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COMMENTS

POLITICAL CORRECTNESS ON COLLEGE CAMPUSES: FREEDOM OF SPEECH V. DOING THE POLITICALLY CORRECT THING

Craig B. Anderson

I. INTRODUCTION

FREEDOM of speech is one of the most important rights guaranteed to all American citizens. Set forth in the First Amendment, the Constitution states "Congress shall make no law . . . abridging the freedom of speech." One of the crucial guarantees allowing the free expression of diverse and challenging ideas, the right to free speech is under attack at college campuses throughout the United States. This assault comes in the form of political correctness, a form of intellectual conformity marked by enforcement through intimidation, called by some a kind of liberal McCarthyism. Following are just a few examples of how political correctness manifests itself on university campuses across the country.

At Brown University, a fraternity sent out invitations for a South of the Border party, depicting a man sleeping through a siesta under a big sombrero. After a student complained that such an invitation showed insensitivity to Mexicans, the Greek council banned all ethnic theme parties.

1. U.S. CONST. amend. I.
2. One dictionary defines political correctness as an ideology "marked by or adhering to a typically progressive orthodoxy on issues involving race, gender, sexual affinity or ecology." Random House Webster's College Dictionary 1050 (1991).
3. Michael Kilian, Warning on Political Correctness, CHI. TRIB., July 31, 1991, at 4. Lynée Cheney, head of the National Endowment for the Humanities has charged that "the nation's colleges are falling victim to a liberal McCarthyism in which the political correctness of curricula and teaching is used to advance social agendas and political causes." Id. American Civil Liberties Union Director Morton Halperin has commented that he could find "no cases where universities discipline students for views or opinions on the Left, or for racist comments against non-minorities." Chester Finn, The Campus: "An Island of Repression in a Sea of Freedom," COMMENTARY, Sept. 1989, at 17, 21. "[I]n the name of toleration and diversity, American universities are becoming intolerant, unscholarly and undiverse." Firing Line Debate, Resolved: Freedom of Thought is in Danger on American Campuses 1 (August 28, 1991) [hereinafter Firing Line Debate] (statement of Michael Kinsley of the New Republic magazine).
5. Id.
Dining hall employees at Harvard were denounced by the dean for having a back-to-the-'50s party, apparently because it was politically incorrect to feel nostalgic about a decade marred by segregation. Little more than a year after the Supreme Court reaffirmed the principle that burning the American flag is a protected form of speech, University of Maryland officials asked students who were hanging American flags and pro-war banners from their dormitory windows to take them down. One university official justifying the action stated that "this is a very diverse community, and what may be innocent to one person may be insulting to another." In a similar display of the hypocrisy of political correctness, white demonstrators at a pro-Gulf war rally at the University of Cincinnati were denounced as racists by the Student Senate for taunting Arab students. However, the sole black demonstrator was spared this label because the official university handbook stated only whites can be racist. Instead, the black student was termed "European-influenced African." Not limiting its enforcement of political correctness to demonstrations, the University of Cincinnati also does not allow the discussion or study of "myths" about Columbus and its Student Senate has declared the university "a Columbus-myth-free campus." At New York University Law School, the moot court board initially selected as an exercise a case involving the custody rights of a divorced lesbian mother. The problem was withdrawn after some students complained that making arguments against custody to the mother would be insensitive to homosexuals. During a first year study session at the American University, two law school students were asked by a professor to leave the class because of their race. The two students were white and they were told that the review session was only open to African-American, Hispanic, and Asian-American students. A Harvard criminal law professor was chastised by a women's group for "insensitivity" for discussing the validity of rape shield laws which allow inquiry into a rape victim's past. At Evergreen State College in Washington, the student editor was suspended from the campus newspaper for lack of coverage of ethnic and minority issues. At Southern Methodist University, the judicial committee recently punished one student for referring to Martin Luther King, Jr., as a communist and singing We Shall Overcome in a sarcastic manner. The committee also punished another student for calling a classmate a Mexican in a derogatory manner, even though the

9. Id.
10. Id.
11. Id. at 26.
12. Thomas Jipping, Education vs. Indoctrination: Does Washington Have a Role in Fighting "PC" on Campus, 1991 Heritage Foundations Reports.
student immediately apologized for any offense the term might have caused. In early 1987, the UCLA campus paper printed a cartoon satirizing affirmative action. After controversy broke out, UCLA suspended the editor who allowed the drawing to appear. James Taranto, a student columnist for the Daily Sundial at California State University at Northridge, wrote an article criticizing university officials at UCLA for censorship. Taranto was also suspended from his editorial position for publishing controversial material without permission.

At the University of Michigan, a male undergraduate student sent a message on his computer to a female student observing that some allegations of date rape were false. School administrators quickly threatened prosecution of the male student if he continued to express such ideas. A school official told the male student that the discussion of such ideas "reflects an insensitive and dangerous attitude toward date rape. . . . The reality of rape in our culture is that women rarely make false accusations. . . . The effect of your message on the reader is offensive, hostile, and demeaning. University policy prohibits such acts of discriminatory harassment." A professor at the University of California at Santa Barbara noted that the term pet had become a derogatory name and that the politically correct name urged by animal rights activists was the term companion animal. When the professor facetiously stated to her class that some magazine centerfold models, called Penthouse Pets, would now have to be referred to as Penthouse Companion Animals, fifteen women promptly filed sexual harassment charges. A brochure issued by MIT lists as an example of ethnoviolence a student's perception that his professor rarely calls on any black students and when he does he asks the black students easy questions. At a university conference concerning gender, race and ethnicity, one speaker denounced West Side Story because it had been produced by a white male who had no authority to represent the Puerto Rican American experience. After another participant pointed out that West Side Story was merely a variation of Romeo and Juliet, a play originally created by a white male who was neither an Italian nor a citizen of Verona, the speaker denounced Shakespeare as a racist.

Colleges and universities across the country have enacted politically correct speech codes. For example, Smith College warns new arrivals against lookism, defined as construction of a standard for beauty, and ableism, the oppression of the differently abled (the handicapped) by the temporarily

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16. Id. at 302, n.17.
17. Dirk Johnson, Censoring the Campus News, N.Y. TIMES, Nov. 6, 1988, at 4A.
18. Id. After the ACLU threatened to sue the California State University on Taranto's behalf, the school reversed his suspension. Id.
abled.\textsuperscript{23} At the University of Michigan, the student code prohibits the display of a confederate flag on a student’s door or laughing at a joke about someone in class who stutters.\textsuperscript{24} The University of Connecticut passed a student code prohibiting “inappropriately directed laughter, inconsiderate jokes, . . . and conspicuous exclusion from conversations.”\textsuperscript{25} At the University of Delaware, students and faculty are told to use the term persons of African, Asian, Latin American, Middle Eastern, and European descent rather than “blacks, Asians, Hispanics, Arabs, and whites”.\textsuperscript{26} In addition, the University called for the replacement of the terms majority and minority with the terms target populations and under-represented groups.\textsuperscript{27} At the College of William & Mary, guidelines to nonsexist language stated that the term “kingpin” should be replaced with “key person” and the phrase “male chauvinist,” apparently now redundant, becomes simply “chauvinist.”\textsuperscript{28}

What has happened to freedom of speech and expression on the university campus? Do students, faculty members, and school administrators now rate political correctness over the right to free speech provided by the Constitution?

The political correctness philosophy posits that because the mere discussion of certain ideas or viewpoints offend certain groups, the expression of these ideas or viewpoints should not be allowed.\textsuperscript{29} The offended group may consist of a certain racial, political, religious, or gender based association. Adherents to the political correctness movement lobby to enact coercive student speech codes to suppress these prohibited ideas or viewpoints. According to those who espouse politically correct expression, the First Amendment presents no limit on punishing offenders of these codes. However, political correctness only requires that certain ideas or viewpoints not be expressed because some groups require special protection from any discussion of these harmful or offensive ideas.\textsuperscript{30} Only ideas considered politically correct can remain unchallenged while those outside the politically correct can be challenged.

\begin{thebibliography}{99}
\bibitem{25} Department of Student Affairs, Univ. of Connecticut, Protect Campus Pluralism (quoted in Robert C. Post, \textit{Racist Speech, Democracy, and the First Amendment}, 32 WM. & MARY L. REV. 267, 269 (1991)).
\bibitem{26} Memorandum from the University of Delaware Dean’s Office, A Guideline for the Sensitive Use of Language 1 (1991).
\bibitem{27} \textit{id.} at 2.
\bibitem{28} Leo, \textit{supra} note 8, at 26.
\bibitem{29} Glenn Loury, former professor of political economy at the Kennedy School of Government at Harvard, has stated “the cult of sensitivity has evolved in such a way that particular substantive issues of vital importance to be discussed cannot be discussed because particular minorities are exercising power . . . to curtail the discussions that their feelings not be hurt.” Firing Line Debate, \textit{supra} note 3, at 10. “The range of considerations that are brought into debate are limited by the self-censorship that attends the strenuous and sometimes irrational . . . response to certain kinds of positions.” \textit{id.} at 12.
\bibitem{30} In response to this type of thinking, Alan Keyes, a former assistant secretary of state and now president of Citizens Against Government Waste, said “To think that I [as a black man] will . . . be told that white folks have the moral character to shrug off insults, and I do not . . . That is the most insidious, the most insulting, the most racist statement of all!” Stanford News, Press Release (Mar. 19, 1990) (criticizing Stanford hate speech regulation)
\end{thebibliography}
correct spectrum may be freely challenged.31 In addition, not all groups are protected equally by these restrictions. Statements that would offend religious fundamentalists, pro-Israeli groups, Japanese Americans or white Europeans are not prohibited because criticizing such groups is considered politically correct. The political correctness movement espouses the belief that because certain ideas are considered correct by adherents to the movement, these ideas are above debate.

The rising wave of political correctness on college campuses affects both

(quoted in Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal, 1990 DUKE L.J. 484, 493 (1990)). Another commentator has stated:

One has got to conclude that if the colleges and universities put as much effort into high-quality instruction, vigorous advising, extra tutoring, summer sessions, and other supplementary academic services as they do to combating naughty campus behavior and unkind words . . . they could make a big dent in [the number of minorities who drop out of college]. But, of course, it is easier to adopt a behavior code for students than to alter faculty-time allocations and administrative priorities. Symbolic responses to problems are always quicker and less burdensome, at least in the short run, than hard work.

Finn, supra note 3, at 22.

31. For example, Becky Thompson, professor of Women's Studies at Brandeis University begins her course by stating "it is not open to debate whether a white student is racist or a male student is sexist. He/she simply is." An Inclusive Curriculum: Race, Class and Gender in Sociological Instruction, American Sociological Association, Patricia Collins and Margaret Anderson, eds., (1987).

In another one of the many examples of political correctness prohibiting the expression of politically incorrect ideas while allowing the free expression of those considered politically correct, a student was physically removed from class to prohibit his questioning of the professor's viewpoint. Pete Schaub enrolled in a Women's Studies class at the University of Washington at Seattle. On the first day of class, the professor stated that "the traditional American family represents a dysfunctional family unit." Students who protested that their families were functional were shouted down with yells of "denial, denial" by teaching assistants hired by the professor. When the professor claimed that U.S. statistics showed that lesbians could raise children better than married couples, Schaub asked after class for the source of this information. The professor replied, "Why are you challenging me? Get away from me. Just leave me alone." A member of the professor's undergraduate circle then told Schaub he was a "chauvinist goddamn bastard." The next day, Schaub was banned from class. The professor had two campus police officers waiting in the hall to escort him away. Timothy Egan, Challenge in Women's Course Roils Washington U. Campus, N.Y. TIMES, April 6, 1988; Nicholas Davidson, Who is Pete Schaub?, CHRONICLES, Jan. 1989, at 46-48.
students and faculty. This current challenge to free speech on the college campus, historically an institution known for protecting freedom of expression, threatens to severely limit one of the fundamental building blocks of a well rounded education—the ability to discuss all ideas and evaluate them critically without preconceived notions of what the correct conclusion

32. The effect of political correctness on students is shown by the enactment of various restrictive speech codes as well as by the pressure put on students by the university, student special interest groups, and faculty to conform to a certain ideological viewpoint.

A recent incident at Dartmouth demonstrates that political correctness can be enforced through other means than by enacting restrictive speech codes. In February 1988, The Dartmouth Review, a conservative weekly newspaper, published a highly critical review of William S. Cole's course noting his use of foul language in class and his reference to students as honkies. Harmeet D. Singh, Shanties, Shakespeare, and Sex Kits: Confessions of a Dartmouth Review Editor, The Heritage Foundation Policy Review, Fall 1989, at 58. Four members of the Review approached Cole, a black professor, at the conclusion of his music class to invite him to respond to the review of his class. The confrontation turned into a shouting and pushing match between the professor and Review members. After breaking the flash attachment off a photographer's camera, Cole then ordered the students to leave. Black students charged that the article and classroom incident were racially motivated; the Review insisted that they were simply criticizing a professor's teaching ability. Dartmouth filed charges against the students the next day for harassment, invasion of privacy, and disorderly conduct. No university action was taken against Cole. A university panel found three students guilty of the charges and for initiating and secretly recording the "vexation exchange" with Cole. Id. The Review charged Dartmouth with censorship and reverse discrimination. A New Hampshire state judge ordered Dartmouth to reinstate two of the students on the ground that a member of the disciplinary panel was shown to be substantially biased and prejudiced against the students. John Casey, At Dartmouth the Clash of '89, N.Y. TIMES, Feb. 26, 1989, at 28. A federal court later dismissed the student's suit against the University. Dartmouth Review v. Dartmouth College, 709 F. Supp. 32 (D.N.H.), aff'd, 889 F.2d 13 (1st Cir. 1989).

Later the next semester, Cole's wife Sarah Sully, a French professor at Dartmouth, asked her students to write, in French, their opinions regarding the dispute between Cole and the Review. The Privileged Class, WALL ST. J., Sept. 20, 1989, at A24. Most of the class knew that Sully was Cole's wife and tailored their response in the exam to conform to her partisan opinion. Singh, at 58. One student who was unaware of the connection wrote an essay in support of the Review's position. The student received a "D" on the exam, despite his excellent French, because he refused to condemn the Review. Id. Sully declared that she could not "in good conscience reward an 'A' to someone who is writing racist remarks, no matter how well it is said." The Privileged Class, at A24. The student appealed the grade and the department chairman held Sully's grading of the student to be inappropriate.

33. Although restrictive speech codes are not directed so much at faculty as they are directed to students, political correctness affects faculty members through the formal and informal pressures to accept and express certain views while avoiding the support or discussion of others. Like university students, faculty members receive this pressure from the tripartite coalition of school administrators, student special interest groups, and other faculty members who are adherents to the political correctness movement. See infra notes 350-95.

34. As one commentator observed:

In the Western world, the university has historically been the locus of the freest expression to be found anywhere. One might say that the precepts embodied in the First Amendments have applied there with exceptional clarity, and long before they were vouchsafed in other areas of society. . . . The campus was a sanctuary in which knowledge and truth might be pursued—and imparted—with impunity, no matter how unpopular, distasteful, or politically heterodox the process might sometimes be.

Finn, supra note 3, at 18. Another commentator has opined that "[m]any high-priced colleges are not inculcating in students those qualities of critical thought and reflection that are the essence of a liberal education. Instead university leaders have created a sham community where serious and honest discussion is frequently drowned out by a combination of sloganeering, posturing and intimidation." Dinesh D'Souza, Cap and Goon: Facing Up to the New Intolerance on Campus, THE WASHINGTON POST, April 7, 1991, at D1.
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should be. This Comment addresses the impact of political correctness on college campuses and its demeaning effect on students, faculty, and the institution of higher learning itself. Part II summarizes the most important justifications given for the right to free speech. Part III explores the basic constitutional principles protecting the First Amendment right to free expression and also discusses constitutionally permissible restrictions on this right. In Part IV, the courts’ response to demanding politically correct expression from university students is discussed in both the public and private university context. Finally, Part V analyzes the courts’ response to political correctness in the context of university faculty members.

II. WHY HAVE A RIGHT TO FREE SPEECH?

Throughout history, the right to free speech has been justified for many different reasons. Perhaps the most important reason given for the right to free speech is to encourage the discovery of truth.35 This approach begins with the assumption that any idea might be true; therefore, any suppression of ideas might cause suppression of the truth.36 The best means to facilitate this search for truth is to allow as much speech as possible so that the truth can be revealed and incorrect assumptions can be disproven.37 John Stuart Mill emphasized the importance of the right to free speech as a facilitator in the search for truth.38 Justice Holmes also set forth this truth seeking function of the right to free speech by stating that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be...
carried out.”\(^{39}\) Holmes’ premise is that any idea might be true, and therefore suppression of ideas might cause the suppression of truth.

Another justification underlying the First Amendment is that freedom of speech is a necessary prerequisite to democracy and self-governance.\(^{40}\) Justice Brandeis, in his concurring opinion in *Whitney v. California*,\(^{41}\) strongly asserted that free speech is essential to the survival of a democratic form of government when he stated:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. [They decided] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of government majorities, they amended the Constitution so that free speech and assembly should be guaranteed.\(^{42}\)

In addition, some commentators have argued that the fundamental human dignity of each individual requires that the government not interfere with the right to freely express one’s views and opinions.\(^{43}\)

A final but very important justification for the right to free speech is that freedom of speech is crucial to engendering in our society a tolerance for diverse and conflicting viewpoints.\(^{44}\) This justification reflects that an important reason to protect freedom of speech is that it reinforces our society’s commitment to the value of tolerance, and that, by preventing the govern-

\(^{39}\) Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

\(^{40}\) Connick v. Myers, 461 U.S. 138, 145 (1983) (speech relating to democratic self-governance is at the core rather than the periphery of First Amendment values); Carey v. Brown, 447 U.S. 455, 467 (1980) (speech about matters of public concern are at the “highest rung of the hierarchy of First Amendment values”); First Nat’l Bank v. Bellotti, 435 U.S. 765 (1978) (“the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”) (citing Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (“speech concerning public affairs is more than self-expression; it is the essence of self-governance”); Citizen Publishing Co. v. United States, 394 U.S. 131, 139-40 (1969) (“The First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”) New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (freedom of expression on public questions is guaranteed by the First Amendment); American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985), aff’d per curium, 474 U.S. 1001 (1986) (“Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech . . . Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.”); Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 547-48 (1980) (In a democracy, “even the most odious ideas must be afforded constitutional protection if the society is to retain its essential characteristic of popular self-governance.”).

\(^{41}\) 274 U.S. 357 (1927).

\(^{42}\) Id. at 375-76 (Brandeis, J., concurring).


\(^{44}\) The free speech principle “involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.” BOLLINGER, supra note 35, at 107. See McGowan & Tangri, supra note 36, at 835.
ment from suppressing offensive speech, we will be forced to combat it in our society. In particular, a university’s attempt to use coercive rules to prevent the free discussion of all ideas in the name of maintaining a certain level of civility on campus is doomed to failure and will create resentment among those forced into silence. In addition, neither those permitted to freely express their ideas nor those coerced into silence have learned the value of tolerating diverse or conflicting views. Therefore, censoring expression in an attempt to create civility is likely to make the censored speech more, rather than less, appealing. Only by allowing all students the right to freely give and receive ideas can we teach them the ability to think critically, giving them the ability to change their own minds and form their own opinions. Restrictive speech codes, by suppressing or eliminating the need for critical thought about pressing social issues, undermine even this possibility.

Given these persuasive justifications for the right to free speech, the question arises why have so many university and college campuses become adherents to the political correctness philosophy that allows certain viewpoints and opinions to be prohibited? Although opposed by groups as different and ideologically diverse as the ACLU, the Heritage Foundation, and the Republican party, enforcement of politically correct thought on the American college campus is increasingly becoming accepted and adopted at many educational institutions. Even so, political correctness remains a direct challenge to the right to free speech guaranteed by the Constitution.

46. Strossen, supra note 30, at 554. "In the context of countering racism on campus, the strategy of increasing speech—rather than decreasing it—not only would be consistent with first amendment principles, but also would be more effective in advancing equality goals." Id. at 555.
47. Sometimes it is even considered politically incorrect to discuss the truth. Timothy Maguire, then a third-year law student at Georgetown University Law Center, revealed that the median LSAT score at Georgetown is 43 for whites and 36 for blacks. Georgetown’s Law Weekly published Maguire’s article revealing the LSAT discrepancy Maguire discovered while working in the admissions office. The Georgetown Aftermath, at 5. Although Georgetown threatened to expel Maguire from law school, prior to this case, Georgetown had never threatened to impose sanctions for such a breach of confidentiality. Id. In a similar case, Rev. Robert Drinan, a former liberal Democratic member of the House of Representatives from Massachusetts, had taught at Georgetown in 1985. While discussing a Supreme Court affirmative action decision during the class, Drinan wrote minority and white students’ median academic averages and their average LSAT scores on the blackboard. Georgetown did not prosecute Drinan for any breach of confidentiality. Linda Himelstein, It Has Been a Nightmare, LEGAL TIMES, April 22, 1991, at 12. Maguire’s lawyer argued that Georgetown was guilty of a double standard. Maguire’s lawyer also alleged that Maguire’s exposure of the admissions data was protected under Title VI of the Civil Rights Act of 1964 because Maguire believed he was revealing information that showed discrimination against whites at Georgetown. Any punishment of Maguire would therefore constitute a retaliatory action for Maguire’s whistleblowing on Georgetown. Anne Kornhauser, More Fallout Over ‘Admissions Apartheid’, LEGAL TIMES May 20, 1991, at 10. The disciplinary proceedings against Maguire ended in a settlement between the two sides where Maguire was allowed to graduate. The Georgetown Aftermath, STUDENT LAWYER, Oct. 1991, at 5.
III. **Political Correctness Directly Challenges Fundamental First Amendment Principles**

Political correctness goes to the heart of the First Amendment. The political correctness philosophy states that because discussing certain ideas is offensive to some special groups, these ideas should not be expressed. Enacting coercive rules to suppress certain types of speech and ideas is permissible, and those who break the rules may be severely punished. However, political correctness only requires that certain ideas not be expressed because they are offensive to certain selected groups. Only expression considered politically correct can remain unchallenged while those outside the politically correct spectrum may be freely challenged. In addition, not all groups are protected equally by these restrictions. The political correctness movement espouses the belief that because certain ideas are considered correct by adherents to the movement, these ideas are above debate.

Any inquiry into the validity or constitutionality of the tenets of political correctness requires an analysis under basic First Amendment concepts. These concepts, articulated by the Court in many speech related cases, show which restrictions on speech are valid and which are unconstitutional. The Court has demonstrated that speech may not be suppressed because of its offensiveness, content, or mode of expression and the right to free speech is especially protected in the university environment. Restrictions on speech that are overbroad, vague, or not the least restrictive means to accomplish a substantial governmental purpose are unconstitutional.

A. **Underlying First Amendment Principles**

I. **Free Speech in the University Context is Especially Protected**

In all public universities, a student's right to exercise his freedom of speech is assured by the First Amendment. Thomas Jefferson recognized this right when, speaking of the university, he said "here we are not afraid to follow truth, wherever it may lead, nor to tolerate error so long as reason is left free to combat it." Neither students nor faculty "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court has recognized that the "classroom is peculiarly the 'marketplace of ideas'," and that students have a "right to receive ideas." One of the most important purposes of getting a college education is to teach students

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54. Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (local school boards may not remove books from school library simply because they dislike the ideas contained in those books); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas.").
to think for themselves. "We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is a barrier to the tyranny of authoritarian or even majority opinion as to the rightness or wrongness of particular doctrines or thoughts."\(^{55}\) Many commentators argue that universities should allow greater, not less, freedom of expression than is prevalent in society at large.\(^{56}\) The Court has clearly repudiated the view that "First Amendment protections should apply with less force on college campuses than in the community at large."\(^{57}\)

The Court has also held that no matter how offensive it may be to some individuals, the expression of certain views on university campuses may not be suppressed to protect certain individuals from being offended.\(^{58}\) In \textit{Tinker v. Des Moines Indep. Community School Dist.}\(^{59}\) the Court held that in the high school setting, a school must show that speech regulation is based on "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."\(^{60}\) In \textit{Tinker} the Court upheld the students' rights to wear black armbands to show objection to the Vietnam War by characterizing the act as one "closely akin to pure speech."\(^{61}\) The school could not prohibit the students' expression based on an objection to the ideas expressed rather than the students' conduct in expressing the ideas.\(^{62}\) Additionally, because the students' expression did not materially or substantially interfere with the educational process, it could not be suppressed.\(^{63}\) The "undifferentiated fear" stemming from the students' silent expression of political opinion was not enough "to overcome the right to

\(^{55}\) \textit{Report of the Committee on Freedom of Expression at Yale}, \textit{4 Human Rights} 357, 357-58 (1975) [hereinafter \textit{Report}]; see \textit{Gay Alliance of Students v. Matthews}, 544 F.2d 162, 166 (4th Cir. 1976) ("[a] state college or university may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.").

\(^{56}\) Donald Kagan, Dean of Yale College, stated that:

[U]niversities have a stronger responsibility to defend freedom of speech than the public at large. . . . [W]e need to hear every kind of opinion, even the most offensive kind of opinion in order to arrive at the truth. And it is the special business of universities to seek the truth. Our standards have to be higher in defending freedom of speech.

\textit{This Week with David Brinkley}, (ABC television broadcast, May 5, 1991).


\(^{58}\) \textit{Papish v. Board of Curators of the Univ. of Missouri}, 410 U.S. 667, 670 (1973) (citing \textit{Healy}, 408 U.S. at 192-93). The Court held that the student's First Amendment rights were violated by expulsion from a state university for distributing a campus newspaper containing a political cartoon depicting policemen raping the Statue of Liberty and an article using the expression "mother-fucker": \textit{Id.} at 671. \textit{See Report, supra} note 55, at 359 ("the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable" is essential in a university); Jack Schmidt, \textit{Freedom of Thought: A Principle in Peril?}, \textit{Yale Alumni Mag.}, Oct. 1989, at 66 ("On some . . . campuses in this country, values of civility and community have been offered by some as paramount values of the university, even to the point of superseding freedom of expression. Such a view is wrong in principle, and, if extended, disastrous to freedom of thought.").

\(^{59}\) 393 U.S. 503 (1969).

\(^{60}\) \textit{Id.} at 509.

\(^{61}\) \textit{Id.} at 505.

\(^{62}\) \textit{Id.} at 509.

\(^{63}\) \textit{Id.}
freedom of expression." 64

In *Healy v. James* 65 students attempting to create a local chapter of Students for a Democratic Society at a state college were denied recognition as a campus organization. The Court ruled that the college's disagreement with the group's philosophy was not a valid reason for denying it recognition. 66 The Court noted that a public university could regulate student speech that posed a substantial threat of material disruption to the educational process. 67 Colleges were not required to tolerate activities by an association which infringed on campus rules, interrupted classes, or substantially interfered with the opportunity of other students to obtain an education. 68 The Court, however, stressed that unpopular views could not be regulated, stating that "[t]he College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." 69

The Court has clearly articulated that it will vigilantly and jealously guard the constitutional right to free speech in colleges and universities. 70 As the Court stated in *Sweezy v. New Hampshire*: 71

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise civilization will stagnate and die. 72

The possibility of disruption in society caused by expressing one’s views is not enough to overcome the constitutional right to free speech. 73 The Court has stated that "[a]ny departure from absolute regimentation may cause trouble. . . . Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." 74 Students may freely criticize their university, its faculty, or the government in vigorous and harsh terms. 75 As the Court has long recognized, in our system of government state schools “may not be enclaves of totalitarianism” where only governmentally approved views are allowed to be expressed. 76

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64. *Id.* at 508.
65. 408 U.S. at 169.
66. *Id.* at 187.
67. *Id.* at 189 (citing *Tinker* 393 U.S. at 513. See also Blackwell v. Issaquena County Board of Educ., 363 F.2d 749 (5th Cir. 1966) (court refused to prevent principal from prohibiting wearing of "freedom buttons" when the proponents of the buttons had harassed other students and caused "an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline, and decorum.
68. *Healy*, 408 U.S. at 189.
69. *Id.* at 187-88.
72. *Id.* at 250.
73. *Tinker*, 393 U.S. at 508.
74. *Id.*
76. *Tinker*, 393 U.S. at 511.
The Court has recognized the power of colleges and universities to restrict some types of student expression. "A public university does not violate the First Amendment when it takes reasonable steps to maintain an atmosphere conducive to study and learning by designating the time, place, and manner of verbal and especially nonverbal expression."\(^7\) The Court addressed the free speech rights of students in *Bethel School Dist. v. Fraser*.\(^7\) In *Bethel* the Court held that a high school had the authority to punish a student for making a lewd speech at an official school assembly.\(^7\) One justification for the regulation of the speech was that the student’s speech was lewd and sexually-oriented.\(^8\) Another justification was that, regardless of the content of the speech, it disrupted the high school assembly.\(^8\) Similarly, in *Hazelwood School Dist. v. Kuhlmeier*\(^8\) the Court held that public school officials did not violate the First Amendment rights of high school journalism students by "exercising editorial control over the style and content" of a school sponsored newspaper. "so long as their actions are reasonably related to legitimate pedagogical concerns."\(^8\) However, in *Hazelwood* the Court made it clear that its decision in *Fraser* was based on the vulgar, lewd, and plainly offensive character of the student’s speech at a school event rather than the likelihood of such speech causing a material disruption of the educational process.\(^8\)

These allowable restrictions on the student’s right to free speech do not support the attempt to suppress politically incorrect speech. Politically correct speech regulations do not limit their restraints on free speech to simply designating reasonable time, place or manner. Most, if not all, of the expression prohibited by these speech codes pose no threat whatsoever of a material disruption to the educational process. The educational process, if it is to mean anything at all, surely includes the discussion of differing and opposing views and not simply the teaching of one idea as the unassailable truth. In fact, the educational process works best when students are allowed to critically evaluate all possibilities and then to form their own opinion as to what they believe to be the correct view. In reality, restrictive speech codes are an attempt by universities to avoid discomfort from the expression of what they consider to be an unpopular or incorrect viewpoint. The Court has expressly forbidden public universities from to achieve this end.\(^8\)

Through cases involving the right to free speech on university campuses, the Supreme Court has shown a willingness to consider the special role a university plays in our society.\(^8\) The Court has clearly recognized the value of the free flow of ideas on college campuses as a tool to educate the students.

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77. Shelton v. Trustees of Indiana Univ., 891 F.2d 165, 167 (7th Cir. 1989).
78. 478 U.S. 675 (1986).
79. Id. at 676.
80. Id. at 678.
81. Id.
83. Id. at 273.
84. Id. at 271 n.4.
85. See Papish, 410 U.S. 667; Healy, 408 U.S. 169; Tinker, 393 U.S. 503.
86. See Healy, 408 U.S. 169 (1972).
and allow the development of their ability to think critically. The Court seems to be especially concerned with censorship of unpopular ideas, clearly repudiating the state's ability to demand conformity and acceptance of ideas officially approved by the state. Therefore, free speech in the university context will be especially protected and any politically correct speech restrictions would most likely be given the most exacting scrutiny in order to preserve both the students' and faculty's right to free expression.

2. Merely Offensive Expression May Not Be Prohibited

The majority of courts have concluded that even the most deeply offensive public statements are protected by the First Amendment and therefore cannot be prohibited solely on grounds of their offensiveness. As Justice Holmes stated, "it is . . . not free thought for those who agree with us, but freedom for the thought that we hate." Under our Constitution, "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Guaranteed to each American citizen is the right to freely criticize the government and its policies, and this "means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."

There is no such thing as a false idea under the First Amendment. Under our Constitution, offensive ideas may be countered with opposing ideas, not censorship of what may be offensive. In our society every citizen has an absolute right to freely express his views, even if others find these views wrong or even hateful. The right to free speech "undoubtedly means freedom to express views that challenge deep-seated, sacred beliefs

89. Street, 394 U.S. at 592. See Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (offensive statements may be protected "even when a speaker or writer is motivated by hatred or ill-will"); Houston v. Hill, 482 U.S. 451, 460-65 (1987) (criticism and insults are constitutionally protected activities); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) ("if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 85 (1976) (Stewart, J., dissenting) ("The kind of expression at issue here is no doubt objectionable to some, but in fact does not diminish its protected status."); New York Times, 376 U.S. at 270 (Court recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks"); Bridges v. California, 314 U.S. 252, 270 (1941) ("it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions"); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("[a] State may not unduly suppress free communications of views, religious or other, under the guise of conserving desirable conditions."); Abrams 250 U.S. 616, at 630 (1919) (Holmes, J., dissenting) ("we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.").
92. Id.
and to utter sentiments that may provoke resentment.”

The Supreme Court clearly articulated this view in a recent case dealing with flag burning when it stated that “virulent ethnic and religious epithets” are among the types of offensive expression that the government cannot prohibit.

In another example of this view, the Court in Cohen v. California held that the public use of offensive epithets as part of a political message was constitutionally protected expression. Cohen was convicted of violating a California statute which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct.” Cohen violated this statute by wearing a jacket bearing the words “Fuck the Draft” into a county courthouse. The Court’s first reason for protecting this speech was that if California’s statute were upheld, then such a statute could be used against a variety of other political speakers as well. The Court’s second reason for protecting this type of speech was that Cohen’s form of expression was not completely without value as the state contended. Cohen was entitled to use emotionally provocative epithets because the provocation itself had communicative value. After all, “one man’s vulgarity is another man’s lyric. Indeed, we think it largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.” The Court rejected the state’s argument that it could constitutionally punish “public utterance of this unseemly expletive in order to maintain what it regard[s] as a suitable level of discourse within the body politic.” The Court held that “so long as the means are peaceful, the communication need not meet standards of acceptability.” The Court’s ruling in Cohen seems to clearly deny the state any power to regulate the civility of speech. The Court has also ruled that individuals in public places bear the burden of averting their attention from expression which they find offensive.

In perhaps the clearest example of the impermissibility of restricting

95. Eichman, 110 S. Ct. at 2410 (1990). See American Booksellers Ass’n, Inc., 771 F.2d at 330 (“Racial bigotry, anti-semitism, violence on television, reporters’ biases—these and many more influence the culture and shape our socialization. . . . Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.”).
97. Id.
98. Id. at 16.
99. Id. at 25. “Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below.” Id.
100. Id.
101. Id. at 26.
102. Id. at 25.
103. Id. at 23.
104. Id. at 25 (quoting Citizens for a Better Austin v. Keefe, 402 U.S. 415 (1971)).
105. McGowan & Tangri, supra note 36 at 900.
106. See Erznoznik v. Jacksonville, 422 U.S. 205, 210 (1975) (ordinance banning movies showing nudity on drive-in movie screens visible from the street could not be upheld to protect the sensibilities of involuntary passers-by).
speech because it is offensive, the court in *Collin v. Smith*¹⁰⁷ allowed a Nazi march through Skokie, Illinois, a prominently Jewish neighborhood with many holocaust survivors, and held that the city's restrictions on the Nazi's right to march were unconstitutional.¹⁰⁸ The court held that the problem with adopting an exception to the First Amendment for such situations is that they are "indistinguishable in principle from speech that invites dispute, induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."¹⁰⁹

It should be clear that a university cannot restrict a student or teacher's expression of certain ideas merely because the university or certain individuals find the ideas offensive. Courts have consistently held that every citizen has a right to express his ideas, no matter how offensive they may be to others. Other citizens are free to express their own ideas in order to combat offensive ideas. In this way the Court has adopted the view that more speech, not less, is the best way to arrive at the truth. The Court uses this approach because the government has no criteria to judge what speech is offensive and should be restricted since much speech is potentially offensive to at least one individual. Therefore, the political correctness philosophy cannot rest on the concept that the expression of certain viewpoints can be silenced merely because they offend certain groups.

3. Free Speech Cannot be Regulated Based on Its Content

The First Amendment prohibits both federal and state governments from restricting speech because of an objection to the underlying ideas expressed. "[A]bove all else, the First Amendment means that [the] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹¹⁰ Any regulation of speech must be content neutral because the government has no acceptable criteria for distinguishing between valuable and worthless speech.¹¹¹

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¹⁰⁷. 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).
¹⁰⁸. *Id.* at 1201.
¹⁰⁹. *Id.* at 1206.
¹¹⁰. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
The First Amendment's protections prohibit the government from limiting the availability of information to the public.112 Under the First Amendment, the government may not allow the expression of views which it finds acceptable while suppressing less favored or more controversial ones.113 The government also may not select which issues are worth discussion or debate.114 The government must give all points of view an equal opportunity to be heard and may not restrict expression based on its content.115 In Terminiello v. Chicago116 the Court held that racist public speech which merely stirs the public to anger and invites dispute was protected under the First Amendment.117

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.118

Following the guidelines set forth by the Court, it is clear that the free expression of both students and faculty cannot be prohibited based on the content or subject matter of their speech. Any attempt to do so would violate the requirement that any restriction on speech be content neutral. This approach reflects the Court's position that expressions of opinions or beliefs cannot be regulated merely because other individuals disagree with these viewpoints or that these viewpoints are unpopular. Therefore, the political correctness philosophy cannot attempt to restrict the right to free speech simply because some ideas or expressions are considered politically incorrect.

4. Free Speech Cannot be Regulated Based on an Offensive Mode of Expression

The First Amendment also prohibits the government from restricting

113. Mosley, 408 U.S. at 96 (citing A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).
114. Id.
115. Id.
116. 337 U.S. 1.
117. Id.
118. Id. at 4-5 (citations omitted). Viewpoint discrimination is proscribed even in regulations that govern non-public forum government property. United States v. Kokinda, 110 S.Ct. 3115, 3121 (1990); Cornelius, 473 U.S. at 806. Viewpoint discrimination is also prohibited in regulations that protect captive audiences. Lehman v. City of Shaker Heights, 418 U.S. 298, 305 (1974); American Booksellers Ass'n, Inc., 771 F.2d at 333.
speech because of an objection to the offensive mode of expression. *Texas v. Johnson* 119 is a recent expression of this concept by the Court. In *Johnson*, the Court struck down a statute prohibiting the burning of the American flag and protected this form of expression under the First Amendment, even though the conduct was likely to cause serious offense to many individuals.120 “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”121 The Court concluded that Johnson's conduct did not fall within any constitutional exception to free speech and therefore his expression was protected and could not be prohibited.122 The Court stated that the toleration of offensive expressions, such as burning the flag, is a sign and source of our society's strength.123

To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries... In evaluating these choices [among symbols] under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.124

The Court dismissed the argument that speech could be suppressed solely because the views expressed are opposed by many citizens.125

5. *Overbroad Restrictions on Free Expression are Unconstitutional*

In order to meet constitutional requirements, any restriction on free speech must not be overbroad.126 A speech restriction statute found to be overbroad will be struck down as unconstitutional.127 A statute is overbroad when it is “designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment.”128 Even if the speech which is before the court is not protected by the First Amendment, a court will nevertheless strike down the statute as overbroad if it could also be applied to prohibit other expressive conduct which is protected by the First Amend-

120. *Id.* at 399.
121. *Id.* at 414.
122. *Id.* at 409.
123. *Id.* at 419.
124. Johnson, 491 U.S. at 417. See *Eichman*, 110 S. Ct. at 2408 (striking down the Flag Protection Act of 1989 on First Amendment grounds notwithstanding the government's contention that it had an interest in safeguarding the flag as "the unique and unalloyed symbol of the Nation" and conceding such conduct was likely to cause serious offense); *Cohen*, 403 U.S. 15 (protection under the First Amendment for wearing "Fuck the Draft" jacket in courthouse).
127. *Id.*
When a regulation not only affects the exceptions to free speech but also constitutionally protected speech, with no provision for severing the latter unconstitutional application, it is overbroad and void in its entirety. If the challenged provision is substantially overbroad, “the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation.” The Court has stated that a law may be declared unconstitutional “if it prohibits privileged exercises of First Amendment rights” even if the law has not yet been used to suppress such protected expression.

The constitutional doctrine of overbreadth recognizes that “the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn.” By prohibiting overbroad statutes, the Court protects against the chilling effect on speech that such statutes would likely cause. The Court has adopted a strict evaluative standard by placing the burden on the government to “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” Courts have consistently held that “statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad.”

Therefore, if a court finds that a university rule restricting some types of free expression could be applied to protected forms of speech, the court will likely invalidate the entire statute as overbroad and unconstitutional. This result is probably reached even if the rule is not applied to protected speech, because the rule could be applied to reach constitutionally protected speech. Because of the importance of the right to free expression, the Court should closely scrutinize any speech restriction which would have a chilling effect on constitutionally protected forms of expression. The overbreadth doctrine undermines any possible validity of politically correct speech codes. Even if these codes prohibited some types of expression not protected by the First

129. Id.

130. See Houston v. Hill, 482 U.S. 451, 461-65 (1987) (Court invalidated a Houston law making it “unlawful for any person to assault or strike or in any manner oppose, molest, and abuse or interrupt any policeman in the execution of his duty” on overbreadth grounds because it also forbade citizens from criticizing or insulting police officers which was a constitutionally protected activity); Gooding, 405 U.S. 518 (Court reversed the defendant’s conviction on grounds that a statute prohibiting use of “opprobrious words or abusive language” was unconstitutionally overbroad and was not confined to fighting words); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (statute prohibiting all types of picketing, peaceful or otherwise, was void due to overbreadth).


133. Brockett, 413 U.S. at 611.


135. Widmar, 454 U.S. at 270; see Pico, 457 U.S. at 877 (“the State may not suppress exposure to ideas . . . absent sufficient compelling reasons.”); Button, 371 U.S. at 433 (government may only regulate speech with “narrow specificity”).

Amendment, these codes also can be applied to suppress constitutionally protected speech. Therefore, the entire code would probably be unconstitutional due to overbreadth and could not be enforced.

6. **Vague Restrictions on Free Expression are Unconstitutional**

Another doctrine under which any speech restriction must pass is the void for vagueness doctrine. The void for vagueness doctrine requires that every law give notice to all citizens as to what activity is prohibited. A statute will be invalidated for vagueness when a person "of common intelligence must necessarily guess at its meaning." The void for vagueness doctrine requires clear guidelines to govern the enforcement of a law. The Court has held that legislators must draft statutes so that potential violators will understand which activities are prohibited and so that public officials will have explicit standards to follow. In other words, legislators must draft statutes in such a way that the "ordinary person exercising ordinary common sense can sufficiently understand and comply." Generally, a court also will conclude that a statute is vague if it fails to provide an "adequate warning of what activities it proscribes," or if it "fails to set out 'explicit standards' for those who must apply it." This is particularly true when the challenged regulation is capable of reaching expression protected by the First Amendment. The Court strictly enforces the void for vagueness doctrine in the First Amendment context. Without such clear guidelines, those who enforce the law would have discretion to enforce it on a selective basis.

Finally, because the First Amendment needs breathing space, government regulation of First Amendment rights must be drawn with "narrow specificity." The regulation must not have a chilling effect on protected forms of expression and a narrowing construction of the regulation must be unavailable before a court will declare it void for vagueness.

7. **Allowable Free Speech Restrictions Must be the Least Restrictive Means for Accomplishing a Substantial Governmental Interest**

Even if a speech regulation satisfies all the preceding requirements, it must also be the least restrictive means of accomplishing a substantial governmental interest. As the Court has stated, even if the legislative purpose is a legitimate one of substantial governmental interest, "that purpose cannot be

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138. *Id. at* 607 (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)).
141. *Broadrick*, 413 U.S. at 607.
144. *Button*, 371 U.S. at 433 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)).
pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.\textsuperscript{148} The Court requires that the legislation use means which are the least restrictive of free speech.\textsuperscript{149} In other words, statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand.\textsuperscript{150}

Any university restriction on free speech would likely be held unconstitutional because it would not be the least restrictive means to accomplish any substantial governmental interest. A court would likely hold that a university’s desire to allow only certain ideas to be expressed while suppressing others is not a substantial governmental interest. Even if a substantial government interest existed, other less restrictive means for accomplishing the objective are available such as having mandatory classes or seminars where controversial ideas could be freely discussed and debated without the threat of punishment.

\textbf{B. Constitutionally Permissible Restrictions on Free Speech}

The Court has ruled that some types of expression can be restricted by the government.\textsuperscript{151} As the Court stated in \textit{Konigsberg v. State Bar};\textsuperscript{152}

[W]e reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are ‘absolutes.’ . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidently limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the State to pass, when they have been found justified by subordinating valid governmental interests, a pre-requisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.\textsuperscript{153}

Although it is clear that the First Amendment right to free speech is not absolute, the exceptions to this important right are few and narrowly interpreted.

\textsuperscript{148} Tucker, 364 U.S. at 488.
\textsuperscript{149} Nowak, supra note 128 § 16.10 at 848.
\textsuperscript{150} Broadrick, 413 U.S. at 611.
\textsuperscript{151} Hustler Magazine, Inc., 485 U.S. at 56 (“not all speech is of equal First Amendment importance”) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985)); Dennis v. United States, 341 U.S. 494, 544 (1951) (Frankfurter, J., concurring) (“Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances.”)
\textsuperscript{152} 366 U.S. 36 (1961).
\textsuperscript{153} Id. at 49-51.
1. Clear and Present Danger Exception to Free Speech

The clear and present danger exception to the right of free speech allows for suppression or punishment of speech advocating unlawful conduct when that advocacy appears to come too close to triggering the occurrence of the unlawful conduct. This doctrine was articulated in Schenck v. United States\textsuperscript{154} when Justice Holmes stated that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."\textsuperscript{155} Speech that creates an immediately harmful impact or is tantamount to "falsely shouting fire in a theatre and causing panic" is not protected.\textsuperscript{156} Holmes further defined his clear and present danger test in Abrams v. United States\textsuperscript{157} where he stated that the government could only restrict freedom of expression when there was "present danger of immediate evil or an intent to bring it about."\textsuperscript{158}

In Dennis v. United States\textsuperscript{159} the defendants had been convicted under a federal act for conspiring to advocate the overthrow of the United States government. The Court considered whether the act was "contrary to all concepts of a free speech and free press"\textsuperscript{160} by applying "the clear and present danger [test]."\textsuperscript{161} The Court adopted the definition of this test from an earlier decision in United States v. Dennis\textsuperscript{162} which requires that "[i]n each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."\textsuperscript{163} In applying this test, the Court found that the federal act was constitutional.\textsuperscript{164}

This doctrine was again used by the Court in Brandenburg v. Ohio\textsuperscript{165} where the Court ruled that speech which causes imminent lawless action is not protected under the First Amendment.\textsuperscript{166} Government regulation of expression was permitted when the expression reached the level of "inciting or producing imminent lawless action and is likely to incite or produce such action."\textsuperscript{167} The Court distinguished between mere advocacy, which the government cannot punish, and inciting a group to violence, which the government can permissibly regulate.\textsuperscript{168}

After Brandenburg, the Court has strictly interpreted this standard, re-
Inquiring a careful consideration of the facts and circumstances surrounding the challenged expression. In *Hess v. Indiana* the police arrested the defendant, an anti-war demonstrator, for disorderly conduct for shouting "[w]e'll take the fucking street later [or again]" after police officers had cleared demonstrators off a street. The Court held that because "at worst, [defendant's speech] amounted to nothing more than advocacy of illegal action at some indefinite future time," the defendant's expression did not incite imminent action. Moreover, since the Court stated that the defendant was not even advocating action as the defendant did not direct his statement to any specific person in the crowd. Courts have expressed their continuing support for the view that some types of speech may be restricted under this doctrine.

The expression of politically incorrect ideas cannot be prohibited under the clear and present danger exception because most expression considered politically incorrect would not incite imminent lawless action and would not advocate unlawful conduct. Therefore, any restrictive speech code which attempts to suppress politically incorrect expressions cannot rely on the clear and present danger exception.

2. Fighting Words Exception to Free Speech

In *Chaplinsky v. New Hampshire* the Court unanimously upheld the conviction of a Jehovah's Witness for derogatory comments made to a fire marshall during the course of an arrest. The defendant was charged with violating a law which provided:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

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170. 414 U.S. 105 (1973) (per curiam).
171. *Id.* at 107 (last words of defendant's statement were unclear at trial).
172. *Id.* at 108.
173. *Id.* at 108-09.
174. *Johnson*, 491 U.S. at 410. ("We do not suggest that the First Amendment forbids a State to prevent 'imminent lawless action.' "); University of Michigan, 721 F. Supp. at 862 ("speech which has the effect of inciting imminent lawless action and which is likely to incite such action may . . . be lawfully punished."). Nevertheless, courts do not seem inclined to invoke the clear and present danger exception to restrict speech but instead rely on the fighting words exception. This may be a result of the early use of the clear and present danger exception in cases involving allegations of communist activities to overthrow the United States government. After the "Red Scare" and McCarthyism abuses of this century, the clear and present danger test seems to have a stigma of illegitimacy attached to it. Therefore, courts seem much more comfortable using the fighting words exception.

176. 315 U.S. 568 (1942).
177. *Id.*
178. *Id.* at 569 (quoting Chapter 378, Section 2, of the Public Laws of New Hampshire). The Court stated that the statute had two provisions, the first relating to words or names addressed to another in a public place and the second relating to noises and exclamations. *Id.*
The statute, as construed by the Court, prohibited face-to-face words, including fighting words, which were likely to cause an immediate breach of the peace. The complaint arose when the defendant yelled at the marshall, "[y]ou are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." The defendant contended the statute violated his First Amendment right to free speech. The Court upheld his conviction for making the statements on the ground that they were fighting words that were not protected by the First Amendment. The Court stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The Court therefore held that such words are beyond the protections of the First Amendment’s right to free speech and may be prohibited. “Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.” However, the Court stressed that “no words [were] forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, [they are] addressed.” The Court held that the law was a constitutionally permissible restriction on the content of the speech.

Decisions following Chaplinsky reveal an effort by the Court to narrow the holding of that case and recognize the “potential social value” of statements which might fall under Chaplinsky’s definition of fighting words. In Terminiello v. Chicago the Court invalidated a municipal ordinance prohibiting breaches of the peace on grounds that the statute was vague and overbroad. Although the Court did not reach the issue of whether the speech was protected by the First Amendment, Justice Douglas’ strong statement of the extent of permissible speech indicates a recognition that

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179. Chaplinsky, 315 U.S. at 573.
180. Id. at 569.
181. Id. at 573.
182. Id. at 571-72 (citations omitted). It must be noted that the first prong of Chaplinsky’s fighting words definition, words “which by their very utterance inflict injury” was dictum. Strossen, supra note 30, at n.119.
183. Id.
184. Id. at 571-72 (quoting Cantwell, 310 U.S. at 309-310).
185. Id. at 573.
188. 337 U.S. 1.
189. Id.
some forms of provocative and challenging speech are protected.\textsuperscript{190}

Other cases have also narrowed the fighting words exception by focusing on the context in which the words are spoken.\textsuperscript{191} In every case after \textit{Chaplinsky} dealing with fighting words, the Court disregarded the dictum in which the first prong of \textit{Chaplinsky}'s definition was set forth and treated only those words that "tend to incite an immediate breach of the peace" as fighting words. Under the Court's current view, the government may constitutionally restrict fighting words only in circumstances where their very utterance almost certainly will lead to an immediate breach of the peace.\textsuperscript{192} Therefore, a statute penalizing fighting words is unconstitutional on its face unless limited to face-to-face insults likely to cause acts of violence by the addressee in response.\textsuperscript{193}

A recent example of this view is demonstrated by \textit{People v. Dietze}\textsuperscript{194} where New York's highest court addressed a New York criminal code prohibiting the use of abusive language spoken with the intent to "harass" or "annoy" another person.\textsuperscript{195} In \textit{Dietze}, the complainant, who was mentally retarded, was walking on a public street when the defendant called her a "bitch" and said she would "beat the crap out of [the complainant] some day."\textsuperscript{196} The court reversed the defendant's conviction, holding the statute unconstitutional for overbreadth.\textsuperscript{197} The court observed that calling someone a bitch is "abusive."\textsuperscript{198} Nevertheless, the defendant's words were constitutionally protected.\textsuperscript{199}

\textsuperscript{190} \textit{Id.} at 4-5.

\textsuperscript{191} Tribe, supra note 186, at 850-51; See Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (ordinance making it unlawful for any person "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty" as construed by the Louisiana Supreme Court in such a way as being susceptible of application to constitutionally protected speech was constitutionally overbroad and facially invalid); Hess, 414 U.S. at 107-08 (speaker's statement during an antiwar protest that "We'll take the fucking street later" was constitutionally protected since the words were not aimed at anyone in particular); Gooding, 405 U.S. at 528 (statute, which prohibited any person from directing "opprobrious words or abusive language, tending to cause a breach of the peace" to another person, and which had not been narrowed by the Georgia courts to apply only to fighting words "which by their very utterance... tend to incite an immediate breach of the peace" was on its face unconstitutionally vague and overbroad); Cohen, 403 U.S. at 20 ("Fuck the Draft" not fighting words because no individual "could reasonably have regarded the words on appellant's jacket as a direct personal insult"); Bachel lar v. Maryland, 397 U.S. 564, 567 (1970) (anti-Vietnam war demonstration in front of an Army recruiting station, which involved inflammatory posters and an exchange between demonstrators and the public, did not rise to the level of "fighting words").

\textsuperscript{192} See Eaton v. City of Tulsa, 415 U.S. 697, 699 (1974) (per curiam) (reversing contempt of court conviction for witness' use of word "chickenshit," since there was no showing that it posed imminent threat to administration of justice); Hess, 414 U.S. at 107-08 (speaker's statement during an antiwar protest that "We'll take the fucking street later" was constitutionally protected since the words were not aimed at anyone in particular and there was no showing that violence was imminent).

\textsuperscript{193} Gooding, 405 U.S. at 523.

\textsuperscript{194} 549 N.E.2d 1166 (N.Y. 1989).

\textsuperscript{195} Id. at 1167.

\textsuperscript{196} Id.

\textsuperscript{197} Id.

\textsuperscript{198} Id. at 1168.

\textsuperscript{199} Id. The Court stated:
The Court's limitations on the fighting words doctrine may be summarized as follows:

The offending language (1) must constitute a personally abusive epithet; (2) must be addressed in a face-to-face manner; (3) must be directed to a specific individual and be descriptive of that individual; and (4) must be uttered under such circumstances that the words have a direct tendency to cause an immediate violent response by the average recipient. If any of these four elements is absent, the doctrine may not justifiably be invoked as a rationale for the suppression of the expression.200

Using its narrow construction of constitutionally permissible prohibitions upon fighting words, the Court has overturned every single fighting words conviction that it has reviewed since Chaplinsky.201

Under the fighting words exception to free speech, a university may constitutionally restrict certain forms of expression. Some universities, such as Stanford, have used this approach in designing their student codes.202 Other
universities have been forced to adopt this approach by the courts. The fighting words exception is very narrow and only allows the prohibition of certain well-defined types of speech. Expressing politically incorrect views that some find offensive cannot be prohibited using the fighting words exception.

3. **Low Value Speech Exception to Free Speech**

Traditionally, courts have adopted a two-tier analysis when evaluating content-based restrictions on speech. Speech is classified either as high value, enjoying the strict scrutiny extended to core political speech, or as low value, being so utterly worthless that it enjoys no First Amendment protection at all. Although the Court has not articulated any precise standard of review for low value speech, the Court has accorded different categories of speech lower value than core speech and has allowed the government greater leeway in regulating such speech in order to promote substantial state interests. Justice Stevens indicates that speech is of low value and may be regulated by the government if it intrinsically lacks sufficient social value to warrant full protection under the First Amendment. The amount of protection given to low value speech depends on the value assigned to the speech by a majority of the Court in a given case. In some cases the Court has adopted a type of intermediate scrutiny where the state must show that the law serves a substantial rather than a compelling governmental interest and is closely related to the achievement of that interest. In other cases the Court has stated that the state is required to show that "its regulation is necessary to serve a compelling state interest and that it is nar-
rowly drawn to achieve that end,\textsuperscript{212} and that the harm is both imminent and extremely likely to occur.\textsuperscript{213}

According to one commentator, low value speech may be distinguished from high value speech on four grounds.\textsuperscript{214} The speech must not involve a matter of public affairs and must have purely noncognitive appeal, the speaker must have no intent to communicate a message, and the government may not be acting to suppress speech for constitutionally impermissible reasons.\textsuperscript{215} Other commentators have suggested the abandonment of the low value approach entirely.\textsuperscript{216}

The low value speech exception to free speech is never used to prohibit the freedom to speak one's views or opinions in the university setting. The low value speech approach provides little support for the suppression of politically incorrect ideas. In fact, many of the ideas or viewpoints which would be considered politically incorrect actually have a very high value because they involve the discussion of issues and problems in our society which need to be openly discussed and debated without university censorship.

4. Group Libel Exception to Free Speech

The Supreme Court has addressed the constitutionality of group libel only once in its history. In\textit{ Beauharnais v. Illinois}\textsuperscript{217} the Court sustained the defendant's conviction for distributing racist leaflets.\textsuperscript{218} The Court upheld Illinois' power to punish distribution of the leaflets under a group libel statute prohibiting the dissemination of any publication that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."\textsuperscript{219} The court sustained Beauharnais' conviction for group libel because his leaflet communicated extreme racial and religious propaganda in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.\textsuperscript{220}

\textsuperscript{212} Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).
\textsuperscript{213} See Johnson, 491 U.S. at 412 (since the expression was restricted because of content, the State's interest in restricting such speech must be examined with the most exacting scrutiny); Cornelius 473 U.S. at 800 ("speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest"); Widmar, 454 U.S. at 276 (requiring the "most exacting scrutiny" of content-based restrictions); Brandenburg, 395 U.S. at 447-48 (distinguishing advocacy of violence in the abstract from speech threatening actual, imminent violence).
\textsuperscript{214} Sunstein, supra note 207 at 603-04.
\textsuperscript{215} Id.
\textsuperscript{216} Larry Alexander, Low Value Speech, 83 Nw. U. L. REV. 547, 552 (1989); Prygoski, supra note 208 at 319.
\textsuperscript{217} 343 U.S. 250 (1952).
\textsuperscript{218} Id. at 266.
\textsuperscript{219} Id. at 251 (quoting ILL. REV. STAT. ch. 38 para. 471 (1949)). Under this statute, group libel was defined as the depiction of the "depravity, criminality, unchastity, or lack of virtue" of any social group, including a race, which holds the group up to public contempt. Beauharnais, 343 U.S. at 251.
\textsuperscript{220} Id. at 262.
The Court cited *Chaplinsky v. New Hampshire* in support of the view that group libel was one of the unprotected categories of speech, based on the state's interest in preventing the breach of the peace that could flow from such libel. The Court stated that if the leaflet was directed at an individual, it would clearly be libelous. The Court then went on to say that "if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group." In *Beauharnais*, the Court seemed to adopt the view that offensive speech that contained epithets and degrading comments "which by their very utterance inflict injury" could be prohibited. However, in *Beauharnais* the Court seemed to hold that it was not necessary for the injurious words to incite any breach of the peace since no such breach of the peace occurred or was alleged in the case.

In his dissent, Justice Black viewed the defendant's actions as merely expressing an opinion about a matter of public concern and Black rejected the notion that the government could punish this conduct. Justice Black stated that "no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's." In addition, Justice Black stated that the only constitutionally recognized form of criminal libel protected individuals, not huge groups. Finally, Justice Black claimed group libel was merely a sugar-coating on blatant censorship and cautioned any minority groups who believed this holding was a victory to consider the warning of the time worn phrase: "[a]nother such victory and I am undone."

Later developments, however, have caused many courts to question the continuing validity of group libel under *Beauharnais*. Many commentators have also reflected their doubts as to whether *Beauharnais* group libel approach is still good law. Most importantly, *New York Times Co. v.*

221. 315 U.S. 568.
222. *Beauharnais*, 343 U.S. at 258.
223. *Id.*
224. *Id.* The Court again articulated this position by stating "we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved." *Id.* at 263.
225. *Id.* at 256. Under the fighting words exception to free speech, words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" may be prohibited. *Id.*
226. *Id.* at 270 (Black, J., dissenting).
227. *Id.*
228. *Id.* at 272.
229. *Id.* at 275.
230. See *Garrison*, 379 U.S. at 82 (Douglas, J., concurring) (arguing that *Beauharnais* is a misfit and should be overruled); Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring) (arguing that *Beauharnais* no longer reflects the view of the Court's majority); United States v. Handler, 383 F. Supp. 1267, 1277-78 (D. Md. 1974) (questioning whether *Beauharnais* is still good law).
231. *See*, e.g., *Nowak*, supra note 128, at § 16.33, at 926 ("Although Beauharnais v. Illinois has never been explicitly rejected, it should not represent present law in light of *New York Times v. Sullivan...* "); Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 284 (concept of group libel is an "anachro-
Sullivan\textsuperscript{232} established that not all libelous speech is beyond the protection of the First Amendment. This emphasis on falsity led the Court later to conclude that statements which could not be proven false could not support an action for defamation.\textsuperscript{233} In Collin v. Smith\textsuperscript{234} the court expressed its doubts about the continuing viability of the tendency to induce violence prong of Beauharnais.\textsuperscript{235} It then questioned Beauharnais' other rationale — that libel is not constitutionally protected speech — in light of New York Times and the cases following that decision.\textsuperscript{236} The court expressly rejected the argument that group libel could be regulated solely on the basis of its offensiveness without regard to its likelihood to lead to violence.\textsuperscript{237} In addition, the Supreme Court has recently reaffirmed the principle that statements that defame groups convey opinions or ideas on matters of public concern and therefore should be protected even if those statements are offensive to some individuals.\textsuperscript{238} Although the Court declined "to create a wholesale defamation exemption for anything that might be labeled opinion," it stressed that statements would only be actionable in defamation suits if it was concluded that they imply an assertion of fact.\textsuperscript{239}

The validity of group libel is at best uncertain and has been called into question by many courts and commentators as a way to restrict free speech. The Court has made it clear that the government cannot prohibit the expression of "virulent ethnic and religious epithets"\textsuperscript{240} and therefore any statements of opinions or beliefs about certain groups which happen to offend or are derogatory toward such groups should be protected under the First Amendment. Any university speech restriction based on the group libel approach which is designed to prohibit speech merely because it is offensive or demeaning to a group would most likely be held to be in violation of the First Amendment.

IV. EFFECT OF POLITICAL CORRECTNESS ON STUDENTS

One manifestation of political correctness' effect on students is found in the passing of student codes by many universities that restrict the students'...
right to free speech. Many of these codes are purportedly designed to prevent certain kinds of discriminatory remarks or hate-speech. These restrictions on speech do not fall within any of the recognized categories of speech which may be prohibited, such as speech which represents a clear and present danger, fighting words, or low value speech. Additionally, courts have never recognized that such types of speech may be prohibited; indeed the opposite is true in that a substantial amount of speech prohibited by these codes is specifically protected under the First Amendment. Finally, these restrictive codes reflect the politically correct philosophy of punishing the expression of certain ideas which are considered by some to be politically incorrect while leaving the expression of other ideas which may be just as offensive to other groups completely unrestricted. These unprotected ideas have the misfortune of being outside the realm of politically correct thought.

A. Court's Response to Politically Correct Speech Codes in the Public University

1. Doe v. University of Michigan

In 1988 the University of Michigan adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment [Michigan Policy].241 Under the Michigan Policy, a student could be subjected to sanctions ranging from a formal reprimand to expulsion from the University for "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnamese veteran status, and that:

a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:

a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

Id. In August of 1989, the University withdrew section 1(c) although the analogous provision in section 2(c) remained in force. Id.
Vietnam-era veteran status." An interpretive guide published in connection with the policy, but later revoked, gave examples of both sanctionable conduct and conduct that would make one a harasser. The former category included a male student remarking in class that "women just aren't as good in this field as men," and students in a dormitory sponsoring a party and inviting everyone on their floor except for one woman because some students thought she might be a lesbian. Examples of conduct that would make one a harasser included telling jokes about gay men or lesbians; displaying a confederate flag on the door of your residence hall; laughing at a joke about someone in a class who stutters; and making a derogatory comment about a particular person or group's appearance, sexual orientation, cultural origins, or religious beliefs.

A University of Michigan graduate student specializing in biopsychology, a field of psychology that studies biological bases of individual differences in personality traits and mental abilities, filed suit against the University claiming that the Michigan Policy violated his right to freedom of speech. He claimed that his right to freely and openly discuss controversial theories of biologically based differences between the sexes and races might be sanctionable under the policy. In its discussion of the student's claim, the court also noted that on at least three other occasions the University applied the Michigan Policy to prohibit protected speech in the classroom. In the first case, the University charged a graduate student with violating the Michigan Policy by stating in a research class his belief that "homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight." For expressing his opinion, the University charged the student with sex and sexual orientation harassment. A hearing panel later unanimously found the student guilty of sexual harassment. In the second case, a student was charged with violation of the Michigan Policy for reading an allegedly homophobic limerick during a class public speaking exercise which ridiculed a well known athlete for his presumed sexual orientation. After pressure from the school and to avoid punishment under the Michigan Policy, the student agreed to attend a "gay rap session," write a letter of apology to the campus newspaper, and apologize to his class. The third case took place in a class which was widely regarded as one of the most difficult for dentistry students. The class had been broken up into smaller sections to informally discuss anticipated class problems. One student stated that "he heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly." The student heard this allegation from his roommate, a black dentistry student. The teacher of the class charged the student with violating the Michigan Policy. The student agreed to write

242. *Id.* at 856-57.
243. *Id.* at 858.
244. *Id.*
245. *Id.*
246. *Id.* at 864.
247. *Id.* at 865.
248. *Id.* at 866.
a letter of apology for making the comment without adequately verifying whether his allegation was true. The court also noted that in another case, a complaint of anti-semitic harassment was filed by a Jewish student against another student who suggested that Jews cynically used the Holocaust to justify Israel's policies toward the Palestinians. Unlike the previous cases, here the Jewish student was told that the comment was protected speech not punishable under the Michigan Policy. According to the court, these cases showed that the University did not exempt statements made in the course of classroom academic discussions from the sanction of the Michigan Policy. In all these cases, the persuasion used by the University to get students to accept some punishment was backed up with "the subtle threat that failure to accept such sanctions might result in a formal hearing."249

In response to the University's argument that the plaintiff lacked standing to challenge the Michigan Policy, the court ruled that "[t]he ideas discussed in Doe's field of study bear sufficient similarity to ideas denounced as 'harassing' in the Guide to constitute a realistic and specific threat of prosecution."251 The court noted that the drafters of the Michigan Policy "intended that speech need only be offensive to be sanctionable."252 The court held that the University could not "establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed. . . . nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people."253 "[T]he fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests."254

Because the Michigan Policy attempted to regulate constitutionally protected speech, the court ruled that the policy was unconstitutionally overbroad both on its face and as applied.255 In addition, the court ruled that the Michigan Policy was unconstitutionally vague because it was "impossible to discern any limitation on [the policy's] scope or any conceptual distinction between protected and unprotected conduct."256

2. The UMW Post, Inc. v. University of Wisconsin

In 1989, the University of Wisconsin System amended the student conduct code to establish a new offense for certain forms of expression under which students could be expelled or receive other sanctions.257 Under the new policy (Wisconsin Policy), "racist or discriminatory comments, epithets

249. Id. at 865.
250. Id. at 866.
251. Id. at 860.
252. Id.
255. Id. at 866.
256. Id. at 867.
or other expressive behavior directed at an individual" that intentionally
"demean" the individual's "race, sex, religion, color, creed, disability, sexual
orientation, national origin, ancestry or age" and which will "create an in-
timidating, hostile or demeaning" university environment are prohibited. 258
To be regulated under the Wisconsin Policy, a comment, epithet or other
expressive behavior had to be: racist or discriminatory; directed at an in-
dividual; demeaning to the race, sex, religion, color, creed, disability, sexual
orientation, national origin, ancestry or age of the individual addressed; and
created an intimidating, hostile or demeaning environment for education,
university-related work, or other university-authorized activity. 259 Penalties
for violating the Wisconsin Policy included written reprimand, probation,
suspension or expulsion from the University. 260 The Wisconsin Policy ap-
plied to students wherever they were located, even off campus, and also ap-

258. Wis. Admin. Code § UWS 17.06(2) (June 1989). The Wisconsin Policy in full read
as follows:

(2)(a) For racist or discriminatory comments, epithets or other expressive be-
havior directed at an individual or on separate occasions at different individuals,
or for physical conduct, if such comments, epithets, other expressive behavior or
physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orien-
tation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for educa-
tion, university-related work, or other university-authorized activity.
(b) Whether the intent required under par. (a) is present shall be determined
by consideration of all relevant circumstances.
(c) In order to illustrate the types of conduct which this subsection is designed
to cover, the following examples are set forth. These examples are not meant to
illustrate the only situations or types of conduct to be covered.
1. A student would be in violation if:
   a. He or she intentionally made demeaning remarks to an individual
      based on that person's ethnicity, such as name calling, racial slurs, or
      "jokes"; and
   b. His or her purpose in uttering the remarks was to make the educa-
tional environment hostile for the person to whom the demeaning re-
mark was addressed.
2. A student would be in violation if:
   a. He or she intentionally placed visual or written material demeaning
      the race or sex of an individual in that person's university living quarters
      or work area; and
   b. His or her purpose was to make the educational environment hostile
      for the person in whose quarters or work area the material was placed.
3. A student would be in violation if he or she seriously damaged or
   destroyed private property of any member of the university community
   or guest because of that person's race, sex, religion, color, creed, disabil-
ity, sexual orientation, national origin, ancestry or age.
4. A student would not be in violation if, during a class discussion, he
   or she expressed a derogatory opinion concerning a racial or ethnic
group. There is no violation, since the student's remark was addressed to
the class as a whole, not to a specific individual. Moreover, on the facts
as stated, there seems no evidence that the student's purpose was to cre-
ate a hostile environment.

Id.

During the time the Wisconsin Policy was in force, the University prosecuted several students for violations of the policy. In one case, the University "found that a student used inappropriate language" when he called another student Shakazulu. This student was placed on probation, required to meet with an alcohol abuse counselor and to plan a project with the University's Center for Education and Cultural Advancement so that he could become sensitized to the issues of diversity. In a second case, the University punished a student for stating to an Asian-American student that "[i]t's people like you that's the reason this country is screwed up," that "[y]ou don't belong here," and that "[w]hites are always getting screwed by minorities and some day the whites will take over." The student making the statement was placed on probation for seven months and had to participate in an alcohol abuse assessment and treatment program. In a third case, the University disciplined a student for harassing a Turkish-American student by impersonating an immigration official and asking for the Turkish-American student's immigration documents. The student was placed on probation for eight months. In a fourth case, during a physical altercation a student allegedly called one University staff member a "piece of shit nigger" and the other a "South American immigrant." The student was sentenced to a seven month suspension. In a fifth case, a student working with the University's computer system sent a message to an Iranian faculty member stating "Death to all Arabs!! Die Islamic scumbags!!" The student was formally reprimanded and placed on probation for the remainder of the semester. In a sixth case, a student was required to watch a video on racism and write an essay and a letter of apology after she called another student a "fat-ass nigger" during an argument. Finally, in a seventh case a male student yelled at female student "you've got nice tits." The student was placed on probation for the remainder of his enrollment at the University, was ordered to refrain from contacting the female student, and was required to obtain psychological counseling.

The plaintiffs filed suit against the University of Wisconsin alleging that the Wisconsin Policy was unconstitutionally overbroad and void for vagueness. The plaintiffs stated that the policy was an unconstitutional content based rule which regulated a substantial amount of protected speech, includ-

263. Id.
264. Id.
265. Id. at 1168.
266. Id.
267. Id.
268. Id. at 1168. In support of their claim of overbreadth and vagueness, the plaintiffs cited one example where the University stated that "it would be very difficult to show that the term 'redneck' is by itself the equivalent of a discriminatory epithet." Brief, supra note 261, at 45. The plaintiffs cited this as an example of the difficulty of applying the term epithet to situations which deserved punishment. In another case in which a white student called a black student "nigger", the University decided the policy had not been violated because the white
ing offensive epithets directed at political issues which are protected forms of speech under the First Amendment. The plaintiffs also argued that the policy prohibited students from expressing opinions and ideas about important social issues which also made the policy unconstitutionally broad.

The court agreed that the policy was overbroad and in violation of the plaintiffs’ right to free speech and therefore enjoined the University from any enforcement of the Wisconsin Policy. The court rejected the University’s contention that it could regulate these types of expressions to prevent interruption of educational activities. The court emphasized that speech protected under the First Amendment could be prohibited under the Wisconsin Policy. Under the fighting words exception to free speech, the expression must incite an immediate breach of the peace. However, under the Wisconsin Policy no such requirement was necessary. “[S]peech may demean an individual’s characteristics without tending to incite that individual or others to an immediate breach of the peace.” In addition, the court noted that an “intimidating or demeaning environment is unlikely to incite violent reaction.”

Because the policy regulated expression regardless of whether it was likely to provoke a violent response, it covered a substantial number of situations where no breach of the peace was likely to result. Therefore, the Wisconsin Policy failed to meet the requirements of the fighting words exception or any other recognized exception to free speech and was an unconstitutional content based regulation on speech.

The Wisconsin Policy was also ruled to be unconstitutionally vague. The court noted that nothing in the Wisconsin Policy prevented it from “regulating speech which is intended to convince the listener of the speaker’s discriminatory position.” Because of this, the policy would prohibit speech in many situations where students were merely attempting to convince other individuals of their positions. The speech the policy attempted to suppress would also be protected because of its “emotive function” as well as its protection of speech on matters of public concern. Speech is protected under the First Amendment for its emotive function even if it lacks cognitive value or intellectual support. The University’s claim that the prohibited speech constituted verbal assault on a listener gave no support to the suppression of such speech because speech which causes injury is still

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student was raised in a neighborhood where it was common for both blacks and whites to refer to blacks who were not respected as “nigger.” Id. at 1168-69.

269. UWM Post, Inc., 774 F. Supp. at 1176.
270. Id. at 1177.
271. Id.
272. Id. at 1175 (citing Widmar, 454 U.S. 263; Healy, 408 U.S. 169; Tinker, 393 U.S. 503).
273. Id. at 1172.
274. Id.
275. Id.
276. Id.
277. Id. at 1173.
278. Id. at 1177.
279. Id. at 1175.
280. Id.
281. Id. at 1178.
entitled to protection under the First Amendment. The court stated that the Wisconsin Policy "does as much to hurt diversity on Wisconsin campuses as it does to help it. By establishing content-based restrictions on speech, the [policy] limits the diversity of ideas among students and thereby prevents the 'robust exchange of ideas' which intellectually diverse campuses provide."

3. Wu v. University of Connecticut

In 1989 the University of Connecticut enacted a student speech code (Connecticut Policy) which prohibited certain kinds of student expression. Article VII(4) of the policy as originally adopted prohibited the following:

4. Harassment and/or Intimidation — Conduct causing alarm, or recklessly creating a risk by: threatening to commit crimes against persons or their property; exhibiting, distributing, posting, or advertising publicly offensive, indecent or abusive matter concerning persons; using, in a public place, abusive or obscene language or making obscene gestures; making unwelcomed sexual advances or requests for sexual favors; making personal slurs or epithets based on race, sex, ethnic origin, disability, religion or sexual orientation. This also covers harassment or intimidation of persons involved in a University disciplinary hearing and of persons in authority who are in the process of discharging their responsibilities.

The Connecticut Policy also provided that the "use of derogatory names, inappropriately directed laughter, inconsiderate jokes, anonymous notes or phone calls, and conspicuous exclusion from conversations and/or classroom discussions are examples of harassing behaviors that are prohibited." The Connecticut Policy listed the "signs" of proscribed "Harassment, Discrimination and Intolerance," some of which included:

Stereotyping the experiences, background, and skills of individuals.
Treating people differently solely because they are in some way different from the majority.
Responding to behaviors or situations negatively because of the background of the participants.
Imitating stereotypes in speech or mannerisms.
Attributing objections to any of the above actions to "hypersensitivity" of the targeted individual or group.

Nina Wu, a student of the University, was expelled from University residences and dining halls after she displayed a poster on her door listing "people who are shot on sight" including "preppies, bimbos, men without chest hair, racists and homos." The word homos violated the Connecticut Pol-

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282. Id. at 1175.
283. Id. at 1176.
285. Department of Student Affairs, Univ. of Connecticut, Protect Campus Pluralism (quoted in Robert Post, supra note 25, at 269.
286. Id.
icy's prohibition against making slurs or epithets based on race, sex, ethnic origin, religion or sexual orientation. Wu filed suit against the University claiming that the Connecticut Policy was unconstitutional because it was overbroad and vague and that the University's action violated the exercise of her right to free speech.

The lawsuit forced the University to change the Connecticut Policy, although the University made the changes with apparent reluctance and distress. The parties entered into a consent decree, approved by the court, amending the Connecticut Policy to prohibit only narrowly defined "fighting words." The consent decree provided that the University was permanently enjoined from enforcing Article VII(4) of the Connecticut Policy or any part of it which "interferes with the exercise of First Amendment rights by the . . . student, when the exercise of such rights is unaccompanied by violence or the imminent threat of violence." The consent decree also provided that the University would allow Wu to move back into her dormitory room. The Connecticut Policy now appears less likely to be declared unconstitutional on its face, although it may remain unconstitutional as applied to student conduct.

4. Sigma Chi Fraternity v. George Mason University

For the past two years at George Mason University, the Sigma Chi fraternity has held an event known as Derby Days. Derby Days is a combined social event and charitable fund raising activity performed by the fraternity. A traditional event during Derby Days is the "Dress A Sig" contest in which fraternity members are dressed as caricatures of "ugly women." In preparation for the 1991 Derby Days, the fraternity submitted the Derby Days program to George Mason University's assistant director of student organizations and programs for approval. The program specifically listed the "Dress A Sig" contest as one of the events stating: "Dress a SIG contest

289. Wu, No. H89-649 (D. Conn. 1990). Article VII (4) as amended now provides that:
   4. Harassment and/or Intimidation—Conduct causing alarm, or recklessly creating a risk by: threatening to commit crimes against persons or their property; making unwelcome sexual advances or requests for sexual favors. This also covers harassment or intimidation of persons involved in a University disciplinary hearing and of persons in authority who are in the process of discharging their responsibilities.
   The face to face use of "fighting words" by students . . . is prohibited. "Fighting words" are those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke an immediate violent reaction, whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, religion, sex, sexual orientation, disability, and other personal characteristics.
290. Id. at 2-3.
291. Id. at 3.
293. Id.
After requiring numerous changes in the program to be made, the University approved the program. However, the University made no request for any changes to the Dress A Sig contest.

During the Dress A Sig contest, one of the participants “dressed in black face, used pillows to represent breasts and buttocks and wore a black wig with curlers.” Other fraternity members dressed up as other types of “ugly women.” One week after the contest took place several students from the University requested that the University impose sanctions on the fraternity because the contest had “offended them because it perpetuated racial and sexual stereotypes.” In response to the request, the University suspended the fraternity for two years. The fraternity brought suit against the University claiming that their right to free speech had been abridged.

The court agreed that the fraternity’s right to free speech had been unconstitutionally restricted and enjoined the University from imposing any discipline on the fraternity as a result of the Dress A Sig contest. The court held that “[o]ne of the fundamental rights secured by the First Amendment is that of free, uncensored expression, even on matters some may think are trivial, vulgar or profane.” A state university has no right to restrict a student’s First Amendment rights simply because the university believes that “exposure to a given group’s ideas may be somehow harmful to certain students.” Although appropriate time, place and manner restrictions on free expression are permissible, a state university may not suppress expression because it finds that expression offensive. Here, the University was attempting to punish the fraternity for certain expressions simply because the activity was deemed offensive by the University. In this situation, the University was not regulating conduct but instead was attempting to regulate the content of the message conveyed by the contest because the expression happened to offend certain student groups. The court held that the skit was a form of student expression which “demands First Amendment protection,” and stated that allowing a student organization to express itself through this sort of activity was “consistent with [the University’s] educational mission in conveying ideas and promoting the free flow and expression of those ideas.” The court suggested to the University that:

[A] more appropriate response to the activities of the fraternity, and one

294. Id.
295. Id.
297. Iota Xi Chapter of Sigma Chi Fraternity, 773 F.Supp. at 793.
298. Id. at 794.
299. Id. at 793.
300. Id. (citing Healy, 408 U.S. at 187-88).
301. Id. at 795.
302. Id. at 794.
303. Id.
304. Id. The court noted that there was no substantial or material disruption of the University’s educational mission which would allow it to suppress this form of expression. Id. (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988); Healy, 408 U.S. 169).
consistent with the First Amendment 'would have been instead to say to those offended by . . . [the] speech that their right to protest that speech by all peaceable means would be as stringently safeguarded . . . as would . . . [the] right to engage in it.'

The clear implication by the court is that those who are offended by certain expressions may not prohibit the expressions but instead are free to express their own opposing viewpoints.

The court stated that "[t]he First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar or profane." Although the University did not approve of the message expressed by the fraternity's contest, the University could not discipline the students by infringing on their First Amendment rights merely because other students found the content of the contest offensive. The University was trying to discipline the students based on the "heckler's veto" which was impermissible and unconstitutional.

B. Political Correctness in the Private University

The constitutional guarantees of free speech provided in the First Amendment only restrict the state and federal government from suppressing protected forms of expression. Included in this group subject to First Amendment restraints are state actors—entities which represent state authority because of their close connection with the state. State actors, such as state universities, are also prohibited from suppressing speech protected by the First Amendment. However, the First Amendment does not apply to private entities who remain free to restrict speech in ways which would be held unconstitutional if the action were done by the government or a state actor. In many cases it is difficult to clearly distinguish between state actors and private entities, and in such instances the state action doctrine is invoked to determine if the acts of an allegedly private entity may be considered state action and thus subject to constitutional limitations provided by the First Amendment.

1. State Action Issue

Most of the protections for individual rights and liberties contained in the Constitution and its amendments apply only to the actions of governmental entities. The safeguards against deprivations of individual rights which are contained in the text of the Constitution specifically apply only to the activities of either the federal or state governments. Additionally, any

305. Id. (quoting Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985), cert. denied, 476 U.S. 1159 (1986)).
306. Id. at 795.
307. Id.
308. Id.
309. See Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) (protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights.").
310. See Gitlow v. New York, 268 U.S. 652, 666 (1925) (Court extended the First Amendment's prohibitions to the states through the Fourteenth Amendment's due process clause).
subdivision of a federal or state government represents government or state authority to a sufficient degree to invoke constitutional restrictions on its actions.  

When a legislature, executive officer, or judicial system takes some official action against an individual, that action is subject to review under the Constitution because the official act of any governmental agency is direct governmental action. The "state action" issue only arises when the person or entity alleged to have violated the Constitution is not acting on behalf of the government. In such a case the person alleged to have violated the constitutional provision will argue that he is incapable of violating the Constitution because he is not part of the government, giving rise to the question of whether the state action issue applies.

A state university is a state actor and its conduct involves state action. In the public school context, "state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment." It is in the context of the private university that the state action issue arises. Because private schools are somewhat insulated from the requirements of public schools, private universities remain "free to take positions which are often impossible or uncomfortable for the State University."  

The tax-exempt status or government allocation of funds to a private university does not by itself create state action. Courts will also consider whether the state is so closely involved in regulating a private institution that it becomes a de facto state school. Some judges and commentators have

311. NOWAK, supra note 128, at § 12.3.
312. Id.
313. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (state action depends on whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State."); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."); United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" is state action).
315. Pico, 457 U.S. at 880.
318. See Tarkanian, 488 U.S. at 195 (1988) (University's imposition of disciplinary sanctions against basketball coach in compliance with NCAA rules and recommendations did not turn NCAA's otherwise private conduct into state action); Evans v. Newton, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with governmental character" that it can be regarded as governmental
urged that there is state action whenever a private individual's conduct "is lawful within the state" and that "this is true whether the state has explicitly authorized the challenged practice or simply allowed it to exist." Courts have rejected the argument that the conduct of private universities is state action because of their public function of education. Another type of public function argument, which analogizes a college campus to a "company town," also has failed to provide a basis for state action.

In Furumoto v. Lyman students at Stanford, a private university, were charged with violating the student code for interrupting a professor's class with allegations of racism. The students alleged that Stanford had denied them their right to free speech under the First Amendment. The court held that Stanford's actions were not state action. "A finding of general state action here would require more than an accumulation of the state benefits or regulations [of the school by the state]." The court held that even if Stanford was directly subsidized by the state, this financial aid would not necessitate a finding of State control; "[t]he question would then be what control did the State obtain over the University." University education as such is not necessarily state action.

As the preceding discussion demonstrates, a private university is most likely not bound by First Amendment limitations in the United States Constitution. Therefore, a private university would not be prohibited solely on

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319. Robert J. Glennon & John E. Nowak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 SUP. CT. REV. 221, 230; see Rendell-Baker, 457 U.S. at 849-50 (Marshall, J., dissenting) ("When an entity is not only heavily regulated and funded by the State, but also provides a service that the State is required to provide, there is a very close nexus with the State. Under these circumstances, it is entirely appropriate to treat the entity as an arm of the State.").


321. See, e.g., Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971) (rejecting allegations that private university took on public character because it was a self-contained community); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (asserting categorical differences between football field of private university and company town); McLeod v. College of Artesia, 312 F. Supp. 498 (D.N.M. 1970) (public patronage of private university school buildings did not create public function similar to that of company town).


323. Id. at 1268.

324. Id. at 1278.

325. Id.

326. Id. at 1279.
First Amendment grounds from enforcing politically correct speech codes against university students. Whether a private university with academic integrity and intellectual honesty would want to hide behind the state action issue to suppress certain types of speech is another matter. Congress has also begun to consider the validity of speech restrictive student codes. Illinois Representative Henry Hyde has introduced a bill in Congress that would require private universities to comply with the requirements of the First Amendment. House Resolution 1380 was introduced as the “Collegiate Speech Protection Act of 1991” on March 12, 1991. The bill would amend Title VI of the Civil Rights Act of 1964 to provide a civil lawsuit for students at private schools similar to that available under the Constitution to students at public schools. Senator Larry Craig introduced Senate Bill 1484 on July 17, 1991 as the “Freedom of Speech on Campus Act of 1991” which would amend Title IX of the Education Amendments of 1972 to withhold federal financial assistance from any school with a formal disciplinary code that punishes students who utter politically incorrect speech. If these types of laws were enacted, private universities would be prohibited from enforcing political correctness without regard to the state action issue.

2. State Constitutions

Many state constitutions explicitly provide for the right to free expression. These state constitutional provisions promote a broad definition of the right to free speech by expressly providing protection to certain forms of expression. Unlike the First Amendment which applies to state and federal governments and sometimes to private entities under the state action doctrine, some state constitutions create an affirmative right to expressive freedom which applies to both public and private entities in the state. Several courts have clearly stated that their state constitutions provide for greater free speech rights than those provided for under the United States Constitution.

328. Jipping, supra note 12.
329. Id.
330. Id.
331. Id.
333. See, e.g., Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (court affirmed California Supreme Court’s holding that California state constitution provides more expansive free speech rights than that provided under the First Amendment); Batchelder v. Allied Stores
In *State v. Schmid* the court held that Princeton University, a private institution, violated a nonstudent's expressive rights when it evicted him from the campus after he distributed political literature. The court indicated that the New Jersey constitution required the University to respect the free speech rights of the defendant, despite the absence of state action. Although the defendant's actions were not protected by the First Amendment, they were protected by the New Jersey state constitution. Similarly, in *Commonwealth v. Tate* the Supreme Court of Pennsylvania held that Muhlenberg College, a private entity, infringed on the state constitutional rights of two nonstudents who were distributing pamphlets on the campus. The court noted that a state constitution may provide more expansive individual rights and liberties than the United States Constitution provides. These types of cases stand for the proposition that even private colleges and universities risk violating state constitutional rights of expressive freedom even though such rights might not be protected under the United States Constitution, either because the conduct does not fall within First Amendment protection or because the state action doctrine bars any application of the First Amendment to the private university.

3. The Supreme Court

The Supreme Court recently addressed the constitutionality of a particular hate speech ordinance and declared it unconstitutional. In *Matter of R.A.V.*, the Minnesota Supreme Court upheld the defendant's conviction under a hate speech ordinance. The ordinance stated that:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The defendant was charged with violating the ordinance for burning a cross in a black family's yard. The defendant alleged that the ordinance was

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Int'l, Inc., 445 N.E.2d 590, 593 (1983) (Massachusetts Declaration of Rights provides broader speech rights than the United States Constitution); Alderwood Assoc. v. Washington Envtl. Council, 635 P.2d 108, 113 (1981) ("We have often independently evaluated our state constitution and have concluded that it should be applied to confer greater civil liberties than its federal counterpart ... "); see generally W. Freedman, *FREEDOM OF SPEECH ON PRIVATE PROPERTY* 75-82 (1988) (state protection is frequently broader than that provided by the federal First Amendment).

335. *Id.*
336. *Id.* at 630.
338. *Id.* at 1387.
339. *Id.*
341. *Id.*
342. *Id.* at 508 (quoting *St. Paul, MINN. LEG. CODE* § 292.02 (1990)).
overbroad on its face because it could be applied to prohibit expression protected under the First Amendment. On its face, the ordinance could be used to prohibit protected forms of expression such as flying a Confederate flag, placing a sign on a door denouncing the government as racist, displaying a cartoon ridiculing a university's racially preferential admission policies, or lampooning the Catholic church for its anti-abortion stance.

The Minnesota Supreme Court held that the ordinance should be narrowly interpreted to reach only unprotected conduct such as the fighting words exception for conduct that inflicts injury or tends to incite immediate violence or the exception for conduct that is likely to incite or produce imminent lawless action. Because the ordinance was not interpreted to reach protected forms of expression, the Minnesota Supreme Court held that the ordinance was not unconstitutionally overbroad.

The United States Supreme Court reversed, holding that the ordinance was facially invalid under the First Amendment because it unconstitutionally prohibited speech on the basis of the subjects the speech addresses. The Court held "the government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." The Court stated that:

[T]he ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." . . . Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.

The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects . . . In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination . . . But "fighting words" that do not themselves invoke race, color, creed, religion, or gender-aspirations upon a person’s mother, for example—would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by the speaker’s opponents . . . St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules. The Court noted that under the First Amendment, majority preferences cannot justify the silencing of speech based on its content. Finally, the Court rejected the argument that the ordinance served a compelling interest, stating that "the only interest distinctively served by the content limitation is that of displacing the city council’s special hostility towards the particular biases thus singled out. That is precisely what the First Amendment

343. Id. at 510.
344. Id.
346. Id. at *5.
347. Id. at *6-7 (citations omitted).
348. Id. at *7.
V. POLITICAL CORRECTNESS AFFECTS FACULTY MEMBERS

Political correctness also has an effect on faculty members by the pressure put on them by the university administration and certain special interest student groups to accept and express certain views while avoiding the support or discussion of others. This unhealthy restriction on the learning environment is harmful to students in that they are not presented with the full spectrum of opinions or viewpoints in many subject areas. In turn, students may feel less willing to express these politically incorrect ideas because of a perceived "wrongness" with which these views are now endowed.

A. Idea of Academic Freedom

The legal conception of academic freedom is generally stated in terms of the "four freedoms" of universities. The university has the right "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." "Our Nation is deeply committed to safeguarding academic freedom [which is] a special concern of the First Amendment, [and] which does not tolerate laws that cast a pall of orthodoxy over the classroom." As Justice Frankfurter has stated:

[I]nhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of [the First and Fourteenth Amendments] vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice . . .

Courts generally do not characterize the claims of individual professors as "academic freedom" claims, but instead resolve these claims under a general First Amendment analysis.

B. Response of the Courts

1. Levin v. Harleston

One court's recent attempt to grapple with the political correctness debate

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349. Id. at *9.
351. Id. at 263.
352. Keyishian, 385 U.S. at 603; see University of Pennsylvania v. EEOC, 110 S. Ct. 577, 586 (1990) (court reaffirmed an "academic-freedom right against governmental attempts to influence the content of academic speech."); Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) ("absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"); Adler v. Board of Educ., 342 U.S. 485, 511 (1952) (Douglas, J., dissenting) (academic freedom is central to "the pursuit of truth which the First Amendment is designed to protect").
demonstrates itself vividly in Levin v. Harleston. The court began its discussion by stating that "[t]his case raises serious constitutional questions that go to the heart of the current national debate on what has come to be denominated as 'political correctness' in speech and thought on the campuses of the nation's colleges and universities." Professor Levin was a tenured philosophy professor at the City College of New York (City College), a public institution, and was well known for his controversial views on issues such as racism, feminism, and homosexuality. However, these subjects were not taught in his classes. In fact, in his twenty-two years of teaching, Professor Levin had taught more than 3,000 students and had never had a complaint from any student for unfair treatment on the basis of race or sexual orientation.

Professor Levin was the repeated target of protest groups for several years at City College. A few of the protestors' activities included distributing pamphlets outside Professor Levin's classes; burning documents attached to his door; calling him a racist while blocking entry and exit from his classroom; attaching a letter to his office door stating "[w]e know where you live you Jewish bastard your time is going to come"; and sending him two written death threats in his campus mail box. Professor Levin repeatedly complained of the disturbances to college officials, but no action was taken. When he met to complain of the protests and inaction of City College, the college president told him "What do you want me to do? There's academic freedom issues here. The students have academic freedom as well, and their academic freedom is protected." Although the offending students were cited for violating City College's student code, the students simply refused to appear to answer any of the charges. City College did not pursue any disciplinary action against the students because it claimed that enforcing the rules would cause chaos on campus.

Professor Levin was subsequently asked to withdraw from teaching his required philosophy course because of a feared disruption of class by protestors and because some members of the class might "feel uncomfortable being taught by one holding such views." City College had never before asked a professor to withdraw from a class for these reasons; nevertheless, Professor Levin complied.

Professor Levin resumed teaching his philosophy class the following semester. However, a City College dean sent Professor Levin's incoming stu-
students a letter stating that the professor had "expressed controversial views" and telling them that a newly opened second section—a so-called shadow section—of his required philosophy course was available with another professor. Never before had City College created such a shadow section merely to allow students to avoid taking a class taught by a particular professor.

The president of City College requested that the College Faculty Senate appoint a faculty committee to investigate allegations of bias and racism on campus. The Faculty Senate refused to do so on the grounds that such a committee would have a chilling effect on the campus. The president thereafter simply appointed the committee himself, staffing it with members who had previously denounced Professor Levin and who had no academic background in philosophy. The president later stated to a group of students that his formation of the committee was in response to their demand that Professor Levin be fired.

The court held that the school infringed on Professor Levin's right to academic freedom and that his right to freely express his ideas had been unconstitutionally prohibited. The court noted that although Professor Levin's classes were being disrupted in clear violation of City College's regulations, nothing was done to stop the disruptions. City College's failure to discipline known student offenders was held to be without any justification. In fact City College supported the disruptions by "failing to denounce specifically the disruptions, [and] by failing to affirm unequivocally Professor Levin's right to teach his classes unimpeded by the appalling behavior of the shout-

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361. *Id.* at 908. The letter read in part:

> You may know—and otherwise, I expect would soon learn from sources other than this letter—that Professor Levin has expressed controversial views on such issues as race, feminism and homosexuality. Last year the faculty Senate of the College registered its opposition to written statements by Professor Levin at the same time upholding his right as a faculty member to express his views without restraint. . . . Taking into consideration the rights and sensitivities of all concerned, and wishing to permit informed freedom of choice for students . . . I have in this instance decided to open a second [section] . . .

*Id.* In response to this letter, forty-three academics from a variety of institutions wrote a letter to City College which stated in part:

> We . . . write to convey to you and the entire City College administration our growing alarm at your increasing encroachments on the academic freedom of Professor Michael Levin. Your peremptory removal of him from his introductory classes . . . and your letter of incitement . . . sent to some of his students this semester, suggesting that they might wish to remove themselves, constitute improper and dangerous precedents. That letter itself admits that neither Professor Levin's speech, nor conduct in class, nor his grading patterns reflect in any way his scholarly or social views. If today Professor Levin may be deprived of his academic freedom because some dislike his views, whose academic freedom will be safe tomorrow?

> Though you may not have intended it, your actions give encouragement to the Nazi-like tactics of the student thugs who invaded Professor Levin's classroom, to the dismay and disgust of his own students. Such an outrage bears too close a resemblance to escape comparison with the beginning of the downfall of the great German universities some sixty years ago.

*Id.* at 908-09.

362. *Id.* at 919.

363. *Id.* at 917.
ers, the intimidators and the bullies. . . . "364 By officially condemning Professor Levin’s views, City College intentionally injured his position as a tenured member of the faculty and pressured students to avoid his class because his views did not conform to the views of the College’s administrators.365 The court held that City College punished Professor Levin solely in retaliation for his expressed views and that in so doing the College violated his constitutional rights to free speech.366

Professor Levin’s expression of his views outside the classroom on such issues as affirmative action and the relationship between race and test scores was protected expression under the First Amendment as matters of public importance which could not be suppressed by City College.367 A claimed fear that “exposure in the campus environment to Professor Levin’s views might somehow have caused some students harm” was not a constitutional basis for prohibiting certain forms of expression.368 The court noted that “[a]cademic tenure, if it is to have any meaning at all, must encompass the right to pursue scholarship wherever it may lead, the freedom to inquire, to study and to evaluate without the deadening limits of orthodoxy or the corrosive atmosphere of suspicion and distrust. . . .”369 In affirming this decision in large part, the Second Circuit altered the judgment slightly by granting Professor Levin a declaratory judgment that his right to free speech had been violated.370 The Second Circuit stated that “[City College’s] encouragement of the continued erosion in the size of Professor Levin’s class if he does not mend his extracurricular ways is the antithesis of freedom of expression.”371 In addition, the Second Circuit affirmed the lower court’s decision of enjoin City College from creating or maintaining shadow sections of Professor Levin’s classes, because such an expression of ideas was protected by the First Amendment.372

364. Id.
365. Id.
366. Id. at 918-19.
367. Id. at 921.
368. Id. at 923.
369. Id. at 925.
370. Levin v. Harlston, 1992 LEXIS 13374 (2nd Cir. June 8, 1992). Basically, the Second Circuit completely affirmed the lower court’s judgement, only changing the grant of permanent injunction to a grant of declaratory relief and vacating that part of the judgment ordering City College to prevent students from protesting Professor Levin’s class. Id.
371. Id. at *8.
372. Id. In another case addressing the right of a teacher to express his opinions, the court in Bishop v. Aronov held that a University of Alabama professor could not interject his religious views and opinions in a physiology class. 926 F.2d 1066, 1075 (11th Cir. 1991). The court also held that the teacher could not schedule optional classes dealing with religion immediately before finals because this might pressure students into attending and adopting the teacher’s beliefs for the examination. Id. at 1076. However, this court explicitly stated that with regard to his religious views, the teacher could “express them, on his own time, far and wide and to whomever will listen; or write and publish, no doubt authoritatively, on them.” Id. In addition, the University could not prohibit the teacher from organizing religious meetings, making notice of them on campus, or requesting University space in which to hold such meetings. Id.
2. Dube v. The State University of New York

In Dube v. State Univ. of New York, a university professor claimed violation of his First Amendment rights for the denial of tenure based on his discussion of controversial topics in class. The professor taught a course in the Africana Studies Program called "The Politics of Race." A course description made reference to three types of racism citing Nazism in Germany, apartheid in South Africa, and Zionism in Israel. After complaints arose about the inclusion of Zionism as a form of racism, the professor's course was removed from the course listings of the political science department. Subsequently, the professor was denied tenure at the University and his employment there was terminated.

The professor filed suit alleging that his denial of tenure and of continued employment was due to his discussion of controversial issues in his class and that this denial was a violation of his First Amendment right to free speech. The court denied the University's motion for summary judgment and held that the professor had presented enough evidence that a jury could find that he was denied tenure and promotion in response to pressure exerted by school officials and community activists outraged by his teachings. This decision allowed the professor's First Amendment claim to go to trial. The court stated that the university had no power or right to deny tenure for the exercise of First Amendment rights. At trial, the University would have to show that the professor was denied tenure and promotion for "permissible academic reasons, without regard to community pressure triggered by [the professor's] teaching on Zionism and racism, and that the controversy resulting from that teaching did not affect the outcome of the decision regarding tenure and promotion."

3. DiBona v. Matthews

In DiBona v. Matthews, the court held that the cancellation of a college drama teacher's class constituted a violation of his First Amendment rights. DiBona, a college drama teacher, had chosen a play called "Split Second" to use in his teaching of a drama class which required students to produce and perform the play. The play concerned a black police officer who, while arresting a white suspect, was subjected to many racial slurs and epithets. The police officer loses control for a brief moment and kills the suspect, planting a knife in the suspect's hands and claiming self-defense in the shooting.

The college had no requirement that teachers obtain approval of plays to be performed in class. However, DiBona discussed the play's content with Matthews, the college president. Matthews canceled DiBona's class because there was opposition to the play from certain religious groups, concern re-

374. Id. at 597.
375. Id. at 598.
376. Id. at 587.
377. Id. at 598.
PC ON COLLEGE CAMPUSES

4. The University of Delaware

In an arbitration between the University of Delaware and one of its professors, the arbitrator ruled that the University wrongly and unfairly denied a professor’s research funding solely because of the University’s disagreement with the content of her research. The professor’s primary focus in her research involved “the societal consequences of differences of ability between groups and individuals.” The professor had received several grants from the Pioneer Fund, an organization established to fund research into the problems of heredity and eugenics. The professor’s work sponsored by the Pioneer Fund included research into the relationship between general intelligence and education, intelligence quotient and crime, the merits of objective tests for hiring workers, and the relationship between ability differences and educational policy. Some faculty members questioned the propriety of the University’s ongoing relationship with the Pioneer Fund in light of the University’s stated commitment to racial and cultural diversity, with one faculty member alleging that the Pioneer Fund was “an organization with a long and continuous history of supporting racism, anti-Semitism,

379. Id. at 890.
380. Id. at 891 (citing Tinker, 393 U.S. at 509).
381. Id.
382. Id. at 891; see also Brown v. Board of Regents of Univ. of Nebraska, 640 F. Supp. 674, 679 (D. Neb. 1986) (cancellation of film by University violated the constitutional rights of persons wishing to view it “because action taken by an arm of the state merely to avoid controversy from the expression of ideas is an insufficient basis for interfering with the right to receive information.”).
384. Id. at 2.
and other discriminatory practices." The University president created a committee to consider whether the University should allow the Pioneer Fund to continue to support the professor's research. The committee concluded that "the Pioneer Fund is committed to the proposition that people of different ethnic and cultural backgrounds are on the basis of their heredity inherently unequal and can never be expected to behave or perform equally. According to this view, which the activities of the Fund propagate, affirmative action plans are unjust and doomed to failure, and should be abandoned." The committee found this incompatible with the University's goal of diversity and its support of affirmative action. The University president accepted the committee's recommendation that the University not accept support from the Pioneer Fund.

The professor later tried to apply for research grants from the Pioneer Fund. The University refused to process the application, causing the professor to be unable to get the needed funds for research. The professor charged that the University's refusal to allow her to receive funding violated her right to academic freedom provided under an employment agreement with the University. Part of the agreement dealing with academic freedom provided that "[t]he teacher is entitled to full freedom in research and in the publication of results." The professor contended that her right to academic freedom precluded the University from banning the source of her research funds on "political or ideological" grounds. Even if the University was not deliberately attempting to suppress her research, the ban on all support from the Pioneer Fund was for all practical purposes a suppression of her research on ideological grounds thereby violating her right to academic freedom in her research.

The arbitrator stated that it was clear that the University's decision to deny the professor's requests for research grants from the Pioneer Fund was based essentially upon the committee's report. The arbitrator further stated that the committee violated its own standards of review by looking to the content of the professor's research. Any restrictions on a faculty member's academic freedom were required to be fair, reasonable, and consistent. Here the restriction on the professor's academic freedom did not meet these requirements since the committee recommended to refuse funding based on the content of the research. The arbitrator held that the professor had a right to academic freedom and that public perceptions alone did not suffice to overcome this right. The University's commitment to racial and cultural diversity was an essential part of, and not a rival in conflict with, the University's commitment to academic freedom. The arbitrator
therefore ruled that the University unfairly and wrongly denied the professor's funding requests by delving into the content of her research.\textsuperscript{394} The University could only restrict her academic freedom by fairly applying its own procedural standards which did not allow any consideration of the substantive nature of a faculty member's work.\textsuperscript{395}

\section*{VI. Conclusion}

Many recent cases demonstrate the courts' negative response to attempted enforcement of political correctness in public universities. Restrictive student speech codes which prohibit offensive expressions or views have met with firm resistance from the courts. When these codes could be used by universities to suppress protected forms of speech, they have been struck down as unconstitutional. University attempts to censor the expression of views which some find disagreeable or offensive have been set back by these court decisions, hopefully ending this unwise and distressing censorship of student expression. In addition, attempts by universities to punish students for expressing views not “approved” by the university or opinions which certain student groups find “offensive” have not been tolerated by the courts. Therefore, the legality of enforcing politically correct expression in public universities, either through the enactment of restrictive student speech codes or through selective prosecution of certain students, is very doubtful.

Unfortunately, at least for those who value free speech, private universities potentially have more “freedom” to censor student expression. However, many state constitutions provide guarantees to the right to free speech which are applicable to both public and private universities. In addition, Congress has indicated that it may pass laws preventing private universities from suppressing free speech. Therefore, private universities may be equally unable to force politically correct expression from its students.

Courts have also been willing to defend university faculty members' rights to academic freedom and free expression. Colleges and universities attempting to impose politically correct ideologies on their faculty members have been rebuked by the courts for trespassing on faculty members' constitutional rights. Political correctness remains no more applicable to faculty members than it is to students.

These court decisions only reinforce basic constitutional principles of the right to free speech in our society. The enforcement of politically correct expression is offensive to one's common sense as well as violative to the First Amendment's very essence of freedom to speak your mind. University attempts to enforce political correctness might be laughable if it were not for the seriousness with which too many universities and their officials pursue these censorship efforts. Regardless of the courts' complete rejection of attempts to enforce politically correct expression, one wonders why any university would even pursue such a plan.

\textsuperscript{394} Id.
\textsuperscript{395} Id.
Students attend college to broaden their educational experience and to enhance their thinking ability. What lesson is learned if the university itself engages in censorship and suppression of thought and expression? How can faculty members teach if the university creates an environment where deviation from officially accepted views will be met with denouncement and expulsion from their job? Universities must once again become defenders of the right to free expression of one's opinions and viewpoints, no matter how many others disagree with that view, instead of retaining their current role as censurer, prohibiting the expression of certain views. Universities, as well as society in general, should return to the principle that has served our country so well: the expression of competing and diverse views is healthy to our society because it fosters a toleration for diversity as well as forcing us to think about crucial issues of the day. Our society will be much improved when we can once again recognize the value of freedom to speak one's views instead of labeling people who disagree with us as racists, homophobes, liberals, or sexists and attempting to silence them. Instead, we must learn to first listen before condemning and shutting out all views that conflict with our own. The university is a microcosm of society, and in that environment students must be taught the value of diversity. If we abandon this idea, we will not only have lost the foundation of our great educational institutions, but we may also lose one of the very principles that holds our society together as one nation.