Reimagining the First Amendment: Racist Speech and Equal Liberty

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REIMAGINING THE FIRST AMENDMENT:
RACIST SPEECH AND EQUAL LIBERTY*

MARY ELLEN GALE**

I. THE PERSISTENCE OF RACISM AND THE FAILURE OF EDUCATION

Racism still haunts American life.1 Like Banquo's ghost, it is the silent witness at our national banquet, the "horrible shadow"2 that should compel memory and remorse. But most white Americans don't see it.3 Like Macbeth's guests, we consume the feast and

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1 Cf. Post, Racist Speech, Democracy, and the First Amendment, 32 WM. & MARIL. REV. 267, 267 (1991) ("curse of racism continues to haunt the Nation"). I am unwilling to relinquish the metaphor. Our articles are otherwise dissimilar.


Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced us, we are all racists. At
don't ask questions about those who are missing from the table. Like Macbeth, even when we can see the specter admonishing us, we are likely to disclaim responsibility. We read and forget reports that suggest that the United States has enacted much of the tragedy predicted by the National Advisory Commission on Civil Disorders twenty-two years ago, that we have become—even more now than then—"two societies, one black, one white—separate and unequal." Too many white Americans—even those of us who par-

the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.

Id.; see also Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) ("One wonders whether the majority [of the Supreme Court] still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was"); Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARv. L. REV. 1331, 1348 & n.66 (1988) (most white Americans do not believe that racism still denies equal social and economic opportunities to blacks); Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2327 (1989) (whites deny reality of racism); Reeves, The Truth, Too Little Told, Is That There's Some Racism in All Americans, L.A. Times, June 15, 1990, at B7, col. 1 (legal and political notions of colorblindness are "a sham designed to keep black people in their place" and to "freez[e] the status quo. The Confederacy wanted about the same thing").

At least some cognitive and emotional dissonance is necessary for Americans not to acknowledge the persistent reality of racism. See Fulwood, Attitudes on Minorities in Conflict, L.A. Times, Jan. 9, 1991, at A13, col. 1. A poll taken by the University of Chicago's National Opinion Research Center revealed that while whites claimed to support equal rights and racial integration, they consistently reported negative attitudes, describing blacks and other minorities as "more violence-prone, less hard-working, less intelligent, less likely to be self-supporting and less patriotic than whites." Id. (quoting Tom W. Smith, senior study director for center). A study done in Atlanta showed that similar prejudicial attitudes among white business executives prevented minority businesses from getting private contracts. Id.


6 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (paperback ed. 1968). Currently, almost half the black children in the United States live in families—often with one parent who is nearly always female—with incomes below the poverty line. L.A. Times, Dec. 11, 1990, at A20, col. 2 (reporting statistics gathered by Joint Center for Political and Economic Studies in Washington, D.C.). Other recent studies have focused on the distorted lives of black men: black males in inner-city ghettos are more likely to die young than if they lived in Bangladesh; young black males in California are three times more likely to be murdered than to be admitted to the University of California; the murder rate for black males aged 15 to 25 is 10 times that of white males in the same age group. Harris, NAACP Seeks Solutions to Crisis of Black Males, L.A. Times, July 10, 1990, at A1, col. 1. One third of California's black males in their twenties—and nearly one fourth of the same
ticipated in the civil rights movement of the 1960’s and still identify ourselves as liberals—have abandoned racial equality as an urgent social goal. We no longer share radical dreams of equal participation, opportunity, and respect in public and private life. Perhaps we have turned our attention to other compelling societal problems or sought nourishment, challenge, and satisfaction in our private lives instead. Or perhaps we have settled for an uneasy social peace as a substitute for equal choices and equal rights. We group nationwide—are incarcerated, on parole, or on probation. Ford, *Prison Life, Parole Touch High Number of Young Blacks*, L.A. Times, Nov. 2, 1990, at A3, col. 6. As of December, 1990, 28.7% of the U.S. troops in the Persian Gulf were persons of color, more than two and a half times larger than their percentage of the national population. Kempton, *Again, ‘Losers’ Will Do Our Dirty Work*, L.A. Times, Jan. 1, 1991, at B5, col. 1 (citing Defense Department estimate). *See generally D. Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 45-49 (1987) (describing current status of blacks in United States); Bell, *The Supreme Court 1984 Term—Foreword: The Civil Rights Chronicles*, 99 Harv. L. Rev. 4, 9-13 (1986) (hereinafter Bell, *Chronicles*) (exploring myths serving as basis for civil rights inaction); Crenshaw, *supra* note 3 (analyzing continuing role of racism in subordination of black Americans).

*6* Writing this Article has made me wonder whether I still may be considered a “liberal.” For a more traditionally liberal statement of my views on free expression, see Gale & Strossen, *The Real ACLU*, 2 Yale J.L. & Feminism 161 passim (1989) (defending ACLU against Andrea Dworkin’s charge of anti-feminism), and Dworkin, *The ACLU: Bait and Switch*, 1 Yale J.L. & Feminism 37 passim (1989) (claiming ACLU is anti-feminist). I leave it to the reader to decide whether my two articles are consistent.

*7* Throughout this Article, I will use the term “rights” just as though I believed unequivocally in some clear conception of them and in its moral and legal power. See generally R. Dworkin, *Law’s Empire* 379-99 (1986); R. Dworkin, *Taking Rights Seriously* (paperback ed. 1978) (hereinafter *Taking Rights Seriously*). In fact, however, my attitude is similar to Professor Alan Freeman’s (though I wouldn’t use the same words to describe it): “rights [are] a problematic, yet persistent, notion that plays a key role in the neverending dialectic of politics and power.” Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 Harv. C.R.-C.L. L. Rev. 295, 315 (1988). Professor Freeman concedes the “power of rights rhetoric and belief as a source of imagery and inspiration,” *id.* at 335, and observes, “I believe simultaneously in the truth of rights critique and the authenticity of rights experiences,” *id.* at 334-35. To some extent at least, this Article is intended to contribute to what Freeman describes as an ongoing project to “‘unthink’ domination”—even though that won’t “make it go away.” *Id.* at 323. For rights critique from a different perspective, see J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 43-70 (1980) (rejecting tradition as a source of fundamental constitutional values).

With respect to the use of racial discrimination to disfavor minorities, our country has two conflicting traditions: the egalitarian one to which most official documents have paid lip service over the past century, and the quite different and malevolent one that in fact has characterized much official and unofficial practice over the same period (and certainly before). Presumably no reader would wish to endorse the latter tradition, but I’d be interested to hear the argument that can make it go away.

*Id.* at 61 (emphasis in original) (footnotes omitted).

Nonetheless, I am not an uncritical student of critical legal studies ("CLS"). For one
may know that black Americans too often have none of these, but we comfort ourselves that in our own lives and communities, we still value, seek, and sometimes find them.

One place that we expect to find them is in our educational institutions, idealized as a refuge for the calm, impartial, and unimpeded pursuit of knowledge and truth. Here we hope to escape the bigotry, cruelty, and injustice outside. But universities and colleges are no longer, if they ever were, tranquil havens in a prejudiced world. Instead, for people of color, women, gays and lesbians, religious minorities, and members of other arbitrarily disadvantaged groups, institutions of higher education have become, in-

thing, some CLS authors too often get the facts wrong. Freeman himself uncritically reports the contention that "white activists in the 1960's who showed up in the South ready to 'organize' black communities" were told by the blacks who lived there to "go home and organize their own communities instead." See Freeman, supra, at 322 n.76. No doubt that was the experience of some, especially those who thought they were attending an inchoate CLS conference. But those who came to listen, learn, and record the civil rights movement—or who offered respect, belief, and help for longer than summer vacation—found a complex, if conditional, welcome that changed some of our lives forever (here I speak for myself; I helped to edit a civil rights newspaper in Alabama from 1965 to 1968). Many volunteers who came to Mississippi only for the historic summer of 1964 were organized themselves by black and white leaders into an effective cadre of civil rights workers. See, e.g., S. BELFRAGE, FREEDOM SUMMER 327 (1965). This Article also reflects my experiences as a civil rights activist—the instilled belief that, against all the odds of prejudice and misunderstanding, interracial cooperation and racial justice remain possible.

* In this paragraph, and in this Article generally, I focus on white racism directed at black Americans as a paradigm for prejudice and as the most serious national problem, though I also refer to other prejudices. Cf. Reeves, supra note 3 (other ethnic prejudice is less fundamental). But I realize that other people of color, women, gays and lesbians, and members of religious minorities suffer similar—though not identical—harms from arbitrary stigma and prejudice. See Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1990 U. ILL. L. Rev. 95, 116 & n.83 ("every group subordination rests on a distinct legitimizing myth" accepted by the dominant culture—racial inferiority of blacks, reduction of women to sexual and maternal objects, and rejection of gay and lesbian sexuality as unnatural). But see Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484, 492 & n.30 (harms caused by racist speech do not differ from harms caused by sexist or homophobic speech in conveying messages of, respectively, white, male, and heterosexual supremacy). These contradictory observations each seem partly true, thus suggesting how complex and elusive the psychological, social, and political realities of prejudice may be.

* Like everyone who writes about racism and similar forms of prejudice, I have struggled to find adequate words or short phrases to refer to the target groups. "Minorities" is empirically inaccurate and socially marginalizing. See Williams, Alchemical Notes: Reconstructing Ideals From Deconstructed Rights, 22 HARV. C.R.-C.L. L. Rev. 401, 404 n.4 (1987) (discussing characterization difficulties). "People of color," now becoming accepted, may sound too much like the discredited "colored people" to some readers. "Historically disadvantaged" may exclude both persons with AIDS, and those gays and lesbians who pass for heterosexual rather than suffer the often legally approved mistreatment. It may also imply
creasingly, places of physical and psychological danger. Statistics, news reports, and personal stories recounted by the victims dis-
close that racist, sexist, and other prejudiced incidents have flared on college campuses across the United States. When the perpe-
trators are identified, they often turn out to be white male stu-
dents, asserting their assumptions of power and privilege against the claims of others to equal educational rights and opportuni-
ties and to equal participation in university life.

not just the dominance but the superiority of white culture over others. See Monture, Ka-
Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah, 2 CAN. J. WOMEN'S L. REV. 159, 161-62 (1986). For Native American cultures which emphasize spiritual rather than material values, "[d]isadvantage is a nice, soft, comfortable word to describe dispossession,... a situation of force whereby our very existence, our histories, are erased continuously right before our eyes. Words like disadvantage conceal racism." Id. Nonetheless I sometimes use these terms.

"Black," the term I use, has different nuances from "African-American." See Crenshaw, supra note 3, at 1332 n.2. Even my choice not to capitalize "black" can be viewed as a manifestation of white racism. See id.; cf. Davis, Law as Microaggression, 98 YALE L.J. 1559, 1565-66 (1989) (dozens of minute cultural cues combine to reinforce stereotype of blacks as inferior). But see Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 586 n.20 (1990) (race and gender issues entwine; "to capitalize 'Black' and not 'Woman' would imply a privileging of race with which I do not agree").

10 E.g., ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, ADL CONFERENCE ON CAMPUS PREJUDICE 7-8 (1990) [hereinafter ADL CONFERENCE REPORT]; France, Hate Goes to College, 76 A.B.A. J. 44, 44 (July 1990) (discussing incidents); Koepke, The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb, 12 HASTINGS COMM./ENT. L.J. 599, 602 n.12 (1990) (citing reports of incidents at Columbia University, Dartmouth College, Duke University, Purdue University, University of California at Los Angeles, University of Massachusetts at Amherst, University of Michigan, University of New Mexico, University of Wisconsin, and Wellesley College); Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 431-33 (listing incidents); Matsuda, supra note 3, at 2320-21, 2327-38 (describing incidents and citing studies); Note, Racism and Race Relations in the University, 76 VA. L. REV. 295, 315-16 (1990) (same); Temkin, Times of Ten-

11 See, e.g., Butterfield, The Uproar at Dartmouth: How a Conservative Weekly In-
flamed a Campus, N.Y. Times, Oct. 7, 1990, § 1, at 26, col. 1. The Dartmouth Review, an off-campus newspaper edited primarily by conservative white males, has run columns prom-
oting various forms of prejudice since its inception in 1981. Id. For instance, one column suggested that black students were illiterate; another, describing a black professor of music as "look[ing] like a used Brillo pad," urged students to harass him; the most recent incident involved the publication on a Jewish holiday of an anti-Semitic quotation from Adolf Hitler. Id.; see also Lawrence, supra note 10, at 431 (white fraternity members painted themselves black and placed rings in their noses for "jungle parties" at University of Michigan); Wil-
liams, The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 MICH. L. REV. 2128, 2133 (1989) (after black Stanford student's observation that Beethoven had some black ancestry, white students "got drunk and decided to color a poster of Beethoven to represent a black stereotype" and posted it outside black student's room (citing Board of Trustees, Stanford Univ., Final Report on Recent Incidents at Ujamaa House (1989)));
The xenophobic prejudices that cause such incidents intertwine like strands of rope, reinforcing each other and doubly victimizing people perceived as doubly distanced from the white male heterosexual Christian center of American consciousness: African-American or Asian-American women, gay blacks, Jewish women, Native Americans who embrace their own religions, Arab-American Muslims, and more. Yet racism in its most native version—hatred, subordination, and prejudice directed by whites against the descendants of the black people whom earlier white Americans enslaved—seems the most pervasive and ineradicable of all. Sexism in its most virulent form—male contempt, dominance, and devaluing of women—contributes equally to social oppression and is, in some respects, more deeply rooted in our individual psyches, our community values, and our social, legal, and economic systems. But racism provides the deep structures for most manifestations of prejudice in our society. Our Constitution as originally written relied on the political silence and insignificance of all women as a contextual certainty, but its framers deliberately

Note, supra note 10, at 315-16 n.76 (white students wearing sheets burned cross in black student's room at The Citadel, South Carolina military college (citing Aitken, Racism on Campus: Beyond the Citadel, PEOPLE MAG., Dec. 15, 1986, at 58)).

See generally D. Bell, supra note 5; Bell, Chronicles, supra note 5, at 4-7 (discussing Constitution's pro-slavery orientation and its harsh effect on blacks); Williams, Spirit-Murdering the Messenger: The Discourse of Finger-Pointing as the Law's Response to Racism, 42 U. MIAMI L. REV. 127, 129 (1987) (discussing effects of whites' exclusion of blacks from society).


But see C. MacKinnon, Feminism Unmodified, supra note 13, at 8-9 (gender inequality, though unlike racial inequality, is just as pervasive and invidious); Bohlen, East Europe's Women Struggle With New Rules, and Old Ones, N.Y. Times, Nov. 25, 1990, § 4 (Week in Review), at 1, col. 1 (describing exclusion of women from power in new "male democracies" of Eastern Europe, documenting repressive anti-abortion movements, and quoting Hungarian women's leader: "Without abortion, women are slaves").

I do not mean to let the framers off lightly for that reason. The exclusion of women from our nation's "constituting document" and its primary concern with limiting state rather than private action have combined to ensure "that those domains in which women are distinctively subordinated are assumed by the Constitution to be the domain of freedom." C. MacKinnon, Feminism Unmodified, supra note 13, at 207.
chose to inflict the pain and degradation of slavery upon black men and women.\textsuperscript{16} From that willed compromise flowed much of our national experience; it has divided our consciousness and flawed our hearts ever since.

Only with that acknowledgment, it seems to me, can white liberals even begin to talk intelligibly and constructively about racist and sexist incidents on college campuses and about the challenge that they pose to our traditional conceptions of free speech as guaranteed by the first amendment. Without that acknowledgment, our voices blend too easily with those who raise the first amendment as a shield for bigotry.\textsuperscript{17} If we expect the victims of

\textsuperscript{16} See U.S. Const. art. I, § 3, cl. 3 (apportioning representatives among states "by adding to the whole Number of free Persons . . . three fifths of all other Persons"); id. § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight"); id. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delievered up on Claim of the Party to whom such Service or Labour may be due"); cf. D. Bell, supra note 5, at 26-42 (chronicling attempts of modern black female civil rights attorney, magically transported back to Constitutional Convention, to persuade delegates not to endorse slavery); Bell, Chronicles, supra note 5, at 7 n.9 (listing 10 original constitutional provisions that effectively preserved slavery); Williams, supra note 12, at 138 ("Blacks were, by constitutional mandate, outlawed from the hopeful, loving expectations that being treated as a whole, rather than three-fifths of a human being can bring").

\textsuperscript{17} But see Bollinger, The Tolerant Society: A Response to Critics, 90 COLUM. L. REV. 979, 990 (1990) ("The great paradox for this country . . . is why our own past of slavery and segregation does not create the problem of tacit approval in the toleration of racist speech"); Linzer, White Liberal Looks at Racist Speech, 65 ST. JOHN'S L. REV. 187, 242 & n.249 (1991) ("When the government or a university allows racist speech to be uttered, it is not approving it or adopting it"); STANFORD UNIVERSITY, FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT, at 4 (June 1990) [hereinafter STANFORD INTERPRETATION] ("Free expression could not survive if institutions were held implicitly to endorse every kind of speech that they did not prohibit").

Even though I would not restrict racist or other prejudiced speech unless it crosses the (sometimes fuzzy) line to become discriminatory harassment of particular individuals, see infra notes 218-22, 235-43 and accompanying text, I think that official tolerance of racist speech legitimates racism and trivializes its harms far more often than Professors Bollinger and Linzer suppose. Professor Linzer actually compares "minorities [who] complain about theories they don't like" with members of "the Spanish Inquisition [who] harassed Galileo over Copernican astronomy." Linzer, supra, at 214. This absurd historical analogy inverts the true power relationships involved by equating today's victims of racist speech with the seventeenth century's hegemonic perpetrators of religious orthodoxy. In the context of Linzer's discussion of the "victim system," id. at 213, it also implies that white racism and male sexism are less serious causes of inequality than self-destructive attitudes ascribed to minorities and women—a theory that conveniently relieves the beneficiaries of racism and sexism from responsibility. Cf. Cover, Violence and the Word, 95 YALE L.J. 1601, 1614-15 (1986) (persons within hierarchical organizations may discard conscience and autonomy to...
prejudice to enter into a dialogue about how to restructure our public and private values to fulfill constitutional guarantees of free speech and equal rights,\textsuperscript{18} we need to abandon the self-righteous condescension of much liberal rhetoric,\textsuperscript{19} and begin again.

We need also to acknowledge that the new incidents of prejudice at American universities reveal an unsettling truth about our educational system and its institutions: they have failed to instill the most important of democratic beliefs—in the equal value and humanity of people different from ourselves and in the universal right to self-respect and self-realization. Perhaps that is not their task,\textsuperscript{20} but it is difficult to identify other social institutions

follow not just commands but even interpretive signals from institutional authorities). See generally Davis, supra note 9, at 1560 (black inferiority is background assumption of institutional neutrality); Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. Rsv. 133, 135-36 (1982) (racial insults demean victims by equating distinctions of race with distinctions of merit, dignity, status, and personhood); Williams, supra note 11, at 2137-42 (examining cases of “analytic paradigm” equating white with good and black with bad).

Oddly, Bollinger thinks that toleration of obscenity and “fighting words” “is too freighted with messages of weakness and condonation” to claim first amendment protection. See Bollinger, supra. I cannot even imagine a scheme of personal or community values in which either fighting words or obscenity ranks as a greater evil than, for example, the Ku Klux Klan’s thinly euphemized call for racial genocide.

\textsuperscript{18} U.S. CONST. amend. XIV, § 1 (equal protection clause).

\textsuperscript{19} Despite their evident sincerity, many liberals tend to phrase their views as instruction for the less enlightened. See, e.g., Gunther, Should Universities Restrict Expression That Is Racist or Otherwise Denigrating? Two Views . . . No, STAN. L.W., Spring 1990, at 7 (despite suffering from anti-Semitic remarks in Nazi Germany as a child, “[t]he lesson I have drawn . . . is the need to walk the sometimes difficult path of denouncing the bigots’ hateful ideas with all my power, yet at the same time challenging any community’s attempt to suppress hateful ideas by force of law”); Kaufman, Nibble at Freedom, and Risk Losing It All, L.A. Times, July 31, 1990, at B7, col. 4 (“Justice Holmes explained and history has taught us, in the long run, the best answer to ‘bad’ speech is more and better speech, not new laws, litigation and repression”).

\textsuperscript{20} As academic controversies over affirmative action, the literary canon, multiculturalism, and the “politically correct” position demonstrate, people disagree about whether universities should embrace attempts to rectify social injustice and inequality or cling instead and only to conventional education in “a disinterested Western cultural tradition, rooted in a commitment to rational inquiry and converging, century by century, on the truth.” See A Campus Forum on Multiculturalism: Opening Academia Without Closing It Down, N.Y. Times, Dec. 9, 1990, § 4 (Week in Review), at 5, col. 1 (quoting introductory paragraph of recent collection of differing opinions from 10 scholars). Defenders of the “disinterested tradition” deride proponents of more inclusive multicultural studies as purveyors of a “politically correct” orthodoxy. See, e.g., Taking Offense, NEWSWEEK, Dec. 24, 1990, at 48; Bernstein, The Rising Hegemony of the Politically Correct, N.Y. Times, Oct. 28, 1990, § 4 (Week in Review), at 1, col. 1; Bernstein, The Arts Catch Up with a Society in Disarray, N.Y. Times, Sept. 2, 1990, § 2 (Arts & Leisure), at 1, col. 1. Few traditionalists seem willing to acknowledge that heterosexual white males of indeterminate or mainstream ethnic origin
that can accomplish it. Moreover, because the new prejudice is so often expressed primarily or exclusively in damning, demeaning, and damaging words, it starkly challenges the liberal faith that free expression reinforces equal opportunity and equal rights. To civil rights and civil liberties activists, therefore, it suggests something even more troubling: that our constitutional theory of government may be fundamentally inadequate to achieve the ideals of liberty and equality that it proclaims.21

Free speech—as conventionally conceived and defended in this century22—has been an extraordinarily powerful device for

still benefit from what might be called “reverse affirmative action”—the dominant cultural assumption that they are naturally more capable and deserving than such stigmatized “outsiders” as gays, blacks, and women.

21 Professor Burt Neuborne, former National Legal Director of the ACLU, described the dilemma to the Anti-Defamation League’s National Conference on Campus Prejudice: What does one do if one is both passionately committed to free expression . . . and . . . to the goals of equality that both the Constitution and a modern and decent civilized community demand of us? . . .

. . . . We start with a conflict between two foundational principles: . . . there is no such thing as a forbidden idea. . . . [and that] everybody, regardless of race, regardless of religion, regardless of ethnic background, everybody is entitled to enjoy an equal shot at getting a good education at the school. . . . [W]hen . . . [hateful] ideas get expressed in ways that prevent identifiable segments of the educational community from having an equal chance at getting an education, then there is a reason for being concerned about the speech and for trying to deal with it. And that means, for me at least, trying desperately not to be put in a position to have to choose between the two. I don’t want to choose between free speech and equality.

ADL CONFERENCE REPORT, supra note 10, at 21 (emphasis in original); cf. Grey, Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment, 8 Soc. Phil. & Pol. 81 passim (Spring 1991) (hereinafter cited to January 1991 manuscript on file with St. John’s Law Review). Professor Grey argues that civil rights and civil liberties views of discriminatory verbal harassment are “mutually incommensurable perspectives—not the poles of a well defined continuum along which negotiators may approach each other in search of a solution, that measurably splits the difference between them,” although he proposes an “accommodat[ion].” Id. at 16-17 n.27. But cf. Matsuda, supra note 3, at 2321 (we need to “mediate[] between different ways of knowing in order to determine what is true and what is just”).

22 Although first amendment partisans sometimes contend that it has strongly shielded free speech from government restriction for all 200 years of its existence, see Kaufman, supra note 19, the facts are otherwise. There was no significant first amendment jurisprudence in the Supreme Court until this century, and no significant doctrine that marked speech for special protection until Louis Brandeis, Zechariah Chafee, and Oliver Wendell Holmes began creating it in the World War I era. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting); Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J., for unanimous Court) (formulating “clear and present danger” test as dividing line between protected and unprotected political expression). See generally A. BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE
reinventing our nation and ourselves. It has rescued us from majoritarian oppression, self-delusion, and ignorance, and disentangled us time and again from history’s and our own mistakes. But the persistence of racism, despite the general acceptance of liberal theories of free speech, overwhelmingly suggests that it can neither save us nor free us from the constitutional sin of slavery and its legacy of racial subordination—nor from the similar forms of prejudice they also have served to legitimate. To renew our national commitment to equal justice under the law, now we must reimagine the first amendment itself.

In this Article, I try to begin that formidable task by focusing on the problematic relationship between the governing ideals of free expression and the incidents of resurgent racist, sexist, and other prejudiced speech on the college campus. In Part II, I describe the heroic ideal of the first amendment and its theoretical justification. In Part III, I examine the failure of the heroic ideal and its traditional defenses, contending that in the real world it privileges the liberty of some at the expense of the liberty and equality of others. In Part IV, I investigate equality-based approaches to the first amendment and propose an alternative that recognizes differences in political power and personal experience as relevant, though not necessarily dispositive, in determining whether government authorities may regulate racist or similarly prejudiced speech. I ground this approach partly in the complex interplay between the first and fourteenth amendments. In Part V, I apply this perspective to the problem of prejudiced speech on the college campus, and attempt to distinguish between protected expression and discriminatory harassment.

II. THE HEROIC IDEAL OF THE FIRST AMENDMENT

Simply stated, the heroic ideal of the first amendment is the

hope and the belief, translated into constitutional theory, that un-
fettered speech will both satisfy our deepest human longings and
produce a better society—more free, more just, and more
equal—than any system of regulation that is within our ability to
design and enforce. It is heroic because it demands that we dis-
play strength and courage, take risks, and suffer pains to fulfill
its promise, and it is an ideal because its justification rests not so
much on the discontinuous, disempowered, and flawed moral selves
that we concretely experience in the flow of real life as on an
imagined model or archetype of the free person, integral, bold, ac-
tive, and in control of his (or possibly her) destiny.

The heroic ideal is a compromise among many core values of
our version of democracy, including tolerance, diversity, and equal-
ity, but it most strongly expresses the thrust toward liberty and
individualism that (at least ostensibly) characterizes American

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23 Cf. Schauer, The Second-Best First Amendment, 31 WM. & MARY L. REV. 1, 2, 11-22 (1989) (arguing that justified distrust of government decision-makers leads to free speech jurisprudence characterized by formal rules that preclude regulation even when considerations of equity and justice might otherwise favor it). Schauer includes “cases . . . that protect racial epithets and other racist speech” among examples “in which direct application of the reasons behind the protection of freedom of speech could well have yielded the opposite result.” Id. at 12 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (invalidating conviction of Ku Klux Klan leader who denounced Jews and blacks and suggested taking some (unclear) action against them, because statute under which he was prosecuted was not limited to “advocacy [that] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).


25 For a powerful description of the complexities of moral consciousness, and of its uneven ebb and flow in response to particular incidents, see Williams, supra note 11, at 2144-51.

26 The perfect individual speaker invoked by the heroic ideal seems almost certainly gendered and male. If you doubt this, try imagining her pregnant. (This comment is not meant to suggest either that pregnancy defines women or that it interferes with cognitive activity or intellectual passion. The incongruity, if any, between pregnancy and individualism is beyond my capacity to explore in this Article.) Nevertheless, some courageous women are prominent figures in first amendment history. See, e.g., Whitney v. California, 274 U.S. 357, 379 (1927) (upholding conviction of Anita Whitney for membership in organization that advocated “criminal syndicalism”). For an invigorating account both of Whitney's life (tribute to traditional first amendment values) and of Justice Brandeis' famous concurrence in the Supreme Court, see Blasi, The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California, 29 WM. & MARY L. REV. 653, 656-63, 666-82, 696-97 & n.148 (1988).

27 Despite the romantic stories we tell ourselves about the conquering power of individ-
life and the concomitant suspicion of majoritarian government that (at least potentially) constricts individual freedom. It springs from a particular blend of optimism and pessimism about human nature and social organization. It both trusts and distrusts individuals to experience freedom as self-realization, power, and pleasure, to celebrate it joyously but not heedlessly, and to use it rationally and wisely to pursue individual and common goals. It embodies both the visionary hope that the aggregate of individual choices to engage in free expression will combine harmoniously and progressively to benefit the nation, and the practical suspicion that such choices instead will often clash discordantly, threatening individual freedom, community relationships, and social order. It acknowled-

ual consciousness in a free society, an observer might focus instead on orthodoxy, conformity, and prejudice against outsiders as more accurately descriptive of the way most of us actually conduct our lives.

28 By “community” I intend a general reference to a wide range of intermediate social institutions, formal and informal, including the family in all its modern forms, the neighborhood, the school or college, the network of friends and co-workers, the workplace or job or profession itself, and the voluntary association, which provide us with our immediate social context. These are to be contrasted with the larger and more remote city, state, and nation, which are the political forms in which we interact both as individuals and usually as members of one or more communities.

Membership in groups identified by particular characteristics, such as gender, race, religion, disability, poverty, homelessness, or social or political interests may or may not signify relationship to a community of similar persons. We belong to some communities, such as birth families, more by chance than by choice, and to others by choice alone (e.g., the ACLU). What they have in common for my purpose here is that they are the contexts within which we enter into relationships with others, and where we are most likely first to test our ideas and feelings.

Their relationship to the first amendment is problematic; most analysts would probably define most of these “communities” as involving private interaction, generally fenced off from government protection of or interference with free expression, yet paradoxically they are the places and networks within which we construct much if not all of our personal and social identities, which directly affect how we participate as citizens in democratic self-government. But cf. Post, supra note 1, at 284 (democratic state cannot coercively form the individual choices it combines into state policy without undermining defining characteristic of self-determination).

Some of these communities are directly connected to the government: public elementary and secondary schools, public colleges and universities, public employers. To all of these the first amendment plainly applies, although not in precisely the same way. See, e.g., Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (high school officials may censor student newspaper articles about divorce and teenage pregnancy on grounds they do not meet journalistic standards); Connick v. Myers, 461 U.S. 138, 147 (1983) (public employee’s rights to free expression in workplace extend only to matters of public concern); Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982) (public school officials may remove books from school library if motivated by educational unsuitability or pervasive vulgarity but not if motivated by dislike for ideas expressed). But see, e.g., Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-16
edges our need to explore the unknown thoughts and passions within us, to give them shapes and names and to test them in our immediate communities and the world beyond, to give them wild, true, and free expression—while appealing to our domesticated intellects, our reasonable, socially constructed selves, to control our expressive responses for our own and the common good.

Despite the many doctrinal differences in first amendment theory and practice that have emerged over the last seventy years, courts, scholars, and commentators frequently have resorted to the heroic ideal to justify the harms that free expression can inflict on individuals, groups, and society. Some of the liberal reluctance to take those harms seriously today stems from the fear that we have forgotten first amendment history and may therefore condemn ourselves to repeat it. Before World War I, courts treated freedom of speech as merely one of several constitutional claims to individual liberty, no more important than any other and no less limitable by majoritarian agreement and common perceptions of the social good. Perhaps the greatest liberating achievement of free speech theorists from World War I through the Warren Court era, which persisted by a bare majority in the 1989-90 Supreme Court term, is entrenchment of the notion that “hostile criticism” of the government is entitled to special protection from government regulation or suppression.


29 See Blasi, supra note 22, at 11-12.

[Judges experienced little difficulty restricting speech in circumstances in which the speaker's words could plausibly be thought to lead to harm, either to other individuals or to the society as a whole. The measure of what harms could be considered in this calculus and how seriously they must be threatened in order to limit individual liberty was the same measure applied to disputes that pitted other liberties against other claims of individual or collective well-being. Speech was not thought to be special. ... [It] could be restricted when it might lead to bad consequences in the form of individual or social harms. The likelihood of such consequences need not be high. The time frame within which the speech might produce the consequences need not be short.

Id. at 12.


21 Blasi, supra note 22, at 12 & n.54 (citing Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), rev'd, 246 F. 24 (2d Cir. 1917)).
Libertarians who oppose any (or nearly any) regulation of prejudiced speech often cite the founding fathers of this major strand of first amendment doctrine as well as later Supreme Court decisions that built upon those foundations. Both sources provide some stirring tributes to the values of free expression. Alexander Meiklejohn, endorsing political dissent, wrote that “[t]o be afraid of ideas, any idea, is to be unfit for self-government.” Justice Holmes, dissenting when the Court affirmed the Espionage Act convictions of defendants who tossed anti-war leaflets into a New York crowd, described free expression as “an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.” Justice Black, echoing another line from Holmes, argued that “freedoms of speech, press, petition and assembly . . . must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.” Justice Brandeis declared:

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose . . . the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

Justice Douglas observed that “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.” The second Justice Harlan defended free expression because it put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that the use of such freedom

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33 See, e.g., Linzer, supra note 17, at 205-06, 241 & n.247; Strossen, supra note 8, at 501, 514 n.150.
34 A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948), reprinted in POLITICAL FREEDOM 28 (1960) (arguing that speakers must be equally free to praise or condemn Constitution, and, even during war, to support or to oppose military conscription or war itself).
38 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
will ultimately produce a more capable citizenry and more perfect
polity and in the belief that no other approach would comport
with the premise of individual dignity and choice upon which our
political system rests.\footnote{Cohen v. California, 403 U.S. 15, 24 (1971).}

Justice Brennan upheld the right to burn one's own American flag
to express political dissent, even if the flames may char the na-
tion's social fabric as well:

The First Amendment does not guarantee that other concepts
virtually sacred to our Nation as a whole—such as the principle
that discrimination on the basis of race is odious and destruc-
tive—will go unquestioned in the marketplace of ideas. . . . We
decline, therefore, to create for the flag an exception to the joust
of principles protected by the First Amendment.\footnote{Texas v. Johnson, 109 S. Ct. 2533, 2546 (1989) (citation omitted). The “joust” meta-
phor aptly illustrates the heroic ideal: the subtextual image is that of English knights (white upper-class males) on horseback, armed with lances, and engaged in deadly or sporting combat.}

Yet these statements and the decisions they support (or, in
the case of dissents, would have supported) may not actually jus-
tify invalidating any government regulation of prejudiced speech.
Although they extend the freedom to express one's thoughts with-
out fear of government retaliation, they ultimately may derive not
from postulates about individual liberty but from the theory, advo-
cated most strongly by Professor Meiklejohn, that free speech is
necessary to self-governance.\footnote{See generally Blasi, supra note 22, at 28-36 (describing how self-government theory has influenced first amendment doctrine).}
If citizens are to rule effectively, the argument runs, they cannot delegate to public officials the power
to control criticism of the government. If they were to delegate
that power, they would reallocate sovereignty from themselves to
their agents and thereby lose the essential continuing capacity to
redetermine their political course. “Truth must be constructed by
a decentralized process that is capable of responding to a changing
world.”\footnote{Id. at 23 (describing Holmes' opinion in Abrams as application of self-government theory of first amendment).}
Thus “[t]he self-government theory is based on a concept
of sovereignty, not a particular vision of political justice.”\footnote{Id. at 14.}

When freedom of speech is viewed as a source of democratic
legitimacy rather than as an individual right, “the harm principle
that limits individual liberties may not be applicable to disputes
over the regulation of speech.” If self-government genuinely requires certain freedoms of expression, then the argument is over. Even if some harmful consequences flow from particular types or instances of free speech, they must be accepted to maintain the constituting framework of our society. The definition of harm itself changes; some consequences that might count as harms to be weighed against the importance of free speech as an individual liberty do not count—or have no weight—when free speech is viewed as a necessary condition of self-government. Justice Brennan’s opinions for the Court in the two recent flag-burning cases provide a clear example. Despite the flag’s importance as a symbol of national ideals and national unity, and the “deep[] offensive[ness]” of flag desecration to many citizens, the Court refused to weigh potential social, psychological, or emotional harms to the nation, to the local community, or to the individual onlookers in its judicial scales; instead it declared, “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Hostile criticism of the government—and by extension, of the society we have created through self-government—must remain free.

Justice Brennan equated “virulent ethnic and religious epithets” with flag desecration in describing his “bedrock principle.” Most civil libertarians would agree. But if the central explanation of the first amendment is the preservation of self-government, the equation may not hold. Flag desecration, though expressive conduct rather than pure speech, nonetheless is at its core “hostile

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48 Id. at 13; cf. Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 213-14, 221 (1972) [hereinafter Scanlon, A Theory] (arguing that certain harms—such as false beliefs and acts based upon those beliefs—caused by expressive acts cannot be counted as justification for government restriction because of “limitation of the authority of states to command their subjects” and requirement that government treat us each as rational, autonomous moral agent). But see Scanlon, Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519, 530-34 (1979) (partially recanting, on grounds that his original theory was incomplete, because it over-valued audience interests and under-valued participant interests, did not explain why free expression should receive special protection, and minimized importance of rights and of distributive justice).

49 See Blasi, supra note 22, at 13.


51 Eichman, 110 S. Ct. at 2410.

52 Id. (citing Johnson, 109 S. Ct. at 2544).

53 Id. (citing Terminiello v. Chicago, 337 U.S. 1 (1949)); see supra note 39 and accompanying text (quoting Johnson, 109 S. Ct. at 2546, endorsing dissemination of racist ideas).
criticism” of the government. Ethnic and religious epithets generally are not. (The comparison would be more persuasive if Justice Brennan had focused on racist speech that, for example, expresses opposition to equal employment laws or government-imposed requirements for affirmative action.) The speaker in *Terminiello v. Chicago,* the case cited by Justice Brennan, was not criticizing the government but denouncing Communists and Jews. Restricting his speech impinged not—or not so much—on the central democratic experience of self-government as on his individual liberty.

The reply to this argument is well-known. Civil libertarians reject Meiklejohn’s self-government theory of the first amendment as too narrow, and contend instead that the first amendment enacts a broader protection of individual liberty as “bedrock principle.” But while rejecting the limitations of the self-government theory, libertarian theorists seek to retain its expansions of free speech—in particular, its uncompromising justification of harms to individuals, groups, or society that might otherwise count as reasons to limit free speech understood as a function of individual liberty. Invoking the heroic ideal of the first amendment, liberals

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49 337 U.S. 1 (1949).

50 I recognize the force of the possible argument that restricting any speech, not just hostile criticism of government or society, limits self-government by diminishing the flow of ideas or the appeals to emotion that may affect the choices we make as self-governors. That argument, however, collapses or at least undermines the distinction between the self-government theory and the individual liberty theory of the first amendment. If the two theories combine into one, it still may require an independent justification for the refusal to consider the harmful consequences of free speech.

51 But see Blasi, supra note 22, at 30-33 (analyzing Justice Douglas’ opinion for *Terminiello* majority as based strongly on the theory that even vituperative speech contributes to self-governance).


When a Free Speech Principle is accepted, there is a principle according to which speech is less subject to regulation (within a political theory) than other forms of conduct having the same or equivalent effects. Under [this] Principle, any governmental action to achieve a goal . . . must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no limitations on speech are employed. . . . If we think of the general rule as a particular point on a scale between total state control and unlimited liberty of the individual, a Free Speech Principle relocates the point on the scale when it is speech that is to be controlled.

*Id.* (emphasis in original) (footnote omitted). See Scanlon, *A Theory,* supra note 43, at 204 (free speech doctrine requires philosophical defense insofar as it protects speech acts from restrictions even though “they have as consequences harms which would normally be sufficient to justify the imposition of legal sanctions”). But see Husak, *What Is So Special About [Free] Speech?,* 4 LAW & PHIL. 1, 3 (1985) (denying that speech is “morally special” and arguing that many exceptions to free speech doctrine are better explained by principle
argue for a "neutral" rule: that we all must acquiesce in suffering the harms that free expression may inflict as the cost of ensuring the continuing vitality, not of self-government itself, but of individual freedom and self-expression as fundamental principles of our national democratic experiment. The heroic ideal is annexed to the individual liberty theory to provide an independent justification for discounting those harms. By denying that the harms inflicted by prejudiced speech differ in a constitutionally meaningful way from the harms inflicted by hostile criticism of the government (even when prejudiced speech does not fit within that category), the heroic ideal restores the missing theoretical link. Combining the heroic ideal with the principle of individual liberty, liberals can argue that the first amendment protects prejudiced speech in the same way, at the same level, and for the same reasons that it protects political dissent.

III. THE FAILURE OF THE HEROIC IDEAL

The argument for stringent protection of racist speech as an important attribute of individual liberty does work at some levels of abstraction. The heroic ideal mirrors an attractive self-image for us as individuals, as members of groups within society, and as a society. Who would not prefer to think of herself as self-confident, brave, daring, and resourceful? Most civil rights activists of twenty-something years ago passionately believed in every libertarian word quoted above (even those that hadn't been written yet). We thought that the heroic ideal of the first amendment

that speakers—like others—should escape sanction only when postulated harmful consequences are not morally attributable to their acts).

The argument that universities may regulate prejudiced speech which rises to the level of discriminatory harassment, see infra notes 180-243 and accompanying text, may be viewed as a subsidiary rule relocating the point on Professor Schauer's scale, because either or both an Antidiscrimination Principle and an Affirmative Action Principle, designed to counteract racism and based on constitutional equality norms, so require.

Cf. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 2-10 (1959) (arguing that judicial review of legislative acts is justified only if judiciary generates neutral and general principles that apply regardless of result in particular case). But cf. Greeneawalt, The Enduring Significance of Neutral Principles, 78 Columbia L. Rev. 982, 1001-13 (1978) (even employing neutral principles, judges cannot avoid choosing between conflicting values in deciding constitutional cases); Williams, supra note 11, at 2137 (term "neutral" in the context of racism "has as its hidden subtext . . . to 'concerns of color' "); id. at 2142 ("Blacks and women are the objects of a constitutional omission which has been incorporated into a theory of neutrality").

See supra notes 33-39 and accompanying text.
would lead and lift us, black and white together, from prejudice to enlightenment. If everyone—philosophers and demagogues alike—could think, write, speak, and listen without fear of governmental repression, we could sing, dance, laugh, and persuade our way to the promised land of equality. But it didn’t work out that way. As we sort through our lives, seeking an answer, we see the gap between theory and practice, between the heroic ideal and the humble reality. We are not equally brave and we are not equally free. Moreover, the freest among us—the ones least likely to suffer public or private restraint of their expressive (or other) choices—are often the least brave, and the bravest among us are often the least free.

The heroic ideal breaks down in practice precisely because we as individual persons are neither fungible subunits in a mechanical system of self-government nor fully autonomous beings divorced from history, culture, and community, from race and sex (both as biological facts and as social constructs), or from the contingencies of intelligence, talent, and personality. Though we entered the game in the middle, without knowing the rules, we cannot start over. We cannot choose ourselves. We can only seek to influence the circumstances, to choose our allies, and to discover, create, combine, and use our resources. But our opportunities and our resources vary. Among the most important variables that constrict our lives are the ones that seem least justifiable in a democracy that postulates the equal moral and political worth of every person—the chains of racism, sexism, and other arbitrary and unjust prejudice.

The new “outsider jurisprudence,” much of it written by racial minorities, women, or minority women, uncovers the hidden, unequal burdens imposed by the combined force of the heroic ideal

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65 See D. Rhode, supra note 13, at 5 (many feminist theorists now “use the term ‘sex’ to refer to biological differences between men and women and ‘gender’ to refer to culturally constructed differences”); Harris, supra note 9, at 585 (opposing “gender essentialism” that subordinates differences of race, class, sexual orientation, and experience); Post, supra note 1, at 296-97 (the meaning of race, like the meaning of sex, is socially and politically constructed and therefore unsettled).

66 See Matsuda, supra note 3, at 2323-26 (describing the “outsider jurisprudence” of “people of color” as “a methodology grounded in the particulars of their social reality and experience[,] . . . consciously both historical and revisionist, attempting to know history from the bottom[,] . . . realist, [and] . . . recognizing, struggling within, and utilizing contradiction, dualism, and ambiguity”); Monture, supra note 9, at 160 (recounting her experiences as only Indian woman at legal conference and differentiating her ways of experiencing, knowing, and understanding from those of white law professors).
and ingrained cultural prejudice. Heterosexual white males, already valued positively for those inherent characteristics and generally (if often subconsciously) identified as both the normal and the model person, often exalt the heroic ideal of the first amendment while seldom, if ever, suffering its consequences. Members of disparaged groups who suffer the negative consequences of the heroic ideal, enduring the real risks and deprivations that flow from prejudiced speech, discover that supporting the ideal may require us to deny our own perceptions and pains, to divorce what we know from what we feel, and to cultivate a perpetual wariness of contact with others who do not share our stigmata and who may (or so we may come to believe) at any moment turn from apparent friends or colleagues into hostile strangers, doubly armed with their own prejudice and with the law’s indifference.

See, e.g., Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1113, 1152-59 (1986) ("equality analysis and homogeneity" advance "the male norm"); Wasserstrom, supra note 13, at 586 (our culture treats nonwhites—especially blacks—as "inferior to the group of standard, fully developed persons, the adult white males"); cf. Grey, supra note 21, at 25-26 (social and political dominance of whites, males and heterosexuals is illustrated by absence of stigmatizing epithets comparable to those commonly understood to convey hatred and contempt for racial minorities, women, or gays and lesbians).

Cf. Lawrence, supra note 10, at 472-76 (tolerance of racist hate speech imposes primary burdens on blacks and other subordinated groups without their consent and replicates common patterns of injustice in American society).

I realize that the statement in the text is easy to undermine. Although white male scholars, judges, and lawyers provide much of the support for most versions of the heroic ideal, e.g., Gunther, supra note 19; Kaufman, supra note 19; Rohde, Crafting Campus Speech Codes: Any Limitations are Bound to Violate the First Amendment, L.A. Daily J., July 19, 1990, § 1, at 6, col. 5, other white males, including some noted first amendment scholars, have acknowledged and explored some of the failings of liberal theories of the first amendment, e.g., Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 376-85; Biegel, Crafting Campus Speech Codes: Sensitive Restrictions Can Be Derived From Harassment Law, L.A. Daily J., July 19, 1990, § 1, at 6, col. 3; Greenawalt, Insults and Epithets: Are They Protected Speech?, 42 Rutgers L. Rev. 287, 303-05 (1990); Grey, supra note 21, at 2-3, 15-17, 25-35; Schauer, Mrs. Palsgraf and the First Amendment, 47 Wash. & Lee L. Rev. 161, 166-69 (1990); Smolla, Rethinking First Amendment Assumptions About Racist and Sexist Speech, 47 Wash. & Lee L. Rev. 171, 172-78 (1990).

Moreover, some—perhaps many—women and racial minorities are enthusiastic supporters of the heroic ideal. See Strossen, supra note 8, at 486-87 (quoting, among others, three black men and one black woman; all four are highly successful professionals; two of the four are nationally prominent—Benjamin L. Hooks, Executive Director of the NAACP, and Eleanor Holmes Norton, recently elected as District of Columbia Representative to Congress).

See, e.g., Delgado, supra note 17, at 143-49 (blacks must attempt to work with white-dominated legal system to find redress for damaging racial insults); Matsuda, supra note 3, at 2326 (proposed legal restrictions on hate speech generally are received sympathetically by
Daring to question the heroic ideal may provoke other negative consequences. The questioners may become further alienated from a dominant culture that welcomes even reluctant or frightened conformity with its controlling myths, but often chastises even thoughtful or gentle defiance. The questioned idealists may respond by condemning the questioners for abandoning civil liberties principles, accusing them of knuckling under to the “easy” or “politically correct” solution, or, for academics, swiftly excluding target groups’ members, and skeptically by nonmembers; Monture, supra note 9, at 160-62 (discussing emotional effect of speaking about racism at predominantly white legal conference); Williams, supra note 11, at 2142-43 (laws fail to acknowledge “unfulfilled promises” of formal equal opportunity). Patricia Monture, a Native American/Canadian, describes a legal conference at which her passionate empathy with a black woman killed by police officers led her to resist treating the story as a hypothetical for critical legal analysis, only to discover that her own expressed pain became a subject for similarly distanced observation, discussion, and dissection by white law professors. See Monture, supra note 9, at 161-70.

See, e.g., Heins, Banning Words: A Comment on “Words That Wound,” 18 HARV. C.R.-C.L. L. Rev. 585, 586 (1983) (characterizing Delgado’s article as “fundamentally hostile” to first amendment); Hentoff, The ACLU Does the Right Thing, Village Voice, Nov. 13, 1990, at 20, col. 2 (comparing me, among others, with “Joe McCarthy”); Rohde, supra note 58 (claiming any campus speech limitation on codes violates first amendment); cf. Strossen, supra note 8, at 489-93 (criticizing Professor Lawrence’s depiction of civil libertarian resistance to “‘new perspectives’ on the first amendment,” while arguing that “strong common goals” nonetheless unite him with many advocates of traditional civil libertarian approach). As Professor Grey explains it, many civil libertarians simply do not see the problem as involving issues of civil rights or discrimination at all. It is not a clash of equal protection and free speech, they insist, but a pure civil liberties issue, in which fragile free speech values are threatened by powerful political pressure groups on liberal campuses. Grey, supra note 21, at 16 (emphasis in original); see also id. at 53 n.26 (“few causes attract more powerful emotional adherence than does first amendment absolutism”) (emphasis in original).

See articles cited supra note 20; cf. Strossen, supra note 8, at 554 (“[h]ate speech regulations ... may appear to provide a relatively inexpensive ‘quick fix,’ but racist speech is only one symptom of the pervasive problem of racism, and this underlying problem will not be solved by banning one of its symptoms”). But no proponent (that I know of) believes that regulating prejudiced speech on campus is cheap, easy, or likely to eradicate racism. The goals, rather, are to combat prejudice, to prevent discriminatory harassment, and to protect the rights of minority students to equal access to higher education. See, e.g., ADL CONFERENCE REPORT, supra note 10, at 19-20 (quoting Professor Thomas Grey); Grey, supra note 21, at 42 (punishing violators of Stanford harassment regulation “provides a remedy for an action that causes real pain and harm to real individuals while doing no good; and it may serve to deter such actions in the future”); Hodulik, Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests, 16 J. COLLEGE & UNIV. L. 573, 575 (1990) (discussing rules adopted at University of Wisconsin); STANFORD INTERPRETATION, supra note 17, at 1 (policy intended to guide students in area where free expression can conflict with right to be free of “invidious discrimination”).
them from the pantheon of serious scholars. Some defenders of
the heroic ideal abandon both compassion and common sense in
urging the victims of prejudiced speech to approve rigidly formalis-
tic notions of freedom and, as a corollary, to disregard the realistic
danger that unchecked racism or sexism may escalate from offhand
comments, unconsidered stereotyping, and generalized denuncia-
tion to particularized psychological assault, overt discriminatory
action, or physical violence.

The central critique of the heroic ideal, then, is that in the
 guise of liberty, neutrality, and openness, it reinforces existing so-
cial and political relationships of dominance and subordination
and thus legitimates prejudice and inequality. From another per-
spective, it is a paradigm whose time has come and gone. Most of
the free speech controversies which shaped our first amendment
jurisprudence from World War I through the 1960's involved dis-
empowered activists who spoke from the margins of society, ap-
ppealing to the center to expand its notion of acceptable discourse.

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62 See, e.g., Delgado, Professor Delgado Replies, 18 HARv. C.R.-C.L. L. REV. 593 pas-
sim (1983) (responding to Heins' criticism of prior article); Lawrence, supra note 10, at 475-
76 (agreeing with Delgado's argument that "low grade racism" excludes many nonwhites
who have "real spirit, real pride" from pursuing academic careers); cf. Delgado, The Impe-
rial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. PA. L. REV. 561, 561-
62 (1984) (white male authors who support minority rights cite almost exclusively each
other rather than minority authors and generally fail to acknowledge minority scholarship
on civil rights). Given the recent upsurge in attention to minority scholarship, this line of
criticism may seem outdated. Many of the new minority, women, and minority women
scholars now publish regularly in major law reviews. Nonetheless, several distinguished par-
ticipants in the Wisconsin Conference on Critical Race Theory, November 9-10, 1990, at the
University of Wisconsin-Madison, described incidents and expressed feelings of exclusion,
especially related to their critiques of first amendment doctrine.

63 See Minow, Neutrality, Equality & Tolerance: New Norms for a Decade of Distinc-
tion, 22 CHANGE 17, 19-20. (Jan./Feb. 1990) (traditional first amendment approach ignores
genuine injury inflicted on victims of racist expression). “Equality will remain elusive until
everyone pays attention to the perspectives of others.” Id. Professor Minow quotes a black
woman's question, replying to white friends' reassurance that local Ku Klux Klan activities
were not a serious threat: “How can I feel safe when my friends don't respect my sense of
danger?” Id. at 25; see also Matsuda, supra note 3, at 2335 (describing racially motivated
killings that demonstrate “connection between racist words and racist deeds”); Williams,
supra note 12, at 140 (“[v]ery little in our language or our culture encourages or reinforces
any attempt to look at others as part of ourselves”).

64 Cf. Balkin, supra note 58, at 388-84 (although first amendment has helped unpopu-
lar, generally leftist groups gain political power in past, conservative interests have learned
to use it to protect property rights and existing social arrangements); Kairys, Freedom of
Speech, in THE PoLITICS oF LAW: A PROoGRESSIVE CRITIQUE 140 (D. Kairys ed. 1982) (left-
wing political movements and organized labor were instrumental in shaping modern first
amendment law).
Defenders of the heroic ideal analogize today’s Nazis, Ku Klux Klan members, pornographers, and even anti-abortionists to the anti-war protesters and civil rights demonstrators of the sixties—all without apparent irony. Yet the differences are at least as striking as the similarities. Racist, sexist, or—perhaps most clearly—homophobic expression is not, or not often, the despised speech of marginal dissenters, representing a viewpoint that the majority seeks to suppress. It is far more likely to represent an overt expression of covert, or thinly veiled, majoritarian views.

Despite the extreme difficulty of separating majoritarian hate speech from unpopular hate speech (the speech of abortion opponents seems especially problematic), doctrine created to permit hostile criticism of the government or to enable progressive social movements to participate in public dialogue may not apply unchanged either to repressive speakers who seek to destroy that dialogue or to majoritarian speakers who crowd—or push—dissenters off the platform. Moreover, it can be extraordinarily liberating even to ask the question why the rules should or should not be the same for all speakers, even if in the end you concede, as I will, that most—though not all—of them should. The question reminds us that doctrine should not be venerated in itself; the first amendment matters to us because of the values that it serves.

The libertarian answer to the question has taken several forms. One approach is to examine the purposes that have been attributed to the first amendment. Free expression has been described as crucial to democracy because it encourages political dissent and debate, moral inquiry, and participation in self-government; limits or checks governmental power by exposing abuses; the libertarian answer to the question has taken several forms. One approach is to examine the purposes that have been attributed to the first amendment. Free expression has been described as crucial to democracy because it encourages political dissent and debate, moral inquiry, and participation in self-government; limits or checks governmental power by exposing abuses;
promotes mutual tolerance, diversity, self-doubt, and self-restraint; manages social change and conflict by ensuring that dissenting opinions will be examined and considered rather than suppressed and denied; provides information, advances knowledge, stimulates intellectual exploration, and discovers truth; and promotes individual autonomy.
and self-fulfillment. Beneath all these purposes lies a central assumption that elevates process over content. Democracy by its very nature is and must be pluralistic, various, and incomplete. Most if not all fundamental moral and political questions have only multiple, diverse, and contingent, not single, fixed, or final, answers. Even our understanding of what it means to be an autonomous individual—for what rights that hope may imply, or what relationships with others it may require—is itself contextual, culturally constructed, and subject to change. As an ineluctable corollary, then, though government may sometimes regulate the means of communication, it can never (or hardly ever) restrict the message. Government's only role is to facilitate public discourse, to provide "the framework for all possible forms of politics" in the broadest sense—the interplay of asserted ideas, facts, feelings, and opinions. Government regulations therefore must be neutral with respect to both the content of the speech and the viewpoint of the speaker.


For one example, the "right" to an abortion is meaningless unless it can be safely accomplished by available medical techniques. Yet, it can be argued, the medical technology would not have been developed if we had not first recognized the interest and conceptualized the right.

See I. Berlin, Two Concepts of Liberty, in Four Essays on Liberty 118, 155 (paperback ed. 1969) (each of us is inevitably social not just because we must interact with and may harm each other but also because our ideas of ourselves and our "sense of [our] own moral and social identity[ ] are intelligible only in terms of the social network" to which we belong); cf. C. Gilligan, In a Different Voice 63 (1982). "[W]e know ourselves as separate only insofar as we live in connection with others, and... we experience relationship only insofar as we differentiate other from self." Id.

E.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984) (National Park Service may apply anti-camping regulations to political protesters sleeping in park across from White House); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (city may apply rule against posting signs on public property to political candidate seeking to advertise his candidacy on utility poles); Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949) (city may prohibit use of loudspeakers in residential areas).

Post, supra note 1, at 314.

E.g., Boos v. Barry, 485 U.S. 312, 315, 334 (1988) (invalidating District of Columbia's prohibition of displaying any sign within 500 feet of foreign embassy if sign "tends to bring that foreign government into 'public odium' or 'public disrepute'"); Police Dep't of Chicago
"[A]bove all else," the Supreme Court has declared, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Abstracted from the facts that prompted it and treated it as an empirical description of the law, this assertion is nonsense. The first amendment, as construed (and constructed) by the Court, permits the government to ban or restrict a wide variety of expression because of its content or its viewpoint—not just crimes or torts accomplished wholly or partially by words, such as fraud, bribery, perjury, agreements to fix prices or to rob a bank, and offers to pay for criminal acts, but also defamation, obscenity, some commercial advertising, and false statements of fact (as op-

v. Mosley, 408 U.S. 92, 101-02 (1972) (invalidating, under equal protection analysis, city’s prohibition of all picketing near school except for labor union picketers).

81 Mosley, 408 U.S. at 95.

82 See Balkin, supra note 58, at 522; Greenawalt, Speech and Crime, 1980 AM. BAR. FOUND. RES. J. 645, 741-43.

83 See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (government officials generally may recover damages for defamatory falsehoods relating to official conduct if they prove defamation made with "actual malice" ... with knowledge that it was false or with reckless disregard of whether it was false or not."). Sullivan is usually stated the other way around (government officials may not recover damages unless . . . ) as a major victory for proponents of free expression, which of course it was. Nonetheless, even the words of its best-known passage imply the possibility of content-based limitations outside the not-clearly-defined arena of public discourse or when the person attacked is not a public official. There is, as Justice Brennan wrote, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270 (emphasis added).

84 See, e.g., Miller v. California, 413 U.S. 15, 31-32 (1973) (state may ban communications found obscene under detailed three-part test). In New York v. Ferber, 458 U.S. 747 (1982), the Court upheld a state’s ban on producing or distributing even non-obscene pornography that depicts sexual performances by children under age 16. Id. at 753-58. The statute survived strict scrutiny because preventing sexual abuse of children is a compelling government interest of “surpassing importance” and no less restrictive means were available to protect it. Id. at 757. In Osborne v. Ohio, 110 S. Ct. 1691 (1990), the Court upheld a state’s ban on private possession of non-obscene child pornography because the purpose was to protect children, not to “regulat[e] Osborne’s mind.” Id. at 1696.

posed to opinion). The list could continue, but why bother? Although libertarians ordinarily resist the exclusion of some of these categories, such as obscenity, from the circle of protected speech, no one seriously argues that the first amendment means that anyone anywhere can say absolutely anything. Once that concession is made and the exceptions multiply, then the question about racist speech becomes more pointed: if we can draw lines between unprotected fraud or misrepresentation and protected truthful advertising, if we can differentiate sales talk from political or cultural speech, if we can determine when school officials are censoring books or newspapers to suppress ideas and when they are doing so to fulfill educational standards, then why can we not mark off boundaries between prohibited racist and sexist harassment and permissible, though racist or sexist, self-expression or intellectual inquiry? It seems impossible to argue that commercial fraud (or ban "hits the hardest . . . the poor, the sick, and particularly the aged" who cannot easily engage in comparison shopping).

See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (New York Times ruling does not apply to defamatory falsehoods involving "matters of purely private concern"). But cf. L. Tribe, AMERICAN CONSTITUTIONAL LAW 878 (2d ed. 1988) (laws that narrowly permit compensating private individuals for reputational harms regulate speech for reasons "other than content, at least in the sense that the objective is unrelated to whether government approves or disapproves the content of the message").

For instance, the Court allows some regulation of high school student newspapers based directly on their content. See, e.g., Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (high school officials may censor student newspaper articles that do not meet journalistic standards); Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 870-71 (1982) (public school officials may remove library books if motivated by educational unsuitability or pervasive vulgarity but not if motivated by dislike for ideas expressed). These decisions permit government regulations based on content, but—arguably—not on viewpoint. Nonetheless, a sophisticated defendant should have little trouble demonstrating the appropriate motive to insulate its regulations.

See, e.g., POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, POLICY No. 4, at 6-9 (rev. ed. 1990) (obscenity should also be included in protected speech category). I agree that unless obscenity or pornography constitutes discriminatory harassment as defined below, see infra text accompanying notes 241-43, it should count as protected speech—despite powerful arguments to the contrary by Andrea Dworkin and Professor MacKinnon. See A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN passim (1981); C. MacKINNON, FEMINISM UNMODIFIED, supra note 13, at 10-15, 209-13, 221-28; MacKinnon, Pornography, Civil Rights, and Speech, 20 HARV. C.R.-C.L. L. REV. 1 passim (1985).

See, e.g., Cohen, Free Speech and Political Extremism: How Nasty Are We Free to Be?, 7 LAW & PHIL. 263, 265 (1988/89) ("neither the Constitution, nor any sensible principle lying behind it, guarantees the right to say anything, anywhere, anytime"). This Article succinctly reiterates the standard arguments against regulation of political expression and exemplifies support for the heroic ideal of the first amendment. Interestingly, Cohen describes his own views not as liberal but as "conservative," id. at 264, and "libertarian," id. at 275.

See supra note 87. As there suggested, I doubt that we can.
exuberantly careless high school journalism) is more harmful to the nation—or more destructive of individual lives—than the devastations of racial prejudice.

Even the argument that unprotected racist speech is more difficult to identify than unprotected commercial speech,91 despite its initial persuasiveness, seems ultimately to rest on the unproved assertion that racist speech contributes to self-expression or self-government in ways that commercial speech does not. Yet the Constitution—the blueprint for our system of self-government—explicitly favors congressional regulation of commerce92 for the purpose of ensuring that it fulfills national goals.93 Although Congress can ban or limit commerce—for instance, to outlaw private racial discrimination by hotels, restaurants, and other public accommodations94—the Constitution's basic message is that commerce (and by ready extension, commercial speech that promotes it) is a good thing, though open to abuse and subject to legislative control. By contrast, though belatedly and by amendment, the Constitution explicitly bans official racism.95 It brands racism a bad thing, harmful to self-government, and invites legislative regulation of not only public but private racism.96 The Constitution

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91 See Strossen, supra note 8, at 537-39.
92 U.S. CONST. art. I, § 8, cl. 3.
95 See U.S. Const. amends. XIII, XIV, XV. The Supreme Court also has implied an equal protection component into the due process clause of the fifth amendment. Buckley v. Valeo, 424 U.S. 1, 93 (1976) (equal protection analysis in fifth amendment area same as under fourteenth amendment); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (District of Columbia's racially segregated schools violate fifth amendment guarantee of due process).
96 See U.S. Const. amends. XIII, § 2; XIV, § 5. Because the fourteenth amendment focuses on state-sponsored discrimination, however, section 5 may not authorize regulation of private activities. See The Civil Rights Cases, 109 U.S. 3, 6-7 (1883) (Reconstruction civil rights laws regulating private conduct are not authorized by fourteenth amendment). That is one reason why Congress justified its enactment of the Civil Rights Act of 1964 under the commerce clause. See, e.g., Heart of Atlanta Motel, 379 U.S. at 261 (Congress adopted Act to eliminate barriers in interstate commerce caused by discrimination). But see United States v. Guest, 383 U.S. 745, 755-56 (1966) (six Justices endorse congressional power to punish private conspiracies that interfere with exercise of fourteenth amendment rights). See generally L. Tribe, supra note 86, at 350-53 (suggesting that fourteenth amendment, § 5 power is unnecessary to reach private racial discrimination because Congress may control private conduct under commerce clause and thirteenth amendment, and may forbid private interference with privileges or immunities of national citizenship derived from constitutional structure and recognized by § 1 of fourteenth amendment); Lawrence, supra note
therefore suggests that racist speech is at least as recognizable an evil and as appropriate a subject for regulation as commercially fraudulent speech.\textsuperscript{97} Of course, we do not customarily think of racist speech that way because we categorize it as “political speech.” But commerce and politics are just as entangled as racism and politics, and the category of “political speech” seems just as malleable and socially constructed as “obscenity” or “commercial speech.” If the boundaries of protected speech no longer serve democratic ideals,\textsuperscript{98} there is no reason other than blind allegiance to legal formalism not to change them.

One possible reply is to contend, with Professor Harry Kalven, that “[f]reedom of speech is indivisible; unless we protect it for all, we will have it for none.”\textsuperscript{99} This remark can have more than one meaning.\textsuperscript{100} But insofar as it is cited for the purpose of arguing that free speech is a unitary system, it is open to Professor MacKinnon’s riposte that equality too is a unitary system.\textsuperscript{101} If any victory for expression advances democracy, any victory for prejudice and inequality hinders it. Only if liberty clearly trumps equality as the primary value of democracy as a form of government or of our particular democracy,\textsuperscript{102} does it seem possible to end the discussion by asserting the “indivisibility” of free speech.

Moreover, that assertion seems to rely on willful ignorance of

\textsuperscript{97} Cf. Strossen, supra note 8, at 536 & n.256 (“[r]acist speech is arguably different in kind from other offensive speech, because the elimination of racism is itself enshrined in our Constitution as a public value of the highest order” (quoting Professor Rodney Smolla)) (emphasis in original).

\textsuperscript{98} See Balkin, supra note 58, at 387, 393-94; cf. Bollinger, supra note 17, at 988-89 (considering, but rejecting, possibilities that “free speech promotes an excessive and undesirable individualism or quest for truth at the expense of other undernourished values” and “toleration of bad speech might be rooted in a wish to have the speakers injure the victims . . . or in sheer insensitivity and unconcern”).

\textsuperscript{99} Kalven, Upon Rereading Mr. Justice Black on the First Amendment, 14 UCLA L. Rev. 428, 432 (1967).

\textsuperscript{100} See infra text accompanying notes 101-29.

\textsuperscript{101} See Balkin, supra note 58, at 377; MacKinnon, supra note 88, at 4.

\textsuperscript{102} See, e.g., Strossen, supra note 8, at 568-69 & n.432 and authorities cited therein (raising the question without answering it). Strossen appears to argue instead both that empirically, and perhaps theoretically, liberty and equality are always interdependent and never in conflict, see id. at 493-94, 555-61, 569 (minorities will be first targets of any regulation suppressing racist speech; any such regulation will encourage rather than reduce racism), and that it is strategically better not to acknowledge any conflict, see id. at 491. But see Grey, supra note 21, at 1-2 (problem of discriminatory verbal harassment illuminates conflict between civil liberties and civil rights perspectives).
the actual distribution of free speech as a resource in the United States today. "Freedom of the press is guaranteed only to those who own one," A. J. Liebling once wrote. Freedom of expression fares better, especially if the speaker enlists her imaginative resources to gain access to expressive resources owned by others, but not that much better. Free speech is scarcely an issue for prominent apostles of the cultural or political status quo. They nearly always have more of it than they need, while dissidents—especially inarticulate or marginal ones—must struggle for meaningful access to a marketplace of ideas that operates (if at all) on the principles of social Darwinism rather than distributive justice. In fact, racism and sexism have operated as an interlocking system of prejudice, coercion, and subordination just as certainly as has censorship. As the new outsider jurisprudence compellingly demonstrates, racism and sexism have even functioned—however imperfectly—as an informal system of censorship; they have sometimes served to deny proponents of egalitarianism (of black or female participation/supremacy) not only the chance to speak but also the chance to be listened to, and thus to participate effectively in the dialogue of democracy.


Casting one's news nets wide but (mostly) shallow is not a moral virtue that suffices in all situations. And, on the whole, the daily press and the weekly newsmagazines are merely bland, not broad. Their pages lop off the edges of experience, grind emotions into cliches, homogenize ideas in the editorial blender, and too often portray a tidy government of plans and progressions that is wildly divergent from the surprises and confusions of real life. Is that what the First Amendment is for?

Id. at 24.


105 See, e.g., D. Bell, supra note 5; K. Karst, Belonging To America: Equal Citizenship and the Constitution 43-80 (1989); Crenshaw, supra note 3, at 1358 (blacks are "boxed in" by consensus among many whites that the oppression of Blacks is legitimate"; Karst, Citizenship, Race, and Marginality, 30 WM. & MARY L. Rev. 1, 2 (1988) (fourteenth amendment's main target is stigma of racial caste and system of group subordination).

106 I realize that this claim is highly controversial. Black advocates like Malcolm X and Stokely Carmichael in the 1960's and Louis Farrakhan in the 1980's captured substantial attention in the media and delivered their messages to large audiences. Martin Luther King, Jr., preaching egalitarianism, was among the best-known orators and leaders of his era. Radical feminists like Andrea Dworkin and Catharine MacKinnon are not overtly suppressed today; their works are widely published. Yet both groups have struggled with hostility from mainstream scholars and media.
Another libertarian answer has been to shift focus. Instead of berating the questioners for insisting on our power and responsibility to draw lines between protected and unprotected expression on the basis of values that correspond with our experiences in the real world, liberals may argue that the questioners are endorsing a set of dangerous (because unclear and unbounded) distinctions when they should instead approve a different set of safer (because clear and limited) distinctions: between speech and action,\(^{107}\) between government expression and private expression,\(^{108}\) or, perhaps, between the public discourse that is necessary to self-government and all other discourse that (by hypothesis) is not.\(^{109}\) These distinctions, it is argued, permit the sovereign (but nongovernmental) collective will of the people to prevail because the untrustworthy agents of government\(^{110}\) cannot readily alter them. Unlike distinctions between, for example, discriminatory verbal harassment and statements of racist opinion, such line-drawing is neutral, objective, and comfortably removed from the problem of government

By calling racism (and sexism) systems of censorship I do not mean that they are never questioned, even by powerful and original voices. I mean rather that they influence us—all of us—to discount the value of words spoken by women and minorities, especially when women and minorities choose to speak on matters of public policy that we are accustomed to leaving to white male decision-makers. This discounting in turn affects both the consciousness from which our expression springs and the expression that we give to that consciousness.

\(^{107}\) See, e.g., Strossen, supra note 8, at 492, 494, 532-33, 541-44 (distinguishing speech from action is central to traditional libertarian view of free expression).

\(^{108}\) See, e.g., Post, supra note 1, at 284 & n.73 (discussing relationship between freedom of expression and democratic self-government); Strossen, supra note 8, at 492, 544-47 (distinction between governmental and private speech and action is crucial because of “government’s constitutional duty to disassociate itself from racism”).

\(^{109}\) See supra note 52 (quoting Schauer).

\(^{110}\) See supra note 52 (quoting Schauer).
censorship of hostile criticism or of other disfavored ideas.\textsuperscript{111}

In fact, however, the distinction between speech and conduct is at least as fuzzy as the line between different kinds of speech. Professor Post boldly acknowledges that "[w]e designate the communicative processes necessary to sustain the principle of collective self-determination 'speech'" to protect them from regulation,\textsuperscript{112} a formulation that, in less sophisticated language, would bear a striking resemblance to Justice Stewart's famous test for obscenity, "I know it when I see it."\textsuperscript{113} Flag-burning to criticize the government is, in Professor Ely's somewhat less famous phrase, "100\% action and 100\% expression."\textsuperscript{114} In some cases, therefore, there is no line at all. Perhaps the best way out of this dilemma is the one Ely suggests—asking whether the harm the state seeks to deflect stems from the expressive act's "communicative significance" or not.\textsuperscript{115} But for some crucial cases relevant to racist expression, even the answer to that question is far from certain. In \textit{Brown v. Board of Education}\textsuperscript{116} the Court declared "a principle of equal citizenship" that forbids "the systematic group defamation of segregation" imposed for the purpose of maintaining "the mes-

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\textsuperscript{111} Cf. Strossen, \textit{supra} note 8, at 532 (referring to "the critical distinction between speech that has a direct and immediate link to unlawful conduct and all other speech, which has less direct and immediate links"). \textit{But see id.} at 542-43 (twice conceding lack of clear distinction between speech and conduct).

\textsuperscript{112} Post, \textit{supra} note 1, at 285; \textit{see also supra} note 109 (quoting Post).

\textsuperscript{113} Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (majority did not see "it" in film reviewed; dissent did).

\textsuperscript{114} \textit{See Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis}, 88 \textit{Harv. L. Rev.} 1482, 1495-96 (1975) (twice stating "burning a draft card to express opposition to the draft is an undifferentiated whole, 100\% action and 100\% expression"); \textit{see also id.} at 1495 n.53 (acknowledging "[t]he impulse to define clear categories, and thus better to safeguard freedom of expression in times of national panic" but rejecting speech-conduct distinction as unworkable).

\textsuperscript{115} \textit{Id.} at 1497. Ely also effectively demolishes most of the cherished distinction between forbidden regulation of message or content and permissible regulation of "time, place, and manner," observing that governments often regulate the latter to suppress the former, as in \textit{Tinker v. Des Moines Indep. Community School Dist.}, 393 U.S. 503 (1969) (school may not forbid students to wear armbands as nondisruptive anti-war protest). \textit{See Ely, supra} note 114, at 1498. Professor Balkin carries the argument one step further, observing that the Supreme Court's

public forum cases . . . have produced exactly what one would expect from a guarantee of formal equality in conditions of substantive economic inequality. . . . [A] low level of scrutiny in cases involving time, place, and manner regulation will produce not only less speech overall, but less speech from the least powerful groups in society.

Balkin, \textit{supra} note 58, at 397.

\textsuperscript{116} \textit{347 U.S.} 483 (1954).\end{flushleft}
sage of white supremacy."117 Does the harm the state seeks to correct in prohibiting separate but equal schools stem primarily from the stigma the system of segregation communicates or not?118 What if stigma from the communicative aspects of segregation and educational deprivation from its noncommunicative aspects intertwine (as they surely do)?119 But I need not untangle this knot to reject treating the distinction between speech and action as a superior method for separating protected from unprotected speech.

The distinction between public and private speech is perhaps sharper than that between speech and action.120 If agents of the government are speaking or acting for the government, that is public expression; if individuals are speaking or acting for themselves (or for nongovernmental associations), that is private expression. Moreover, both the first and the fourteenth amendments seem, at least facially, to limit protection for the rights they create to impairment by persons directly wielding the authority of the state. Implicitly, then, it can be argued, they authorize private individu-

117 Lawrence, supra note 10, at 438-44; see Bollinger, supra note 17, at 980-81 (injuries that stem from segregating schools, forcing blacks to sit at back of bus, or denying them hotel rooms and restaurant service are "largely the thought and message of inferiority, of hatred and contempt, that is communicated by the discriminatory act and that afflicts the human spirit of the victim... Racist speech does not differ in kind, nor does it necessarily differ in magnitude of injury") (emphasis in original). Nonetheless, Bollinger views racist speech as protected because "free speech may simply function as a zone of extreme toleration" where we learn to accept "divergent behavior." Id. at 984.

118 Professor Lawrence contends that it does. Lawrence, supra note 10, at 440-43. Professor Strossen contends that it does not. Strossen, supra note 8, at 542-43.

119 Professor Lawrence argues that "[t]he non-speech elements are byproducts of the main message [of white supremacy]." Lawrence, supra note 10, at 441. Professor Strossen argues that state-mandated school segregation treated blacks as inferior "through pervasive patterns of conduct" and that the "message [of inferiority] was only incidental." Strossen, supra note 8, at 542. As an editor of an alternative newspaper that covered the civil rights movement in Alabama and Mississippi from 1965 to 1968, I never met anyone who thought the message was "incidental." Arguably, though, Brown was intended and understood, at the time and throughout the 1960's, as a decision outlawing particular official actions that were part of a combined system of action and expression that subjugated blacks to whites. But if constitutional law—or at least the equal protection clause—evolves, that need not be its meaning today. See Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966). Presumably we are not tied to our past epistemological mistakes.

120 Or perhaps not. This area is too complex for summary explication. See generally L. Tribe, supra note 86, at 1688-1720 (general discussion of public/private speech distinction); Freeman & Mensch, The Public-Private Distinction in American Law and Life, 36 Buffalo L. Rev. 237 (1987) (legal liberalism constructs artificial categories of "public" and "private" that diminish both public responsibility and private experience). For an early but valuable analysis, see Black, The Supreme Court, 1966 Term—Foreword: 'State Action,' Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 100-09 (1967).
als to inflict the same kind of harm without restriction.\textsuperscript{121} But at least two important situations are indeterminate: when a government official speaks or purports to speak as a private citizen and when government itself or government officials instigate, encourage, cooperate with, ratify, or acquiesce in private speech that damages constitutional rights.

The second situation is the relevant one for this analysis. The Supreme Court has recognized that government agents cannot delegate unconstitutional acts to private persons and then shield them from constitutional scrutiny as private rather than public action.\textsuperscript{122} Nor, at least in some circumstances, can they "tacit[ly] ratif[y]" a private choice that would be unconstitutional if made by the state.\textsuperscript{123} The real question here examines whether distinguishing government prejudiced speech from private prejudiced speech is a philosophically satisfying or empirically successful way to protect individual liberty from coercion that interferes with self-determination,\textsuperscript{124} or, more likely, whether the distinction instead serves to shield unconstitutional manifestations of racism (speech acts that are legitimated by the absence of legal controls) that, while furthering the actor's self-determination, impermissibly destroy the self-determination of others.\textsuperscript{125}

The libertarian argument privileges untrammeled private racist speech and divorces it from similar state or state-sanctioned speech that would violate constitutional rights.\textsuperscript{126}

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\textsuperscript{121} See, e.g., Strossen, supra note 8, at 544-47 (first amendment protects private speech endorsing racism just as it protects private speech endorsing religion).

\textsuperscript{122} See, e.g., Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 941-42 (1982) (private person who attaches disputed property before adjudication pursuant to state statute and with assistance of state officials is "state actor" suable under federal civil rights statutes); Marsh v. Alabama, 326 U.S. 501, 507-08 (1946) (private company which operates entire town cannot exclude religious proselytizers from streets). But see Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 161-63 (1978) (state statute permitting warehouse owners to sell warehoused items to obtain unpaid storage fees does not convert owners into state actors subject to fourteenth amendment due process requirements); Lloyd Corp. v. Tanner, 407 U.S. 551, 569-70 (1972) (private shopping center may exclude anti-war protesters from mall).

\textsuperscript{123} See L. Tribe, supra note 86, at 1689.

\textsuperscript{124} See Post, supra note 1, at 284 ("some form of public/private distinction is necessarily implied by democracy understood as a project of self-determination"). But see id. at 284 n.87 (distinction is nonetheless "inherently unstable and problematic, for all government regulation influences . . . the formation of individual identity").

\textsuperscript{125} See Balkin, supra note 58, at 416-20 (arguing that because system of legal rights and obligations constructs individual will and free choice, it is impossible, without circularity, to justify freedom of private racist speech as self-determination).

\textsuperscript{126} See, e.g., Strossen, supra note 8, at 544.
seems to depend on a social contractarian model of imaginary human beings who formulate their own consciousness and select their political values in a prehistoric, precultural, prelegal state of grace that produces a substantial distrust of the idea of government.\textsuperscript{127} Not knowing what their own situation will be, they choose the greatest possible freedom commensurate with social order. Once we reject this model in favor of one that accepts the reality of contextual, specific lives, burdened in different ways by the hierarchies of politics, law, and culture, and inescapably tied to history, it seems much less obvious that private speech is necessarily less harmful than or easily separable from government speech. Even if we can identify and circumscribe purely private speech, our knowledge of the intractable reality of prejudice reduces the likelihood that we should choose to exempt private expression from constitutional norms of equal rights. The proper question instead concerns whether unrestricted private speech causes the harms that equality rights were established to avert. If so, only the existence of some countervailing constitutional norm that supersedes the equality rights of the victims should protect private racist speech from government regulation.

This, it seems to me, is the point at which libertarian absolutists, whether or not they explicitly acknowledge it, simply choose the liberty rights of the speakers over the liberty and equality rights of those who may suffer harm from the unrestricted speech. In the context of our particular constitutional history and the society we have constructed, that also means choosing racial and sexual discrimination, or at least that which is accomplished by speech acts that are not defined as regulable conduct.\textsuperscript{128} Even Professor Post’s subtler argument that free speech doctrine provides a neutral matrix, “the framework for all possible forms of politics,”\textsuperscript{129} is subject to the criticism that it reifies the neutrality it idealizes without regard to the contextual reality of bias. There is no neutral framework. There is only this imperfect world.

\textsuperscript{127} Cf. J. Rawls, A Theory of Justice 12 (1971) (imagining “original position” in which rational but abstract persons who know nothing of their actual individual attributes—such as race, sex, status, wealth, or political views—construct society and choose principles of justice through “fair agreement or bargain”).

\textsuperscript{128} Cf. Lawrence, supra note 10, at 446 (“alternative to regulating racist speech is infringement of the claims of blacks to liberty and equal protection”).

\textsuperscript{129} Post, supra note 1, at 285; see supra note 79 and accompanying text.
IV. AN EQUALITY-BASED THEORY OF THE FIRST AMENDMENT

The idea of equality is built into the structure of the first amendment. Free speech is guaranteed not just to one speaker or to one class of speakers but by simple inference to all speakers. In refusing dominance to the most obvious choice for hierarchical control (i.e., the government elected by the prescribed majority), the first amendment implicitly rejects all other hierarchies as well, including hierarchies of free speech that stem from existing concentrations of social power understood to be “private” despite their individual and cumulative effects on our public life. In granting equal liberty, the first amendment may implicitly require dismantling even private structures of prejudice as vital to the fulfillment of its free speech guarantee.

By contrast, most libertarian theories of the first amendment insist on a negative model of free speech—defining it as freedom from restrictions imposed by the constraints of government and law. This freedom is justified by the notion that some area of unregulated personal choice is the most centrally humanizing characteristic of all. Even though “individual freedom is not everyone’s primary need” (because food, clothing, shelter, medical care, and even education may be first in our priorities if we have been deprived of them), its possibility provides, for many libertarian theorists, a foundation for democratic self-government. Yet, as Isaiah Berlin points out, no logical or necessary connection exists between negative liberty and democracy. A democracy may deprive individual citizens of many liberties that a despotic regime may grant. The collective choices we democratically make may restrain a wide variety of activities that we as individuals might otherwise undertake, from printing our own money to speaking our own minds. In order to connect democratic self-government with negative liberty, libertarians first must generate the idea of political rights—entitlements that even a majoritarian government cannot limit or invade to increase the common good—and then in-

1 See, e.g., I. BERLIN, supra note 77, at 122-31 (defining “‘negative’ freedom” and differentiating coercion “by [other] human beings” from innate “incapacity to attain a goal”). Berlin explicitly recognizes that this distinction “depends on a particular social and economic theory about the causes” of deprivation or inequality. Id. at 123.

1 See id. at 124, 126-28.

1 Id. at 124.

1 Id. at 129-30.

1 See, e.g., TAKING RIGHTS SERIOUSLY, supra note 7, at 269.
clude negative liberty within that set of protected rights. To most Americans accustomed to negative conceptions of free speech, this sequence may seem not only natural, but philosophically—perhaps even morally—compelled. But it is not the only way to connect liberty with self-government. At least two formidable objections preclude accepting this analysis as exclusive.

First, another concept of liberty—positive liberty or personal autonomy—emphasizes the freedom to control one's own life and decisions. Berlin distinguishes this familiar idea from, but acknowledges its interconnections with, the desire for status and recognition. Because we are all involved in a context of relationships which shape and circumscribe our individual selves, the liberty we seek—especially if we belong to an oppressed group—may include "an alteration of the attitude towards [us] of those whose opinions and behaviour help to determine" our self-images and our identities. In borrowing Berlin's insights, however, I do not feel constrained to accept his categories. I would argue instead that positive liberty does include at least some portion of the desire for recognition and respect as an equal, autonomous self, even—perhaps especially—when that desire is strengthened by our experience as members of a group often treated as "not quite fully human, and therefore not quite fully free." If the equal liberty that the first amendment protects includes this concept of positive liberty, as well as the notion of negative liberty, then the absolutist libertarian version of the first amendment remains inadequate. It fails sufficiently to account for the experience of freedom as pro-

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If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so. This . . . anti-utilitarian concept of [a] right . . . marks the distinctive concept of an individual right against the State which is the heart . . . of constitutional theory in the United States.

Id.

135 I. Berlin, supra note 77, at 131:
I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes. I feel free to the degree I believe this to be true, and enslaved to the degree that I am made to realize that it is not.

Id.

136 Id. at 156; cf. Williams, supra note 12, at 151 ("fundamental part of ourselves and of our dignity is dependent upon the uncontrollable, powerful, external observers who constitute society").

137 See I. Berlin, supra note 77, at 156-57. Berlin's own use of the terms "liberated," "liberty," and "free" to describe this desire deconstructs his insistence that it is "akin to, but not itself, freedom." Id. at 158.
tection or release from nongovernmental social constraints—imposed by an aggregate of private choices—that interfere with the construction of a social-and-individual self (the only self we can ever know). In fact, many first amendment theorists accept something close to this type of individual autonomy, either as the primary justification for or as an important purpose of the first amendment.

Second, as Ronald Dworkin has argued, there may be no right, in the strong sense of the word, to negative liberty at all. Once we distinguish between basic liberties (such as freedom of speech) that are intended to fence off certain human actions from government interference, and trivial ones (such as freedom from traffic laws) that are not, then the primary value defended is not liberty itself but rather the particular liberty at stake. The focus correspondingly shifts to our reasons for designating any particular liberty as basic. Utilitarian answers concerning the general good cannot serve to justify individual rights since they are rights asserted against the majority and in spite of their potential detriment to society. But in constructing a theory of rights that includes freedom of speech as a basic liberty, Dworkin argues, the foundation principle turns out to be, not liberty, but equality. This principle of equality protects "the right to treatment as an equal," explained not as "the right . . . to an equal distribution of some good or opportunity" but as "the right to equal concern and respect in the political decision about how . . . goods and opportunities are to be distributed." Even though Dworkin does not fully defend this portion of his theory of rights, it provides a perspective from which to critique the libertarian conception of the first

128 John Stuart Mill made a similar argument (though not, of course, about the first amendment):
[Society's] means of tyrannizing are not restricted to the acts . . . of its political functionaries. . . . [S]ocial tyranny [can be] more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling . . . .
J. Mill, supra note 73, at 4.
129 See supra note 56 (citing examples).
130 See supra note 134 (quoting Dworkin).
131 See Taking Rights Seriously, supra note 7, at 271.
132 Id.
133 Id. at 273.
amendment as primarily a device for repelling government intrusions on our lives. In particular, Dworkin’s approach enables us to challenge the libertarian resistance to the possibility that we can use government and law to expand—not just to constrict—opportunities for freedom of speech.

The first amendment arguably may establish a right to free speech as a right to “equal treatment,” meaning that everyone is entitled to the same free speech resources as everyone else—a “one person, one voice” rule parallel to “one person, one vote.” There is an intuitive appeal to the requirement of strict distributive justice when dealing with fundamental rights. But it seems unworkable in practice for many reasons, and, in any event, it is unnecessary for my purposes here. Even if the equal right to free speech is a right only to “equal concern and respect,” that right can be violated by private as well as state action that inflicts the disempowerments of prejudice. It can be vindicated by government protection of the victims of prejudice from the silencing or distortion of their voices.

The state can enrich public debate by regulating at least some forms of prejudiced speech in order to combat prejudice, without privileging any particular set of ideas. If we start with the observation that the playing field is not level, but tilted to favor the status quo—in this case, racism and sexism—then the state’s intervention

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144 See, e.g., Reynolds v. Sims, 377 U.S. 533, 562 (1964) (if votes of citizens in one part of state have ten times weight of citizens’ votes in another part, “it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted”); id. at 565 (“[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in [legislative elections]”). Similarly, full participation in society may require that each citizen have an equally effective voice in social and cultural arrangements that we usually think of as private or apolitical.

145 Voices, for example, are less definable than votes, which haven’t proved very easy to define either. See, e.g., L. Tribe, supra note 86, at 1062-95 (exploring complexities of determining when one person, one vote principle is satisfied).

146 Cf. L. Tribe, supra note 86, at 1438. Treating each individual with equal regard means “singl[ing] out for special scrutiny and probable invalidation those disadvantageous political judgments which seem likely to reflect a preference based upon prejudice.” Id. Though this comment focuses on government choices, Tribe elsewhere questions the state action requirement, id. at 1698-1720, noting that although the Supreme Court has no “general theory of liberty allocating public and private responsibility,” id. at 1698, in practice it makes choices, based on “perceptions of what we do not believe particular constitutional provisions should be read to control,” id. at 1720. The disagreement over regulations of racist speech is, in part, a clash between different “perceptions” of the legitimate reach of constitutional provisions that protect liberty and equality.
can be limited to efforts to remove the tilt and level the field. \(^\text{147}\) By recognizing that “contemporary social structure is as much an enemy of free speech as is the policeman,” \(^\text{148}\) we can liberate our concept of free speech to permit regulation based on content when necessary to ensure that all speakers have, not equal speech resources, but equal opportunities to develop them. The first amendment permits the state to impose at least some regulations to deter ostensibly private prejudiced speech acts that directly interfere with the victims’ self-determination and equality and indirectly impoverish public debate by silencing their voices. \(^\text{149}\) The principle of free speech, from the perspective of the victim of prejudice who seeks an equal opportunity to express her views to a listening audience, justifies regulations that remove barriers to her equal access—both to her own possibilities of self-expression and to her potential audience.

Nonetheless, this equality-based theory of free speech is open to several criticisms. If private social arrangements encourage and solidify prejudice and inequality, the state itself may—more likely than not—simply give those arrangements political form and substance. Social power has always translated readily into political power; dominant groups have more often used government to enforce their dominance than subordinate groups have used it to restore a democratic balance. \(^\text{150}\) Even if we assign the judiciary, as the most independent and least political branch of government, the task of questioning the government’s regulations to ensure that they actually enhance individual autonomy and enrich public de-

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\(^{147}\) I realize that substituting one metaphor for another does not change the requirements of analysis. If the state cannot provide a neutral matrix or framework within which we can fairly bargain about our political future, presumably it can’t provide a level playing field either. The argument here, though, is that we should recognize the ways in which existing social and political arrangements skew the game and make attempts to counteract them. It would be fatuous to claim that acknowledging our biases and seeking to minimize their harms will restore us to an “original” state of innocent neutrality.

\(^{148}\) Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1415 (1986). Professor Fiss argues persuasively that traditional free speech doctrine as applied in modern Supreme Court decisions impoverishes rather than enriches public debate by preferring (negative) autonomy to collective self-determination. *See id.* at 1416-17.

\(^{149}\) Cf. *id.* at 1417 (Supreme Court decisions that reject the “heckler’s veto” not only permit but require state intervention where “necessary to make the speaker’s autonomy ‘real’ or ‘effective’”).

\(^{150}\) *See id.* at 1418; Gale & Strossen, *supra* note 6, at 175-76. But the first amendment itself is an example of using government to counteract its own tendencies towards oppression and orthodoxy. *See infra* notes 154-56 and accompanying text.
bate by encouraging "outsider" speech, we have no assurance that judges will invariably or even frequently arrive at the right answer. Moreover, challenges to a government regulation seldom reflect the full range of its effects. If legislative and administrative authorities intentionally or inadvertently have furthered censorship and stifled diversity in the name of restricting the harms of prejudice, judicial correctives may not occur in time to protect many potential legitimate exercises of the right to free expression. In addition, they may not fully counteract the chilling effects that accompany even the failed attempt to regulate protected speech. Regulation is justified only if the risk of harm that prejudiced speech causes to positive liberty and equality, outweighs the risk of harm that regulation causes to protected speech. That, it seems, is an empirical inquiry to which the persistence of racism and similar prejudices begins to provide the reply. The reply becomes more complete if we limit regulation of prejudiced speech acts to those narrowly defined categories that cause, if not the worst harms, the harms that we believe can be counteracted without destroying the values of free expression.

Another, perhaps more fundamental, criticism of this theory of free speech contends that equality norms work in precise contradiction to my account of them. Professor Kenneth Karst, among others, has argued that "the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech." Comparing equal liberty of expression to the equal right to vote, Karst maintains that the equal right to freedom of speech means the equal right to be free of government controls. Yet it is possible to deconstruct even

\[\text{See supra note 56 (describing outsider jurisprudence).}\]
\[\text{See infra notes 241-43 and accompanying text.}\]
\[\text{Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21 (1975) [hereinafter Karst, Equality]; see also Karst, supra note 8, at 117 ("members of every subordinated group need an expansively defined first amendment" to establish their identities and liberate their voices).}\]
\[\text{Karst, Equality, supra note 154, at 26; Karst, supra note 8, at 117.}\]
\[\text{See Karst, Equality, supra note 154, at 23-24. This may be an example of an "equal treatment" approach to free speech, in the sense that the demand for content neutrality provides each person with the same arguments to use against government regulation of her speech. Id. at 52-54. Even though content neutrality is incomplete, each person faces the same theoretical gaps, however defined, except insofar as the courts fail to apply the doctrine consistently from case to case. See supra notes 53, 56-66 and accompanying text.}\]
the cases that Karst uses to exemplify his contention that equality as neutrality is a central principle of the first amendment. For instance, writing for the Court in Police Department of Chicago v. Mosley, Justice Marshall observed both that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,” and that “government must afford all points of view an equal opportunity to be heard.” He thus assumed that the first proposition (removing governmental power to regulate messages) necessarily fulfilled the requirement of the second (governmentally provided equal access for all viewpoints). But if government’s failure to restrict certain messages (such as racist ones) guarantees that other messages (such as the views of the victims of racism) will not have an equal opportunity to be formulated, articulated, or heard, then either the decision is unintelligible or we must choose which of the propositions is more fundamental to the first amendment’s guarantee of equal liberty. Although traditional libertarians would choose the first proposition, egalitarian reformers may, with equal propriety, choose the second. Even if the facts involved in Mosley seem to support the priority of the first proposition, it can be argued that when the facts change, the priorities change. If narrow restrictions of the directly repressive speech of dominant groups or individuals will encourage the controversial speech of dissident groups and individuals, the purposes of the first amendment may be better served by such restrictions. Karst himself declares that Mosley’s determinative principle “requires courts to start from the assumption that all speakers and all points of view are entitled to a hearing, and permits deviation from this basic assumption only upon a showing of substantial necessity.”

Another reinterpretation of Professor Karst’s theory examines

157 In the colloquial sense, that is. I am not here claiming to apply deconstruction in the rigorous manner that might be required by disciples of Jacques Derrida. See Balkin, Deconstructive Practice and Legal Theory, 96 YALE L.J. 743, 743-44 (1987) (describing how legal scholars misappropriate deconstructive techniques).
158 408 U.S. 92 (1972). In Mosley, the Court used equal protection analysis to invalidate city regulation which prohibited all picketing near schools except for labor unions. Id. at 101-02.
159 Id. at 95.
160 Id. at 96.
161 See Karst, Equality, supra note 154, at 27-28. Karst quotes these passages together, without suggesting that there is any potential tension or conflict between them. Id.
162 Id. at 28.
the permitted deviation in light of his dual contentions that equal liberty of expression "has special relevance for protecting the downtrodden" and that "[a] showing of high probability of serious harm might justify regulation of a particular kind of speech content." Victims of racist and sexist speech are more "downtrodden" than its speakers, and serious harm, at least from some subsets of prejudiced speech, is highly probable, if not virtually certain. Nonetheless—at least in 1975—Karst rejected restrictions on racist speech. He argued instead that even regulations of "abusive speech" are applied unequally to restrict the speech of "racial and political minorities" rather than that of prejudiced majoritarian speakers. More recently, he reaffirmed that perspective, describing speakers protected by the Supreme Court's free speech jurisprudence as "outsiders" who were subordinated, labeled (as unreasonable, disloyal, or both), and silenced by dominant majorities. Yet nothing in his theory entirely precludes the recognition that messages of white supremacy, conveyed by non-governmental speakers in a manner that causes direct and irreparable harm to racial minorities, may deserve less protection than other messages; indeed, such supremacist messages form part of the system of racial oppression that Karst strongly opposes. If many first amendment decisions of the Warren Court were important "because the Court authoritatively declared that black people were citizens whose voices deserved to be heard," then it should be equally important to make the same declaration today—by our refusal to permit racists to use first amendment rules crafted for another era to label and silence blacks as outsiders unworthy of equal participation in community, or university, life.

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163 Id. at 30.
164 Id. at 31.
But see id. at 33 (characterizing as "unfortunate" decision in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 379 (1973) (city civil rights laws may ban sex segregation of help-wanted advertisements)).
165 Id. at 38.
166 See Karst, supra note 8, at 109-11.
167 Cf. Karst, Equality, supra note 154, at 51 (although equality-based prohibitions of government control of speech content do not solve problem of private censorship by media, equality justifies only content-neutral regulations).
168 Karst, supra note 8, at 123.
169 See id. at 135 n.160. Perhaps because it was written before some of the recent critiques of traditional first amendment doctrine, Professor Karst's most recent article never directly addresses arguments similar to the ones made here. Compare id. at 136 n.166 (apparently conceding that laws may forbid sexual harassment "even though it may consist of
The proposed equality-based theory of the first amendment permits government regulation of some categories of racist speech to combat the deep and continuing individual and social harms of prejudice. It looks to history, social context, and personal experience to tell us which kinds of prejudice are sufficiently severe and pervasive to justify regulation, and to the values of the first amendment to help us construct a test that will combine categorization and balancing analyses\textsuperscript{171} to protect as much free expression as possible—without preferring dominant to subordinate speakers. Although I think that this theory can be justified on its own by the first amendment's equal liberty principle, it is strengthened and sharpened by the fourteenth amendment's protection of equality.\textsuperscript{172} Even if the framers of the fourteenth amendment consciously chose to constitutionalize equality norms only in opposition to state-inflicted prejudice, their—and our—ultimate purpose seems to be the disestablishment of prejudice as a system of arbitrary disadvantage and dispossession. If we now recognize more clearly that private actions serve to maintain the system, government failure to check them may operate not unlike government support of prejudice. At least since Brown v. Board of Education,\textsuperscript{173} we have both acknowledged the message of stigma as one of the primary harms of racism and treated educational institutions as a focal point for the constitutionally mandated transformation from a society marked by racial prejudice and oppression to one distinguished instead by equal respect and equal rights.

If the constitutional principle of free speech is an important reason to discount the harms that speech can inflict in drawing the

\textsuperscript{171}See, e.g., L. Tribe, supra note 86, at 790-94 (distinguishing “balancing” from “categorization” as methods of first amendment analysis). Professor Tribe prefers categorical rules as “usually less open to manipulation,” id. at 793, but concedes that balancing is nearly always necessary when government arguably restricts protected expression while pursuing one or more legitimate goals. Id. at 791, 794.

\textsuperscript{172}Although I will not here construct the argument, thirteenth amendment jurisprudence invalidating even privately imposed “badges or incidents” of slavery also supports reading the first amendment to guarantee equality as well as liberty. See, e.g., The Civil Rights Cases, 109 U.S. 3, 20 (1883) (“[thirteenth amendment] has a reflex character . . . establishing and decreeing universal civil and political freedom”).

\textsuperscript{173}347 U.S. 483 (1954).
line between permissible and impermissible government regulations, the constitutional principle of antidiscrimination is an equally important reason to redraw the line when speech itself inflicts the harms that the antidiscrimination principle is intended to prohibit. Insofar as the fourteenth amendment also incorporates a principle of affirmative action—either permitting or (in some instances) requiring government action to counteract racism and its continuing harms—the line may shift further toward regulation and away from unrestricted individual liberty to inflict the harms that the fourteenth amendment compels us as a society to prevent.174

In a very different context, the Supreme Court has already ruled that later amendments to the Constitution may affect the interpretation of the first amendment.175 Even if those cases are questionable or open to narrowing interpretation or both, they demonstrate another meaning of Chief Justice Marshall's comment that "we must never forget, that it is a constitution we are expounding."176 The Constitution is not just a list of discrete powers and rights, or even a blueprint (though I have used that metaphor in this Article177) for constructing our government; rather, it is the foundational structure itself. Its parts must be interpreted in relation to each other and to the whole.178 As one point alone in space cannot define any geometric figure, yet two points can together define a line and three a triangle,179 so the Constitution's mul-

174 See supra note 52.
175 In a somewhat peculiar line of cases, the Supreme Court has held that the twenty-first amendment, granting states primary control over liquor traffic, permits greater state regulation of sexually explicit expression than the first amendment would otherwise allow. See, e.g., City of Newport v. Iacobucci, 479 U.S. 92, 95 (1986) (broad powers of state conferred by twenty-first amendment outweigh any first amendment interest); New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 717 (1981) (same); California v. LaRue, 409 U.S. 109, 114 (1972) (twenty-first amendment confers more than normal state authority over public health, welfare and morals). Professor Tribe argues that these cases stand "not for the proposition that the twenty-first amendment overrides the first but for the more modest notion that . . . state[s] [have] power to zone strong sexual stimuli away from places where liquor is served." L. Tribe, supra note 86, at 478 n.15. I am indebted to my colleague, David Treiman, for calling my attention to this general point.
177 See supra text accompanying note 92.
178 See generally C. Black, Structure and Relationship in Constitutional Law 33-67 (1969) (setting forth structural considerations); cf. L. Tribe, supra note 86, at 10 n.2 (even though Constitution does not express "any single, coherent vision or philosophy, . . . it is to the entire Constitution, and not just some parts, that we owe our allegiance") (emphasis in original).
179 One can not carry this metaphor very far, though, without encountering difficulty.
tidimensional provisions and their values can serve to situate us on a map we should at least consult if not follow. This command should have special force when the provisions to be interpreted have become as central to our sense of fundamental rights and relationships under law as the first amendment’s guarantee of free expression and the fourteenth amendment’s guarantee of equality.

V. Equal Liberty and Racist Speech: Regulating Discriminatory Verbal Harassment on the College Campus

The argument thus far is that the first amendment, reinforced by the fourteenth, contains a principle of equal liberty that permits regulating some categories of racist and similarly prejudiced speech to prevent serious harms to liberty and equality rights of the victims and thus to the democratic dialogue through which we continually reconstruct our society. The principle of equal liberty is especially relevant when speakers in a university setting use prejudiced speech as a weapon to destroy the right to educational equality of blacks, women, and other devalued minorities, and to deny them equal access to university dialogue and dispute. Education, like the vote, is a right preservative of other rights.¹⁶⁰ It is fundamental not only to individual self-realization but to democratic self-governance as well. If we can ever construct rules that successfully balance the rights and liberties of dominant and subordinate groups in hopes of creating a more just and equal society, the university, increasingly a site of racist and sexist incidents, seems like an appropriate and necessary place to begin.

Libertarians—even those who are not first amendment absolutists—often argue, however, that universities are the last, best refuge of free speech and the last place where speech regulations should be considered, much less adopted and enforced.¹⁶¹ Because

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Six points—or sixty—could provide a bewildering array of options, unless—as is true of the Constitution—they are not points at all but substantive and differentiated propositions. Moreover, even if each of them was entirely clear and distinct (which each is not), without some preceding rule (or set of rules) for making choices or ordering priorities our structure may be indeterminate and malleable. But constructing those rules is one function of constitutional interpretation and adjudication.


¹⁶¹ E.g., Carnegie Foundation For the Advancement of Teaching, A Special Report: Campus Life, in Search of Community 20-23 (1990) [hereinafter Carnegie Report] (re-
the university is dedicated to the pursuit of knowledge and the freedoms of inquiry and belief that are central tenets of traditional first amendment doctrine, perhaps it cannot embrace even those deterrent rules (like statutes forbidding threats, invasion of privacy, intimidation, or harassment) that are permissible in the surrounding world. The university, it is argued, is the quintessential marketplace of ideas. The speakers—even racist speakers—are constitutionally approved sellers, and the students who hear and evaluate their ideas are the idealized consumers whose interests and choices the first amendment is also designed to protect. ¹⁸²

Assuming that the primary purpose of speech regulation is to enforce decency, civility, and respect, proponents of this view then easily move to the conclusion that “[i]t may sometimes be necessary in a university for civility and mutual respect to be superseded by the need to guarantee free expression.”¹⁸³ Instead of restricting “slurs and epithets intended to discredit another's race, ethnic group, religion, or sex,” a Yale University committee declared,

[e]ven when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression. . . . If the university’s overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument.¹⁸⁴

This somewhat repetitive assertion, however, asks and answers only the wrong questions. It balances the powerful and primary rights of free expression for racist speakers against the relatively weak and “secondary” rights of their victims to “civility” and “re-

¹⁸² For a more sophisticated version of this argument, see Post, supra note 1, at 319-25. Professor Post distinguishes three different concepts of education—civic (intended to inculcate respect for existing authority and community norms), democratic (intended to create “autonomous citizens, capable of fully participating in the rough and tumble world of public discourse”), and critical (intended to “discover and disseminate knowledge” and truth). Id. at 319-22. He identifies the third as most closely linked to market theories of the first amendment. Id. at 323.

¹⁸³ CARNEGIE REPORT, supra note 181, at 21 (quoting Yale University committee’s 1975 report, later incorporated into Yale undergraduate regulations).

¹⁸⁴ Id.
spect." It focuses almost exclusively on the perpetrators (those who "fail to meet their social and ethical responsibilities"). It entirely ignores the victims' primary rights to educational and expressive equality. It nowhere acknowledges that the commitment to eradicate racism and ensure equality is part of the same Constitution that protects free expression, or even that the constitutional value of equality engenders cultural values that are centrally important to university life. Moreover, this position fails to perceive that the first amendment is structured to protect, not just liberty, but equal liberty, and never confronts the university's responsibility to provide an educational environment in which all students alike can pursue knowledge, truth, and self-determination. Like the libertarian arguments criticized earlier, this approach simply prefers—without serious explanation or justification—the speakers' freedom and autonomy, and their contributions to educational discourse, to those of the victims.

The marketplace metaphor used to support this vision of the university is itself flawed and inapposite. By more appropriately

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185 The term "respect" in this context seems to mean something like "politeness" or "consideration"—something much less than either the connotations I have invoked throughout this Article or "the right to equal concern and respect" that Dworkin identifies as central to equality. See R. Dworkin, Taking Rights Seriously, supra note 7, at 180-83, 272-73; supra text accompanying note 143.

186 But see Carnegie Report, supra note 181, at 25-35 (university must honor "the sacredness of each person" and aggressively pursue "diversity"). The Report's chapter urging interracial and multicultural understanding, id., immediately follows its chapter demanding that "freedom of expression [be] uncompromisingly protected," id. at 17-23. Yet, there is no explicit (or implicit) recognition of possible contradictions between the two. The Report even quotes (with approval) Princeton University's prohibition of sexual harassment, defined as "verbal or physical conduct" that "has the effect of unreasonably interfering with an individual's work, academic performance, or living conditions by creating an intimidating, hostile, or offensive environment," id. at 34, without acknowledging that this rule may clash with uncompromising protection of freedom of expression. For two interesting attempts to resolve the tensions that the Carnegie Report ignores, see Balkin, supra note 58, at 421-24; Strauss, Sexist Speech in the Workplace, 25 Harv. C.R.-C.L. L. Rev. 1, 3-5, 33-51 (1990).

187 Although constitutional law (as currently structured) does not govern a private university in the same way that it governs a public one, the same constitutional culture affects them both. Cf. Grey, supra note 21, at 9 n.14 (explicitly assuming that private universities accept obligation to provide equal opportunities to women and students of color).

188 The marketplace of ideas is, in practice, profoundly racist and sexist. See Lawrence, supra note 10, at 467-72 (racism causes whites to discount the needs and rights of persons of color, to reject their own similar needs and deny their shared humanity, to devalue ideas of nonwhites, and to silence their voices). For other effective demolitions of the market metaphor, see Baker, supra note 75, at 974-83 (critiquing marketplace as favoring dominant groups); Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1, 4-5.
focusing on the notion of “public discourse” or “public dialogue,” or even open, serious, and searching conversation among friends or colleagues, we come closer to the ideals of both “democratic” and “critical” education as defined by Professor Post; such education enhances effective participation in the democratic process and embraces disciplined pursuit of knowledge. We also come closer to the educational ideal of self-discovery or self-fulfillment, including possibilities for passion, creativity, experimentation, and intellectual play. None of these values is easily captured within a metaphor of purchase and sale.

(government regulation may be needed to connect failures in communicative market similar to failures in economic market).

See generally Post, supra note 1, at 279 (defining “public discourse” as “communication deemed necessary for the processes of democracy”).

See Denvir & Powell, Caliban’s Complaint: Racist Speech and the First Amendment 24 (1989) (unpublished manuscript, on file with the author) (arguing that “the operative concept” in Justice Brandeis’ theory of first amendment “is a public dialogue as the decision-making tool of democracy”). Denvir and Powell contend that this model strongly implies that government has an “active duty to promote a public dialogue in which all can participate.” Id. at 25. They continue:

If we substitute the “dialogue” metaphor for that of a “market place of ideas” we get a different perspective on the proper role of speech in a democracy. Instead of a laissez-faire approach which sees the only evil as the suppression of speech based on its message, we envision a government which aims at “husbanding” our public dialogue. The primary goal of the First Amendment is now seen as the establishment of the preconditions for an intelligent conversation between political equals.

Id. at 27.

The most important self- and society-constructing discourse, dialogue, or conversation is not necessarily “public,” unless we give the word a very broad meaning. If we first construct ourselves and often interact with our culture within a network of overlapping communities, some of which are clearly “private” as we commonly use the term, and others of which commingle “public” and “private” characteristics, then one of the more perplexing tasks for first amendment doctrine is to identify which of those communities are, or should be, linked by formal law or informal cultural norms to its implied commands. For a discussion of communities, see supra note 28.

See Post, supra note 1, at 321-24. We also come closer even to “civic education,” see id. at 319, if the notion is redefined (as I think it could be) to focus on education not as indoctrination (or inoculation) with existing community values as filtered through the perceptions of educational decision-makers but rather as education that explores and explains both historical and current justifications for those values, at the same time that it recognizes the essential open-endedness of the democratic process.

Curiously enough, however, the law-and-economics school of analysis, for all its shortcomings and coldheartedness, occasionally seems more to appreciate—and to make legal room for—the quirks of human personality, the surprises of creative thought, and the nondestructive pleasures of irrationality than do many of the feminist scholars, critical race theorists, new communitarians, or adherents of critical legal studies—even though the latter groups all, in one form or another, contend that they are attempting to give the law a, friendlier, more human face. Perhaps the reason is simply that one of the unfair benefits of
When the liberty of some is furthered at the expense of the liberty and equality of others, both the university and the first amendment suffer. A university that seeks to provide both "democratic" and "critical" education is dedicated not only to universal freedom but to universal education—to equal opportunities and equal rights of participation and self-realization for students of all races, religions, and economic classes, both sexes, and any sexual orientation. Leaving some persons out of the academic circle for arbitrary reasons is not only a moral wrong and a personal injury, it is also an intellectual mistake that impoverishes the dialogue and impedes the search for truth. The ideal university would welcome everyone seeking knowledge and the wisdom to use it, without regard to characteristics like race or sex that may deeply affect identity and experience but that are, nonetheless, essentially irrelevant to the desire and capacity to learn and to the ability to light a path for others. The ideal university would educate its students for a wide variety of jobs and lives, based upon their diverse talents, needs, and choices. It would guide intellectual exploration, stimulate artistic expression, instill political awareness and moral complexity, and channel, protect, and encourage the risk-taking and experimentation through which we discover and create ourselves. It would ask and expect its students to talk to each other across the boundaries of race, sex, class, and religion, to hear and to value dissonant voices. It would teach them to participate vigorously, effectively, and maybe even civilly, in their shared community, while preparing them to thrive in the world outside and to restructure that world together as democratic citizens. Even the real university, which must cope with the stubborn distractions of everyday life and with the intractable realities of prejudice, may aspire to these ideals.

The failure to regulate at least some subset of prejudiced speech can directly undermine this vision of the university. Some victims of prejudice leave the campus, forfeiting their educational cultural dominance is the opportunity to experiment with moral unseriousness.

194 Emphasizing the virtues of civility strikes me as both mistaken and dangerous. The notion of civility radically misconceives and diminishes the goals of educational and political equality and of democratic pluralism or multiculturalism, replacing the desire and the right to autonomy and respect (in the strong sense) with (at its worst) a simplistic preference for the forms of dialogue over the substance of genuine communication and response. Norms of civility can chill adventurous investigation of facts and ideas and discourage strong expressions of feelings or opinions. Nothing is gained if we lie to each other in "nicer" language, while the realities of political power and oppression remain unchanged.
rights altogether, while others flee to the comparative safety of 
home ground—colleges where their own race, sex, or religion pre-
dominates. Even minority students who remain on campus may 
adjust their own conduct to minimize the threat of repeated verbal 
aggression, becoming alienated from the educational community 
while ostensibly remaining within it, dissimulating their views, dis-
placing their racial, cultural, or sexual identity, diminishing their 
contributions to learning, teaching, and scholarship, and deny-
ing—perhaps even to themselves—their own pain and with-
drawal.\textsuperscript{195} When the victims of prejudiced speech relinquish the 
opportunity they once sought to confront new ideas and to com-
municate with people of different backgrounds and viewpoints, 
both they and the perpetrators—and society as a whole—suffer the 
kind of losses the first amendment seems designed to prevent. Our 
devotion to the heroic ideal has too often blinded us to these 
harms. Like Macbeth's guests, we need to look behind the veil of 
familiar realities, to see the ghosts that inhabit our world.

How, then, can and should the university respond to racist, 
sexist, and similarly prejudiced speech? Despite everything I have 
written so far, I do not mean to discount the dangers of encourag-
ing educational authorities, who already wield a substantial 
amount of democratically unaccountable power, to consult their in-
tuitions in deciding who shall speak and what shall be said on the 
college campus. The second-best first amendment—the one that 
warns us not to let any government control our words and our 
thoughts\textsuperscript{196—is, in many respects, the only one we have. I have ar-
gued, perhaps more tentatively than my rhetorical style may sug-

\textsuperscript{195} See generally Davis, supra note 9, at 1565-71 (describing how racism injures the 
self, undermines self-esteem, and skews behavior of those who encounter it as part of everyday life); Delgado, supra note 17, at 135-47 (same); Lawrence, supra note 10, at 448, 468-72 
(same); Matsuda, supra note 3, at 2326-27, 2336-40 (same). In a widely-quoted passage, Pro-
fessor Patricia Williams explains how white students' defacement of a Beethoven poster 
—their literally figurative rejection of blackness as consistent with greatness—obliterates 
black (and by extension, female) freedom, accomplishment, and participation in Western 
culture:

[I]f I ever manage to create something as significant, as monumental, and as im-
portant as Beethoven's music, . . . if I am that great in genius, and perfect in 
ability—then the best reward to which I can aspire, and the most cherishing ges-
ture with which my recognition will be preserved, is that I will be remembered as 
white. Maybe even a white man.

Williams, supra note 11, at 2135.

\textsuperscript{196} See generally F. SCHAUER, supra note 52, at 157-58 (free speech principle stems 
from skepticism of government power and of democratic choice of leaders); Schauer, supra 
ote note 23, at 2 (free speech principle embodies “risk-adverse distrust of decisionmakers”).
gest, in favor of reimagining the first amendment to encompass both an idea of affirmative liberty and an enforceable right to equal liberty. Together these encompass the freedom to construct an authentic self, who can make her own choices and explore her own possibilities, and who can participate fully and effectively in democratic self-governance. The first problem, therefore, may be to identify the categories of racist speech which most threaten that idea, that right, and that freedom. The first question may be whether the university can find a means to regulate them.

Unfortunately, both the problem and the question have unsettling answers. The prejudiced speech or expressive act that causes the deepest injury may well be the insensitive or ignorant remark that occurs in the give-and-take of daily conversation or classroom discussion, or the signifying behavior of words or gestures that form the microaggression of unconscious or partly-conscious racism; each reconfirms "the tyranny of the prevailing opinion" that the perspectives and contributions of blacks, women, religious minorities, and gays and lesbians simply are not important within the dominant culture. Yet it seems extraordinarily difficult to impose restrictions on such expression without sweeping within the net of regulation the kind of political or self-constitutive speech that first amendment values most strongly protect. Only the most artless of regulation drafters have even tried.

197 See Note, Racism, supra note 10, at 323-27.

The daily repetition of subtle racism and subordination in the classroom and on campus can ultimately be, for African Americans, more productive of stress, anxiety, and alienation than even blatant racist acts. The subtle institutional racism and white cultural bias that pervades the campus infringes on black students' right to equal enjoyment of their civil right to an education...

[Black]eck perspectives are not part of the campus culture or community consciousness. Black students attend class (and take exams) often having just confronted offensive reminders of either overt racial hostility or subtle racial insensitivity—perhaps in the campus newspaper, on posters at the bus stop, the structure of classroom discussion—that serve as distractions from academic performance that white students do not endure.

Id. at 323.

199 See, e.g., Davis, supra note 9, at 1565-68 (discussing microaggression); Lawrence, supra note 3, at 330-39, 347-55 (arguing that modern psychology recognizes unconscious sources of racial antagonism and that equal protection theory must incorporate our knowledge of unconscious motivations in order to combat racism).

199 J. Mill, supra note 73, at 4.

Another approach has been to annex expressions of racial hostility to the Supreme Court's discredited "fighting words" doctrine. The authors of the Yale University report quoted above seemed to believe that the most important subset of racist speech consists of "slurs and epithets intended to discredit another's race, ethnic group, religion, or sex." (Nonetheless, they found such remarks unregulable.) Professor Richard Delgado has argued that racial insults are among "the most pervasive channels through which discriminatory attitudes are imparted," that certain epithets are "only calculated to wound" and have "[n]o other use," that effective response and redress currently do not exist, and that, therefore, we should create a tort action for racial insults. Professor Thomas Grey, a primary author of the Stanford Fundamental Standard Interpretation that prohibits discriminatory harassment, similarly focuses on "personal vilification" that makes use of

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201 See, e.g., Houston v. Hill, 482 U.S. 451, 462 (1987); Gooding v. Wilson, 405 U.S. 518, 528 (1972). Houston-Gooding sharply limited the ruling in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which stated that some words are beyond first amendment protection because they are "no essential part of any exposition of ideas," and because "their very utterance inflict[s] injury" or "tend[s] to incite an immediate breach of the peace." Id. at 571-72. For concise but detailed criticism of the fighting words doctrine, see L. Tribe, supra note 86, at 837-41, 849-52.

202 See supra notes 183-84 and accompanying text.

203 See Carnegie Report, supra note 181, at 21 (quoting Yale undergraduate regulations).

204 Delgado, supra note 17, at 135.

205 Id. at 145. But see id. at 180 (recognizing that at least some racial epithets may be "spoken affectionately" among members of group epithet usually derogates).

206 Id. at 146-47.

207 See, e.g., id. at 134, 149, 165 (arguing for independent tort action for racial hate speech). Oddly, Professor Delgado rejects any parallel between racist and sexist insults: [R]acial insults are in no way comparable to statements such as "You are a God damned woman and a God damned liar," which the Restatement [(Second) of Torts] gives as an example of a "mere insult." Racial insults are different qualitatively because they conjure up the entire history of racial discrimination in this country.

Id. at 157. Sex-based insults conjure up the entire history of sexism in this country (and the world), including male violence committed against women both because they are women and because they are often physically or psychologically incapable of fighting back.

I nonetheless agree with Delgado and the Restatement that the remark quoted above, in the particular context in which it was hypothetically made (over the phone to a telephone operator), is not and should not be actionable. But in some contexts it could function as the kind of discriminatory verbal harassment that I believe can be regulated by a college or university to protect the victim's right to educational equality (including the right to equal participation in campus dialogue) without seriously impairing the speaker's free speech interests.
“[i]nsulting or ‘fighting’ words or non-verbal symbols.”

According to Grey, this regulation combines the “relevant common elements” of the “fighting words” and “intentional infliction of emotional distress” rationales and adapts them to the campus setting.

Nonetheless, for reasons that have been, for the most part, sufficiently discussed by others, both the “fighting words” doctrine and the tort of intentional infliction of emotional distress seem problematic models for regulating any expression, even prejudiced speech, on the university campus. Like group defamation, these categories may be inextricable from vigorous political debate. In addition, they effectively belittle the emotional, nonrational components of human nature while seeming, paradoxically, to acknowledge them. The traditional conception of fighting words implies an exchange involving white males who approve of and engage in instantaneous violent responses, discharging emotions as if they were automatic rifles. Such a concept diminishes both emotional and moral complexity and has little or nothing to say to most members of dominated groups like women and blacks, for whom fighting back has often risked serious injury and death. (It probably doesn’t have much to say even to most heterosexual white)

208 See Stanford Interpretation, supra note 17, at 1; see also Grey, supra note 21, at 18-23 (rule “only prohibits a very narrow category of expression” in order to focus on objectively insulting speech that attacks victim’s identity and to avoid vagueness and chilling effect of broader regulation). The Stanford approach includes two other limitations with which I partially agree. First, prohibited speech must be “intended to insult or stigmatize an individual or a small number of individuals” on the basis of certain characteristics, including race and sex, which are strongly linked with arbitrary prejudice and disadvantage. See Stanford Interpretation, supra note 17, at 1. Second, prohibited speech must be “addressed directly” to those “whom it insults or stigmatizes.” See id. Apart from the terms “insult or stigmatize,” which seem both too broad and too narrow, see infra text accompanying notes 223-26; cf. Smolla, supra note 58, at 209 (terms like “stigmatize” are too general and subjective to survive constitutional scrutiny), I would impose similar limitations.

210 See, e.g., L. Tribe, supra note 86, at 837-40, 849-55 (“fighting words”); Stanford Interpretation, supra note 17 (intentional infliction of emotional distress); Linzer, supra note 17, at 222-26; Strossen, supra note 8, at 508-14 (“fighting words’”), 514-17 (intentional infliction of emotional distress).

211 See L. Tribe, supra note 86, at 926-27. But see Note, Group Vilification Reconsidered, 89 Yale L.J. 308, 327-32 (1979) (arguing in favor of criminal restraints on group libel). This Article almost suffices to make me reconsider the virtues of first amendment absolutism.

213 See Lawrence, supra note 10, at 453-54 & n.93.

215 But see id. at 451-57 (arguing that fighting words doctrine can be reconfigured to support regulation of racial insults).
males.) The "emotional distress" tort has customarily been ringed with anxious reassurances that it would seldom apply, not because of any deep concern for first amendment values, but because claimants (like rape victims) are thought of as likely to be cheats and liars. Yet for most of us, the experience of consciousness and identity, of a self that persists over time and change and that relates to others within a complex of interconnected communities, is constructed as much from passion as from reason.

Moreover, none of these rationales for regulation—fighting words, emotional distress, or group defamation—strikes through the protective mask at the constitutional injury that racist or sexist speech inflicts on students who become its targets: the interference with the victim's first and fourteenth amendment rights to equal voice, equal liberty, and equal education. Thus, these rationales also forfeit the constitutional base that, I have argued, entitles or even requires us to move the line between protected and unprotected speech when the relevant rights are at stake.

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214 But see Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) (first amendment prohibits public figure from recovering damages for emotional harm caused by profane, sexually explicit parody published in nationally circulated magazine).

215 See Delgado, supra note 17, at 151-57. But see Love, Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress, 47 Wash. & Lee L. Rev. 123, 159 (1990) (arguing that tort of intentional infliction of emotional distress, if somewhat modified, is "well suited to vindicate the rights of the victims of discriminatory harassment").


[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot 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. But see Karst, supra note 8, at 102 (questioning Harlan's dichotomy because "cognition is not limited to the analytic mode" but also includes intuitive, holistic knowledge). Nonetheless, Karst opposes a "civic deliberation model of the first amendment" precisely because it "will be of little help when the purpose of expression is to reach the fears that underlie group subordination." Id. at 147.

217 This perception and argument mark my primary disagreement with existing ACLU policies, both National and California, even though I voted for them both (and played some role in drafting them both, especially the California policy) on the grounds that each of them was, for the organization involved, a positive step.

The National ACLU policy, which is reprinted in full as an appendix to Strossen, supra note 8, at 571-73, "opposes all campus regulations which interfere with the freedom of professors, students and administrators to teach, learn, discuss and debate or to express ideas, opinions or feelings in classroom, public or private discourse." Id. at 571 (citation omitted). I believe I recall writing that sentence; not surprisingly, I agree with it. The policy
A better model can be found in the statutes, regulations, and case law that prohibit even private employment discrimination based on protected characteristics such as race or sex, and that restrict sexual and racial harassment in the workplace. Most areas of the college campus function, in many important respects, more like a workplace where prejudiced speech may be regulated than like a public forum where nearly anything may be said. The college classroom and the university itself are more than moral and intellectual—and physical—spaces for the exploration of ideas; they are also places where students must work and often live, and perform successfully if they are to accomplish both their practical goals (getting a degree) and their idealized ones (getting an education). The university is, in that sense, a company town. Under

also opposes “disciplinary codes that reach beyond permissible boundaries into the realm of protected speech, even when those codes are directed at the problems of bias on campus.” Id. I disagree with the location of those “permissible boundaries,” at least as implied by the policy’s next paragraph and explanatory footnote:

This policy does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy. The fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation. Id. at 571-72 (footnotes omitted). In one of the footnotes, the policy explains that the terms “harassment,” “intimidation,” and “invasion of privacy” refer to conduct which is legally proscribed in many jurisdictions when directed at [specific persons] and when intended to frighten, coerce, or unreasonably harry or intrude upon its target. Threatening telephone calls to a minority student’s dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behavior which has no other effect than to create an unpleasant learning environment, however, would not be the proper subject of regulation. Id. at 571 n.440. The implied model, therefore, is simply existing tort law, with a first amendment gloss that would restrict some of its reach. There is nothing objectionable about that approach per se, but it fails to recognize either the particular harms of discriminatory verbal harassment or the constitutional implications of those harms when they interfere with the expressive and educational rights of the victims.

The California ACLU policy, by contrast, does focus on the harms of discriminatory harassment. See infra note 242 (quoting from policy). It never expressly states, however, the theoretical underpinnings that I would give it, and one could accept its language while rejecting the theory.


I realize the inapposite connotations of that phrase, identified with Marsh v. Ala-
current law, based on constitutional rights of equality, workers are entitled to protection from racial, sexual, or religious harassment that "unreasonably interfer[es] with an individual's work performance or create[es] an intimidating, hostile, or offensive working environment." 221 Students too should be entitled to a workplace environment that enables them to accomplish the job they came to do—or at least to regulatory protection in that environment from unjustified harms that imperil their task.

My argument, then, is that the first amendment permits (and, coupled with the fourteenth amendment, may require222) the university to make reasonable efforts to provide an educational workplace free of at least some forms of discriminatory verbal harassment. Yet the first amendment also protects even vituperative, cruel, misinformed, and prejudiced speech. Even when a particular instance of expression falls clearly within the suspect category of prejudiced speech, we need principles to guide us in balancing the rights and liberties involved. I think that some principles can be constructed, although I concede both that they will sometimes pro-

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221 29 C.F.R. § 1604.11(a) (1990).

222 If the combined first and fourteenth amendment rights of equal liberty require universities to regulate speech while the first amendment right of free speech requires them to permit it, we are confronted with an analytical analog of the first amendment's protections of religion (the free exercise clause) and from religion (the (dis)establishment clause). See Smith, Non Preferentialism: A Response to Professor Laycock, 65 St. John's L. Rev. 245, 245 (1991). Supreme Court performance in this area may not inspire confidence in the ability of judges to strike the correct balance when opposing rights collide on a continuum of experience. See Gregory & Russo, Let Us Pray (But Not "Them")! The Troubled Jurisprudence of Religious Liberty, 65 St. John's L. Rev. 273, 288-95 & nn.56-58 (1991). But a "solution" which abdicates the responsibility to make choices and draw lines by simply weighting one set of rights more strongly than the other is no solution at all.
duce hard cases and that they may seem—especially to those who believe that racism, like slavery before it, permanently scars the nation while it devastates its victims—to protect perpetrators too much and victims too little.

One way to begin to derive those principles is to consider specific incidents and locate their place on the scale. Among the examples—adapted from reported incidents—that I think cannot be prohibited are these: (1) students form a White Supremacy Council and hold meetings on the campus lawn at which they display a swastika, protest affirmative action admissions and the presence of nonwhite students on a campus that is one-fifth nonwhite, and use racial epithets to express their feelings and opinions; (2) white students draw a blackface cartoon of the composer Beethoven and post it on the bulletin board in a predominantly black dormitory; (3) black students tear the posted cartoon down; (4) in a classroom discussion of biological differences between the sexes, a male student contends that women’s brains are insufficiently compartmentalized to permit first-rate analytical thought.

Among the examples—also adapted from reported incidents—that I think may be properly prohibited are these: (5) someone enters the room of two black college students and scrawls a note on the mirror inside, “African monkeys, why don’t you go back to the jungle?” (6) a group of white male students follows a black female student across campus, shouting racist and sexist epithets and suggesting the possibility of imminent sexual assault; (7) a fraternity selects a particular woman as “Jewish American Princess” and ridicules her over the loudspeaker at a football game; (8) a student (of either sex) corners a male student in a library hallway and harangues him for organizing a gay rights group on campus, using no epithets but hostile words that demean his sexual orientation.

All of these incidents exemplify the persistence and virulence of racism, sexism, and homophobia. All of them poison the campus climate for members of the targeted groups. Allowing any of them to occur, especially without regulation or reprisal, may inflict some of the very harms that compromise or destroy equal educational rights—even if university officials take the opportunity to condemn the incidents and the views they express as incompatible with both democracy and education.223 But the first four—the ones that I

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223 The National ACLU policy, the Carnegie Foundation Report, and some scholars ar-
would permit—share several important characteristics of protected speech. In particular, even when they involve insulting or stigmatizing words, they are part of the ongoing debate about democratic self-governance. They may expose iniquities committed (or so the speaker believes) in the name of racial or sexual equality. They may stimulate intellectual inquiry into their basis (or lack thereof) in provable fact or respectable opinion. And they may powerfully express the speaker's feelings and validate his or her identity in a way that no less harmful alternative can match.

The first example is simply the famous Nazis-in-Skokie case translated to the campus setting, minus the extra emotional impact derived from the Village of Skokie's high percentage of Holocaust survivors; however, it substitutes a substantial racial minority student population who are likely to suffer similar emotional devastation, and accompanies the Nazi swastika with racial epithets. Despite this incident's virulent racism and its potentially destructive impact on the university community, the white supremacists are engaging in the campus analog of public political speech, disseminating ideas to willing listeners and to indifferent or unwilling passersby (who presumably can, however, evade or ignore the message). They are not directly inciting anyone to vio-

gue that the proper role for the university in response to racist speech is to permit it while denouncing it and seeking to counter it by means other than regulating speech. See Carnegie Report, supra note 181, at 21-23; Linzer, supra note 17, at 236-44; Strossen, supra note 8, at 564. Thus, the National ACLU policy declares that “colleges and universities have an affirmative obligation to combat racism, sexism, homophobia, and other forms of bias, and a responsibility to provide equal opportunities through education.” Id. at 572 (appendix). It then urges each university (among other actions) “to utilize every opportunity to communicate through its administrators, faculty, and students its commitment to the elimination of all forms of bigotry on campus” and “to develop comprehensive plans aimed at reducing prejudice, responding promptly to incidents of bigotry and discriminatory harassment, and protecting students from any such further incidents.” See id. I cannot help but hear a submerged note of complacent hypocrisy in all of this well-mean exhortation; when we really care about harms in our society, we usually outlaw them. But I concede that the case for exception is especially strong when constitutional norms push us toward deregulation.


lence or targeting any particular individual for assultive speech. By hypothesis, unbigoted students and victims of prejudice have equal opportunities to use the same or an equally accessible quasi-public space to disseminate equally passionate opposition (Bran-deis’s “more speech” remedy\(^{226}\)). As for the racial epithets and the swastika,\(^ {227}\) I cannot find a way to ban them without embracing values of civility that I think the first amendment implicitly re-jects.\(^ {228}\) On the deeper moral issue, polite racism seems no less damaging to the victims’ self-esteem and educational rights.\(^ {229}\) And Mark Antony’s speech in *Julius Caesar*,\(^ {230}\) making the word “honourable” into an epithet, demonstrates the almost infinite flexibility of words in context, casting some doubt on our ability to know when an epithet is being used or created. First amendment skepticism about official discretion arguably tips the balance. It seems better—though perhaps only marginally better—to try to ensure full play for the creative possibilities for angry, vituperative replies than to restrict the speakers’ use of epithets and symbols.\(^ {231}\)


\(^{227}\) The Stanford policy prohibits the “use of insulting or ‘fighting’ words or non-verbal symbols” if they are “intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin” and are “addressed directly to the individual or individuals” insulted or stigmatized. See Stanford Interpretation, supra note 17, at 1. Although the Stanford policy thus would not ban the example given (because no individual or small group is singled out for vilification), its focus on particular words and symbols could discourage their use even in campus “public” forums. That might improve both the intellectual content and the civility of college life, but it still seems to risk impoverishing political speech without significantly deterring prejudice.

\(^{228}\) See, e.g., Cohen, 403 U.S. at 26 (majoritarian disapproval or viewers’ distaste for sexually-referenced profanity did not transform wearing jacket inscribed “Fuck the Draft” into nonprotected expression).

\(^{229}\) See Note, Racism, supra note 10, at 323-25. But see Delgado, supra note 17 (racial insults remain pervasive mode of communicating discriminatory attitude).


\(^{231}\) I nonetheless agree with Professor Lawrence and others that there is a qualitative difference between epithets directed at whites (honky, gringo, etc.), even white ethnic groups that have suffered serious prejudice, and those directed at the most severely dispos-sessed racial minorities (I do not provide examples because I prefer not to use these words, even in an academic context, unless there is some truly compelling reason), women, or gays and lesbians. See, e.g., Lawrence, supra note 10, at 455-66 (because of unequal “power relationships,” dominant racial and sexual groups do not experience the same shock, fear, and disorientation when denounced because of their group membership). As a white woman who stayed in the civil rights movement long enough to suffer occasional black rejection, including the use of anti-white and anti-female epithets, I felt the difference. The history and context of asymmetrical oppression produce asymmetrical meanings. It is another instance
The second and third examples are variations on the Beethoven incident at Stanford. The second one is permissible because—just barely—it still constitutes a contribution to the campus analog of public dialogue about race and racism. My response would change, however, if the cartoon were posted in a particular student’s room or on her door, or addressed to her—especially if she were singled out as the one who informed the whites of Beethoven’s black ancestry. That crosses the line to become targeted harassment of a particular individual, which I think can always be prohibited, especially when it involves an invasion of the student’s dormitory room, her campus home. Posting the cartoon in the quasi-public area of a predominantly black dormitory—just barely—makes it a provocative statement, and a collective assault rather than a personal one. But it’s a close question. The balance may tip the other way if the dormitory is very small, if the inhabitants are exclusively black, if they constitute a tiny and isolated fraction of the student body, or if the incident occurs in a context of severe or pervasive racial intimidation on the particular campus.

The third example simply acknowledges that provocative statements can be answered and that rules against a “heckler’s veto” should not be extended to preclude effective responses by the victims of racism. The fourth example illustrates first amendment protection of the classroom as a place where students, in pursuit of knowledge, must be permitted to discover error. It too illustrates an opportunity for more speech—this time perhaps more compelling, because more immediate—in a setting where the university can (and under the fourteenth amendment may be required to) structure the classroom framework for discussion to encompass the perspective of sexism’s or racism’s victims.

The fifth, sixth, seventh, and eighth examples all share several important characteristics that contradict the asserted values of free expression. Even if they contribute in some doubtful way to political, moral, or cultural debate or to the perpetrator’s self-realization, they neither advance knowledge, seek truth, expose govern-

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of the non-neutral matrix of politics and law.

See supra note 11.


I realize that the concept of academic freedom and the values that it promotes may complicate this requirement.
ment abuses, initiate dialogue, encourage participation, further tolerance of divergent views, nor enhance the victim’s individual dignity or self-respect. In addition, they often inflict real, immediate, and irreparable harms. The speakers target a particular individual or a small group of individuals for intimidation or harassment on the basis of membership in a group whose identifying characteristic—sex, race, religion, and sexual orientation—has often been used by governments and other dominant actors to degrade and deny the equal humanity of those who belong to the disfavored group.235 In the fifth example, the speakers invade the victims’ home, destroy their sense of physical and psychological security, and forcibly confront them with prejudice transformed from group defamation to individual verbal abuse. In the sixth example, the speakers hurl words as weapons of assault, and impliedly threaten further, direct, immediate, or serious physical violence from which the victim may, or may not, be able to escape.236 In the seventh example, the victim’s home is not invaded, nor (by hypothesis) is she subjected to fear for her physical safety. But whether or not she is actually present in the football stadium when her name is announced, the speakers have selected her for potentially crippling psychic injury, inflicted in a public setting where the harm is immediate and the supposed anodyne of more speech is, in any practical sense, both irrelevant and totally foreclosed.237

235 Thus, the harm is greater than if the victims were targeted on the basis of other personal characteristics. See Stanford Interpretation, supra note 17, at 2, comment 1 (harassment based on such characteristics as race, sex, religion, or sexual orientation reinforces “socially pervasive invidious discrimination” and is historically linked to physical violence).

Neither my proposals nor the Stanford policy would prohibit the racist speech that led to the recent, widely reported expulsion of a Brown University student, because his remarks would not constitute harassment directed at any particular individual. See Battling Bias, Campuses Face Free Speech Fight, N.Y. Times, Feb. 20, 1991, at B9, col. 1; Student at Brown Is Expelled Under a Rule Barring ‘Hate Speech,’ N.Y. Times, Feb. 12, 1991, at A17, col. 1.

236 Cf. S. Brownmiller, Against Our Will: Men, Women and Rape 15 (1975) (“rape . . . is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear”) (emphasis in original).

237 This example is distinguishable from Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988), because the victim—who also differs because she is a private individual, not a public figure—suffers not just individual emotional harm, but discriminatory harassment that interferes with her educational rights. Comparing the cases demonstrates the practical effect of shifting the line between protected and unprotected speech in order to protect victims against harassment that is based on suspect characteristics like sex and religion, occurs in the university setting, and is inflicted in a manner that makes serious interference with equal education virtually inevitable.
The eighth incident is more troubling, and may seem closer in nature to the first four. The victim is not confronted in his home, not threatened with physical violence, not subjected to public humiliation, and may have a chance to reply. But (again, by hypothesis) he is an unwilling listener subjected to direct, face-to-face verbal assault based upon his activities and his sexual orientation. Even if this speech verges on the political, it still constitutes targeted verbal harassment of a particular individual because of a personal characteristic that has been treated as despicable by political majorities (and even by the Supreme Court\textsuperscript{238}). He is, at least momentarily, an unwilling captive listener\textsuperscript{239} whose own rights to self-determination and to educational equality are devalued if we insist that he absorb the psychic harm to protect the freedom of the perpetrator.

In the last four examples, each of the speakers acts intentionally—not casually or negligently—for the purpose of inflicting harm on the victims. In each instance, a reasonable observer would be likely—even compelled—to conclude that the expression involved is almost certain not only to inflict serious psychological injury, but to interfere with the victim's educational rights. A theory of the first amendment that justifies privileging such speech by reference to values of content or viewpoint neutrality is vulnerable to the charge that, whatever its abstract virtues, in the real world it promotes prejudice, constraint, and conformity rather than tolerance, liberty, and diversity. In the name of abstract and spurious gains for free speech and democracy, it permits and even encourages the infliction of devastating, unnecessary, and unjust harms on real people.\textsuperscript{240} Regulation of the last four examples of the cate-


\textsuperscript{239} Cf. Lehman v. Shaker Heights, 418 U.S. 298, 304 (1974) (treating bus passengers as "captive audience" unable to leave without suffering unreasonable losses). Arguably, the harassed student has a basic right to remain on campus without suffering this harm. If he may walk away without being followed or taunted, however, the first amendment may require him to do so. See Erznoznik v. Jacksonville, 422 U.S. 205, 209-11 (1975).

\textsuperscript{240} Even Professor Tribe, generally an advocate of broad first amendment freedoms, believes in some limits:

The Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard. . . . [A] commitment to protect evenhandedly the expression of all sentiments should not degenerate from an abiding faith in the first amendment to an obsession with alluring abstractions or neutral principles. The first amendment need not sanctify the deliberate infliction of pain sim-
gory of prejudiced speech fulfills the balancing test: it is necessary to further the compelling interest in protecting the victims’ first and fourteenth amendment rights to equal liberty and equal education.241

By inductive reasoning, then, we can generalize principles to apply to future cases. Universities may prohibit and punish direct verbal assaults on specific individuals—severe or pervasive harassment based on membership in a group whose identifying characteristic is practically or historically linked to serious and persistent prejudice242—if the speaker intends to do harm and if a reasonable

ploy because the vehicle used is verbal or symbolic rather than physical.
L. Tribe, supra note 86, at 856.


242 The categories included in the California ACLU policy are sex, race, disability, religion, sexual orientation, alienage, and national or ethnic origin.

The policy, a document drafted by a committee and redrafted as it was enacted by three separate ACLU affiliate boards of directors, does not precisely reflect my views even though I helped to write it. As this Article goes to press, the policy is under review. In its current form, a preliminary statement declares that universities “should not bar the ability of professors to teach their philosophies or students to express their views no matter how offensive, but must instead focus on speech or expression used as a weapon to harass specific victims.” See ACLU of California, Policy Concerning Harassment on College Campuses (1990).

The ACLU policy itself states:

Campus administrators are obligated to take all steps necessary within constitutional bounds to minimize and eliminate a hostile educational environment which impairs access of protected minorities to equal educational opportunities. Campus administrators must: speak out vigorously against expressions of hatred or contempt based on race, sex, religion, sexual orientation, national or ethnic origin, alienage, or disability; promote equality and mutual accommodation and understanding among these groups and the balance of the community (including steps to assure diversity within the faculty, administration, staff, and student body and to incorporate into the curriculum and extra-curricular activities educational efforts to reduce racism and other forms of discrimination); and eliminate discriminatory educational policies, practices and procedures that exist on the campuses. Campus administrators may not, however, enact campus codes of conduct prohibiting discriminatory harassment of students on the basis of speech or expression unless at a minimum all of the following conditions are met:

1. The code of conduct reaches only speech or expression that:
   a) is specifically intended to and does harass an individual or specific individuals on the basis of their race, sex, religion, sexual orientation, national or ethnic origin, alienage, or disability;
   b) is addressed directly to the individual or individuals whom it harasses; and
   c) creates a hostile and intimidating environment which the speaker knows or reasonably should know will seriously and directly impede the educational opportunities of the individual or individuals to whom it is directly addressed.
person would recognize the potential for serious interference with the victim’s educational rights. I would add further limiting principles as well: that sanctions, proportionate to the harm intended and done, may be imposed only when they are the least restrictive means available to discourage prejudiced harassment; that harassment must be clearly evident to an objective observer; that the incident or incidents must be highly likely to produce serious psychological harm and a hostile or intimidating educational environment; and that university regulations must be accompanied by specific illustrations of punishable harassment that warn students in advance of the types of expressive acts that fall within the prohibited zone. In doubtful cases, a presumption in favor of free speech should prevail.\(^2\) In any event, regulations that prohibit prejudiced expression directed at individual students should not limit campus debates, speeches, or demonstrations, classroom discussions, or conversations among students, unless the circumstances clearly show that the speakers intentionally singled out particular individuals for discriminatory harassment.

VI. Conclusion

Everything I have written here is open to misinterpretation. It is not easy to relinquish the heroic ideal of the first amendment guarantee of free speech, or to acknowledge that our society and our laws too often have chosen the victims of prejudice and injustice to carry the burdens of that ideal. Even to suggest reimagining the first amendment is, in some circles, tantamount to heresy. The regulations I propose are easy to attack from a traditional libertarian perspective; cries of vagueness, overbreadth, and chilling effect

\(^2\) The code of conduct is enforced in a manner consistent with due process protections (including the right of any individual charged with violation to notice and a hearing), contains specific illustrations of expected occurrences which demonstrate when the policy does or does not apply, is proportionate to the gravity of the violation, and does not impose prior restraint upon expression. Id. at 2-3.

\(^{143}\) I recognize that this limitation risks moving the line between protected and unprotected speech back toward its hypothesized original position and tolerating racist or other prejudiced speech that should, in fact, be forbidden. I include it because I think university regulations in this complex area of constitutional rights should incorporate a “tiebreaker” that favors traditional notions of free speech when the factfinder is unable in good faith to locate the place on the continuum where the victim’s fundamental rights supersede those of the speaker. I believe that if we try, in most instances we can distinguish discriminatory verbal harassment from merely “offensive or disagreeable” speech. The persistence of racism, sexism, and homophobia make the effort a moral imperative.
can be heard not far in the distance. From the perspective of the victims of prejudiced speech, however, my performance may seem to fall short of my original premise: I have declared bold new visions of constitutional rights and offered only a timid and limited implementation of them—a pattern of injustice that the victims of racism have seen before. This discussion about the meaning and interplay of constitutional rights and moral values is an unfinished project.

But it does mean this much: that even as a liberal and a civil libertarian, I believe we are long overdue to recognize that the social and individual interests in deterring racism, sexism, and similar prejudices and in ensuring that college students have a true and equal opportunity to learn are at least as important as the interests in preventing criminal behavior, physical violence, or employment discrimination that have already been found sufficient to justify limited regulation of free expression. We can expand our vision of the first amendment beyond the libertarian paradigm—the speaker as the victim of governmental repression—to acknowledge a more complicated world. We can regulate speech to combat the harms done when speakers themselves perpetuate prejudice and repression: silencing the voices of targeted victims, undermining equality, and decreasing both individual liberty and democratic dialogue. A more complex theory of free speech, informed by social context and lived experience, can take the harms of racist speech seriously and allow us to weave a remedy into our continuing constitutional story of individual rights.

Nothing in my proposal would change the calculus of benefits and burdens in most areas of first amendment law. Outside the campus, when fourteenth amendment concerns are not present to reinforce first amendment values of equality and when the targets of discriminatory speech may ignore or evade it without sacrificing their own rights, democratic pluralism and liberal theory would triumph as before. The Village of Skokie would still be required to permit Nazis to march and chant their racist slogans in the public streets. The State of Alabama would still have to endure the March on Selma and the searing eloquence of Martin Luther King, Jr. The United States and its states and cities and towns would still be prohibited from censoring raucous musicians, irreverent artists, deceitful politicians, pornographic publishers, or demonstrators against wars in Indochina or the Persian Gulf. And the university would have to countenance them all—unless they pur-
sue their message by targeting specific individuals for harassment that threatens to destroy the fourteenth amendment right to educational equality and the first amendment right to equal liberty and equal voice.

That may not be enough to exorcise Banquo's ghost. But it is a beginning.