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DOE V. UNIVERSITY OF MICHIGAN AND CAMPUS BANS ON "RACIST SPEECH": THE VIEW FROM WITHIN

ROBERT A. SEDLER†

I. INTRODUCTION

In reading the numerous law review articles advocating some form of restriction for "racist speech" on campus, I am struck by the difference between how campus bans on "racist speech" are analyzed by academic commentators and by lawyers and judges in the context of actual litigation. Academic commentators typically justify restricting "racist speech" on the ground that it is inconsistent with the equality value of the fourteenth amendment. They contend that the freedom of expression interest implicated by the restriction must be balanced against the state's prerogative—and even obligation—to advance the equality value of the fourteenth amendment by restricting "racist speech." Not surprisingly, they

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1. "Racist speech" is a generic term, referring to speech that denigrates persons on the basis of their race, gender, sexual orientation or the like. The commentators contend that "racist speech" causes demonstrable harm to racial minorities, women, gay and lesbian persons, and other "victim groups," because it brands them as inferior to the dominant societal group of heterosexual white males. "Racist speech" is also said to promote the ideology of dominant group supremacy and is a "mechanism for keeping selected victim groups in subordinated positions." Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2332-36 (1989).

2. These articles include Brownstein, Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles?, 39 Buffalo L. Rev. 1 (1991); Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431; Smolla, Rethinking First Amendment Assumptions About Racist and Sexist Speech, 47 Wash. & Lee L. Rev. 171 (1990); and Matsuda, supra note 1. The constitutional and policy arguments against campus bans on "racist speech" are set forth in Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484 (1990). This author's constitutional analysis of campus bans on "racist speech" is set forth in Sedler, "Racist Speech" on Campus and the First Amendment: The View from Without and Within (forthcoming) [hereinafter Racist Speech].
conclude that because "racist speech" is "low value" speech, and because it causes demonstrable harm to racial minorities and other "victim groups," the state's interest in advancing the equality value outweighs the freedom of expression interest and justifies restricting "racist speech."³

My own views concerning the constitutional permissibility of campus bans on "racist speech" are "lawyers' views,"⁴ and have been formed primarily in the context of my role as lead counsel for the plaintiff in the successful challenge to the campus "racist speech" policy in Doe v. University of Michigan.⁵ As I have explained more fully elsewhere,⁶ in actual litigation the analytical framework for the resolution of first amendment issues is what I have called the "law of the first amendment." The "law of the first amendment" is that body of concepts, principles, specific guidelines and the "balancing/subsidiary doctrine"⁷ that has emerged from Supreme Court decisions in first amendment cases over the years. It is the "law of the first amendment" that governs actual first amendment cases that come before the courts for decision.

3. See, e.g., Lawrence, supra note 2, at 438-49, 466-72; Matsuda, supra note 1, at 2374-80.

4. As an academic commentator who regularly engages in constitutional litigation, I have both "academic commentators' views" and "lawyers' views" on a number of constitutional questions. My "academic commentators' views" refer to my view of what the Constitution should mean, while my "lawyers' views" refer to my understanding of what the Constitution does mean in the context of actual litigation. Sometimes I am successful in persuading a court to accept my "academic commentators' views." See Sedler, The Constitution and the Consequences of the Social History of Racism, 40 ARK. L. REV. 677, 731-38 (1987) (governmental action having a "racially discriminatory effect" should be unconstitutional unless supported by strong justification), and NAACP v. City of Dearborn, 173 Mich. App. 602, 434 N.W.2d 444 (1988), leave to appeal denied, 433 Mich. 904, 447 N.W.2d 751 (1989) (the "anti-discrimination" clause of the Michigan Constitution, Art. I, § 2, reaches governmental action having a "racially discriminatory effect"). In regard to the constitutional protection of "racist speech," there is complete congruence between my "academic commentators' views" and my "lawyers' views."


7. The term, "balancing/subsidiary doctrine," refers to the "subsidiary doctrine" that is found in the precedents dealing with a particular kind of restriction or interference with expression. This precedent has resulted from the residual application of the "balancing approach" in cases where the result is not controlled by an applicable concept, principle or specific doctrine. Id. at 5-6.
Doe v. University of Michigan is the seminal case presenting a first amendment challenge to a public university's ban on "racist speech." The district court, invoking the important first amendment principles of content neutrality, protection of offensive speech, and heightened protection for expression in the academic context, held that under the void on its face doctrine, the university's "racist speech" policy violated the first amendment. Doe is still the only reported case dealing with this highly controversial matter, and because there was no appeal from the district court's decision, it is likely to serve as a starting point for the constitutional analysis of "racist speech" policies adopted by other public universities.8

Academic commentators who favor restrictions on "racist speech" tend to discount the Doe decision. Some commentators focus on the fact that the doctrinal basis of the district court's decision in Doe was the impermissible overbreadth and vagueness of the university's "racist speech" policy. They see the decision as doing no more than invalidating one university's imprecisely drafted policy.9 Other commentators fault the district court for failing to give sufficient weight to the "equality" value in its constitutional analysis, although they do not contend that the decision itself was erroneous.10 It is clear that Doe is not viewed by these commentators as a very important decision that will cast serious doubts on the constitutional permissibility of virtually any "racist speech" restriction on campus. They give only passing mention to Doe and go about the business of advocating significant campus bans on "racist speech."11

8. It has also had an impact on proposals to adopt "racist speech" policies at other public universities. See the discussion in Strossen, supra note 2, at 507 n.115.
9. See, e.g., Lawrence, supra note 2, at 477-78 nn.161-62 ("poorly drafted and obviously overbroad regulation"); Smolla, supra note 2, at 208 ("failed to confine sufficiently its definition of covered speech").
10. See, e.g., Jones, Equality, Dignity and Harm: The Constitutionality of Regulating American Campus Ethnoviolence, 37 Wayne L. Rev. 1383 (1991); Brownstein, supra note 2, at n.84.
11. However, the Doe decision may have had at least a subliminal effect on these commentators, to the extent that they all say that they are advocating only limited and narrowly-framed bans on racist speech. They implicitly concede that the first amendment does not permit a public university to ban the expression of "racist ideas," and they deny that this is the purpose of the proposed bans. Of course, they do not deny that the proposed bans may have this effect. Their focus is almost entirely on the harm that is caused to "victim groups" by "racist speech" on a university campus. What they seem to be saying is that even if the proposed bans do have the effect of restricting the expression of "racist ideas" in some circumstances, they are necessary to prevent the harm to "victim groups."
Perhaps not surprisingly, I view the impact of Doe quite differently. I assert that Doe is a very important case, and that in the real world of constitutional litigation, it will be a “landmark” decision having considerable impact on the constitutional permissibility of campus bans on “racist speech.” To understand why this will be so, it is necessary to understand precisely why the district court in Doe held the University of Michigan’s “racist speech” policy unconstitutional. While the district court invalidated the policy on the basis of its impermissible overbreadth and vagueness, the Doe decision was not about poorly drafted campus bans on “racist speech.” The University of Michigan’s policy was not one that had been carelessly drafted or that used language that inadvertently reached some protected expression. Quite to the contrary, the policy went through a large number of drafts, and the language of the policy was deliberately chosen to accomplish a specific objective. It was the objective itself and the underlying premises on which it was based that rendered the policy unconstitutional.

The primary objective of the University of Michigan’s “racist speech” policy was to prohibit the expression of “racist ideas.” The justification for the prohibition was that the expression of “racist ideas” created an “intimidating, hostile and demeaning environment” on the campus for minority students and other members of “victim groups.” However, as will be discussed more fully subsequently, a prohibition on the expression of “racist ideas” is inconsistent with the important first amendment principles of content neutrality, the protection of offensive speech, and heightened protection of expression in the academic context. Therefore, a public university cannot constitutionally prohibit the expression of “racist ideas” on campus. Because the language of the University of Michigan’s policy was deliberately chosen to accomplish this specific objective, the policy was, on its face, violative of the first amendment.

The reasons why the University of Michigan’s policy violated the first amendment indicate that virtually every ban of “racist speech” on campus imposed by a public university will also be held unconstitutional. Campus bans on “racist speech,” no matter how narrowly-framed and no matter how justified, are directed primarily against the expression of “racist ideas.” Under the “law of the first amendment,” a public university cannot constitutionally prohibit the expression of “racist ideas” on campus.
II. THE CONTROVERSY OVER “RACIST SPEECH” ON CAMPUS AND THE UNIVERSITY OF MICHIGAN’S “RACIST SPEECH” POLICY

The reasons given by universities for restricting “racist speech” on campus may be assumed to reflect a genuine concern for the personal and educational welfare of racial minorities, women, gay and lesbian persons and other “victim groups.” These reasons, however, interact with another phenomenon that goes beyond the personal and educational welfare of the students who are assumed to have suffered harm from the effects of “racist speech.” This phenomenon is the emergence of a new secular orthodoxy on the campuses of many universities today. This secular orthodoxy involves the implementation of values that came to the forefront in the 1960s, and include racial equality, gender equality, respect for individual differences and alternative lifestyles. These values are widely held by many in the university community—and by no one more strongly than this author—however, the efforts to implement these values in the university context all too often give rise to an officially-imposed secular orthodoxy, in which ideas that are seemingly inconsistent with these values are deemed “illegitimate.”

12. See supra note 1.
13. Popularly referred to as “politically correct thinking” or “P.C.”
14. One such idea, for example, is that there are biological differences among racial groups which contribute to cognitive and other differences among the races. A related idea is that biological differences between men and women cause them to behave differently in some respects, so that men are biologically more suited to perform certain kinds of tasks while women are biologically more suited to perform other kinds of tasks, such as taking care of children. Other aspects of this secular orthodoxy are that homosexuality is morally acceptable and a legitimate lifestyle, that the tenets of feminism are superior to the traditional view of women, and that “male-oriented” sexuality is a form of discrimination against women.

It is interesting to note that many university faculty members and administrators today are products of the ’60s. They are trying to implement on campus values to which they are strongly committed, values that came to the forefront in the ‘60s. In the ’50s and ’60s, the universities all too often tried to establish a political orthodoxy by restricting the expression of controversial political ideas and prohibiting “anti-establishment” political activity. As will be seen subsequently, the first amendment principle of heightened protection of expression in the academic context, which emerged from the constitutional challenges to the efforts of public universities to impose a political orthodoxy in the ’50s and ’60s, now operates to prevent public universities from imposing a secular orthodoxy on campus today.
Moreover, public universities have many constitutionally permissible means at their disposal to protect the personal and educational welfare of minority students and other "victim groups." These include, first and foremost, the prohibition of discrimination and the vigorous enforcement of the university's antidiscrimination policy. They also include the protection of individual students from harmful acts specifically directed against them by other students; for example, the intentional infliction of emotional distress, sexual harassment in the form of unwanted sexual advances, requests for sexual favors, nonconsensual physical touching, and the sending of "obscene phone calls" to another student. In regard to minority students, the university can best promote equality of educational opportunity by making a strong commitment to "affirmative action," thereby enrolling a "critical mass" of minority students, and by hiring a reasonable number of minority faculty and administrators. Finally, universities can expand their curricula to promote the values of equality and to provide increased knowledge about racism, sexism, homophobia and the like in American society.

Since public universities have all these means at their disposal to advance equality of educational opportunity for minority students and other "victim groups," the claimed necessity for bans on "racist speech" on campus is a dubious assertion. This is especially true for those public universities whose enthusiasm for the more "costly" means of achieving equality of educational opportunity—such as a strong commitment to "affirmative action"—has been less than striking. Bans on "racist speech" may also have as their objective the imposition of a new secular orthodoxy that conforms with the beliefs of many faculty members and administrators today. Nonetheless, it must be emphasized that universities have many more effective means of achieving equal educational opportunity than bans on "racist speech." Unlike bans on "racist speech," the use of such means does not risk under-cutting the freedom of unfettered inquiry to which a university

15. The university can prohibit discrimination on the part of faculty members, such as applying differential grading standards to minority or women students, or refusing to call on them in class, or belittling them when they do speak. It can prohibit discrimination by university-recognized student organizations, such as where a fraternity has racial or religious restrictions on membership. The university can further prohibit recruiting on campus by employers that engage in discrimination against "victim groups," such as a ban on military recruitment because of the military's discrimination against gay and lesbian persons.
should be committed. Additionally, these means do not give rise to serious constitutional problems for public universities.

The substance of the University of Michigan's "racist speech" policy, and how it operated in practice will be discussed in detail elsewhere. Therefore, only a brief summary of that discussion suffices here. The policy went through a number of drafts, with its objective reflected in the language of the policy as well as in the "legislative history" leading up to its promulgation. The rationale for the policy, stated by then acting President Fleming in a confidential memorandum to the University's executive officers on December 14, 1987, was that "students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding."

This rationale was embodied in the language of the policy. The policy applied to "educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers." In those areas, students were subject to discipline for "verbal behavior" that (1) "stigmatizes or victimizes an individual on the basis of race . . ." and (2) "[c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored . . . activities."

The district court held that the italicized language rendered the policy unconstitutionally vague. Moreover, this language clearly indicates that the policy was directed against the expression of "racist ideas;" ideas considered offensive to racial minorities and other "victim groups."

16. See Racist Speech, supra note 2.
17. 721 F. Supp. at 855.
18. Id. at 856.
19. Id. (emphasis added).
20. Id. at 867. The court also found impermissible vagueness in the "threats" and "effects" provisions.
21. The use of the phrase, "intimidating, hostile or demeaning environment for educational pursuits," in the University of Michigan's "racist speech" policy and the "racist speech" policies of many other universities is an unfortunate example of the "fallacy of the transplanted concept." The concept of "hostile environment" finds its source in EEOC Guidelines which define prohibited on-the-job sexual harassment. These Guidelines define prohibited sexual harassment to include both "quid pro quo" sexual demands and "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature where such conduct has the purpose or effect of unreasonably interfering
The assertion that the policy was directed against the expression of "racist ideas" is further indicated by the examples of violations set forth in an authoritative "interpretive guide" issued by the University.\textsuperscript{22} It was our contention that "[e]very single example with an individual's work performance or creating an intimidating, hostile or offensive working environment." Since Title VII affords women and other protected groups the right to work in an "environment free from discriminatory intimidation, ridicule and insult," the existence of an "intimidating, hostile or offensive working environment" for women, minorities and other protected groups constitutes prohibited discrimination. See the discussion in Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-67 (1986).

In the context of employment discrimination, the concept of "intimidating, hostile or offensive working environment" has an analytically clear meaning. It is a workplace environment that creates barriers to equal employment opportunity by making it difficult for women or other protected groups to work in that environment. There is no analytical or practical difficulty in establishing criteria to determine whether such an environment in fact exists in a particular workplace: Is the working environment such that a reasonable woman would have difficulty working there because of the practices and behavior of employers, supervisors or co-workers that are directed against women? Such practices and behavior must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." \textit{Id} at 67.

The business of the workplace is to produce goods, provide services, sell products, and the like. Practices and behavior of employers, supervisors or co-workers that create an "intimidating, hostile or offensive working environment" are usually irrelevant and counterproductive to the business of the workplace. Elimination of such practices and behavior will not have an adverse effect on the business of the workplace, but to the contrary, are likely to contribute to its improvement. More significantly, for Title VII purposes, elimination of such practices and behavior—and of the resulting "intimidating, hostile, or offensive working environment—is absolutely necessary to provide equal employment opportunity for women and other protected groups.

The "fallacy of the transplanted concept," represented by the substitution of "environment for educational pursuits" for "working environment" in the University of Michigan's and other universities' "racist speech" policies, is that the "business" of the university is education, not the production of goods and services. Education involves the presentation and discussion of ideas, including ideas that may be perceived as "intimidating, hostile, or offensive," such as ideas about race, gender, sexual orientation, and the like. Thus, the concept of "intimidating, hostile or offensive environment for educational pursuits" is internally contradictory. The educational environment, by its very nature, may be "intimidating, hostile, or offensive" to some students, or to many students, at one time or another because of the presentation and discussion of controversial ideas. It is for this reason that the use of the concept of "intimidating, hostile or offensive environment" to define prohibited activity in the context of a public university's educational programs will necessarily result in constitutionally impermissible overbreadth and vagueness.

\textsuperscript{22} The "interpretive guide" was issued after concerns were expressed by
prohibit[ed] acts of expression or association that [were] absolutely or in all but very limited circumstances protected by the first amendment.\textsuperscript{23} The most important example, which was the basis for the plaintiff’s standing in \textit{Doe},\textsuperscript{24} and which was a major point of reference for the overbreadth challenge, was the following: “A male student makes remarks in class like ‘Women just aren’t as good in this field as men,’ thus creating a hostile learning atmosphere for female classmates.”\textsuperscript{25} The expression of this idea, of course, would be contrary to the prevailing secular orthodoxy that the tenets of feminism are superior to the traditional view of women, and that there are no biological differences between the sexes that would make members of one sex biologically more suited to engage in particular kinds of activity than the other. Whenever a male student expressed such an idea, he would be deemed to have “created a hostile learning atmosphere for female classmates.”

Another example, directed against the expression of offensive ideas, was: “You comment in a derogatory way about a particular person or group’s physical appearance or sexual orientation, or their cultural origins or religious beliefs.”\textsuperscript{26} The number of viewpoints and ideas that would be proscribed under this example is staggering.\textsuperscript{27} Still another example of this genre was: “You display

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\textsuperscript{23} Brief in Support of Plaintiff’s Motion for Preliminary Injunction at 16.

\textsuperscript{24} The plaintiff in \textit{Doe} was a graduate psychology student whose field of specialty was biopsychology, which he described as the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities. Using this example, he alleged that certain controversial theories positing biologically-based differences between the sexes and among the races might be perceived as “sexist” and “racist” by some students, and he feared that discussion of such theories might subject him to sanction under the policy. 721 F. Supp. at 858. The district court found that Doe’s fear of sanctions under the policy, if such theories were discussed, was “entirely reasonable” and it was the “chilling effect” on Doe’s discussion of these theories that furnished the requisite “injury in fact” for standing purposes. \textit{Id.} at 859-61.

\textsuperscript{25} \textit{Id.} at 858.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} As the plaintiff in \textit{Doe} stated in an affidavit: “Rather than encourage her maturing students to question each other’s beliefs on such diverse and controversial issues such as the proper role of women in society, the merits of particular religions, or the moral propriety of homosexuality, the University has decided that it must protect its students from what it considers to be ‘unenlightened ideas.’” Affidavit of John Doe in Support of Plaintiff’s Motion for Preliminary Injunction, at 8-9.
a confederate flag on the door of your room in the residence hall.” The expression of ideas by the display of a flag has been considered protected by the first amendment ever since *Stromberg v. California*.

Finally, the policy, as administered in practice, clearly reached the expression of ideas that were inconsistent with the officially-approved “secular orthodoxy.” The district court discussed three cases involving a claimed violation resulting from expression occurring in the classroom to support its conclusion that, “as applied by the University over the past year, the policy was consistently applied to reach protected speech.” In one of these cases a graduate student in social work was charged with harassment on

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28. 721 F. Supp. at 858.
29. 283 U.S. 359 (1931).
30. Through discovery, we obtained all of the cases in which complaints of a violation of the policy were filed. As we had requested, all the names of the complaining and offending students were deleted from the files. After sifting through the cases, and discarding the large number of “obscene phone call” complaints and most of the cases where no action was taken, we settled on twenty representative cases and submitted them with a summary of each case and the complete file as an Exhibit in Support in Plaintiff’s Motion for a Preliminary Injunction.
31. 721 F. Supp. at 865. This was in response to the university’s argument that the policy “did not apply to speech that was protected by the [f]irst [a]mendment,” and its urging the court to “disregard the Guide as ‘inaccurate’ and look instead to the manner in which the [p]olicy has been interpreted and applied by those charged with its enforcement.” Id. at 864.
32. We later discovered that this student was black. Experience with the operation of the policy indicated that contrary to the popular perception, “racist speech” is not a matter of “straight white males versus minorities, women, gays, and other victim groups.” Here a complaint was filed against a black student for “homophobic speech.” In another case, a complaint was filed against a black law student, who during the course of an argument with a white law student in the law building, used the term “white trash,” and said “[I]t would be in your best interest not to be indignant with me or 4:00 will be more than quitting time.” The black student complied with the white student’s demand for a letter of apology. The letter of apology was very humiliating and could not help but adversely affect the black law student’s self-esteem—the very thing that a “racist speech” policy is supposedly designed to protect. Still another case involved a Chinese-American student, who in a discussion among male students, all apparently intoxicated, made a statement “asking why Black people feel discriminated against,” and also spoke about “conceited Jews.” Following counseling, the student apologized for his “inappropriate language” and his apology was accepted by the other students. He said that he was attempting to complain that black residents of the residence hall tended to socialize together and that as a Chinese-American, he felt isolated since he had no one with whom to associate. A number of the complaints were filed by women students on the ground that male students,
the basis of sexual orientation in that he had "repeatedly said that
homosexuality was an illness that needs to be cured," and that he
had "developed a model to change gay men and lesbians to a
heterosexual orientation." He had also discussed efforts to apply
this model in his field placement. The student contested the charge,
and the case went to a formal hearing, where a divided hearing
panel held that the student's discussion of "homosexuality as an
illness" did not violate the policy. The panel gratuitously stated,
however, that the finding should not be construed as "condoning
the actions or statements of the student," and that his statements
"should be reviewed by the appropriate social work professionals
in considering the student's suitability as a social worker."33

In a second case, a student in a business school class read a
limerick which poked fun at the alleged homosexual acts of a well-
known athlete. After class, another student, apparently gay, read
him the policy and accused him of having engaged in "intimidating
behavior." The offending student immediately apologized, but the
offended student filed a complaint anyway. The offending student
agreed to an informal resolution, under which he was to publish
a letter of apology in the campus newspaper and to attend a "Gay
Rap" session.34

The third case involved statements made by a white dental
student at the orientation session of a preclinical dentistry class. The
class was widely regarded as one of the most difficult for
second-year dentistry students. In the orientation session, when
the class was broken up into small groups, the student stated that,
"he had heard that minorities had a difficult time in the course
and that he heard they were not treated fairly." The faculty
member teaching the course, herself a minority person, filed a
complaint on the ground that the comment was unfair and hurt
her chances for tenure. The student was then "counseled" about
the existence of the policy, and he agreed to write a letter apolo-
gizing for making the statement without adequately verifying the
allegation, which he said he had heard from his roommate, a black
former dentistry student.35

sometimes unidentified, had put up posters or pictures of a sexual nature; one
such complaint was that magazine pictures of nude women were posted over the
stalls in the men's bathroom. Other complaints were on the basis of overheard
remarks that were not addressed to the complainant. In short, it was "everybody
complaining against everybody else about everything."

33. The case is discussed at 721 F. Supp. at 865.
34. Id.
35. Id. at 865-66.
As the district court noted:

[the manner in which these three complaints were handled demonstrated that the University considered serious comments made in the context of classroom discussion to be sanctionable under the [p]olicy . . . . There is no evidence in the record that the Administrator ever declined to pursue a complaint through attempted mediation because the alleged harassing conduct was protected by the first amendment . . . . The University could not seriously argue that the policy was never interpreted to reach protected conduct. It is clear that the policy was overbroad both on its face and as applied.]

III. THE DOE DECISION AND THE CONSTITUTIONAL IMPERMISSIBILITY OF CAMPUS BANS ON “RACIST SPEECH”

I now want to elaborate further upon why a public university cannot constitutionally prohibit the expression of “racist ideas” on campus. This explanation will be related to the district court’s decision in Doe, and to the impact of the Doe decision on the constitutional impermissibility of campus bans on “racist speech.”

A public university cannot constitutionally prohibit the expression of “racist ideas” on campus, even on the assumption that the expression of such ideas generally or in particular circumstances, creates an “intimidating, hostile or demeaning” environment for minority students and other “victim groups.” It cannot do so because, regardless of the justification, any prohibition on the expression of “racist ideas” on the campus of a public university is inconsistent with three important first amendment principles. These principles are content neutrality, protection of offensive speech, and heightened protection to expression in the academic context.

Under the principle of content neutrality, the government may not proscribe any expression because of its content, so that an otherwise valid regulation violates the first amendment if it differentiates between expression based on its content. There are two aspects to the principle of content neutrality: viewpoint neutrality and category neutrality. Under the viewpoint neutrality aspect of the principle, to which the Court has never recognized any excep-

36. Id. at 866.
tions, the government cannot regulate expression in such a way as to favor one viewpoint over another. Under the category neutrality aspect of the principle, to which the Court has recognized only limited exceptions, the government generally cannot regulate in such a way as to differentiate between categories of expression.

A prohibition on the expression of “racist ideas” on campus violates the viewpoint neutrality aspect of the content neutrality principle. Such a prohibition favors a particular viewpoint over the opposing viewpoint, such as the view of racial equality over the view of racial inferiority, the view of gender equality over the traditional view of male supremacy and female subordination, or the view of homosexuality as being an acceptable lifestyle over the view of homosexuality as being immoral or a condition of mental illness. Under the principle of content neutrality, a public university

37. See generally the discussion of the viewpoint neutrality aspect of the principle in Law of the First Amendment, supra note 6, at 10-12. The requirement of viewpoint neutrality was the basis for the Court’s invalidation of state and federal bans on flag desecration in Texas v. Johnson, 491 U.S. 399 (1989) and United States v. Eichman, 110 S. Ct. 2404 (1990). The difference between the majority and the dissent in both of these cases was whether the requirement of viewpoint neutrality was implicated by these bans. The majority took the position that the asserted governmental interest in preserving the flag as a “symbol of nationhood and national unity” did implicate this requirement. They emphasized that the government authorized burning as a proper means of disposing of a torn or soiled flag, so that the thrust of the ban was directed toward the “content of the message” conveyed by the burning. 491 U.S. at 410-12; 110 S. Ct. at 2409.

Other cases involving the requirement of viewpoint neutrality include: Boos v. Barry, 485 U.S. 312 (1988) (prohibition of display of sign within 500 feet of foreign embassy that “would tend to bring the foreign government into public odium or public disrepute”); Schacht v. United States, 398 U.S. 58 (1970) (federal law allowing wearing of U.S. military uniforms in portrayal only if the portrayal does not “tend to discredit the military”); American Booksellers Ass’n. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff’d., 475 U.S. 1001, reh’g denied, 475 U.S. 1132 (1986) (law defining “pornography” in such a way as to mandate an officially-approved view of “equality” between men and women in sexual encounters).

38. See generally the discussion of the category aspect of the principle of content neutrality in Law of the First Amendment, supra note 6, at 12-14. The Court has recognized only two limited exceptions to this aspect of the principle, one involving special zoning regulation of businesses that purvey sexually explicit materials, and one involving regulation of commercial billboards. In addition, regarding access to public property that is not a traditional or designated public forum, since the government may reserve the property for its intended purposes, communicative or otherwise, it may impose category-type regulations appropriate to the particular property.
cannot favor one viewpoint over another for any reason, including 
the reason that the expression of the officially disapproved view-
point causes discrete educational harm to "victim groups." 39

Under the principle of protection of offensive speech, the 
government cannot prohibit the expression of an idea on the 
ground that the idea itself is highly offensive to many people. As 
the Supreme Court stated in Texas v. Johnson: "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." 40
In that case, the Court refused to recognize an exception to this 
principle "even where our flag has been involved." 41 Nor may the 
government prohibit the expression of an idea in a particular 
manner that is highly offensive, such as by the use of an "unseemly 
expletive." 42

Thus, any time the government tries to justify a restriction of 
expression on the ground of the "offensiveness" of the particular 
expression, the justification is necessarily improper. This means 
that a public university cannot constitutionally justify a ban on 
"racist speech" on the ground that it expresses a highly offensive 
idea or that it is very offensive to the "victim groups." It is 
likewise immaterial that the "racist speech" is considered to cause 
direct educational harm to members of "victim groups." The harm 
is caused only because the idea itself or the manner in which it is

39. In Doe, we illustrated this proposition by the "women just aren't as 
good in this field as men" example:

As the plaintiff has demonstrated in his Affidavit, under the [p]olicy 
the University has established a 'secular orthodoxy,' an element of 
which, as illustrated by the above example, is that 'the tenets of feminism 
are superior to the traditional view of women.' Under the principle of 
content neutrality, the government may not 'ordain a preferred viewpoint 
about women' .... Nor may it prescribe the expression of any idea 
because of the content of that idea or the message it conveys, in the 
name of creating a 'non-hostile' environment for students.

Brief in Support of Plaintiff's Motion for Preliminary injunction, at 12-13.

40. 491 U.S. at 414.

41. Id. The principle of protection to offensive speech also applies to 
commercial speech, therefore, the government cannot prohibit product advertising, 
such as an advertisement for contraceptives, on the ground that such advertising 
would be offensive to many persons. Bolger v. Youngs Drug Products Corp., 

(public display of jacket with the message, "Fuck the draft").
expressed is offensive to the members of the "victim groups." Therefore, the protection of offensive speech principle applies and is dispositive.

The principle of heightened protection to expression in the academic context emerged from constitutional challenges to governmental efforts in the '50s and '60s to impose a political orthodoxy on university campuses and in the public schools. In a number of cases the Court invalidated legislative inquiries into the beliefs and associations of teachers and loyalty oath requirements for public employees by emphasizing the importance of free inquiry in the academic context, stating that the first amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." This principle was also involved in cases arising in the late '60s and early '70s when public universities tried to sanction or restrict "anti-establishment" student speech and association on campus. The Court held, for example, that a public university could not refuse to grant official recognition to a student group because of a disagreement with the group's philosophy or because of an unsubstantiated fear that the group would be a "disruptive influence," or discipline a student for distributing on campus a newspaper containing material that was inconsistent with the univ-

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43. The relationship between the purported offensiveness of "racist speech" and the resulting harm to members of "victim groups" was an underlying premise of the University of Michigan's policy invalidated in Doe. The rationale for the policy, according to then acting President Fleming was that, "students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding." 721 F. Supp. at 855.

44. As we stated in our brief, again using the "women just aren't as good in this field as men" example:

It may well be that female students at the University of Michigan would be offended by the expression of the idea that, 'women just aren't as good in this field as men,' or that, 'women are more suited than men to care for children,' and would find the expression of such ideas to create a 'hostile learning atmosphere'.

... The University may not prohibit the expression of any idea, no matter how offensive the idea or the form in which it is expressed may be to other students. Nor may the University say that a particular idea is so offensive as to create an 'intimidating, hostile or demeaning environment for educational pursuits.'

Brief in Support of Plaintiff's Motion for Preliminary Injunction at 13-14 (emphasis in original).


ersity's view of "conventions of decency."\textsuperscript{47} The principle of heightened protection to expression in the academic context operates to preclude a public university from prohibiting the expression of "racist ideas," notwithstanding the purported harm that the expression of these ideas causes to "victim groups."\textsuperscript{48}

In its opinion in \textit{Doe}, the district court discussed the interaction of the principles of content neutrality, protection of offensive speech, and heightened protection to expression in the academic context, as they related to the facial invalidity of the university's "racist speech" policy:

What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with the 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 . . . . These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission.\textsuperscript{49}

The court concluded that the policy was void on its face for overbreadth because, by its terms, it reached "broad categories of speech, a substantial amount of which is constitutionally protected."\textsuperscript{50}

\textsuperscript{47} Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667, \textit{reh'g denied}, 411 U.S. 960 (1973). During this time, lower courts invalidated the efforts of public universities to ban "controversial" speakers on campus, making it clear that a public university's policy on outside speakers generally must be limited to imposing reasonable and content-neutral time, place and manner regulations. \textit{See}, \textit{e.g.}, Pickings v. Bruce, 430 F.2d 595 (8th Cir. 1970); Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970); Stacy v. Williams, 306 F. Supp. 963 (N.D.Miss. 1969) (three-judge).

\textsuperscript{48} As we argued in our brief:

The third fundamental first amendment principle that is literally trashed by the University's policy is the principle of heightened protection of expression in the academic context . . . .

\textsuperscript{49} 721 F. Supp. at 863.

\textsuperscript{50} \textit{Id.}
The point to be emphasized is that the university's policy was void on its face, not because it was poorly drafted, but rather because it reached categories of speech that were constitutionally protected. The underlying premises of the policy made it clear that the policy was intended to reach these protected categories of speech, since the policy was directed at the expression of "racist ideas" that were deemed to cause discrete educational harm to racial minorities and other "victim groups."

It will be recalled that proponents of bans on "racist speech" justify these bans as being necessary to advance the equality value of the fourteenth amendment and to provide equal educational opportunity for members of "victim groups."51 This was exactly the justification that the University of Michigan advanced for its "racist speech" policy.52 But as demonstrated, the policy was directed at the expression of "racist ideas," and the premise of the policy was that the expression of those ideas caused discrete educational harm to members of "victim groups." The University of Michigan then tried to do the very thing that proponents of bans on "racist speech" say that a university should do: Restrict "racist speech" in order to provide equal educational opportunity for members of "victim groups."

What Doe makes clear, however, is that a public university is constitutionally foreclosed from trying to bring about equal educational opportunity in this way. A prohibition of "racist speech," no matter how narrowly-framed and no matter how justified, is necessarily directed against the expression of "racist" ideas. This being so, the underlying basis of a "racist speech" policy is inconsistent with the first amendment principles of content neutrality, protection of offensive speech, and heightened protection to freedom of expression in the academic context. In light of these principles, a public university cannot establish an officially approved "secular orthodoxy" and cannot protect minority students and other members of "victim groups" from exposure to "racist ideas," no matter how offensive these ideas may be and no matter how much discrete "educational harm" these ideas cause to members of "victim groups."

51. See supra note 2.
52. See supra notes 18-23 and accompanying text.
53. In this connection, it is completely irrelevant from a constitutional standpoint that "racist speech" is purportedly inconsistent with the equality value of the fourteenth amendment. As a constitutional matter, "racist speech" does not involve any "tension" between the fourteenth amendment's equality guarantee.
The reason *Doe* is so important in practice is that it demonstrates several key points. First, a prohibition against "racist speech" on campus is directed against the expression of "racist ideas." Second, the expression of "racist ideas" on the campus of a public university is fully protected under the first amendment principles of content neutrality, the protection of offensive speech, and heightened protection to expression in the academic context. Third, because of this protection, a ban on "racist speech" on campus cannot constitutionally be justified on the ground that it causes direct educational harm to members of "victim groups." Academic commentators who dismiss *Doe* as a case about poorly-drafted "racist speech" restrictions are simply ignoring the district court's careful analysis and application of first amendment principles in reaching its conclusion that the University of Michigan's "racist speech" policy was void on its face. A careful reading of the *Doe* decision, with reference to its rationale and the district court's analysis and application of first amendment principles, should make it clear that virtually any campus ban on "racist speech" imposed by a public university will be found to violate the first amendment. While academic commentators may continue to discount the impact of *Doe* and go about the business of advocating significant bans on "racist speech" on campus, lawyers for a public university considering the imposition of such a ban are likely to treat the *Doe* decision with considerably more respect.

The fourteenth amendment prohibits the state from engaging in invidious racial discrimination; the first amendment prohibits the state from abridging freedom of expression. These guarantees do not "conflict" in the sense that one cannot be asserted to obviate what would otherwise be a violation of the other. For example, the fourteenth amendment's equal protection clause prohibits the states from operating racially-segregated public schools, and the states cannot get out from under the fourteenth amendment and justify state-imposed segregation in the public schools on the ground that whites should have a "freedom of association" right not to associate with blacks in public facilities. See the discussion of this point in Sedler, *The Constitution and School Segregation: An Inquiry into the Nature of the Substantive Right*, 68 Ky. L.J. 879, 939-40 (1979-80). By the same token, the first amendment principles of content neutrality, protection of offensive speech, and heightened protection to freedom of expression in the academic context prohibit a public university from restricting the expression of "racist speech" on campus. The public university cannot get out from under the first amendment and justify the restriction on the ground that it is necessary to provide equal educational opportunity for racial minorities and other members of "victim groups."

54. In practice, the *Doe* decision has had at least some impact within this
IV. THE MATTER OF “NARROW” BANS ON “RACIST SPEECH”

Some academic commentators maintain that certain types of restrictions on “racist speech,” not directed primarily at the expression of “racist ideas,” but rather at “racial epithets,” “direct face-to-face racial insults,” and “targeted vilification” are constitutionally permissible. Professor Charles Lawrence, in a far-ranging analysis of “racist speech,” has argued that the first amendment permits “narrowly drafted provisions aimed at racist speech that results in direct, immediate, and substantial injury.” These would include both “face-to-face” racial insults and “racial epithets and vilification that do not involve face-to-face encounters—situations in which the victim is a captive audience and the injury is ex-

The bringing of the “lawyers’ perspective” to the matter of campus bans on “racist speech” is illustrated by the article in this symposium by Ms. Patricia Hodulik, who is Senior System Legal Counsel for the Office of General Counsel of the University of Wisconsin System, and who was the principal drafter of the System’s “racist speech” policy. Hodulik, Racist Speech on Campus 37 Wayne L. Rev. 1433 (1991). Ms. Hodulik notes that “compliance with the first amendment became the focus of the regulatory effort,” and contends that “what emerged was a narrow rule based principally on the first amendment ‘fighting words’ doctrine, and incorporating equal opportunity concepts that prohibit demeaning expressive behavior that creates a hostile environment for minorities.” Id. at 1437. The Wisconsin policy applies only to intentional “racist” remarks directed at a particular person and specifically excludes statements made during class discussion. Id. at 1438-39. Ms. Hodulik emphasizes that the policy represents a careful effort to satisfy the requirements of the first amendment. However, I think that it still has overbreadth and vagueness problems, due to the use of the “intimidating, hostile or demeaning environment” concept, see supra note 21, and due to the fact that, whether intended or not, it still reaches the expression of “racist ideas,” albeit on a one-to-one basis.

Ms. Hodulik’s article also makes a very valuable contribution to the discussion of campus bans on “racist speech” because it is built around a specific proposal. Professor Brownstein’s article in the Symposium, Brownstein, Hate Speech at Public Universities: The Search for an Enforcement Model, 37 Wayne L. Rev. 1451 (1991) is also helpful in this regard, because it discusses the University of California at Davis’ policy. Much academic commentary in this area avoids setting out specific proposals that incorporate the author’s views of permissible restrictions on “racist speech.” By avoiding specific proposals, the authors also avoid subjecting their views to careful first amendment analysis. It is only when a specific proposal is presented that it is possible to engage in reasoned debate as to what kinds of restrictions are permissible under the “law of the first amendment,” and as to whether the “law of the first amendment” should be modified to permit restrictions on “racist speech,” and if so, in what respects it should be modified. See supra note 6 and accompanying text.

On October 11, 1991, the United States District Court for the Eastern District of Wisconsin held that the University of Wisconsin policy was unconstitutionally vague and overbroad. The UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys., No. 90-C-328 (E.D. Wis. Oct. 11, 1991).

55. Lawrence, supra note 2 at 437.
experienced by all members of a racial group who are forced to hear or see these words; the insulting words, in effect, are aimed at the entire group."

I have discussed the constitutional issues raised by Professor Lawrence's proposals at length elsewhere. I would submit, however, that most of Professor Lawrence's proposals would be unconstitutional if adopted by a public university. No matter how the proposals are framed or justified, they are still directed against the expression of "racist ideas," and as Doe makes clear, the expression of "racist ideas" on the campus of a public university is fully protected by the first amendment.

Professor Lawrence argues that face-to-face racial insults are the "functional equivalent" of fighting words, and are undeserving of first amendment protection, because (1) they create an immediate injurious impact on the victim and leave no opportunity for response speech, and (2) they disserve the purpose of the first amendment, "because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim." "Fighting words" are not protected by the first amendment because they are an invitation to a fight, and so amount to an illegal "verbal act" rather than the expression of an idea for first amendment purposes. The expression of "racist ideas" on a one-to-one basis, however, even if considered the "functional equivalent" of "fighting words," is still the expression of an idea for purposes of the first amendment. It is thus constitutionally protected, notwithstanding that the "racist" idea is intended to "stigmatize" the person to whom it is addressed. Nor does it matter that the intention is to "injure the victim," because that "injury" results solely from the expression of an idea. Again, under the principle of protection of offensive speech, the expression of a "racist" idea is protected no matter how offensive it is, no matter what the purpose of the speaker in expressing it, and no matter what kind of harm it causes to the person to whom it is addressed.

56. Id.
57. Id. at 452.
58. See the discussion of "fighting words" in Strossen, supra note 2, at 226-27; L. Tribe, AMERICAN CONSTITUTIONAL LAW 929 n.9 (2d ed. 1988). In Texas v. Johnson, 491 U.S. 397, 409 (1989), the Supreme Court referred to that "small class of 'fighting words' that are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"
59. Professor Lawrence uses Stanford University's definition of "harassment by vilification" as a model of permissible regulation of "face-to-face"
Professor Lawrence contends that minority students and other members of "victim groups" are a "captive audience" on the university campus and so, while on campus, are entitled to be protected against "racial vilification." He essentially invokes the "privacy of the home" justification for this proposal. However, he extends the "privacy of the home" concept to include not only a student's dormitory room but common living spaces and in fact the entire campus. "Racial vilification" directed at a "captive audience" is no less protected than the expression of other ideas directed at an audience that cannot escape the message being conveyed by the speaker.

It is certainly true that under the doctrine of reasonable time, place and manner regulation, the government may constitutionally impose regulations that enable an unwilling listener to avoid speech in the privacy of the listener's home. There would be no constitutional problem, therefore, with a public university's regulation that enabled a student to exclude "unwanted speech," racist or otherwise, from her or his dormitory room. Such a regulation could authorize a student to put up a notice saying, "post nothing on the door to my room and put nothing under the door." This would be a fully constitutional, content-neutral place regulation, designed to protect the student from "unwanted speech" in the privacy of the student's dormitory room.

Common rooms and the entire university campus, however, do not constitute a student's home. A ban on "racial vilification" throughout the campus could not conceivably be sustained as a reasonable time, place and manner regulation designed to protect racial insults. It states that "speech or other expression intended to insult or stigmatize an individual or a small number of individuals on the basis of race, etc., and (1) is addressed directly to the individual or individuals whom it insults or stigmatizes and (2) makes use of "fighting words" or non-verbal symbols." Lawrence, supra note 2, at 450-51. There is no doubt that such a "harassment by vilification" rule, if adopted by a public university, would be void on its face for overbreadth because, by its terms, it deliberately goes beyond unprotected "fighting words" and essentially prohibits the expression of "racist ideas" on a one-to-one basis.

60. Lawrence, supra note 2, at 456-57.

61. See the discussion of this doctrine in Law of the First Amendment, supra note 6, at 20-25.

the privacy of the "student's home." Professor Lawrence is saying that minority students and members of other "victim groups" should have the right not to be exposed to "racist ideas" while on a university campus because they are a "captive audience" there. But as we have emphasized, and as *Doe* makes clear, a public university cannot constitutionally protect minority students from exposure to "racist ideas." This is no less true when the students are in "common rooms" or going across the campus than it is when they are in the classroom. Any effort to do so runs up against the first amendment principles of content neutrality, the protection of offensive speech, and heightened protection to expression in the academic context, and is clearly unconstitutional.

As this discussion of Professor Lawrence's proposals demonstrates, so-called "narrowly drafted provisions aimed at racist speech that results in direct, immediate and substantial injury" are still directed at the expression of "racist ideas." Thus, they have the same objective as the University of Michigan's "racist speech" policy that was held unconstitutional in *Doe*, and they would be held unconstitutional for the same reasons. Again, a public university cannot constitutionally prohibit the expression of "racist ideas," no matter how it tries to justify that prohibition, and no matter how "narrowly-framed" the prohibition purportedly is.

A different kind of first amendment analysis would apply where a public university merely prohibited the use of "racial epithets." The university could try to justify the restriction as a reasonable time, place and manner limitation assuming that the university succeeds in defining the proscribed "racial epithets" with sufficient precision to withstand a vagueness or overbreadth challenge—which, in my opinion, it could only do by specifically

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63. Mr. Henry Saad, who represented the University of Michigan in *Doe*, has prepared an article for this Symposium in which he contends that prohibitions on the use of racial epithets in the classroom do not violate the first amendment, a proposition with which I agree. Saad, *The Case for Prohibitions of Racial Epithets in the University Classroom*, 37 WAYNE L. REV. 1351 (1991). While noting that the prohibition must be drafted "narrowly and carefully," Mr. Saad indicates his view that the use of the term, "racial epithets and slurs," is sufficiently clear to survive a facial challenge, as long as it is accompanied by a specific intent to "demean the victim" and "unreasonably and substantially interferes with the victim's ability to obtain an education," and a disclaimer of applicability to the expression of ideas, "including racist or sexist ideology or philosophy." The limited rule would certainly not give rise to any overbreadth or vagueness problems, but it would be better if the rule specifically indicated the prohibited "racial epithets" and kindred words.
proscribing particular “racial epithets” and kindred words. It would argue that such a restriction is appropriate on a university campus in order to “promote civilized discourse” and to prevent the “discrete injury” racial minorities and other “victim groups” suffer from “racial epithets.” Moreover, there is certainly no need for any person to express any idea by the use of “racial epithets.” In order to be plausibly sustained as a reasonable time, place and manner restriction, such a restriction could not be directed against the expression of “racist ideas,” but only against the means by which those ideas would be expressed on a university campus. Under such a restriction, for example, a student could put up a poster saying, “Blacks are intellectually and morally inferior and don’t belong at the university,” but not a poster substituting the “racial epithet,” “niggers,” for “blacks.”

Professor Lawrence and other proponents of bans on “racist speech,” while making use of “racial epithets” to illustrate “racially assaultive speech,” have never proposed a ban limited only to the use of “racial epithets.” In all fairness, such an extremely limited ban would not accomplish their objective of protecting minority students from the harm that they contend results from “racist speech.” The perceived harm would only be marginally less, if at all, when the message is “blacks are inferior,” than it would be when the message is “niggers are inferior.”

Nonetheless, for our present purposes, it is sufficient to note that a ban on the use of “racial epithets” imposed by a public university could plausibly be sustained against a first amendment challenge justified as constituting a reasonable time, place and manner limitation. In my opinion, it could be sustained on this basis as applied to the one place on a university campus where “racial epithets” are not likely to be used at all, the classroom. It is difficult to perceive even the most “racist” professor or student using “racial epithets” in the classroom today. But in the completely hypothetical situation where a professor would do

64. See the discussion of the doctrine of reasonable time, place and manner regulation in Law of the First Amendment, supra note 6, at 20-25.
65. More specifically, as a place and manner limitation.
66. Mr. Saad’s article, supra note 63, sets forth a number of reasons why a ban on the use of “racial epithets” in the classroom is consistent with first amendment doctrine and principles. Without disagreeing with his analysis, I would say that the reasons he gives also support the conclusion that such a ban constitutes a reasonable time, place and manner limitation.
67. For example, discussing the meaning of the word “nigger” in American society today would, of course, be related to legitimate academic purposes.
so, it is an impermissible act of discrimination directed against minority students because it serves no purpose other than to make them feel inferior and unwanted in the classroom. Likewise, if a student would try to use “racial epithets” in class, the professor would doubtless prohibit the student from using such language in the discourse of the classroom.68

Outside of the confines of the classroom, however, a ban on the use of “racial epithets” becomes more difficult to sustain as a reasonable time, place and manner limitation.69 The matter of maintaining an “appropriate level of discourse” becomes quite diffuse when applied to the university campus as a whole. This is particularly true if the university has made no other effort to prescribe an “appropriate level of discourse” except for the ban on “racial epithets.” Moreover, the ban on the use of “racial epithets” is premised on the offensiveness of this expression, thereby implicating the first amendment principle of protection of offensive speech. For these reasons, it is highly problematical that a ban on the use of “racial epithets,” going beyond the classroom and applied to the campus as a whole, could be sustained as a reasonable time, place, and manner regulation.

In any event, it must be emphasized that most proposed campus bans on “racist speech” are not limited to “racial epithets,” and the proponents do not try to justify these bans as being nothing more than a reasonable time, place and manner regulation. The proposed bans are directed against the expression of “racist ideas,” and no matter how narrowly-framed or justified, they cannot be sustained under the “law of the first amendment.”

V. CONCLUSION

This discussion demonstrates why Doe v. University of Michigan is an important case in practice. It was not a case about poorly-drafted bans on “racist speech,” but a case about fundamental first amendment principles. The holding in Doe and the opinion of the district court in that case make it clear that virtually

68. The professor’s right to maintain a suitable level of discourse in the classroom would give the professor the right to prohibit the use of any “unseemly expletives” in the classroom that otherwise would be permissible on the streets or in a public building. Cf. Cohen v. California, 403 U.S. 15, reh’g denied, 404 U.S. 876 (1971).

69. “Racial epithets” addressed to a person on a one-to-one basis could be proscribed if they amount to “fighting words,” or if they are a part of a course of conduct amounting to the intentional infliction of emotional distress.
any ban of "racist speech" on campus imposed by a public university will be found to violate the first amendment. While the academic debate about the protection of "racist speech" under the first amendment will continue—as it should—Doe teaches us that under the "law of the first amendment," there cannot be "racist speech" bans on the campuses of public universities. Doe is thus one of the most important first amendment cases decided by a lower federal court in recent times, and in the "real world" of constitutional litigation, it will have a tremendous impact.70

70. It is likely to have the same impact on campus bans on "racist speech" at public universities that the Seventh Circuit decision in American Booksellers Ass'n. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd., 475 U.S. 1001, reh'g denied, 475 U.S. 1132 (1986), has had on so-called "civil rights anti-pornography" laws. While the academic debate may continue over whether the first amendment should protect the "graphic sexually explicit subordination of women," it is clear after Hudnut, that laws proscribing expression on this basis violate the first amendment, therefore, such laws are no longer being proposed or enacted.