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### **Hateful Speech and the Marketplace of Ideas: An Alternative Rationale for Speech Codes on College Campuses**

Higher education institutions around the country are faced with a difficult dilemma: do they permit their students to say whatever they want, knowing that some students will be so grievously offended it affects their education, or do they set limits on permissible speech, potentially invading on the protections of the First Amendment?

These administrators, their efforts focused on facilitating diversity, sometimes write and enforce speech codes that are far too strict and invasive. While their dedication to maximizing the ability of students to participate in the college experience is admirable, codes which restrict protected speech without providing ample rationale are impermissible according to First Amendment jurisprudence.

Both sides of the dilemma are backed by a claim to constitutional rights: the right to free speech or the right to equal protection.<sup>1</sup> There is no clear answer that can be developed from interpreting the constitution to place one above the other without disregarding rationale for the losing side. To introduce a metaphor: the compasses with which we use to decide how to proceed have all broken, they spin back and forth from east to west, north to south, a never-ceasing twist of confusing. A new type of compass is required. The magnetic pull of a high moral calling or a constitutional ruling is not sufficient here.

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<sup>1</sup> U.S. Const. amend. I, U.S. Const. amend. XIV.

Instead of being forced to make a moral choice or value one form of constitutional interpretation over another, higher education administrators should instead stay within familiar ground: they should put the interests of their institution first. As “it is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation,”<sup>2</sup> administrators should aim to write and enforce policy which helps them fulfill their “business,” educating as many students as well and as fully as possible. Socially minded, prestige inclined, fiscally concerned, and freedom focused administrators alike will all be satisfied with a doctrine developed in pursuit of this goal. In fact, doing so furthers the interests of both parties in the argument above. Defenders of the moral imperative of free speech will see that this method protects the ability of students who would otherwise be victims of unsanctioned speech restrictions to speak their mind without fear, and those seeking protection for the victims of hateful speech will be satisfied as well.

When victims of hateful speech are excluded from the laissez-faire marketplace of ideas of academic discourse, their valuable diverse life experiences and opinions go with them. A diverse economic marketplace fosters superior products, and whether a marketplace is an academic or economic one, its producers rely on having a superior product in comparison to their competition. When the lived experiences, including those of interacting with a diverse population, represented in an institution’s degree are compromised, the institution is sufficiently harmed to permit legal recourse. As this harm to the institution’s products is inflicted by the effects of hateful speech, that recourse allows institutions to prohibit it.

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<sup>2</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (J. Frankfurter, concurring).

In Part I of this paper, I explain why crafting speech codes is difficult as well as what particular constitutional requirements these codes need to address. Part II demonstrates how the exclusionary effects of hateful speech have the effect of preventing diversity at institutions by causing students to remove themselves from the environment, and affirm that diversity is a sufficiently compelling interest for institutions. Part III isolates hateful speech as something which injures the interest of diversity by explaining how the functionality of the marketplace of ideas is lost when certain students are excluded. Lastly, Part IV explains how to use this paradigm to craft speech codes which are sufficiently narrowly tailored to pass constitutional muster.

## **I. Hateful Speech Jurisprudence**

Institutions may not simply ignore the protections granted to their students by the First Amendment.<sup>3</sup> Over the last fifty years, there have been a substantial number of rulings by the courts illustrating this fact. The rights conferred by the First Amendment are fundamental - meaning that any laws which seek to infringe upon them must first undergo strict scrutiny: they must be narrowly tailored in order to minimize incidental restrictions upon protected speech, and the rationale for doing so must be compelling.<sup>4</sup> Here I present three cases which demonstrate

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<sup>3</sup> In this paper, when I reference “institutions,” I assume they are publicly funded to a degree which they are as beholden to the Bill of Rights as Congress itself is.

<sup>4</sup> Justice Rehnquist notes in *Gratz v. Bollinger* that an institution may not “employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by [the Court’s] strict scrutiny analysis.” *Gratz v. Bollinger*, 539 U.S. 244, 275.

what happens when the tight legal space that institutions can enact speech rules within is abused. In each of these cases, the speech code in question was struck down.

In the case of *R.A.V. v. City of St. Paul*<sup>5</sup> the Supreme Court decided that the city's ordinance caused the city's legislators to "impose special prohibitions on those speakers who express views on disfavored subjects."<sup>6</sup> Restrictions on speech which test for the content of the words or the viewpoint of the speaker are unconstitutional. The ruling in *R.A.V.* renders speech restrictions unconstitutional that prevent students from talking about specific topics, from being hateful towards specific groups, or that cares about the individual words a speaker says.

As institutions cannot pick and choose the words or viewpoints that they wish to outlaw, they instead turn to sweeping statements that in turn exhibit overbreadth. Over time, the Supreme Court has partitioned different types of speech into protected and unprotected. When a restriction on speech legitimately targets unprotected speech but also can be applied to restrict protected speech, that restriction is overbroad.<sup>7</sup> In *UWM Post v. Board of Regents of U. of Wis.*, a District Court determined that a speech code, the so-called "UW Rule" developed by the university restricted protected speech in addition to the unprotected speech it claimed to prohibit.

The Board of Regents claimed that the UW Rule restricted "fighting words" - a specific class of unprotected speech - and only "fighting words." "Fighting words" are one of a few "certain well-defined and narrowly limited classes of speech" of which "the prevention and punishment of...has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those by

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<sup>5</sup> 505 U.S. 377 (1992).

<sup>6</sup> 505 U.S. 377, 391.

<sup>7</sup> Harvey A. Silvergate et al., *FIRE's Guide to Free Speech on Campus* (Philadelphia: FIRE, 2012), 77.

which their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>8</sup> The Court in *UWM Post* understood fighting words at the time of *Chaplinsky*, when they were developed, to be those which either “by their very utterance inflict injury” and “by which their very utterance tend to incite an immediate breach of the peace.”<sup>9</sup> However, since the 1940s, the Supreme Court has limited the definition of fighting words to only those which tend to incite the breach of the peace.<sup>10</sup> In *UWM Post* it was found that the UW Rule restricted speech that did not necessarily fit this very closely defined category, and was unconstitutional. While the UW Rule required speech to be racist or discriminatory, a content-requirement, to be targeted at and to demean an individual, and to create an “intimidating, hostile or demeaning environment,”<sup>11</sup> it never checked to see what the effects of the speech were. Had the UW Rule been focused more on something akin to “speech which causes an immediate violent reaction is prohibited,” the ruling may have been different. Later in this paper, I will propose that institutions focus their restrictions on speech which has particular effects in order to appeal to the fighting words doctrine.

A third major barrier to institutions developing constitutional speech codes is clarity. In the case of *Doe v. University of Michigan*,<sup>12</sup> the language of the code was found to be too vague, leading to it being ruled unconstitutional. It was found that denoting prohibited speech by saying that such speech causing punishment under the code “stigmatizes” or “victimizes” based on a

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<sup>8</sup> *UWM Post v. Board of Regents of U. of Wis.*, 774 F. Supp. 1163, 1169 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (footnotes omitted)). (emphasis removed)

<sup>9</sup> 774 F. Supp 1163, 1169.

<sup>10</sup> 774 F. Supp 1163, 1170.

<sup>11</sup> 774 F. Supp 1163, 1172.

<sup>12</sup> *Doe v. University of Michigan*, 721 F. Supp 852 (1989).

protected aspect of their identity was not clear enough.<sup>13</sup> The University both withdrew their guide to interpreting the policy, claiming it was inaccurate as well as saying that it would discover the difference between merely offensive speech and stigmatizing or victimizing speech “very carefully,”<sup>14</sup> while also having withdrawn a portion of their code previously “for further explanation and clarification.”<sup>15</sup> The court recognized that if the University could not interpret its policy, it would be likely that “men of common intelligence”<sup>16</sup> would impermissibly be forced to “guess at its meaning,<sup>17</sup> a direct contradiction of the requirements of clarity in laws.<sup>18</sup> This vagueness likely contributed to the University's code being found overbroad as well - it was found to have been used in impermissible contexts. I expect the reason that it was used this was that the person interpreting the policy could not understand it. As demonstrated in *Doe*, if an institution chooses to restrict speech, it must make it very clear what speech is restricted so that it can be understood, otherwise, it is likely to be interpreted in an overbroad manner.

These cases have demonstrated the importance behind a line from both *UWM Post* and *Doe*: “It is fundamental that statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand.”<sup>19</sup> In order to create speech codes that follow this rule, universities must select the specific evil that causes by which they are injured: the relational harm that hateful speech inflicts upon the institution.

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<sup>13</sup> 721 F. Supp 852, 867.

<sup>14</sup> 721 F. Supp 852, 867.

<sup>15</sup> 721 F. Supp 852, 856.

<sup>16</sup> *Broadrick v. Oklahoma* 413 U.S. 601, 607 (1973).

<sup>17</sup> 413 U.S. 601, 607.

<sup>18</sup> 721 F. Supp 852, 867.

<sup>19</sup> 774 F. Supp. 1163 at 1168; *see also* 721 F. Supp 852 at 864.

## Part II. Injuries to Diversity from Hateful Speech

### *A: Immediate Effects of Hateful Speech*

Hateful speech has severe effects upon those at whom it is targeted at or at whom it is meant to discriminate against. Vague hateful speech directed at a class or category of people degrading them in some manner is less likely than its counterpart of individually-targeted hateful speech to inflict immediate physical harm, but instead has the effect of prejudicing society against the degraded group due to the presence of the unfettered idea of inferiority within the minds of the populace.<sup>20</sup> However, when hateful speech is leveled at an individual, it has effects both instantaneously and over the lifetime of the individual in question.<sup>21</sup> In order to demonstrate how this is important in the university setting, I will first lay out some definitions of hateful speech, examining both its legal classifications, syntax, and its immediate effects. I will then show how hateful speech has an effect upon higher education institutions.

Hateful speech is not an official classification of unprotected speech. Instead, it is a cobbled together category of speech which has certain intentions and effects. Notably, as recognized by codes which have tried to prohibit it, hateful speech is often said with an intent to intimidate, in the case of the code in *UWM Post* or with an intent to victimize, as in the case of the code in *Doe*.<sup>22</sup> However, hateful speech itself is not an unprotected class of speech. As noted earlier, there are a limited number of classes of speech left unprotected: fighting words,<sup>23</sup>

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<sup>20</sup> Richard Delgado and Jean Stefanic, *Understanding Words that Wound* (Boulder, Colorado: Westview Press, 2004), 16.

<sup>21</sup> Delgado, *Understanding Words that Wound*, 12-13.

<sup>22</sup> 774 F. Supp. 1163, 1168; *see also* 721 F. Supp 852, 856.

<sup>23</sup> *Chaplinsky v New Hampshire*, 315 U.S. 568, 572 (1942).

threats,<sup>24</sup> and imminent lawless action.<sup>25</sup> Each of these classes of speech tends to invoke an immediate physical outburst or states the intent of physical harm.

Hateful speech absolutely might include these classes of unprotected speech within its syntax. However, it need not to still be harmful, as hateful speech instead invokes the history of past abuses.<sup>26</sup> First, when initially spoken, hateful speech shocks its victim, causing physical effects - rapid pulse, raised blood pressure, dizziness.<sup>27</sup> When received over time, these physical effects may accumulate to result in high blood pressure, and the stress of receiving such abuse has serious psychological effects, including both a “damaged self image”<sup>28</sup> and “lower aspiration level.”<sup>29</sup> It is doubtful that either of these are ever desirable in a student population.

There are also immediate psychological effects of hateful speech, including “withdrawal from society.”<sup>30</sup> In such a case, “the victim of hate speech, especially the one who fears more of the same, may behave circumspectly, avoiding the situations, places, and company where it could happen again.”<sup>31</sup>

If a student at a higher education institution is the victim of hateful speech, a reasonable response to protect themselves is to withdraw themselves from the environment of the institution. However, doing so ends up being quite harmful for every stakeholder involved.

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<sup>24</sup> *Virginia v. Black*, 538 U.S. 343, 344 (2003).

<sup>25</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>26</sup> Delgado, *Understanding Words that Wound*, 16.

<sup>27</sup> Delgado, *Understanding Words that Wound*, 13.

<sup>28</sup> Delgado, *Understanding Words that Wound*, 13.

<sup>29</sup> Delgado, *Understanding Words that Wound*, 13.

<sup>30</sup> Delgado, *Understanding Words that Wound*, 14.

<sup>31</sup> Delgado, *Understanding Words that Wound*, 14.



*B: The Institutional Interest in Diversity*

It is well understood that higher education institutions have a compelling interest in having a diverse population at their school, and may pursue this through race-conscious admissions programs. As early as 1967, the Supreme Court has recognized this fact - in *Keyishian v. Board of Regents* - and has continued to do so, as recently as in 2013 in *Fisher v. University of Texas*.<sup>32</sup> It is important to note that my analysis of these cases is focused solely the interest or lack thereof of the institution as related to diversity.

In *Regents of the University of California v. Bakke*, Justice Powell wrote in the judgement of the court that of all the reasons the University gave for their race-conscious admissions program, only “the attainment of a diverse student body...clearly is a constitutionally permissible goal for an institution of higher education.”<sup>33</sup> Not only is that goal particular permissible, in Justice Powell’s opinion it is one of “paramount importance to the fulfillment [of the institution's] mission.”<sup>34</sup>

Justice Powell additionally noted that this goal has been one of import for some time. Referring back to *Keyishian*, Justice Powell wrote that “The Nation’s future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’ *United States v. Associated Press*, 52 F. Supp. 362, 372.”<sup>35</sup> However, the court’s only actual holding carried forth

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<sup>32</sup> *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Fisher v. Univ. of TX at Austin*, 570 U.S. \_\_\_\_ (2013).

<sup>33</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-312 (1978).

<sup>34</sup> 438 U.S. 256, 313.

<sup>35</sup> 385 U. S. 589, 603.

from *Bakke* was that a “[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”<sup>36</sup>

In 2003, the Court reaffirmed and expanded the concepts from *Bakke* in two more cases related to the University of Michigan Law School: *Grutter v. Bollinger* and *Gratz v. Bollinger*.<sup>37</sup> In *Grutter*, Justice O’Connor writes that regardless of whether Justice Powell’s recognition of the importance of diversity was in fact controlling as of *Bakke*, “today we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”<sup>38</sup> The Supreme Court believes that educational institutions have the right to complete their “business” of education as earlier taken from *Sweezy*. In *Grutter*, Justice O’Connor writes:

“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits...attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.” 438 U. S., at 318-319.”<sup>39</sup>

The Court recognizes many benefits to such diversity. Diversity “promotes cross-racial understanding,” “helps break down racial stereotypes,” “enables [students] to better understand

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<sup>36</sup> 438 U.S., at 320; *see Grutter v. Bollinger*, 539 U.S. 306 at 322-323.

<sup>37</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>38</sup> 539 U.S. 244, 325.

<sup>39</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328-329 (2003).

persons of different races,” and has the result that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting.” A diverse educational setting even “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”<sup>40</sup> All of these reasons most certainly are relevant at undergraduate institutions as well as graduate institutions. In fact, promoting the “robust exchange of ideas” noted in *Keyishian* as a result of diversity is identified by Justice Powell in *Bakke* as quite possibly even more critical at undergraduate institutions.

These cases (*Bakke*, *Grutter*, and *Bollinger*) all reference admissions programs which seek to induct a diverse class into the institution, which could conceivably be called the first step towards maintaining a diverse institution. However, as noted earlier, the presence of minority groups, which is apparently critical to provide this diversity, is sometimes removed from the system the institution has crafted to further its interest in diversity because of the existence of hateful speech.

The benefits the Court recognizes to diversity occur over time. “Understanding,” “breaking-down,” and “classroom discussion” are ongoing processes that occur within the lives of students throughout their entire time at the institution. If institutions just wanted to tell their students that diversity matters, the Court would never uphold race-conscious admissions programs, as there would have been a more narrowly tailored solution: lectures from experts. Therefore, when an institution is preparing a student to work in a diverse workforce, one can assume that it does so at a similar rate to that which it educates: a time much longer than that of

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<sup>40</sup> 539 U.S. 306, at 330 (quotations omitted).

the student receiving their letter of acceptance and putting in a deposit, but instead one that utilizes the whole scope of time a student spends with an institution.

As such, the compelling interest of diversity higher education institutions seek to promote applies to the entire educational process, and may be used as a rationale for actions the university takes to further its interests in terms of diversity at times other than the admissions process. However, diversity for diversity's sake alone does not stand up under strict scrutiny as sufficient rationale for the abridgement of fundamental rights. The Court recognizes diversity as a compelling interest because of the unique benefits it provides, even if those benefits are identified by the institution.<sup>41</sup>

Hence, when a student who has been the victim of hateful speech makes the reasonable response, in that it is the regular reaction of a regular individual, and withdraws from the institution's educational environment, they are damaging the effective diversity of the institution, and the institution's compelling interest is suffering.

### **III: The Harms of Hateful Speech upon the Marketplace of Ideas**

As explained in Part I, institutions seeking to prohibit classes of protected speech must demonstrate that they have a compelling interest in doing so, and that the method which they use is narrowly tailored. Any restrictions must not prohibit or apply a chilling effect to any protected speech other than which specifically denies the institution its interest. In order to create such a restriction, discovering how to categorize speech which causes sufficient harm to permit said

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<sup>41</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330.

restrictions is vital. To do so, I will explore how the means of institutions result in the ends that make diversity a compelling interest, and find when those means are prevented from occurring.

*A: The Marketplace of Ideas*

Higher education institutions are manifestations of the marketplace of ideas: a laissez-faire system for speech where individuals share differing ideas and experiences to learn about new ways to view the world.

In his 1919 dissent in *Abrams v. United States*, Justice Oliver Holmes wrote about the value of a free market of ideas as a rationale for the freedom of expression. He wrote “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- 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 can safely be carried out. That at any rate is the theory of our Constitution.”<sup>42</sup>

In *Abrams*, Justice Holmes’ “best test” is one which students participate in every day in their classroom settings. When a student responds to a discussion question, writes about a reading, or disagrees with a classmate, they are putting their thoughts into the market and those thoughts compete with their peers. As such, higher education institutions are a prime example of the marketplace of ideas.

Some scholars doubt that the marketplace metaphor is an appropriate one. In the particular case of higher education institutions, it works quite well. Even concerns that the argue

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<sup>42</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

that regulation of the marketplace goes against its ideals of the free competition of ideas are voided by real-world conditions. Stanley Ingber writes in *The Marketplace of Ideas: A Legitimizing Myth* that “although laissez-faire economic theory asserts that desirable economic conditions are best promoted by a free market system, today's economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions.”<sup>43</sup>

In the economic marketplace, obstacles that prevent access to the market are called barriers to entry.<sup>44</sup> A barrier to entry that is too high prevents new firms from entering the market, and if the barrier is raised high enough by one single organization, it creates a monopoly, defined by Senator George Hoar, an author of the Sherman Anti-Trust Act, as a situation someone or some corporation has created which prevents “other men from engaging in fair competition with him.”<sup>45</sup> Hoar testified that if someone “who merely by superior skill or intelligence...got the whole business because nobody could do it as well as he was not a monopolist, [but if] it involved something like the use of means that made it impossible for other persons to engage in fair competition [then their actions were monopolistic]” and should be prohibited by “common-law principles, which protected fair competition to trade in old times in England.”<sup>46</sup> Monopolies are regulated not because of their act of creating the barriers to entry, but because the result of those actions is that they prevent others from participating in the marketplace.

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<sup>43</sup> Stanley Ingber, “The Marketplace of Ideas: A Legitimizing Myth”, *Duke Law Journal* 1984:1 (1984): 5.

<sup>44</sup> McAfee, R. Preston, Hugo M. Mialon, and Michael A. Williams. 2004. “What Is a Barrier to Entry?”. *The American Economic Review* 94 (2). American Economic Association: 461–65.

<sup>45</sup> James Arthur Finch, *Bills and Debates in Congress Relating to Trusts: Fiftieth Congress to Fifty-seventh Congress, First Session, Inclusive* (Washington DC: USGPO), 279 (1902).

<sup>46</sup> Finch, *Bills and Debates*, 279.

Higher education institutions should respond to hateful speech as a barrier to entry, as it has the same effect upon the exchange of ideas within the academic marketplace of ideas as monopolizing actions do in an economic marketplace. If particular students are excluded from the exchange of ideas within the academic marketplace, both their potential contributions to all who participate in that marketplace are stifled as well as the skills and knowledge that they themselves would learn. Hateful speech monopolizes the academic marketplace by preventing interpretations of academic material from occurring by those of diverse backgrounds, isolating the context by which material is learned. It also, as previously explained, denies students the ability to interact with students who have had experiences vastly different from their own. Higher education institutions expect both of these experiences which are damaged by hateful speech to be components of the education they provide their students.

*B: Relational Harm to the Institution*

As I have discussed, hateful speech always inflicts some degree of reactive harm, viewpoint, passion, or vulgarity, upon its victims.<sup>47</sup> Regulations which are based off of reactive harm alone are prohibited, as they by nature must infringe upon protected speech.<sup>48</sup> In certain situations, it also causes physical or relational harms as well, the latter of which I focus on.<sup>49</sup> When victims of hateful speech no longer are participants in an institution's marketplace, many separate parties are relationally harmed.

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<sup>47</sup> Reactive Harms include both "Injuries to Individual Emotional Tranquility" and "Injuries to Communal Sensibilities." Rodney A. Smolla, "Academic freedom, hate speech, and the idea of a university," *Law and Contemporary Problems* 53.3 (1990): 204.

<sup>48</sup> Rodney A. Smolla, "Academic freedom, hate speech, and the idea of a university," *Law and Contemporary Problems* 53.3 (1990): 204.

<sup>49</sup> Smolla, "Academic freedom," 205.

At the most basic level, all students who are participants in an educational institution do so with the understanding that they will be able to utilize the facilities and the education of the institution. If students are forced to leave for their own safety, the institution has not fulfilled its duties of providing students with an educational space in accordance with its mission.<sup>50</sup> They are additionally removed from the “marketplace of ideas” of the institution, a place where they would learn and grow, and as such, their diplomas represent a lesser education.

This has serious long-term effects, not only on the student but additionally the institution. If a period of time occurs at a given institution where the presence of students with diverse backgrounds is greatly reduced, it is likely that the benefits of diversity which the Supreme Court understands to be so compelling will be denied. As Justice Powell has noted, the skills gained by being educated in a diverse environment are extraordinarily important,<sup>51</sup> and as the court wrote in *Grutter*, “These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in to day's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>52</sup> As such, they are real, desired, marketable skills that at some point in a student’s life will have monetary value: those with them are going to be hired, those without them less so. When students who graduate during the time of sparse diversity training time enter the workforce and underperform in regards to their expected skills granted by learning in a diverse environment, future generations of students from such schools will not be expected to be endowed with those skills. It would not be remiss to suggest that in such circumstances, graduates of institutions which have demonstrated a

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<sup>50</sup> 354 U.S. 234, 263 (1957) (J. Frankfurter, concurring).

<sup>51</sup> 438 U.S. 265, 311-312.

<sup>52</sup> 539 U.S. 306, 330.



poor ability to train their students for the diverse workplace - which diversity at the institution does - will have a more difficult time being hired.

One statistic that schools find to be quite important is the rate at which their graduates are employed. It would be irrational to suggest that for some applicants, who will be paying the school money if they attend the school - engaging in a financial, contractual relationship - the rate of employment post-graduation is at least a minor point of interest. If employers want to hire graduates who are educated in a diverse environment, producing these graduates is in the best financial interest as well as the best educational interest of the college.

Even the propagator of hateful speech is harmed in much the same way. By removing certain students from the “marketplace of ideas,” the propagator themselves injures their diploma as well. However, this example serves more to demonstrate the breadth of the marketplace more than as an actual harm that an institution should use to demonstrate the value of its speech code.

A final example of how institutions are harmed can be seen in how hateful speech renders inaccurate the modeling of an institution’s carefully designed race-conscious admissions decisions. Before race became a positive factor in the objectivity-focused process of admissions, schools would necessarily base their selection process off of other factors. Among these, one can assume, are tangible academic or cocurricular activities and other qualities which the institution found valuable, implying that institutions believed that students who were successful in their high school years or who possessed those particular qualities had a higher chance of succeeding at the undergraduate level. In such a scenario if an institution had a given number of seats to distribute to its incoming class, it would likely pick the best students it could who it believed would go on to be successful and reflect well on the institution. These might include students

who would be easily hireable because of family connections, exceptional intellect, or those with prowess at niche leisure skills such as baseball or tennis. However, when institutions decided to implement a race-based quota system they likely rationalized that the opportunity cost of reducing the number of seats for those students they had previously deemed desirable, regardless of race, in order to bring more minority students into the environment, would be repaid by the enhanced quality of the education of the previously regarded as superior students.

This interpretation leads to the unfortunate cynical conclusion that quota-based admissions, and even race-conscious admissions, are in part intended to use the experiences of minority students as teaching tools to provide a better education for the majority students. Whether or not this is entirely true is immaterial. The key to this situation is that institutions are investing the educational space and time that they have in certain students who are potential victims of hateful speech. Institutions clearly intend for these students to succeed. Many institutions provide additional support services to these minority students in particular, implying that they are not intended to be used solely as textbooks of diversity for other students but that the opportunity-cost formula of their admittance, regardless of whether their race was a factor in their admittance, includes an expectation that they will succeed in ways similar to that which the institution expects its other students to do, as well as to act as teaching tools for diversity. When minority students, whether they have specially subsidized experiences in the form of being admitted through race-consciousness or not, are prevented from participating both the diversity bonuses they would grant to the education of other students as well as the success the university is relying on them achieving in return for their presence are reduced or removed. If a student

were admitted in part due to race-consciousness, the institution loses even more value when that student becomes the victim of hateful speech and removes themselves from the marketplace.

Hateful speech can be said by anyone regardless of whether they are a member of the majority or of a minority, and is equally harmful to the institution in either case. As such, an institution is harmed whenever a student is excluded, because the institution has reserved a portion of their capability for that student, regardless of their identity.

The focus on the purpose of race-conscious admissions is coldly cynical, however examining it in this light provides a legitimate representation of the injury upon the institution. It is clear that when hateful speech excludes certain people from participating in the marketplace of ideas, there is a much greater effect than sadness, anger, suicide, or any individual injury. There is not only reactive or physical harm to the student, prompting them to take the reasonable and responsible choice to protect themselves by withdrawing from the marketplace, but also relational harm to the institution.

Institutions are both reputationally injured when students fail to demonstrate sufficient diversity training to be hired, leading to lower post-graduation employment rates, as well as financially injured, when the admittance of students does not have the intended effect of successful graduation and employment. If the institution wants to halt these relational harms: it has only one route to take. Higher education institutions must prohibit hateful speech and provide education for students to help them productively exchange ideas within a diverse academic marketplace of ideas.

#### **IV: Constitutionally Prohibiting Hateful Speech**

In this paper, I have reviewed how hateful speech can have the effect of forcing certain students to leave the marketplace of ideas and how when that occurs, the institution itself is relationally harmed. I began by focusing on the fact that institutions had a very small amount of wiggle-room within First Amendment Jurisprudence in order to enact their speech codes. Now, I will conclude by demonstrating how a policy focused on protecting the institution from the harms of hateful speech is both sufficiently constitutional and supportive of the functionality of the marketplace of ideas while also protecting the institution and potential victims of hateful speech.

In order to survive the strict scrutiny due any restriction upon protected speech, the restriction must be both one that furthers a compelling interest of the restricting party as well as being narrowly tailored and the least restrictive means available. I have reviewed the Supreme Court's assurances that diversity is a compelling interest and transposed it from race-conscious admissions to the logical next step: ensuring that the diverse class remains at the institution in order for the institution's interests to be satisfied. Without speech codes against hateful speech, one might be led to argue based on the effects of said speech that these race-conscious admissions programs are irrelevant if the classes they admit do not remain at the institution long enough to benefit from their diversity.

One proposed method of codes to prohibit hateful speech revolves around the time, place, and manner doctrine adopted by the court as a way to constitutionally restrict speech. A restriction of time, place, or manner, can serve to permit the compelling interest of an entity to be

realized. However, the use of this method is incorrect - it will suffer from overbreadth. At no time can hateful speech be allowed: its occurrence will result in negative affects at any time. Nor is a particular manner of hateful speech permissible. In most circumstances at an institution, hateful speech can be delivered in a manner compatible with the “normal activity of a particular place at a particular time,”<sup>53</sup> meaning that it cannot be restricted in that way. And just like the time example, if at any location associated with the institution hateful speech is used, it will affect a student. Attempting to prohibit hateful speech based on time, place, or manner will result in an unconstitutional chilling effect on speech - as anything that could possibly be interpreted as hateful would be restricted everywhere and at every time.

Instead, anti-hateful speech codes must be designed to stand up to the full investigation of strict scrutiny. In order to be of a sufficiently compelling interest, they must focus specifically on the exclusion of students from the university’s marketplace. The only variable which the code may interact with is whether a student is caused to leave the marketplace because of the speech in question and whether a reasonable person in their circumstance would do so. The motivation, viewpoint, or content of the speech cannot be included, not even as examples.

Such a code is naturally narrowly tailored. It is not overbroad, as it does not restrict speech other than that which it is specifically designed to curtail. It is not vague, as it is clear in what it serves to do. Nor is it viewpoint oriented, as any speech which has such an effect is disallowed.

Some students may believe that the code has the effect of chilling their speech by forcing them to avoid sensitive topics traditionally targeted by such codes. However, this can be easily

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<sup>53</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

be averted by reminding them that the metric used is that of a reasonable person, meaning that an individual's claim to have been seriously affected by the mention of a particular thing could be rebuffed by the institution, while a grossly harmful epithet would perennially be ruled as in violation of the code. In order to supplementarily safeguard its students, institutions should also have their disciplinary procedures regarding speech codes involve education about how students can defend themselves if they choose to.

Persons interested in banning hateful speech because they do not appreciate its content or motivation will clearly be dissatisfied by such a code. However, that is not the intent of this paradigm. This code is not designed to cure prejudice by amputating its existence. No speech code can do that. Instead, the guidelines established here are designed precisely to protect the interests of the institution by permitting all students to receive the best education that the institution can grant them.