

The Shanties, Symbolic Speech, and the Public Forum: Ramshackle Protection for Free Expression?

Edwin B. Firmage, Michael J. Duncan**
& J. Kevin Murphy****

I. INTRODUCTION

Shanties, symbolizing student opposition to South African apartheid and the demand that United States universities divest from corporations doing business in South Africa, were the sit-ins of the 1980s. Silent but graphic, shanties challenged the established order and attracted media attention. Sometimes, like sit-ins, the impact of shanties provoked state officials to demand their removal. The resultant confrontations between protestors and officials both highlighted the demand for change and challenged the boundaries of first amendment law.

Occasionally a nonverbal symbol manages to capture the essence of the meaning behind a movement. As Justice Jackson observed, "Symbolism is a primitive but effective way of communicating ideas. The case of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."¹ Symbolic speech enjoys constitutional protection. The case for such protection is stronger when the speech occurs in a public forum, an area dedicated to speech activities. Nevertheless, certain state interests can, if properly pursued, justify limits on protected speech.

This Article will examine the concepts of symbolic speech and the public forum—concepts that gained explicit legal recognition in the 1930s. In light of these concepts two cases involving shanties will be reviewed. While these cases occupy a small portion of first amendment history, their differing outcomes raise concern for

* Samuel D. Thurman Professor of Law, University of Utah College of Law.

** Associate, United States Army Trial Defense Services, Fort Carson, Colorado; Juris Doctor 1987, University of Utah College of Law; Note and Comment Editor 1986-87, *Journal of Energy Law and Policy*.

*** Law Clerk, Utah Court of Appeals, Salt Lake City, Utah; Juris Doctor 1990, University of Utah College of Law.

1. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

speech rights, and the ability to bring important political and social issues to the public's attention, as we move into the 1990s. The Article will then review a variety of university responses to shanties, focusing on one state university's speech regulations as a model for dealing with symbolic speech. This model assumes that speech rights are of paramount importance, and that they should be protected to the extent that university functions will permit.

II. SYMBOLIC SPEECH

Draft card burning in opposition to the Vietnam war and sit-ins protesting racial discrimination enflamed words that attempted to persuade a nation. Shanties pursue the same goal. When located on a state university campus, shanties do not necessarily raise the difficulty of trespass on private property as did the sit-in cases.² Trespass, however, is not the real issue. More important is the fact that a structure, albeit one of cardboard, plywood, and graffiti, may be symbolic speech.

Shanties were first found to constitute symbolic speech and, therefore to be protected from discretionary destruction in *University of Utah Students Against Apartheid v. Peterson*.³ The United States District Court for the District of Utah issued an injunction forbidding the removal of two shanties.⁴ The court held that the

2. In the early 1960s, the United States Supreme Court frequently found itself confronted with sit-in cases but managed to avoid the issue of trespass on private property. The Maryland Court of Appeals, in *Bell v. State*, 227 Md. 302, 176 A.2d 771 (1962), *rev'd and remanded*, 378 U.S. 226 (1964), directly confronted that issue. "On principle, we think the right to speak freely and to make public protest does not import a right to invade or remain upon the property of private citizens, so long as private citizens retain the right to choose their guests or customers." 176 A.2d at 772.

The United States Supreme Court, rather than directly confronting the issue, reversed on the basis of subsequently enacted state and local public accommodations legislation. See *Bell v. Maryland*, 378 U.S. 226 (1964); see also *Robinson v. Florida*, 378 U.S. 153 (1964) (dismissing sit-in conviction based on equal protection and state involvement in restaurant segregation); *Barr v. City of Columbia*, 378 U.S. 146 (1964) (dismissing sit-in conviction for insufficiency of evidence); *Peterson v. City of Greenville*, 373 U.S. 244 (1962) (dismissing sit-in conviction on equal protection grounds). See generally H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT*, 123-72 (1966) (discussing sit-in cases); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-3, at 1702 n.14 (2d ed. 1988) (briefly discussing sit-in cases).

With the passage of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h), the Court gained the power to decide questions of public accommodations on a statutory basis. See *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Therefore, the rights of the owner of private property open to the public to exclude a speaker for reasons unrelated to race remains an open question.

3. 649 F. Supp. 1200 (D. Utah 1986).

4. See *id.* at 1201.

shanties were constitutionally protected symbolic speech, and thus could be regulated only by reasonable time, place, and manner rules promulgated and applied with content-neutrality.⁵

In so doing, District Judge Aldon Anderson connected the shanties with an honored line of cases recognizing that nonverbal symbols truly may speak louder than words. The symbol may motivate action with an immediacy and power that transcends verbal speech. Whether the Christian cross or the swastika, tea dumped into Boston's harbor, the music of Bach, the soaring spires of a Gothic cathedral, a burning draft card, or our nation's flag and our own salute, symbolic speech needs no words to convey meaning and compel action.

Beginning at least as early as 1931 with *Stromberg v. California*,⁶ when the United States Supreme Court held unconstitutional a state regulation prohibiting the display of a red flag, a symbol of revolution, symbolic speech has been recognized and protected. In *West Virginia State Board of Education v. Barnette*⁷ the Court barred the state from demanding that school children salute the flag. The Court held that nonverbal symbolic speech, like verbal speech, cannot be compelled.⁸ The Court found no conflict between the rights of those individuals choosing not to salute the flag and the rights of any other individual. "The sole conflict," the Court noted, "is between authority and rights of the individual."⁹

Barnette established that a state cannot compel an individual to speak. Nor can the individual compel the state to speak. The Court found no compelled state speech in *Spence v. Washington*,¹⁰ a flag desecration case. The defendant, protesting the Kent State killings and the Cambodian invasion, taped a peace sign to a United States flag and displayed it in his window. "There was no

5. See *id.* at 1211. But see *State v. Ybarra*, 550 P.2d 763 (Or. Ct. App. 1976)(holding physical structure is not symbolic speech). The *Ybarra* court found the defendants' speaking and leafletting at Portland State University to be speech. The court said, however, that under the first amendment the erection of a structure (a tent) was not protected. See *id.* at 766. This conclusion may have been compelled by the court's finding that the *Ybarra* defendants, by using a bullhorn, "greatly disrupted classes." *Id.* at 764; see also *Grayned v. City of Rockford*, 408 U.S. 104 (1972)(involving noise disturbance); *Kovacs v. Cooper*, 336 U.S. 77 (1949)(involving sound truck); *Saia v. New York*, 334 U.S. 558 (1948)(involving sound amplification).

6. 283 U.S. 359 (1931).

7. 319 U.S. 624 (1943).

8. See *id.* at 630.

9. *Id.*; see also *Wooley v. Maynard*, 430 U.S. 705 (1977)(state cannot compel motorists to display "Live Free or Die" motto on license plates).

10. 418 U.S. 405 (1974).

risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully protesting that it did not."¹¹ Thus the state was not justified in prosecuting the desecration based on a "compelled speech" or "unwilling endorser" rationale.¹²

Williams v. Eaton,¹³ was an unusual case in which the state's concerns about being an unwilling endorser were held to support a restriction on symbolic speech. In *Williams*, the dismissal of fifteen black football players from the University of Wyoming football team was upheld.¹⁴ The players, protesting allegedly racist policies of Brigham Young University and the Mormon Church, had refused to play a scheduled football game unless allowed to wear black armbands. The court held that the protest of the football players, in keeping with the state's principle of complete neutrality, could not be allowed.¹⁵ A key distinguishing factor from *Williams* and from the usual state unwilling endorser argument is apparent. In most unwilling endorser cases the speakers are not asserting their views in connection with any state sponsored activity. In *Williams*, the state university sponsored and financed the football team.¹⁶

The most compelling response to the unwilling endorser argument—indeed usually the only argument necessary—is that the university, as host to a multitude of conflicting ideas, cannot reasonably be thought to endorse any one particular message, whether spoken or symbolic. Like the protestor in *Spence*, speakers who erect shanties do so not because the University agrees with their position, but precisely because it does not. The University of Utah raised the unwilling endorser argument in *University of Utah Students Against Apartheid*, but without success.¹⁷

11. *Id.* at 414-15.

12. *Id.* at 415.

13. 333 F. Supp. 107 (D. Wyo. 1971). This case was actually the third in a series of four published opinions. See *Williams v. Eaton*, 310 F. Supp. 1342 (D. Wyo. 1970), *aff'd in part and remanded*, 443 F.2d 422 (10th Cir. 1971), *on remand*, 333 F. Supp. 107 (D. Wyo. 1971), *aff'd*, 468 F.2d 1079 (10th Cir. 1972).

14. See *Williams*, 333 F. Supp. at 113.

15. See *id.* at 113-14.

16. The decision is not without its critics. Some argue that *Williams* was wrongly decided because of the court's emphasis on avoiding "hostile expression," which is not a constitutionally valid way to limit speech. See J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 1.12, at 30 (1979).

17. Following the decision in *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200 (D. Utah, 1986), the University of Utah established a committee to draft time, place, and manner regulations. In its new University Speech Policies, the Univer-

The civil rights movement and opposition to the Vietnam War produced major changes in the law of symbolic speech. Nonverbal symbolic demonstrations were the incarnation of opposition to racial segregation. In *Brown v. Louisiana*,¹⁸ the Court reversed the breach of the peace convictions of five black individuals who asserted physical albeit silent opposition to segregated library facilities. Although not decided strictly on speech grounds, the Court in *Street v. New York*¹⁹ reversed the conviction of a black man who, distraught over the shooting of civil rights leader James Meredith, burned his American flag.

Similarly, the burning draft card became a symbol of opposition to the Vietnam War. In *United States v. O'Brien*²⁰ the Court found that burning a draft card was symbolic speech.²¹ But the Court also held that the government's interest in efficient administration of the Selective Service system was sufficiently compelling to justify the restriction on speech that resulted from making draft card destruction a criminal offense.²² "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."²³ The Court asserted that the law criminalizing the destruction of a draft card was aimed only at the "noncommunicative aspect" of the conduct.²⁴ Although *O'Brien* has been widely criticized on this point,²⁵ it established a standard

sity of Utah weakened future use of the compelled speech argument: "By virtue of regulating the exercise of free speech on the campus, the University does not sponsor or sanction the messages being stated or the methods of speech being used unless expressly stated otherwise." University Regulations, Ch. IX, *University Speech Policies* (May 15, 1987). See also *infra* notes 226-40 and accompanying text (discussing University of Utah speech policies).

18. 383 U.S. 131 (1966). The defendants had remained in the "white" library after being asked to leave. See *id.* at 136-37.

19. 394 U.S. 576 (1969). The defendant's conviction under the flag desecration statute was reversed because the Court found a possibility that the defendant had been convicted for what he had said as he burned the flag. See *id.* at 581. The Court did not directly confront the issue whether a state could constitutionally prohibit flag desecration until *Texas v. Johnson*, 109 S. Ct. 2533 (1989). *Johnson* is discussed *infra*, at notes 55-64 and accompanying text.

20. 391 U.S. 367 (1968).

21. See *id.* at 376.

22. See *id.* at 377-80.

23. *Id.*

24. *Id.* at 381-82.

25. While the government's interest in maintaining its draft cards may not have been nonexistent, it seems to have been nominal at best. Burning a draft card would not remove an individual's record from the Selective Service computers. Even assuming a valid govern-

that still helps to define the limits on government regulation of symbolic speech:

[A] Government regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²⁶

A more sensitive approach to symbolic speech was taken in *Spence v. Washington*.²⁷ In *Spence*, the Court declared a peace sign taped to the American flag to be protected symbolic speech.²⁸ The Court found that "the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression."²⁹ *Spence* set the standard for determining when conduct is to be treated as speech: "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."³⁰ Both of these criteria are associated with shanties.³¹

Spence is important for two other reasons. First, in rejecting

mental interest, that interest was still insufficient to justify suppressing speech. "The Court was content to demonstrate that the government's interest in preventing the destruction of draft cards is real, that is, not imaginary or nonexistent. But an interest may well be real without being important enough to sustain an abridgment of speech." Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 23. Indeed, the fact that destroying a draft card was illegal made its burning a potent symbol. "With the passage of the Rivers amendment [making illegal the destruction of a draft card], Congress had thrown down the gauntlet and provided an invitation to martyrdom certain to be irresistible to those who felt the need to make a personal sacrifice for the cause of conscience." *Id.* at 6.

It appears that the Court considered not so much the government's interest in a piece of paper, but rather public destruction of what the paper represented. It was precisely the power of the act that the government feared; it was the power of symbolic speech that *O'Brien* attempted to stifle. The government was not concerned with its piece of paper, but rather with the message conveyed by the paper's destruction. It feared the content of the message.

26. *O'Brien*, 391 U.S. at 377.

27. 418 U.S. 405 (1974).

28. *See id.* at 410.

29. *Id.* at 409-10.

30. *Id.* at 410-11.

31. "The structures themselves have few, if any, nonexpressive benefits . . . Further, on all outside walls of the shanties, words and drawings serve to explain the anti-apartheid/pro-divestiture message of the protestors." *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1204 (D. Utah 1986).

the "captive audience" argument, the Court stated: "Moreover, appellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display."³² This is also true in the case of shanties.³³ Second, *Spence* reaffirmed that the "offensiveness" of speech does not justify its suppression: "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."³⁴

Three years before *Spence*, in *Cohen v. California*,³⁵ the Court reversed the breach of the peace conviction of an individual who had worn a jacket, in the county courthouse, with a common though offensive epithet emblazoned on it. In addition to noting that those offended had the option of "averting their eyes,"³⁶ the Court rejected the "fighting words" argument, finding that the epithet was not "directed to the person of the hearer."³⁷

Cohen is applicable to the shanties question in that the University of Utah relied on the hostile reaction to the shanties to justify their removal.³⁸ The University argued that the shanties were "intentionally ugly and unaesthetic," and "an imposition on a captive audience."³⁹ As the Court noted in *Cohen*, however, "[s]urely the State has no right to cleanse public debate to the point where

32. *Spence*, 418 U.S. at 412 (citing *Cohen v. California*, 403 U.S. 15 (1971)). In *Cohen*, the Court wrote that those offended by the visual display "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen*, 403 U.S. at 21.

33. The University of Utah asserted a captive audience argument in its attempt to remove the shanties. See Defendants' Memorandum at 16-17, *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200 (D. Utah 1986)(No. 86C-06884).

34. *Spence*, 418 U.S. at 412 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Justice Douglas, in his concurring opinion, was even more emphatic on this point. He commended an Iowa decision involving a fact situation similar to that in *Spence*:

Someone in Newton might be so intemperate as to disrupt the peace because of this display. But if absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only "free" speech would consist of platitudes. That kind of speech does not need constitutional protection.

Id. at 416 (Douglas, J., concurring)(quoting *State v. Kool*, 212 N.W.2d 518, 521 (Iowa 1973)).

35. 403 U.S. 15 (1971).

36. See *supra* note 32 and accompanying text (discussing "averting their eyes" argument).

37. *Cohen*, 403 U.S. at 20 (quoting *Cantwell v. Connecticut*, 310 U.S. 296 (1940)); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)(discussing regulation of fighting words).

38. The shanties twice were destroyed in nighttime attacks. On other occasions, a shanty was set afire and a Molotov cocktail was thrown near the shanties. See *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1202 (D. Utah 1986).

39. Defendant's Memorandum at 17, *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1700 (D. Utah 1986)(No. 86C-06884).

it is grammatically palatable to the most squeamish among us.”⁴⁰ *Cohen* thus rejected grammatical palatability. Similarly, visual palatability should not be a factor in the regulation of symbolic speech. Indeed, the “offensive” appearance of shanties furthered the protestors’ goal of illustrating the offensiveness of apartheid.

*Tinker v. Des Moines School District*⁴¹ combined an educational setting, symbolic speech, and the anti-war movement. Plaintiffs had been suspended from school for wearing black armbands in protest of the Vietnam War.⁴² The Court held that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.”⁴³

The University of Utah attempted to justify removal of the shanties on the basis of concern for personal safety and the economic costs of preserving safety and property.⁴⁴ These are often legitimate concerns, subject to protection through reasonable time, place, and manner regulations.⁴⁵ The Court in *Tinker*, however, noted that such concerns do not always justify restricting speech:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.⁴⁶

By recognizing and protecting symbolic speech, *Spence*, *Cohen* and *Tinker* furthered the expressive rights of individuals. Unfortunately, the current trend in symbolic speech law appears to be based more upon *O’Brien* and the state’s desire for authority. There has been a shift away from protecting activities as speech, and toward protecting government interests asserted in limiting

40. *Cohen*, 403 U.S. at 25.

41. 393 U.S. 503 (1969).

42. *See id.* at 504.

43. *Id.* at 506. *But see* *Guzick v. Drebus*, 305 F. Supp. 472 (N.D. Ohio 1969) (distinguished from *Tinker* by school board’s showing that regulation prohibiting wearing of buttons was necessary to maintain discipline), *aff’d*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

44. *See* *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1202 (D. Utah 1986).

45. *See, e.g.*, *Clark v. Community for Creative Non-violence*, 468 U.S. 288 (1984) (regulations forbidding tent city demonstration except in designated camping areas were reasonable).

46. 393 U.S. at 508.

symbolic speech. An example of this trend is *Clark v. Community for Creative Non-Violence*.⁴⁷ In *Clark*, the Court assumed, without deciding, that sleeping in "Reaganville,"⁴⁸ a small tent city established in Lafayette Park in Washington, D.C., to demonstrate the plight of the homeless, was symbolic speech.⁴⁹ The Court then upheld as reasonable National Park Service regulations forbidding camping except in designated areas,⁵⁰ finding that the regulations met the *O'Brien* standard.⁵¹

Clark is representative of a trend that the Court has come to recognize a wide variety of symbolic conduct as speech, yet has upheld as reasonable the regulation or even prohibition of that speech. This trend has its roots in the *O'Brien* and *Spence* decisions. *Spence* provides a standard generous to the actor for defining when conduct is speech, but *O'Brien* provides a standard generous to the government for defining when regulation of symbolic conduct, even though speech, is justified. In *Clark*, the Court paid homage to its decision in *Spence*, noting: "It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."⁵² Taking back what it had just given, however, the Court then applied the *O'Brien* standard: "Symbolic expression of this kind may be forbidden or regulated *if the conduct itself may constitutionally be regulated*, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech."⁵³

The *Clark* Court's language is in part a paraphrase of the *O'Brien* standard. New to the formula, however, is the italicized language. This language indicates either an application of *O'Brien* even less protective of symbolic speech or a modification of the *O'Brien* standard toward that same end. This reformulated test

47. 468 U.S. 288 (1984).

48. The tent city is named only in the dissent. See *id.* at 305 (Marshall, J., dissenting).

49. See *id.* at 293. The dissent criticized what it perceived as the majority's evasiveness in not deciding that such activity is, or is not, speech. See *id.* at 301-02 (Marshall, J., dissenting). Chief Justice Burger, in his concurrence, stated that sleep is conduct, not speech; "conduct that interferes with the rights of others to use Lafayette Park for the purposes for which it was created." *Id.* at 300 (Burger, C.J., concurring).

50. See *id.* at 294.

51. See *id.* at 298. There is some change in the words of the standard from the original *O'Brien* statement. See *supra* note 23 and accompanying text (*O'Brien* standard). Cf. *infra* note 53 and accompanying text (*Clark* standard).

52. *Clark*, 468 U.S. at 294 (citing *Spence v. Washington*, 418 U.S. 405 (1974)).

53. *Id.* (emphasis added).

could be applied to give symbolic speech virtually no protection; almost any form of conduct may be regulated. And the test also invites only cursory scrutiny of the governmental interest asserted in the restriction of speech.⁵⁴

The recent weakening of symbolic speech rights is evident even in cases where such speech has been protected against government regulation. One of the most notorious symbolic speech cases of the 1980s was *Texas v. Johnson*.⁵⁵ In *Johnson*, the Court upheld the reversal of the conviction for flag desecration of a protestor who burned an American flag during the 1984 Republican National Convention in Dallas.⁵⁶ Applying *Spence*, the Court easily found the flag burning to be an expressive act.⁵⁷ Because the desecration statute as applied was aimed at the expressive impact of flag burning,⁵⁸ it was related to the suppression of speech, and thus outside the *O'Brien* test.⁵⁹ Furthermore, because Texas had other laws in place to deal with breaches of the peace, the statute was not necessary to prevent possible violent reactions to flag burning.⁶⁰ Finally, the Court found that Texas' asserted interest in "preserving the flag as a symbol of nationhood and national unity"⁶¹ was insufficiently compelling to support the conviction.⁶²

Although *Johnson* was correctly decided, the decision cannot be considered heartening for supporters of symbolic speech rights.

54. See Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 496 (1986) ("The Court presently gives extreme deference to the government's asserted purposes, while maintaining that it is using a significantly higher standard.") (footnote omitted).

55. 109 S. Ct. 2533 (1989).

56. See *id.* at 2538-48.

57. See *id.* at 2540.

58. The statute prohibited "defac[ing], damag[ing], or otherwise physically mistreat[ing]" a flag or other "venerated object" "in a way that the actor knows will seriously offend one or more persons likely to discover his action." *Id.* at 2537 n.1 (quoting TEX. PENAL CODE Ann. § 42.09 (Vernon 1989)).

59. See *id.* at 2542; see also *supra* note 26 and accompanying text (setting forth the *O'Brien* test).

60. See *Johnson*, 109 S. Ct. at 2542.

61. *Id.*

62. See *id.* at 2548. The *Johnson* opinion did not use the term "compelling," but did apply the "most exacting scrutiny" demanded in *Boos v. Barry*, 485 U.S. 312, 321 (1988). *Johnson*, 109 S. Ct. at 2543-44. In *Boos*, the Court struck down a Washington, D.C. ordinance prohibiting demonstrations against foreign governments within 500 feet of their embassies. See *Boos*, 485 U.S. at 331-33. Noting that the ordinance was "a content-based restriction on political speech in a public forum," the Court, through Justice O'Connor, held that to be sustained, the ordinance must be "necessary to serve a compelling state interest and [be] narrowly drawn to achieve that end." *Id.* (emphasis in original) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

The decision was five to four, with one majority Justice "express[ing] distaste in the result."⁶³ Additionally, the minority Justices made emotional appeals for the creation of a special exception to symbolic speech law when the American flag is involved.⁶⁴ The willingness of four Justices to create exceptions to symbolic speech law precisely because of the "emotive impact" of a certain form of speech is cause for concern.

As a profoundly potent form of communication, nonverbal symbolic speech should be protected as strongly as more traditional forms of speech. No reason exists to do otherwise as long as the physical presence of the symbol does not constitute a crime against another or a trespass.⁶⁵ Absent such circumstances, a distinction between "speech" and "conduct" makes no sense. Verbal speech itself, after all, merely symbolizes deeper, inarticulate meanings that we approach awkwardly with words.

Protection afforded symbol, verbal or physical, should be determined by its subject matter: obscenity, commercial speech, "fighting words," and libel or slander are properly unprotected or protected at minimal levels, whether the speech is verbal or nonverbal. Political, religious, or aesthetic messages, absent crime or trespass, deserve maximum protection, regardless of the mode of expression.

Government interests, even if "unrelated to speech," should be strictly scrutinized where political speech is concerned. Cases like *O'Brien*, *Clark* and those involving shanties may well have implicated government interests unrelated to speech. More critically, however, they highlight dissatisfaction with government policies. The use of nonverbal symbolism commanded attention to these issues. The denial of the power of such commands, through the government's invocation of "nonspeech interests," should be allowed only on a showing that such interests are themselves of critical so-

63. *Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring).

64. Chief Justice Rehnquist, joined by Justices White and O'Connor, dismissed Johnson's flag burning as "the equivalent of an inarticulate grunt or roar." *Id.* at 2553 (Rehnquist, C.J., dissenting). Justice Stevens added that the "logical application" of the Court's symbolic speech precedents is inappropriate because of the "intangible dimension" of speech involved in desecration of the flag. *Id.* at 2556 (Stevens, J., dissenting).

65. In *Texas v. Johnson*, the demonstration included theft and spray-painting buildings, which occurred before the flag-burning. *See id.* at 2536. Strangely, no criminal action was taken against the tangible harm done. *See id.* Rather, the state took action only when onlookers became "seriously offended by the flag-burning." *Id.* at 2537. Prosecuting someone for communicative acts is bad; but it is worse when the prosecution is carried out, as a substitute for the prosecution of acts which truly invade the rights of others, as it apparently was in *Johnson*.

cietal importance.

III. THE PUBLIC FORUM

The placement of shanties on a natural, although limited, public forum strengthens their claim to protection. Streets and parks,⁶⁶ libraries,⁶⁷ state capitol grounds,⁶⁸ the mayor's residence⁶⁹ and courthouses⁷⁰—places where speech and debate naturally occur—have been held to be less susceptible to the regulation of speech.⁷¹ The university is a citadel of free expression, and is likewise a place where speech, verbal or nonverbal, deserves maximum protection.

The foundation of today's law on the public forum was laid in *Hague v. Committee for Industrial Organization*,⁷² in Justice Roberts' famous dictum:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.⁷³

In the 1960s, the civil rights movement,⁷⁴ and later the antiwar movement,⁷⁵ challenged the boundaries of the public forum.⁷⁶

66. See *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939).

67. See *Brown v. Louisiana*, 383 U.S. 131 (1966).

68. See *Edwards v. South Carolina*, 372 U.S. 229 (1963).

69. See *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

70. See *Cox v. Louisiana*, 379 U.S. 536 (1965).

71. See Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. Another commentator, drawing on cases subsequent to Kalven's article, suggests that the Court employs two different tests to determine whether a particular locale is a public forum. "One test is whether the property is suitable for public speech use. The other is whether government has assigned the property for public speech use." Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1305 (1979)(footnotes omitted).

72. 307 U.S. 496 (1939).

73. *Id.* at 515. At least one commentator believes that Justice Roberts' emphasis on streets and parks, and the tradition of speech therein, led to today's distinction between the traditional public forum and the nontraditional or nonpublic forum. See Note, *The Public Forum and the First Amendment: The Puzzle of the Podium*, 19 NEW ENG. L. REV. 619, 627-28 (1983-84).

74. See Kalven, *supra* note 71, at 2-3; *Brown v. Louisiana*, 383 U.S. 131 (1966)(library); *Edwards v. South Carolina*, 372 U.S. 229 (1963)(state capitol grounds). *But see* *Adlerley v. Florida*, 385 U.S. 39 (1966)(jail grounds not a public forum).

75. The antiwar movement played an important role in the area of symbolic speech. See *supra* notes 10-11, 20-30 and accompanying text.

76. Public forum status has been extended to municipal bus terminals, see *Wolin v.*

While it is not always easy to define exactly what is a public forum, the Court had little difficulty deciding that a jail was not a public forum in *Adderley v. Florida*.⁷⁷ Justice Black distinguished *Edwards v. South Carolina*,⁷⁸ in which the Court had held a state capitol grounds to be a public forum: "In *Edwards*, the demonstrators went to the South Carolina State Capitol grounds to protest. In this case they went to the jail. Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not."⁷⁹

Access to a particular forum will depend on its classification. In *Perry Education Association v. Perry Local Educators' Association*,⁸⁰ the Court established three classifications. The traditional, or "quintessential," public forum offers the speaker the most protection. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."⁸¹ Streets and parks fall within that classification. A government cannot close a quintessential public forum to all communication; nor may it regulate the forum with regard to the content of the speech without showing that a compelling state interest exists, and that the regulation is narrowly drawn to achieve that interest.⁸² The state may, however, enforce content-neutral regulations pertaining to time, place, and manner of the speech.⁸³ Those regulations also must be narrowly drawn to serve a "significant" government interest and must leave open alternative channels of communication.⁸⁴

The second type of public forum is "public property which the State has opened for use by the public as a place for expressive activity."⁸⁵ A state which has created such a forum need not maintain it indefinitely. As long as a forum is maintained, however, speech restrictions in the forum must meet the same standards as they would in a quintessential public forum: "Reasonable time, place, and manner regulations are permissible, and a content-based

Port of N.Y. Auth., 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968), and railway stations, *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

77. 385 U.S. 39 (1966).

78. 372 U.S. 229 (1963).

79. *Adderley*, 385 U.S. at 41.

80. 460 U.S. 37 (1983).

81. *Id.* at 45.

82. *See id.*

83. *See id.* at 47 n.6 (citing *Cox v. Louisiana*, 379 U.S. 536, 558 (1965)).

84. *See id.*

85. *Id.*

prohibition must be narrowly drawn to effectuate a compelling state interest."⁸⁶

The third type, the nonpublic or private forum, is more easily regulated or even entirely closed to speech. This category includes jails, and more recently, the Nevada Nuclear Weapons Test Site.⁸⁷ "Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government.'"⁸⁸ The state may reserve a forum for a particular use, but the regulation must be reasonable "and not an effort to suppress expression merely because public officials oppose the speaker's view."⁸⁹

The above language on the nonpublic forum suggests the Court's willingness to give at least some protection to the speaker using it. But *Adderley* made intended use of the property paramount—a consideration that survives to this day. "[T]he State, no less than a private owner of property, has power to preserve the

86. *Id.* at 46.

87. *See Hale v. Department of Energy*, 806 F.2d 910 (9th Cir. 1986). The United States Court of Appeals for the Ninth Circuit held that the road leading up to the gates of the Nevada Nuclear Weapons Test Site was a nonpublic forum. *See id.* at 916. The Department of Energy, therefore, had "the right to preserve the property under its control for its lawfully dedicated purpose." *Id.* at 915. The court relied on the existence of alternative channels of communication, finding, "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Id.* at 917 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985)).

Reliance on dedicated use and alternative fora is misplaced, and even calls into question the content neutrality of the Department of Energy's application of its regulations. In an era of electronic media, the image of demonstrators at the gate to the Nevada Nuclear Weapons Test Site will be much more memorable and effective than a shot of the same demonstrators in a barren desert just two or three miles from the gate. The *Hale* court rejected appellants' reliance on precedent limiting officials' discretion, saying that the United States Supreme Court has "never applied [that] kind of analysis to regulations restricting access to government property that was not a public forum." *Hale*, 806 F.2d at 917 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (striking down authority of city commissioners to deny parade permits); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (striking down law forbidding distribution of any literature without written permission of the city manager)). Yet, revealing its uncertainty, the *Hale* court retreated from that approach. It found that the appellants had made "no claim that the regulations were applied other than in a content-neutral manner." *Hale*, 806 F.2d at 917.

Perhaps the *Hale* court and the Department of Energy truly did fear disruption. If so, it is likely that the disruption they feared was not that caused by the physical presence of the demonstrators, but rather by the political echoes of the speakers' message.

88. *Perry Educ. Ass'n*, 460 U.S. at 37, 46 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)).

89. *Id.*

property under its control for the use to which it is lawfully dedicated."⁹⁰

Cases involving a nonquintessential forum generally focus, as did *Adderley*, on whether a restriction on time, place, or manner is reasonable. The intended use of the location at issue is central to such a determination. In *Grayned v. City of Rockford*,⁹¹ the Court upheld an ordinance prohibiting demonstrations near the city's schools. The ordinance was "a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school."⁹² Similarly, in *Greer v. Spock*⁹³ the Court denied a political candidate the right to speak at a military base. The majority emphasized that the purpose of Fort Dix was to train soldiers; it was not, therefore, a public forum.⁹⁴

In contrast, the Court in *Tinker v. Des Moines Independent Community School District*⁹⁵ used language indicating that, even when focusing on intentional use, a university could not prevail in an attempt to remove shanties from its campus. "The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students."⁹⁶ In other words, if the intended use of public property includes communication, speech restrictions on that property are likely to be carefully scrutinized.

In *Widmar v. Vincent*⁹⁷ the Court suggested that a public university, when open for general use by student groups, is a public forum, at least for its students and faculty. "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and

90. *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

91. 408 U.S. 104 (1972).

92. *Id.* at 112.

93. 424 U.S. 828 (1976).

94. *See id.* at 838.

95. 393 U.S. 503 (1969).

96. *Id.* at 512. The Court cited *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967), for the proposition that a school is not like a jail enclosure (as in *Adderley*). *See Tinker*, 393 U.S. at 512 n.6. The *Tinker* Court found that a school "is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property." *Id.* This suggests a narrow reading of the dedicated use test, at least when applied to public educational facilities.

97. 454 U.S. 263 (1981).

exclusions under applicable constitutional norms.”⁹⁸ The *Widmar* Court found that the defendant university’s refusal to grant student religious groups the same access to the forum provided to secular groups was a content-based exclusion.⁹⁹ This violated “the fundamental principle that a state regulation of speech should be content-neutral.”¹⁰⁰

Taken together, *Tinker* and *Widmar* indicate that, to be sustainable, speech restrictions on a university campus must meet the strict standards applied to quintessential and state-created public forums. Even if a university is considered a nonpublic forum, its primary intended use is the communication of ideas. Communication occurs both specifically in the classroom and generally on the campus. Therefore, content-based speech limits must be narrowly drawn to serve a compelling state interest and time, place, and manner limits must be narrowly drawn to meet a significant state interest.

A “significant” interest should be defined as one that clearly outweighs the value of the type of speech involved. For example, if the speech is political in nature, a much stronger justification for limits must apply than for limits on commercial speech. Such justification would not necessarily have to be “compelling,” but certainly close to it.

Shanties, like the armbands in *Tinker*, communicate ideas on political and social issues. Therefore, even a content-neutral time, place, and manner restriction on the use of shanties must pass rigorous scrutiny. This not only preserves the rights of the protestors, but also promotes the function of universities as centers for uninhibited dialogue on key social issues.

Speech restrictions in the university setting have strong justification when one speaker’s communication interferes with that of another, and a choice must be made concerning whose speech

98. *Id.* at 267. The Court stopped short of proclaiming a campus to be any type of public forum. It began with the statement that “[t]his Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.” *Id.* at 267 n.5. Then, considering “the special characteristics of the school environment,” the Court concluded:

A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held . . . that a university must grant free access to all of its grounds or buildings.
Id. at 268 n.5.

99. *See id.* at 269-70.

100. *Id.* at 277.

rights take priority. As in *Grayned*, it is appropriate to give priority to classroom communication over that outside of class. Other university-sponsored events such as graduation, athletic and artistic exhibitions can also take priority. Justifications for speech restrictions on campus should be examined in light of their relation to such "core" university functions: certainly campus access, travel, and safety are closely related. As this relation becomes attenuated, however, the case for speech restrictions on campus weakens.

Given sufficient justification, time, place, and manner restrictions, free of content regulation, are appropriate even in a public forum, including a university. Shanties, although protected speech, carry no more right to remain in perpetuity than any other speaker. Yet a difference exists. A parade blocks the normal use of the street for other more customary forms of traffic. A speaker at the podium prevents another speaker's presence. Shanties may or may not do the same. In most cases, another symbol or verbal speaker is not waiting to displace the shanty. Absent direct competition for use of the forum, justification for the removal of shanties and other political symbols must be powerful to be sustained.

For universities and other public fora, shanties pose significant problems in the threat of violence and the consequent necessity of protection, insurance coverage and upkeep of the grounds.¹⁰¹ This is where time, place, and manner regulations come into play. In developing regulations to deal with these problems, universities must keep in mind a line of cases in which a powerful trend is apparent. The enormous movement from *Feiner v. New York*¹⁰² to

101. The defendants in *University of Utah Students Against Apartheid v. Peterson*, claimed that the cost of providing security for the shanties justified their removal. Affidavit of Chase Peterson (University of Utah President) at 3, *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200 (D. Utah 1986)(No. 86C-06884). Up to the time the plaintiffs filed suit to block removal of the shanties, the cost of security totaled approximately \$5000. Salt Lake Tribune, Sept. 19, 1986 at A10, col.5. The University paid more than four times that amount to counsel for the Students Against Apartheid, the prevailing party in the action. See *id.* Apparently no attempt was made to estimate the value of the legal services provided to the University by the Utah Attorney General. It seems that it is often more expensive to fight speech than to protect it.

102. 340 U.S. 315 (1951). The *Feiner* Court upheld the breach of the peace conviction of a speaker who refused to leave the podium despite the requests of a police officer who was concerned with the "hostile audience." See *id.* at 321. *Feiner* was of no help to the University of Utah in *University of Utah Students against Apartheid*, however, because in *Feiner* the Court found that the defendant was inciting the crowd to riot. According to the Court:

It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.

*Edwards v. South Carolina*¹⁰³ and *National Socialist Party of America v. Village of Skokie*¹⁰⁴ has limited what the state may do to protect the peace where the exercise of speech rights is involved. The state usually must protect the speaker and the community against the violence of the hostile crowd by means other than curtailing the speech.

In *Feiner*, decided in 1951, police, fearing an angry crowd, removed a speaker from his soapbox.¹⁰⁵ The speaker's breach of peace conviction was upheld by the Court.¹⁰⁶ By 1963, our law had indeed come a long way. In *Edwards*, civil rights demonstrations on a street outside a courthouse were protected, even though a large and hostile crowd had gathered.¹⁰⁷ The *Edwards* court admonished police to protect the demonstrators by restraining the crowd, not by silencing the speaker.¹⁰⁸ In *Skokie*, decided in 1977, state officials faced the seemingly impossible task of maintaining public safety in an extremely hostile Jewish community and protecting the lives of the demonstrators, American Nazis, without curtailing the speakers' rights.¹⁰⁹ Yet, even there, the Court refused to allow the state to preserve public safety by silencing the speaker.¹¹⁰ Indeed, a hostile audience often indicates effective, powerful speech rather than "nonspeech," or some similar label used to deny protection:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.¹¹¹

Id. at 321. Although there were several attempts to destroy the shanties, the University did not allege that the speakers were inciting their audience to riot.

103. 372 U.S. 229 (1963).

104. 432 U.S. 43 (1977); see also *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). *Collin* was one in a series of cases in which the town of Skokie, Illinois tried to prevent the American Nazi Party from marching in their community. Although *Skokie* was unsuccessful in the courts, the American Nazi Party, eventually chose not to stage the march.

105. See *Feiner*, 340 U.S. at 318.

106. See *id.* at 321.

107. See *Edwards*, 372 U.S. at 237-38.

108. See *id.* at 236-37.

109. See *Skokie*, 432 U.S. at 43-44.

110. See *id.*

111. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Speech, as in *Skokie*, may be offensive; the very presence of Nazi speakers in a Jewish suburb can be offensive. To the potential listener, the speakers in *Skokie* symbolized hatred and inhumanity; the speakers symbolized the Holocaust itself. But decisions upholding speech rights in those places where speech is highly valued, however offensive the speaker, however fraught with danger, demonstrate our commitment to first amendment principles. This commitment should be at its strongest in our public universities—institutions dedicated to the robust exchange of ideas.

IV. SHANTIES IN THE COURTS

Litigation involving shanties on public university campuses represents a unique convergence of first amendment principles involving symbolic speech and the public forum. Proper application of both concepts is necessary to provide adequate protection to first amendment rights. In *University of Utah Students Against Apartheid* the court applied these concepts properly. Subsequent cases arising from shanty demonstrations on the campus of the University of Virginia, however, did not.

A. *The University of Utah Students Against Apartheid Decision*

The University of Utah, in its attempt to force removal of the shanties, relied primarily on pragmatic concerns: the cost of protecting the shanties and the potential tort liability from reaction to the shanties.¹¹² Plaintiffs claimed that they had offered to provide their own insurance and security, but the University of Utah disputed that claim.¹¹³

Judge Anderson of the United States District Court for the District of Utah concluded that the shanties were symbolic speech under *Spence v. Washington*.¹¹⁴ there was intent to convey a mes-

112. Individuals unsympathetic to the message of the shanties attacked the structures several times. See *supra* note 38 and accompanying text. Judge Anderson stated:

On two occasions part or all of the shanties were destroyed in nighttime attacks. On another occasion one shanty was set on fire. On a final occasion a Molotov Cocktail was thrown in the vicinity of the shanties. Although no injuries were sustained in these attacks, the university was forced to increase police protection of the shanties and increased the university's estimated potential liability.

University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200, 1202 (D. Utah 1986).

113. See *id.*

114. 418 U.S. 405 (1974). See also *supra* notes 27-30 and accompanying text (discussing *Spence*).

sage, and viewer understanding was likely.¹¹⁵ Indeed, Judge Anderson found it "hard to imagine a more effective transmission of a message."¹¹⁶

The court then explored the limits of symbolic speech, discussing several cases in which a particular activity had been held not to be symbolic speech.¹¹⁷ Distinguishing cases holding certain conduct unprotected, Judge Anderson found that the conduct at issue in those cases "frequently occur[s] for noncommunicative reasons and thus blur[s] any message intended to be conveyed."¹¹⁸ Sleep,¹¹⁹ as in *Clark v. Community for Creative Non-Violence*, is such an activity; it is a gross understatement to say that it frequently occurs for noncommunicative reasons. The problem, therefore, becomes one of convincing a court that the conduct is intended to convey a "particularized message."¹²⁰

The *University of Utah Students Against Apartheid* court noted that the shanties had "few, if any, nonexpressive benefits."¹²¹ The "likely viewer understanding" element of the *Spence* test further eased the problem of proving communicative intent.¹²² Moreover, the deliberate ugliness of the shanties was found to serve an "emotive function," capturing media attention and the public eye.¹²³ "Media attention is a strong indication of observer

115. See *University of Utah Students Against Apartheid*, 649 F. Supp. at 1204-05 (footnote omitted).

116. *Id.* at 1205.

117. See *id.* at 1205-07. Among the cases where a particular activity has been held not to be symbolic speech is *DeWeese v. Town of Palm Beach*, 616 F. Supp. 971, 979 (S.D. Fla. 1985), *rev'd*, 812 F.2d 1365 (11th Cir. 1987) (running without a shirt involved "neither pure speech nor the type of conduct akin to pure speech that would constitute symbolic speech").

118. *University of Utah Students Against Apartheid*, 649 F. Supp. at 1207.

119. Although its status as protected speech is uncertain, several decisions of the United States Circuit Courts of Appeals' for the District of Columbia have held sleep to be protected speech. See *Community for Creative Nonviolence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983) (en banc), *rev'd*, 468 U.S. 288 (1984); *United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976). In *Clark*, the United States Supreme Court assumed without deciding that the sleep at issue was speech. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *supra* note 49 and accompanying text.

120. See, e.g., Magid, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 504 (1984) ("The difficult task lies in finding a way to distinguish expressive and nonexpressive instances of the same act.").

121. *University of Utah Students Against Apartheid*, 649 F. Supp. at 1204.

122. See *id.* at 1205.

123. See *id.*; see also *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, the Court declared that it could not "sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Id.* at 26.

understanding because it highlights the communicative nature of the very form of conduct undertaken."¹²⁴

Judge Anderson then turned to the character of the university as a public forum. He began with the position that access to public property is not an absolute right: "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property."¹²⁵ The University of Utah campus, however, was found to be a limited public forum under *Perry*,¹²⁶ as "public property which the State has opened for use by the public as a place for expressive activity."¹²⁷ Supporting this conclusion is the line of cases addressing the importance of communication in the educational context.¹²⁸ In one of those decisions, *Healy v. James*,¹²⁹ the Court rejected the view that, "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."¹³⁰

In establishing the University of Utah as "a limited public forum," the court looked to the University of Utah's Student Bill of Rights.¹³¹ The Student Bill of Rights guarantees students "the right to freedom of speech and assembly without prior restraint or censorship, subject only to clearly stated reasonable and nondiscriminatory rules and regulations regarding time, place, and manner."¹³² Noting that the University of Utah had granted permits to other student groups, as well as to the plaintiffs, the court found sufficient evidence indicating that the campus was available to students as a public forum.¹³³

The court did not decide, however, "to what extent permits can be required by the university for various free speech activi-

124. 649 F. Supp. at 1205 n.10.

125. *Id.* at 1208 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799-800 (1985)).

126. *See id.* at 1209.

127. *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

128. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981) (holding university to be a limited public forum for students).

129. 408 U.S. 169 (1972).

130. *Id.* at 180. Indeed, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* (citation omitted).

131. *University of Utah Students Against Apartheid*, 649 F. Supp. at 1209.

132. *Id.* at 1209 (quoting University Regulations, Ch. X, *Student Code*, art. II, § 2.02 (Jan. 13, 1981)).

133. *See id.* at 1209 & n.17.

ties.”¹³⁴ The court did not need to decide that question because the University of Utah had no clearly stated regulations in place.¹³⁵ Rather than relying on clearly stated time, place, and manner regulations, the University of Utah administration had simply “concluded that it would be in the best interests of the university to require [removal of the shanties].”¹³⁶

The court emphasized the deficiencies of that approach. Valid regulation of protected speech must be clearly stated and narrowly drawn.¹³⁷ In addition, the regulations must be “[f]ormally drawn . . . to insure that restrictions on free speech are content-neutral.”¹³⁸ In two footnotes, Judge Anderson noted the tension between limiting official discretion in regulating speech through time, place, and manner regulations, and the competing desire of universities to keep “their campuses as rule-free as possible.”¹³⁹ It seems that first amendment values may be better protected by the presence of rules rather than by their absence. Without rules, it would be difficult to insure that a restriction on speech was content-neutral. “‘An official who can grant or deny the right to speak according to what he deems to be in the public interest is indistinguishable in all relevant respects from a censor.’”¹⁴⁰

Given that official discretion is unacceptable, it follows that speech itself generates pressure for time, place, and manner regulations. This conclusion is implicit in Judge Anderson’s opinion. “Situations like [the shanties case] make [the rule-free] approach increasingly difficult to maintain.”¹⁴¹ Formal regulations, once in place, would allow student groups to plan speech activities that would effectively convey their message while, at the same time, be “acceptable to the administration.”¹⁴²

Finally, the court addressed the University of Utah’s safety concerns. Because these concerns had arisen from nighttime van-

134. *Id.* at 1209 n.17.

135. *See id.* at 1210. Although the University of Utah was without formal regulations, “[t]he cases cited by the university in support of its right to order the removal of the shanties involved alleged violations of formally enacted regulations.” *Id.*

136. *Id.* at 1209-10.

137. *See id.* at 1210.

138. *Id.*

139. *Id.* at 1210 nn.19-20.

140. *Id.* at 1210 n.19 (quoting *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1286 (D.C. Cir. 1972)).

141. *Id.* at 1210 n.20. The rule-free approach, although not yet dead, has been on its way out since the late 1960s. *See id.* (citing *Wilson, Campus Freedom and Order*, 45 DEN. L.J. 502, 507 (1968)).

142. *Id.* at 1210.

dalism and violence, the protestors were ordered by the Court to take the shanties down at night, pending the University's development of formal regulations.¹⁴³ While acknowledging the importance of the University of Utah's concerns, Judge Anderson expressly noted that "the free speech interests of the students do not appear to be furthered by nighttime display," so that the burden of removing the shanties at night was merely "incidental"¹⁴⁴ to the free speech interest.

A superficial reading of *Clark v. Community for Creative Nonviolence*¹⁴⁵ and *University of Utah Students Against Apartheid v. Peterson* suggests that the University of Utah might have successfully defended a "formally drawn" regulation banning shanties. If such a regulation exists, a court could more easily minimize the probability that a regulation was directed at the suppression of free expression, while more easily maximizing the weight of the regulator's aesthetic or functional concerns than if no formal regulations were present. In *Clark*, the United States Court of Appeals for the District of Columbia affirmed the district court's decision permitting sleep, as symbolic speech, to be part of a protest in Lafayette Park.¹⁴⁶ The National Park Service, which administered the park, then clarified its regulations to forbid sleeping in the park, and the United States Supreme Court upheld the revised regulations.¹⁴⁷

In *Clark*, the government relied on aesthetic concerns and its interest in physical preservation of public property: "maintaining the parks in the heart of our Capital in an attractive and intact condition."¹⁴⁸ The government agreed that "[t]o permit camping . . . would be totally inimical to [this] purpose."¹⁴⁹ The University of Utah, in *University of Utah Students Against Apartheid*, cited unwritten aesthetic concerns, as well as unwritten concerns of "overall cost, difficulty and expense in obtaining liability insurance, risk of physical harm, [and] potential university liability."¹⁵⁰ But Judge Anderson correctly concluded that, "[h]owever substan-

143. See *id.* at 1211.

144. *Id.*

145. 468 U.S. 288 (1984); see also *supra* notes 47-53 and accompanying text (discussing *Clark*).

146. See *Clark*, 468 U.S. at 292.

147. See *id.* at 299.

148. *Id.* at 296.

149. *Id.*

150. *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1211 (D. Utah 1986).

tial these interests are, they cannot be used in their present form to circumscribe the students' speech interests."¹⁵¹ The court then encouraged the University of Utah to draft content-neutral regulations to protect its own interests "while allowing the maximum possible exercise of student expression."¹⁵²

Unfortunately, a more recent case involving shanties on a university campus appears to continue a trend of allowing the suppression of symbolic speech under questionable justification, so long as formal regulations are in place.

B. Students Against Apartheid Coalition v. O'Neil

In *Students Against Apartheid Coalition v. O'Neil*¹⁵³ (*O'Neil III*) the United States Court of Appeals for the Fourth Circuit, in a brief per curiam decision, upheld the University of Virginia's removal of a shanty from the south lawn of its historic Rotunda. As in *Clark*, university officials had originally been rebuffed in trial court, because the "Lawn Use Policy" used to justify removal of the shanty was found to be unconnected to the university's aesthetic interest and unconstitutionally vague.¹⁵⁴ The officials then amended the policy to a less vague form, clarifying the term "structure."¹⁵⁵ On relitigation, the federal district court upheld the amended policy and removal of the shanty.¹⁵⁶

In *O'Neil II*, the district court had no difficulty, under *Spence* and *University of Utah Students Against Apartheid*, in finding that the shanty was symbolic speech.¹⁵⁷ Then, applying *Clark, Re-*

151. *Id.*

152. *Id.*

153. 838 F.2d 735 (4th Cir. 1988)[hereinafter *O'Neil III*].

154. See *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 338-39 (W.D. Va. 1987)[hereinafter *O'Neil I*].

155. See *Students Against Apartheid Coalition v. O'Neil*, 671 F. Supp. 1105, 1106 (W.D. Va. 1987), *aff'd*, 838 F.2d 735 (4th Cir. 1988)[hereinafter *O'Neil II*]. The Lawn Use Policy as first promulgated prohibited any "structure or extended presence . . . on the Lawn except for those needed in connection with official University functions." *O'Neil I*, 660 F. Supp. at 341 (quoting Final Report of the President's Ad Hoc Committee on the Use of the Lawn, 1.B, Sept. 24, 1986). The modified policy deleted the term "extended presence" and added parenthetical language: "The term 'structure' includes props and displays, such as coffins, crates, crosses, theaters, cages, and statues; furniture, and furnishings, such as desks, tables (except those temporarily used by participant in the ceremonies or by University officials for the conduct of the ceremonies), bookcases, and cabinets; shelters, such as tents, boxes, shanties and other enclosures; and other similar physical structures." *O'Neil II*, 671 F. Supp. at 1109 (quoting University Policy on Use of the Lawn, 1.B, as amended, May 15, 1987).

156. See *O'Neil II*, 671 F. Supp. at 1108.

157. See *id.* at 1106.

gan v. Time, Inc.,¹⁵⁸ and *O'Brien*,¹⁵⁹ the court found that the amended Lawn Use Policy was sufficiently content-neutral and narrowly tailored, and left open ample alternative channels of communication to justify the shanty's removal.¹⁶⁰

As for the aesthetic interest pursued by the University of Virginia, the *O'Neil II* court noted, "[r]egulations of speech based on aesthetic concerns alone have been found constitutional."¹⁶¹ The court apparently ignored its previous observation in *Students Against Apartheid Coalition v. O'Neil (O'Neil I)*,¹⁶² that other cases upholding speech restrictions to protect government's aesthetic interests "also served goals of ensuring public safety, protecting public resources, or maintaining presidential security."¹⁶³ In fact, in *Metromedia, Inc. v. City of San Diego*,¹⁶⁴ cited by the court in *O'Neil II* for the proposition that aesthetic concerns alone could justify speech restrictions, the United States Supreme Court specifically cautioned that "aesthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose."¹⁶⁵ This dictum suggests that without the associated traffic safety interest, the city's aesthetic interest might not have sustained the billboard limitation ordinance.¹⁶⁶

158. 468 U.S. 641 (1984). Under *Regan*, a time, place, and manner restriction on speech "may not be based upon either the content or subject matter of speech." *Id.* at 648 (quoting *Hefron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981)). It must, however, "serve a significant governmental interest," and "must leave open ample alternative channels for communication of the information." *Id.* (quoting *Hefron*, 452 U.S. at 648). The "alternative channels" element was added to the *O'Brien* and *Clark* tests.

159. 391 U.S. 367 (1968).

160. See *O'Neil II*, 671 F. Supp. at 1106-07.

161. *Id.* at 1107 (citing *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)).

162. 660 F. Supp. 333 (W.D. Va. 1987).

163. *Id.* at 338 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802 (1984)(public safety); *Clark v. Comm. for Creative Nonviolence*, 468 U.S. 288, 296 (1984)(protecting public resources); *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1533 (D.C. Cir. 1984)(presidential security)).

164. 453 U.S. 490 (1981).

165. *Id.* at 510. The Court in *Metromedia* based its partial affirmance of a municipal billboard restriction on the city's traffic safety interests in addition to aesthetic interests. See *id.* at 508-09.

166. Indeed, with respect to political messages, the *Metromedia* billboard ordinance failed. In prohibiting political billboards altogether, the city had impermissibly trod upon core first amendment values. The Court, however, upheld the ordinance with respect to

Despite the fact that aesthetic interests were the only interests asserted by the University of Virginia in support of its removal of the shanty,¹⁶⁷ the district court, and the Fourth Circuit upheld the shanty ban. This result is troublesome because it permits symbolic speech restrictions solely for aesthetic reasons. The lesson of *Cohen v. California*¹⁶⁸—that speech cannot be banned simply because some find it unpleasant—appears to have been eroded or lost.

Elevation of aesthetic interests to justify suppression of speech has been justly criticized.¹⁶⁹ The inadvisability of such a policy was perhaps best summarized by Justice Harlan's observation in *Cohen*, that "one man's vulgarity is another's lyric."¹⁷⁰ In the *O'Neil* cases, the University of Virginia's aesthetic interests, though clearly less compelling than the safety and liability concerns of the University of Utah in *University of Utah Students Against Apartheid*, were held sufficient to justify an infringement of speech simply by virtue of being addressed in written regulations.¹⁷¹

The *O'Neil* cases also failed to consider the nature of the forum involved. The vital distinction between *Clark* and *University of Utah Students Against Apartheid* is not the existence or lack of formal regulations, but rather the paramount role of speech at the core of a university's reason for being. A park, although the most traditional public forum, has many functions. It meets many non-speech needs such as recreation. The sole purpose of the university is its educational role, however variously manifested in arts, humanities, and science. Developing an awareness of critical political and social issues, whether in the classroom or through student-organized activities and protests, is a vital part of the university's role in educating citizens. Speech in its many forms is central to

commercial messages. *See id.* at 513. This was due, in part, to the reduced first amendment protection given to commercial speech. *See id.*

167. *See O'Neil I*, 660 F. Supp. at 338. The parties stipulated that the shanties had done no physical damage to university property. *See id.* at 336. Nor was interference with traffic or class disruption mentioned in any of the *O'Neil* cases.

168. 403 U.S. 15 (1971); *see also supra* notes 35-40 and accompanying text (discussing *Cohen*).

169. *See Quadres, supra* note 54.

170. *Cohen*, 403 U.S. at 25.

171. A final irony is that the court in *O'Neil II*, in addressing the University of Virginia's aesthetic interest, stressed that "[t]he Rotunda is part of the historic lawn area, originally designed by Thomas Jefferson." *O'Neil II*, 671 F. Supp. 1105, 1106 (W.D. Va. 1987), *aff'd*, 838 F.2d 735 (4th Cir. 1988). One wonders whether Jefferson, a proponent of individual liberty who once wrote, "I hold it that a little rebellion, now and then, is a good thing," would share the university's distress at the presence of shanties near the Rotunda. Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), *reprinted in* THOMAS JEFFERSON: WRITINGS 882 (M. Peterson ed. 1984).

this role. Accordingly, limitations on speech in the university setting, no matter how "formal," should be strictly scrutinized pursuant to *Perry Education Association v. Perry Local Educators' Association*.¹⁷² Such limitations should be upheld only upon a showing of powerful, if not compelling, government interests. Aesthetic interests alone simply do not rise to this level.

The existence of an alternative forum, as with aesthetic interests, does not necessarily justify a restriction on speech. While such a consideration may be relevant, it should not be determinative.¹⁷³ The alternative forum argument, like the aesthetic interest argument, was given too much weight in the *O'Neil* cases.¹⁷⁴

Relegating a speaker to an alternative forum may deprive that speaker not only of the most effective means of delivering the message, but also of the intended audience. In *Dr. Martin Luther King Jr. Movement, Inc., v. City of Chicago*,¹⁷⁵ following the denial of a parade permit to plaintiff, the city suggested several alternative routes and gathering places. The court noted that the forum requested by plaintiffs was one where they believed there was an audience to which they could effectively express their views: "The audience [at the city's alternative site] would be Negroes, people who needed no persuasion to the views plaintiffs had concerning events near [the requested forum]."¹⁷⁶ The alternate route, then, had the effect of depriving plaintiffs of their first amendment rights.¹⁷⁷

The shanty situation is similar. If the speakers are denied their choice of forum and are therefore driven into a lecture hall, then their audience will likely consist only of those already aware

172. 460 U.S. 37 (1983); see also *supra* notes 80-86, 88-89 and accompanying text (discussing *Perry*).

173. See *Cass, supra* note 71, at 1323. Although relevant, the alternative forum is just one of many considerations for a court. "If a court considers alternative speech forums, it also must take account of the factors that make a given forum more or less suited to the speech involved." *Id.*

174. The district court in *O'Neil II* noted that the University of Virginia's amended Lawn Use Policy "restricts structures from only a small section of the historic area, namely the south side of the Rotunda." *O'Neil II*, 671 F. Supp. at 1107. Additionally, the court found that "the new policy does not prohibit demonstrations, sit-ins, marches, hand-held signs or other forms of protest" in the contested area. *Id.* "While the alternatives may not be plaintiffs' first choice of expression, 'the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.'" *Id.* (quoting *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981)).

175. 419 F. Supp. 667 (N.D. Ill. 1976).

176. *Id.* at 674.

177. See *id.*

of the apartheid issue; the speakers will be reduced to preaching to the choir.

Indeed, the *O'Neil* protestors erected their shanty near the Rotunda for the express purpose of bringing their divestment plea to the attention of the University of Virginia's Board of Visitors, the University's policymaking body which meets quarterly in the Rotunda.¹⁷⁸ In removing the shanty from that area, the University of Virginia distanced the protestors from their intended audience. The amended Lawn Use Policy was found "not [to] prohibit demonstrations, sit-ins, marches, hand-held signs or other forms of protest" in the Rotunda area.¹⁷⁹ But the prohibition of shanties denied the protestors the more powerful impact of deliberately ugly structures, "dramatizing the squalid living conditions of black South Africans . . . to make explicit the contrast between those conditions and the beauty of the Rotunda."¹⁸⁰

Professor Tribe has argued that the relationship between the forum and the message may require opening otherwise nonpublic forums. Using hospitals and welfare departments as examples, he asks, "Where else could cancer patients be persuaded to appeal for the legalization of laetrile but at a hospital? Where else could welfare recipients be urged to protest bureaucratic neglect but at a welfare office?"¹⁸¹ Similarly, where else could college students protest their university's investment policy but on their campus? Tribe answered his questions by rejecting as implausible any claim of incompatibility and then concluded that "the bare possibility of alternative ways to communicate the same message should not suffice to defeat the first amendment claim."¹⁸²

As with aesthetic interests, the alternative forum claim is a weak justification for speech restrictions, especially when the speech occurs on a university campus—a forum dedicated to the exchange of ideas. Absent disruption of classroom education or university-sponsored activities, or actual physical damage to uni-

178. See *O'Neil I*, 660 F. Supp. 333, 336 (W.D. Va. 1987).

179. *O'Neil II*, 671 F. Supp. at 1107.

180. *O'Neil I*, 660 F. Supp. at 336. Nor can the possibility of an "impermissible purpose" be ruled out. The protestors in *O'Neil I* had erected shanties in the Rotunda area on several prior occasions. See *O'Neil I*, 660 F. Supp. at 336. Were the Board of Visitors and University of Virginia administrators truly concerned primarily with the aesthetic appearance of the area, or were they in fact feeling uncomfortable at the students' persistent demand for divestment in the face of their continued inaction? If the latter were the case, the shanty removal was motivated by the very effectiveness of their message.

181. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-21, at 691 (1978).

182. *Id.* § 12-21, at 691-92.

iversity property, the exercise of first amendment rights on campus should be encouraged, not restricted.

V. REGULATION OF SHANTIES AND OTHER FORMS OF SYMBOLIC SPEECH

The right of a speaker is not absolute, even if the speaker's symbol is found to be entitled to first amendment protection and located in a public forum. The state, or in the shanty case, the university, still has the right to establish reasonable regulations governing the speech. Such regulations should recognize that free speech, especially political speech, must be encouraged, even at some cost.

A. *Time, Place, and Manner Regulations*

Speech, whether symbolic or verbal, may be constitutionally regulated through time, place, and manner restrictions.¹⁸³ A time, place, and manner restriction must meet at least three requirements, as provided in *Regan v. Time, Inc.*¹⁸⁴ The regulations "may not be based upon either the content or subject matter of the speech," must "serve a significant governmental interest," and must "leave open alternative channels for communication of the information."¹⁸⁵

This article proposes that a four-part test, such as that articulated in *City of Watseka v. Illinois Public Action Council*,¹⁸⁶ is more appropriate. In *Watseska*, the United States Court of Appeals for the Seventh Circuit interpreted United States Supreme Court precedent to demand a fourth requirement: the regulation must be "narrowly tailored to serve the governmental objective."¹⁸⁷ This fourth element is found both in *Clark v. Community for Creative*

183. Time, place, and manner, as a constitutional standard for regulating speech, is of a relatively recent vintage, as is use of the first amendment to protect speech. But the words themselves date back 200 years, to the Constitution. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed." U.S. CONST. art. 1, § 4, cl. 1.

184. 468 U.S. 641 (1984).

185. *Id.* at 648 (quoting *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981)).

186. 796 F.2d 1547 (7th Cir. 1986), *aff'd without opinion*, 479 U.S. 1048 (1987). At issue in *Watseska* was an ordinance regulating, and severely limiting, the hours of permissible door-to-door solicitation.

187. *Id.* at 1552; *see also* *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983)(insurance requirement imposed on demonstrators not least restrictive means of serving state's legitimate interest in protecting itself from liability).

*Non-Violence*¹⁸⁸ and in the *Perry* standards for speech regulation in a public forum.¹⁸⁹ The United States Supreme Court affirmed the *Watseka* court without opinion.¹⁹⁰

The *Watseka* opinion is most significant for its analysis of the "narrowly tailored" test. According to the Seventh Circuit, "narrowly tailored" means that a less restrictive alternative to the regulation at issue must be inadequate to meet the governmental need.¹⁹¹ The government must "show both that there is a significant relationship between the regulation and the governmental interest, and that less restrictive alternatives are inadequate to protect the governmental interest."¹⁹² The narrowly tailored test refines the *O'Brien* requirement that restrictions on first amendment freedoms be "no greater than is essential" to further the government's interest.¹⁹³ The "significant relationship" part of the test requires that the government interest actually be furthered by the regulation. If the government's interest is not likely to be significantly advanced by the regulation, then its value to the government is outweighed by the restriction on speech rights, and the regulation should fall.¹⁹⁴

B. Insurance Requirements

A current trend in time, place, and manner regulations is to impose an insurance requirement on the speaker.¹⁹⁵ Such a requirement is often in addition to other regulations and might even go so far as to silence a speaker. The University of Washington has the following insurance requirement:

Permission to a nonuniversity organization or to a registered or official student organization for the use of university facilities is granted with the express understanding and condition that such or-

188. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

189. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1984); see also *supra* notes 81-84 and accompanying text (discussing *Perry* standards).

190. See *City of Watseka v. Illinois Public Action Council*, 479 U.S. 1048 (1987).

191. See *Watseka*, 796 F.2d at 1554.

192. *Id.* (citation omitted).

193. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

194. The application of this part of the test probably would have changed the outcome in *O'Brien*. Maintaining possession of one's draft card could in no way significantly aid the Selective Service in identifying and contacting its registrants.

195. See Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 258 (1985). "[W]ith increasing frequency, municipalities from Berkeley to New York to Skokie have been requiring political organizers . . . to obtain insurance, sign hold-harmless agreements, pay police and other public service fees, and post cleanup deposits, in addition to paying traditional permit application fees." *Id.*

ganization assumes full responsibility for any loss, damage or claims arising out of such use.

When the event involves physical activity, or otherwise will increase the risk of bodily injury above the level inherent in the facilities to be used, proof of appropriate liability insurance coverage with limits of at least \$1,000,000 per occurrence must be provided to the university's office of risk management before approval for the requested use will be granted.¹⁹⁶

Washington had shanties, but they were removed after six to eight weeks without any action on the part of the University.¹⁹⁷

The University of Utah did not attempt to make the Students Against Apartheid purchase liability insurance. Nevertheless, the University relied in part on liability concerns in their effort to remove the shanties, claiming that "due to the nature of the shanties and the inherent risk associated therewith, liability coverage . . . will be cancelled with respect to any liability arising out of the shanties. Optional liability insurance is not available at reasonable cost to the University."¹⁹⁸ The University also claimed to be "at risk with respect to liability suits brought by third persons due to any injury caused in connection with the shanties."¹⁹⁹

Potential liability, while a valid concern of government or an institution, does not necessarily justify suppressing the symbols of speech, whether verbal or nonverbal. The United States Court of Appeals for the Second Circuit, in *Eastern Connecticut Citizens Action Group v. Powers*,²⁰⁰ considered the Connecticut Department of Transportation's attempt to impose an insurance requirement on an organization seeking to march against a proposed freeway. The court stated that "[w]hile the state has a legitimate interest in protecting itself from liability for injuries associated with the use of its property, we are not persuaded that the insurance requirement represents the least restrictive means of serving that interest."²⁰¹ The court noted the availability of criminal sanctions to deal with trespass or vandalism and placed the burden on the state to demonstrate that "those carefully-crafted remedies

196. WASH. ADMIN. CODE § 478-136-060(2)(1983).

197. See Letter from Elsa Kircher Cole, Assistant Attorney General, to Edwin Firmage (Nov. 10, 1986).

198. Defendants' Memorandum at 3, *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200 (D. Utah 1986)(No. 86C-06884).

199. *Id.*

200. 723 F.2d 1050 (2d Cir. 1983)[hereinafter *ECCAG*].

201. *Id.* at 1056.

[were] unavailing."²⁰²

It is also well established that officials must protect a speaker against a hostile audience.²⁰³ To do otherwise would be to allow hostile groups or individuals, through violence or the simple threat of violence, to act as censors. Additionally, it makes little sense to single speech out for an insurance requirement when other activities, quite likely more risky to participants or to others, are not subjected to such treatment:

[I]ndividual pedestrians are not forced to pay for insurance against street crimes, businesses need not post insurance against business crimes or torts, and police officers are not required to buy insurance for police misconduct. Likewise, these groups are not required to buy insurance for any possible municipal liability derived from their misbehavior. Only large public associations are subjected to this requirement, even though there is no evidence that the risk of crime or intentional torts is statistically greater in these circumstances.²⁰⁴

Universities administer research hospitals and transplant human organs, conduct nuclear research, store and dispose of fissionable materials, use toxic chemicals, and use—even create—biological organisms. Insurance requirements, carried to extremes, could preclude each of those activities. Speech is central to the existence of the university; it must not be stifled with extraordinary risk insurance costs.

As it did early in the development of the public forum law with permit requirements,²⁰⁵ the United States Supreme Court should put strict limits on the imposition of insurance requirements for use of public forums. At least one lower court has already taken this step. The United States District Court for the Northern District of Illinois, in *Collin v. O'Malley*,²⁰⁶ invalidated an insurance requirement imposed on the National Socialist (Nazi)

202. *Id.* at 1057. The court, however, left open the possibility of a "reasonably applied" insurance requirement, noting that such requirement "must be carefully scrutinized." *Id.*

203. *See supra* notes 105-11 and accompanying text.

204. Neisser, *supra* note 195, at 302. Neisser, however, advocates the requirement of insurance for the negligent acts of speakers. Such premiums presumably would be much lower than those for intentional acts. *See id.* at 305.

205. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)(permit requirements must not "deny or unwarrantedly abridge the right of assembly"); *Schneider v. State*, 308 U.S. 147, 160 (1939)(permit regulations "may not abridge the individual liberties secured by the Constitution"); *Hague v. CIO*, 307 U.S. 496, 516 (1939)(ordinance may not allow local officials to deny parade permit on mere opinion that disruption might occur).

206. No. 76 C 2024 (N.D. Ill. July 29, 1977), *motion for stay denied*, 452 F. Supp. 577 (N.D. Ill. 1978).

Party of America. Officials had required plaintiffs to purchase liability coverage of \$100,000/\$300,000 and property damage coverage of \$50,000.²⁰⁷ Notwithstanding likely disruption from the demonstration, the court struck down the requirement “as an unreasonable restraint on First Amendment rights.”²⁰⁸ If such a requirement was unreasonable for the American Nazi party, it is certainly unreasonable for those speaking through a silent symbol and seeking to avoid rather than create confrontation.

C. *Shanties Across America*

From coast to coast college campuses have seen shanties; at least thirty colleges or universities have had shanties.²⁰⁹ Generally, shanty demonstrations have been nondisruptive and costs to universities hosting the shanties have been minimal.²¹⁰ The exceptions to those generalizations, of course, have received much more publicity.²¹¹

Most universities experiencing shanties have recognized that they were intended as speech and attempted to work with the students associated with the shanties. These universities thus fulfilled their role in fostering the free exchange of ideas.

Indiana University exemplifies the tolerant, and even supportive, approach. “Universities in our civilization are places where dis-

207. *See id.*

208. *ECCAG*, 723 F.2d 1050, 1057 (2d Cir. 1983)(discussing *Collin v. O'Malley*, No. 76 C 2024 (N.D. Ill. July 29, 1987), *motion for stay denied*, 452 F. Supp. 577 (N.D. Ill. 1978)).

209. Information on shanties on campuses other than the Universities of Utah and Virginia derives from general circulation media and a questionnaire sent by the authors of this Article to universities across the country. One hundred thirty-four universities responded. Institutions indicating that they have had shanties were Boston University, Brandeis University (Waltham, Massachusetts), Brown University (Providence, Rhode Island), Bucknell University (Lewisburg, Pennsylvania), Eastern Illinois University, Harvard University, Indiana University, Johns Hopkins University (Baltimore, Maryland), Keene State College (New Hampshire), Millsaps College (Jackson, Mississippi), Oberlin College (Oberlin, Ohio), Ohio State University, Pennsylvania State University, Plymouth State College (New Hampshire), Princeton University, Syracuse University (tents), University of Houston, University of Iowa, University of Kansas, University of Michigan, University of New Hampshire, University of North Carolina, University of Pennsylvania, University of South Carolina, University of South Florida, University of Southern California, University of Virginia, University of Washington and Washington University (St. Louis).

210. Of 22 universities responding to the authors' questionnaire item regarding the costs of shanties, six reported they had no data, 13 reported minimal or no costs, and only two reported costs in excess of \$1,000. The latter two reported costs of over \$5,000 and over \$20,000. Among the “minimal cost” responses, the most common expenses were cleanup and lawn reseeding.

211. Costs to the University of Utah included \$5,000 for security and at least \$20,000 for the shanties litigation. *See supra* note 101.

senting and controversial views can be aired and discussed. This exchange of views is not merely something to be tolerated; it is a source of diversity and strength for our society as a whole."²¹²

Oberlin College worked with its shanty builders to minimize confrontation and disruption. Students were asked to move the shanties when the space was needed for commencement. The students did not move them. Rather than destroying the structures, the administration simply had its workers move them.²¹³

Some form of regulation will often prove essential, if only to deal with the situation of multiple speakers attempting to use a single forum simultaneously.²¹⁴ The University of Iowa focuses on time, place, and manner considerations rather than on the content of the speech: "In dealing with student expressions of dissent, the central question is one of time, manner and place. There is no question about the worthiness of the views expressed or the right to express the views. Rather, it is the form and circumstances of expression which is occasionally the issue."²¹⁵

Time, place, and manner restraints need not be incompatible with free speech. Indiana University decided to use regulation not to restrict access, but to open a forum.²¹⁶ The University of Illinois at Urbana-Champaign emphasizes both free speech and regulation

212. University of Indiana Assembly Ground Committee, Report to Dean M.V.W. Gordon (Sept. 26, 1986).

213. See Letter from George H. Langelier, Dean of Students of Oberlin College, to Edwin B. Firmage (Oct. 9, 1986). Oberlin experienced more difficulty with two other instances of symbolic speech. After the shanties had been erected, a different group of students erected a "Berlin Wall." Another group of students destroyed the wall. Students also disrupted, and prevented, a 21 gun salute planned in conjunction with a Ronald Reagan Appreciation day. Additionally, the administration cancelled a showing of the film, *The Gods Must Be Crazy* (C.A.T. Film 1984), because it feared disruption after a student group had asked that it be cancelled because it was racist and demeaning to blacks. See *id.*

Dean Langelier, responding to those incidents of intolerance, said, "I, on the one hand, will protect the right of anyone to speak his or her thoughts in accordance with the Constitution and by the same token take action against those who violate the rights of others to freely express themselves in accordance with the Constitution." George H. Langelier, Remarks at the Forum on Civil Liberties, Oberlin College (Sept. 7, 1986).

214. The classic example is that of two parades attempting to march on the same street at the same time. See *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

215. Letter from Julia A. Mears, Assistant to the President of University of Iowa, to Edwin B. Firmage (Dec. 3, 1986).

216. "The Board of Trustees has designated an area on Dunn Meadow immediately north of the Memorial Union as the Indiana University Assembly Ground. Here, members of the University Community may express themselves freely on all subjects, within the limits of applicable laws and regulations, with or without advance notice." *Student Shanties Protest Apartheid*, Indiana Daily Student, Apr. 14, 1986, at 1, col. 1 (citing Indiana University campus regulations).

of that speech. The university had shanties three times in the spring of 1986, with permits granted each time. Once the university granted a permit even though the demonstrators had not requested one, "to ensure that no university regulations were violated."²¹⁷ The shanties were allowed to remain for about one week each time. The first and the third time, the students removed the shanties themselves; the University removed the shanties on expiration of the permit the second time. The administration, in discussing the shanties, did not question the right of the speakers to erect the structures. Rather, discussion focused on the size of the shantytown and a limit on its duration.²¹⁸ The University of Illinois at Urbana-Champaign found itself faced with a problem often troublesome to the United States Supreme Court: where to strike the balance between freedom of expression and control of a forum. "Our campus has a history in the past two decades of respecting the right of free speech while vigorously seeking to control time, place, and manner."²¹⁹ The University of Illinois seems to have made an informed attempt to find that balance. Rather than choosing a confrontational approach, the Chancellor of the University of Illinois spoke at the shantytown, commending the protesters and asking their cooperation.²²⁰

Washington University, a private school in St. Louis, Missouri, also worked with its shanty builders. The result was six weeks of shanties on campus, with minimal costs to the university.²²¹ The students initially did not apply for a permit. After the shanties were constructed, the administration suggested to the builders that they obtain a permit. The students then applied for, and received, the appropriate permit. Washington University encountered a situation often cited as a justification for permit requirements—conflicting uses of a particular space. The shanty builders had to move their shanties twice, once for a concert, and again for commencement. The moves were not to hide the shanties, but simply because the space was needed for other previously scheduled activities. Students abandoned the shanty after commencement

217. Letter from Stanley R. Levy, Vice Chancellor of University of Illinois at Urbana-Champaign, to Edwin B. Firmage (Dec. 2, 1986).

218. *See id.*

219. *Id.*

220. *See id.*

221. *See* Letter from Karen Holm, Associate General Counsel for Washington University, to Edwin B. Firmage (Dec. 17, 1986).

and university workers then removed it.²²²

One common fear of speech in general, and nonverbal symbolic speech in particular, is cost. Universities experiencing shanties reported costs ranging from zero to over \$20,000.²²³ Harvard reported a cost of at least \$20,000.²²⁴ The University of Michigan, on the other hand, said that it dealt with its shanties "calmly," and that the shanties had not cost the university any money.²²⁵

D. University of Utah Speech Regulations

The University of Utah responded to the *University of Utah Students Against Apartheid* decision by drafting a new campus speech policy. That policy may furnish guidance to other college and university administrators confronted with symbolic speech. It was drafted with the awareness that while regulation may be permissible, tolerance and protection of speech rights are essential in a university setting.

The preamble to the University of Utah's new time, place, and manner regulations ("Speech Policies") states: "It is the purpose of these regulations to protect and enhance the free exchange of ideas in the University and on the University campus."²²⁶ The new regulations, promulgated by the University of Utah Speech Committee ("Flynn Committee"),²²⁷ appear to represent a significant step toward that end; the University of Utah recognizes that it must not only permit speech but also must protect speech from censorship, and "from those committed to interference with a speaker's presentation through acts of disruption."²²⁸

Giving substance to the desire to "protect and enhance the free exchange of ideas," the Speech Policies explicitly permit the use of structures such as shanties to convey a message. "Members

222. *See id.*

223. *See supra* note 210 and accompanying text.

224. *See* Letter from Daniel Steiner, Vice President and General Counsel for Harvard University, to Edwin B. Firmage (Oct. 27, 1986).

225. Letter from Roderick K. Dane, General Counsel for University of Michigan, to Edwin B. Firmage (Oct. 10, 1986).

226. University Regulations, Ch. IX, *University Speech Policies*, Preamble and Statement of Policy (May 15, 1987)[hereinafter *Speech Policies*].

227. The University of Utah Speech Committee soon became known as the Flynn Committee. Chairing the committee was John J. Flynn, Hugh B. Brown Professor of Law at the University of Utah College of Law. The committee included students, university administrators, law and communications faculty, practicing attorneys, and a representative of the media. It also included one of the individual plaintiffs in *University of Utah Students Against Apartheid*, Mark Nelson.

228. *Speech Policies*, Preamble and Statement of Policy.

of the University community and their organizations may erect structures on campus to express their views or opinions. Such structures may deal with any subject matter including, but not limited to, expressions of positions and ideas on social or political topics."²²⁹

Recognizing that excessive discretion is not acceptable, the regulations stipulate that the University "shall" grant a permit to erect a structure:

- (1) if the intended structure and uses made of it will not constitute an unreasonable safety hazard and will not impede the normal functions of the University;
- (2) the structure does not block or impede entry to any building or interfere with normal pedestrian or vehicular traffic; and
- (3) the proposed location of the structure does not inflict unreasonable damage upon landscaping like flower gardens and shrubs.²³⁰

The first two tests address protection of classroom-based education and other university-sponsored functions. The third test by implication limits "aesthetic" concerns to actual physical damage to university property. These threshold permit requirements are thus content-neutral and limited to protecting university interests whose substantial nature cannot be doubted.

In addition, the Speech Policies provide for renewal of a permit. Assuming that the speaker still meets the requirements, the permit "shall" be renewed.²³¹ The real limitation comes from the academic calendar: "[I]n no case shall a renewal period extend beyond the end of the academic quarter."²³²

Obtaining a permit to use expressive structures subjects the speakers to additional time, place, and manner requirements. The first three requirements of the permit are simply administrative. The permit application must identify (1) the speaker, (2) the proposed location and design of the structure, and (3) the length of time, with a thirty-day maximum, that the permit will be in

229. *Id.* tit. IV, § 3(A)(1). The same section defines "structure" as "any object (other than objects such as handbills, signs, notices and posters, arm bands or personal attire) used in the process of expressing views or opinions including, but not limited to, lawn signs, tables (and other structures used to display materials), booths, buildings, billboards, banners, and similar displays." *Id.* tit. IV, § 3(A)(2). The final regulations reflect a significant change from earlier drafts which included shanties in the definition of "structure." Also omitted were flags and crosses. See *Speech Policies*, Draft 8 (Jan. 17, 1987).

230. *Speech Policies*, tit. IV, § 3(B)(3).

231. See *id.* tit. IV, § 3(B)(4).

232. *Id.*

effect.²³³

Two further requirements are more important, as they address concerns of the university which might be used to justify denying a speaker access to a forum. First, the permit application must include "an agreement to . . . pay for any damage the structure may cause to the site upon which it is erected."²³⁴ Second, the application must include "an agreement to hold the University harmless for any assessed damages or liabilities caused by the structure itself."²³⁵

The "agreement to pay" and "hold harmless" requirements are repeated in a section entitled "Responsibility for Content and Safety of Structures."²³⁶ That section poses potential problems if the University interprets it to justify imposing insurance or bonding requirements on speakers. If simply interpreted as written, however, the section meets the *Watska* requirements:²³⁷ it is content-neutral, serving the substantial University interest in the physical integrity of its grounds; it leaves open all communicative channels that do not cause physical harm; and it is narrowly tailored, limiting the speakers' liability to that actually caused "by the structure itself," and relieving them from liability for the lawless acts of those opposing the structures or their message.

The "hold harmless" requirement also has a content-based component: "By erecting any structure on campus, the member or members of the University community agrees to hold the University harmless for any assessed damages or liabilities . . . caused by *libel or slander in the message it conveys*."²³⁸ By law, the content-based italicized portion, applying to political speech in a public forum, must be "necessary to serve a compelling state interest and

233. See *id.* tit. IV, § 3(B)(2). The Speech Policies also require "an agreement to remove the structure upon expiration of the permit." *Id.*

234. *Id.* tit. IV, § 3(B)(2).

235. *Id.* The section also includes a staffing requirement. "In the case of structures . . . other than structures that are lawn signs, posters, billboards, banners and similar self-explanatory structures, the Scheduling Director shall require that the structure be regularly staffed during daytime school hours as a condition of issuing the permit and renewing the permit." *Id.* This requirement serves as a "mettle" test, "so that individuals or organizations would not just perpetually keep structures up without any on-going responsibility for them and the message they were attempting to convey." Flynn Committee, Distribution to Committee Members, Document 3 (Jan. 20, 1987).

236. *Speech Policies*, tit. IV, § 3(D).

237. See *City of Watska v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986); see also *supra* notes 186-92 and accompanying text (discussing *Watska*).

238. *Speech Policies*, tit. IV, § 3(D) (emphasis added).

. . . narrowly drawn to achieve that end.”²³⁹ It appears that the “hold harmless requirement satisfies this test: the University’s interest in avoiding lawsuits unrelated to its own actions is certainly compelling. More importantly, the requirement is narrowly drawn in that it leaves the University of Utah out of the business of censoring the message for possible defamation; that judgment is left to the speakers. The University of Utah is allowing use of its forum to express political views, while ensuring that it will neither endorse nor defend defamatory messages.”²⁴⁰

The University of Utah’s Speech Policies are also significant for their title: “University Speech Policies.” Those wishing to exercise their speech rights on the campus need not hunt for, or be surprised by, seemingly nonspeech-related policies such as the “Lawn Use Policy” at issue in the *O’Neil* cases. The University Policies are thus not only formally drawn but serve an important notice function by being clearly identifiable.

VI. CONCLUSION

Nonverbal symbolic speech has an honorable history in first amendment jurisprudence. Its use implicates certain government interests. These interests, however, do not justify limiting symbolic speech unless they are substantial and unrelated to the symbol’s message, and interfere with speech no more than necessary to further the government interest. Concerns about offensiveness and aesthetics, standing alone, are inadequate to justify restricting symbolic political speech. As with verbal speech, symbolic speech should receive strict protection when it deals with political issues. Too often we simply assume words are ultimate reality. Words, after all, are symbols of a deeper inarticulate reality. Words and non-verbal entities or activities equally are symbols of such ultimate meaning.

State universities are public forums limited only by the necessities of their function as educational institutions. The university’s educational function must of course be protected against excessive interference by its use as a public forum. Freedom of expression,

239. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); see also *supra* notes 80-89 and accompanying text (discussing *Perry*); *Boos v. Barry*, 485 U.S. 312, 321 (1988)(reaffirming *Perry* doctrine).

240. See *Speech Policies*. The Preamble and Statement of Policy further buttresses the University’s intent to not serve as a shield for defamatory speech: “By virtue of regulating the exercise of free speech on the campus, the University does not sponsor or sanction the messages being stated . . . unless expressly stated otherwise.” *Id.*

however, is a central component of the university's educational function, and restrictions on this freedom in the university setting must accordingly be strictly scrutinized.

Balancing techniques are appropriate to protect both state interests and speech. Such balancing must not be done through official discretion, but through formally drawn, carefully conceived regulation. When balancing potentially competing interests, it is important to limit the weight given to the state's aesthetic or other subjective interests. At the same time, the effectiveness of symbolic speech and the nature of the forum in which such speech occurs must be carefully considered. The efforts of the University of Utah to protect the integrity of its educational function and the attractiveness of its grounds through its Speech Policies provide a model for such balancing.

The shanties aroused emotions and engaged intellect. Like sit-ins, burning draft cards, and tea in Boston Harbor, they called on us to examine the relationship between ethics and politics, rhetoric and actions. And they did so with an empowering directness that threatened the established order.

The dialogue stimulated by shanties and other provocative forms of speech is the ingredient essential to change, renewal, and survival. The impact of shanties arguably contributed to the freeing of Nelson Mandela as the 1990 decade opened. Apartheid may be falling. But the coming decade will present our nation—indeed, the world—with further challenges to the human impulse of growth and survival. A multitude of critical issues will vie for positions at the forefront of our consciousness. At times, those attempting to educate the world about important issues will be faced with other powerful human impulses—such as complacency and fear of change. Precisely because it has the power to overcome complacency where words alone may not, nonverbal symbolic speech should be protected to the greatest extent possible. Precisely because our universities are valued for their contribution to the marketplace of ideas, robust, even provocative speech occurring on our campuses should be encouraged. The task of our courts is to foster the bringing of social and political issues to our attention, and view with suspicion any efforts to limit such communication. The first amendment demands no less.