that "this argument ignores significant evidence to the contrary" (*Gerlich v. Leath* 2017). Additionally, the Eighth Circuit found that the facts in this case were similar to those in a previous case that they had decided, *Gay & Lesbian Students Association v. Gohn* (1988). Through analogizing with this case, the court came to the decision that viewpoint discrimination did occur as seen through the different treatment of NORML ISU from the treatment received by other groups.

Arguments Rejected by Court:

The Defendants argued that even if viewpoint discrimination did take place, it was not a violation of the Plaintiffs' rights. The Defendants claimed that anything with the ISU trademark should be considered government speech, noting that government speech is not subject to the Free Speech Clause. The court does not accept this, because ISU had created a limited public forum which requires policies and practices to be viewpoint neutral.

Despite rejecting that argument, the court still applied the three-part *Walker* standard for determining if speech is properly designated government speech. The three factors that must be determined are whether the government has historically used the medium in question to speak, whether the public closely associates the medium with the state, and whether the state has "direct

control over messages conveyed through the medium" (*Gerlich v. Leath* 2017). The court found that the first and second factors were not applicable to the question at hand. The third factor was rejected due to testimony in the record declaring group merchandise using the university's trademark was not to be considered associated with ISU and because ISU does not speak through the trademark process to the public.

The final argument made by the Defendants was that the relief granted by the lower court was too broad. The court found that the injunction was not overly broad—permitting NORML ISU to include a cannabis leaf in their designs was not encouragement for illegal marijuana use but rather encouragement for reforming laws dealing with marijuana.

Qualified Immunity:

This evaluation also looked at the application of qualified immunity from civil damages. The court initially found that qualified immunity was not a part of this debate—because the Plaintiffs were solely asking for injunctive relief—but in a rehearing went on to address this question. After having determined that the rights of the plaintiffs were violated, the court then had to decide if those rights had been 'clearly established,' the key determination necessary in judging qualified immunity.

"For a right to be clearly established its contours must be sufficiently clear so that a reasonable official would understand when his actions violate the right" (*Gerlich v. Leath* 2017). In other words, the constitutional question must be answered beyond question. The court, therefore, had to decide if viewpoint discrimination in a limited public forum was a clearly established violation of the first amendment.

The court found that the trademark program at ISU was a clearly established limited public forum. It was also determined that the administration of the trademark program was clearly not government speech. Lastly, the court found that it was clearly established that viewpoint discrimination was not permissible in a limited public forum. In summation, it was 'clearly established' at the time that viewpoint discrimination in the trademark program was a violation of the plaintiffs' constitutional rights. This resulted in the 8th Circuit determining that the district court did not make a mistake in denying qualified immunity to the defendants or in granting summary judgement to the plaintiffs.

This became a major source of contention between the judges, leading to a dissenting opinion being authored and a concurring opinion written to address that dissent. The dissent did not agree that the question of the trademark program, being a limited public forum with no viewpoint discrimination being permitted, was clearly established. Judge Loken claimed that the trademark could be considered government speech, and, therefore, not subject to discrimination-free review. He also asserted that ISU could take part in content discrimination if the purpose of the limited public forum was to protect the image of the school. Noting the differences between content and viewpoint discrimination, Judge Loken disagreed with the majority's opinion on the topic of qualified immunity.

Judge Kelly wrote the concurring opinion intended to respond to the dissenting opinion. She argued that there were only two cases of government speech that the dissent cited that could be considered and discounted both of them for a lack of relevance. She asserted that *Rosenberger* was the case most analogous to the one at hand and that that case made clear that the trademark program was a limited public forum with no viewpoint discrimination allowed. She also responded to the claim that content discrimination would be the more accurate way to describe

the rejection of NORML ISU's t-shirt application. Judge Kelly argued that protecting ISU's image was not the true motivation of the rejection as seen through the approval of the first t-shirt design and claimed that content discrimination was a post facto explanation. She concluded by reaching the same decision as the majority opinion did, saying that the district court was correct in denying qualified immunity to the defendants.

Ruling:

In conclusion, the Eighth Circuit affirmed the decision of the district court, holding the district court's grant of summary judgement on behalf of the Plaintiffs and holding the permanent injunction issued by the district court.

Why This Case:

This case looks at several aspects that are not discussed in the other cases. The first is the unique forum where this speech takes place—ISU's trademark program. Even though the program was found to be a limited public forum, having a case so closely tied to the university provided an interesting perspective. It even opened the door to the university's claim that the speech was properly considered government speech. By introducing the *Walker* standard to demonstrate that the speech was not 'government speech,' the court added another claim that students can expect to see argued in future challenges.

Salazar v. Joliet Junior College

- Brought before the United States District Court—Northern District of Illinois
- Joint Stipulation signed April 18, 2018
- Brought before Judge Matthew F. Kennelly

Background:

Just as in the Pierce College case, Joliet Junior College (JJC) confined student expression to a Free Speech Area that required prior approval to get access to. Additionally, JJC mandated that any literature that was to be distributed had to be approved as well.

Ivette Salazar, a student at JJC, sought approval from the college to pass out and post information related to the Party for Socialism and Liberation (PSL). She was informed by officials at the college that she was not permitted to distribute, or post, information related to PSL, because the organization was not affiliated with JJC officially.

About a month later, Salazar noticed another student group advocating for capitalism on campus through the initiation of conversations and the distribution of literature. In an effort to present an opposing viewpoint, Salazar began passing out flyers advocating for socialism. While engaging in this behavior, a staff member from the university informed her that prior approval was required to pass out literature.

After this encounter, a university police officer took Salazar to the station to question her about her behavior and to fill out a report. At the station, the officer had Salazar identify herself and informed her that approval was needed to engage in this behavior. She was then released from custody.

Salazar hired the Foundation for Individual Rights in Education (FIRE) to represent her in her dealings with the university. FIRE wrote to the university informing them of their

representation and their belief that the school's speech policies were unconstitutional. Salazar and officials from FIRE met with school administration but no consensus was reached. This resulted in Salazar bringing a lawsuit against JJC for several reasons.

Main Policies in Question:

First, Salazar brought challenges to the Board Polices and the Posting Policies at JJC, both facial and as-applied, under the First and Fourteenth Amendments. She also claimed that her Fourth Amendment rights were violated due to false imprisonment during the situation. Salazar submitted a *Monell* claim against JJC and requested declaratory relief and injunction from the court.

These challenges encompassed the Free Speech area, the requirement for advanced approval, and the lack of standards for officials to follow in making determinations on requests. Salazar also claimed that the policies prevented anonymous and spontaneous speech. She also claimed that some policies, specifically the Posting Policy requiring 'appropriate language,' were vague and overbroad. These challenges and claims were submitted to the court in a prayer for relief and a demand for a jury trial.

Result:

This case was settled outside of court. The parties involved came up with terms that satisfied both sides and submitted a Joint Stipulation of Dismissal with Prejudice. This permanently dismissed all claims brought against JJC.

As the *Chicago Tribune* reported, JJC paid FIRE thirty thousand dollars as part of the settlement (Fabbre, 2018). Additionally, the college changed their speech polices, now allowing

students to speak freely throughout JJC (Fabbre, 2018). This ended the designated Free Speech Area that was questioned in Salazar's complaint (Fabbre, 2018). JJC also replaced their "former policy on student expression" with a policy that more fully protected students' rights in that realm (Fabbre, 2018). When agreeing to this settlement, JJC held that officials at the university, and the policies at the school, did not violate Salazar's rights.

Why This Case:

This lawsuit is very different from the other ones discussed in this paper. This suit demonstrates that the mere challenge being raised can sometimes lead to favorable policy change, especially when the university has questionable policies to begin with. In certain instances, a lawsuit alone can force the hand of the university and produce policies that are more consistent with the First Amendment.

This case is also unique in the fact that it raised a Fourth Amendment challenge. While several of the cases in this paper have a student being questioned by campus police or university officials, this is the only case that dealt with the actual imprisonment of the speaker.

Conclusion:

While these cases discussed had different facts and circumstances, all three pertained to the protection of speech that was political in nature. Even with these differences, the court still, in places, used similar logic and tests. There were also places where the court diverged, using different criteria and reasoning. From looking at the two different court opinions, and the settlement with JJC, interesting comparisons can be made to better understand the political speech that is protected under the First Amendment.

Threshold Requirements:

Shaw and *Gerlich* had different threshold requirements due to the difference in what the court was tasked with doing. In *Shaw*, the defendants submitted a motion to dismiss and that dictated the approach the court took. Judge Wright also laid out the three reasons that a case can be dismissed in his discussion of the threshold. In *Gerlich*, the court had to review the grant of summary judgement issued by the district court and address the question of qualified immunity. This also shaped the approach taken by the court in the decision of this case.

Establishment of Standing:

Both the case involving Pierce College and the case involving Iowa State University looked to establish the Plaintiffs' standing. The same criteria were used in both cases—the Plaintiffs had to establish an injury in fact, show causation, and demonstrate that relief would be provided by a decision in their favor. Also, the reason for 'injury in fact' was similar. In both cases it was found that the student(s) suffered injury in their individual capacity from the government institution.

It is also interesting to note the differences between the two cases. In *Shaw*, standing was reviewed, because the defendants cited it twice as grounds for dismissal of the case. In *Gerlich*, standing was needed to be established in order for the case to proceed further. Also, in *Shaw* the court used a test to determine pre-enforcement standing on his facial challenges to Pierce College's policies. This was the only case that took that approach of any cases discussed in chapters one and two.

Forum Analysis:

The proper designation of each forum was also discussed in both cases. In *Shaw*, the court reviewed three items to determine if the forum in question was a traditional public forum. This required the court to look at the physical characteristics of the area, the uses and purposes of the area, and historic use of the area. The court ultimately found that the open areas on the campus of Pierce College would be properly designated traditional public fora, and thus the university must have a significant interest in any policies enacted, those policies must be narrowly tailored to meet that significant interest, and alternate avenues of communication must be available.

In *Gerlich,* the court looked at the definition of a limited public forum and found that the trademark program at ISU fit that definition well. The trademark program was open to any officially recognized student group as long as the group met the guidelines the school had. This designation meant that viewpoint discrimination was not permitted and dictated the approach taken throughout the rest of the decision in this case.

Relevance of *Salazar*:

It is also intriguing to see how the case concerning Joliet Junior College compared to the other two decisions. While a decision by the court was never rendered, much of the same logic from the ISU and Pierce College cases would be used in that case. In fact, Salazar made many allegations that were similar to those expressed in *Shaw*. It is not outside of the realm of possibility that the court's determination in the Pierce College case played a role in the settlement reached between JJC and Salazar, as Pierce was decided a few months prior to the agreement. The JJC case uniquely shows that policy change can still be achieved through means outside of the legal system.

Conclusion:

All three of the cases exemplify the inconsistent application of the First Amendment by college officials. The two cases that the court decided found that the students' free speech rights had been unconstitutionally violated by the school's policies and practices. Additionally, in each of the cases reviewed, the policies pertaining to free speech changed to more fully guarantee the protection of the First Amendment right to speak freely.

Chapter Three: Hate Speech

Introduction:

The protection of hate speech under the first amendment has been frequently visited by the court. With America's past experiences with slavery, exclusionary immigration policies, and other controversial practices, the guaranteed protection of hate speech, racist speech in particular, is a very sensitive topic. Yet, the court has repeatedly ruled that hate speech is protected.

The court has been committed to guaranteeing all ideas access to the public sphere so long as the speech is not among the few prohibited classifications (obscene, incitement to violence, etc.). As the Supreme Court said in Street v. New York (1969), "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." As offense is subjective, the effect of banning certain "offensive ideas" can severely restrict an individual's freedom to speak freely.

Additionally, it is important to note that hate speech is generally protected by anti-viewpoint discrimination policies. This was seen in the unanimous Supreme Court decision in *Matal v. Tam (2017). "*The disparagement clause denies registration to any mark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint" (*Matal v. Tam* 2017). In this case, the court ruled that offensive speech is protected. The justices noted that just because someone is offended by another's speech, does not mean that that speech is any less protected than inoffensive speech.

In the case *Doe v. University of Michigan* (1989), the court discussed the challenges with evaluating racist speech. In the majority opinion, Judge Cohn wrote, "it is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The

difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values." Judge Cohn recognized the difficulty in striking a balance between free speech and promoting equality. However, so long as someone's rights are not being infringed upon due to their race, the court's precedent is to protect racist speech.

The decision in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University* (1993) discusses hate speech in the university setting.

> "The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism…Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express. We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that 'the manner of [its action] cannot consist of selective limitations upon speech.'"

The court makes clear that "selective limitations upon speech" are not permissible. This means that university administrations cannot suppress speech just because they find it to be racist or offensive. This all ties back to the idea that viewpoint discrimination is impermissible in certain forums and that offense is a viewpoint. While university administrations are tasked with creating a safe and comfortable learning environment, it is imperative that the means chosen to go about this are in line with the Constitution.

<u>Shift with College Administrators:</u>

Race was an integral part of the Berkeley Free Speech Movement. Much of the advocacy for freedom of speech was an effort to openly discuss the Civil Rights Movement, and racial issues more generally (Eynon, 1989). While avenues for speech dealing with race were opened up on

college campuses during the Free Speech Movement, university administrators began protecting less speech relating to race in the decades that followed (Rosenberg, 1991).

"In the late 1980s and early 1990s many U.S. universities adopted codes of conduct limiting racist and other kinds of hate speech, in an effort to create a more welcoming climate on campus" (Bird, 2000). These speech codes protect some students by making them feel included and comfortable, but they also severely limit the speech of other students who are expressing unfashionable opinions. "The problem of combatting the growing racism among college students pits the ideal of free discourse in the academic setting against the closely related ideals of academic diversity and tolerance" (Rosenberg, 1991). This battle of ideals is still taking place and periodically results in the courts adjudicating challenges brought before them. This chapter will look at three court challenges related to this concept—the protection of alleged hate speech.

Monica Pompeo v. Board of Regents of the University of New Mexico et al.

- Decision by the 10th Circuit of the United States Court of Appeals
- Decided on March 28, 2017
- Opinion Authored by Judge Lucero

Background:

This challenge raised an interesting question for the court to consider. Precedent has long established that in the school setting strong deference will be given to educators. Nevertheless, protecting the first amendment right to speak freely is a fundamental right explicitly protected under the Bill of Rights. This case requires the court to determine the correct balance between these two principles.

As *Bethel School District No. 403 v. Fraser* (1986) laid out, the Tenth Circuit is to rely on the precedent that the "freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." Yet, the courts cannot intervene in challenges that come from the daily operation of a school and that do not directly infringe on constitutional rights. Even so, Monica Pompeo, a student enrolled in graduate-level classes at the University of New Mexico (UNM), raised a challenge under this framework.

Pompeo alleged that officials at UNM disagreed with some of the viewpoints that she expressed in a paper for a course and retaliated against her for those viewpoints. She claimed that this retaliation was a violation of her constitutionally guaranteed right to free speech. Pompeo raised a decision by the Tenth Circuit, *Axson-Flynn v. Johnson* (2004), as analogues to her claim. In *Axson-Flynn* the court found that "courts may not override an educator's decision in the school-sponsored speech context 'unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually

exercise professional judgement' and instead used 'the proffered goal or methodology as a sham pretext for an impermissible ulterior motive'" (*Pompeo v. Board of Regents of the University of New Mexico* 2017). Pompeo claims that the religious discrimination seen in *Axson-Flynn* is comparable to the viewpoint discrimination that she allegedly faced. The court made clear that precedent protects educators making viewpoint-based evaluations about school-sponsored speech and that educators are permitted to restrict speech deemed inflammatory or divisive.

Pompeo registered for Professor Caroline Hinkley's class, called "Images of (Wo)men: From Icons to Iconoclasts," in the spring of 2012. The main assignments in the course were several response papers to material covered in class. The guidelines for these papers were clear and required students to think critically in crafting their replies.

Pompeo submitted four of these response papers. The first two and the fourth were not in question. However, the third paper, submitted on February 21, 2012, is where this challenge arose. Responding to the 1985 film Desert Hearts, which centers around a lesbian romance, Pompeo highly criticized the movie. On March 6, 2012, Pompeo was requested for a meeting by Professor Hinkley to discuss her paper. This meeting took place after her response paper was returned to her with comments from the teacher and with no grade assigned to the work. At the March 6 meeting, Hinkley corrected some misunderstandings in Pompeo's paper and noted the lack of critical backup to many of Pompeo's assertions.

The two met again on March 20, 2012, when Hinkley again made clear that Pompeo's work did not meet the course standards for critical analysis. At this meeting, Hinkley offered Pompeo the chance to rewrite her response paper. "Pompeo [stated] that Hinkley was emotional during the meeting, accused Pompeo of using 'hate speech,' and said 'that it was in Pompeo's best

interest not to return to her class' (*Pompeo v. Board of Regents of the University of New Mexico* 2017). Pompeo also claimed that Hinkley suggested that she write a response paper to a different film that she would get a good grade on.

Pompeo then tried to meet with Professor Hinkley again. When this proved unsuccessful, Pompeo met with UNM Provost Jane Slaughter on March 22. That same day, the associate dean referred Pompeo to share her concerns with Dever. Pompeo met with Dever the next day where Dever informed Pompeo that she had offended Hinkley. At this meeting, Pompeo decided to finish the course as an independent study supervised by Dever. Pompeo claimed that this was not a choice but rather a forced decision.

In early April, Dever and Pompeo were in contact and agreed that Pompeo would revise her response to Desert Hearts, rather than do a paper on a new topic. At this point, Dever gave Pompeo some constructive feedback on word choice and usage that had been problematic in the first draft. Pompeo replied that she did not like being instructed what words she could use, and Dever responded noting that she was helping Pompeo write for an academic audience.

After several extensions were granted on the paper, Pompeo never re-submitted the assignment. According to Dever, Pompeo abandoned the independent study when she did not submit any work. "Pompeo [indicated] that she was unwilling to omit specific words from her paper, and that she understood the 'consequences' Dever threatened to be a poor grade or other academic or non-academic penalties" (*Pompeo v. Board of Regents of the University of New Mexico* 2017). Pompeo said she withdrew from the class, because she was not willing to revise the paper she originally submitted. Pompeo eventually filed a grievance within the university. The school ultimately refunded her tuition for the course.

Threshold Requirements:

Pompeo then filed suit against UNM seeking a declaratory judgement and damages. The court reviewed the grant of summary judgement de novo, "viewing the evidence in the light most favorable to the non-moving party" (*Pompeo v. Board of Regents of the University of New Mexico* 2017).

The court had two questions to answer to determine if the defendants were entitled to qualified immunity: first, whether they violated the constitutional rights of the plaintiff; second, if the right was clearly established. Once again, "for the law to be 'clearly established,' there ordinarily must be a Supreme Court or Tenth Circuit opinion on point, or the clearly established weight of authority from other circuits must point in one direction" (*Pompeo v. Board of Regents of the University of New Mexico* 2017). In other words, the question at hand must be beyond debate.

School-Sponsored Speech:

This case is centered on the protection granted, or lack thereof, to school-sponsored speech. This is defined by *Fleming* which says that school-sponsored speech is "speech that a school affirmatively promotes, as opposed to speech that it tolerates" (*Pompeo v. Board of Regents of the University of New Mexico* 2017). Activities completed as part of a school's curriculum fall under this category. The first amendment is not violated when educators exercise "editorial control" over certain elements of a student's speech in this realm, so long as this control is related to the pedagogical concerns of the school. The only time a court intervenes in this context is when school-sponsored speech is limited for no educational purpose.

Many decisions have reaffirmed the existing precedent that educators can make viewpoint-based evaluations and decisions on school-sponsored speech. In fact, the court has held that viewpoint neutrality is not required in this context, because the school is in charge of the content of the education provided to its students. The test to establish first amendment protection in the context of school-sponsored speech is laid out in *Vanderhurst v. Colorado Mountain College District* (2000). "Whether an action restricting a plaintiff's school-sponsored speech is 'reasonably related to the school's legitimate pedagogical interests is the test for determining whether his speech fell within the ambit of First Amendment protection'" (*Pompeo v. Board of Regents of the University of New Mexico* 2017).

As previously mentioned, Pompeo used the *Axson-Flynn* decision as what clearly established law the defendants had violated. That decision covered the standards used in school-sponsored speech claims extensively. In that case, the court said that, at times, schools need to restrict certain student speech for pedagogical reasons. Additionally, in an effort to teach critical thinking to students, schools can require certain viewpoints to students for activities that are not their own. In another case, *Brown v. Li* (2002), the court held that the first amendment does not force educators to approve work that does not meet legitimate standards in the academic setting.

In the university setting, *Hazelwood* provides valuable guidance on speech occurring as a part of the course curriculum. The question in this context is "whether the school's 'decision was reasonably related to legitimate pedagogical concerns,' giving 'substantial deference to educators' stated pedagogical concerns'" (*Pompeo v. Board of Regents of the University of New Mexico* 2017). This highly deferential stance of the court does not mean that the court will not look into whether the pedagogical concern was dubious or pretextual. The court has established that it may override an educator when the claimed pedagogical concern is a "pretext for an

impermissible ulterior motive" (*Pompeo v. Board of Regents of the University of New Mexico* 2017). Courts are not to override an educator unless their decision was significantly outside of academic norms.

Pompeo, once again relying on *Axson-Flynn*, claimed that the case law was settled regarding the issue—she argued that an educator cannot restrict student speech, because the educator is hostile to the viewpoint expressed. The court disagreed that this question was beyond debate. Additionally, the court cited the *Hazelwood* decision that said it was permissible for educators to make viewpoint-based decisions on school-sponsored speech as diametrically opposed to her assertion that educators cannot restrict school-sponsored speech on the basis of viewpoint. As noted in this case, Tenth Circuit precedent is to defer to educators as to when it is appropriate to make viewpoint judgements.

The court also held that courts can only overrule an educator if the stated pedagogical goals were a false pretext for an impermissible ulterior motive. In *Axson-Flynn* the court listed several impermissible motives, but viewpoint discrimination was not one of them. "Axson-Flynn does not clearly prohibit educators from restricting school-sponsored speech based on viewpoints that they believe are offensive or inflammatory" (*Pompeo v. Board of Regents of the University of New Mexico* 2017). Therefore, *Axson-Flynn* did not clearly establish that viewpoint judgements on school-sponsored speech were impermissible.

Qualified Immunity:

Other questions were raised, but the court decided it was unnecessary to investigate them due to the defendants being entitled to qualified immunity. "The qualified immunity analysis looks to whether an official's conduct was objectively reasonable" (*Pompeo v. Board of Regents of the*

University of New Mexico 2017). Yet, this is not necessary, because, to claim first amendment retaliation, the plaintiff has to show that the speech the defendant reacted to was protected. Because the defendants' actions were related to pedagogical goals, the claimed violation of Pompeo's rights was not clearly established.

The court defines the pedagogical concept as any activity related to education and learning. This standard, a pedagogical goal, can be satisfied simply by a school wanting to avoid controversy in an academic setting. The court has already ruled that school-sponsored speech can be restricted if it has statements deemed inflammatory or divisive, as laid out in *Fleming*.

To determine qualified immunity, the court has to look at the defendants' actions individually. Hinkley, who commented on a response paper and requested more critical analysis, was found to have taken action related to "legitimate pedagogical goals" (*Pompeo v. Board of Regents of the University of New Mexico* 2017). Even if this criticism was based on speech she found inflammatory, it is still acceptable under *Fleming.* Therefore, Hinkley is entitled to qualified immunity. Dever, who worked to dissuade Pompeo from certain word choices, was also found to be entitled to qualified immunity.

Ruling:

The Tenth Circuit affirmed the district court's grant of summary judgment in favor of the defendants.

Why This Case:

This case focused on school-sponsored speech which was relatively unprotected. Introducing this concept into this thesis was key, because the classroom accounts for a

substantial amount of student speech on campus. Recognizing that educators maintain a great deal of discretion in evaluating speech related to the course curriculum is important for all students to understand.

Speech First, Inc. v. Mark Schlissel, et al.

- Heard in United States District Court—Eastern District of Michigan, Southern Division
- Decided on August 6, 2018
- Opinion Authored by Judge Linda Parker

Background:

The first sentence of this decision sums up the core idea of this thesis. "This action reflects a conflict faced by many public universities in their attempt to balance the First Amendment rights of students and the need to provide a safe learning environment free from discrimination and harassment" (*Speech First v. Schlissel* 2018). In the effort to arrive at the right balance, many policies enacted by university administrators have been challenged.

In this case, Speech First, Inc., an organization working to protect university students' civil rights, filed a motion for a preliminary injunction on behalf of three unnamed University of Michigan (UM) students. These three students claimed that their free speech rights were chilled by UM's disciplinary rules and procedures which prohibited "harassment," "bullying," and "bias-related conduct." Speech First also claimed that the "Bias Response Team" at UM investigated and punished students for engaging in "bias" conduct.

UM's Statement of Student Rights and Responsibilities, known as "Statement" hereafter, discusses potential behaviors that do not align with the school's values. The Statement lays out responses to those behaviors and lists potential sanctions associated with them. It is important to note that the Statement also says that UM students are entitled to the same rights as those protected by both the state and federal constitutions.

In the "Violations" portion of the Statement, the list of behaviors contrary to the university's values is more direct. "Harassing or bullying another person—physically, verbally, or through

some other means" is listed (*Speech First v. Schlissel* 2018). The Statement, including the violations section, governs all actions on UM property, at UM events, and occurring in the city of Ann Arbor, MI. Any individual affiliated with UM may lodge a complaint claiming a violation of the Statement with the University's Office of Student Conflict Resolution (OSCR). A Resolution Coordinator is then in charge of investigating the allegations and determining the proper response.

OSCR posted the Statement on its website and also had a "Definitions" page for the terms used in the Statement. "Harassing" and "bullying" were defined from three different sources: the Merriam-Webster Dictionary, University Policies, and Michigan state law. Speech First based this suit off of the dictionary definitions, which defined harassing as "to create an unpleasant or hostile situation for, especially by uninvited and unwelcome verbal and physical conduct" (*Speech First v. Schlissel* 2018). However, before this lawsuit was brought by Speech First, UM revised the definitions of "bullying" and "harassing," defining the words solely by Michigan statutes.

The person designated to oversee OSCR, Royster Harper, noted in the record that the new definitions were approved by several individuals in UM leadership, the President included. Mr. Harper also stated for the record that the new definitions were the only ones that would govern student behavior and disciplinary action. The new definitions were not the only amendments to the Statement. UM also added a new violation for any of their already designated violations occurring "when motivated by bias or prejudice" (*Speech First v. Schlissel* 2018). The "motivated by bias" charge would be an independent violation coupled with the initial alleged violation, and sanctions could be assessed on both.

UM had also established a Bias Response Team (BRT) that was intended to be "an informal resource to support students who believe they have been affected by incidents of bias, to report them to other campus resources as appropriate, and to educate the University community regarding bias issues" (*Speech First v. Schlissel* 2018). The BRT was solely an educational resource and a support mechanism for students; it had no disciplinary authority. The term "bias incident" was written to be broad, because the BRT wanted to support any students who needed the resource, not to punish the alleged perpetrators. When conduct reported to BRT was considered to be illegal or in violation of UM rules, the BRT could discuss referral of the alleged perpetrator to the appropriate body with the reporting student.

BRT's process for handling complaints began with the logging of all reports. Every report was recorded without evaluating the merits of the alleged incident. A BRT employee would then determine if there was an office that the complaint should be sent to, like University Housing for roommate situations. If the complaint did not fall to one of the designated offices, the BRT employee would be responsible for handling it. The employee would then reach out to the reporting party to meet, if that individual was willing. The appropriate resources would be recommended to the reporting party, and, if a violation of the Statement seemed like it occurred, the employee would discuss filing a complaint to OSCR with the reporting party.

The employee also would ask if the reporting party would like the alleged perpetrator to be called for a meeting with the employee. This meeting would be completely voluntary and the report filed would be discussed. If the alleged perpetrator declined to meet, there would be no follow-up from the BRT.

Additionally, UM was operating a campus-wide campaign, Expect Respect. This campaign worked to build a culture of respect for all persons in the campus community. The webpage for the Expect Respect campaign had definitions listed for "bias" and "harassing." "Bias is defined as a 'pre-formed negative opinion or attitude toward a group of persons who possess common physical characteristics, such as skin color; or cultural experiences, such as religion or national origin,'" and "harassment is defined as 'unwanted negative attention perceived as intimidating, demeaning or bothersome to an individual'" (*Speech First v. Schlissel* 2018). In the lawsuit, Speech First used those definitions as examples of overbroad policies at UM. However, the definitions on the Expect Respect webpage were prefaced with a statement saying that the definitions on the page were not to be interpreted as legal definitions.

Speech First was representing three students who claimed that UM's policies posed a chilling effect on their speech. They believed they could not fully participate in debates and discussions without violating the policies at UM and being reported to the BRT or OSCR.

Threshold Requirements:

To issue a preliminary injunction, there are four criteria used by the court. First, the court looks at whether the movant is likely to prevail on the merits. Second, the court looks at "whether the movant would suffer irreparable injury without the injunction" (*Speech First v. Schlissel* 2018). Third, the court decides whether issuing an injunction would substantially harm others. And fourth, the court looks at whether issuing an injunction would serve the public interest. Generally, the first criterion will be the determinative factor in the issuance of a preliminary injunction.

The court took up that first question, "whether the movant has a strong likelihood of success on the merits" (*Speech First v. Schlissel* 2018). The defendants argued that it was unlikely that the plaintiff would prevail, because Speech First lacked standing and the challenges it raised were moot.

Establishment of Standing:

Moving to the standing of Speech First, the court listed the three requirements needed to establish associational standing. The requirements are satisfied if "its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit" (*Speech First v. Schlissel* 2018). The defendants responded by claiming that the first requirement was not met—essentially arguing that the three students lacked standing.

There are three requirements needed to be satisfied to establish the students' standing. "First, [the p]laintiff must have suffered an injury in fact…Second, there must be a causal connection between the injury and the conduct complained of…third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" (*Speech First v. Schlissel* 2018). The party that brought the case to federal court bears the burden in satisfying these requirements.

The defendants argued that Speech First lacked standing, because there was not a credible threat that the students' expression would result in disciplinary action. Citing the Statement that said a core value of UM is free expression, the defendants discounted the argument that there was a credible threat of discipline. Additionally, the defendants claimed that UM had embraced

those who held similar viewpoints as the plaintiff and did not discipline them for voicing their positions. The defendants also noted that the plaintiff had no examples of UM disciplining students for expressing certain positions. Defendants argued that because BRT is not a disciplinary body and involvement with BRT is voluntary, BRT did not pose a credible threat and Speech First lacked standing as well.

Speech First facially challenged UM's policies on bullying and harassment. This led the court to explain an exception to the general standing rules—an overbroad regulation of freedom of expression can be facially reviewed, even if the application of the policies is permissible. As the Supreme Court has noted, broadly written policies in existence can chill expression.

The court made clear that just because the certain issues that the plaintiffs wanted to speak about were not in violation of the "bullying" and "harassing" policies, did not mean that talking about other matters would not result in discipline for constitutionally protected speech. UM even acknowledged in the hearing that, from 2016 to 2018, there were sixteen disciplinary cases centered on "bullying" and "harassing" misconduct. Because this policy was overbroad, UM-affiliated individuals could not pre-determine what speech was permissible and what would result in discipline. On this question, Speech First had standing to bring the suit. However, Speech First had to satisfy the other standing requirements.

To have standing, a plaintiff who is claiming chill must establish that enforcement of the policies has occurred or is imminent. Plaintiffs do not need to wait until the policy is enforced to bring a lawsuit, so long as there is a specific claim of the threat of looming harm. While Speech First successfully claimed that those who engage in "bullying" and "harassment" are subject to discipline, the plaintiff did not prove that BRT poses a credible threat to UM student's first

amendment right. Speech First alleged that BRT punishes students for certain behavior, but the record shows that BRT has no disciplinary authority. “Mere allegations” do not suffice in the establishment of standing for a preliminary injunction (*Speech First v. Schlissel* 2018).

Speech First responded by arguing that BRT’s procedures with a voluntary response mechanism for alleged perpetrators “still has a coercive effect on the exercise of First Amendment rights by members of the University community” (*Speech First v. Schlissel* 2018). These indirect discouragements can have the same chilling effect as discipline by the university. Speech First argued that this apprehension of being addressed by university officials can do just as much to chill speech as the actual levying of sanctions. The court found that there was no evidence of indirect or veiled threats from the BRT for biased behavior. The court also agreed that universities should be permitted to address students who engage in speech that may be offensive, so long as they do not violate the first amendment in doing so. Speech First did not demonstrate credible threat to the court’s satisfaction and, thus, Speech First did not establish injury-in-fact in the challenge to the Bias Response Team.

Mootness:

The court then took up the question of mootness. The defendants argued that Speech First’s challenges to certain definitions were moot because those definitions were removed. The amended definitions for “bullying” and “harassment” were solely based on Michigan statutes and were not challenged by the plaintiff. Speech First responded by claiming that the challenges to the BRT remained, because UM’s unilateral revisions to the definitions did not moot the case.

Because the Constitution only gives federal courts the power to resolve “Cases” and “Controversies,” mootness would close the case. “A case and controversy no longer exist, and

the matter 'is moot, when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" (*Speech First v. Schlissel* 2018). There are two criteria for establishing mootness. First, it must be reasonably expected that the claimed violation will not recur. Second, the effects of the claimed violation must be "irrevocably eradicated" by the unfolding of certain events or by the granting of interim relief. The party that argues that the claims are moot bears the burden of proof, one described as a heavy burden.

First, the action to review and alter the challenged definitions was in motion prior to the initiation of this lawsuit and was completed shortly after the lawsuit was brought. The amended definitions were reviewed and approved by much of UM's leadership, including the university president. Also, the new definitions were presented to the UM community. Additionally, UM maintained that the amended definitions would be the sole definitions governing the university.

Still, the OSCR website did not provide definitions for "bias" or "prejudice." Speech First then claimed that those terms had overbroad definitions. However, the Statement was only violated if the "bias" or "prejudice" initiated other prohibited behavior. This nuance prevented an overbroad interpretation that would have been unconstitutional. Noting that it was clear that UM's alleged improper actions were not likely to recur, the court found the plaintiff's challenge to be moot.

Without the preliminary injunction, Speech First argued that members would endure irreparable harm for the loss of the right to speak freely. Yet, the court found that removing the challenged definitions for "bullying" and "harassing" also removed any threat to the first amendment rights of UM students. Because Speech First did not argue that the new definitions, those based on Michigan statutes, were overbroad and the court found that there was not credible

fear of the BRT disciplining students, the court denied the plaintiff's motion for a preliminary injunction.

Arguments Rejected by Court:

Speech First also argued that UM regularly instituted policies that violated the first amendment rights of the students at the school. The plaintiff cited *Doe v. University of Michigan* as an example of this behavior. The court rejected this argument saying, "the fact that the University adopted a policy thirty years ago that was immediately overturned, does not persuade this court that it is likely to reverse course once this lawsuit terminates" (*Speech First v. Schlissel* 2018). This argument that UM had a habit of crafting impermissible policies was not demonstrated by a single case three decades prior to the one at hand.

Ruling:

The motion for a preliminary injunction filed by the plaintiff was denied.

Why This Case:

This case introduced associational standing into this thesis. In most instances, organizations will represent the plaintiffs as counsel. However, in this case, the organization, Speech First, Inc., had an interest in this case that was related to the organization's purpose and brought suit on behalf of the anonymous students. An exception to the general standing rules was also introduced in this thesis. Regulations of expression thought to be overbroad may be facially reviewed, even if the regulations are constitutional in their application.

Donald S. Sabatini v. Robert Reinstein, et al.

- Heard in United States District Court—Eastern District of Pennsylvania
- Decided on October 7, 2016
- Memorandum Authored by Judge R. Barclay Surrick

Background:

Donald Sabatini was a student at the James E. Beasley School of Law of Temple University (Law School). As a law student, Sabatini was a member of the Western Heritage Society (WHS), a conservative group that wanted to preserve European, or white, culture. He served in several leadership positions within the organization, including president and vice president.

Temple University (TU) had an "Open Forum (Free Speech) Policy" at the time that reaffirmed the protection of the first amendment on TU's campus. This policy stated that unpopular and offensive ideas could not be suppressed. It also noted that reasonable and content-neutral time, place, and manner restrictions were permissible.

TU's Campus Police Department (CPD) was required to follow this Open Forum Policy. CPD could use discretion in enforcing time, place, and manner restrictions in the distribution of literature as long as the restrictions were not based on the content of the leaflets. No written policy was ever given to CPD officers on dealing with expressive activities, but the officers knew the University's policy.

Some of the alleged first amendment violations occurred at the 1997 and 1998 commencement exercises at TU. At graduation, thousands of people were to be exiting the building while thousands more would be entering for the next ceremony. CPD prohibits the distribution of literature on University property while graduation ceremonies are ongoing, unless

the literature is related to the commencement exercises. This policy was in place to ensure the safety of the people attending the graduation events on campus.

In 1997, the plaintiff attended the Law School graduation ceremony with leaflets that he intended to distribute. These leaflets were copies of newspaper articles that criticized the Dean of the Law School, Dean Reinstein, and the Law School itself. The plaintiff began distributing these leaflets inside a campus building in the lobby area as one ceremony was concluding and as another was getting ready to begin. After approximately ten minutes of distributing the literature, two CPD officers came up to Sabatini and asked to see the leaflets. After reviewing the literature, the officers told the plaintiff that he could not distribute the leaflets inside the lobby of the building.

The plaintiff then asked to speak to a supervisor who did not review the leaflets, but nevertheless told the plaintiff to move to the public sidewalk. Sabatini claimed that the sidewalk was an ineffective location for distributing his information. A short while later, Sabatini entered the building to attend the graduation ceremony and was reminded by CPD officers not to pass out his articles. CPD officers claimed in the record that the Sabatini situation was handled just like other similar situations.

In 1998, the plaintiff and Lincoln Herbert, a founding member of WHS, went to the graduation exercises to pass out leaflets criticizing Dean Reinstein and the Law School. The plaintiff was also present and went to the lobby of the building to begin distributing his literature. Sabatini was then approached by two officers who requested a leaflet. On the steps of the building outside, Lincoln Herbert began distributing the same leaflets. CPD officers observed him there and allowed him to continue his activities. Herbert then went inside to join Sabatini

when a CPD officer told them both that distributing literature in the building was not allowed. That officer did not view the literature before making his declaration. The plaintiff then moved to the public sidewalk where he was permitted to distribute the leaflets. The plaintiff claimed that this was an ineffective location for his activity.

Plaintiff asserted that there was a pattern of discrimination against him and the WHS. He cited several instances. The first dealt with his attempt to post fliers in spaces outside of the Law School. These areas were under the jurisdiction of the Student Activities Center (SAC) who had to stamp all material groups wished to be posted. The stamp of approval was not based on the content of the message. The plaintiff claims that SAC did not post his fliers about a WHS event, because he submitted them too late. SAC said that they were short staffed and that is why they never were put up. The plaintiff then asked for a meeting with SAC where it was determined that his claims of discrimination were without merit. WHS tried again to distribute fliers shortly thereafter. This time, the plaintiff put his fliers on a SAC table. The fliers were unstamped, so an employee told him that he was not permitted to place them there.

A third incident occurred when WHS requested more bulletin board space for their materials. Citing the Environmental Law Council which had more space, the plaintiff wanted equal treatment. When this request was not responded to, the plaintiff placed an easel near the entrance of the Law School, just as many student groups had made a practice of doing. After his easel appeared, the Law School removed all easels from the area. The administration cited safety concerns, in particular that the easels obstructed traffic, as their reasoning for this action.

Fourth, the plaintiff attempted to get a room for a WHS lecture. He was informed that the cost of reserving that particular room was one thousand dollars. When the plaintiff was looking

to reserve a room, only one was available and that was the faculty lounge. Student groups were charged for the labor of rearranging the room; the fee was not an effort to dissuade WHS from hosting an event.

Additionally, the Law School had a policy that all non-law school students had to be signed up on a guest list to attend an event in the Law School. This was to maintain the security of the building. WHS wanted to make their event open to the entire university, but the administration of the Law School said that all non-law school students were required to be on a guest list.

The Plaintiff also explicitly accused Dean Reinstein of discrimination. The court then went through the Dean's efforts to protect WHS's right to speak freely. Reinstein had a history of protecting controversial speech, best exemplified by his allowance of Louis Farrakhan to speak on campus. Reinstein even supported WHS's efforts to become a recognized student organization, telling the approval body that they must recognize the group if WHS met the criteria. Also, Reinstein received complaints from WHS about their signs being ripped down. In response, he penned an open letter to the Law School in support of WHS's first amendment rights. Reinstein additionally wrote a letter to the Law School about WHS as an organization. He discussed his belief that their speech should be protected but also criticized some of the organization's beliefs and practices. In his letter he wrote, "The members of the Western Heritage Society should not be left in doubt that the practice of expressing hate speech is reprehensible…" (*Sabatini v. Reinstein* 2016).

Type of Forum:

Permissible governmental regulation of speech depends on the designation of the area where the speech or conduct took place. Whether the property is a public or nonpublic forum dictates

what the permissible standard of conduct is. In a nonpublic forum, the government has much more latitude to place restrictions on expression than in a public forum. The court found that the areas in question, that being the lobbies of the buildings, were nonpublic forums. In a nonpublic forum, governmental regulation must be reasonable in light of the purpose of the area and must be view-point neutral.

Threshold Requirements:

The plaintiff claimed that the restrictions placed on his distribution of leaflets by CPD officers was based on the content of the literature. The defendants claimed that the school's policy was that no literature that was unrelated to the graduation ceremonies could be distributed. The defendants also refuted the plaintiff's claim that their decision was based on the content of his leaflets.

Alleged Content Discrimination:

TU's policy at the time, the Open Forum (Free Speech) Policy, stated that time, place, and manner restrictions were allowed so long as they were reasonable and viewpoint neutral. The court found that on its face, the Open Forum Policy was content neutral and thus permissible. However, the next question came down to the application of the policy and its enforcement. The head of the CPD at TU stated that his officers operated under the policy that viewpoint discrimination was prohibited. The CPD officers also knew that they had to maintain safety and order and that time, place, and manner restrictions were allowed. While CPD officers never got a written copy of the speech policy, the policy and department protocols were shared orally with all officers.

The plaintiff claimed that CPD had suppressed his speech as part of a larger TU effort to restrict WHS's communications. The court found, "however, [that the] plaintiff had not established through direct or circumstantial evidence that defendants instructed the CPD officers to prevent him from distributing his leaflets" (*Sabatini v. Reinstein* 2016). The court did not find that the evidence in this case supported the plaintiff's assertion that actions taken by the CPD were based on the content of his leaflets. Also, the plaintiff did not show that he was treated differently than others distributing literature, so his claim of inconsistent enforcement came up short as well.

Again, the plaintiff claimed that there were several instances where his speech was suppressed and that those instances were part of a pattern of discrimination against him and his organization. He first cited the failure of SAC to post his fliers. However, the court found that this occurred because SAC was short staffed; WHS was not treated unfairly, just as the meeting between SAC and WHS determined. The second incident was also tied to the distribution of fliers. The plaintiff put unstamped literature on a table and a university employee told him that that was not permitted. This is because the school policy required that all literature be stamped and have an organization's identification on it. Again, the court found that the plaintiff's claims of discrimination were pure conjecture.

The third incident dealt with WHS's request for additional bulletin board space. The plaintiff wrote a couple of letters to administration with his request and they were never responded to. The administrators claim that they never received these requests. Additionally, the Student Bar Association (SBA) was responsible for allocating bulletin board space, so any lack of response would have been the fault of the SBA.

The fourth situation dealt with the easels set up by student groups at the entrance to the Law School. The plaintiff claimed that the removal of all easels only occurred after WHS set one up and that this was an effort to suppress his speech. The court again found that this was pure conjecture. Additionally, Law School administration had been warned by the fire marshal that the quantity of easels posed a safety hazard. This was found to be the reason for the shift in policy.

The fifth incident revolved around the plaintiff's reservation of a room for a guest lecture. The plaintiff was told the cost for the reservation was one thousand dollars, and he claimed that the fee was put in place to prevent the lecture from taking place. The court found that this assertion was unsupported as well. The school employed union labor, and the costs would have been the same for any group wanting to reserve the space.

The sixth incident dealt with the requirement that all non-law school students be placed on a guest list prior to an event in the building. The school stated that the policy was to ensure security and prevent theft from occurring. The plaintiff argued that the policy was inconsistently enforced. Again, the court found that there was no evidence to support this claim. Overall, "after weighing all of the evidence, we are compelled to conclude that the restrictions placed on plaintiff's first amendment rights were not content based" (*Sabatini v. Reinstein* 2016).

Reasonableness:

The court then went on to view whether the restrictions were reasonable. During the 1997 and 1998 graduation ceremonies at TU, thousands of people were entering and exiting the buildings. The school's policy for those events was that individuals could not distribute materials; safety was the reasoning for that policy. The court found that those restrictions were

reasonable. CPD officers told the plaintiff that he could not distribute leaflets inside the university building and directed the plaintiff to the public sidewalk, which was found to be reasonable by the court.

TU did not have to sit idly by until a safety issue arose before taking actions. As the Supreme Court said in *Cornelius*, "the government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation" (*Sabatini v. Reinstein* 2016). Thus, the court did not find the plaintiff's argument, that the new location for distribution was ineffective, to be compelling.

Ruling:

In all of the situations raised, TU imposed restrictions that were reasonable and content neutral.

Why This Case:

This case was unique in that the type of decision issued by the court was a memorandum opinion. This is a unanimous decision that does not go into extensive conversation about the court's reasoning. This brief opinion is acceptable when the decision is in line with well-established law and precedent. Additionally, this case alleged a pattern of discrimination, rather than an isolated incident. This was not the norm in the majority of cases reviewed for this thesis. Even so, the court interestingly found every alleged violation to be unsupported by the evidence.

Conclusion:

Three different challenges were presented in this chapter, all dealing with hate speech of some kind. Investigating the consistency of the court between these cases is important for students to form a complete understanding of their rights.

Main Actions Challenged:

Each of these challenges brought first amendment claims dealing with hate speech; however, the actions and policies challenged were very different. In *Pompeo v. Board of Regents of the University of New Mexico* (2017), the plaintiff claimed that her speech in a course response paper was subjected to viewpoint discrimination by the professor of the class. In *Speech First v. Schlissel* (2018), the civil rights organization challenged anti-discrimination and anti-harassment policies at the University of Michigan. In *Sabatini v. Reinstein* (2016), the plaintiff claimed viewpoint discrimination by Temple University restricted his efforts to distribute literature.

Establishment of Standing:

Standing was only brought up in one of the cases looked at. *Speech First* discussed standing in two different contexts. First, associational standing had to be established for Speech First, Inc. to bring the case on behalf of the three UM students. In the criteria to establish associational standing, the court had to review the standing of the three unnamed students on their own. The criteria used to establish individual standing matched that used in the other cases discussed in this thesis.

Forum Analysis:

Determination of the proper forum designation only occurred in one of the cases in this section, *Sabatini v. Reinstein* (2016). Forum designation is important to understand, because it decides the standards governing the area. In *Sabatini*, the court found that the lobbies of the buildings in question were non-public forums. This meant that the permissible regulation of speech in those forums had to be reasonable and viewpoint neutral. This standard was the same one used for limited-public forums, as limited-public forums are non-public forums that are open to only certain people or groups.

Threshold Requirements:

The threshold requirements are based on the requests brought to the court. In *Pompeo*, the plaintiff was seeking a declaratory judgement and damages. This meant that the court had to determine if a violation of constitutionally protected rights occurred and whether the defendants had qualified immunity. The court found that the speech in question was correctly designated school-sponsored speech which provided strong deference to educators and also allowed for viewpoint discrimination. The court found that the defendants were entitled to qualified immunity, because the defendants' actions were not deemed to be impermissible and the question at hand was not beyond debate.

In *Speech First*, the plaintiff was asking the court to issue a preliminary injunction. There was a four-part test used to determine whether an injunction would be issued. Interestingly, this case made clear that the determinative factor is usually whether the plaintiff would prevail on the merits of the case. Thus, the court took up the merits of the case, which required the court to look at whether the plaintiff had standing and whether the claim was moot. Ultimately, the court denied the motion of the plaintiff.

In *Sabatini*, the plaintiff had a bench trial to determine whether his first amendment was violated by the defendants tied to Temple University. The court looked into alleged content discrimination and into reasonableness to come to a decision. After determining that there was no content discrimination and that the restrictions were reasonable, the court ruled in favor of the defendants.

Conclusion:

Hate speech is the speech most debated in discussions on the utility of a broad interpretation of the first amendment and the protection of free speech on college campuses. Nevertheless, the Supreme Court has ruled that hate speech is constitutionally protected. The justices of the Supreme Court unanimously held this opinion in the *Matal v. Tam* (2017) decision. The application of this decision may be where most challenges arise from here on out, because the court was very clear in the protection of hate speech provided for by the first amendment. Even with this guidance from the highest court in America, university policies and actions taken to combat or minimize hate speech continue to be challenged as administrators work to build an inclusive campus for all people.

Conclusion

The First Amendment:

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

Public vs. Private Universities and Colleges:

Public institutions are state agents that are required to respect the constitutional rights of students. The First Amendment only regulates government action. Private institutions, those that do not get government money, set their own standards for protecting free speech as they are not bound by the first amendment.

Relevant Topic:

The topic of free speech on public college campuses has remained in the news throughout the last few years. There are several reasons for the attention given to this topic. First, students continue to challenge policies and practices of university officials, taking questionable conduct and protocols to court for a determination on the legality of the actions. One of the more prominent challenges that has been covered by the media came in the form of a settlement between the University of California, Berkeley and the Young America's Foundation (YAF). This settlement resulted in YAF being compensated seventy thousand dollars, the termination of the school's policy of charging student groups security fees for bringing controversial speakers to campus, and administration at the school will end basing venue decisions on community reaction, thus ending the heckler's veto (Brown, 2018).

This settlement with Berkeley is not the only reason that that institution has been in the news recently over issues with free speech. In February 2019, a young adult was on Berkeley's campus recruiting students of the university for a conservative student group when he was approached by another individual. The individual came up and violently punched the recruiter as seen in videos of the incident (Mettler, 2019). Many have attributed this criminal activity to an intolerance of conservative viewpoints appearing on several college campuses, Berkeley's in particular. This incident revitalized the debate of free speech on campus and may have been responsible for one of the more significant governmental actions dealing with this topic—an executive order issued by President Donald Trump.

In March 2019, Trump signed an executive order intending to ensure the protection of free speech on campus. "[Trump's] executive order conditions research funding on 'compliance with the First Amendment' and directs federal agencies to ensure that institutions receiving federal research or education grants 'promote free inquiry'" (Schwartz, 2019). According to the President, this was done to maintain the right to free expression and free speech on college campuses in a time when "many universities have become 'increasingly hostile' to free speech" (Schwartz, 2019). This executive order has also kept the discussion of free speech on public college campuses alive.

Role of the Courts:

The courts are tasked with deciding cases and resolving controversies under the Constitution. Thus, any challenges brought by students, or groups representing them, would be decided by the judiciary. Students can challenge school policy, administrator conduct, and much more in the courts. Recently, students have taken university administrators to court over free

speech zones, student organization recognition, and unequal imposition of security fees for outside speakers.

Forums and Permissible Regulation:

There are four possible types of forum designation, all of which appeared in this thesis. The first, where speech is most protected and restrictions must survive the strictest scrutiny, is a traditional public forum. This was seen in *Shaw v. Burke* (2018). To determine if a traditional public forum is the proper designation, the court must consider the actual use and purpose of the property, the physical characteristics of the property, and the traditional and historic use of the property and properties similar to the one in question. The court reviewed descriptions of the areas on Pierce College's campus and came to the determination that the forum was a traditional public forum. In order for a restriction on speech in this type of forum to be permissible, the restriction must serve a significant state interest and its means must be narrowly tailored.

The next type of forum designation is a designated public forum. A designated public forum is created when the government is attempting to establish a nontraditional forum for public speech. In *Justice for All v. Faulkner* (2005), the court used the *Chiu* test to come to the determination that the area was a designated public forum. Through looking at the intent of the forum, as well as the nature of the forum, the area in question was properly characterized as a designated public forum. This subjects restrictions on speech to strict scrutiny, just like restrictions in a traditional public forum.

A forum can also be designated a limited public forum. A limited public forum is government property opened up to specific groups or opened up for discussion of specific subjects, as defined by *Pleasant Grove City v. Summum* (2009). The forum in question in *Alpha Delta Chi* (2011) was deemed a limited public forum. This is because the forum was restricted to

public use—only student organizations were permitted to use the forum. Also, use of the forum required university approval. Restrictions on speech in a limited public forum must be reasonable in light of the purpose of the forum and must be viewpoint neutral. It is important to note that speech in a limited public forum is far less protected than speech in a designated public forum.

The final possible forum designation is deeming an area a nonpublic forum. If a forum does not fall into any of the other designated types, it is a nonpublic forum. Speech in a nonpublic forum has the least protection as compared to the other possible forums. In *Sabatini v. Reinstein* (2016), the court found the lobbies of the buildings in question to be a nonpublic forum. This meant that restrictions on speech must only be reasonable in light of the purpose of the area and viewpoint neutral.

Threshold Requirements:

Standing:

When evaluating standing, there are three things for the court to consider. The court must determine whether the plaintiff suffered an injury in fact, whether the challenged conduct or policy caused the alleged injury, and whether the injury would be redressed by a decision in the plaintiff's favor. These standing rules were used in *Shaw v. Burke* (2018), *Gerlich v. Leath* (2017), and *Speech First v. Schlissel* (2018).

The court also had two other types of standing that were evaluated in cases reviewed in this thesis—pre-enforcement standing and associational standing. In Shaw, the plaintiff raised a facial challenge that required pre-enforcement standing to be evaluated. When judging pre-enforcement standing, the court has to determine whether there is a reasonable likelihood that the

policies being evaluated will be enforced, whether the plaintiff has shown an intent to violate the policy, and whether the policy is applicable to the plaintiff.

In Speech First, this civil rights organization brought suit on behalf of three students at the University of Michigan. This required the court to evaluate the associational standing of Speech First. The standard for associational standing requires the court to determine whether the members of the organization would have standing to sue in their own right, whether the interests the organization seeks to protect are germane to the organization's purpose, and whether the claim asserted and the relief requested requires the participation of individual members in the lawsuit.

Interestingly, in *Uzuegbunam & Bradford v. Preczewski* (2018), the court only looked at one aspect when determining standing. It came down to whether the court could grant the plaintiffs relief through an injunction or declaratory judgment. Because Uzuegbunam had graduated and was not going to be subjected to the challenged policy again, his claims were dismissed. Bradford, however, was still a student and, therefore, still subjected to the challenged policies. Because of this, Bradford had standing to bring the case. In this case, the court did not use the three-part standard used in the other cases reviewed in this thesis to determine standing.

Mootness:

The standard to determine mootness is also important to understand. In *Uzuegbunam & Bradford v. Preczewski* (2018), the defendants brought a motion to dismiss for mootness to the court. The court used several criteria to make a determination on this motion. In order for the case to be found moot, the court must find that it is likely that the alleged violation will not happen again and that it is unlikely that the challenged practice will resume after the lawsuit is

dismissed. To dismiss for mootness, the court must find that the policy change came from considerable deliberation, that the challenged conduct was ended unambiguously by significantly altering the gravamen, and that the institution is committed to the new policies.

In *Speech First v. Schlissel* (2018), mootness was also reviewed. Here, the court noted that a case will become moot if "it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" (*Speech First, Inc. v. Schlissel* 2018). The court found the plaintiff's claims to be moot, because UM had removed the challenged definitions within a month of this lawsuit being brought, the revisions were approved by several people in university leadership, and the university had committed to solely using the revised definitions in any disciplinary proceedings moving forward. The court was convinced that the alleged violation would not recur.

Unprotected and Protected Speech:

The court has made clear that all speech that does not fall into the following categories are protected. Those categories are incitement, fighting words, true threats, obscenity, child pornography, defamation, and perjury (Constitutional Law Reporter, 2019). This thesis also reviewed cases that clarified certain categories of speech that are explicitly protected, like hate speech, anonymous speech, and spontaneous speech.

Summary of Cases in Thesis:

Table 1 goes through each case covered in this thesis. It clarifies what prompted the legal challenge, whether it be policy, conduct, or both. *Table 1* also shows which party prevailed and what lessons were learned from each case that was examined in this paper.

Case	**Challenge**	**Ruling**	**Lessons Learned**

Uzuegbunam & Bradford v. Preczewski	Policy (Speech Zone)	University	Revisions to challenged policies can moot case
Alpha Delta Chi—Delta Chapter v. Reed	Policy (Organization denied recognition due to religious restrictions on membership)	University	All-comers policy is permissible, because it does not take viewpoint into consideration
Justice for All v. Faulkner	Policy (Distribution of literature)	Plaintiff-Organization	Anonymous speech is protected
Shaw v. Burke	Policy (Speech Zone and Permit process for distribution of literature)	Plaintiff-Student	Spontaneous speech is protected, and free speech zones that are unreasonable and lack available alternative channels for communication are unconstitutional
Gerlich v. Leath	Conduct (As-applied claim of discrimination)	Plaintiff-Student	Unequal application of university policies due to viewpoint discrimination is unconstitutional
Salazar v. Joilet Junior College	Policy and Conduct (Posting materials, false imprisonment)	Settlement	There are ways to get the desired result without waiting for the court to make a determination (i.e. settlements)
Pompeo v. Board of Regents of the University of New Mexico	Conduct (viewpoint discrimination in class setting)	University	Viewpoint-based decisions on school-sponsored speech are constitutional
Speech First v. Schlissel	Policy (definitions of harassment and bullying, as well as the existence of a Bias Response Team	University	Revising the challenged policies prior to lawsuit makes the case moot, so long as the revisions make the policy constitutional
Sabatini v. Reinstein	Conduct (alleged pattern of discrimination)	University	Evidence is necessary to establish violation of rights; mere allegations come up short

Table 1: Breakdown of cases examined in this thesis, including what was challenged, what party prevailed, and what the case determined on the topic of free speech

Inconsistent interpretations:

Suppression of student speech by university administrators is the biggest threat students face regarding the exercise of their free speech rights. Some university administrators have policies in place that unconstitutionally restrict the first amendment rights of the students at their institution. Others have engaged in unconstitutional conduct that suppresses students' free speech rights. In most cases, this behavior is not a deliberate attempt to violate the rights of students on campus; these issues typically result from administrators not making appropriate adjustments to their policies or conduct when decisions are handed down by the court. Decisions rendered by the court should serve as a guide to university administrators, yet that does not seem to be the case.

This thesis reviewed several instances where procedures or behaviors were found to be unconstitutional. In the cases where the court ruled in favor of the plaintiff, that being those students challenging the educational institution, the court found that university officials enacted unconstitutional policies or engaged in unconstitutional conduct. These decisions handed down by the court should provide guidance to universities with policies or conduct similar to those in question. The decisions, should they not be awaiting appellate review, should be used to craft policies or alter conduct to fall in line with the constitution. However, this is not always the case and is what leads to inconsistent interpretations of the first amendment by university administrators. This is exemplified by looking at some institutions' current policies that are similar to the policies found unconstitutional in the cases reviewed in this thesis.

In *Justice for All v. Faulkner*, the court reaffirmed that anonymous leafletting was protected by the first amendment. At UT-Austin, the forum in question was determined to be a designated forum, thus forcing the policies to survive strict scrutiny to be permissible. The initial burden was on the plaintiff, but once the policies had to survive strict scrutiny, the burden shifted to the defendants. The court found that saving the college campus for student use and expression was a significant interest of the government. UT-Austin then had to demonstrate that the policies were narrowly tailored. The court found that mandating identification on every leaflet was not narrowly tailored, because the policy burdened substantially more speech than was necessary to further the government's interest.

Even after this determination, institutions still have policies that prohibit anonymous leafletting in a similar way. Troy University, a public university in Alabama, is an example of this. Troy's current policy requires identification of the individual or organization that is responsible for distributing the material. "All notices and printed materials must carry the name of the organization or individual responsible for distribution" (The Oracle, 2019, 124). This policy mirrors that seen in Justice for All; one that was found to be unconstitutional.

In *Shaw v. Burke,* the Pierce College campus was declared a nonpublic forum except for a small free speech zone. Literature could only be distributed within the free speech zone and access to that area required a permit from administration. The minimal size of the free speech zone and the lack of alternative avenues for communication were the reasons that the court found Pierce College's policies unconstitutional—they were not narrowly tailored, a requirement in a public forum.

Nevertheless, colleges across the country still have restrictive free speech zones as the only areas on campus where free expression can occur. Arkansas State University is a public institution that currently has a free speech zone policy.

> "There are several areas designated as a Free Expression Area for speeches and demonstrations at Arkansas State University. These areas will generally be available for this purpose between 8:00 a.m. and 9:00 p.m. Monday through Friday. Use of this area for speaking, demonstrating and other forms of expression will be scheduled through the Director of Student Development and Leadership in order to accommodate all interested users. Should any individual or group desire the use of other areas of the campus and other times for speeches and demonstrations, a request must be made to the Vice Chancellor for Student Affairs, his/her designee, or the Director of Student Development and Leadership at least 72 hours in advance of the event. Such plans will be considered in accordance with the principle of content neutrality" (Arkansas State University, 2019).

This policy clearly implements a free speech zone on Arkansas State's campus. Not only is much of the campus off-limits to free speech, this policy also limits spontaneous speech with the requirement for approval of using the space. This approval process makes this case even more similar to the circumstances in Shaw's case, where the court found that prior restraints like this impermissibly limit spontaneous speech. With the small area available on campus for free speech and the prior restraint, this policy regarding student speech is questionable at best.

In *Gerlich v. Leath*, the court found that ISU engaged in viewpoint discrimination against NORML ISU by treating the group differently than other recognized student groups. By subjecting NORML ISU to additional scrutiny with prior approval, placing reauthorization of designs on hold, and prohibiting designs with a cannabis leaf, ISU behaved differently when dealing with NORML ISU. This viewpoint discrimination was found to be impermissible as the trademark program was determined to be a limited public forum.

One recent example of an incident with potential viewpoint discrimination stands out. In January 2017, a University of Alabama student began a national controversy when she posted a

video of herself discussing her hatred for "n-----s." The university responded to this video by expelling the student from the institution (Miller, 2018). Had this action been challenged in court, the main student could have persuasively argued that the University of Alabama violated her first amendment rights through engaging in viewpoint discrimination.

Other examples, some very similar to *Gerlich*, have been taken to court in the last year. In *Students for Life at Ball State University v. Hall* (2018), Ball State University settled with the plaintiff over a claim of viewpoint discrimination. The defendant agreed to revise the school's policy regarding student organization fund allocation. The new policy explicitly prohibits taking a group's viewpoint into consideration when allocating funds, something that was not in the challenged policy. In *Young America's Foundation v. The Regents of the University of California* (2018), a claim of viewpoint discrimination was also raised. The Young America's Foundation had claimed that there was an unpublished policy charging higher security fees to conservative groups wishing to bring speakers on campus. In the settlement reached in this case, the University of California revised their policies regarding security fees for outside speakers to ensure that viewpoint discrimination was not permitted.

The lack of adjustments to university policy and conduct in response to decisions by the court is detrimental to student exercise of their first amendment rights. Students are not familiar with what behavior and expression they can engage in on their campus, since university policy does not always align with existing court precedent. The inconsistency among college administrators in interpreting and applying the new case law to their school policies and practices is credited for much of the tension on campus surrounding free speech. Some attribute this inconsistency to administrators wanting to create an inclusive and tolerant campus for all. In their efforts to provide this inclusive environment, students' free speech rights can be violated.

***Disclaimer:** Some of the decisions analyzed in this thesis may be appealed. Before citing any ruling, verify that the decision in this paper is the most recent finding by the court.

Resources for Students:

- Free Speech on Campus by Erwin Chemerinsky and Howard Gillman
- https://www.thefire.org/spotlight/
- Speech First, Inc. (https://speechfirst.org/)
- The Foundation for Individual Rights in Education (https://www.thefire.org/)

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