

# FREE SPEECH IN THE QUAD: WHY FIRST AMENDMENT OPPRESSION IS NOT THE PATH TO RACIAL JUSTICE

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## I. INTRODUCTION

“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>1</sup> The touchstone of the First Amendment, and any of free society, is freedom of expression – and the most important aspect of free speech is being able to express what may be controversial or unpopular. “I disapprove of what you say, but I will defend to the death your right to say it.”<sup>2</sup> Free speech allows for individual freedom of mind and promotes a “marketplace of ideas,” while placing an important check on those in power.<sup>3</sup> This freedom however, is not one-sided. “Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain.”<sup>4</sup> Therefore, each time a speaker is someone with whom an individual disagrees, the value placed on free speech is tested most.<sup>5</sup>

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> EVELYN BEATRICE HALL, *THE FRIENDS OF VOLTAIRE* 199 (Putnam's, May 5, 2008).

<sup>3</sup> *Campus Rights*, THE FIRE: FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <https://www.thefire.org/campus-rights/> (last visited May 3, 2016) [hereinafter *Campus Rights*, THE FIRE].

<sup>4</sup> *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011).

<sup>5</sup> *Hate Speech on Campus*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/hate-speech-campus> (last visited May 1, 2016) [hereinafter *Hate Speech on Campus*, AM. CIV. LIBERTIES UNION].

Recently, the value placed on free speech has been tested at colleges and universities across the country.<sup>6</sup> A movement has emerged among students and some faculty that seeks to suppress First Amendment freedom of speech in the name of racial equality.<sup>7</sup> Activists contend a First Amendment “hate speech” exception will suppress racial intolerance and lead to a more welcoming environment.<sup>8</sup> Those opposed contend free speech and freedom of association are the very tools that empower a minority and should therefore be protected.<sup>9</sup>

In this Note I will show why First Amendment oppression at university campuses will not lead to racial justice. Part II will provide a historical background of the discord surrounding the First Amendment and race relations on university campuses. Part III will discuss the impact of proposed First Amendment restrictions on university campuses. Finally, Part IV will argue why First Amendment oppression on university campuses will not lead to racial justice.

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<sup>6</sup> Public institutions, as arms of the federal government must guarantee First Amendment protections. However, private institutions must guarantee certain free speech protections if required by contractual obligation and/or federal funding requirements. “[P]rivate universities that restrict students’ speech may violate their contractual obligations if they have written policies promising freedom of expression [and] because most private universities receive federal money, they are bound by federal laws forbidding discrimination on the basis of gender under Title IX, or race under Title VI. Sarah Glazer, *Free Speech on Campus: Where Should Colleges Draw the Line*, CQ RESEARCHER (May 8, 2015), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2015050800>.

<sup>7</sup> David Cole, *Racial Conflict in US Universities and the Challenge to Freedom of Speech*, FINANCIAL REVIEW, (Jan. 22, 2016), <http://www.afr.com/lifestyle/racial-conflict-in-us-universities-and-the-challenge-to-freedom-of-speech-20160118-gm80ml>, [hereinafter David Cole, *Racial Conflict in US Universities*]; See also THE DEMANDS, <http://www.thedemands.org> (last visited Apr. 29, 2016) (student activist website that compiles demands of students from universities across the country and has the stated mission to, “end systematic and structural racism on campus”).

<sup>8</sup> Eugene Volokh, *No, There’s No “Hate Speech” Exception to the First Amendment*, THE WASHINGTON POST (May 7, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/>.

<sup>9</sup> See David Cole, *Racial Conflict in US Universities*, *supra* note 7.

## II. HISTORICAL BACKGROUND

Students and some faculty have moved to suppress First Amendment freedom of speech in the name of racial equality at university campuses across the country.<sup>10</sup> Hurting a student's feelings – even in the course of respectful instruction – can now get a teacher into serious trouble.<sup>11</sup> "Emotional discomfort is [now] regarded as equivalent to material injury, and all injuries have to be remediated."<sup>12</sup> Now, "anyone with a grudge, a political agenda, or a desire for attention can quite easily leverage the system" to expand what Title IX covers.<sup>13</sup>

One notable example of this troubling trend occurred in October 2015, when students at Yale University pressured instructors Erika Christakis and her husband Dr. Nicholas Christakis to resign after an email she wrote.<sup>14</sup> Prior to Halloween, the Intercultural Affairs Committee had sent a message urging students to reconsider Halloween costumes that might be racially insensitive.<sup>15</sup> And after some students voiced concern to Ms. Christakis and her husband that administrators were offering heavy-handed

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<sup>10</sup> *Id.*

<sup>11</sup> Edward Schlosser, *I'm a Liberal Professor, and my Liberal Students Terrify Me*, VOX (Jun. 15, 2015), <http://www.vox.com/2015/6/3/8706323/college-professor-afraid>.

<sup>12</sup> Laura Kipnis, *My Title IX Inquisition*, THE CHRONICLE OF HIGHER EDUCATION (May 29, 2015), <http://chronicle.com/article/My-Title-IX-Inquisition/230489>. But see Deanna Isaacs, *University Professors Claim Title IX Abuse in New Report*, CHICAGO READER (Apr. 6, 2016), (reporting that Laura Kipnis has since been exonerated), <http://www.chicagoreader.com/Bleader/archives/2016/04/06/university-professors-claim-title-ix-abuse-in-new-report>.

<sup>13</sup> See Laura Kipnis, *supra* note 12.

<sup>14</sup> Anemonia Hartocollis, *Yale Lecturer Resigns After Email on Halloween Costumes*, THE NEW YORK TIMES (Dec. 7, 2015), <http://www.nytimes.com/2015/12/08/us/yale-lecturer-resigns-after-email-on-halloween-costumes.html>.

<sup>15</sup> Libby Nelson, *Yale's Big Fight Over Sensitivity and Free Speech, Explained*, VOX (Nov. 7, 2015), <http://www.vox.com/2015/11/7/9689330/yale-halloween-email>.

advice on what Halloween costumes to avoid, Ms. Christakis sent her email.<sup>16</sup>

In her email, she lauded the administration's goal of racial sensitivity but questioned the administration's approach as, "implied control over college students."<sup>17</sup> She also expressed concern that universities had become places of censure and prohibition: "Have we lost faith in young people's capacity — in your capacity — to exercise self-censure, through social norming, and also in your capacity to ignore or reject things that trouble you?"<sup>18</sup> And, "[e]ven if we could agree on how to avoid offense . . . I wonder, and I am not trying to be provocative: Is there no room anymore for a child or young person to be a little bit obnoxious... a little bit inappropriate or provocative or, yes, offensive?"<sup>19</sup> She closed her email stating: "[f]ree speech and the ability to tolerate offence are the hallmarks of a free and open society."<sup>20</sup> And invited students to think about the controversy through an intellectual lens but asserted it was their right to decide which costumes to wear.<sup>21</sup>

About a month after this email, Yale University released a statement that said, to their disappointment, Ms. Christakis had made a "voluntary decision not to teach in the future," and her husband would take a one-semester sabbatical.<sup>22</sup>

This free speech incident at Yale University is not an isolated event. In another notable incident in November 2015, University of Missouri students petitioned and

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<sup>16</sup> Conor Friedersdorf, *The New Intolerance of Student Activism*, THE ATLANTIC (Nov. 9, 2015), <http://www.theatlantic.com/politics/archive/2015/11/the-new-intolerance-of-student-activism-at-yale/414810/>.

<sup>17</sup> *Email From Erika Christakis: "Dressing Yourself," email to Silliman College (Yale) Students on Halloween Costumes*, THE FIRE: FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Oct. 30, 2015), <https://www.thefire.org/email-from-erika-christakis-dressing-yourself-email-to-silliman-college-yale-students-on-halloween-costumes/>, [hereinafter *Email From Erika Christakis: "Dressing Yourself"*].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; See Conor Friedersdorf, *supra* note 16.

<sup>22</sup> See Anemonia Hartocollis, *supra* note 14.

obtained the resignation of their college president and chancellor for what they considered an insufficient response to racist speech on campus.<sup>23</sup> That same month, student protesters at Amherst College demanded the administration adopt zero-tolerance policies for hate speech and demanded (1) that the “All Lives Matter” signs around campus be condemned as offensive to the national Black Lives Matter movement, (2) that the unofficial mascot Lord Jeff be abandoned because it advocated for spreading smallpox among Native Americans, and (3) that the school honor code be revised to include “zero tolerance” for “racially insensitive” remarks.”<sup>24</sup> At Princeton University, students petitioned for the school to remove Woodrow Wilson’s name from a residential college and school of public policy due to Wilson’s known racist views.<sup>25</sup> At Wesleyan, students petitioned to deny funding to the school newspaper after it published an article critical of Black Lives Matter. At Georgetown University, students petitioned, and the school agreed, to rename two buildings previously named after slave owners.<sup>26</sup> At the University of Mary Washington, students petitioned that the administration to implement a speech code to protect female students from threats of violence and sexual assault.<sup>27</sup> When the university declined, the students filed a Title IX

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<sup>23</sup> See David Cole, *Racial Conflict in US Universities*, *supra* note 7.

<sup>24</sup> *Id.*

<sup>25</sup> Nick Anderson, *Princeton Will Keep Woodrow Wilson’s Name on Buildings, but also Expand Diversity Efforts*, THE WASHINGTON POST (Apr. 4, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/04/04/princeton-will-keep-woodrow-wilsons-name-on-buildings-but-it-will-take-steps-to-expand-diversity-and-inclusion/>.

<sup>26</sup> Ari Shapiro, *Georgetown University To Rename Buildings Named After Slaveowners* NATIONAL PUBLIC RADIO (Nov. 16, 2015), <http://www.npr.org/2015/11/16/456254036/georgetown-university-to-rename-buildings-named-after-slaveowners>.

<sup>27</sup> Derek Quizon, *Efforts to stifle speech by colleges, students 'honored' with Jefferson Muzzle Awards* RICHMOND TIMES DISPATCH (Apr. 20, 2016), [http://www.richmond.com/news/virginia/article\\_4d9c7901-c1bd-5a20-8b03-b69d2f43ed2a.html](http://www.richmond.com/news/virginia/article_4d9c7901-c1bd-5a20-8b03-b69d2f43ed2a.html); Tyler Kingkade, *UMW President Strikes Back At Feminist Group Over Complaint About Yik Yak Threats*, HUFFINGTON POST (Jun. 9, 2015), [http://www.huffingtonpost.com/2015/06/09/umw-feminist-yik-yak-threats\\_n\\_7539264.html](http://www.huffingtonpost.com/2015/06/09/umw-feminist-yik-yak-threats_n_7539264.html).

lawsuit.<sup>28</sup> “The fact that so many of the recent controversies have arisen on college campuses is no accident. Because universities can select their student bodies and are committed to diversity, they are some of the most integrated sites in an otherwise remarkably segregated nation.”<sup>29</sup>

Many activists for “hate speech” exceptions assert the free speech defense is just a diversion to racial justice – or as one critic put, “victim-blaming with a software update.”<sup>30</sup> That, “[t]he default for avoiding discussion of racism is to invoke a separate principle, one with which few would disagree in the abstract—free speech, respectful participation in class—as the counterpoint to the violation of principles relating to civil rights.”<sup>31</sup> And because the freedom to offend the powerful is not equivalent to the freedom to bully the relatively disempowered, “hate speech” exceptions are therefore necessary.<sup>32</sup> And a look at the past 50 years will show some universities have capitulated to this idea.

In the past fifty years, the university free speech pendulum has swung – campuses are no longer safe havens for free expression, but increasingly places of censorship and prohibition.<sup>33</sup> Previously students and universities pressured for freedom of expression and acted as engines of change; now, the trend among many students and universities is a move for silence. Currently one-in-six university campuses in the United States employ

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<sup>28</sup> *Id.*

<sup>29</sup> David Cole, *Yale: The Power of Speech*, NYR DAILY (Nov. 18, 2015), <http://www.nybooks.com/daily/2015/11/18/yale-power-of-speech/>, [hereinafter David Cole *The Power of Speech*].

<sup>30</sup> Jelani Cobb, *Race and the Free-Speech Diversion*, THE NEW YORKER (Nov. 10, 2015), <http://www.newyorker.com/news/news-desk/race-and-the-free-speech-diversion>.

<sup>31</sup> See Jelani Cobb, *supra* note 30.

<sup>32</sup> *Id.*

<sup>33</sup> See *Hate Speech on Campus*, AM. CIV. LIBERTIES UNION, *supra* note 5.

free speech zones.<sup>34</sup> This trend favoring free speech restrictions seems to be generational. A recent survey shows four-in-ten of American Millennials say the government should be able to prevent people from publicly making statements that are offensive to minority groups.<sup>35</sup> That same survey shows older generations are far more likely to oppose free speech restrictions: only about a quarter of Generation X and Baby Boomers agree and only about one-in-ten of the Silent Generation agrees.<sup>36</sup>

Perhaps then, it is no surprise the university free speech pendulum has swung in favor of speech restrictions – Millennials make up most of the university population and are present to apply greatest pressure on the administration for change. In response to these campus pressures, many universities have adopted codes and policies that prohibit “offensive” and “outrageous” speech.<sup>37</sup> On the surface such measures may sound appealing. However, who gets to decide what speech is “offensive” enough or “outrageous” enough?<sup>38</sup> More vexing, how can a university that limits speech educate students from different backgrounds to effectively handle differences in a “marketplace of ideas?”<sup>39</sup> Therefore, how can First Amendment oppression really be the right path to social justice?

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<sup>34</sup> Lydia Wheeler, *Colleges are Restricting Free Speech on Campus, Lawmakers Say*, THE HILL (Jun. 2, 2015), <http://thehill.com/regulation/243785-colleges-are-restricting-free-speech-on-campus-lawmakers-say>.

<sup>35</sup> Jacob Poushter, *40% of Millennials OK With Limiting Speech Offensive to Minorities*, PEW RESEARCH CENTER, (Nov. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/>.

<sup>36</sup> See Jacob Poushter, *supra* note 35.

<sup>37</sup> See *Hate Speech on Campus*, AM. CIV. LIBERTIES UNION, *supra* note 5.

<sup>38</sup> *Snyder v. Phelps*, 562 U.S. at 458; “[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate “breathing space” to the freedoms protected by the First Amendment.” *quoting Boos v. Barry*, 485 U.S. 312, 322 (1988).

<sup>39</sup> See *Campus Rights*, THE FIRE *supra* note 3.

### III. ANALYSIS/ARGUMENT

“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”<sup>40</sup>

These student activists across the country reflect First Amendment values and traditions to their core.<sup>41</sup> For that, they deserve applause. These activists have been organizing politically, speaking out, holding rallies, and using the First Amendment to stand up, communicate and demand equal justice.<sup>42</sup> But the end they seek runs contrary to their purpose. Curtailing freedom of speech in any manner would place limits on those that challenge the *status quo* – a dangerous precedent for any free society.

It is a mistake to suppress speech in the name of equality. “Free speech and association are tools for the minority, whoever they are at a given moment.”<sup>43</sup> The First Amendment empowers individuals. It empowers individuals to “express their views, to dissent from majority policies, and to organize politically to advance their interests.”<sup>44</sup> Free speech protected Martin Luther King Jr., Malcolm X, Susan B. Anthony, and many other civil rights activists.<sup>45</sup> “The last thing a minority group should seek is the suppression of free expression.”<sup>46</sup>

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<sup>40</sup> *Snyder v. Phelps*, 562 U.S. at 461.

<sup>41</sup> See David Cole *The Power of Speech*, *supra* note 29.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*



Academic and education freedom are bedrocks of a free society.<sup>47</sup> Universities should therefore impose policies that encourage students to become productive members of society – policies that, as Ms. Christakis observed—would be “conducive to the civil dialogue and open inquiry required to solve our urgent societal problems.”<sup>48</sup>

#### IV. CONCLUSION

“Speech that severely offends an individual’s morality or is hostile to an individual’s way of life warrants the same constitutional protection as other speech because the right of free speech is indivisible: When one of us is denied this right, all of us are denied.”<sup>49</sup> Justice Harlan recognized that in interpreting the Constitution, the Supreme Court must strike a balance between “liberty of the individual” and “the demands of organized society.”<sup>50</sup>

The touchstone of the First Amendment, and any of free society, is freedom of expression – no matter if the government or others may disagree. It allows for individual freedom of mind, and places an important check on those in power.<sup>51</sup> First Amendment oppression would set a dangerous precedent and is not the answer to any social intolerance. “[F]reedom for the thought that we hate” is often important to the discovery of truth, because sometimes viewpoints change.<sup>52</sup> Free speech and freedom of association are the tools that empower a minority – tools that must not be diminished.<sup>53</sup> Ideas in vogue

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<sup>47</sup> See *Hate Speech on Campus*, AM. CIV. LIBERTIES UNION, *supra* note 5.

<sup>48</sup> Isaac Stanley-Becker, *Yale Instructor at the Center of Racial Protest to Leave Teaching Role*, THE WASHINGTON POST (Dec. 4, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/12/04/with-her-words-this-instructor-helped-set-off-protests-over-race-and-a-debate-over-free-speech-now-shes-leaving-yale/>.

<sup>49</sup> See *Hate Speech on Campus*, AM. CIV. LIBERTIES UNION, *supra* note 5.

<sup>50</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961).

<sup>51</sup> See *Campus Rights*, THE FIRE *supra* note 3.

<sup>52</sup> Peter Sagal, *The First & Second Amendments*, PUBLIC BROADCASTING SERVICE, <http://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/first-and-second-amendments/> (last visited May 1, 2016).

<sup>53</sup> See David Cole, *Racial Conflict in US Universities*, *supra* note 7.

today may not be in vogue tomorrow. Therefore, we must “be eternally vigilant against attempts to check the expression of opinions that we loathe.”<sup>54</sup>

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<sup>54</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).