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INTRODUCTION

THE restriction of hate speech[1] on the campuses of public universities[2] raises complex issues of constitutional law. That apparently

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1. The term "hate speech" refers to language that vilifies and holds up to hatred and contempt the members of any group that generally meets the Supreme Court's criteria for a suspect class. Groups defined by their race or nationality are the paradigm examples. *See* Korematsu v. United States, 323 U.S. 214 (1944). *See generally* Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-47 (1985) (describing and applying criteria used to identify a suspect class). These same criteria identify groups defined by gender as a quasi-suspect class. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Frontiero v. Richardson, 411 U.S. 677 (1973). A strong argument may be made that religious minorities should also be recognized as a suspect class. *See* Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 102-12 (1990) [hereinafter *Heavenly and Earthly Spheres*].

In discussing examples of hate speech in the text, I have struggled to reconcile two conflicting beliefs. I believe that hate speech, like other acts of cruelty and insensitivity, is easier to defend as an abstraction. Illustrations involving explicit epithets argue the case for regulation more powerfully than do examples using euphemisms. On the other hand, too frequent and careless use of pejorative language can trivialize the demeaning impact of such terms. It may also cause unnecessary discomfort to some readers.

Accordingly, in the examples in the text, I use the first and last letters of common epithets with dashes in between. Only in more abstract discussions are offensive terms stated explicitly. I assume that virtually all readers are familiar enough with common hate speech that this will not interfere with anyone's understanding of the text.

2. This article only addresses restrictions of hate speech on the campuses of public universities because that location raises the most serious constitutional issues. It is generally recognized that

benign statement may today be both controversial and a minority position. Battle lines are drawn quickly when college administrators promulgate policies to limit the use of racist, ethnic, and sexist epithets and other pejorative language directed at minorities and women.[3]

In the resulting debate, some free-speech proponents argue that the first amendment permits relatively few limits on what may be said at a public university. They believe that within the framework of traditionally protected expression, the academic environment should be the quintessential, unregulated marketplace of ideas.[4] Other writers, dismayed and angered by the pain and harm that hate speech causes its victims, support a categorical response to the problem.[5] Joining those commentators who challenged the judicial decision protecting the right of American Nazis to march through Skokie, Illinois in 1977,[6] these authors advocate the designation of a new classification of unprotected speech that the government may regulate in the same way that it currently re-

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administrative decisions restricting speech at private colleges are not as rigorously constrained by the first amendment. The conventional reason for this distinction is the lack of state action in the decisions of private universities. *See, e.g.*, Grafton v. Brooklyn Law School, 478 F.2d 1137, 1143 (2d Cir. 1973); Blackburn v. Fisk Univ., 443 F.2d 121, 123 (6th Cir. 1971). *See generally* Annotation, *Action of Private Institutions of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C.S. § 1983*, 37 A.L.R. FED. 601 (1978).

3. *See generally* Finn, *The Campus: "An Island of Repression in a Sea of Freedom,"* COMMENTARY, Sept. 1989, at 17; France, *Hate Speech Goes to College*, 76 A.B.A.J., July 1990, at 44; Lawrence & Gunther, *Good Speech, Bad Speech*, STANFORD LAWYER, Spring 1990, at 4; Kaufman, *Nibble at Freedom, and Risk Losing It All*, L. A. Times, July 31, 1990, § B, at 7, col. 4; *Free Speech Issue Gets Re-Examined*, L. A. Daily J., July 4, 1990, at 1, col. 5; Wilson, *College's Anti-Harassment Policies Bring Controversy Over Free Speech Issues*, 36 Chron. Higher Educ. 1, Oct. 4, 1989, at 1, col. 2; *UC's Doctrine of Silence*, The Recorder, Oct. 2, 1989, at 1, col. 2; Russo, *Free Speech at Tufts: Zoned Out*, N. Y. Times, Sept. 27, 1989, at A29, col. 2; Gunther, *Stanford's Free Speech Debate*, Sacramento Bee, May 8, 1989, at B-11, col. 4.

4. *See generally supra* note 3. These materials describe the challenges raised by students, professors and civil libertarians to hate speech regulations at particular universities. For example, Floyd Abrams, a prominent civil liberties attorney, criticized the Northern California ACLU for failing to challenge the University of California's hate speech policy. Abrams argued, "[t]o call offensive language a denial of access, and then to use it to trump a First Amendment right is a failure of courage for any civil liberties organization." *UC's Doctrine of Silence, supra* note 3.

5. *See, e.g.*, Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989) [hereinafter *Public Response*] (arguing that persecutorial, hateful, and degrading messages of inferiority directed against historically oppressed groups should be "treated as outside the realm of protected discourse"); Delgado, *Words that Wound: A Tort Action for Racial Insult, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter *Words that Wound*].

6. *See, e.g.*, Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985); Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77 (1984) [hereinafter *Big Brother*].

stricts obscenity,[7] fighting words,[8] and speech that constitutes a clear and present danger of unlawful conduct.[9]

The purpose of this article is to respectfully challenge the free speech position. Indeed, this article is principally directed at first amendment proponents, including members of the university community, who properly bristle at content and viewpoint discrimination and shiver when administrators exercise regulatory discretion in limiting expression of any kind. The article's objective is to convince these readers that hate speech on public property is not as immune from careful regulation as some first amendment defenders suggest. Significant restrictions on hate speech at public universities are consistent not only with current constitutional doctrine but also with those cases and principles typically endorsed, or at least respected, by civil libertarians.

This article does not, however, endorse a categorical first amendment exception for hate speech.[10] Rather, it attempts to establish a mid-

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7. Obscenity is patently offensive expression that appeals to a prurient interest in sex. The complete legal definition is set out in Miller v. California, 413 U.S. 15 (1973). The dissemination of obscene material, even between consenting adults, may be suppressed by the state through criminal sanctions. *See* United States v. Reidel, 402 U.S. 351 (1971).

8. In theory, speech involving fighting words, that is, "face-to-face words plainly likely to cause a breach of the peace by the addressee," may be prohibited. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). This doctrine has been sharply limited, however, and is seldom used to sustain the conviction of speakers whose expression arguably constitutes fighting words unless the threat of violence is actually imminent. *See* K. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 293-94 (1989); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 929 n.9 (2d ed. 1988).

9. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

10. Although concerns raised by writers who describe the harm that hate speech produces cannot be lightly dismissed, *see* K. GREENAWALT, *supra* note 8, at 141-57, 287-313; *Words that Wound*, *supra* note 5; Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 462-67 (1987); *Public Response*, *supra* note 5, I am nonetheless generally unsympathetic towards the idea that any form of speech is completely beyond the scope of first amendment protection.

Certainly, the Supreme Court's experience in identifying specific categories of unprotected speech does not encourage this approach. The Court at one time found group libel to be unprotected speech and subject to criminal sanction. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952) (law prohibiting speech that defames a large but discrete group of individuals such as a racial minority upheld). Subsequent first amendment cases have severely undermined the reasoning of *Beauharnais*, however, and there is serious doubt that it continues to have significant value as precedent on this issue. *See* Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978); L. TRIBE, *supra* note 8, at 926-67. While the Court continues to hold that obscene expression is unprotected speech, it undermines any objective justification for that conclusion by defining obscenity in subjective terms by reference to local community standards, Miller v. California, 413 U.S. 15 (1973), and by its decision to protect obscene materials in home libraries, Stanley v. Georgia, 394 U.S. 557 (1969).

A more sensible first amendment model rejecting a categorical approach to regulating speech is

dle ground position where hate speech, though generally protected, is subject to some regulation. Implicit in this position is the recognition that the extent to which hate speech may be restricted is limited, and that important distinctions must be drawn between different intra-campus locations and contexts.

This article also does not propose a model regulation that neatly identifies each instance where hate speech may be prohibited. Nor does it resolve the difficult problems of line-drawing and balancing that will necessarily be faced by administrators and judges if its thesis is accepted. The purpose of the article is a narrow one. It seeks to demonstrate that complex line-drawing and balancing are intrinsic and *unavoidable* parts of any first amendment analysis of speech restrictions on public university property.

Part I of the article examines the restriction of racist speech on public university campuses under the Supreme Court's forum analysis. It evaluates the standards of review applied to the regulation of speech on public property serving specific purposes, and suggests how these rules should be applied to public universities. Part II discusses how this constitutional analysis changes when the expression to be regulated on public property arguably impairs or interferes with the implementation of other constitutional principles. This section seeks to reconcile the constitutional protection afforded freedom of speech with the equal protec-

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suggested by Justice Brennan's dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73-114 (1973) (Brennan, J., dissenting). Rather than attempting to define a particular type of expression as obscene and, therefore, completely beyond first amendment protection, Brennan argued that the Court should examine the distribution of obscene material in context. The regulation of obscene expression should be upheld only in those circumstances where the dissemination conflicts with particular and important state interests such as the protection of children and unconsenting adults from exposure to sexually explicit materials. *Id.* at 106-14.

In any case, refuting the categorical restriction of hate speech is beyond the scope of this article. The argument that all, or virtually all, hate speech may be categorically prohibited is only relevant to the thesis of this article as a reminder that all-or-nothing definitional balancing has its risks as well as its virtues, and that those risks are inherent in any absolutist approach to first amendment problems. The categorical rejection of hate speech flounders under many of the same criticisms that may be fairly leveled at those who condemn any restriction of hate speech whatsoever. Not the least of these is the judgment that the uncompromising support of either polar position increases the legitimacy of the extreme counter argument. For example, it is more difficult to persuade an audience reasonably concerned about the harmful effects of hate speech that a categorical exception should *not* be carved out of the first amendment if one insists that even the most modest and temperate attempt to regulate such expression on public property must be rejected out of hand as being totally inconsistent with free speech values. Similarly, the surest way to convince a first amendment absolutist that he or she should hold fast to an uncompromising position is to argue that all hate speech should be unprotected because even the indirect and attenuated consequences of such communications are too dangerous to be tolerated.

tion guarantees of equal access and equal worth provided to suspect classes.

I. THE PUBLIC UNIVERSITY AS A FORUM

A. *The Nature of Forum Analysis*

Supreme Court case law evaluating restrictions on speech on public property classifies the property in question as a type of forum in order to determine the appropriate standard of review to apply to the challenged regulation.[11] Three basic models or types of forum are recognized. Speech is most stringently protected in the traditional public forum, the classic paradigm of which is a public street or park.[12] Here, content or viewpoint discrimination receives strict scrutiny,[13] and content-neutral laws are subject to a rigorous multifactor balancing test.[14] At the other extreme is the nonpublic forum, a category which describes public property of uncertain suitability for private expression.[15] Although viewpoint discrimination is still carefully reviewed in nonpublic forums, both content-discriminatory and content-neutral regulations limiting expression in these locations will be upheld if found to be reasonable.[16]

The Court has been imprecise and inconsistent in defining the third type of forum. Although the case law refers to this intermediate category as both a "designated" public forum[17] and a "limited" public forum,[18]

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11. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985): [T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other [expressive] purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.

12. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing Hague v. C.I.O., 307 U.S. 496, 515 (1939)).

13. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

14. *Id.* (citing United States Postal Serv. v. Council of Greenbush Civic Ass'ns, 453 U.S. 114, 132 (1981)). Content-neutral regulations of the time, place, and manner of expression must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

15. *See Cornelius*, 473 U.S. at 805-06 (annual charitable fund-raising drive conducted in the federal workplace is not public forum).

16. *Id.* at 806 (citing *Perry*, 460 U.S. at 49).

17. *Id.* at 803 (referring to "a public forum by designation") (citing *Council of Greenbush Civic Ass'ns*, 453 U.S. at 130 n.6). *See also* M. NIMMER, NIMMER ON FREEDOM OF SPEECH, § 4.09[D], at 4-71 n.168 (1984). *Perry*, 460 U.S. at 45-46, and Widmar v. Vincent, 454 U.S. 263, 267-68 (1981) adopt the same forum concept but do not actually use the term "designated." Rather, they describe the state creating or opening a forum for expressive use even though it is not required to do so.

18. *Perry*, 460 U.S. at 48; Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1980); M. NIMMER, *supra* note 17, at 4-71 n.168.

these classifications encompass two distinct standards of review applicable to speech restrictions. The designated forum standard is based on the intent of the government to open up public property to a particular class of speaker or subject of expression. In analyzing speech regulations under this standard, the Court inquires whether the excluded expression would reasonably fall within the favored class of speakers or subjects that the government has deliberately admitted to the forum in question. The inherent subjectivity and circularity of this approach, however, substantially undermine its utility to persons seeking to challenge location-based constraints on their expressive activities.[19] The alternative model, the limited forum, applies a functional compatibility test to determine

19. The Court uses the designated public forum concept in two ways, both of which raise serious analytic difficulties. In the first, because the government opens up property, which would otherwise be classified as a nonpublic forum, to virtually all public discourse, the exclusion of any speaker or subject of expression receives strict scrutiny review. *Widmar*, 454 U.S. 263, is the paradigm example of this kind of analysis. *See also* United States v. Kokinda, 110 S. Ct. 3115, 3119 (1990); *Perry*, 460 U.S. at 45-46 (1983).

The problem with this definition of a designated public forum is the uncertain criteria for determining that it exists. The Court has emphasized that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. If the government's purpose is the controlling factor, however, presumably all the state must do to avoid rigorous review of its decision to bar particular speakers from its property is to make clear that these exclusions are deliberate acts rather than oversights.

The Court also explains that it looks to "the policy and practice of the government to ascertain whether it intended to designate a place . . . as a public forum." *Id.* Does this mean that if the state allows a sufficient number of diverse speakers to use its property it will be found to have inadvertently designated a public forum? The language of several recent cases seems to reject that possibility as inconsistent with the Court's focus on the government's intent. *See Kokinda*, 110 S. Ct. at 3121 ("[A] practice of allowing some speech activities on [public] property [does] not add up to the dedication of [public] property to speech activities."); *Perry*, 460 U.S. at 47 ("[S]elective access does not transform government property into a public forum.").

Moreover, the intent principle is subject to self-justifying manipulation by both the state and the courts, however it is defined. How many speakers must be kept out of the forum to establish an intent not to open it to the general public? More than one, obviously, or the very act of the state in excluding the speaker prevents the speaker from claiming that he or she has been barred from a designated forum. Whatever number is adopted, however, the state can always exclude one disfavored speaker, and still avoid designated forum status, by barring a few other unpopular speakers until it reaches the threshold figure.

The Court's second use of the designated forum concept suggests that a forum can be opened and dedicated to a circumscribed group of speakers or topics as opposed to the general public. The Court describes this partially open, designated forum in tentative terms as if it is uncertain that such forums really exist for constitutional purposes. *See Kokinda*, 110 S. Ct. at 3118; *Perry*, 460 U.S. at 48. More importantly, it is unclear whether this concept can actually help an excluded speaker gain access to a forum from which he or she has been barred. With regard to a partially designated forum, "[t]he Constitutional right of access would in any event extend only to other entities of similar character." *Perry*, 460 U.S. at 48. In addition, the state's justification for treating the excluded speaker as dissimilar from those granted access will be reviewed under the reasonableness

whether the prohibited expression would materially impair or disrupt the use to which the public property in question is being put.[20]

Under this forum approach to first amendment cases, the Supreme Court determines the standard of review it will use by identifying the property to be regulated as either a traditional public forum, a limited or designated public forum, or a nonpublic forum. While the rigor of the review applied decreases along the continuum from traditional to non-

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standard applied to speech regulations governing nonpublic forums. *Kokinda*, 110 S. Ct. at 3118-19. *See also* M. NIMMER, *supra* note 17, at 4-71 n.168.

20. A functional compatibility standard permits the regulation of speech on public property in order to prevent expression from significantly interfering with the use to which the property is being put. Accordingly, how the state uses its property and the effect of speech on that activity are critical elements of the limited public forum analysis. *See Heffron*, 452 U.S. at 650-51 ("Consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."). *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (special characteristics of the school environment). Other cases apply a functional compatibility standard of review to speech regulations on public property without clarifying why it is appropriate to do so. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104 (1972).

Nevertheless, an argument can be made, based upon recent case law, that the limited public forum no longer exists. Language in *Kokinda*, 110 S. Ct. at 3117-18, *Cornelius*, 473 U.S. at 803-06, and *Perry*, 460 U.S. at 46, suggests that if public property is neither a traditional public forum nor a designated public forum, then it is a nonpublic forum. The rejoinder to this contention, however, is sufficiently strong that the issue remains open. Some of the cases cited in support of the limited public forum's demise equivocate. For example, Justice White in *Perry* considered a limited public forum argument, but it was based in part on the government allowing some speakers access to the public property. *Perry*, 460 U.S. at 48. Justice O'Connor's opinion in *Kokinda* would have sounded the death knell of the limited public forum if she had convinced four other Justices to join her in characterizing an interior side walk in front of a post office as a nonpublic rather than a limited public forum. *Kokinda*, 110 S. Ct at 3120-21. If an interior sidewalk in front of a post office is not a limited public forum, it is hard to imagine any other property which deserves to be so identified.

O'Connor's opinion, however, did not command a majority of the Court. Justice Kennedy provided the critical fifth vote in upholding the anti-solicitation ban on the interior post office sidewalk, but he refused to join O'Connor in characterizing the sidewalk as a nonpublic forum:

> If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case. While it is proper to weigh the need to maintain the dignity and purpose of a public building, or to impose special security requirements [on public property], other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended.

Id. at 3125 (Kennedy, J., concurring) (citations omitted).

Finally, many of the Court's functional compatibility cases, including those most relevant to this article, have not specifically been overruled and, therefore, continue to stand as good law. *See Tinker*, 393 U.S. 503; *see infra* notes 42-73 and accompanying text.

Although the Court does not carefully distinguish between "limited public forums" and "designated public forums," *see, e.g., Perry*, 460 U.S. at 48 (Court suggests that there may be a designated limited public forum if state intentionally creates a forum that is only partially open), for purposes of clarity I believe it is easier to define limited public forums with a functional compatibility analysis and designated forums (whether fully or partially open) with an intent analysis.

public forum, however, the primary basis for regulating speech on public property remains the same regardless of the nature of the forum. Private expressive activities cannot substantially interfere with the use to which public property is being put by the state. What varies between forums is the severity with which the Court scrutinizes the state's claims of incompatibility and interference between expression and the property's function, and the weight assigned by the Court to free speech interests in balancing them against the state's need to fulfill its legitimate objectives on government property. Obviously, it is easier for the state to argue that its concerns about the disruptive effect of speech are reasonable than it is to establish that the prohibition of speech is necessary to the furtherance of a compelling state interest.[21] Nonetheless, at some point the need to curtail speech in order to facilitate the state's use of its property must clearly constitute the kind of compelling state interest required by strict scrutiny.

Thus, a broad range of first amendment interpretations may be grounded on a forum analysis. Unfortunately, the Supreme Court's most recent cases have been solidly lodged at the end of the forum continuum that is least protective of freedom of expression. Although these decisions are *not* endorsed in this article, it is important to understand their scope in order to properly evaluate alternative arguments which justify speech regulations on public property.[22]

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21. Thus, in *Kokinda*, 110 S. Ct. at 3124, Justice O'Connor supported a total ban on solicitation on interior sidewalks in front of post offices, a nonpublic forum under her analysis, because a general "description of the disruption and delay caused by solicitation rings of 'common sense,' which is sufficient in this Court to uphold a regulation under reasonableness review." *Id.* (quoting *Heffron*, 452 U.S. at 665). That the post office's efficiency concerns could be alleviated by adopting regulations which were less burdensome to expression was irrelevant. *Id.* By contrast, the Court in *Heffron* determined that a state fairground was a limited public forum. While the Court upheld regulations requiring that solicitation activities be limited to fixed booths at the fair, it did so by balancing the state's interests in crowd control and fraud prevention against the burden these regulations imposed on petitioners' opportunities for expression. *Heffron*, 452 U.S. at 649-50. The booth regulations, far from being a total ban, provided organizations "an adequate means to sell and solicit on the fairgrounds," and did not "unnecessarily limit" their first amendment rights. *Id.* at 654-55.

In Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), the Court utilized a more rigorous standard of review in invalidating a municipal ordinance which required solicitors to prove that at least seventy-five percent of the proceeds they obtained would be used for charitable purposes before they could solicit funds on the public streets, a traditional public forum. While the city's objectives of preventing fraud and protecting residential privacy were strong and legitimate interests, they could not be advanced through laws that intrusively interfered with first amendment freedoms, even if alternative regulatory approaches would be less efficient and convenient for the authorities. *Id.* at 636-39.

22. There is more than one way to justify the regulation of hate speech in public universities. Contemporary case law, often unsympathetic to free speech values, provides one doctrinal approach for doing so. The thesis of this article is that an alternative analysis can accomplish the same result

Current case law applying the Court's forum analysis would permit significant restrictions of hate speech on university property which was determined to constitute a nonpublic forum. That important locations within the college environment could be so identified is no longer improbable. In *Hazelwood School District v. Kuhlmeier*,[23] the Supreme Court concluded that a high school journalism class was not a public forum since school authorities had not " 'intentionally open[ed] a nontraditional forum for public discourse.' "[24] The Court's analysis in *Hazelwood*, focusing as it did on the plaintiff's failure to show that the state had deliberately opened its property for indiscriminate use, is equally applicable to a university program.[25]

In a nonpublic forum, speech regulations covering high school and university activities receive relatively lenient review from the Court. Content-discriminatory and content-neutral rules are upheld if they are reasonable in their purpose and manner of operation.[26] Only viewpoint discrimination is subject to close scrutiny.[27] While regulations banning

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without repudiating core first amendment principles. The dissonance between these two frameworks causes some awkwardness in discussing the cases. The alternative analysis uses precedent that is still technically good law, in the sense that it has not been formally overruled, but which may carry little weight with the current Court. The former approach is based on reasoning the Court favors, but which is correctly rejected by free speech advocates as unsatisfactory. It is, of course, important to understand the current case law because it defines the practical parameters of what is constitutionally possible and likely. Readers should not, however, confuse these discussions of what is the case with the author's sense of what the law ought to be.

The true dilemma here is really a practical one. The arguments suggested in this article justify hate speech regulations in a way that recognizes and reconciles both first amendment and equal protection values. These arguments, however, may not be persuasive to a Court that is generally unsympathetic to both principles. The only way to convince this Court to sustain such regulations may be to base one's arguments on the truncated vision of the first amendment that a majority of the current Justices seem to endorse.

23. 484 U.S. 260 (1988).

24. *Id.* at 267 (quoting *Cornelius*, 473 U.S. at 802). *See also* Planned Parenthood v. Clark County School Dist., 887 F.2d 935 (9th Cir. 1989) (holding that high school newspapers, yearbook, and athletic event programs are nonpublic fora because school authorities did not open them for indiscriminate expressive activity).

25. *See generally* Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1346-47 (11th Cir. 1989) (applying *Hazelwood* analysis to university speech regulations).

26. Content discrimination refers to regulations based on the subject of expression. A law prohibiting political speech on a military base would constitute content discrimination. For examples of the use of the reasonableness standard to review content discrimination, see Searcey v. Harris, 888 F.2d 1314, 1318-19 (11th Cir. 1989) (equating *Hazelwood* reasoning with nonpublic forum reasonableness standard of review described in *Cornelius*); *Alabama Student Party*, 867 F.2d at 1346-47 (upholding "reasonable" university speech regulations).

27. Viewpoint discrimination regulates only one of the contending positions within a subject of discourse. A law prohibiting pro choice but not pro life arguments relating to abortion would constitute viewpoint discrimination.

racist epithets would ordinarily be construed to be viewpoint discrimination under traditional analysis, at least one recent decision casts doubt on that conclusion and supports the application of a less rigorous content discrimination standard.

In *Boos v. Barry*,[28] Justice O'Connor's opinion construed a District of Columbia regulation prohibiting the display of any sign within 500 feet of a foreign embassy, if the sign tended to bring that government into "public odium" or "public disrepute,"[29] to be content discrimination rather than viewpoint discrimination.[30] O'Connor explained that since expression censuring any foreign government's policies would be restrained by this provision, the law did not single out a particular viewpoint for disfavored treatment. Rather, it prohibited "an entire category of speech—signs or displays critical of foreign governments."[31] Using similar logic, a regulation which prohibited vulgar language asserting the inferiority or negative characteristics of any ethnic or racial group would constitute content discrimination, and therefore be sustainable in a nonpublic forum if found to be reasonable.[32]

The contention that regulating racial and ethnic epithets would involve content rather than viewpoint discrimination is further bolstered by the Court's reasoning in offensive speech cases such as *FCC v. Pacifica Foundation*.[33] In upholding the FCC's reprimand of the Pacifica radio station for its broadcast of George Carlin's "Filthy Words" monologue, Justice Stevens emphasized that the FCC's action did not constitute viewpoint discrimination. It was not Carlin's point of view that the government objected to, but the manner in which he expressed it.[34] Thus, Stevens argued, the FCC's language restriction was based on the content of speech, and not on the message being conveyed.[35] An analogy of this reasoning to ethnic epithets suggests that the exclusion from classroom discourse of words such as "nigger," "kike" and "mick" would be re-

28. 485 U.S. 312 (1988).

29. *Id.* at 316.

30. The line between these two types of regulations can, however, often be unclear. The regulation in *Boos*, prohibiting signs critical of foreign governments, could also be described as viewpoint rather than content discrimination, since signs complimenting foreign governments were not prohibited.

31. *Id.* at 319.

32. *See generally* Planned Parenthood v. Clark County School Dist., 887 F.2d 935, 946 (9th Cir. 1989) (High school authorities acted reasonably in refusing to allow "controversial" advertisements from Planned Parenthood in high school publications.).

33. 438 U.S. 726 (1978).

34. *Id.* at 746 n.22.

35. *Id.* at 744.

viewed and upheld in most cases as reasonable content regulation.[36]

The argument that public universities are nonpublic forums is not, however, completely convincing. There is longstanding and significant support in the cases for the contrary proposition that, as a general matter, public universities constitute some type of public forum.[37] Recent precedent does not clearly supersede these older cases. Moreover, free speech advocates, who are properly critical of the ease with which current nonpublic forum cases uphold speech regulations, will be unpersuaded by decisions suggesting that universities are nonpublic forums, and unimpressed by arguments predicated on such a dubious foundation.[38] Decisions such as *Pacifica*, which substantially reduce the protection afforded "indecent" and offensive speech, are likely to receive similar disapproval.[39]

On the other hand, first amendment proponents may read too much into favorable decisions of the last three decades when they argue that the university must, in most respects, be treated as a traditional public forum. A more accurate description would recognize that the typical university campus includes many different kinds of property dedicated to a variety of functions. Some areas and uses are properly identified as traditional public forums. Others are nonpublic forums. Although some first amendment advocates may argue that, in general, the strict rules governing traditional public forums are a more appropriate basis for reviewing university speech regulations, a fair reading of the case law supports a more moderate position. Those parts of the university directly involved in the educational enterprise, such as classroom activities, are better understood as limited public forums in which speech regulations are subject to an objective, functional compatibility standard of review.[40] Indeed, even those Justices with the strongest commitment to freedom of

36. In distinguishing the broadcast in question in *Pacifica*, Stevens implied that indecent speech in works of literary merit, such as the "occasional expletive" in an "Elizabethan comedy" would be protected. *Id.* at 750. Under similar reasoning, reading the word "nigger" in *Huckleberry Finn* would not subject the speaker to sanction.

37. *See infra* notes 53-74 and accompanying text.

38. *See* M. NIMMER, *supra* note 17, at 4-73 - 4-74 (submitting that "the Court has erred insofar as it has used the speech-dedicated standard rather than the incompatibility standard in applying the public forum concept"); L. TRIBE., *supra* note 8, at 996 (describing the Court in recent nonpublic forum cases as operating "[i]n a cloud of logic that threatened quickly to evaporate in circles of tautology," with the decision in Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985), having "effectively turned the public forum doctrine on its head").

39. *See, e.g.*, M. NIMMER, *supra* note 17, at 3-29 (regretting the Court's apparent retreat from Cohen v. California, 403 U.S. 15 (1971), in FCC v. Pacifica Found.); Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 282-96 (1981).

40. *See supra* note 20.

speech appear to accept a functional compatibility analysis in cases of this kind.[41]

1. *The Functional Compatibility Foundation*—Tinker v. Des Moines Independent Community School District.[42] In *Tinker*, the Supreme Court forcefully vindicated the first amendment rights of high school students to wear black arm bands to school to protest United States policies in Vietnam. The Court declared that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[43] School authorities cannot suppress expression to avoid controversy or "the discomfort and unpleasantness that always accompany an unpopular viewpoint."[44] Nor can they use "undifferentiated fear or apprehension of disturbance"[45] as an all-purpose justification for silencing student speech when no evidence exists to support their institutional concerns. *Tinker* is a landmark opinion in protecting student rights of expression by five of the most stalwart first amendment champions the Court has produced: Justices Fortas, Warren, Douglas, Brennan and Marshall. No future Court is likely to be more protective of first amendment values than this majority.

Nevertheless, *Tinker* is also an analytically ambiguous opinion. To begin with, it never identified the category of forum into which a public high school falls. More importantly, although the Court pointedly noted that only one symbol representing a particular point of view was singled out and restricted by the authorities, the majority did not apply strict scrutiny to the challenged restriction.[46] It would be difficult to imagine a more glaring omission from traditional doctrine.

Far from adopting a public forum standard, *Tinker* in effect represents a pure functional compatibility analysis. Free speech rights must be evaluated "in light of the special characteristics of the school environment."[47] Accordingly, speech must be permitted unless it " 'materially and substantially' " interferes with the school's educational program.[48]

Although the Court in *Tinker* never spelled out exactly what constitutes such a sanctionable interference with a school's educational pro-

41. *See infra* notes 42-46 and accompanying text.
42. 393 U.S. 503 (1969).
43. *Id.* at 506.
44. *Id.* at 509.
45. *Id.* at 508.
46. *Id.* at 510-11.
47. *Id.* at 506.
48. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

gram, one point is repeatedly made clear. Student expressive activity may be limited if it intrudes "upon the work of the school[ ]"[49] or interferes "with the rights of other students to be secure and to be let alone."[50] By implication, even viewpoint discrimination could be upheld under this analysis. The Court argued that "the prohibition of expression of one particular opinion . . . is not constitutionally permissible," but added the important caveat: "at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline."[51]

2. *The* Tinker *College Progeny*—Healy, Papish, *and* Widmar. *Tinker* is a high school case. On its face it says nothing about the regulation of speech on a public university campus. Moreover, several subsequent decisions involving the review of college speech regulations contain language suggesting that a more rigorous standard of review is appropriate on the college campus. Those who argue that the regulation of hate speech on public university campuses involves a retreat from existing first amendment doctrine[52] must predicate their arguments on a narrow interpretation of *Tinker* and a very favorable construction of these later cases. No other authority is available to support their position.

That analysis, however, is unpersuasive. A careful reading of the later cases demonstrates that they do not broadly provide a different standard of first amendment protection for universities than the Court endorsed in *Tinker*. Indeed, *Tinker* is repeatedly cited and quoted with favor. What distinguishes *Tinker* from the college cases, if anything, are the Court's underlying assumptions about the nature of a university's functions and the degree of compatibility the Court believes exists between free expression on a university campus and a college's regular educational activities.

The first, and perhaps best known college speech case after *Tinker*, was *Healy v. James*,[53] in which the Court reviewed the President of Central Connecticut State College's (CCSC) denial of official recognition to a local chapter of Students for a Democratic Society (SDS). The President's decision effectively precluded the student group from using any campus facilities for its activities.[54] In reviewing that action, the Court,

49. *Id.* at 508.
50. *Id.*
51. *Id.* at 511.
52. *See generally supra* note 3.
53. 408 U.S. 169 (1972).
54. *Id.* at 176.

as in *Tinker*, emphatically endorsed the first amendment rights of college students. Justice Powell's majority opinion declared:

> The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. . . . The college classroom with its surrounding environs is peculiarly the " 'market-place of ideas,' " and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.[55]

Given such a preamble, it is not surprising that the Court concluded that the mere fact that the local SDS chapter was loosely affiliated with other SDS branches involved in unlawful activities could not justify denying it recognition.[56] Similarly, the President's determination that the philosophy of SDS was "abhorrent" to him and dedicated to "the destruction of the very ideals and freedoms upon which . . . academic life is founded" did not permit the total banishment of SDS from campus life.[57]

The Court in *Healy* nevertheless went on to argue, citing *Tinker*, that campus speech may be regulated under a functional compatibility analysis.[58] Different locations, the Court recognized, warrant different standards of review. In the general community, advocacy can only be restricted if it crosses the line between protected and unprotected speech.[59] "In the context of the 'special characteristics of the school environment,' " however, the Court explained that the government's power to limit speech is more expansively defined.[60] At a public university, "associational activities need not be tolerated where they infringe upon reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[61] As in *Tinker*, the Court did not detail what kinds of activities are actionable under this standard, but it did favorably describe CCSC college regulations prohibiting student organizations from "invad[ing] the privacy of others" and "interfer[ing] with the rights of others."[62]

In reliance on *Healy*, the Court in *Papish v. Board of Curators of the*

55. *Id.* at 180-81 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

56. *Id.* at 185-87.

57. *Id.* at 187.

58. *Id.* at 189.

59. *Id.* at 188. As an example, the Court pointed to speech that violates the standard of Brandenburg v. Ohio, 395 U.S. 444 (1969), by intentionally inciting lawless activity, as crossing the line between protected and unprotected speech.

60. Healy v. James, 408 U.S. 169, 189 (1972) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)).

61. *Id.*

62. *Id.*

University of Missouri [63] ordered the reinstatement of a student who had been expelled from college for distributing a newspaper on campus that included "indecent speech."[64] In a *per curiam* opinion, the Supreme Court affirmed that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' "[65] Although *Papish* constitutes a strong condemnation of content discrimination by college authorities, the decision is not fundamentally inconsistent with a functional compatibility analysis. The charges against the expelled student stated that the speech she published was generally improper—apparently without regard to the place or manner of its distribution or its effect on other students.[66] In this context, "in the absence of any disruption of campus order or interference with the rights of others," the university's prohibition against indecent speech was held to be invalid and unconstitutional.[67]

A final college speech case is *Widmar v. Vincent*,[68] in which the University of Missouri refused to permit a group of Christian students to use campus facilities for religious meetings and worship. The Court reviewed the university's content discriminatory regulation under strict scrutiny and held it to be unconstitutional.[69]

By insisting that this particular content discriminatory regulation be narrowly drawn and necessary to the furtherance of a compelling state interest, however, the Court did not challenge the general applicability of the functional compatibility standard of *Tinker* to the university environment. Indeed, *Widmar* repeatedly affirms *Tinker*'s analysis.[70] Although the Court acknowledged that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum," it also recognized that:

> [A] university differs in significant respects from public forums such as streets or parks or even municipal theatres. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use

63. 410 U.S. 667 (1973).

64. *Id.* at 668-69. The use of the term "M— F—" as in "Up against the wall M— F—" in the newspaper constituted a major part of the university's case against the petitioner.

65. *Id.* at 670.

66. *Id.* at 670-71 n.6.

67. *Id.*

68. 454 U.S. 263 (1981).

69. *Id.* at 270, 277.

70. *Id.* at 267-68 n.5, 277 (citing *Healy*, 408 U.S. 169, 180-84 (1972) (endorsing *Tinker*'s functional compatibility analysis).

of its campus and facilities.[71]

The Court reviewed the University of Missouri's regulations in *Widmar* under strict scrutiny rather than the *Tinker* functional compatibility standard because the university had created a forum that was generally open to over a hundred officially recognized student groups. By opening its facilities to such a diverse constituency, the university was obliged to satisfy stringent constitutional standards in order to deny access to one group based solely on the content of its speech.[72] The review appropriate in *Widmar*, however, would not necessarily apply to all university cases. As the majority acknowledged, its holding was "limited to the context of a public forum created by the University itself."[73]

The purpose of discussing in detail the Court's analysis in these cases is not to undermine their holdings, but to clarify their scope and reasoning. *Healy*, *Papish*, and *Widmar* are limited decisions. They protect freedom of expression in the university environment in important circumstances. They do not, however, involve situations in which the authorities have even a colorable claim that student expression is disruptive to the educational enterprise or that it impinges on the rights of other students. If anything, the dicta in these opinions confirm that evidence of such disruption or interference with the rights of others would constitute an entirely different case.

B. *Applying a Functional Compatibility Standard of Review to University Activities—Disruptive Speech and Speech that Impinges on the Rights of Others*

If a functional compatibility standard of review controls speech regulations on college campuses, how is that standard to be implemented? Clearly, something less than the general application of traditional public forum rules is envisioned. Otherwise, the Court's focused attention on "the special characteristics of the school environment" would be meaningless.[74] Similarly, it seems evident that school authorities may not capriciously suppress unpopular or discomforting speech in its entirety. On the other hand, administrators need not be limited to content-neutral,

71. *Id.* at 267-68 n.5.

72. *Id.* at 269-70. "In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

73. *Id.* at 276-77 n.20. The majority was responding to Justice Stevens' statement that not all content discriminatory decisions of a university relating to student expression must receive such exacting review. *See id.* at 277-80 (Stevens, J., concurring).

74. *See supra* notes 60, 71 and accompanying text.

time, place and manner regulations either. Beyond this point, there are few specific guidelines. Although the Court has recognized "a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education,"[75] there is no Supreme Court case law dealing with the university environment which illustrates the type of expressive activities that might be subject to discipline for impinging on the rights and opportunities of other students to further their educational goals.

The functional compatibility standard of review has been more explicitly applied to expressive activities in high schools after *Tinker*. In *Bethel School District No. 403 v. Fraser*,[76] for example, a high school student was suspended for using sexual metaphors in a school assembly speech.[77] Such high school cases, however, are arguably of limited relevance in the university context because their reasoning is heavily influenced by the immaturity of the high school audience and the "civilizing" function of secondary education.[78] In the university setting, students require less protection from offensive speech and the educational institution's mission is less involved with the inculcation of values.

Despite its different emphasis, the *Fraser* opinion is not entirely irrelevant to the university context. Justice Burger argued that one of the functions of the public schools is to teach students "manners of civility" and "consideration of the personal sensibilities of other[s]," even while engaging in heated public debate.[79] To enforce that lesson, speech that will offend the personal sensibilities of other students may be regulated.

Justice Brennan concurred with the Court's conclusion that sanctions may be imposed on a high school student who delivers a sexually suggestive speech, but his reasons were more respectful of free speech values than the majority's. The issue for Brennan was not so much teaching students to be civil to their peers as it was maintaining a level of discourse that allowed an educational interaction among students to occur. Having found Mr. Fraser's expression to be disruptive of the school's educational program, school authorities could constitutionally punish him. Thus, school officials may protect the personal sensibilities of other students from offensive speech, not out of any sense of cultural

75. *Widmar*, 454 U.S. at 277.
76. 478 U.S. 675 (1986).
77. *Id.*
78. *Id.* at 681-86.
79. *Id.* at 681.

propriety, but because offensive speech interferes with and disrupts the educational enterprise.[80]

Justice Brennan's concurrence in *Fraser* helps lay the groundwork for upholding some hate speech regulations on public university campuses. Brennan's analysis is contextual. The hapless Mr. Fraser might have been protected by the first amendment if he had given his speech in other circumstances where the school's need to monitor the civility of his discourse was less important to the success of its programs.[81] His expression was, however, inappropriate in the assembly in which it was delivered. Moreover, while Justice Brennan disputed the Court's conclusion that Fraser's teenage audience was insulted by the language he used, he did not challenge the majority's suggestion that insulting comments may be prohibited in at least some situations.[82] For Brennan, presumably, insults might be sanctioned if they produced a disruptive effect. The issue that remains open is whether these same arguments are applicable to racist comments uttered on the campus of a public university.

C. *Constitutionally Acceptable Restrictions on Racist Speech*

Under the foregoing analysis, first amendment advocates who oppose any significant restriction of racist speech on college campuses must make one of two arguments. They may argue that racist expression is generally compatible with the uses to which property may legitimately be put on a university campus, or, alternatively, they may argue that *some* racist speech is functionally incompatible with *some* university activities, but that there is no way to prohibit such speech without unacceptably undermining academic and student freedom of expression.[83]

Neither of these arguments can be sustained. The first is simply

80. *Id.* at 687, 688-89 (Brennan, J., concurring).

81. *Id.* at 689. Justice Brennan gives no examples. Presumably lunch table conversation using sexual metaphors would not subject a student speaker to discipline.

82. *Id.* at 689 n.2.

83. Judge Cohn's invalidation of the University of Michigan's racist speech regulations in Doe v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), appears to be an example of the latter argument. Although the court claimed to be mediating the conflicting values of free speech and equality, no real balancing occurred. Instead, Judge Cohn concluded that "[w]hile the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech." *Id.* at 868. Similarly, although the court summarily recognized that hate speech could be regulated if it constituted "fighting words," met the criteria for the common law tort of intentional infliction of emotional distress, or created a hostile or abusive working environment (prohibited by Title VII), *id.* at 862-63, it nonetheless found the University's use of terms such as "stigmatize," "victimize," and "threat to an individual's academic efforts," hopelessly vague and overbroad. *id.* at 864-67. Why these terms should be held to

wrong. The second has more merit, but tells only half the story. One can easily imagine worst-case scenarios in which well-intentioned regulations of racist speech are abused by administrators to stifle the kind of "robust" debate and inquiry that are essential to the fulfillment of a university's research and educational objectives. However, one can also imagine equally unacceptable scenarios in which racist expression renders a university environment uninhabitable (or at least educationally useless) for minority group members. In short, a comparison of worst case scenarios filled with precarious slides down concededly slippery slopes does not prove the first amendment advocate's case. Rather, it demonstrates that absolutist approaches to this problem are untenable and that the tough and risky business of careful balancing and line-drawing is unavoidable.

An analysis of the first argument helps to illustrate some of the problems with the second point as well. Is racist speech ever functionally incompatible with the uses to which property is put on a public university campus? It clearly is in certain circumstances. Assume a law professor is teaching a seminar in which the students are expected to actively participate in the discussion of important cases. There are ten white students and two black students in the seminar. Several of the white students regularly and repeatedly refer to the black students as "dumb n__rs" and address them directly in the same manner, by saying "Listen n__rs" as a preface to their statements. As the administrator of the seminar discussion, does the professor violate the first amendment by interceding and informing the student speakers that continued use of such epithets will result in their being excluded from the seminar? There can be little doubt that the use of these epithets in this context unreasonably disrupts the tenor of the seminar and impinges on the black students'

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give less notice and to be less precise than the constitutional, common law, and statutory standards the court implicitly approved was never explained.

The examples cited by the court to demonstrate the unacceptable scope of the University's policy are also unpersuasive. A graduate student in social work was challenged for saying that he thought homosexuality was a disease and that he had been counseling several of his gay clients accordingly. The court strongly disapproved of this application of the University's policy and questioned whether statements "made in the course of academic discussion and research" can ever be called into question and subjected to sanctions despite the "innocent intent of the speaker." *Id.* at 865-66. One wonders if the court would have thought differently had the graduate student described being Jewish or Mormon as examples of a religious psychosis, of which he was "curing" his clients, or if he claimed to be treating racial minorities for the delusion that they were as good as white people. The court's apparent tolerance of the recitation of an "allegedly homophobic limerick" in a public speaking class, *id.* at 865, raises similar issues and analogies. There are many words that rhyme with vulgar ethnic epithets.

right to participate in this educational experience. Does even the most ardent first amendment advocate insist that this pattern of expression in this circumstance must be tolerated?[84]

Suppose we alter the hypothetical so that it is the professor rather than the students who uses racist epithets in addressing minority students and pejorative language in describing their attributes. Surely that does not make the speech in question more consistent with the university's educational mission. We can also change the location of events. A campus dormitory houses nineteen white students and one Hispanic student. The walls in the corridors are covered with vulgar racist posters, and the Hispanic student is targeted with hate mail and racist messages stuck to his door or slipped under it. Entering and leaving his room involves running a gauntlet of epithets. Can it seriously be proposed that all of these expressive activities are compatible with the residential environment the university seeks to provide its out-of-town students?

Most readers would presumably agree that at least some of the events described above are unacceptable. The more difficult question is whether such events are capable of being regulated in a manner that does not open the door for any individual whose sensibilities are offended by a statement with which he or she disagrees, to seek administrative protection against the offending expression. Free speech advocates correctly recognize that speech regulations are intrinsically dangerous, that they are not easily constrained, and that they inevitably require the exercise of discretion by officials who cannot be trusted. When speech regulations

84. One response to this hypothetical is that the incident described involves constitutionally unprotected "fighting words." Therefore, first amendment proponents could support regulating such expression without also endorsing a functional incompatibility analysis. This argument is not persuasive for several reasons. Not only has the "fighting words" exception to the first amendment been narrowed almost to oblivion, *see supra* note 8, but it technically applies only to those situations in which the victim of hate speech is likely to respond violently to the speaker's verbal assault. *See* K. GREENAWALT, *supra* note 8, at 292-301. The hypothetical in the text is intended to also include situations in which hate speech hurts, disorients, and intimidates its victim, but is unlikely to provoke physical retaliation. Such circumstances would justify the regulation of speech under a functional incompatibility analysis, but not under the "fighting words" doctrine.

In addition, the "in your face" proximity and vulgarity associated with "fighting words" provides a narrower framework for regulation than the text suggests. The speaker using hate speech may be on the other side of the classroom from his victims and may address his remarks to the entire seminar group. Furthermore, his message may avoid the use of recognized epithets. Still, if a student in an English composition seminar presents a paper extolling the mass murder of Jewish children during the Holocaust, one can hardly expect Jewish participants to fulfill the traditional role of seminar members and critique the organization and persuasiveness of that essay. The reading of such a paper may not constitute "fighting words," but it will fundamentally distort the educational purpose of the seminar.

are at issue, we have truly met the enemy, and he is us.[85] Well intentioned foes of bigotry and racial discrimination are no more reliable monitors of hurtful speech than anyone else.

It should be remembered, however, that a functional compatibility standard of review is not a deferential one. It does not support the suppression of speech based on the "undifferentiated fear" of disturbance[86] or abstract "common sense" generalities.[87] Speech regulations must be more than simply reasonable; they must meet a real need. Moreover, a functional compatibility analysis of speech regulations is not completely open-ended. It does not suggest that any expression that some student finds unsettling or offensive may be banned. The concept is relative. The standard requires a combined examination of what the various functions of a university are, and how particular expression interferes with these functions. For speech to be restricted, the challenged expression must do far more than provoke an intense desire to rebut the speaker's comments. That need can be accommodated without preventing speech from occurring. Indeed, one of the university's purposes is to facilitate just that kind of spirited debate.

Ultimately, some concerns about overregulation may be reduced by clear statements from the Supreme Court emphasizing that the function of the university includes directly challenging accepted assumptions about what is empirically accurate or normatively correct. Disturbing speech must be tolerated if it is appropriately directed to the furtherance of an intellectual inquiry. A heavy presumption of compatibility between the expression of ideas to be tested and evaluated and a university's basic nature must be accepted as the foundation of this standard of review.

The most vulgar examples of hate speech directed at minorities for the purpose of harassment probably do not fall within this presumption. There is no serious issue to debate if someone calls you a "Jew bastard" to your face. Other hurtful expression, however, requires more careful analysis. Statements that black people or Hispanics or Jews have genetic predispositions involving negative character traits are in theory, at least, verifiable propositions with social policy ramifications. Their incompatibility with the university's mission is much harder to evaluate. How courts or administrators would or should treat such statements within a

85. W. KELLY, IMPOLLUTABLE POGO 128 (1970).

86. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969).

87. *See supra* note 21.

functional compatibility framework can be honestly debated.[88] Certainly, the issue cannot easily be resolved in the abstract. It is unlikely that statements propounding the genetic inferiority of racial minorities can be completely excised from a university campus. It is equally unlikely, however, that a true-false examination in Sociology 101 should be allowed if it presents the statement "[t]he white race and culture is superior to other racial groups," and only scores "true" as the correct answer.

Thus, a functional compatibility analysis may be unavoidable in one sense, but, standing alone, it provides a dangerous basis for determining the degree of regulatory discretion available to public university administrators. Fortunately, however, the situation is not so bleak. Although there are no totally safe havens, and no immunity from chilling effects and administrative discretion, that does not mean that there are no familiar and limited doctrinal plateaus on which speech regulations can be grounded without throwing caution to the wind. Part II examines the regulation of hate speech in particular circumstances in which the regulation of expression has been historically recognized and effectively restrained. It presents a more constrained functional compatibility framework which may be used to identify speech that the Constitution itself condemns as incompatible with the function of a public university.

88. I do not contend that such speech should necessarily be subject to sanction under a functional compatibility standard of review, but I also do not think that the issue is a simple one.

Matsuda discusses this problem far too briefly. At the professorial level, she suggests that "poorly documented, racially biased work" may properly be denied an academic forum because it fails to meet neutral standards of merit. However, she adds that such expression should not be prohibited, it should be subject instead to the rigor of open debate and challenged directly. *Public Response, supra* note 5, at 2364-65. Unfortunately, social science generalizations and theories may be sufficiently indeterminate on enough controversial subjects that a wide variety of hate-inspiring premises may be presented as worthy of legitimate consideration. Moreover, in the hierarchical system of education that exists in most universities, a presumption of truth extends to the professor's analysis, but not that of his student challenger. While other professors might take issue with the racist views of their colleague, how do they reach the audience of his or her class to present their contrary analysis? Even worse is a situation where a majority of professors in a department share racist beliefs.

Much of the discussion of racist speech in academia seems to presuppose that racism is and always will be a minority position there. If that turns out to be an erroneous assumption, will the state be able to intervene, in at least certain situations, through the university's administration or the courts?

II. MAKING FREE SPEECH AND EQUALITY COMPATIBLE: REGULATING HATE SPEECH TO GUARANTEE THE EQUAL PROTECTION OF THE LAWS

A. *State Action*

Professors at state universities are state actors performing official functions, and, as such, are subject to the constitutional constraints imposed by the fourteenth amendment.[89] Thus, one way to legitimate as well as to control restrictions on the expression of academic personnel is to prohibit speech in college classrooms that violates constitutional limitations on government speech.

The doctrinal foundation for regulating hate speech under this analysis is the argument that the equal protection clause prohibits the state from preaching racial invective or the supremacy of one race over another. *Brown v. Board of Education* holds that "separate but equal" school facilities are unconstitutional because they communicate messages of inferiority to black children.[90] By analogy, the state is also forbidden from causing the same stigmatic consequences that segregation produces by disseminating messages of racial inferiority directly through government speech. The protection provided the "hearts and minds" of minority students should apply with equal force in both situations.[91]

The extent of this equal protection prohibition remains to be determined. It is one thing to argue that professors may be prevented from cursing their students with racial epithets; it is something else to suggest that any discussion of differences between racial groups that casts an unfavorable light on a racial minority is unconstitutional. Are Dr. Shockley's statements about the intelligence of black people to be barred from academic consideration by judges enforcing the equal protection clause?[92]

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89. While "there are some constitutional prohibitions that the acts of individual government officials cannot in isolation violate," L. TRIBE, *supra* note 8, at 1704, there seems little doubt that a single state official can violate equal protection and first amendment rights. *See generally* Ingraham v. Wright, 430 U.S. 651 (1977) (school principal and teachers); Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978) (social workers, physicians); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978) (university administrator); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975) (university administrator).

90. "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

91. *See Heavenly and Earthly Spheres, supra* note 1, at 150.

92. *See Public Response, supra* note 5, at 2364-65 (citing Lacayo, *A Theory Goes on Trial*, TIME, Sept. 24, 1984, at 62). *See generally Big Brother, supra* note 6, at 127; Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1978).

The problem is a serious one, but it is roughly comparable to other constitutional constraints on government speech that civil liberty groups routinely accept with equanimity. If a professor insisted on beginning each class with a sectarian prayer, which he led students in reciting, his expression would be immediately (and successfully) challenged as violating the establishment clause.[93] A similar constitutional violation would arise if a professor pronounced a particular faith to be the one true religion, or insisted that students who were not baptized would burn in hell for eternity.[94] It is clear, however, that, despite these restrictions, religion may be regularly discussed in college history, philosophy and literature classes.[95] The establishment clause may on occasion limit expression in these classes,[96] but the line drawing it requires has not disabled the academic community to the point that civil libertarians challenge its application as an unacceptable assault on academic

93. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962) (striking down teacher-led school prayers). *See also* Wallace v. Jaffree, 472 U.S. 38, 73 (1985) (O'Connor, J., concurring) (noting in striking down moment of silence statute that the unconstitutional "message of endorsement [of religion] would seem inescapable if the teacher exhorts children to use the designated time to pray").

94. There is language in Supreme Court opinions suggesting that the establishment clause analysis of colleges and public high schools may vary in certain respects because public school students are more impressionable and school authorities exercise greater coercive power in that context. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 584 n.5 (1987); Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981). These distinctions, however, clearly do not justify the direct endorsement of religious doctrine by professors. *Widmar* itself establishes that point. There would be little reason for the Court to argue that a public forum in which religious groups participate does not violate the establishment clause because "by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there," *Widmar*, 454 U.S. at 271-72 n.10, if university professors did not violate the establishment clause by teaching their students the tenets of the "one true faith" in the classroom.

See also Tilton v. Richardson, 403 U.S. 672, 679-80 (1971) (upholding federal construction grants to church-related colleges, despite establishment clause concerns, because of statutory restrictions prohibiting the funds from being used for religious instruction, training, or worship).

95. *See* Stone v. Graham, 449 U.S. 39, 42 (1980) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like" in a school curriculum, but not to endorse a religious faith.); *Edwards*, 482 U.S. at 606-08 (Powell, J., concurring).

96. "Of course, the 'academic freedom' of teachers to present information in public schools, and students to receive it, is broad. But it necessarily is circumscribed by the establishment clause." *Edwards*, 482 U.S. at 599 (Powell, J., concurring). "Whatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a particular religious belief." *Id.* at 604. *See also Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1052 (1968) ("[A]n affirmative requirement that the inferiority of a racial group be taught . . . would violate the equal protection clause. Similarly, the teaching of religious ethics, dogma, or ritual would probably violate the establishment clause of the first amendment.").

freedom.[97]

The establishment clause analogy to equal protection principles is particularly apt for several reasons. It persuasively suggests that certain prohibitions on government speech are worth enforcing even though their implementation is necessarily imprecise and will leave speakers with considerable uncertainty as to the boundaries within which they must operate. Moreover, the establishment clause's mandate serves many of the same functions as the equal protection clause. Its purpose, as both case law and commentary recognize, is to protect the sensibilities and civil status of the members of minority faiths.[98] Given that constitutional mission, it is difficult to understand why prohibiting the state's endorsement of a majority religion trumps first amendment concerns while government promotion of the supremacy of a majority race must be tolerated in the name of first amendment values. Finally, despite the general uncertainty that exists as to their exact parameters, both of these constitutional provisions protect core concerns that may be readily distinguishable from a host of other subjects.

Only a narrow class of expression, a small subset of the much larger category of controversial and offensive speech that might arise in a university setting, may be constrained under this analysis. No one would suggest, for example, that a defense of flag burning in a constitutional law class, which offended the sensibilities of several participants, could in any way transgress equal protection clause or establishment clause requirements. Only speech stigmatizing members of a suspect class[99] or undermining the civil status of religious groups could even arguably be subject to regulation under the analysis proposed here.

B. *Attenuated State Action—Symbiotic Relationships, Endorsements and Imprimaturs*

1. *Equal Protection: Symbiotic Relationships.* State action for constitutional purposes is not limited to official acts by state employees. In a

97. *See generally* Brief of Petitioners, Board of Educ. of the Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990) (Amicus Curiae by the Anti-Defamation League of B'nai B'rith et. al.) [hereinafter *Westside Community Schools* Brief]; Brief for Respondents, County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989) [hereinafter *County of Allegheny* Brief].

98. *See Heavenly and Earthly Spheres, supra* note 1, at 134-37.

99. Under the proposed analysis, stigmatizing the members of a suspect class refers to expression that communicates a message of disfavored status similar to that which Brown v. Board of Education condemns because of its invidious effect on the listener's self esteem. Not all speech that may produce a stigmatizing effect can necessarily be prohibited, however. That will depend on the circumstances. The point of the text is that *only* speech of this kind may be restricted under the equal protection analysis proposed.

variety of circumstances, the conduct of private individuals is found to be imbued with state action and therefore subject to the discipline of the fourteenth amendment.[100] Because of the inconsistent and analytically obscure state of the case law, it is difficult to predict when private conduct will be held to constitute state action.[101] Thus, the discussion that follows must be based in part on assumption and analogy. This uncertainty need not be a serious concern for the purposes of this article, however. The article's goal is to fight the battle over regulating racist speech on liberal turf—on the basis of assumptions and principles that are consistent with a civil libertarian-oriented constitutional framework. That objective can provide critical background and direction for the analysis of state action which follows.

Initially, it is necessary to confront the lack of uniform interpretations as to what constitutes state action along a continuum of possible constitutional claims. A court may find private conduct to be state action in a case involving an equal protection challenge to racial discrimination, while the same private institutional defendant would not be a state actor if it was accused of violating someone's procedural due process rights.

For example, in *Burton v. Wilmington Parking Authority*,[102] a private lessee who operated a restaurant in a municipal parking garage flying the state flag was held to violate the equal protection clause because it refused to serve black customers. The mutual interdependence and symbiotic relationship between the state lessor and private lessee pierced the state action veil and rendered the restaurant's discriminatory service policies vulnerable to constitutional challenge.[103] Suppose, however, that the restaurant was accused, not of operating a segregated facility, but rather of failing to give an employee a due process hearing prior to his dismissal. It is far less likely that state action would be found in this latter circumstance.[104]

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100. *See* L. TRIBE, *supra* note 8, at 1701, 1705-11.

101. *See* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (1976) [hereinafter *"State Action" Requirement*].

102. 365 U.S. 715 (1961).

103. *Id.* at 724-25.

104. *See "State Action" Requirement, supra* note 101, at 226-27. This lack of uniformity is generally recognized. As Tribe notes, the Court's determination as to whether state action exists is often more properly understood to be "a decision about the substantive reach of specific constitutional commands rather than a decision about whether the government has *done* anything to which the Constitution speaks." L. TRIBE, *supra* note 8, at 1720. Similarly, Justice Marshall argued in his dissent in Jackson v. Metro. Edison Co., 419 U.S. 345, 365 (1974) (Marshall, J., dissenting), that state action may be defined narrowly "[i]n the due process area" in order to promote values of

Because *Burton* has been ignored or distinguished by recent Supreme Court decisions, one is tempted to conclude that it has been implicitly overruled.[105] However, these current cases rarely deal with racial discrimination and equal protection violations because private discrimination is now routinely prohibited by statutory law.[106] It is no longer necessary to use the Constitution to prohibit private discrimination. That does not mean, however, that it was a mistake to do so. From the perspective of conventional civil liberties values, *Burton* should be good law. At a minimum, it should continue to be sound precedent as long as its scope is limited to the race discrimination context.[107]

The general inferences that may be drawn from *Burton* for the regu-

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pluralism and diversity "by allowing various private institutions the flexibility to select procedures that fit their particular needs." *Id.* at 372. Allowing those same private institutions to practice racial discrimination in the services they provide, however, would violate the much broader constitutional mandate imposed by the equal protection clause. *Id.* at 374.

See also Jackson v. Statler Found., 496 F.2d 623, 628-29 (2d Cir. 1974) (noting the double standard which finds state action more readily in race discrimination cases than when other constitutional claims are evaluated); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 657, 661 (1974) (concluding that courts seem less willing to find state action when a constitutional claim other than discrimination is raised)[hereinafter *State Action*].

105. *See, e.g.*, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (ignoring *Burton* despite facts suggesting interdependence between state and private entity); Rendell-Baker v. Kohn, 457 U.S. 830, 842-43 (1982); Blum v. Yaretsky, 457 U.S. 991, 1011 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345, 357-59 (1974) (all distinguishing *Burton*).

106. *See, e.g.*, W. LOCKHART, Y. KAMISAR & J. CHOPER, THE AMERICAN CONSTITUTION, 1047 (5th ed. 1981) (past two decades of civil rights legislation have mooted state action issue regarding private racial discrimination); *State Action*, *supra* note 104, at 658 (equal protection cases monopolized state action area in the past; now state action issue arises more commonly with regard to other constitutional claims).

107. *Burton* has never been formally overruled. More importantly, if statutory prohibitions against racial discrimination in places of public accommodations were repealed in some nightmare future time, the grounds for finding state action in a *Burton*-type situation would continue to be valid. In light of the protection provided by civil rights statutes today, it is easy to forget the power and passion of the arguments for an expansive interpretation of state action that were heard twenty years ago. *See* Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

Of course, one can only speculate whether the Court's narrowing of state action doctrine in procedural due process cases would actually be repudiated in race discrimination cases should the need arise to reaffirm cases like *Burton* or Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive covenants violates equal protection clause). In light of the Court's commitment to limiting the scope of constitutional rights, *see generally* Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989), it is possible that the way state action is defined in procedural due process cases will control the application of the fourteenth amendment for all constitutional claims, even core equal protection cases. *See also* Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of* Flagg Brothers, Inc. v. Brooks, 69 GEO. L.J. 745, 766-67 (1981) (arguing that the Court's cases preclude a balancing or double standard approach to state action issue). On the other hand, the due

lation of hate speech on public university campuses are powerful ones. The first is that there should be a greater willingness to find state action where private racist activities are challenged as violating equal protection principles.[108] Equal protection cases rank at or near the top of the constitutional hierarchy in this regard. The second is that in situations where the state and private actors demonstrate substantial interdependence in their interests, state action may be identified, and discriminatory conduct prohibited. While interdependence and symbiotic relationships hardly constitute precise criteria for finding state action, a *Burton*-type analysis might, for example, justify finding racist speech by a university's student association or school newspaper to be state action in violation of equal protection guarantees.[109]

2. *Establishment Clause: State Endorsements.* An even more persuasive state action analogy for the regulation of hate speech may be drawn from establishment clause cases.[110] Permitting private expressive displays involving religious symbols on public property violates the establishment clause if doing so has "the purpose or effect of 'endorsing' religion."[111] Thus, in *County of Allegheny v. ACLU*,[112] the placement by a Roman Catholic group, the Holy Name Society, of a Christmas creche in a county courthouse for the 45-day Christmas season was held to be an unconstitutional endorsement of Christian doctrine and a violation of the establishment clause.[113]

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process cases paint such a truncated picture of state action that it is hard to believe that even the current Court would enforce these holdings across the board.

108. *See infra* note 149 for state action articles endorsing an increased willingness to find state action in equal protection cases involving racial discrimination. Lower court cases suggesting similar conclusions are listed in 2 N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 405-06 (9th ed. 1979).

109. If the student association barred black students from running for student office or if the student newspaper refused to hire black students as editors, a finding of state action would presumably raise few objections. *See generally* Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1345 (11th Cir. 1989) (Student Government Association is a state actor for constitutional purposes). State action would also be found if the school paper regularly proclaimed a particular religious faith to be the one true religion. *See supra* notes 93-94 and accompanying text. The argument for treating racist speech by the student government or newspaper as state action is analogous.

110. This is not to suggest that *Burton* has no bearing on the question of state action in establishment clause cases. It remains available as an independent basis for finding state action under either the equal protection clause or the establishment clause. *See, e.g.*, ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1109 (11th Cir. 1983) (state involvement with placing of private cross in state park sufficient to find state action under *Burton*).

111. County of Allegheny v. ACLU (Greater Pittsburgh Chapter), 109 S. Ct. 3086, 3100 (1989).

112. 109 S. Ct. 3086 (1989).

113. *Id.* at 3093.

This "endorsement" test of the establishment clause has close parallels to the equal protection mandate of *Brown v. Board of Education*.[114] The establishment clause prohibits government from promoting or favoring one religious denomination over another. The state may not send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[115] Similarly, under *Brown*, the state may not communicate a message of racial supremacy to the majority or racial inferiority to minorities.[116]

This constitutional equivalence has important ramifications for the regulation of hate speech on public university campuses. Under contemporary case law, private religious expression on public property violates the Constitution if it suggests that the state endorses the majority Christian faith.[117] Why then should private expression on public property implying state support for white supremacy be any less repugnant to constitutional principles? Civil liberties groups have demonstrated a significant willingness to subordinate private free speech interests to establishment clause concerns in a variety of circumstances. Constitutional challenges have been raised to prevent extra-curricular religious clubs from being allowed to meet in public high schools and to prohibit privately owned religious symbols from being displayed on public property even when such property is generally open to expressive activities.[118]

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114. 347 U.S. 483 (1954).

115. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

116. *See Heavenly and Earthly Spheres, supra* note 1, at 150.

117. *See, e.g.*, County of Allegheny v. ACLU, 109 S. Ct. 3086, 3105 (1989) (privately owned creche display in county courthouse during Christmas season violates establishment clause); Stone v. Graham, 449 U.S. 39, 42 (1980) (posting privately funded copies of Ten Commandments in public school violates establishment clause); Smith v. County of Albemarle, Virginia, 895 F.2d 953 (4th Cir. 1990) (placement by local Jaycees of nativity scene on front lawn of county office building violates establishment clause); American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987) (nativity scene built by private individuals located in city hall violates establishment clause); ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983) (privately funded cross placed in state park violates establishment clause). *See generally* Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990) (placing menorah display belonging to Jewish organization in park in front of city hall violates establishment clause).

Of course, not every private religious display permitted on public property violates the establishment clause. However, the controlling question is whether the challenged display constitutes a prohibited endorsement of religion, not whether the establishment clause applies to private expression. *See, e.g.*, McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984); Okrand v. City of Los Angeles, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (2d Dist. 1989).

118. The American Civil Liberties Union, for example, certainly a quintessential proponent of free speech guarantees, has defended establishment clause principles against freedom of speech defenses on numerous occasions. *See, e.g.*, Board of Educ. of the Westside Community Schools v.

The argument for a parallel constitutional hierarchy elevating equal protection concerns over the public dissemination of private racist speech, in those situations where state endorsement of the racist message may be implied, has substantial bite to it and cannot easily be dismissed.[119] At a minimum, free speech advocates who would constitutionally limit reli-

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Mergens, 110 S. Ct. 2356 (1990) (ACLU joins amicus brief urging that recognition and sponsorship of religious clubs in public high school violates establishment clause); *County of Allegheny*, 109 S. Ct. at 3097 (Greater Pittsburgh Chapter of the ACLU brings direct challenge to private religious displays in county courthouse and in front of city-county building); *Kaplan*, 891 F.2d 1024 (ACLU Foundation of Vermont is of counsel in suit challenging placement of private menorah in park in front of city hall); *Okrand*, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (ACLU represents plaintiff, corporate director and former legal director of ACLU, in challenge to display of privately owned menorah in city hall rotunda regularly used to showcase expressive exhibits).

This is not to suggest that the ACLU or any of its chapters or affiliates would necessarily endorse the regulation of racist speech on college campuses. The national organization opposes such regulations, although it is studying the question, and many state affiliates are torn by the issue. L. A. Daily J., July 4, 1990, at 1, col. 5. Indeed, the amicus brief joined by the ACLU in *Westside Community Schools*, 110 S. Ct. 2356 (1990), vigorously distinguishes the high school and college context in urging that the recognition of student religious clubs is much more threatening to establishment clause principles in the former circumstance than the latter. *See Westside Community Schools* Brief, *supra* note 97, at 19-24.

On the other hand, the ACLU's arguments in its brief in *County of Allegheny*, 109 S. Ct. 3086, are directly analogous to the contentions minority group members might raise to challenge racist speech at a university. The ACLU argued that the creche and menorah displays at issue violated the establishment clause despite their private sponsorship, *County of Allegheny* Brief, *supra* note 97 at 26, because the context in which these religious expressions occurred communicated a message of state endorsement, *id.* at 10-11, 15-17, which offended the sensibilities of members of minority religions, *id.* at 7, 24-25. The ACLU rejected their opponents' argument that the religious displays constituted protected expression, and that first amendment rights outweighed establishment clause concerns in this situation, on the grounds that neither of the locations where the religious symbols were displayed was a public forum. The creche was displayed on the Grand Staircase of the county courthouse, and the menorah was placed just outside the city-county building next to the city's Christmas tree. Although parts of the county courthouse had been used on occasion for expressive displays, the ACLU supported its contentions by characterizing the county courthouse and city-county hall locations as nonpublic forums, citing recent Supreme Court decisions sharply restricting free speech rights on public property. *Id.* at 42-47 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

119. Justice Marshall's concurrence in *Westside Community Schools*, 110 S. Ct. 2356, 2378 (1990) (Marshall, J., concurring) clearly demonstrates the willingness of liberal Justices to subordinate free speech interests to establishment clause concerns. Marshall explained:

> [T]he Constitution requires toleration of speech over its suppression . . . in our Nation's schools.
>
> But the Constitution also demands that the State not take action that has the primary effect of advancing religion. The introduction of religious speech into the public schools reveals the tension between these two constitutional commitments, because the failure of a school to stand apart from religious speech can convey a message that the school endorses rather than merely tolerates that speech. . . . If public schools are perceived as conferring the imprimatur of the State on religious doctrine or practice as a result of such a policy, the nominally "neutral" character of the policy will not save it from running afoul of the Establishment Clause.

gious speech more rigorously than racist speech bear the burden of justifying this distinction.

If the establishment of racial supremacy and religious orthodoxy are comparably prohibited by the Constitution, the regulation of some racist speech on public university campuses is not only constitutionally permissible, it is *constitutionally mandated.* Determining which speech constitutes a prohibited message of endorsement or disfavored status will not be easily accomplished, however, and that doctrinal difficulty will have significant, negative implications. Uncertainty as to what speech must be prohibited risks the serious consequence of chilling speech that deserves to be protected. However, since this uncertainty is clearly tolerated in the grey area separating the establishment of religion from legitimate free speech and free exercise claims, it cannot constitute a per se unacceptable burden on speech that arguably conflicts with equal protection principles.[120]

Although this article does not purport to develop an acceptable set of guidelines that a public university administrator might adopt to regulate hate speech in a constitutionally permissible manner, it is important to recognize that the line drawing problems that administrators must confront do not exist in an analytic vacuum. Establishment clause case law provides significant information as to how equal protection and first amendment conflicts should be resolved.

It is clear, for example, that the context in which the contested expression occurs will be controlling.[121] Certain locations are particularly problematic because of the function they serve or the attention they attract.[122] In these areas, "[n]o viewer could reasonably think that [ex-

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Id. at 2379 (citations omitted).

The same constitutional tension exists between first amendment and equal protection commitments. It should be resolved under a similar analysis.

120. In arguing in support of Justice O'Connor's endorsement test for the establishment clause in *County of Allegheny*, 109 S. Ct. 3086, the ACLU candidly conceded "that the case-by-case analysis contemplated by Lynch [v. Donnelly, 465 U.S. 668 (1984)] lacks a certain precision. . . ." *County of Allegheny* Brief, *supra* note 97, at 20. However, "[s]urely the attraction of a 'bright line' test should not be used to overcome those prohibitions on government so carefully imposed by the framers." *Id.* at 46.

121. *See, e.g.*, Smith v. Lindstrom, 699 F. Supp. 549, 565 (W.D. Va. 1988), *aff'd*, Smith v. County of Albemarle, Virginia, 895 F.2d 953 (4th Cir. 1990) (examining "nature, size, location, and duration of the [religious] display, and its relation to the symbolic center of government" to determine if private religious speech on public property violates establishment clause).

122. *See, e.g., County of Albemarle*, 895 F.2d at 955 (Private creche "displayed in the context of a government site" violates establishment clause since creche could not be viewed "without also viewing the trappings and identifying marks of the state."); Kaplan v. City of Burlington, 891 F.2d 1025, 1030 (2d Cir. 1989) (Private display of "an unattended, solitary religious symbol [a menorah]

pression occurred] . . . without the support and approval of the government."[123] Thus, racist posters hung in the foyer of an administration building create a different impression than a poster or a bulletin board on the basement wall of the student union.[124]

Time is also a critical variable. A single short-term event, whether it be the singing of Christmas carols or the holding of a racist political rally, is much less likely to communicate a message of state approval than is a display or poster set in a prominent location for several weeks.[125] Although the time factor, like location, may be of controlling

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in City Hall Park, given that Park's close association with the seat of government," violates establishment clause notwithstanding the park's general status as traditional public forum.); ACLU v. County of Allegheny, 842 F.2d 655, 662 (3d Cir. 1988), *aff'd in part*, 109 S. Ct. 3086 (1989) (factor in determining that private menorah and creche display violate establishment clause is that "each display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it"); American Jewish Congress v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987) ("Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval."). *But see* Okrand v. City of Los Angeles, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (2d Dist. 1989) (Display of historical artifact, a menorah, in city hall rotunda, the site of a wide variety of historical, cultural, and artistic exhibits, does not violate establishment clause.).

As the ACLU stated in its brief in *County of Allegheny*, 109 S. Ct. 3086, "to suggest that changes in setting have no impact on the message carried by a display is simply to shut ones [sic] eyes to matters of common experience." *County of Allegheny* Brief, *supra* note 97, at 16.

123. *County of Allegheny*, 109 S. Ct. at 3104 (referring to the location of the creche as in "the 'main' and 'most beautiful part' of the building that is the seat of county government").

The endorsement effect of expression in these central locations is not dissipated by the fact that the state permits selective access to the area for displays and promotions. "Even if the Grand Staircase (the site of the creche) occasionally was used for displays other than the creche, . . . it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government." *Id.* at 3104 n.50.

124. *See* Piarowski v. Illinois Community College, 759 F.2d 625,630 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007 (1985) (Transfer of sexually explicit and racially offensive art works from main building gallery to less conspicuous location did not violate first amendment because "[t]he first-floor gallery in Prairie State College's main building is a place of great prominence and visibility, implying college approval rather than just custody. . . .").

125. Time enters into the constitutional analysis in three distinct respects. First, it is an important factor to consider in determining whether the state can be objectively understood to approve, ratify or endorse private expression on public property. Even under Justice Kennedy's extremely lenient establishment clause test that only prohibits coercive action by the state, the duration of symbolic expression of a religious faith on state property is a significant variable. Thus, Kennedy concedes that the Constitution "forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *County of Allegheny*, 109 S. Ct. at 3137 (Kennedy, J., dissenting).

Second, the lengthy period of time during which a poster or display is exhibited may undermine the state's defense that the challenged expression occurs in a public forum, and, therefore, is not the government's responsibility. Opening a location for brief expressive events cannot immunize the

significance in some cases, (a permanent expressive display is probably the best example), it is more generally only one of many factors to be evaluated in the ad hoc balancing that the resolution of these issues requires.[126]

The identification of the private source of speech is also a relevant, though not dispositive, factor. That the creche held unconstitutional in *County of Allegheny v. ACLU* bore a sign identifying its private ownership did not save it from violating the establishment clause. Such signs may simply demonstrate "that the government is endorsing the religious [or racist] message of that organization, rather than communicating a message of its own."[127] On the other hand, the prominent disclaimer of state approval for the message being conveyed is certainly a factor to consider in determining whether the state will be perceived as endorsing a hate group's invidious communication.[128]

Finally, a message of endorsement is less likely to occur in public forums or areas designated to serve as an open site for unrestricted expression. Although problems may arise as to the location of such forums,[129] the case law holds that an establishment clause violation does

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government from the likely association between state and speaker that viewers will infer from idiosyncratic long-term displays which are only occasionally permitted at the same site. *See, e.g., County of Allegheny*, 109 S. Ct. at 3104 n.50; *Kaplan*, 891 F.2d at 1026.

Third, long-term displays magnify the problematic effects of speech on public property for minority group members who desire to use the property for its intended purpose. If a group is allowed to hold an afternoon rally in a public park, those persons whose sensibilities are offended by the speaker's message are only temporarily burdened in their ability to enjoy that facility. Extended exhibits, on the other hand, may make public property generally inaccessible to those for whom the challenged expression is intolerable. *See, e.g.*, ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1108 (11th Cir. 1983) (plaintiffs testified that because of the presence of large lighted cross in state park, they did not camp there for years).

126. *See, e.g., County of Albemarle*, 895 F.2d at 955 (display of creche for a five-week period is one factor in finding establishment clause violation).

127. *County of Allegheny*, 109 S. Ct. at 3105. *See also County of Albemarle*, 895 F.2d at 958 ("It remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion."); *Kaplan*, 891 F.2d at 1029 n.5 ("Even if [religious] display had been accompanied by an express disclaimer of City sponsorship and approval, the pervasive message of government endorsement communicated by [the context of display] would not be negated."); American Jewish Congress v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987) (Despite six disclaimer signs on religious display, "the message of government endorsement generated by [the] display was too pervasive to be mitigated by the presence of disclaimers.").

128. *See, e.g.*, Board of Educ. of the Westside Community Schools v. Mergens, 110 S. Ct. 2356, 2372-73 (1990) (school recognition of religious club will not constitute prohibited endorsement of religion if school effectively disclaims such an intent); ACLU v. Wilkinson, 895 F.2d 1098, 1103-04 (6th Cir. 1990); McCreary v. Stone, 739 F.2d 716, 728 (2d Cir. 1984), *aff'd by an equally divided Court sub. nom.*, Board of Trustees of the Village of Scarsdale v. McCreary, 471 U.S. 83 (1985); Allen v. Morton, 495 F.2d 65, 67 (D.C. Cir. 1973).

129. *See, e.g., County of Albemarle*, 895 F.2d at 959 n.7 (that location of private creche is classi-

not typically occur if religious expression is given equal access to an open forum in which diverse groups regularly participate.[130] Again, the same analysis should apply to speakers communicating a racist message.[131]

3. *First Amendment: Imprimaturs.* A final restriction on private speech tracks an endorsement analysis, but from a different and more problematic perspective. The government may obviously regulate the expression of state employees, not because it is constitutionally required to do so, but because doing so furthers the objectives the employees were hired to achieve.[132] Without regard to equal protection requirements, no one would dispute the power of a public university administrator to impose sanctions on a vocational counselor who insisted on advising black students that they should seek less competitive employment opportunities because they are genetically inferior to white applicants. A state's commitment to antidiscrimination policies is itself sufficient justification to permit the disciplining of employees whose expression in the performance of their duties interferes with the furtherance of the government's equal opportunity objectives.[133]

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fied as a traditional or designated public forum does not preclude establishment clause violation as long as display conveys state endorsement of religion); *Kaplan*, 891 F.2d at 1029-30 (even if park in front of city hall is public forum, long-term religious display located there still violates establishment clause). *See supra* notes 122-24; *see infra* notes 159-61 and accompanying text.

130. *See, e.g., Westside Community Schools*, 110 S. Ct. 2356 (1990); Widmar v. Vincent, 454 U.S. 263 (1981); *McCreary*, 739 F.2d 716. Allowing religious expression access to a public forum does not violate the establishment clause for two reasons. Creating an open forum in which diverse speakers, both religious and secular, can participate is a secular purpose, *Widmar*, 454 U.S. at 271; *McCreary*, 739 F.2d at 725, and "an open forum . . . does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274 (quoted in *McCreary*, 739 F.2d at 727).

131. *See, e.g.*, Knights of KKK v. East Baton Rouge School Bd., 578 F.2d 1122, 1127-28 (5th Cir. 1978); Cason v. City of Jacksonville, 497 F.2d 949 (5th Cir. 1974); National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1016 (4th Cir. 1973); Invisible Empire, KKK v. Mayor of Thurmont, 700 F. Supp. 281, 286-87 (D. Md. 1988); NAACP v. Thompson, 648 F. Supp. 195, 225 (D. Md. 1986).

The less open and diverse the forum is, however, the more likely it is that the message of the speaker may be imputed to the state. *See generally* Gilmore v. Montgomery, 417 U.S. 556, 574 (1974) ("If . . . the city or other governmental entity rations otherwise freely accessible . . . facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation."). If only a few groups participate in the forum, an appearance of state endorsement may also be conveyed. *See Westside Community Schools*, 110 S. Ct. at 2378 (Marshall, J., concurring).

132. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388 (1987) (The government may discipline employees who express themselves on matters of public concern when the employee's speech "impedes the performance of the speaker's duties or interferes with the regular operation of the [government's] enterprise."); Pickering v. Board of Educ., 391 U.S. 563, 570-73 (1968).

133. Justice Scalia argues in dissent in *Rankin* that by protecting the expression of a clerical

Similarly, the government can organize its activities in such a way that private speakers who participate in state sponsored events must express themselves in a way that is consistent with the message that the state is seeking to communicate. A college assembly created for the purpose of discouraging drug use among students need not invite a speaker advocating drug addiction as a desirable practice.[134] An extension of this doctrine permits state institutions to limit the speech of private participants in state activities when that speech might be "erroneously attributed"[135] to the state institution itself. Thus, for example, in *Hazelwood School District v. Kuhlmeier*[136] the Court held that a high school "may in its capacity as a publisher of a school newspaper or producer of a school play 'disassociate itself' . . . from speech that is . . . biased or prejudiced" without violating first amendment guarantees.[137]

Although the Court's language in *Hazelwood* bears some resemblance to the endorsement analysis of the establishment clause, a lesser showing is arguably sufficient to permit the regulation of speech in these circumstances. Expressive activities that "the public might reasonably perceive to bear the imprimatur of the school"[138] may include many more situations than those which technically constitute an endorsement for establishment clause or equal protection purposes. Moreover, the state may have a legitimate interest in promoting far more equality among groups than the equal protection clause requires. If it is state policy, for example, that homosexuals are as welcome as heterosexuals at its institutions of higher learning, (a goal which exceeds the current understanding of equal protection guarantees), may not the state take steps to assure that private speech does not create a false impression as to the state's attitude on this subject?[139]

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worker who spoke approvingly of an assassination attempt against then President Reagan, the majority had created a constitutional world "in which nonpolicymaking employees of the Equal Employment Opportunity Commission must be permitted to make remarks on the job approving of racial discrimination. . . ." 483 U.S. at 400-01 (Scalia, J., dissenting). Scalia's criticism overstates the scope of the majority opinion, however. The Court clearly indicated that even low-level employees are not "insulated from discharge where their speech . . . truly injures the public interest in the effective functioning of the public employer." *Id.* at 391 n.18. *See also* McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985) (upholding discharge of sheriff's department employee who publicly served as recruiter for Ku Klux Klan).

134. Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 578 (1980); M. NIMMER, *supra* note 17, at 4-85 n.236 is in accord.

135. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

136. 484 U.S. 260 (1988).

137. *Id.* at 271 (quoting Bethel School District No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

138. *Id.*

139. The *Hazelwood* analysis extends beyond establishment clause and equal protection doctrine

Unlike the state action and establishment clause analogies previously discussed, however, the *Hazelwood* holding is based on reasoning which traditional first amendment proponents may well reject. Many people understandably view the state's power to censor in these "imprimatur" situations with grave suspicion, particularly at the university level.[140] Still, it is one thing to argue that homophobic groups may meet

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in two respects. First, some racist expression on a university campus may not imply state endorsement of the invidious message to a sufficient degree to find state action. Thus, the university may not be violating the equal protection clause directly by allowing the speech to occur. Nonetheless, the university may be legitimately concerned that some members of the public may perceive the university to support the racist message, and therefore may believe that such a perception interferes with the university's ability to perform its educational mission.

For example, in Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985), the administration of Prairie State College ordered the transfer of an artistic display created by a faculty member in the Art Department from the main floor of the principal building on the campus to a less conspicuous gallery in the same building. The art display involved graphic sexual representations with offensive racist overtones. The college administration feared that the prominent presentation of these works suggested college approval of their content, "an image of the college that would make it harder to recruit students, especially black and female students." *Id.* at 630. The Court of Appeals for the Seventh Circuit upheld the transfer against constitutional challenge. One might legitimately argue that the original site of the display did not constitute the communication of a racist message by the state in violation of equal protection principles, while holding, nonetheless, that the transfer of the display did not violate the first amendment under *Hazelwood.*

Second, and more importantly, by grounding the regulation of hate speech on equal protection and establishment clause principles, the scope of permissible regulation is limited by the doctrinal interpretation of these constitutional provisions. Thus, for example, because gay men and lesbians are not recognized as a suspect class, invidious government speech directed at homosexuals would not violate the Constitution. Certainly, a strong argument can be made that homosexuals do constitute a suspect class, and, therefore, should fall within the coverage of the equal protection clause. *See, e.g.*, Judge Norris' persuasive analysis in Watkins v. United States Army, 847 F.2d 1329, 1345-49 (9th Cir. 1988), *vacated on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc). Unfortunately, it is also clear, as Judge Reinhardt explains in his dissent in *Watkins*, 847 F.2d at 1352-56, that the current Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986), upholding the criminalization of acts of homosexual sodomy, effectively precludes that result. The linchpin of suspect class analysis is a showing of unjustified disfavored status. That foundation can never be established by a Supreme Court that insists on seeing the "unreasoning prejudice" directed at homosexuals historically as "a permissible societal moral judgment." *See Watkins*, 847 F.2d at 1357 (Reinhardt, J., dissenting).

While the Court's failure to protect homosexuals against discrimination and prejudice as a constitutional matter allows government to tolerate homophobic hate speech under this analysis, that failure does not prevent the state from aggressively pursuing more progressive policies. The state may, on the authority of *Hazelwood*, act to restrict private speech that might be erroneously attributed to it.

140. *See* Note, *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 271-79 (1988). The Court in *Hazelwood* explicitly left open the question of whether "the same degree of deference is appropriate with respect to [the regulation of] school-sponsored expressive activities at the college and university level." 484 U.S. 260, 274 n.7 (1988). Clearly, however, school sponsorship must affect the first amendment analysis to some extent. Thus, in University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990), Justice Blackmun explained:

in college buildings along with dozens of other organizations including the gay and lesbian alliances, and quite another to contend that the university newspaper bearing the school's name and published in part with school funds, can run a banner headline urging "Gays Off Campus" and an editorial tacitly approving of "gay bashing," despite university policy to the contrary.[141]

C. *When Rights Conflict—Equality versus Neutrality Requirements*

Sometimes the expression of private speech on public property violates the constitutional rights of a third party, not because the private speech is attributed to the state or constitutes state action, but because it interferes with an independent mandate that the state is constitutionally obligated to implement.[142] In *Cohen v. California*,[143] a high point in first amendment jurisprudence despite its off-color particulars, the Supreme Court reversed the conviction of an individual who wore a jacket with the words "Fuck the draft" emblazoned on it in the corridors of a Los Angeles courthouse. Justice Harlan's opinion eloquently rejected the state's argument that Cohen's arrest was necessary to protect the sensi-

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> *Obvious* First Amendment problems would arise where government attempts to direct the content of speech at private universities. Such content-based regulation of private speech traditionally has carried with it a heavy burden of justification. Where, as was the situation in the academic-freedom cases, government attempts to direct the content of speech at public educational institutions, *complicated* First Amendment issues are presented because government is simultaneously both speaker and regulator.

Id. at 587 n.6 (emphasis added) (citations omitted).

At least one court has questioned whether the *Hazelwood* "school sponsorship" rationale should be rigorously applied at the college level, *see* DiBona v. Matthews, 220 Cal. App. 3d 1329, 1346, 269 Cal. Rptr. 882, 893 (1990), but even it concedes that "school sponsorship is a factor which under some circumstances can be considered at the college level." *Id.* at 1347, 269 Cal. Rptr. at 893. The court's refusal to read *Hazelwood* more broadly provoked a spirited dissent. *Id.* at 1353, 269 Cal. Rptr. at 897 (Huffman, J., dissenting).

141. *See DiBona*, 220 Cal. App. 3d at 1347, 269 Cal. Rptr. at 893 (distinguishing play at issue from the school paper in *Hazlewood* on the basis that "in contrast to a school paper—which if it allowed students to express themselves using profanity would implicitly condone its use—this play does not advocate the use of vulgar speech").

This type of argument is a double-edged sword. If the administration of the university was virulently homophobic in its policies, it would have the power to censor the campus newspaper to prevent the publication of articles endorsing a more tolerant and egalitarian attitude toward gay people. Thus, a *Hazelwood* analysis is more dangerous than the equal protection thesis which operates as a one-way ratchet that only permits the regulation of invidious speech directed toward a suspect class.

142. In these cases, the requisite state action is found by the state's inaction in failing to regulate private conduct that interferes with the accessibility of state institutions to minority group members. *See infra* notes 149-50.

143. 403 U.S. 15 (1971).

bilities of a captive audience,[144] and persuasively explained why first amendment protection must extend not only to the literal ideas that an individual seeks to express but also to the emotive force which the speaker seeks to convey.[145]

Suppose, however, we change the facts of *Cohen*. Now petitioner is wearing a message on his jacket inside a courtroom where a Jewish defendant is being tried for murder. Moreover, the message is changed. The jacket now reads "Kill the murdering k—e" rather than "Fuck the draft." Assume further that there is no disruption in the courtroom and that no one in the audience complains about the message being communicated. Surely in this situation the state may prohibit the wearing of the jacket on the grounds that the message interferes with the defendant's right to a fair trial. In this circumstance the defendant's sixth amendment and due process rights trump the free speech rights of the trial spectator.[146]

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144. *Id.*

145. *Id.* at 25-26.

146. The need to balance the sixth amendment and due process rights of defendants against the free speech rights of the press and others has long been recognized. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (evaluating propriety of gag order restraining pretrial publicity that might undermine defendant's right to a fair trial). The regulation of possibly prejudicial expression outside the courtroom has sometimes been reviewed under traditionally rigorous standards. In Bridges v. California, 314 U.S. 252 (1941), for example, the Court overturned the contempt conviction of a labor leader who was punished for sending a public telegram threatening a crippling strike if the state court decided a labor dispute in a particular way. The Court ruled that the union leader's expression did not constitute a clear and present danger that the administration of justice would be impaired. Even here, however, "the Court in this line of cases has assumed that all behavior—including purely communicative behavior—that prevents the fair adjudication of a case is punishable as contempt." L. TRIBE, *supra* note 8, at 857.

Expression that more closely and directly intrudes into courtroom proceedings may be restricted under less stringent analysis. In Cox v. Louisiana, 379 U.S. 559 (1965) the Court explained:

> The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial "in a courtroom presided over by a judge." There can be no doubt that they embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process. A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence.

Id. at 562. (quoting Rideau v. Louisiana, 373 U.S. 723, 727 (1963)) (citations omitted).

Further, "the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial." *Id.* at 565. Accordingly, notwithstanding petitioners' arguments that their activities did not constitute a clear and present danger to the administration of justice, the Court rejected the implication that "crowds . . . demonstrating before a courthouse may not be prohibited by a legislative determination based on experience that such conduct inherently threatens the judicial process." *Id.* at 566. *See also Nebraska Press Ass'n*, 427 U.S.

A more difficult conflict is presented in the following scenario. It is the late 1950s in a southern community which has hitherto been segregated. Under the impetus of *Brown v. Board of Education*,[147] the school board allows black children to enroll in a previously white school. The first black child arrives and during recess he is all but surrounded by taunting white classmates who shout racial epithets at him again and again and again. The teachers watch contentedly as this event proceeds and take no steps to intervene. The black child runs home and does not return to the school.[148]

Have the school authorities violated the equal protection clause in this case? To put the question in more general terms, does the equal protection clause impose an affirmative obligation on the administrators of public property to make certain that the public facilities in their charge are accessible to racial minorities?[149] Are school authorities required to insure that school facilities provide an environment of equal

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at 561-62 (balancing sixth amendment and due process rights to a fair trial against first amendment right of the press to be free from prior restraints on publications relating to pretrial proceedings); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (Given the effect of press reports on trial proceedings, "trial courts must take strong measures to ensure that the balance is never weighed against the accused."); Estes v. Texas, 381 U.S. 532, 539 (1965) ("While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.").

Of course, prejudicial expression affecting the impartiality of jurors can always be remedied by reversing the defendant's conviction. *See, e.g.*, Evans v. Young, 854 F.2d 1081 (7th Cir. 1988) (third party saying within hearing of jurors "hang him" with reference to defendant is presumptively prejudicial, but its effect may be rebutted); Stockton v. Commonwealth of Virginia, 852 F.2d 740, 744-46 (4th Cir. 1988) (third party statement to jurors that "I hope you fry the son-of-a-bitch" violates defendant's sixth amendment rights). The reversal of conviction remedy, however, is hardly the preferred approach to the problem. "[R]eversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interference." *Sheppard*, 384 U.S. at 363.

147. 347 U.S. 483 (1954).

148. This is basically a true story. My wife, who grew up in Virginia and was just starting school in 1955, remembers this event, although she is uncertain about many details. She told me the story over ten years ago, and I keep remembering it. I hope the child who experienced it has been able to exorcise the memory, but I doubt it. Professor Gunther may disagree with Professor Matsuda about regulating hate speech, *see* Gunther, *Stanford's Free Speech Debate*, *supra* note 3, but he certainly agrees with her on one point—people who have had ethnic epithets directed at them do not forget those occurrences.

149. The argument that the state has an affirmative duty to act, such that state inaction constitutes state action, has a long and distinguished history, particularly with regard to equal protection issues. *See generally* Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); *"State Action" Requirement*, *supra* note 101, at 228-32; Karst & Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 55-80 (1967); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 n.5 (1968) (citing

respect and self-worth for all suspect classes as well as for the majority?[150]

The answers to these questions must consider two points. First, from an equal protection perspective alone, it should not matter whether

several studies supporting the position that the fourteenth amendment "affirmatively requires states . . . to secure racial equality in the salient aspects of public life").

Under the balancing analysis proposed by these writers and others, the state's tolerance of invidious private conduct can deprive racial minorities of the equal protection of the laws.

150. As the Court recently emphasized in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), the Constitution "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 195. Thus, the state bears no constitutional responsibility for failing to protect a four-year-old child from being beaten almost to death by his father, even though state officials were aware of the danger the boy was in. "As a general matter . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

Justice Rhenquist's majority opinion, however, acknowledged two exceptions to the principle that the Constitution only establishes negative rights limiting the state's power to act. First, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200. "The affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [the incarcerated person's] freedom to act on his own behalf." *Id.* at 200. Apparently, this exception may not require total incarceration before it applies. Rhenquist allows for the possibility that the state might assume an affirmative duty to protect a child that it placed with abusive foster parents, although the Court does not reach that issue. *Id.* at 201 n.9. *See* Lipscomb v. Simmons, 884 F.2d 1242, 1247 (9th Cir. 1989) (recognizing that state has "affirmative constitutional duties toward foster care children"). Second, "the State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection clause." *DeShaney*, 489 U.S. at 197 n.3.

The argument in the text is an amalgam of both exceptions although it must stretch each of them beyond the narrow description provided in *DeShaney*. Certainly, no student is forced to attend a public university. On the other hand, higher education is an extraordinarily valuable opportunity, instrumentally tied to one's future success in society. For many students, the public university may be the only feasible source of advanced training and a degree. Moreover, while college students are not institutionalized, many live a substantial part of their life on campus and, quite naturally, become dependent on that environment in important respects. University authorities, in turn, often provide food, housing, medical care and police protection to students attending their institution. This relationship may be sufficiently "special" to impose a duty to act upon the state. *See generally* Horton v. Flenory, 889 F.2d 454, 458 (3d Cir. 1989) (state has duty to prevent harm to accused burglary suspect in private club where city relegates law enforcement in private clubs to proprietors of such establishments); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 723-24 (3d Cir. 1989) (placing affirmative duty on state to protect children in public school may not be inconsistent with *DeShaney*).

More importantly, the typical public university provides its benefits to students by immersing them in a total milieu. Students learn through a variety of mechanisms and interactions, not simply through formal instruction. In this type of circumstance, the state's obligation to treat groups equally becomes complex. It is not necessarily met by a hands-off policy of neutrality that allows private discretionary acts to substantially limit the opportunities of particular groups to obtain educational benefits.

the harassment is purely verbal or physical. The critical issue is whether the state is under some affirmative obligation to provide equal educational opportunities to all students by supervising private conduct on school grounds. Second, whether the harassment is physical, verbal or both, the state may technically respond that its recess policy is even-handed and neutral, since it would not intervene if the situation was reversed and black students were harassing white students. Moreover, the state might explain that either white or black students are free, in this predicament, to defend themselves as best they can. Of course, given the minority status of the black students, the freedom to defend themselves or to counterattack against their tormentors may be of little practical use. But that should not detract from the technical neutrality of the state's policies.[151]

151. In one sense, the equal protection issue can be more easily resolved with regard to physical assaults because it is highly unlikely that the university would refuse to sanction all acts of physical violence against individuals. Thus, one can argue that by providing protection to any student, the university obligates itself to protect all students. The equal protection analysis may not operate on this level of generality, however. *See, e.g.*, McKee v. City of Rockwall, Texas, 877 F.2d 409, 413 (5th Cir. 1989) (Plaintiffs cannot circumvent "the rule of *DeShaney* by converting every due process claim into an equal protection claim via an allegation that state officers exercised their discretion to act in one incident but not in another."). A more particularized inquiry will be necessary.

Suppose there are a series of nighttime sexual assaults on women on a public university campus. Nonetheless, the university refuses to provide extra police protection to students using laboratories or libraries late at night, who return to their dormitories through a poorly lit campus. The lack of protection is technically neutral. Neither men nor women receive it. On the other hand, given the facts stated, women have a greater need for this protection than do their male counterparts. By failing to provide it, the university's facilities in the evening are technically open to everyone regardless of gender, but in practical terms, they are much more available to men than women.

The university's failure to supplement police protection at night raises equal protection concerns for the same reason that a neutral policy tolerating hate speech implicates equal protection issues. Majoritarian ethnic groups simply have far less need to have hate speech regulated. By neutrally allowing such expression to occur, the university arguably provides unequal protection to its students.

The strength of this argument, however, is undermined by the Court's emphasis on the purpose rather than the effect of state policy in equal protection cases. Under current equal protection jurisprudence, neutral policies that do not discriminate on their face only violate constitutional requirements if they are invidiously motivated. *See, e.g.*, Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976). Generally speaking, proof of impermissible intent requires more than official recognition that the government's facially neutral policy will disadvantage minority groups. Plaintiffs must also show that the state's conduct was undertaken " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

This deliberate purpose requirement applies with equal rigor in state inaction cases. It raises a formidable barrier, for example, to women bringing equal protection challenges to police enforcement policies recommending non-intervention in cases of domestic violence. *See, e.g., McKee*, 877 F.2d at 416 (Goldberg, J., dissenting); Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788 (1985-86). Using similar

One may, of course, argue that the equal protection clause is applicable in the physical assault context, but that the speech scenario presents a different case. It is undisputed that no one has a constitutional right to physically assault another person.[152] However, if equal protection rights exist in the physical assault context, changing the assault to verbal abuse alone should not alter that conclusion. What is different is that with verbal abuse, a clash of rights exists, requiring a balancing of constitutional interests, while with physical assault, equal protection rights are impaired with nothing of constitutional value on the other side.[153] As in the hypothetical involving the extension of *Cohen v. Cali-*

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logic, university administrations would not violate equal protection requirements by tolerating hate speech against minorities on their campus as long as the administrator's purpose was to promote first amendment values, not to burden the members of a suspect class.

This invidious motive requirement is not necessarily an insurmountable problem, however, because the Court's evaluation of the evidence establishing discriminatory intent is not always as rigorous as the *Feeney* case suggests. In particular substantive areas, most notably school desegregation cases, the Court has been willing to infer intent from the state decisionmakers' awareness that their facially neutral policies would have discriminatory consequences. *See, e.g.*, G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 557-62 (1st ed. 1986); Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989). Extending this analysis to the provision of equal educational opportunities in state universities would facilitate the doctrinal argument for an equal protection obligation to regulate hate speech suggested in the text. Alternatively, one could challenge the intent requirement directly, and argue that the Court should pay greater attention to discriminatory effects. *See generally* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977). Indeed, the Court's unwillingness to consider discriminatory effects alone can itself be criticized as a misguided attempt to view statutes as operating neutrally when their obvious consequence is to increase inequality. *See* Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 897-98 (1987).

Realistically speaking, of course, it is unlikely that the current Court would support either of these developments. If the Court determines that hate speech at universities can be constitutionally restricted, based on past experience, one would expect it to justify that conclusion by reducing the protection provided to freedom of speech on public property, *see supra* notes 12-39 and accompanying text, rather than expanding the scope of the equal protection clause. Under the constitutional value system endorsed in this article, the preferable approach is to ground the regulation of hate speech on a doctrinal foundation that holds both free speech and equality interests in high esteem.

152. Federal courts often acted aggressively after Brown v. Board of Educ., 347 U.S. 483 (1954), to prevent private interference with school desegregation policies. Federal intervention against private disruption was justified, for example, under the implied right of school authorities to be free to comply with their constitutional obligations. *See* Kasper v. Brittain, 245 F.2d 92 (6th Cir. 1957); Brewer v. Hoxie, 238 F.2d 91, 95-102 (8th Cir. 1956). Courts also recognized that because of the interplay of interests between school authorities and students in their charge, injunctions could be issued at the school board's request to protect the equal protection rights of black children against private obstruction. *Brewer*, 238 F.2d at 104-05. The first amendment claims of the protesters were rejected under a clear and present danger analysis. *Id.* at 102; *Brittain*, 245 F.2d at 95-96.

153. A hypothetical falling somewhere between the physical assault and free speech examples may help to clarify the discussion. Suppose the issue is not speech, but rather association. Assume that in a classroom with more than enough seats for all the students in attendance, students are

fornia and the Jewish defendant's right to a fair trial, the question to be resolved is whether limits on freedom of speech are justified by the state's obligation to comply with a countervailing constitutional mandate.[154]

How should this conflict be resolved? At its most abstract level, the conflict represents the tension between neutrality and equality principles. Under the first amendment's command of content and viewpoint neutrality, the government meets its constitutional obligations by treating everyone the same in a very basic way. The state does not intervene in the marketplace of ideas (at least not through the mechanism of regulating private activities). Everyone is neutrally left alone to say whatever he or she wishes. Conversely, seminal equal protection cases such as *Brown v. Board of Education*, reject this kind of neutrality framework in the name of equality. Treating everyone the same, by allowing both blacks and whites the "freedom" not to associate with members of another race in public school, does not result in equality. When one group is the majority and the other is a minority, ostensibly neutral rules like those that allow one race to segregate itself from the other may be the essence of

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permitted to sit wherever they like, and the white students refuse to sit next to nonwhite students. Since there are only a few minority students in the class, they end up sitting in a small cluster, surrounded by concentric circles of empty seats and, then, their white peers. May the school administration and teachers constitutionally permit this seat selection procedure to operate undisturbed, or are they obliged to intervene? Again, the school's policy is technically neutral, but as the results of this policy become clear, the continuation of the policy raises an inference of deliberate discrimination. *See supra* note 151.

In McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950), the Court prohibited the University of Oklahoma Graduate School from assigning its first black student (admitted under Court order) to a seat in a classroom in a row for black students only and to his own table in the library and cafeteria. While recognizing that white students might still set themselves apart from the petitioner, the Court concluded that such private decisions raised a totally different Constitutional issue from state mandated segregation:

> There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.

Id. at 641-42 (citing Shelley v. Kraemer, 334 U.S. 1, 13-14 (1948)).

It is not clear to me that the *McLaurin* analysis, preceding *Brown* as it did, is still good law. While there may not be any constitutional obligation that requires a bigoted white student to sit next to an Hispanic student in the school cafeteria, classrooms should not be permitted to be segregated as a matter of private preference. The students attending such a divided class are not receiving an equal education since the minority students are subjected to a continuous affront to their dignity as they try to learn their lessons. In this context the white students' associational rights and interests should be subordinate to the equal protection clause's affirmative commands.

154. *See supra* note 146 and accompanying text.

inequality.[155] The government may be acting neutrally, but it is neither equal nor fair to tell the single black child that the only remedy he has for the abuse he experiences is self-help; he is free to throw taunts back at his twenty or thirty tormentors.[156]

There is no simple way to reconcile the inconsistent values of neutrality and equality. One might begin the process by isolating locations and situations in which one principle or the other should be recognized as dominant. For example, in areas of the public university campus that are designated full-purpose public forums, neutrality rules should control the regulation of expressive activities.[157] Minority group members may choose either to participate fully in expressive activities taking place in such environments, or to avoid these areas because they find much of the speech uttered there unacceptably offensive.[158] In other areas of the

155. In his now famous criticism of *Brown*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), Professor Wechsler queried, in essence, why the associational rights of black students to be educated in an integrated school should necessarily outweigh the associational rights of white students who strongly preferred a segregated environment. There seemed to be no neutral principle to justify such a conclusion. The response to Wechsler by other scholars effectively repudiated his contention. Segregation is unconstitutional because it disadvantages black people by treating them unequally. *See* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). For all the force and accuracy of Black's rejoinder, however, it does not negate Wechsler's basic premise. If you ignore the reality of majority and minority status and differences in social and political power, *Brown* is a problematic non-neutral decision. In the real world, however, abstract neutrality is often inherently inconsistent with equality. To Professor Black, the blatant real-world inequality of segregation simply overwhelmed any concerns that might be raised about the violation of neutrality principles in *Brown*.

156. The first amendment's neutrality requirements can also be challenged as being inconsistent with more generalized equality concerns regarding groups such as the poor, who may lack the ability to effectively compete in the marketplace of ideas. *See, e.g.*, Sunstein, *Lochner's Legacy*, *supra* note 151, at 914. Moreover, facial neutrality can often shield hidden discrimination against disfavored speakers. *See, e.g.*, Karst, *Equality and the First Amendment*, 43 U. CHI. L. REV. 20, 35-43 (1975).

157. This result is compelled by accepted case authority. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (religious groups must be given access to public forum created by university); Texas Review Soc'y v. Cunningham, 659 F. Supp. 1239 (W.D. Tex. 1987) (rigorous scrutiny applied to West Mall area on university campus designated as a public forum); Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (Nazis have right to demonstrate in traditional public forum in community in which many concentration camp survivors reside). It is also consistent with the central thesis of this article which rejects categorical limits on expression in favor of the contextual regulation of speech. The regulation of hate speech on the university campus requires the balancing of conflicting first amendment and equal protection mandates. Neither constitutional value, however, totally dominates the other. Thus, some hate speech must be tolerated on campus. The question is where it should be permitted and in what circumstances.

158. On a large campus, this rule is much more easily defended than in a smaller institution. At the University of California, Davis, for example, a very large open field between the main library and the student union serves as a public forum in which diverse speakers may address whomever will listen to them. It is simple to ignore the comments of an offensive speaker in this area. Indeed, the

campus, however, equality rules should control. In these locations, government may protect rights of equal access on a basis of equal status and worth even if to do so requires violating neutrality principles with regard to the regulation of speech.

The allocation between neutrality and equality regimes should be balanced.[159] The creation of a small free-speech zone in the basement of

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overwhelming majority of students ignore speakers in this area regardless of the merits of the speaker's expression. In situations such as this, objecting to a speaker's hateful message is almost analogous to objecting to a racist book in the university library. The problem is not that the message is directed at a victim who cannot escape its disruptive effect on his education. Rather, the objection is that the message exists at all and that some people think it is of sufficient value to listen to it or read it. In circumstances of this kind, first amendment interests outweigh equal protection concerns. *See generally* DiBona v. Matthews, 220 Cal. App. 3d 1329, 1346-47 n.14, 269 Cal. Rptr. 882, 893, 893 n.14 (1990) (first amendment protects right of teacher and students in drama class to put on offensive play where participation and attendance is completely voluntary and easily avoided).

The more difficult scenario involves the small educational institution in which the only feasible location for an open forum is a central area in the university's main building that effectively controls access to the rest of the institution. There is no easy answer to the clash of first amendment and equal protection principles in this situation. It is not clear that designating such an area as a public forum necessarily requires the conclusion that hate speech must be tolerated there. *See generally* Board of Educ. of the Westside Community Schools v. Mergens, 110 S. Ct. 2356, 2364 (1990) (permitting religious clubs to participate in open forum in public high school does not violate establishment clause if religious groups do not dominate the forum and school disclaims any endorsement of club's message); County of Allegheny v. ACLU, 109 S. Ct. 3086, 3104 n.50 (1989) (even if central location in county courthouse is used for a variety of public displays, permitting a private creche to be displayed there may violate establishment clause); Smith v. County of Albemarle, Virginia, 895 F.2d 953, 959 (4th Cir. 1990) (private creche in public forum in front of city hall violates establishment clause); Kaplan v. City of Burlington, 891 F.2d 1024, 1030 (2d Cir. 1989) (that park in front of city hall is a public forum does not preclude conclusion that permitting a menorah display to be located there violates establishment clause); Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985) (Even if gallery on main floor of small college's main building is a public forum, first amendment rights of artist are not abridged if his offensive display is relocated to a less prominent forum elsewhere in the building.). To take the most extreme case, it is doubtful that unrestrained private racist speech should be tolerated in a one-room schoolhouse simply because the school authorities designate it as a public forum at specific times during the school day.

159. *See generally* Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 488-90 (1962) (arguing for a balance between equal protection rights and limited substantive due process rights of privacy, property, and liberty):

> No algebraic formula nor any conjuring with the words of the Constitution can define with precision the limits of the state's choices. What the fourteenth amendment requires of the state in regard to the conflicting demands of liberty and equality has appeared different at different times. . . . At one time it might have appeared that the Constitution required that the state remain "neutral." We now ask what constitutes constitutionally acceptable neutrality. We ask, again, whether government need be—or can be—"neutral." In fact, it is now established, neutrality is not required by the Constitution in all instances of this conflict. . . .
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> . . .In regard to elections, company towns, public parking authorities, and the like, the Constitution requires the state not to be neutral, but to act to prevent inequality. . . . In "private" areas, the state may perhaps be neutral, but the requirements of neutrality

a seldom used building would hardly be appropriate or adequate. On the other hand, protecting racial minorities against verbal abuse requires a better response than that they should simply develop thick skins or avoid most of campus life. Such a response too closely resembles the discredited notion that children of religious minorities could simply wait in the cloakroom while school prayers were recited if majoritarian religious expression made them feel uncomfortable.[160]

A corollary of this analysis is that it is particularly inappropriate for some areas of public university campuses to be designated as sites for unrestricted expression or to be considered public forums.[161] Such areas include critical access points and facilities which are essential for student use. If the entrance to the library is a foyer with empty walls on either side, the walls could be used as open bulletin boards for student groups. Should that arrangement result in minority students having to walk through a gauntlet of racial invective to enter the library, however, one might legitimately question whether their access to that facility has been unacceptably restricted. While other areas may suitably serve the univer-

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have also changed. We now recognize that the state is favoring the liberty to discriminate and is not "neutral" when it enforces [discriminatory private decisions]. . . .

. . . .

. . .But there are circumstances where the discriminator can invoke a protected liberty which is not constitutionally inferior to the claim of equal protection. There the Constitution requires or permits the state to favor the right to discriminate over the victim's claim to equal protection. . . . [This] may . . . be viewed as the result of the inevitable need to choose between competing constitutional rights. . . .

160. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 430 (1961) (rejecting argument that Regents prayer in public school is constitutional because state "does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room").

161. In a distinct but related context, some lower courts have recognized that the location of a public forum is an important factor to consider in evaluating the constitutionality of speech regulations governing access to the forum. *See supra* note 158. In *County of Albemarle*, 895 F.2d 953, for example, the court carefully distinguished different public forum cases in explaining how Justice O'Connor's endorsement test of the establishment clause, (in Lynch v. Donnelly, 465 U.S. 668, 692 (1984)), applies in an "area where the competing First Amendment rights of free speech and separation of church and state overlap." *Id.* at 959 n.7. Religious expression might be constitutionally permissible in certain forums, but not others because it is more likely to convey a message of state endorsement in certain locations. "The associational message [of a creche on the front lawn of the county government building] is more severe than a simple policy of access to vacant school rooms," (as in Widmar v. Vincent, 454 U.S. 263 (1981)), *id.* at 959, or the open forum in a village park, (as in McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984)). *Id.* at 959 n.7.

The analysis in the text parallels this endorsement inquiry, but from a different perspective. The direct analogy to the endorsement test asks whether racist speech in a particular location implies state approval of the speaker's message. By focusing on the state's obligation to provide an egalitarian educational environment, the inquiry now shifts to the effect of racist speech in specific areas on the ability of minority group members to avail themselves of the educational opportunities that the university provides.

sity's commitment to open and uninhibited debate, there may be no other way to enter the library.

D. *Anti-Discrimination Interests and First Amendment Rights*

The approaches suggested thus far for regulating hate speech on public university campuses, may, of course, be rejected. Readers may fear that a functional compatibility test gives far too much discretion to administrators and regulators.[162] The analogy between the establishment clause and the equal protection clause for state action purposes may be discounted on the ground that these constitutional provisions serve different purposes.[163] The equal protection clause may be interpreted to bar state interference with minority access to public property, but not to impose affirmative obligations on the state to protect that access against private obstructions.[164]

If all of the previously stated arguments are repudiated as unpersuasive, one remaining ground exists for restricting hate speech on public university campuses. Courts could ignore the public ownership of university property and apply traditional standards of review to hate speech regulations—the same stringent standards that are used to review the regulation of private speech in the private sector or in a traditional public forum.[165] Since hate speech regulations involve either content or viewpoint discrimination, some form of strict scrutiny must be used.[166] Still, even this exacting standard may sometimes be met. The state's interest in prohibiting racist invective directed against minority students is sufficiently important and can be furthered with sufficiently precise rules that some carefully drawn hate speech regulations should withstand constitutional scrutiny. This kind of conventional balancing of state interests and rights will not often be helpful, but it may have utility in certain limited situations.

In particular, there are two lines of authority which might support

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162. *See supra* notes 85, 88 and accompanying text.

163. *See, e.g.*, Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986) (arguing that establishment clause protects equal liberty of people of all faiths to practice their religions, but it does not require equality of civil status of religious groups). For the contrary position, see *Heavenly and Earthly Spheres*, *supra* note 1.

164. *See, e.g.*, McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 641 (1949) (suggesting that state may not require social isolation of black student in formally segregated graduate program, but it may tolerate private action that accomplishes the same result).

165. *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988) (public forum); Consolidated Edison Co. v. Public Serv. Comm'n., 447 U.S. 530 (1980) (private speech).

166. *See Boos*, 485 U.S. at 321; *Consolidated Edison*, 447 U.S. at 540.

the regulation of hate speech under conventional strict scrutiny standards. The first involves speech that unreasonably intrudes on the privacy of an unconsenting listener. Most of the case law relating to this type of circumstance is directed at protecting one's home from invasive expression.[167] *Martin v. Struthers*[168] suggests that states may protect residential tranquility and privacy against disturbance by prohibiting soliciting that ignores posted "do not disturb" signs. *Rowan v. United States Post Office Department*[169] allows recipients of sexually provocative and pandering advertisements to request the post office to order the publisher to desist from any future mailings to that addressee. In *Frisby v. Schultz*,[170] the Court upheld a content-neutral ban on residential picketing intended "to intrude upon the targeted resident . . . in an especially offensive way."[171] Arguments have been made that other locations involving particularly private and personal activities, such as medical clinics, may also be protected against offensive expression.[172] While most of these cases involve content neutral laws, which receive less rigorous scrutiny than content or viewpoint discrimination, the very high value placed by the Court on protecting an individual's privacy in special locations might justify upholding some restrictions on expression under a higher standard of review. This same line of reasoning might allow administrators to prevent minority students' dormitory rooms and study carrels, at least, from being the target sites of racist invective.

The second doctrinal framework under which hate speech restrictions may withstand rigorous scrutiny relates to anti-discrimination laws that have sometimes been used to limit and punish private expression. The extreme case proves the technical efficacy of the model, but its parameters remain open. Assume a private restaurant claims to comply with civil rights statutes regulating access to public accommodations by

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167. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1970):

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."

Id. at 21 (quoting Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970)) (citation omitted). *But see* Lehmen v. City of Shaker Heights, 418 U.S. 298 (1974) (commuters are captive audience for advertising on municipal buses).

168. 319 U.S. 141 (1943).

169. 397 U.S. 728 (1970).

170. 487 U.S. 474 (1988).

171. *Id.* at 486.

172. *See* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856 (1988).

agreeing to serve black patrons. However, the restaurant's walls are covered with posters promoting white supremacy and the inferiority of nonwhite races, the napkins and place settings are decorated with racial epithets, and the waiters and waitresses insult black customers with racist vulgarities. Obviously, in practical terms, this restaurant is not open to black customers. It would take a first amendment absolutist of the highest order to argue that freedom of speech guarantees preclude the enforcement of civil rights laws against the proprietor of this establishment.

The more common circumstance in which anti-discrimination laws are used to sanction racist expression involves Title VII cases in which employers are accused of creating or condoning a work environment that is hostile and offensive to racial minorities or women.[173] Although plaintiff must demonstrate "that more than a few, isolated incidents of racial harassment have taken place,"[174] the case law clearly indicates that a work environment pervaded with racist epithets and derogatory comments directed at minority or women workers, constitutes actionable discrimination[175] as to the terms, conditions or privileges of employment.[176]

173. *See, e.g.*, Gilbert v. City of Little Rock, Arkansas, 722 F.2d 1390, 1394 (8th Cir. 1983) ("An employer violates Title VII simply by creating or condoning an environment at the work place which significantly and adversely affects the psychological well-being of an employee because of his or her race."); Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (pervasive sexual harassment in workplace constitutes "an illegal and discriminatory condition of employment"); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (hostile or offensive work atmosphere created by sexual harassment violates Title VII); Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981) (injection of "demeaning sexual stereotypes into the general work environment" violates Title VII); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) ("derogatory comments" may be "so excessive and opprobrious as to constitute an unlawful employment practice under Title VII"); Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 573 (W.D.N.Y. 1987) (evidence of pornography and demeaning sexual comments raises triable issue of fact in Title VII case); United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980).

174. Snell v. Suffolk County, 611 F. Supp. 521, 525 (E.D.N.Y. 1985), *aff'd*, 782 F.2d 1094 (2d Cir. 1986). *See also Gilbert*, 722 F.2d at 1394 ("[r]acial remarks and derogatory epithets" used by white officers, racially oriented graffiti in restrooms, and racial cartoon on bulletin board at police headquarters do not rise to level of Title VII violation); Friend v. Leidinger, 588 F.2d 61, 67 (4th Cir. 1978) ("isolated incidents of racial tension did not constitute a violation of Title VII"); *Cariddi*, 568 F.2d at 88 (derogatory comments made in casual conversation do not rise to level of Title VII violation); EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 384 (D. Minn. 1980) (requiring more than a few isolated incidents of harassment to find a Title VII violation).

175. *See, e.g.*, *Katz*, 709 F.2d at 254 (plaintiff subjected to "extremely vulgar and offensive sexually related epithets" by coworkers in workplace "pervaded with sexual slur, insult and innuendo"); *Henson*, 682 F.2d at 900-01 (female employees regularly subjected to crude and vulgar language and "almost daily inquiry . . . as to their sexual habits and proclivities"); *Bundy*, 641 F.2d at 944 ("sexually stereotyped insults and demeaning propositions" directed at female employee by male supervisor); *Snell*, 611 F. Supp. 521 (demeaning epithets and derogatory mimicking directed at black and Hispanic employees, scurrilous statements and cartoons posted on bulletin board and other areas);

Moreover, the willingness of courts to deny relief based on occasional, casual or sporadic episodes of racist expression by fellow employees against minority coworkers may stem in significant part from the need to demonstrate that it is the employer who should be held responsible for the racist incidents on which plaintiffs base their complaints.[177] Nothing in the case law suggests that employers would be held to violate the first amendment rights of their employees if they punished even minor incidents of racial harassment on the basis that it makes no sense to wait until the workplace is engulfed by racially abusive incidents among workers before taking action. By that time, not only might plaintiff's cause of action have already accrued, thereby exposing the employer to liability, but the cost of policing the workplace and disciplining workers would have increased substantially.[178]

While Title VII cases rarely discuss first amendment concerns directly,[179] the willingness of courts to enforce civil rights statutes against

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Murphy Motor Freight Lines, 488 F. Supp. at 384-85 ("anti-black sentiments" expressed verbally, on company bulletin board, on wall of restroom, on door of lunchroom, and on sides of loading carts); *City of Buffalo*, 457 F. Supp. 612 (racial slurs and comments directed at black employees, posted on bulletin boards, and transmitted over police radio). *But see* Rabidue v. Osceola Refining Co., 805 F.2d 611, 615, 623-24 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (anti-female obscenities directed at plaintiff and referring to women generally, and display of pictures of nude women in work area do not violate Title VII given the traditionally vulgar atmosphere in the work environment).

176. *See, e.g., Gilbert*, 722 F.2d at 1994; *Katz*, 709 F.2d at 254-55; *Henson*, 682 F.2d at 904; *Bundy*, 641 F.2d at 943-45; Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Murphy Motor Freight Lines*, 488 F. Supp. at 384; *City of Buffalo*, 457 F. Supp. at 631.

177. *See, e.g., Katz*, 709 F.2d at 255 (responsibility of employer for sexual harassment in workplace predicated on actual or constructive knowledge, but plaintiff may show that "harassment was so pervasive that employer awareness may be inferred"); *Henson*, 682 F.2d at 905, 910 (conduct of employees toward coworkers which creates hostile working environment cannot automatically be imputed to employer. Employer must know of the harassment to be held liable, but pervasiveness of harassment may establish constructive knowledge). Also, casual or occasional ethnic epithets do not establish a Title VII violation because they do not alter the conditions of employment to a sufficient degree to constitute actionable discrimination. *See, e.g., Henson*, 682 F.2d at 904.

178. Many cases specifically suggest that employers may escape Title VII liability if they move "promptly and effectively to rectify the offense" when they learn that employees are being harassed. *See Bundy*, 641 F.2d at 943. *See also Rabidue*, 805 F.2d at 621 ("The promptness and adequacy of the employer's response to correct instances of alleged sexual harassment is of significance in assessing a sexually hostile environment claim."); *Katz*, 709 F.2d at 256; *Murphy Motor Freight Lines*, 488 F. Supp. at 385 ("Supervisory personnel participated in the harassment of [plaintiff] by their delay in removing [racially] derogatory article from the company bulletin board.").

179. *See, e.g., Snell*, 611 F. Supp. at 531 (court notes that "the First Amendment does not bar appropriate relief" in cases involving racist epithets in the workplace, but declines to discuss the issue since it was not raised by the parties); Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990).

expressive activities cannot be ignored. College administrators are obliged by Title VII requirements to ensure that university employees do not create a racially offensive environment for their coworkers. If administrators are constitutionally permitted to take steps to create a nondiscriminatory work environment for university employees, that surely suggests that some regulation of student speech may be enforced to prevent the creation of a discriminatory educational environment for students as well.

CONCLUSION

Because hate speech is defined by its content and communicative impact, its regulation raises serious first amendment concerns. Even speech which is invidious in its purpose and insidious in its effect merits constitutional protection because it is speech.

Expression that cannot be constitutionally suppressed, however, can be regulated as to its location. The very power of speech that justifies its recognition as a fundamental right also requires that limits be placed on where it may occur. Speech can distort and disrupt the uses to which property may be put. The first amendment does not give individuals an unconditional easement to exercise that power and cause such distortions in any area they choose. Thus, restrictions of the kind proposed in this article go beyond pristine and neutral time, place and manner regulations. These regulations are hybrids; they are content-based but are justified in terms of the site at which the expression is to occur. In order for such regulations to be upheld, the speech being regulated must be incompatible with important functions the state has assigned to the property it owns and controls.

A functional compatibility standard of review, however, is ad hoc and indeterminate and risks judicial toleration of overregulation. It invites discretionary choices by property administrators and casts a chilling web of uncertain sanctions over potential speakers. With regard to conventional expression involving even hotly debated issues, conclusions of incompatibility should be cautiously arrived at and grounded on hard evidence of disruptive effects.

Some hate speech restrictions, however, involve a different balance, one that is cabined in its scope but more aggressive in its implementation. Administrators of public property are subject to two constitutional commands, one imposed by the first amendment and the other by the equal protection clause. Equality principles require that public facilities be accessible to all suspect classes on a basis of equal worth and mutual re-

spect. In situations in which the majority is actively intolerant of minorities, that equality mandate cannot be fulfilled by a government committed to absolute neutrality in the regulation of expression.

This is not to suggest that all hate speech may be excluded from a public university campus. The analogies suggested here are context-based. Hate speech may be prohibited in certain circumstances but not others. Clearly, difficult questions remain as to how such line-drawing and balancing issues should be resolved. The thesis of this article only involves the development of general doctrine, not particular rules or standards. It does not directly address how to draft hate speech regulations that are not substantially overbroad, that do not grant too much discretion to those responsible for enforcing the regulations, that provide adequate notice to students and professors, and that do not unreasonably chill clearly protected and permissible expression.

What this article does present is a justification for regulating hate speech, a challenge to the instinctive reaction of many academics that any regulation of speech in the university environment is ill-advised and per se unconstitutional. Contrary to that intuitive conclusion, prohibiting hate speech on public property can be solidly grounded on respected constitutional authority. Appropriate constitutional analogies suggest that the line-drawing and uncertainty inherent in the regulation of hate speech is a tolerable burden on the academic enterprise. It is time to shift the discussion from the abstract question of whether hate speech restrictions are ever legitimate to the tough job of tailoring and balancing that the regulation of hate speech demands.