

THE ALT-RIGHT, THE CHRISTIAN RIGHT, AND IMPLICATIONS ON FREE SPEECH

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I. INTRODUCTION

2016 brought a lot of things, but perhaps most alarming was the rise of the Alternate-Right, or in short, the “Alt-Right.”¹ The Alt-Right had a meteoric rise to prominence, especially as the political spectrum in the United States became increasingly polarized.² While the Alt-Right is widely known to be a fringe group much further right than the normal conservative, it is actually much more complex.³ The group is made up of a number of far-right groups, as the Southern Poverty Law Center has indicated that more than fifteen groups are associated and designated as extremist hate groups.⁴ Many of these groups

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¹ *Alt-right*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/alt-right> (last visited Jan. 30, 2019). Merriam-Webster defines the “Alt-right” as: “a right-wing, primarily online political movement or grouping based in the U.S. whose members reject mainstream conservative politics and espouse extremist beliefs and policies typically centered on ideas of white nationalism.”

² Taylor Hosking, *The Rise of the Alt-Right*, THE ATLANTIC, Dec. 28, 2017, <https://www.theatlantic.com/politics/archive/2017/12/alt-right/549242/>.

³ *Alt-Right*, Southern Poverty Law Center, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/alt-right> (last visited Oct. 26, 2017).

⁴ *Groups*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/groups> (last visited Oct. 26, 2017).

overlap on an ideology of hate, centered on “white identity” and ultra-free speech.⁵

While the Alt-Right encompasses many different groups, it is commonly understood to be most synonymous with Richard Bertrand Spencer.⁶ Spencer is attributed with coining the term “Alternative Right” in 2008, “to describe a loose set of far-right ideals centered on “white identity” and the preservation of “Western civilization.””⁷ The Alt-Right is also connected to “American Identitarianism,” a version of an ideology well known in Europe that “emphasizes cultural and racial homogeneity within different countries.”⁸ The Alt-Right movement is, in a sense, amorphous in that some groups are zealously anti-Semitic, while others see the Jewish community as “white.”⁹ Furthermore the movement is amorphous as groups are constantly reacting to the issues they deem adverse to their agenda, keeping up with modern controversies.¹⁰ The amorphous nature of ideologies under the Alt-

⁵ See SOUTHERN POVERTY LAW CENTER, *supra* note 2.

⁶ See *Id.* Spencer is the head of a white think tank, National Policy Institute.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See *Id.* The group has been reactionary in many different contexts most recently including the Syrian refugee crisis as well as the issue of illegal immigration in the U.S. Furthermore the group has been reactionary regarding serious issues such as the Black Lives Matter movement as well as the somewhat frivolous #BoycottStarWarsVII in protesting the casting of a black actor into an installment of Star Wars.

Right make it difficult to pinpoint exactly what the Alt-Right will take issue with and when.

The Alt-Right has received undoubtedly well-deserved and foreseeable criticism from a majority of society; however, there appears to be staunch support by those within the Alt-Right and it is clear that they embrace the idea of being against the establishment.¹¹ The Alt-Right has many different websites associated with it, including right-wing websites like the staunchly racist *The Daily Stormer*.¹² Major Alt-Right figureheads have reacted to how the movement is perceived in the media and society. They refer to themselves as “intellectuals” and that they are distinctly different than “old-school racist skinheads.”¹³ While they characterize skinheads as “low IQ thugs,” they claim that the major difference between them and the alternatives is “intelligence.”¹⁴ As for their often-characterized “pro-white”

¹¹ *Id.*

¹² Luke O'Brien, *The Making of an American Nazi*, THE ATLANTIC, December 2017, <https://www.theatlantic.com/magazine/archive/2017/12/the-making-of-an-american-nazi/544119/>. Andrew Anglin is attributed with publishing the *Daily Stormer*. He is known for attacking members of the Jewish community online and encouraging his devoted following to do the same. Anglin uses *The Daily Stormer* to publish his racist and anti-Semitic rhetoric. While payment processors have abandoned the website, Anglin continues to receive donations through cryptocurrency totaling in \$250,000 since 2014.

¹³ Allum Bokhari & Milo Yiannopoulos, *An Establishment Conservative's Guide to the Alt-Right*, BREITBART, Mar. 29, 2016, <http://www.breitbart.com/tech/2016/03/29/an-establishment-conservatives-guide-to-the-alt-right/>.

¹⁴ *Id.*

ideology, the Alt-Right defends its position that the Alt-Right are “inclined to prioritiz[e] the interests of their tribes, they recognize that other groups—Mexicans, African-Americans, or Muslims—are likely to do the same.”¹⁵ Furthermore, the Alt-Right draws comparisons to the left—acknowledging that their political views may not actually be as far apart as they seem.¹⁶

While the Alt-right has received a majority of the attention, many fail to focus on small details that have immense importance. While the Alt-Right has many groups, a significant number of them identify with religion, particularly Christianity.¹⁷ The Southern Poverty Law Center identifies a significant number of groups within the Christian Right, with a number of these groups designated as hate groups.¹⁸ Christian extremism has a long

¹⁵ *Id.*

¹⁶ *See Id.* The Alt-Right claims that many of their members believe that racial harmony may never be fully realized. An example provided is that a Mosque on the same street full of houses flying a flag of St. George may not be a Muslim street or an English street. They claim that separation is necessary to have distinctiveness. They liken this to the rising view of “cultural appropriation,” in that a person of one culture encroaches on the culture of another. For more info on cultural appropriation *See generally* Jenni Avins, *The Dos and Don't of Cultural Appropriation*, THE ATLANTIC, Oct. 20, 2015, <https://www.theatlantic.com/entertainment/archive/2015/10/the-dos-and-donts-of-cultural-appropriation/411292/>.

¹⁷ *See* SOUTHERN POVERTY LAW CENTER, *supra* note 2.

¹⁸ *See Id.*

history in the United States,¹⁹ however, it has now merged into the Alt-Right movement.

In the context of 2017, this became more complicated in a society that was sharply divided regarding immigration, based on fears of Islamic extremism. While Islamic extremism is widely talked about and widely feared throughout society, Christian extremism has arguably been an issue in this country far longer.²⁰ The nation has long harbored prominent threats of extremism, mainly between “Islamist extremism and far-right extremism.”²¹

The rise of the Alt-Right has interesting implications, as it tangles both free speech and freedom of religion into one controversial argument. On the one hand, the Alt-Right pushes free speech to its ultimate breaking point, and in some cases the consequences turn deadly.²² An obvious defense for the Alt-Right is

¹⁹ *Christian Identity*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/backgrounders/christian-identity?xpicked=4&item=Christia>, (last visited Oct. 27, 2017).

²⁰ See generally William Parkin, *Analysis: Deadly Threat from Far-Right Extremists is Overshadowed by Fear of Islamic Terrorism*, PBS, Feb. 24, 2017, <https://www.pbs.org/newshour/nation/analysis-deadly-threat-far-right-extremists-overshadowed-fear-islamic-terrorism>.

²¹ See *Id.*

²² Jason Hanna, Kaylee Hartung, Devon M. Sayers, & Steve Almasy, Virginia Governor to White Nationalists: ‘Go home...shame on you,’ CNN, Aug. 13, 2017, <http://www.cnn.com/2017/08/12/us/charlottesville-white-nationalists-rally/index.html>. At a “Unite the Right Rally” in Charleston, Virginia, a woman was killed when a protestor drove his car into a group of people. Nearly 20 people were injured in that incident in addition to multiple injuries throughout the day’s events. Two state troopers were also killed in a helicopter crash in responding to the event. The killing sparked outrage against the Alt-Right, which had

the First Amendment, which provides that Congress shall make no law abridging freedom of speech or prohibiting the free exercise clause.²³ The Supreme Court, however, has addressed the issue of hate speech in the context of protection under the First Amendment, establishing a jurisprudence regarding what is protected and what is not.²⁴

This note will examine the Christian Right, which not only pushes freedom of speech to its limit, but complicates it with the intricacies of the free exercise clause. The free exercise clause may be much more difficult to grasp, as it delves into belief.²⁵ Thus, although the First Amendment contains both the free speech and the free exercise clause, the Alt-Right finds itself in a unique position somewhere in between.

II. BACKGROUND

A. The Alt-Right

As mentioned, Richard Spencer coined the term “Alternative Right” in 2008.²⁶ Yet, the group only became a

converged on the city’s in a response to its plans of removing Confederate symbols that had been in various places around the city. It was characterized by the Southern Law Poverty Center as potentially one of the largest hate gatherings in the United State’s short history.

²³ U.S. Const. amend 1.

²⁴ This note will address precisely this issue and explore the jurisprudence and its implications in depth in a later section of the note.

²⁵ See generally J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 2, (1969).

²⁶ See *supra* note 3.

mainstay in media coverage during the 2016 election. This was only furthered by newly elected President Trump's appointment of Steve Bannon as a chief advisor.²⁷ Those in the Alt-Right are characterized as rejecting mainstream conservatism, viewing it as weak and insufficient in supporting their cause.²⁸ Although the ideology is amorphous there are a few common themes amongst those that make up the Alt-Right.

A major theme is "American Identitarians;" an ideology that rejects multiculturalism and seeks to preserve a common identity.²⁹ Perhaps in a more simple characterization many identify as white nationalists, in an effort to "preserve the White majority in the U.S."³⁰ The group is made up of a majority of young white males, who are considered intellectuals.³¹ The Alt-Right does not shy away from criticism and seems to embrace the characterization that it is comprised of primarily of young white men. The Alt-Right has defended its stance, claiming its members

²⁷ *What You Need to Know about the Alt-Right Movement*, NPR, <http://www.npr.org/2016/08/26/491452721/the-history-of-the-alt-right> (last visited Oct. 27, 2017). Bannon is considered a champion of the Alt-Right, and his website Breitbart is considered to be a major outlet for all things Alt-Right.

²⁸ *See Alt Right: A Primer about the New White Supremacy*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/backgrounders/alt-right-a-primer-about-the-new-white-supremacy> (last visited Oct. 27, 2017).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* These "intellectuals" are considered internet savvy and usually college educated. The group also celebrates what they perceive as an alleged cultural superiority of Whites.

are just looking out for their own.³² It recognizes that that its message of White Nationalism clearly appeals to disenfranchised “[w]hite men from more modest backgrounds.”³³ The demographic of the Alt-right may actually be more complex than the movement realizes. A recent poll questioned respondents’ values on white identity, a belief in the importance of white solidarity, and a sense of white victimization.³⁴ Of the responses, divorced respondents typically scored highest (compared to married and never married respondents), agreeing to all three values posed.³⁵ Unsurprisingly, respondents without a college degree scored much higher than those with a college degree.³⁶ Finally, those in the lowest income

³² Vincent Law, *The Alt-Right Is A Movement For And By Young White Men*, Alt-Right, Jul. 2, 2017, <https://altright.com/2017/07/02/the-alt-right-is-a-movement-for-and-by-young-white-men/>.

³³ *Id.* Law, a member of the Alt-Right, concludes that the movement has no appeal to baby boomers who have “already got theirs.” Furthermore, he claims that the groups is “de facto not a White advocacy group,” rather they are a “Young White Man Advocacy group.” Also apparent is a sense that young white men are at a disadvantage and need to rise up and take what they deserve..

³⁴ George Hawley, *The Demography of the Alt-Right*, INSTITUTE FOR FAMILY STUDIES, Aug. 9, 2018, <https://ifstudies.org/blog/the-demography-of-the-alt-right>. The survey included 3,038 non-Hispanic white respondents. Only a minority of those polled expressed high values on the ideas posed. 28% expressed strong feelings of white identity; about 38% expressed strong feelings of white solidarity; and about 27% felt that whites suffer a meaningful amount of discrimination in American life. Only about 6% expressed all three opinions.

³⁵ *Id.* The survey identifies that one possible reason for this group scoring highest is the general experience of divorce makes one feel alienated and negative in general.

³⁶ *Id.*

level (\$0-29k) scored dramatically higher than those in the highest income category (\$100k+).³⁷

In recent years, the movement concentrated specifically, and not surprisingly, on anti-immigration and the Syrian refugee crisis.³⁸ The obvious fear being that these issues conflict with the Alt-Right's ideology of cultural homogeneity and fears that Whites will become a minority.³⁹ Recently in the news, the Alt-Right took up protests against the removal of confederate statues.⁴⁰ Although the movement is aligned on its central themes, it is apparent that there are clear rifts within the umbrella of the Alt-Right.⁴¹

While it is often unclear with what the Alt-Right will take issue and when, it is clear the internet played a major role in the

³⁷ *Id.* Interestingly, on each question a slightly higher percentage of women expressed these attitudes of white identity, white solidarity, and white victimization. Interestingly, the survey also found that a larger number of independents scored higher than Republicans, with Democrats scoring the lowest.

³⁸ *Supra* note 3. For more on the Syrian refugee crisis *See Syrian Refugee Crisis: Facts, FAQs, and how to help*, WORLD VISION, <https://www.worldvision.org/refugees-news-stories/syria-refugee-crisis-war-facts>, (last visited Oct. 28, 2017).

³⁹ *See supra* note 24.

⁴⁰ *See generally* German Lopez, *The Battle over Confederate statues, explained*, VOX, Aug. 23, 2017, <https://www.vox.com/identities/2017/8/16/16151252/confederate-statues-white-supremacists>.

⁴¹ *See supra* note 3. Some of the prominent figureheads have shown discontent for each other. Andrew Anglin, a known neo-Nazi and publisher of a famous neo-Nazi website remarked that Milo Yiannopolous was a "Jewish Homosexual." He also shared that Yiannopolous is know for a history of "Jewish tricks." This is illustrative that, although the Alt-Right is seen as a cohesive movement, there are many moving parts within it. Thus, the ideology itself continues to shift and change, with some parts undoubtedly being more dangerous and provocative than others.

Alt-Right's spread and rise. While in the political context, the internet was blamed for the furnishing of fake news, which had affects throughout the political sphere,⁴² the internet had more sinister things happening. At the same time of this alleged "fake news," the internet was generating a storm of far-right conservatives looking for a place to bring their collective outrage.⁴³ This radicalization can and did occur in a number of ways, and the Alt-Right did not actively have to seek out new members, sometimes the members stumbled upon it themselves.⁴⁴ A main issue is that much of this radicalization does not appear sinister at first; many do not go seeking the ideology of these groups.⁴⁵ A lot of what draws in members appears as whimsical memes, including Pepe the frog and other cartoons that are seemingly poking fun at

⁴² Kathryn Perrott, *'Fake News' on Social Media Influenced US Election Voters, Experts Say*, ABC, Nov. 14, 2016, <http://www.abc.net.au/news/2016-11-14/fake-news-would-have-influenced-us-election-experts-say/8024660>.

⁴³ See Emma Grey Ellis, *How the Alt-Right Grew From an Obscure Racist Cabal*, WIRED, Oct. 9, 2016, <https://www.wired.com/2016/10/alt-right-grew-obscure-racist-cabal/>.

⁴⁴ See *Id.* Ellis uses the example of Dylan Roof, who was convicted of a mass shooting in an African American church in Charleston

⁴⁵ See *Id.* Ellis identifies two ways that fringe ideologies acquire new followers, passively and actively. A passive acquisition occurs when people land on the websites themselves, by searching for hateful material or by just a coincidence. An active acquisition is much more aggressive, where figureheads of the Alt-Right run their own Twitters and websites in an attempt to push their message out to more people. Ellis notes that "the cycle perpetuates" and that once someone's interest is peaked they will eventually stumble upon more hateful material.

society.⁴⁶ These memes draw many in and make it difficult to determine what is just a meme, or internet trolling, vs. what is actually far more sinister.⁴⁷

The meme, while written off as a joke, is a major component of the Alt-Right's Internet presence. A major difficulty that the use of memes presents for society is that they seem innocent and published in a joking fashion to the layperson.⁴⁸ Memes can be published quickly through these social media profiles that these figureheads run and can provide information in an easy and accessible way.⁴⁹

⁴⁶ See Bohkari & Yiannopoulos, *supra* note 9. For more information on Pepe the Frog See Adam Serwer, *It's Not Easy Being Meme*, THE ATLANTIC, Sep. 13, 2016, <https://www.theatlantic.com/politics/archive/2016/09/its-not-easy-being-green/499892/>. Matt Furie, an artist and illustrator based on Los Angeles, created Pepe the Frog in the early 2000s. Pepe's original use was to describe happy emotions and sometimes-ironic situations. Furie never intended for the image to be used in racist fashion and has begun to take legal action against the use of Pepe. For more on the legal action surrounding Pepe See Brett Barrouquere, *Creator of Pepe the Frog Gets Trial Date in Case Against Alex Jones*, SOUTHERN POVERTY LAW CENTER, Sept. 13, 2018, <https://www.splcenter.org/hatewatch/2018/09/13/creator-pepe-frog-gets-trial-date-case-against-alex-jones> .

⁴⁷ See Ellis, *supra* note 14.

⁴⁸ See Jason Wilson, *Hiding in Plain Sight: How the Alt-Right is Weaponizing Irony to Spread Facism*, THE GUARDIAN, May 23, 2017, <https://www.theguardian.com/technology/2017/may/23/alt-right-online-humor-as-a-weapon-facism>. Wilson claims "troll culture became a way for fascism to hide in plain sight."

⁴⁹ See ADL Charts *Explosive Growth of Hateful Memes and Anti-Semitic Conspiracy Theories Against Jared Kushner*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/news/press-releases/adl-charts-explosive-growth-of-hateful-memes-and-anti-semitic-conspiracy>, (last visited Oct. 30, 2017).

A major meme that was identified as a symbol of the Alt-Right is “Pepe the Frog.”⁵⁰ The meme has been so controversial that the Anti Defamation League has labeled Pepe as a symbol of hate.⁵¹ Even Apple has implemented a blanket ban on the use of Pepe the Frog and has enforced the ban against app creators.⁵² According to Alt-Righters themselves, those that perpetuate these memes online are not actually bigots and that memes are a way to “fluster their grandparents.”⁵³ A major component for these young members of the “Meme Team,” is that their antics “annoy the right people.”⁵⁴ The major motivation is to get a reaction, and Alt-Righters do not think there may be real hatred present.⁵⁵ However, it is undeniable that the meme and the internet has played and will continue to play a major role for Alt-Right growth.

⁵⁰ Matthew Gault, *Pepe the Frog’s Creator Goes Legally Nuclear Against the Alt-Right*, MOTHERBOARD, Sep. 18, 2017, https://motherboard.vice.com/en_us/article/8x8gaa/pepe-the-frogs-creator-lawsuits-dmca-matt-furie-alt-right. The story of Pepe is an interesting one. Pepe was created as a non-political character. The Alt-Right movement then appropriated Pepe during the 2016 U.S. Presidential Election. Pepe’s creator, Matt Furie has threatened major legal action against those of the Alt-Right who continue to use Pepe.

⁵¹ *Pepe The Frog*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols/pepe-the-frog>, (last visited Oct. 30, 2017). The ADL teamed up with the creator of Pepe, Matt Furie, to attempt to reclaim the symbol from its hateful uses. The ADL identifies that the rise of Alt-Right has increased the use of Alt-Right Pepe memes.

⁵² *See supra* note 42.

⁵³ *See supra* note 9.

⁵⁴ *Id.*

⁵⁵ *Id.*

B. Christian Extremism

The Alt-Right is more complex than at first glance, as it also entails a religious aspect. According to one study on the religious population of the United States, over 70% of the religious population identifies as Christian.⁵⁶ Illustrative of that statistic, one study determined that if the United States were made up of 100 people, 71 would be Christians.⁵⁷ Thus, Christianity makes up a major portion of the U.S. population which, like every other religion of the world, is made up of a majority of peaceful everyday people. However, like most religions, there are facets that have been identified as hateful and extremist. As previously mentioned, the SPLC has identified a significant number of Christian-Right groups that it has labeled as a hate group.⁵⁸ These groups include such hate groups as “America’s Promise Ministries” and “Kingdom Identity Ministries.” Many other groups consider themselves as

⁵⁶ Religious Landscape Study, PEW RESEARCH CENTER, <http://www.pewforum.org/religious-landscape-study/>, (last visited Oct. 30, 2017). The study surveyed more than 35,000 Americans from across the 50 states about their religious affiliations.

⁵⁷ Becka A. Alper & Aleksandra Sandstorm, *If the U.S. had 100 People: Charting Americans’ Religious Affiliations*, PEW RESEARCH CENTER, Nov. 14, 2016, <http://www.pewresearch.org/fact-tank/2016/11/14/if-the-u-s-had-100-people-charting-americans-religious-affiliations/>.

⁵⁸ See *supra* note 2.

Christians even if their obvious ideology would not suggest a Christian affiliation.⁵⁹

Christian extremism is not a new concept, it has existed in the United States for years, sometimes with dire consequences. Extremism in a religious context suggests fanaticism, taking its own sense of identity. It takes this identity “to an extreme” by “intensifying its self-understanding” as representing the center, or the norm.⁶⁰ Furthermore, fundamentalism has been characterized as a specific set of “Christian beliefs” and an “allied ultra-conservative attitude.”⁶¹ Even more worrisome, fundamentalism is associated with various “forms of religious-oriented terrorism.”⁶² Troublingly, Christianity can breed fundamentalism, which can morph into extremism, and extremism can and has generated terrorism.⁶³ Incidents of hate-crimes based on race continue to rise

⁵⁹ See *supra* note 2. Although only a few groups are designated as hate groups under Christian Identity, it is important to note that other groups also characterize themselves as Christians although that may not be there ideological alignment. Groups like the “Knights of the Ku Klux Klan,” have also been noted to envision themselves as Christians and have remarked about their “ideal Christian government.” See *Knights of the Ku Klux Klan*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/group/knights-ku-klux-klan>, (last visited Oct. 31, 2017.)

⁶⁰ Douglas Pratt, *Religion and Terrorism: Christian Fundamentalism and Extremism*, 22 *Terrorism and Political Violence* 3, 438-456, 439. Pratt further acknowledges “a religious extremist requires specific religious identity as the primary reference for self-legitimization.”

⁶¹ *Id.*, at 440.

⁶² *Id.*

⁶³ *Id.* at 454.

steadily, with hate crimes against Jews up 78.6% from 1995-2012.⁶⁴

The ideology of the far right is far from harmless. A government report covering September 12, 2001 to December 31, 2016 found that there have been eighty-five attacks in the United States conducted by violent extremists which resulted in the deaths of 225 people.⁶⁵ Of the 225 deaths, 106 people were killed at the hands of conduct committed by far-right extremists in sixty-two separate incidents.⁶⁶ Thus almost half of the deaths at the hands of domestic terrorism were the result of far-right ideologies. Although the Alt-Right itself has not been directly identified as a domestic terrorist organization, those that are on the far-right will likely come under its umbrella. A prime example of far-right domestic terrorism is Dylann Roof's shooting of nine innocent

⁶⁴ Bill Dedman, Mike Bruner, & Monica Alba, *Hate Crime in America, by the Numbers*, NBC News, (Jun. 18, 2015), <https://www.nbcnews.com/storyline/charleston-church-shooting/hate-crime-america-numbers-n81521>. From 2001-2012 the percentage of hate crimes towards Jews dropped to 66% while Muslims rose to 12.1%.

⁶⁵ Miriam Valverde, *A Look at the Data on Domestic Terrorism and Who's Behind It*, Politifact, (Aug. 16, 2017). <http://www.politifact.com/truth-o-meter/article/2017/aug/16/look-data-domestic-terrorism-and-whos-behind-it/>.

⁶⁶ *Id.* There were 119 deaths at the hands of radical Islamist extremists in 23 separate incidents. Thus, from September 12, 2001 to December 31, 2016, 47% of the deaths resulted from domestic terrorism, while 53% of the deaths were attributed to radical Islamic extremists. Forty-one percent of the deaths attributed to radical Islamic extremists occurred in the Orlando shooting of the Pulse nightclub.

people in a primarily African American church.⁶⁷ On June 17, 2015, Dylann Roof targeted a group of African American worshippers during a Bible study he was invited to attend.⁶⁸ Roof later confessed to the killings, and was found guilty and sentenced to death.⁶⁹

Although the Alt-Right is the umbrella term, the Christian Identity has its own specific agenda as well as its own specific ideology. Christian in name, it is further conservative than even the most conservative religion factions in the U.S.⁷⁰ The Christian Identity has its own unique anti-Semitism and racism, and the

⁶⁷ David Neiwert, *Alt-America: the Time for Talking About White Terrorism is Now*, THE GUARDIAN, (Nov. 26, 2017), <https://www.theguardian.com/world/2017/nov/26/alt-america-terrorism-rightwing-hate-crimes>. Roof's manifesto was filled with racial and political language tied to white supremacy. Roof purposely chose the Charleston Mother Emanuel Church, and the city of Charleston for its historic roots and for its past proportion of blacks to whites. Roof was only the latest in high profile attacks from far right domestic terrorists. Others include Timothy McVeigh and Terry Nichols bombing in Oklahoma City as well as Neo-Nazi Wade Michael Page shooting of a Sikh temple in Wisconsin.

⁶⁸ See Jon Schuppe and Jamie Morrison, *Dylann Roof Sentenced to Death for Charleston Church Massacre*, NBC NEWS, Jan. 11, 2017, <https://www.nbcnews.com/storyline/charleston-church-shooting/dylann-roof-sentenced-death-charleston-church-massacre-n705376>.

⁶⁹ *Id.* Roof represented himself in the penalty phase and prevented his defense lawyers from presenting mental health evaluations. Roof is now the 63rd person on federal death row. See *Dylann Roof: Charleston Church Shooter Gets Nine Life Sentences in State Case*, NBC NEWS, <https://www.nbcnews.com/news/us-news/dylann-roof-charleston-church-shooter-pleads-guilty-state-charges-n744746>, (last visited Jan. 30, 2019), Roof was also sentenced to nine consecutive life sentences in state prison after pleading guilty to state murder charges in South Carolina.

⁷⁰ *Christian Identity*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/christian-identity>, (last visited Oct. 31, 2017).

movement peaked in 2011-2012.⁷¹ As shown with the Alt-Right, the Christian Identity has different factions, which vary in their agenda and their degree of extremism. “America’s Promise Ministries” is known for promoting white separatism and contempt for non-Whites and Jews.⁷² Furthermore, and possibly more extreme, “Kingdom Identity Ministries” identifies non-whites as “soulless sub-humans” and Jews as “satanic.”⁷³ The ideology has since slowly declined as many of its influential leaders met their demise due to aggressive law enforcement.⁷⁴ Although Christian Identity itself has since slowly declined, the movement may have in part been absorbed into the Alt-Right.

It may have not been a just a coincidence that the Alt-Right embraces a Christian right within its movement. Richard Spencer has in the past identified as an atheist, although claimed in 2016 that he “longed for something as robust and binding as Christianity had been in the West.”⁷⁵ While the Alt-Right propagates extreme political views, it is also an alt-religious

⁷¹ *Id.*

⁷² *America’s Promise Ministries*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/christian-identity>, (last visited Oct. 31, 2017).

⁷³ *Kingdom Identity Ministries*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/group/kingdom-identity-ministries>, (last visited Oct. 31, 2017).

⁷⁴ *Id.*

⁷⁵ Graeme Wood, *His Kampf*, THE ATLANTIC, Jun. 2017, <https://www.theatlantic.com/magazine/archive/2017/06/his-kampf/524505/>.

movement, providing its followers with what religions provide; *identity, purpose, and community*.⁷⁶ One commenter found that “as traditional Christian institutions shrink,” the Alt-Right is creating a “violent Alt-Christianity, as their counterparts in the Middle East have created an alt-Islam.”⁷⁷

The Alt-Right’s target audiences, young white men, are part of a millennial generation that were increasingly rejecting religious affiliation.⁷⁸ In 2012, a survey showed that one-fifth of the U.S. public, and a third of adults under thirty years of age classified themselves as religiously unaffiliated.⁷⁹ Peter Beinart argues that the “Alt-Right is ultra-conservatism for a more secular age. Its leaders like Christendom, an old-fashioned word for the West. But they’re suspicious of Christianity itself, because it crosses boundaries of blood and soil.”⁸⁰ This may help to explain that while the Alt-Right does not embrace Christianity out-right, they still

⁷⁶ Brian D. McLaren, *The ‘Alt-Right’ Has Created Alt-Christianity*, Time, Aug. 25, 2017, <http://time.com/4915161/charlottesville-alt-right-alt-christianity/>.

⁷⁷ *Id.* McLaren argues that if we do not provide future generations with identity, purpose, and community through spiritual communities, the stagnation of good religion will result in further “bad religion” as an alternative.

⁷⁸ Peter Beinart, *Breaking Faith*, THE ATLANTIC, Apr. 2017, <https://www.theatlantic.com/magazine/archive/2017/04/breaking-faith/517785/>.

⁷⁹ Nones on the Rise, Pew Research Center, <http://www.pewforum.org/2012/10/09/nones-on-the-rise/>, (last visited Oct. 31, 2017). The survey also found that young adults today “are much more likely to be unaffiliated than previous generations were at a similar stage in their lives.” A combined total of 46 million people describe themselves as unaffiliated in the five years leading up to 2012.

⁸⁰ See *supra* note 60.

relish in many of its concepts and still welcome the more extreme of the Christian-Right.

III. LEGAL BACKGROUND

A. Jurisprudence of Hate Speech

The First Amendment of the United States Constitution provides, “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.”⁸¹ The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion or abridging the freedom of speech of the people of the United States. Thus, the First Amendment is crucial in examining the implications the rise of the Alt-right will have on society as a whole. Episodes like Charlottesville directly illustrate the dichotomy provided by the First Amendment.⁸² On the one hand, the freedom of speech and religion is arguably absolute, and integral to the United States as a nation. On the other hand, how

⁸¹ U.S. Const. amend. 1.

⁸² See generally Joe Heim, *Recounting A Day of Rage, Hate, Violence, and Death*, THE WASHINGTON POST, https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.b54118676ebe. Clashes between groups erupted in violence after Alt-Right members gathered for a large rally.

much violence and adversity can the First Amendment stretch to cover. In a time when there is fierce political strife, all have a right to practice free speech, religion, and assembly but at what cost?

The Supreme Court has established a significant body of law regarding the First Amendment and has held statutes unconstitutional that infringe on that right. In 1938 the Court found that freedom of speech, which is protected under the First Amendment from infringement by Congress, is among the fundamental personal rights and liberties protected under the Fourteenth Amendment from state invasion.⁸³ Furthermore the right to freedom of worship is held in a similar regard.⁸⁴ The Court has held that the First Amendment generally prevents the government from proscribing speech because of a disapproval of the ideas expressed.⁸⁵ Thus, at the state level, there is a challenge for local ordinances to address hate speech and meet strict scrutiny.

In *R.A.V. v. City of St. Paul, Minn.*, the Court held that a city ordinance prohibiting bias-motivated disorderly conduct was facially invalid under the First amendment.⁸⁶ Petitioner R.A.V.

⁸³ *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

⁸⁴ *Cantwell v. State of Connecticut*, 310 U.S. 296, 301 (1940).

⁸⁵ *Id.*

⁸⁶ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

allegedly burned a cross on a black family's lawn and was charged under the Bias-Motivated Crime Ordinance.⁸⁷ The Bias-Motivated Crime Ordinance prohibited the display of a symbol one knows or should know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."⁸⁸ The Court held that the statute was facially invalid for it prohibited otherwise permitted speech based on the subject the speech addresses.⁸⁹ The Court found that the ordinance only served the interest of the city council's hostility towards the particular bias, which is exactly what the First Amendment forbids.⁹⁰ The Court recognizes two general exceptions to the First Amendment including defamation and obscenity.⁹¹

In 1993 the Court addressed the issue of criminal sentencing based on racial motivations. In *Wisconsin v. Mitchell*, the defendant was convicted of theft and battery and received an aggravated sentence for selecting his victim based on race.⁹² The Court found that the defendant's First Amendment rights were not

⁸⁷ *Id.* at 377.

⁸⁸ *Id.*

⁸⁹ *Id.* at 381.

⁹⁰ *Id.* at 396. The Court found that although the politicians of St. Paul themselves may express hostility towards that particularly racially charged bias, they may not do so through "imposing unique limitations upon speakers who" disagree.

⁹¹ *Id.* at 383.

⁹² *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S. Ct. 2194 (1993).

violated by the penalty-enhancement.⁹³ The defendant Mitchell, an African American, led a group of African American men and severely beat a white boy.⁹⁴ While the original sentence of the crime carried a maximum of two years, but because the jury found that Mitchell selected his victim based on race the maximum sentence was increased to seven years.⁹⁵ Mitchell argued that the penalty-enhancement was invalid because it punished the defendant's discriminatory motive.⁹⁶ The Court distinguished the present case from *R.A.V.*, arguing that the statute in the present case is aimed at unprotected conduct.⁹⁷ The Court found that the statute in the present case redresses possible harms, and gives an adequate explanation for the penalty-enhancement above and beyond disagreement with the offender's biases.⁹⁸

Thus the Court has held that although a statute cannot prohibit speech based on the subject matter the speech addresses,

⁹³ *Id.*

⁹⁴ *Id.* at 480.

⁹⁵ *Id.* at 480-81. (The provision enhanced the maximum penalty for an offense when a defendant "intentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . ." In light of the provision, the circuit court sentenced the defendant to four years imprisonment).

⁹⁶ *Id.* at 487.

⁹⁷ *Id.* at 487-488 (The Court distinguished the statute in *R.A.V.* that was found unconstitutional because it "was explicitly directed at expression." In *Mitchell*, the provision singles out enhancement based on bias for it is thought to cause greater harm to society and the individual. The Court based on that State and its amici, crimes based on bias more likely provoke retaliatory crimes, incite unrest, and inflict worse emotional harms.).

⁹⁸ *Id.* at 488.

a statute may provide sentence enhancement when a crime is based on racial bias. However, possibly more perplexing is the Court's holding in *Dawson v. Delaware*. In *Dawson*, the Court held that it was a constitutional violation to admit the defendant's membership in a white supremacist prison gang when the evidence was not relevant in the punishment phase.⁹⁹ The Court found that the introduction of the evidence was not relevant to sentencing and only proved Dawson's abstract belief.¹⁰⁰

Somewhat contradictory is the Court's holding in *Barclay v. Florida*. In *Barclay*, the defendant was convicted of first-degree murder, and was sentenced to death.¹⁰¹ Barclay brought a challenge to the sentence that the judge improperly added non-statutory aggravating circumstances of racial hatred.¹⁰² The Court rejected this argument and found that the Constitution does not prohibit the trial judge from taking into account elements of racial hatred.¹⁰³ Thus, while a statute may be facially invalid regarding

⁹⁹ *Dawson v. Delaware*, 503 U.S. 159 (1992).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 945.

¹⁰² *Id.* at 948-49.

¹⁰³ *Id.* at 949 (Evidence was introduced that the defendant was a member of the Black Revolution Army and that the crime was specifically racially motivated, in a quasi-retaliatory fashion for the treatment of African Americans in the United States. The trial judge at sentencing discussed his own army experiences in WWII and Nazi concentration camps.).

speech, penalty enhancement based on racially motivated factors may be permissible.

Although these cases address speech, the Court has also addressed racially charged displays, i.e. cross-burning. In *Virginia v. Black*, the defendants were convicted of attempt to cross burn with intent to intimidate.¹⁰⁴ The defendants were convicted under a Virginia statute, which makes it a felony to burn a cross on the property of another or in a public place with intent to intimidate any person or group.”¹⁰⁵ The Court found that the burning of a cross is a clear image of hate, and a cross burner intends to invoke fear into the recipients of their message.¹⁰⁶ The Court examined the history of cross burning in the context of the Klu Klux Klan, and noted that cross burning is particularly a call sign of the hate group.¹⁰⁷ Although the Court has held that fighting words are not included under the First Amendment, the act of cross burning is significantly different.¹⁰⁸ The Court held that Virginia may ban

¹⁰⁴ *Virginia v. Black*, 538 U.S. 343 (2003). The cross burnings in the present case were done in context of a KKK rally as well as specifically burning a cross on the property of an African American neighbor.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 344 (The Court noted that few messages are as powerful as cross burning.).

¹⁰⁷ *Id.* at 355 (The Court found that cross burning originated in Scotland as a means of communication. However, in the history of the United States it became much more sinister and has a long history of being used to intimidate.).

¹⁰⁸ *See Cohen v. California*, 403 U.S. 15 (1971). (The Court found that “fighting words” may be proscribed if the abusive epithets as a matter of common knowledge inherently provoke a violent reaction.).

cross-burning done with intent to intimidate because that act is particularly heinous form of intimidation.¹⁰⁹

This begs the question; may all protests and rallies that are based on hatred and racism be banned? There is a clear argument that a rally with flags that are symbols of hate as well as speeches carrying racial sentiment are intending to intimidate somebody. Further, even without intent to intimidate, those that are in opposition to or are offended by the display have a valid argument to prevent the display from happening. Charlottesville led to the death of a women and the injury of many others¹¹⁰— is society okay with events like this in the name of the First Amendment? While the First Amendment is undoubtedly crucial in society, is society willing to let citizens be put in jeopardy of physical harm to protect freedom of speech. Many will likely agree that speech based on hatred and racism fails this balancing test of citizen safety against the First Amendment.

¹⁰⁹ *Virginia v. Black*, at 362. The Court however found that defendant Barry Black's conviction under the statute could not stand. The Court found that the cross-burning itself, as done at the KKK rally was not necessarily meant to intimidate and could be a symbol of solidarity. However, the convictions of defendants Elliot and O'Mara who burned a cross on an African Americans property could stand and thus the Court vacated the decision of the Supreme Court of Virginia. In the case of Elliot and O'Mara they burned a cross on the property of a minority in a clear attempt to intimidate.

¹¹⁰ *Supra* note 18.

B. Jurisprudence of Religious Freedoms

The Court has complicated the first amendment analysis through its precedent of religious freedoms. In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court reviewed the claimant's dismissal from employment for the religious use of peyote, which subsequently disqualified them from receiving unemployment benefits.¹¹¹ The petitioners were fired from their private employment for having ingested peyote for sacramental purposes consistent with the Native American Church.¹¹² Their applications for unemployment compensation were denied by Oregon for their discharged was classified as work-related "misconduct."¹¹³ The Court found that there was no dispute that Oregon's criminalization of peyote placed a severe burden on the ability for the respondents to exercise their religion freely.¹¹⁴ The Court found that granting exemption in this case would impair Oregon's compelling interest in prohibiting possession of peyote, thus meeting strict scrutiny.¹¹⁵

¹¹¹ *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

¹¹² *Id.* at 872. Peyote is a hallucinogenic drug that is regarded as a Schedule I drug. It is used in the Native American religion as a key component of sacrament.

¹¹³ *Id.*

¹¹⁴ *Id.* at 903.

¹¹⁵ *Id.* at 906.

Congress attempted to codify the application of strict scrutiny in 1993 by passage of the Religious Freedom Restoration Act (RFRA). RFRA provided that the “government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.¹¹⁶ RFRA provided exceptions that the government may substantially burden a person’s exercise of religion only if it can prove that it is (1) in furtherance of compelling government interest; and (2) is the least restrictive means of furthering the compelling interest.¹¹⁷ Finally, RFRA provides judicial relief that a person whose religious exercise has been burdened in violation of the act may assert the violation as a claim or a defense in a judicial proceeding and obtain relief against the government.¹¹⁸ The Court however found subsequently that the RFRA exceeded Congress’s enforcement powers in *City of Boerne v. Flores*.

In *City of Boerne*, a Catholic Archbishop brought a challenge under the RFRA after he was denied a building permit to enlarge a church under an ordinance governing historic preservation.¹¹⁹ The Respondent Archbishop applied for a building

¹¹⁶ 42 U.S.C.A. § 2000bb-1.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

permit to enlarge a church in Boerne, Texas.¹²⁰ The local zoning authorities denied the permit, citing an ordinance governing the historic preservation and argued that the church fell within a historic district.¹²¹ The Court found that the RFRA appeared “to attempt a substantive change in constitutional protections.”¹²² The RFRA’s sweeping coverage, the Court reasoned, will intrude at every level of government, and would prohibit official actions of “almost every description and regardless of subject matter.”¹²³ The Court argued that RFRA exacts substantial costs by both burdening the courts through heavy litigation and restraining states’ “traditional general regulatory power.”¹²⁴ The Court found that through states’ regulations, like the zoning at issue in *Boerne*, there will be a substantial burden on a large class of people.¹²⁵ However, if the exercise of one’s religion is burdened in an incidental way through this general application, it does not follow that those affected have been burdened for their religious beliefs.¹²⁶ Finally, the Court found that RFRA was beyond

¹²⁰ *Id.* at 512.

¹²¹ *Id.*

¹²² *Id.* at 532.

¹²³ *Id.* at 535.

¹²⁴ *Id.* at 534.

¹²⁵ *Id.* at 535.

¹²⁶ *Id.* The Court also took issue with the RFRA requiring that in every case there be a least restrictive requirement, which was not used pre-*Smith*. The Court found that this indicates the Act is broader than necessary if the goal is to “prevent and remedy constitutional violations.”

congressional authority and it is the Supreme Court's precedent, rather than the statute, that controls.¹²⁷

Although the Court found that RFRA was unconstitutional, that does not mean that similar statutes will suffer the same fate. Congress passed a similar statute called the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).¹²⁸ RLUIPA's general rule prohibits the government from imposing a land use regulation in a manner that substantially burdens the religious exercise of a person.¹²⁹ If there is a burden imposed, the government must show that it is in furtherance of a compelling governmental interest and is the least restrictive method.¹³⁰ While this is similar to RFRA, RLUIPA is somewhat different in scope, covering substantial burdens imposed on programs that receive federal financial assistance, a substantial burden or removal thereof on commerce, and a substantial burden imposed in implementation of land use regulation.¹³¹ More importantly, the issue at hand falls under (B)(2) "Nondiscrimination" which provides that, "[n]o government shall impose or implement a land

¹²⁷ *Id.* at 536

¹²⁸ 42 U.S.C.A. § 2000cc (West).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* Commerce is construed broadly under (A)(2)(B) as a "substantial burden that would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability."

use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”¹³² Finally, the Act provides that no government shall impose a land use regulation that either “totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”¹³³

Thus, for groups like the Christian Right, there is a clear argument that any restriction on their right to assemble in a public space will violate RLUIPA. RLUIPA provides that the government may not unreasonably limit religious assemblies, without specifically defining “religious assemblies.”¹³⁴

Consequently an “assembly” of the Christian right, which may be loaded with hateful and racial speech, may find its way into the public sphere, even if it is being used to intimidate. This may circumvent the Court’s precedent specifically in the case of *Virginia v. Black*, there may be an argument to make that burning a cross is a religious assembly.

¹³² *Id.*

¹³³ 42 U.S.C.A. § 2000cc (West).

¹³⁴ *See id.*, which provides a definition for “religious exercise.” “Religious Exercise” includes “any exercise of religion, whether or not compelled by, or central to a system of religious belief.” It is likely that religious exercise will be construed broadly.

In application, the Court has taken up the RLUIPA in the primary context of prisoners. In *Holt v. Hobbs*, a Muslim inmate brought an action against the Director of Arkansas Department of Correction under RLUIPA for denying a religious accommodation under the Department of Correction's grooming policy to allow prisoners to grow half-inch beards.¹³⁵ The grooming policy provides that inmates are only allowed to have neatly trimmed mustaches that do not extend past the corner of the mouth.¹³⁶ The Court found that the grooming policy violated RLUIPA, and laid out the test for identifying a violation of RLUIPA.¹³⁷ Finally the Court sided with the petitioner finding that the violation of RLUIPA prevented him from acting in accordance with his religious beliefs. The Court did not take issue with RLUIPA as it did with RFRA. Other statutes have been passed addressing racial biases.

¹³⁵ *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). The issue in *Holt* falls under 42 U.S.C.A. § 2000cc-1, Section 3 which governs the religious exercise by institutionalized persons.

¹³⁶ *Id.* at 861. The petitioner sought permission to grow a beard, which he believed was required by his faith. Petitioner believed his faith required him to not trim his beard at all but as a compromise he said he would only grow it a half-inch.

¹³⁷ *Id.* at 863. The Court found that the petitioner bore the initial burden of proving that the government action implicated his religious exercise and that the request for an accommodation was based in a sincerely held religious belief. After proving this, the government then bears the burden of showing that its action was (1) in furtherance of a compelling government interest and (2) was the least restrictive means of furthering that compelling interest.

C. Legislative Responses

Federally, the most well-known statute addresses hate crimes directly. Recently, President Obama signed the Matthew Shepherd and James Bird Hate Crime Prevention Act (HCPA), which provides sentencing guidelines for crimes based on perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.¹³⁸ HCPA provides that crimes which cause injuries based on these factors shall not result in imprisonment for more than 10 years, but if death results, a defendant may be imprisoned for any term of years or for life.¹³⁹ Former President Obama acknowledged the bill as a way to “help protect our citizens from violence based on what they look like, who they love, how they pray.”¹⁴⁰ However, the issues of hate speech and intimidation still cause difficulty among the states.

New Jersey attempted to address hate speech and bias intimidation with the passage of N.J.S.A. § 2C:16-1, which addresses bias intimidation, providing that a person is “guilty of

¹³⁸18 U.S.C.A. § 249 (West). The Act covers any offense which “willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive incendiary device.” Thus, the Act covers particularly dangerous and heinous crimes.

¹³⁹ *Id.* Aside from crimes that result in death, the Act also states that an offense that includes kidnapping, attempted kidnapping, aggravated sexual abuse or attempt to commit, or an attempt to kill also qualifies for imprisonment for any term of years or for life.

¹⁴⁰ *Obama signs Hate Crimes Bill into Law*, CNN (Oct. 28, 2009), <http://www.cnn.com/2009/POLITICS/10/28/hate.crimes/>.

the crime of bias intimidation if he commits, attempts to commit, or conspires with another to commit, or threatens the immediate commission of an offense” specified in certain chapters of the criminal code.¹⁴¹ The statute stipulates that a person is guilty of bias intimidation if they act with a purpose to “intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin or ethnicity.”¹⁴²

Furthermore, even without purpose, a person is guilty if they act “knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because” of the factors listed.¹⁴³ Thus, the statute almost implicates a subjective standard, which the New Jersey Supreme Court took issue.

The New Jersey Supreme Court found N.J.S.A. § 2C:16-1 unconstitutional in *State v. Pomianek*. The defendant in *Pomianek*

¹⁴¹ N.J. Stat. Ann. § 2C:16-1 (West).

¹⁴² *Id.*

¹⁴³ *Id.* N.J. Stat. Ann. § 2C:16-1(a)(3) (West 2008) provides a catch all: “under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.”

was found guilty of a number of counts including bias intimidation under N.J.S.A. § 2C:16-1.¹⁴⁴ Defendant was found guilty after harassing an African American co-worker with offensive language and locking him in a cage.¹⁴⁵ Specifically the court took up N.J.S.A. § 2C:16-1(a)(3), after the jury convicted defendant of bias harassment on the basis that the victim “reasonably believed that the harassment was committed with a purpose to intimidate him.”¹⁴⁶ The Court found that the statute was unconstitutional for its vagueness and violated notions of due process under the Fourteenth Amendment.¹⁴⁷ The Court further noted that under the statute, the defendant’s fate depends on whether the victim “reasonably believed” bias was the purpose for the commission of the crime.¹⁴⁸ The Court struck down 2C:16-1(a)(3), but remarked that its decision did not affect other parts of the statute.¹⁴⁹

Even more complicating, is the previously mentioned Alt-Christianity, which raises the additional issue of religious freedom. A recent example of this complication is *Masterpiece Cakeshop*. In *Masterpiece*, a gay couple went to the Colorado based

¹⁴⁴ *State v. Pomianek*, 221 N.J. 66, 70 (2015).

¹⁴⁵ *Id.* at 72.

¹⁴⁶ *Id.* at 69. The jury found the defendant “not guilty of purposely or knowingly harassing the victim because of the victim’s race or color.”

¹⁴⁷ *Id.* at 91.

¹⁴⁸ *Id.* at 69.

¹⁴⁹ *Id.* at 91.

Masterpiece Cakeshop to order a cake for their upcoming wedding.¹⁵⁰ However, the bakery owner, Jack Phillips, informed them that the bakery would not sell a wedding cake to a same sex couple.¹⁵¹ Under Colorado law it is prohibited for a business open to the public to refuse service based on race, religion, or sexual orientation.¹⁵² The couple filed complaints with the Colorado Civil Rights Division claiming that the bakery violated the Colorado Anti-Discrimination Act.¹⁵³ The Colorado Civil Rights Commission determined that the bakery illegally discriminated against the couple.¹⁵⁴ The Colorado Court of Appeals affirmed the Commission's decision and found that the Act did not infringe on the bakery's freedom of speech or free exercise of religion.¹⁵⁵ The Colorado Supreme Court denied review; however, the U.S. Supreme Court granted certiorari and held oral arguments on December 5th, 2017.¹⁵⁶

Although *Masterpiece Cakeshop* was decided in favor of religious freedoms, the ruling did not do much to alleviate the

¹⁵⁰*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, ACLU, <https://www.aclu.org/cases/masterpiece-cakeshop-v-colorado-civil-rights-commission> (last visited Feb. 6, 2018).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Supra* note 139.

tension between freedom of speech, religion, and the Alt-right. Although the owner was not a member of the Alt-Right, he represented a religious sect of society with very conservative views.¹⁵⁷ As previously mentioned Alt-Christianity is typically anti-homosexual, albeit in a more extreme fashion.¹⁵⁸ The owner of the bakery, Jack Phillips, refused to make a custom wedding cake for a same-sex couple on the basis of his religious beliefs.¹⁵⁹ The same-sex couple, Craig and Mullins, filed charges of discrimination with the Colorado Civil Rights Division alleging discrimination based on sexual orientation under the Colorado Anti-Discrimination Act (CADA) § 24-34-601(2)(a)(2017).¹⁶⁰ Justice Kennedy, speaking for the majority, recognized the tension in the case:

¹⁵⁷ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018). The bakery owner, Jack Phillips, is a devout Christian and proclaimed that his main goal in life is to be obedient to Jesus Christ. He argued that creating a wedding cake for a same-sex couple would be contrary to his deeply held beliefs.

¹⁵⁸ See *Anti-LGBT*, SPLC, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbt> (last visited Feb. 8, 2018). Anti-LGBT ideology is typically associated with Christian Right groups. Most group's efforts to oppose the LGBT community revolve around defamation, including extremely crude and hateful speech. However, "viewing homosexuality as unbiblical or simply opposing same-sex marriage does not qualify an organization to be listed as an anti-LGBT hate group."

¹⁵⁹ *Masterpiece Cakeshop*, 138, S. Ct. 1724.

¹⁶⁰ *Id.* at 1725. The relevant section of the statute provides: "It is discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, or ancestry, the full and equal employment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. § 24-34-601(2)(a)(2017).

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.¹⁶¹

The Court held that the Commission's treatment of Phillips' case "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or a religious viewpoint."¹⁶² Justice Kennedy focused on the fact that the record indicated that the Commission's consideration of the case was "neither tolerant nor respectful of Phillips' religious beliefs."¹⁶³ Because of this, the Court inferred that Phillips' religious objection was not considered under the neutrality the Free Exercise Clause requires.¹⁶⁴ The Court had an opportunity to address a key question in the conundrum of free speech and religion, namely, do deeply held religious beliefs excuse someone from complying with

¹⁶¹ *Id.* at 1727.

¹⁶² *Id.* at 1731.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

neutrally applicable laws?¹⁶⁵ Justice Kennedy avoided this question, and thus, the challenge and uncertainty continues.¹⁶⁶

IV. IMPLICATIONS OF FREE SPEECH AND FREEDOM OF RELIGION

Scholars have long debated the regulation of hate speech and religious freedom. Legal Scholar John Knechtle identifies two harms caused by hate speech.¹⁶⁷ Harms of potential violence refer “to the propensity of hate speech to incite and cause violence.”¹⁶⁸ A government has a compelling interest in protecting its society from violence, and for this reason “governments around the world have enacted hate speech codes that address the harm of violence, or the potential for violence.”¹⁶⁹ Harms affecting human dignity are a little bit more abstract, focusing on how a state defines human dignity and a human’s right to personal dignity.¹⁷⁰ While many countries have strict hate speech codes, the United States has

¹⁶⁵ Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in A Post-Kennedy World*, 82 ALB. L. REV. 121, 121 (2019)

¹⁶⁶ *Id.*

¹⁶⁷ John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 543 (2006).

¹⁶⁸ *Id.* at 546.

¹⁶⁹ *Id.* at 548. Knechtle also notes that “[e]ven when violence is not explicitly mentioned, many states prohibit insulting or racist speech. These states realize that there is a cumulative affect of racial incitement, which, over time, will lead to increased violence.”

¹⁷⁰ *See id.* at 551.

placed greater value and emphasis on individual rights.¹⁷¹ This “Libertarian” philosophy will “almost always allow hate speech, unless there is an eminent risk of violence.”¹⁷²

Knectle argues that perhaps this threshold should be lowered to reflect the environment of the United States as well as the history of human rights.¹⁷³ However, he recognizes that “one must balance the jurisprudential history of the United States in realizing workable solutions that have a basis in United States’ legal tradition.”¹⁷⁴ Knectle argues that courts in the United States “seem increasingly unwilling to impose restraints on the ‘freedom of speech,’ even though it has a troubled, highly emotional history of interracial violence and suppression.”¹⁷⁵ In the opinion of Knectle, the United States has not implemented a sufficient hate speech code to counter the tensions created through “its history of abuse.”¹⁷⁶

¹⁷¹ *See id.* at 552.

¹⁷² Knectle, *supra* note 152 at 552.

¹⁷³ *See id.*

¹⁷⁴ *Id.* Although the potential for violence has struck a chord with the United States, the harm of human dignity has not had the same affect. Human dignity, unlike political rights, was not taken up in the Constitution and thus “has not significantly developed in the common law. In its place, the right of free expression has taken root.”

¹⁷⁵ *Id.* at 557.

¹⁷⁶ *Id.* at 558. Knectle includes such abuses as “...the genocide of Amerindians, African American Enslavement, Jim Crow politics, the internment of Japanese-Americans, human rights abuses of Iraqi prisoners, sterilization programs, government abuses against minorities, and the disproportionate killings of poor blacks in the prison systems.”

In line with previously mentioned jurisprudence, Knechtle concludes, “hate speech laws in the U.S. should be written to cover hate speech that incites to imminent violence or contains a true threat.”¹⁷⁷ However, Knechtle also advises that those advocates of hate speech codes must figure out a way around the imminence requirement.¹⁷⁸ To get around the imminence requirement, the United States should “prohibit threats of unlawful acts.”¹⁷⁹ Finally, Knechtle argues, for the United States to meet its interest in protecting its citizens from violence, it should expand past the “imminence test” and “include hate speech that intimidates or threatens unlawful acts.”¹⁸⁰

However, it may not be so simple to expand past the imminence test. Courts have not been especially favorable to legislation regarding hate speech and hate crimes, particularly because they have difficulty surviving a constitutional challenge.¹⁸¹ Legal Scholar Jeffrey Kassel notes that in *R.A.V.* the Supreme Court suggested that “banning all fighting words directed at members of specific protected groups, rather than just those fighting words that insult because of their biased content”

¹⁷⁷ *Id.* at 570.

¹⁷⁸ Knechtle, *supra* note 152 at 571.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 579.

¹⁸¹ Jeffrey J. Kassel, *Hate Crimes*, WIS. LAW., Oct. 1992, at 10, 12.

might survive a First Amendment challenge.¹⁸² The Court further found that a “prohibition on fighting words that are directed at certain persons . . . would be facially valid if it met the requirements of the Equal Protection Clause.”¹⁸³ Even so, writing legislation that would also meet the demands of Equal Protection would be challenging.¹⁸⁴ One major difficulty in writing this legislation is asking which groups a legislature would define as deserving special protection?¹⁸⁵ Furthermore, Kassel finds that even if the legislation were to meet equal protection, these regulations “would not resolve the difficult policy concerns presented.”¹⁸⁶ Finally, Kassel raises the issue of whether institutions such as public universities, where free speech dominates, should ever seek to enact restrictions on speech.

While the answer to this question is controversial and complex, the issue has been exemplified by “safe spaces.” In recent years, universities around the country have enacted safe spaces across their campuses.¹⁸⁷ Universities face an interesting dilemma:

¹⁸² *Id.* at 12, (citing *R.A.V.*, 112 S. Ct. at 2548).

¹⁸³ *Id.* (citing *R.A.V.*, 112 S. Ct. at 2548).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (citing *R.A.V.*, 112 S. Ct. at 2548).

¹⁸⁶ *Id.* Kassel further noted more interesting implications regarding whether these laws are effective in actually combating discrimination and intimidation, or if they are more symbolic.

¹⁸⁷ *See generally* Alexander Tthesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863.

on one hand they have a compelling interest to preserve free speech in an educational environment, and on the other ensuring that the campus is not a hostile environment.¹⁸⁸ A safe space is characterized as an “environment where students join like-minded companions at particular locations on campus.”¹⁸⁹ “Safe spaces are by design exclusive,” argues Tthesis, and may harm open free-flowing conversation. However, as shown in Supreme Court precedent, any public university that would choose to separate individuals based on a protected status must demonstrate a compelling interest and narrowly tailor the restriction.¹⁹⁰ Thus, the issue of safe spaces will continue to be debated and contested, with an intricate balance between free speech and campus health.

Universities have not been free from changing times, as the Alt-Right is an issue they have had to tackle head-on. There have been extremely controversial episodes on college campuses, when the left and the right get into sometimes-physical altercations over

¹⁸⁸ *See id.* Tthesis also points out the interesting role universities have in society and history. He finds that “universities have always been repositories of knowledge and wisdom...” however at times in history universities “have been incubators of proslavery and racist ideologies.” 1866. Freedom of speech is of the utmost importance in these educational institutions, but this freedom of speech is sometimes abused and misused to target and attack groups of individuals.

¹⁸⁹ *Id.* at 1869-70. For a counterargument regarding safe spaces *See* Sophie Downes, *Trigger Warnings, Safe Spaces and Free Speech*, N.Y. Times, (Sept. 10, 2016), <https://www.nytimes.com/2016/09/11/opinion/trigger-warnings-safe-spaces-and-free-speech-too.html>.

¹⁹⁰ *See id.* at 1871.

free speech.¹⁹¹ One particular violent incident involved Alt-Right figurehead Richard Spencer and a speech he was scheduled to give at Auburn University.¹⁹² The brawl started when a Spencer supporter got into an altercation with a member of the radical “Antifa.”¹⁹³ Auburn University attempted to shut down Spencer’s speech four days prior; however, a “federal judge forced the public university” to allow Spencer “to exercise his First Amendment right.”¹⁹⁴

Although the altercation was mainly between two individuals, it is an example of how quickly these issues can lead

¹⁹¹ Elliott C. McLaughlin, *War on Campus: The Escalating Battle over College Free Speech*, CNN, May 1, 2017, <https://www.cnn.com/2017/04/20/us/campus-free-speech-trnd/index.html>.

¹⁹² *See id.*

¹⁹³ *See id.* *See Antifa*, INFLUENCE WATCH, <https://www.influencewatch.org/movement/antifa/> (last visited Jan. 30, 2018). Antifa is short for “anti-fascist” and comprises a left-wing extremist movement that violently opposes groups that it considers fascists. Most famously Antifa engages in aggressive protests against right-wing and center-right political groups. There is no known official leader for the group and no official headquarters. They have been attributed with conducting a number of violence protests including Berkeley, California on February 1, 2017, The Inauguration of Donald Trump, and a number of protests in Portland, Oregon over the past two years. In May 2017, 25 Anarchists were arrested in Portland for rioting, vandalism, and throwing incendiary devices at police.

¹⁹⁴ *Id.* *See* Travis M. Andrews, *Federal Judge stops Auburn from Canceling White Nationalist Richard Spencer Speech, Protests and a Scuffle Greet Him*, The Washington Post, Apr. 19, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm_term=.1f2490b0ee25. Cameron Padgett, the individual who booked the speech, sued Auburn University, claiming that as a public institution it must abide by the First Amendment. Judge W. Keith Watkins reversed Auburn’s decision, finding no evidence that Spencer advocates for violence. The judge found that “[d]iscrimination on the basis of message content cannot be tolerated under the First Amendment.” *** There was no source for this article.

to violence.¹⁹⁵ Around the country, incidents like this are becoming more and more commonplace. University of California, Berkeley found itself amidst rioting during protests against another Alt-Righter, Milo Yiannopoulos.¹⁹⁶ At Middlebury College of Vermont, a protest against political scientist Charles Murray became so unruly that a professor of the university was injured.¹⁹⁷ Universities “are avoiding controversial speech altogether by banning polarizing speakers.”¹⁹⁸

There has been a shift in the collegiate assault on free speech in recent years. Decades ago this assault came “top-down, originating with government or school administrators.”¹⁹⁹ Now, according to experts, “students and faculty stifle speech themselves, especially if it involves conservative causes.”²⁰⁰ “Threats, incitements, and instigations of fights create an atmosphere of exclusion [and] intimidation” while “[s]hout[ing] down or demeaning other speakers, by disrupting classrooms and community gatherings . . . is also a form of bullying that has no

¹⁹⁵ *See id.*

¹⁹⁶ McLaughlin, *supra* note 176.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* Many different issues can lead to polarization, with evolution and Israel surprisingly being “among the most controversial topics.” However, most backlashes occur from “disagreements over immigration, gender, race, religion, sexual orientation or abortion.” Furthermore “left-leaning speakers routinely appear on university campuses without fuss.”

place on university campuses.”²⁰¹ Allowing this form of bullying “rejects the free exchange of views and information.”²⁰²

However, equating harassment with the core of the First Amendment “creates a false analogy between dissemination of information, discourse, and self-fulfillment and vitriolic attacks aimed at disturbing targeted students.”²⁰³ Conversely students need be able to “joke, voice their opinions,” and “clash over politics.”²⁰⁴ It is clear that as society becomes increasingly polarized, universities have not seen the end of this predicament.

As previously mentioned in the examples of *Masterpiece Cakeshop* and universities across the country, hate speech is still at the forefront of domestic issues. The question of how to address hate speech in an ever-polarizing society seems to handcuff society. However, after events like Charlottesville, the tide may begin to change regarding how society addresses racially charged protests as well as the Alt-Right. Like Auburn University, the “Unite the Right” rally found itself in a courtroom, after the city tried to move the demonstration to another park.²⁰⁵ Right-wing

²⁰¹ Alexander Tsesis, *Campus Speech and Harrassment*, 101 MINN. L. REV. 1863, 1917 (2017).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Sarah Toy & Charles Ventura, *Federal Judge Allows ‘Alt-Right’ Rally to Go Ahead as Planned*, USA TODAY, Aug. 11, 2017,

blogger Jason Kessler, represented by the ACLU and Rutherford Institute, filed suit against the city claiming a violation of his constitutional rights.²⁰⁶ In a letter to the city, the civil liberties organizations argued that although the rally will “raise strong feelings of opposition,” that cannot be the basis to allow government action that would “suppress the First Amendment rights” of those participants.²⁰⁷

This particular rally turned violent, resulting in the death of one woman.²⁰⁸ Much of the tone was what many would consider “fighting words.”²⁰⁹ The violence was derived directly from the presence of a racially charged rally, one that drew many people into the streets in a chaotic fashion.²¹⁰ At first glance, this seemed like the exact “fighting words” that the Court in *Cohen* held were not included in the First Amendment.²¹¹ However, the rally was allowed to occur and thus society must deal with the consequences.

<https://www.usatoday.com/story/news/2017/08/11/charlottesville-braces-itself-yet-another-white-nationalist-rally-saturday/560829001/>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Hanna, *supra* note 17. A car slammed into a crowd of people and killed one woman while injuring nineteen others.

²⁰⁹ *Id.* Protestors gathered on the University of Virginia Campus in the city of Charlottesville and marched while bearing torches. They chanted “Blood and Soil” in what many would consider an act of intimidation.

²¹⁰ *Id.*

²¹¹ *See Cohen v. California*, 403 U.S. at 20 (1971).. “Fighting words” may be proscribed if they are inherently known to provoke violent reaction.

Another possible approach to address hate speech is through the idea of “social sanctions.”²¹² According to Robert Khan, politeness and respect are “critical parts of living together in a fast-paced, crowded, complicated, and diverse world.”²¹³ These social sanctions, argues Khan, “can be very severe” in a world where social media is continuing to grow.²¹⁴ Khan examined a number of different scholarly arguments and raised a number of approaches to address hate speech.²¹⁵ These approaches include non-penal criminal sanctions, symbolic laws, shunning, education or art, and counterspeech.²¹⁶ It is clear that many of these forms have already taken place against the Alt-Right, as exemplified by the number of counter-protestors at these rallies.²¹⁷ Post-rally shunning seems to be another strategy employed, with many social media users coming together to identify those seen at the rally.²¹⁸

²¹² Robert A. Kahn, *Rethinking the Context of Hate Speech Regulation the Content and Context of Hate Speech: Rethinking Responses and Regulations*, 14 FIRST AMEND. L. REV. 200, 220 (2015)

²¹³ *Id.*

²¹⁴ *Id.* Khan details members of a University of Oklahoma fraternity who were videoed singing a racist chant, who were subsequently suspended as a fraternity and individual expelled from the University.

²¹⁵ *Id.* at 234.

²¹⁶ *Id.* These different strategies have their own strengths and weaknesses and regard “what types of speech acts” should be targeted by each strategy.

²¹⁷ Hanna, *supra* note 17.

²¹⁸ Avi Selk, *A Twitter Campaign is Outing People Who Marched with White Nationalists in Charlottesville*, The Washington Post, Aug. 14, 2017, https://www.washingtonpost.com/news/the-intersect/wp/2017/08/14/a-twitter-campaign-is-outing-people-who-marched-with-white-nationalists-in-charlottesville/?utm_term=.0d7f8664d299. The social media outrage was

Some scholars argue that freedom of speech is compatible with the regulation of hate speech.²¹⁹ Hate speech regulation, it is argued, will not detract from a democratic society and will continue to allow citizens to legally criticize a government.²²⁰ In a somewhat extreme view, Thomas Webb argues that “hate speech is a poison that dilutes any benefit” resulting from unregulated free speech.²²¹ He continues by saying that in permitting hate speech, it works counter to the principles of democracy: “maintaining order, promoting equality, and protecting minority groups.”²²² Webb finds that although the United States has numerous regulations to protect equality, it has failed to “adequately promote these values through its failure to enact hate speech legislation.”²²³ Finally, Webb argues that victims of hate speech cannot avoid hearing the offensive speech, in other words, they are a “captive audience.”²²⁴

successful in identifying a number of the marchers and in a few cases marchers lost their jobs and received death threats.

²¹⁹ Thomas J. Webb, *Verbal Poison-Criminalizing Hate Speech: A Comparative Analysis and A Proposal for the American System*, 50 WASHBURN L.J. 445, 468 (2011).

²²⁰ *See Id.*

²²¹ *Id.* at 469.

²²² *Id.*

²²³ *Id.* at 470.

²²⁴ Webb, *supra* note 205 at 470-471. Webb further concludes that the United States failure to regulate hate speech leaves it in violation of international law.

Perhaps instead of banning hate speech head on, the government should look elsewhere to address hate speech. One possible approach is through the use of the Equal Protection Clause of the Fourteenth Amendment.²²⁵ This may require some creativity in interpreting the Fourteenth Amendment—“from a strict and formal reading to a general and substantive interpretation.”²²⁶ Thus, in this interpretation equality would be affirmative, and instead of proscribing treatment of people unequally, the government would be required to promote equality.²²⁷ Regulations on hate speech would, therefore, be an equal protection tool that could be used to promote equality.²²⁸

In order for this approach to work, a “victim-listener[‘s]” right would have to be considered equal to the right of the person perpetrating the speech.²²⁹ One major drawback to this approach is that if listeners’ and speakers’ rights were equal, then any treatment of one over the other would “be based on an arbitrary and indefensible classification.”²³⁰ Thus, this may not be a

²²⁵ Scott J. Catlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights*, 69 NOTRE DAME L. REV. 771, 790 (1994).

²²⁶ *Id.* at 791.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Catlin, *supra* note 211 at 792. It would be a balancing of rights, with the hate speaker infringing on a “listener’s fundamental rights under an ‘affirmative’ equal protection analysis.”

²³⁰ *Id.*

desirable approach in the context of the Alt-Right. As previously mentioned, the Alt-Right is consistently met with counter-protests. If a counter-protest is to work effectively, there must be a mutual right to speak freely. Through the Fourteenth Amendment approach, any claim by a listener for protection of their rights would be met with an argument for an equal right in engaging in hate speech (as free speech) by a speaker. This could effectively hinder anyone trying to bring an Equal Protection claim.

The key to combatting hate speech may actually lie with the states, and even then the states may not be able to attack it head on. New Jersey for example, has given prosecutors a “potent weapon,” in a 1990 amendment to N.J.S.A. § 2C:33-4.²³¹ Ronald Chen points out that New Jersey’s harassment statute N.J.S.A. § 2C:33-4 “sweeps with an even broader brush [than N.J.S.A. § 2C:33-2]²³² by making it a petty disorderly persons offense if one, ‘with purpose to harass another’: (a)...makes a communication...in offensively coarse language...to cause annoyance or alarm.”²³³

²³¹Ronald K. Chen, *Speech We Love to Hate*, N.J. LAW., August/September 1994, at 32, 33.

²³² See N.J. Stat. Ann. § 2C:33-2 (West). This disorderly conduct statute lays out a standard for prohibited “improper behavior” and “offensive language.” “Offensive language” is defined as a “petty disorderly persons offense, if in a public place, and with purpose to offend the sensibilities of a hear or in reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive language...” Public includes highways, schools, and places of business or amusement.

²³³ Chen, *supra* note 217 at 33.

Chen notes that this “potent weapon” previously mentioned is a 1990 amendment, which makes it a felony under 2C:33-4 when one acts, “at least in part, with ill will, hatred, or bias towards, and with purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.”²³⁴ Chen further notes that it may be surprising to some that engaging in alarming, offensively coarse, or annoying communications is a criminal offense in New Jersey, especially since similar statutes have failed constitutional standards.²³⁵ Thus, a possible way to regulate hate speech without blanket banning it is to use a harassment statute. The harassment statute doesn’t technically mention any particular language; thus it may circumvent an obvious constitutional challenge.

V. CONCLUSION

The Alt-Right has proven to be a difficult movement to address in the United States. Under the First Amendment, the Alt-Right has a constitutional right to free speech and to rally for the causes they see fit. However, when citizens are meeting in the streets in violent affairs that may result in death, it begs the question, is there any way to stop it? As mentioned, universities,

²³⁴ *Id.*

²³⁵ *Id.*

private businesses, and whole cities struggle to manage the tension between freedom of speech, dignity, and religion. Hate speech statutes have suffered constitutionally, and the courts are hesitant to allow bans on protected speech. Private companies, including social media sites like Facebook and Twitter might soon find themselves in the midst of the tension. The internet is increasingly becoming a battle ground, and the anonymity found online has provided a perfect shield for those engaging in hate speech. The battle between hate speech and free speech is far from over, and for now, society can try and combat this issue by promoting tolerance and unity.