Essay

DEFENDING THE FIRST AMENDMENT FROM ANTIDISCRIMINATION LAWS

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Of late, leading legal scholars have argued that the First Amendment should not stand in the way of restrictions on freedom of expression intended to alleviate discrimination. A powerful, normative defense of the First Amendment from the competing claims of the antidiscrimination agenda is therefore greatly needed.

This Essay seeks to provide the outlines of such a defense. Part I of this Essay argues that an unregulated marketplace of ideas is preferable to government restrictions on freedom of expression, not because the marketplace of ideas is efficient and always leads to benign results, but because the alternative of government regulation is far worse. Part II of this Essay defends the ability of judges to enforce a relatively neutral conception of freedom of expression from Stanley Fish and others who argue that 'there is no such thing as free speech.' Fish and his allies ignore cultural and social incentives and restraints that prevent judges from simply voting in favor of their preferred political outcomes. Part III of this Essay critiques scholars who argue that courts should tolerate partial restrictions on freedom of expression until certain egalitarian goals are met. Such views rely on a naive conception of politics that bears little relation to how political markets actually work. Part IV of this Essay argues that if the courts were to allow the First Amendment to be subordinated to antidiscrimination concerns, authoritarianism would inexorably follow--a conclusion supported by experience with speech restrictions on college campuses and, recently, in Canada. This Essay concludes by pointing out that those legal scholars who are most eager to restrict the First Amendment are ironically among those most in need of its protections.

Introduction

Three years ago, the Supreme Court in Boy Scouts of America v. Dale [FN1] held that the First Amendment right of expressive association trumped a public accommodations statute that prohibited discrimination based on sexual orientation. [FN2] Dale has received a great deal of attention in law reviews, [FN3] but almost all of the writing on Dale has focused on the scope of the expressive association doctrine. Commentators meanwhile have largely ignored the broader issue of the growing conflict between antidiscrimination laws and the First Amendment. [FN4]

This conflict is manifesting itself in a wide range of contexts. For example, in Berkeley, California, the federal Department of Housing and Urban Development (HUD) threatened to sanction three neighborhood activists for organizing community opposition to a plan to turn a rundown hotel into a homeless center. [FN5]HUD alleged that the activists had violated the Fair Housing Act by interfering with a project that would serve a group of people who would be disproportionately mentally ill or recovering substance abusers, protected groups under the Act. [FN6] HUD spokesperson John Phillips, trying to parry free speech concerns raised by the media, instead stoked them. [FN7] "To ask questions is one thing," Phillips told reporters, "To write brochures and articles and go out and actively organize people to say, 'We don't want those people in those structures,' is another." [FN8]

In San Francisco, California, Krissy Keefer is using an antidiscrimination law to challenge the artistic autonomy of the San Francisco Ballet. [FN9] She is suing the ballet for height and weight discrimination for refusing to accept her daughter Fredrika into its pre-professional program. [FN10] Fredrika is of average height and weight, while modern ballet's aesthetic standards require that dancers be tall and lithe. [FN11]

In Denver, Colorado, the city government refused to issue a Columbus Day parade permit unless the organizers signed an agreement stating that "there can be 'no references, depictions, or acknowledgment of Christopher Columbus' during the parade . . . [and] no . . . speeches or wreath laying for Christopher Columbus will be conducted." [FN12] The city was responding to pressure from American Indian activists, who alleged that a parade celebrating Columbus would create an illegal "hostile public environment." [FN13]

In Minneapolis, Minnesota, a group of librarians complained of sexual harassment because patrons using library computers viewed images the librarians saw and found offensive. [FN14] The Equal Employment Opportunity Commission found that the librarians had "probable cause" to pursue their claim. Because of this and similar cases, public and private libraries throughout the United States are under pressure to install filtering software on their computers, lest a librarian inadvertently view offensive material and file a sexual harassment lawsuit. Defining the issue precisely backwards, a representative of the National Organization for Women told the New York Times that she

wondered "how far First Amendment rights may go before they infringe on sexual harassment laws." [FN15]

In Eugene, Oregon, the state Newspaper Publishers Association published a list of eighty words and phrases that its members should ban from real estate advertisements to avoid liability under federal, state, or local fair housing laws. [FN16] The forbidden words and phrases include language that signifies an obvious intent to violate fair housing laws (e.g., "no Mexicans"), but also language that is merely descriptive, such as "near church" or "walking distance to synagogue." [FN17] Fair housing officials overzealously interpret such phrases as expressing an illicit preference for Christians and Jews, respectively. [FN18] The list also includes phrases that some fair housing officials believe are used as codes to discourage minorities ("exclusive neighborhood," "board approval required") or families with children ("quiet tenants," "bachelor pad"). [FN19] There are a number of other phrases that did not make the Oregon list, but that some realtors avoid nonetheless for fear of liability, including the following: "master bedroom" (either sexist or purportedly evocative of slavery and therefore insulting to African Americans), "great view" (allegedly expresses preference for the nonblind), and "walk-up" (supposedly discourages the disabled). [FN20]

Religious conservatives have also jumped on the antidiscrimination bandwagon. In Wellsville, Ohio, Dolores Stanley celebrated her new job as manager of the local Dairy Mart by removing Playboy and Penthouse from the store's shelves. [FN21]"It goes against everything I believe in as a Christian," Stanley said. [FN22] "There's no way I could participate in that." [FN23] Stanley's superiors at corporate headquarters, attempting to exercise Dairy Mart's First Amendment right to sell legal magazines, told Stanley to replace the periodicals. [FN24] She refused and was fired. The American Family Association, a conservative anti-pornography organization, represented Stanley in a lawsuit against Dairy Mart for sex and religious discrimination and for subjecting her to a "hostile work environment." [FN25] The case settled before trial for a sum "well into the six figures." [FN26]

These anecdotes are merely a few examples of antidiscrimination laws' threat to civil liberties. [FN27] This Essay argues that the resolution of this conflict should favor civil liberties. Given the moral authority of antidiscrimination law in a society still recovering from a viciously racist past, writing an essay critical of many of antidiscrimination law's applications is necessarily perilous, the law professor's equivalent of a politician disparaging mom and apple pie. The laudable goal of the ever- broadening antidiscrimination edifice is to achieve a fairer, more just society. Yet even, or perhaps especially, well-meaning attempts to achieve a praiseworthy goal must be criticized when the means used to achieve that goal become a threat to civil liberties.

The student who callously utters a racial epithet, the bigots who refuse to admit Jews to their clubs, the co-worker who tells obnoxious sexist jokes, and the neighbor who lobbies against housing for the mentally ill--the actions of these individuals can be infuriating. But the alternative to protecting the constitutional rights of such scoundrels is much worse: the gradual evisceration of the pluralism, autonomy, and check on government power that civil liberties provide.

Nevertheless, the First Amendment's protection of civil liberties from laws reflecting antidiscrimination concerns has come under withering attack from leading legal scholars. [FN28] History teaches that when constitutional provisions lose the support of the public, and especially the support of the legal elite from which federal judges are drawn, those provisions are enervated. Courts will continue to pay lip service to such provisions, but will fail to properly enforce them. [FN29]

Given this dynamic, the prospects for continued judicial protection of civil liberties when they conflict with antidiscrimination concerns are uncertain. Over the last two decades, radical scholars, including many feminists and critical race theorists, have vociferously attacked the First Amendment as a barrier to the government's ability to pursue sex and racial equality. [FN30] Anti-free speech feminists would ban what they call "expressive means of practicing inequality . . . such as academic books purporting to document women's biological inferiority to men . . . or [claiming] that reports of rape are routinely fabricated." [FN31] Critical race theorists, meanwhile, suggest that racist expression is "so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse." [FN32]

Prominent mainstream liberal law professors, such as Owen Fiss, Frank Michelman, and Cass Sunstein, increasingly echo the feminists' and critical race theorists'views. [FN33] The liberal left's prior consensus favoring freedom of speech arose from a belief that a robust, uninhibited political discourse was not only good in itself and of instrumental value to a functioning democracy, but was also beneficial to liberalism's constituencies. [FN34] Left-liberal solicitude for free speech in part arose because the great free speech cases for most of the twentieth century involved left-wing constituencies under assault from the government.

Anarchists, communists, labor organizers, socialists, syndicalists, pacifists, and civil rights activists all benefitted from the First Amendment. [FN35] Today, by contrast, "speech cases are often won by corporations, the media, and other powerful insiders." [FN36] According to feminist scholar Mary Becker, "[p]owerful private actors, such as pornographers and the media, are free to control, suppress, and distort the speech of others, and when they do, political processes cannot redress it." [FN37]

Liberal legal scholars' growing suspicion of freedom of speech, combined with their strong egalitarian commitments, leads to a powerful impetus to seek to weaken civil liberties protections against antidiscrimination laws. A powerful, consistent, normative defense of the First Amendment is therefore greatly needed. This Essay seeks to provide the outlines of such a defense.

Part I of this Essay defends the "marketplace of ideas" paradigm from its critics. This author concludes that an unregulated marketplace of ideas should be defended, not

because the marketplace of ideas is efficient and always leads to benign results, but because the alternative of government regulation is far worse. [FN38]

Part II of this Essay defends freedom of speech from Stanley Fish's claims that "there is no such thing as free speech," [FN39] and that defenses of freedom of expression are mere substitutes for particular political agendas. Fish argues that courts therefore should not sacrifice values such as equality and human dignity to free speech concerns. [FN40] Part II argues that judges can in fact defend a relatively neutral conception of free speech, and, moreover, that if there really is no such thing as free speech, then there is no such thing as equality or human dignity, either.

Part III of this Essay critiques mainstream liberal academics, such as Professor Andrew Koppelman, who argue that courts should tolerate partial restrictions on freedom of expression until certain egalitarian goals are met. [FN41] Such views rely on a naive conception of politics that bears little relation to how political markets actually work.

Part IV of this Essay rebuts those who argue that hate speech and discrimination cause such serious moral harm that civil libertarian concerns simply must be pushed aside when combating these evils. If the courts adopted such a view authoritarianism would inexorably follow, a conclusion supported by experience with speech restrictions on college campuses and, recently, in Canada.

This Essay concludes by pointing out that those legal scholars who are most eager to restrict the First Amendment are among those most in need of its protection.

I. Defending the Marketplace of Ideas

The primary civil libertarian defense of freedom of expression from government suppression is that such freedom is necessary to ensure the existence of a robust marketplace of ideas. More effusive advocates of the marketplace of ideas paradigm suggest that freedom of expression helps ensure the triumph of reason over prejudice, of enlightened public opinion over entrenched political and economic power. [FN42] This argument has some force, given the notable successes of the marketplace of ideas in recent American history. As recently as the 1940s, Catholics and Jews were excluded from many universities, private clubs, and corporations, African Americans were segregated by law in the South and subjected to routine discrimination almost everywhere else, Japanese Americans were incarcerated in concentration camps, American Indian children were removed from their parents and forcibly assimilated in boarding schools, and male homosexuals were generally thought to be pedophilic perverts. The status of these groups has improved dramatically, due to social and political changes made possible only because the Constitution's guarantee of freedom of expression prevented defenders of the status quo from institutionalizing orthodox attitudes.

Nevertheless, at first blush the marketplace of ideas paradigm seems to be an inadequate justification for inhibiting government regulation of speech, especially if one thinks about it in economic terms. [FN43] The unregulated marketplace of ideas is highly imperfect,

and far less perfect than an unregulated economic market when it comes to protecting members of minority groups. A free economic market protects minorities from discrimination to some degree because businesspeople have an economic incentive to hire the best workers and obtain the most customers. [FN44] Meanwhile, minorities get relatively little protection in the marketplace of ideas.

The average citizen seeking an ideology to guide his voting and other political activity has virtually no incentive to seek and find truth, especially since his opinion is highly unlikely to be decisive on any given matter. [FN45] On the other hand, it makes perfect sense for citizens to take pleasure in supporting positions they find intuitively appealing despite their ignorance. When average citizens commit to an ideological position, they will normally adopt a position that either makes them feel good for some reason, or that sends a signal to their social cohort that they are "good people," regardless of the objective validity of the position.[FN46] The aggregation of votes by such "rationally irrational" voters is quite dangerous, especially for minority groups, which are often the subject of emotionally powerful but false myths, and against whom it often pays members of the majority to exhibit social solidarity. [FN47]

Even voters who seek the truth regarding particular issues will have difficulty finding it. The human mind is cognitively limited, and much more suited for certain tasks, such as pursuing economic self-interest, than for others, such as adopting sensible ideological positions. [FN48] As Nobel economics laureate Ronald Coase points out, "it's easier for people to discover that they have a bad can of peaches than it is for them to discover that they have a bad idea." [FN49] One can hardly explain the ubiquitous appeal of nationalism, for example, as an outcome of reason. [FN50] To take a relatively innocuous example, there is no rational reason for soccer fans worldwide to get into a frenzy when the team representing their nation wins the World Cup.

Meanwhile, opportunistic propagandists and demagogues find it beneficial to foment hatred based on false premises. As figures ranging from Adolf Hitler to Al Sharpton show, racist rabble-rousing can lead to public acclaim, and even grand political careers. While despised minorities can always find an economic haven even in a society where most employers discriminate against them, there is no escape for minorities if purveyors of racist ideas win out in the political process and capture the government. David Duke [FN51] poses far more danger to minorities than does Denny's. [FN52]

If anything, then, restrictions on speech that denigrate vulnerable groups are more likely to protect minorities and women over time than are laws banning discrimination in employment. [FN53] Free speech critics, though generally ignoring economic/public choice analysis, nevertheless manage to exploit the power of this point. Fiss, [FN54] Sunstein, [FN55] Morton Horwitz, [FN56] Jack Balkin, [FN57] and others [FN58] criticize liberal civil libertarians who vigorously oppose free market solutions to economic problems, especially in the employment discrimination context, but support an unregulated marketplace of ideas. If the government can make the economic marketplace fairer and more efficient, they ask, why can it not do the same for the less efficient speech marketplace?

One answer, provided by law and economics luminaries such as Ronald Coase, Richard Epstein, and Richard Posner, is that government regulation of the economic marketplace is at least as wrongheaded as government regulation of the marketplace of ideas. [FN59] Epstein argues in favor of both a robust First Amendment and the repeal of antidiscrimination laws that apply to private parties. [FN60] Indeed, he argues that the two policies are synergistic because he doubts that freedom of speech and of religion can ultimately be defended from civil rights laws once it is conceded that an antidiscrimination norm is appropriate in the employment and property area. [FN61]

But even liberal civil libertarians who oppose laissez-faire economics and support civil rights laws have a compelling rejoinder to advocates of censorship. Civil libertarians can recognize that the free marketplace of ideas is imperfect, but still ask the most important question in political economy, "compared to what?" [FN62] While much private speech is harmful, wrongheaded or dangerous, it's even more dangerous to put the government in charge of policing it. [FN63] The alternative to an unregulated speech marketplace is to permit government censorship, leaving "the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." [FN64] For good reason, civil libertarians believe that the government cannot be trusted with the power to establish an official orthodoxy on any issue, cultural or political, or to ensure the 'fairness' of political debate. As one scholar puts it: [F]reedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of government determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense. [FN65]

Freedom of expression is necessary to prevent government from entrenching itself and expanding its power at the expense of the public. As Seventh Circuit Judge Frank Easterbrook wrote in an opinion striking down an anti- pornography statute inspired by academic feminists, "[f]ree speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech . . . . Without a strong guarantee of freedom of speech, there is no effective right to challenge what is." [FN66] First Amendment scholar John McGinnis likewise notes that "government officials have a natural tendency to suppress speech antithetical to their interests . . . and that the free flow of information related to politics and culture threatens government hierarchies both by rearranging coalitions and revealing facts that will prompt political action." [FN67]

The framers of the American Constitution recognized that government, rather than inherently serving the public interest, is susceptible to capture by factions that desire to use the government for their own private ends, a phenomenon known in modern academic literature as "rent-seeking." [FN68] The Constitution and Bill of Rights attempted to establish a system of government that would limit such rent-seeking. [FN69] The First Amendment's protection of freedom of expression was particularly important in this regard. The Founders believed that once in power, factions would exploit any government authority to regulate speech in self-serving ways, to promote their own agendas, and/or to repress dissenting opinions. [FN70] The Founders' insights have been confirmed by experience around the world, and by modern research into human political

behavior by economists and evolutionary psychologists. [FN71] Permitting government regulation of information relating to politics or culture would come at a very high price to society. [FN72]

Contrary to the insinuations of some critics, [FN73] then, civil libertarians recognize that freedom of expression can create many negative side effects, or, as economists put it, negative externalities. [FN74] But civil libertarians, aware of the voracious pursuit of power and self-interest endemic to politicians and their rent-seeking allies, make the cold calculus that the negative externalities caused by government regulation are likely to outweigh any negative externalities that arise from freedom of expression. [FN75] This is especially true in the United States. By contrast to more statist social systems, the United States has largely maintained a Tocquevillian nature, where political and cultural innovations arise from the grassroots, not from the government. [FN76] Freedom of expression is therefore necessary for economic and cultural progress. [FN77]

II. Deconstructing Stanley Fish

Some scholars, most prominently Stanley Fish, argue that the ideal of neutral protection of freedom of expression is illusory. [FN78] In the United States, the task of interpreting the First Amendment falls mainly to the judiciary. Fish argues that judicial invocation of freedom of expression merely masks politically-motivated actions. The only question worth talking about, therefore, is who will get the power to censor whom. [FN79]

Fish is correct that judges are not Platonic guardians immune from political motivation. Yet that does not mean that judges are motivated solely, or even primarily, by politics. Academics have persuasively critiqued law and economics scholars for relying on too narrow a view of human nature. [FN80] In particular, economists tend to treat individuals as rational utility- maximizers, but ignore the power of psychology and social norms to shape behavior. Similarly, Fish ignores the role of psychology and norms in shaping judicial behavior.

Judges, who are trained from their law school days that the role of the judiciary is to fairly enforce constitutional rights, will find their self- image bound up in their ability to eschew personal prejudices and act fairly. [FN81] This has practical consequences. For example, federal judges in the late nineteenth century and mid-twentieth century protected the rights of Chinese immigrants and African Americans, respectively, even though the judges often had little sympathy for those groups' aspirations, and even though local political culture was strongly hostile to those groups. [FN82] Political biases and temptations will always exist for judges, but they will be tempered by the norm of judicial objectivity--unless Fish and his colleagues succeed in destroying that norm, by persuading judges that law and politics are indistinguishable.

Another irony is that Fish and his allies attack claims of neutrality by "employ[ing] an epistemology that denies all eternal verities." [FN83] Simultaneously, however, "they establish current notions of racial and gender equality as an unquestionable, transcendent truth." [FN84] For example, Fish writes that: free speech" is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors that name when we can, when we have the power to do so, because in the rhetoric of American life, the label "free speech" is the one you want your favorites to wear. [FN85]

Since the concept of freedom of expression is merely a political device to promote particular agendas, there is no reason to suffer racist and sexist expression in its name, given the dangers such speech poses to the dignity and equality of its targets. [FN86] Yet, if we accept Fish's view that there is "no such thing as freedom of speech" because everything comes down to politics, then there is no such thing as "dignity" or "equality" either. Those who argue that purportedly illusory notions of freedom of speech should be sacrificed to equalitarian commitments that are based on notions at least as delusive cannot possibly explain why.

III. The Dangers of "Temporary" Speech Restrictions

Some scholars recognize the dangers inherent in governmental regulation of speech, but call for limited censorship to achieve what they consider particularly important antidiscrimination ends. Professor Andrew Koppelman, for example, argues that there should be a presumption in favor of freedom of expression because "[r]acist speech may be substantively worthless, but outlawing it would give the state the power to decide which political views are worthless because they are racist." [FN87] Although Koppelman acknowledges that government power to censor speech can be "easily abused," he adds that censorship can be justified if the speech in question is "exceedingly harmful." [FN88] In such cases, "a significant, but limited,infringement on free speech" [FN89] would be appropriate.

Koppelman would discard speech restrictions when they have served their purpose of achieving "workplace equality" for previously excluded minorities and women. [FN90]This suggestion shows the dangers of political philosophy divorced from political economy. Koppelman never clarifies how the government either could in theory or would in practice determine objectively which speech is sufficiently harmful to merit censorship. With the First Amendment nullified, censorship decisions would ultimately be made through ordinary politics, where the problems of voter ignorance, rent-seeking, and the like would arise. [FN91] In the long run, speech restrictions would likely serve the interests of dominant political factions, with no guarantee that those factions would represent the progressive political forces supported by Koppelman. [FN92]

Moreover, even assuming speech restrictions could be limited to the goals set out for them by Koppelman, he provides no guidance on how speech restrictions would ultimately be abolished once they are in place. He does not explain how Congress or state legislatures will reach a consensus that the goals of speech restrictions have been achieved. Koppelman also does not explain how legislators would override the lobbying power of the interest groups that would inevitably coalesce to defend the restrictions. Congress, for example, has not been able to summon the will to permanently abolish mohair subsidies enacted to ensure fabric availability for World War I army uniforms. [FN93] It is hardly likely to muster the courage to abolish entrenched censorship rules.

IV. The Dangers of Unmitigated Egalitarianism

Some legal scholars would concede many of the points made in this Essay, but nevertheless argue that antidiscrimination concerns should trump freedom of expression because the offense taken by those who are the targets of group obloquy is an especially serious moral harm. [FN94] For example, many distinguished academics argue that because of the offense taken by the listener, even core First Amendment protection of freedom of speech must yield to "hate speech" laws targeting malicious (and sometimes merely inadvertently offensive) speech. [FN95]

Punishing expression because it creates offense has totalitarian implications, as has been amply demonstrated on university campuses that have prohibited their faculties and students from offending each other in politically incorrect ways. Sarah Lawrence College, for example, punished a student for "inappropriate laughter" after the student snorted when his roommate called another student a "fag." [FN96] Other colleges have banned inconsiderate jokes, speech that threatens a student's self-esteem, inappropriate eye contact, and licking one's lips in a provocative manner. [FN97] More generally, campus intolerance of any speech deemed offensive to designated victim groups has led to serious miscarriages of justice, as campus activist groups utilize speech codes to suppress dissent from politically correct orthodoxy. [FN98] Another egregious example of the crackdown on freedom of expression on campus is the theft and destruction of campus newspapers containing stories or advertisements deemed offensive, the modern campus equivalent of book burnings. [FN99] This practice has been both widespread and generally implicitly tolerated [FN100] by university administrations even though it evinces a decidedly authoritarian intolerance for open debate. Private universities have the right to enact and enforce foolish policies. But campus authoritarianism provides a scary glimpse at the potential future of antidiscrimination policies that will be pursued at all levels of American government if civil liberties protections are not maintained.

A glance at events in Canada, where the sensitivity police have made more gains than in the United States, reveals more scary precedents. In 1990, the Canadian Supreme Court upheld hate speech laws against a freedom of speech defense. [FN101] James Keegstra, a public high school teacher, consistently propagated Holocaust denial and his anti-Semitic views to public high school students, despite warnings from his superiors to cease. Even in the United States, Keegstra could be disciplined or even fired for ignoring his obligations to stick to his assigned curriculum, and for using his classroom as a forum for promoting hatred. Instead of stopping there, the government charged and convicted Keegstra of the criminal offense of "willfully promoting hatred against an identifiable group" in violation of Canada's hate crimes law, which carries a penalty of up to two years in jail. [FN102] On appeal, the Canadian Supreme Court upheld the conviction, despite the Canadian Constitution's protection of freedom of expression. Criminalizing hate speech, the court stated, was a "reasonable" restriction on expression, and therefore passed constitutional muster. [FN103]

Two years later, the Canadian Supreme Court held that obscenity laws were unconstitutional to the extent they criminalized material purely based on its sexual content. However, any "degrading or dehumanizing" depiction of sexual activity, including material that the First Amendment would clearly protect in the United States, was deprived of constitutional protection in order to protect women and other groups from discrimination. [FN104] The opinion drew heavily on language from a brief co-authored by American feminist and leading censorship advocate Catherine MacKinnon.

The inevitable result of these decisions has been the gradual but significant growth of censorship and suppression of civil liberties across Canada. The Canadian Supreme Court, for example, turned down an appeal by a Christian minister convicted of inciting hatred against Muslims. [FN105] An Ontario appellate court had found that the minister

did not intentionally incite hatred, but was properly convicted for being willfully blind to the effects of his actions. [FN106] Robert Martin, a professor of constitutional law at the University of Western Ontario, commented that he increasingly thinks that "Canada now is a totalitarian theocracy. I see this as a country ruled today by what I would describe as a secular state religion [of political correctness]. Anything that is regarded as heresy or blasphemy is not tolerated." [FN107]

Indeed, it has apparently become illegal in Canada to advocate traditionalChristian opposition to homosexual sex. For example, the Saskatchewan Human Rights Commission ordered the Saskatoon Star Phoenix newspaper and Hugh Owens to each pay $4,500 (appoximately $3,000 U.S.) to each of three gay activists as damages for publication of an advertisement placed by Owens conveying the message that the Bible condemns homosexual acts. [FN108] The ad conveyed this message by citing passages from the Bible, with an equal sign placed between the verse references and a drawing of two males holding hands overlaid with the universal nullification symbol, a red circle with a diagonal bar.

In another incident, after Toronto print shop owner Scott Brockie refused on religious grounds to print letterhead for a gay activist group, the local human rights commission ordered him to pay the group $5,000 (approximately $3,400 U.S.), print the requested material, and apologize to the group's leaders. Brockie, who always accepted print jobs from individual gay customers, and even did pro bono work for a local AIDS group, is fighting the decision on religious freedom grounds. [FN109] An appellate court has upheld the fine, though it did add that it would have ruled the other way had the material in question impinged more directly on Brockie's "core beliefs," such as a publication advocating homosexual behavior. [FN110] As of this writing, another appeal is pending, with Brockie already having spent $100,000 (approximately $68,000 U.S.) in legal fees. [FN111]

Any gains the gay rights movement has received from the crackdown on speech in Canada have been pyrrhic, because as part of the Canadian government's suppression of obscene material, Canadian customs officials frequently target books with homosexual content. Customs seizures have included Pornography, a book by MacKinnon collaborator and prominent feminist Andrea Dworkin, and several serious novels. A gay organization had to spend $14,000 (approximately $9,600 U.S.) in legal fees to force customs agents to allow The Joy of Gay Sex into the country. Police raids searching for obscene materials have disproportionately targeted gay organizations and bookstores. [FN112] Two gay activists at the University of Toronto were fined for selling Bad Attitude, a lesbian magazine with sadomasochistic content. [FN113] According to the ACLU, "more than half of all feminist bookstores in Canada have had materials confiscated or the sales of some materials suspended by the government." [FN114] The Canadians are, therefore, living proof of the way progressive censorship rules can come back to bite the constituencies that endorsed them.

A great deal more censorship in Canada seems inevitable. British Columbia, for example, has an extremely broad hate speech law that prohibits the publication of any

statement that "indicates" discrimination or is "likely" to expose a person or group or class of persons to hatred or contempt. [FN115] Professor Sunera Thobani of the University of British Columbia, a native of Tanzania, faced a hate crimes investigation under this statute after she delivered a vicious diatribe against American foreign policy. Thobani, a Marxist feminist and multiculturalist activist, remarked that Americans are "bloodthirsty, vengeful and calling for blood." [FN116]

The hate crimes law was meant to protect minority groups from hate speech, but in this case was invoked to protect Americans. The police revealed the investigation to the media, despite a general policy against doing so, because, as a hate crimes investigator explained:

> Here we have a complaint against someone who is obviously from a visible minority, whom the complainant feels is promoting hate. Normally, people think it's a white supremacist or Caucasians, promoting hate against visible minorities. . . .

We want to get the message out that it's wrong, all around. [FN117] If Americans are going to preserve their civil liberties, then, they will need to develop thicker skin. One price of living in a free society is toleration of those who intentionally or unintentionally offend others. The current trend, however, is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination." Yet to the extent the legal system gives people a remedy for offense, they are more likely to feel offended. This is true for two reasons. First, as economists point out, if you subsidize something, you get more of it. [FN118] If the legal remedies of antidiscrimination law, particularly monetary remedies, subsidize feelings of outrage and insult, we will get more feelings of outrage and insult, a net social loss. Economists have also noted the psychological endowment effect: once people are endowed with a right, they lose far more utility once that right is interfered with than if it had never been granted at all. [FN119]

Unfortunately, Americans increasingly coddle and even reward the hypersensitive and easily outraged, perversely encouraging more people to be hypersensitive and easily outraged. In one notorious incident, a Washington, D.C. official was forced to resign for using the word "niggardly" at a meeting because the word sounded like a racial epithet, even though it is actually an innocuous synonym, of Scandinavian origin, for "miserly." [FN120] It should hardly be surprising, then, that people are suing and winning damages when offended by colleagues at work, [FN121] when excluded by a private club [FN122] or turned down as a roommate, [FN123] or for being fired from a church-run school after going back on their promise to obey church doctrine. [FN124]

Preserving liberalism, and the civil liberties that go with it, requires a certain level of virtue by the citizenry. Among those necessary virtues is tolerance of those who intentionally or unintentionally offend, and sometimes, when civil liberties are implicated, who blatantly discriminate. A society that undercuts civil liberties in pursuit of the "equality" offered by a statutory right to be free from all slights will ultimately end

up with neither equality nor civil liberties. The violation of civil liberties required to achieve this kind of equality will diminish constitutional restraints on the government, and the additional power garnered by the government, introduced for noble purposes, will end up in the hands of people who use it to promote their own interests. In these days of the "Oprahization" of public discourse, with even presidential candidates swearing that they feel the public's pain, asking for a measure of fortitude in the face of offense and discrimination is asking a lot. Yet, in the end, it is a small price to pay for preserving civil liberties.

Conclusion

Ironically, protecting freedom of expression from government regulation ultimately will benefit left-wing scholars who support censorship, such as radical feminists and critical race theorists, as much as anyone. These scholars advocate speech regulations while living primarily in the very left-wing academic world, where their views are only marginally out of the mainstream. Yet, if the First Amendment is weakened sufficiently by antidiscrimination law that the government gains the power to suppress speech more broadly, feminists and critical race theorists, as holders of views wildly at variance to those of the public at large, are likely to be among the first victims. [FN125] That leftists writing in a society that has long been and continues to be hostile to their ideology [FN126] would want to weaken the principle that government may not suppress expression because of hostility to its viewpoint seems counterintuitive, to say the least.

Indeed, many critical race scholars and feminists argue that America is innately and irredeemably racist and sexist. [FN127] One need not accept this vision to realize that the Critical Race and Radical Feminist Party, if such a thing existed, would not exactly sweep the American electorate anytime soon. [FN128] Because many critical race theorists and feminists claim to believe that America is so hostile to their values, they should find constitutional protections against the majority especially meaningful.

Indeed, if left-wing professors wish to preserve their own academic freedom, they will need to learn to be more tolerant of those whose speech they currently seek to suppress. For the last several decades, pressure to censor free speech on university campuses has come primarily from the left. The current war against terrorism, and the frequent dissent within the academy to that war, has shifted the dynamic, putting many radical professors on the defensive. The First Amendment, and
the values of academic freedom that it has fostered, will protect the vast majority of dissenters, but only because the radical's war against the First Amendment has as yet been largely unsuccessful.

Of course, left-wing censors imagine a world in which the government silences only their ideological enemies, and they advocate censorship as an integral part of a much broader scheme for reconstructing society along egalitarian lines. Yet, it should be a cardinal principle of political advocacy that one should not support granting the government regulatory powers that one would not want applied to oneself. This principle would not only reduce hypocrisy, but also remind political activists that politics is unpredictable, driven by power rather than morality. Power given to government is often unexpectedly ultimately used against those who advocated that the power be exercised against others. As William Graham Sumner remarked many years ago:

> The advocate of [government] interference takes it for granted that he and his asociates will have the administration of their legislative device in their own hands. . . . They never appear to remember that the device, when once set up, will itself be the prize of a struggle; that

> it will serve one set of purposes as well as another, so that after all the only serious question is: who will get it?" [FN129]

This is a lesson that academic advocates of censorship would do well to learn.

[FNa1]. Professor,George Mason University School of Law. B.A., 1988, Brandeis University;J.D., 1991, Yale University. Brian Frye and Jeffrey Jackson provided excellent research assistance. The Law and Economics Center at George Mason provided generous summer research funding. This Essay is based on several chapters of the book, You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws (2003).

[FN1]. 530 U.S. 640 (2000).

[FN2]. Id. at 659.

[FN3]. E.g., David E. Bernstein, The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes, 9 Wm. & Mary Bill Rts. J. 619 (2001) (discussing Dale's implications for affirmative action and speech codes); Dale Carpenter, Expressive Association and Anti- Discrimination Law After Dale: A tripartite Approach, 85 Minn. L. Rev. 1515 (2001) (proposing an approach that would preserve the core values of both antidiscrimination law and the expressive association doctrine); Erwin Chemerinsky & Catherine Fisk, The Expressive Interest of Associations, 9 Wm. & Mary Bill Rts. J. 595 (2001) (criticizing Dale for allowing groups to discriminate by claiming freedom of association); Richard A. Epstein, The Constitutional Perils of Moderation: The Case of the Boy Scouts, 74 S. Cal. L. Rev. 119 (2000) (calling for a broad interpretation of the right of expressive association); Daniel A. Farber, Speaking in the First Person Plural: Expressive Associations and the First Amendment, 85 Minn. L. Rev. 1483(2001)(tracing the evolution of the right of expressive association and discussing emerging issues in the doctrine); Nan D. Hunter, Accommodating the Public Sphere: Beyond the Market Model, 85 Minn. L. Rev. 1591 (2001) (discussing the need for a "social" theory of citizenship); Steffen N. Johnson, Expressive Association and Organizational Autonomy, 85 Minn. L. Rev. 1639 (2001) (defending Dale's preservation of the autonomy of private organizations); Andrew Koppelman, Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination, 23 Cardozo L. Rev. 1819 (2002) (denouncing the Dale opinion as "sheer lunacy"); David McGowan, Making Sense of Dale, 18 Const. Comm. 121 (2001) (criticizing the reasoning behind Dale); Michael S. Paulsen, Scouts, Families, and Schools, 85 Minn. L. Rev. 1917 (2001)(praising Dale's defense of private expressive associations).

[FN4]. But cf. David E. Bernstein, Trends in First Amendment Jurisprudence: Antidiscrimination Laws and the First Amendment, 66 Mo. L. Rev. 83 (2001) (using Dale as a starting point to discuss the conflict in a variety of contexts). When scholars recognize conflicts between the First Amendment and antidiscrimination laws in other contexts, they also tend to compartmentalize the issue, not recognizing the broader pattern. For example, an essay by Jack Balkin published in December 1999 arguing that sexual harassment laws should trump First Amendment defenses made no mention of the pending Dale case. J. M. Balkin, Free Speech and Hostile Environments, 99 Colum. L.

Rev. 2295 (1999). More generally, the literature on the tension between workplace harassment law and the First Amendment, including those articles written by First Amendment proponents, ignores similar conflicts between antidiscrimination law and the First Amendment. E.g., Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio St. L.J. 481, 548 (1991) (explaining how the EEOC's definition of "harassment" creates a chilling effect on speech in the workplace); Kingsley R. Browne, Workplace Censorship: A Response to Professor Sangree, 47 Rutgers L. Rev. 579, 580-85 (1995) [hereinafter Browne, Workplace Censorship] (arguing that the hostile environment standard is too vague and leads to censorship of speech protected by the First Amendment); Jules B. Gerard, The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment, 68 Notre Dame L. Rev. 1003, 1034 (1993)(arguing that employers may create rules restricting their employees' speech); Nadine Strossen, Regulating Workplace Sexual Harassment and Upholding the First Amendment-Avoiding a Collision, 37 Vill. L. Rev. 757 (1992) (discussing cases where sexual harassment and free speech claims conflict); Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1846 (1992) [hereinafter Volokh, Freedom of Speech] (distinguishing "directed" and "undirected" speech); Eugene Volokh, What Speech Does "Hostile Work Environment" Harassment Law Restrict?, 85 Geo. L.J. 627, 647 (1997) [hereinafter, Volokh, Hostile Work Environment](discussing the scope of harassment laws).

[FN5]. Susan Ferriss, Free Speech Advocates Find a Fight in Berkeley, San francisco Examiner, July 22, 1994, at A6, available at 1994 WL 3467218.

[FN6]. Id.

[FN7]. Id.

[FN8]. Id.

[FN9]. Michelle Tauber, Dancer's Image: Charging Body-size Bias, Krissy Keefer Fights to Have Her 9-year-old Daughter Admitted to Ballet School, People, Mar. 5, 2001, at 80.

[FN10]. Id.

[FN11]. Id.

[FN12]. Al Knight, A City Disgrace, Again, Denver Post, Oct. 1, 2000, at L3.

[FN13]. Id.

[FN14]. Armed with the EEOC ruling, the librarians filed suit in March 2003 against the city library system. Librarians Sue Over Being Subject to Internet Porn, USA Today, Mar. 26, 2003, at A12, available at http:// www.usatoday.com/tech/news/techpolicy/200--6-libraryporn_x.htm. (on file with the North Carolina Law Review).

[FN15]. Carl S. Kaplan, In Library Filtering Case, an Unusual Ally, N.Y. Times, Oct. 2, 1998, at A23.

[FN16]. Kirsten Lagatree, Fighting Words: Efforts to Avoid Housing Discrimination has Changed the Way Realty Ads Are Written, L.A. Times, Feb. 12, 1995, at K1.

[FN17]. Id.

[FN18]. Id.

[FN19]. Id.

[FN20]. Id. The federal government has specified that using these phrases, along with other words and phrases that do not facially express a discriminatory preference, is permissible under federal law. See U.S. Dept. of Housing and Urban Development, Advertisements Under 804(c) of the Fair Housing Act, Jan. 9, 1995, at http://www.fairhousing.com/hud_resources/hudguid2.htm. (on file with the North Carolina Law Review). However, not all state and local agencies follow federal guidelines when enforcing their fair housing laws.

[FN21]. Tom Puleo, Former Dairy Mart Manager in Ohio May Sue for Return of Her Job, Hartford Courant, Jan. 13, 1992, at A1.

[FN22]. Id.

[FN23]. Id.

[FN24]. Stanley v. Lawson, 993 F. Supp. 1084, 1087 (N.D. Ohio 1997).

[FN25]. Id.

[FN26]. Telephone Interview with Benjamin Bull, attorney for Ms. Stanley (Jan. 11, 2002).

FN27]. To take a few more examples, everything from refusing to cast a pregnant woman as a bimbo in a soap opera, see Ruth Shalit, Melrose Case, New Republic, Jan. 26, 1998, at 12-13, to expressing political opinions at work, Eugene Volokh, What Speech Does "Hostile Work Environment Harassment" Law Restrict?, 85 Geo. L. Rev. 627, 637 (1997), to one's choice of roommate, State ex rel. Sprague v. City of Madison, 555 N.W.2d 409, 409 (Wis. Ct. App. 1996), to the funding of student organizations at Catholic universities, Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. App. 1987), has been punished under antidiscrimination laws. Some civil libertarians have attempted to finesse the issue by redefining civil liberties to include antidiscrimination laws that apply to private parties. Conflicts between freedom of expression and antidiscrimination laws can then be construed as clashes between competing civil liberties. For purposes of this Essay, however, civil liberties retains its traditional meaning, referring to the rights protected against government interference by the First Amendment and related constitutional provisions.

[FN28]. See infra note 33 and accompanying text.

[FN29]. Consider the fate of the Commerce Clause. The Clause permits Congress to regulate only interstate commerce, but, when the New Deal emerged constitutionally triumphant in 1937, the Supreme Court refused to enforce the Commerce Clause. Between 1937 and 1994, the Court never found that a federal law was beyond Congress's power under the Commerce Clause, even when Congress was regulating activity that was clearly neither commercial nor interstate. See, e.g., Wickard v. Filburn, 317 U.S. 111, 134-35 (1942) (upholding Congressional regulation of a farmer growing grain for his family's consumption). By the early 1990s, it was conventional wisdom that the Commerce Clause created no barrier whatsoever to federal regulation. This conclusion was belied by the Court's decision in United tates v. Lopez, 514 U.S. 549, 601 (1995) (invalidating a conviction under the Gun-Free School Zones Act), which restored a small amount of substance to the Commerce Clause.

[FN30]. E.g., Owen Fiss, The Irony of Free Speech 79-83 (1996) (arguing that the state acts as a "friend of speech" when its regulations further equality or promote open and robust debate); Catharine MacKinnon, Only Words (1993) (asserting that pornography and hate speech should not be constitutionally protected); Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 NW.U.L. Rev. 343, 371-75 (1991) (claiming that when the First Amendment is used to protect racist speech, it is at odds with the Fourteenth Amendment); Charles R. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 Stan. L. Rev. 317, 326-27 (1987) (arguing that due process and the antidiscrimination principle should be expanded to encompass unconscious racism); Charles R. Lawrence III, If He Hollers Let

Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 480-82 (1990) [hereinafter Lawrence, If He Hollers](concluding that some racist speech does not deserve First Amendment protection); Spencer Overton, But Some Are More Equal: Race, Exclusion and Campaign Finance, 80 Tex. L. Rev. 987, 1042-47 (2002) (examining how the First Amendment undermines attempts to alleviate racial flaws in campaign finance regulations).

[FN31]. MacKinnon, supra note 30, at 107.

[FN32]. Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2357 (1989).

[FN33]. E.g., Owen M. Fiss, Liberalism Divided: Freedom of Speech and the Many Uses of State Power 115 (1996) (arguing that to aid minorities and prevent negative consequences from power disparities, certain forms of hate speech should be banned);Cass R. Sunstein, Democracy and the Problem of Free Speech 186-95 (1993) (claiming that laws prohibiting racist and sexist speech promote the common good and should be constitutionally permissible); Frank Michelman, Universities, Racist Speech and Democracy in America: An Essay for the ACLU, 27 Harv. C.R.-C.L. L. Rev. 339, 351-52(1992) (supporting campus hate speech rules).

[FN34]. Michael S. Greve, Civil Rights and Uncivil Speech, 81 Pub. Int. L. Rep. 1, 2(1994).

[FN35]. Mary Becker, The Legitimacy of Judicial Review in Speech Cases, in The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography 208 (Laura Lederer & Richard Delgado eds., 1995); Kathleen M. Sullivan, Discrimination, Distribution and Free Speech, 37 Ariz. L. Rev. 439, 439 (1995).

[FN36]. Becker, supra note 35, at 200.

[FN37]. Id.

[FN38]. See generally Aryeh Neier, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (1979) (defending the ACLU's support of Nazis' free speech rights on this basis).

[FN39]. Stanley Fish, There's No Such Thing As Free Speech, and It's a Good Thing, Too 121 (1994).

[FN40]. Id. at 102-19.

[FN41]. Andrew Koppelman, Antidiscrimination Law and Social Equality 224-30 (1996).

[FN42]. See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 392-93 (4th Cir. 1993); Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on truth in american law 45-51 (1997); Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 226-27(1992).

[FN43]. See Richard A. Posner, The Constitution as an Economic Document, 56 Geo. Wash. L. Rev. 4, 8 (1987) (considering various constitutional provisions from an economic perspective).

[FN44]. See Gary S. Becker, The Economics of Discrimination 31-46 (1957); Richard A. Epstein, Forbidden Grounds: The case against employment discrimination laws 41-47(1992); Cass R. Sunstein, Free Markets and Social Justice 161-65 (1997); The World Bank, Building Institutions for Markets 75-96 (2002), at http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm. (last visited Nov. 9, 2003) (on file with the North Carolina Law Review).

[FN45]. Anthony Downs, An Economic Theory of Democracy 246 (1957) (explaining that being well-informed does not benefit the average citizen, because "if all others express their true views, he gets the benefits of a well-informed electorate no matter how well-informed he is; if they are badly informed, he cannot produce these benefits himself"); Mancur Olson, The Rise and Decline of Nations 25-26 (1982)(explaining that "[s]ince the probability that a typical voter will change the outcome of the election is vanishingly small, the typical citizen is usually ‘rationally ignorant' about public affairs"); see also Geoffrey Brennan & Loren Lomasky, Democracy and Decision: The Pure Theory of Electoral Preference 19-20 (1993)(explaining that voters will be "rationally ignorant" about their political decisions).

[FN46]. Bryan Caplan, Rational Ignorance versus Rational Irrationality, 54 Kyklos 3, 19 (2001) (distinguishing Caplan's theory of rational irrationality from the more established theory of rational ignorance); Bryan Caplan, Rational Irrationality: A Framework for the Neoclassical-Behavioral Debate, 26 E. Econ. J. 191, 212 (2000)arguing that voters will often support policies that conflict with their self-interest given information costs, the unlikelihood of any given individual to influence the political process, and the psychic gains people get from voting their conscience).

[FN47]. As Pritchard and Zywick explain: [T]he problem of rational ignorance will be exacerbated by the incentives of special interests to exploit this phenomenon. Special interests, of course, will not remain ignorant about the specific government policies that favor them.... Moreover, special interests will have an incentive to disseminate misinformation about the consequences of governmental policies, so that to the extent that voters do seek out information about government policies, it will become more difficult to determine the accuracy of the competing claims. A.C. Pritchard & Todd J. Zywicki, Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation, 77 N.C. L. Rev. 409, 481 (1999). Pritchard and Zywicki also note that legislative traditions are often "traditions of special interest rent-seeking and exploitation of minorities." Id.

[FN48]. Id. at 480 (explaining that "knowledge is scarce; hence, it is costly").

[FN49]. Thomas W. Hazlett, Looking for Results, Nobel Laureate Ronald Coase on Rights, Resources, and Regulation, Reason, Jan. 1997, at 40, 45 available at http://reason.com/9701/int.coase.shtml (on file with the North Carolina Law Review); see also R. H. Coase, The Economics of the First Amendment: The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. 384, 398 (1974) (opposing government regulation of the market for goods and the market for ideas); Aaron Director, The Parity of the Economic Market Place, 7 J.L. & Econ. 1, 8 (1964) (arguing that laissez faire suits the market for goods as well as the market for ideas); Richard A. Epstein, Property, Speech, and the Politics of Distrust, 59 U. Chi. L. Rev. 41 (1992) (asserting that the Free Speech and Takings Clauses should both be interpreted strictly).

[FN50]. See Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev 1003, 1110 (1995) discussing the inability of rational actor theories to explain instances of "excess cooperation like nationalism").

[FN51]. White supremacist and Klan leader David Duke toned down his rhetoric, spiffed up his image, and won a race for state representative in 1989 and the Republican nomination for governor of Louisiana in 1991. He received a majority of the white vote in the general election. See John C. Kuzenski et al., David Duke and the Politics of Race in the South 3-22 (1995).

[FN52]. Denny's, a restaurant chain, settled two class action discrimination lawsuits in 1994. The lawsuits, which received a great deal of publicity, alleged that Denny's discriminated against African American customers. See Jim Adamson, The Denny's Story: How a Company in Crisis Resurrected its Good Name and Reputation (2000).

[FN53]. See W. Bradley Wendel, "Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate-Speech Cases, 65 Law & Contemp. Probs. 33, 64-65 (2002)(presenting arguments for and against restrictions on racist and sexist speech).

[FN54]. Fiss, supra note 30.

[FN55]. Sunstein, supra note 33, at 16.

[FN56]. Morton J. Horwitz, Foreward: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 109-16 (1993).

[FN57]. Balkin, supra note 4.

[FN58]. E.g., Edwin Baker, Of Course, More Than Words, 61 U. Chi. L. Rev. 1181, 1187-88 (1994) (discussing market failure in the marketplace of ideas); Paul H. Brietzke, How and Why the Marketplace of Ideas Fails, 31 Val. U.L. Rev. 951, 960 (1997) (arguing that the free marketplace of ideas is often manipulated by those seeking to denigrate minorities); Frederick Schauer, Uncoupling Free Speech, 92 Colum. L. Rev. 1321, 1332 (1992) (questioning the desirability of legal protection of harmful speech); Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 316(1992) (arguing that "some forms of government intervention into free speech processes can actually improve those processes").

[FN59]. See Epstein, supra note 44, at 495-505; Richard A. Posner, The Efficiency and Efficacy of Title VII, 136 U. Pa. L. Rev. 513, 521 (1987).

[FN60]. Epstein, supra note 44, at 9.

[FN61]. Id. at 495-505. See generally Tom W. Bell, Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence, 87 Minn. L. Rev. 743, 748-49 (2003) (arguing that "political entities should undertake only those projects that they can accomplish more effectively than private ones can"); Volokh, Hostile Work Environment, supra note 4 (noting the cogency of such slippery slope arguments in many contexts).

[FN62]. See, e.g., Ira Glasser, Hate Crimes/Hate Speech, in Speech and Equality: Do We Really Have to Choose? 55-57 (Gara LaMarche ed., 1996) (arguing that freedom of speech and equality are not fundamentally conflicting principles); Henry Louis Gates Jr.,

Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights, New Republic, Sept. 20, 1993, at 37.

[FN63]. See David F. McGowan & Ragesh K. Tangri, A Libertarian Critique of University Restrictions of Offensive Speech, 79 Cal. L. Rev. 825, 917-18 (1991); Michael S. Greve, Remote Control Tuning for Speech, Wash. Times, Nov. 9, 1996, at D3.

[FN64]. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

[FN65]. Frederick Schauer, Free Speech: A Philosophical Enquiry 86 (1982).

[FN66]. American Booksellers Ass'n, 771 F.2d at 332.

[FN67]. John O. McGinnis, Reviving Tocqueville's America: The Supreme Court's Jurisprudence of Social Discovery, 90 Cal. L. Rev. 485, 527 (2002); see also Toni M. Massaro, Equality and Freedom of Expression: The Hate Speech Dilemma, 32 Wm. & Mary L. Rev. 211, 224 (1991) ("[I]f we freeze national consensus at any particular historical moment and repress all speech that is seriously inconsistent with, or regresses from, that viewpoint, then we will curtail revolutionary possibilities"); Robert W. McGee, Hate Speech, Free Speech and the University, 24 Akron L. Rev. 363, 390 (1990) (noting that restricting speech threatens to entrench the power of governing elites).

[FN68]. See Pritchard & Zywicki, supra note 47, at 485.

FN69]. E.g ., The Federalist No. 10 (James Madison) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction."). For a general discussion of the Founders' concern about and opposition to political factions, see Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence 22-60 (1993).

[FN70]. The Federalist No. 10 (James Madison).

[FN71]. See Bell, supra note 61; Volokh, Freedom of Speech, supra note 4; Volokh, Hostile Work Environment, supra note 4.

[FN72]. McGinnis, supra note 67.

[FN73]. Fish, supra note 39, at 125.

[FN74]. See generally Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 214-43 (1996) (arguing that liberty interests must trump equality interests with respect to the First Amendment, in order to avoid "the despotism of thought police").

[FN75]. Id.

[FN76]. E.g., Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 Sup. Ct. Rev. 125, 126-27 (1995) (discussing the persistence in America of the constitutionalism that Tocqueville described); McGinnis, supra note 67, at 491(describing recent Supreme Court jurisprudence as an attempt to preserve Tocquevillian institutions).

[FN77]. McGinnis, supra note 67, at 494.

[FN78]. Fish, supra note 39, at 102-33.

[FN79]. Id.

[FN80]. See Robert Cooter, The Cost of Coase, 11 J. Legal Stud. 1, 13 (1982); Robert C. Downs, Law and Economics: Nexus of Science and Belief, 27 Pac. L.J. 1, 21 (1995); Arthur A. Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451, 480 (1974). Of late, this critique has inspired the entire academic movement of behavioral law and economics. For a critique of behavioral law and economics, see Gregory Mitchell, Why Law and Economics' Perfect Rationality should Not Be Traded for Behavioral Law and Economics' Equal Incompetence, 91 Geo. L.J. 67, 72 (2002) (stating that theories associated with behavioral law and economics "cannot lay claim to empirical validity superior to that of the perfect rationality assumption" of law and economics).

[FN81]. Cf. Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv. L. Rev. 16, 51 (2002) (arguing that "it is a myth that judges always give expression to their subjective beliefs").

[FN82]. See Jack Bass, Unlikely Heroes 11-32 (1986) (describing how Southern judges enforced desegregation in the 1950s and 1960s); David E. Bernstein, Lochner, Parity, and the Chinese Laundry Cases, 41 Wm. & Mary L. Rev. 211, 275 (1999) (explaining that federal judges protected Chinese immigrants from hostile legislation, even though many of these judges intensely disliked the Chinese).

[FN83]. James Weinstein, Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine 5 (1999).

[FN84]. Id.

[FN85]. Fish, supra note 39, at 102.

[FN86]. Id. at 109.

[FN87]. Andrew Koppelman, Antidiscrimination Law and Social Equality 230 (1996).

[FN88]. Id.

[FN89]. Id. at 252.

[FN90]. Id.

[FN91]. See Pritchard & Zywicki, supra note 47, at 480.

[FN92]. Id.

[FN93]. See George Will, Reason One of the Few Things Not Included in Spending Bill, Seattle Post-Intell., Oct. 26, 1998, at A9, available at 1998 WL 4309526 (noting that these subsidies were finally cut from the budget in 1996, only to reappear in 1998).

[FN94]. See, e.g., Wendel, supra note 53, at 51 (noting that free speech critics point out that "courts have repeatedly held that some kinds of emotive harms are not'mere' offense").

[FN95]. See Richard Delgado, The Price We Pay: The Case Against Racist Speech, Hate Propaganda and Pornography 193-201 (1995); Lawrence, If He Hollers, supra note 30, at 436-37; Matsuda, supra note 32, at 2351.

[FN96]. Free Speech Woes at Sarah Lawrence, N.Y. Times, Dec. 13, 1993, at B5; Ethan Bronner, Big Brother is Listening, N.Y. Times, Apr. 4, 1999, <section>4A (Magazine), at 24.

[FN97]. All of these restrictions are noted in John Leo, A Tangled Web of Incorrect Thoughts, Ex Femina, June 2001, at http://www.iwf.org/pubs/exfemina/June2001h.shtml. (last visited Nov. 9, 2003) (on file with the North Carolina Law Review).

[FN98]. See generally Alan Charles Kors & Harvey A. Silverglate, The Shadow University: The Betrayal of Liberty on America's Campuses (1998) (chronicling the battle between political correctness and free speech on college campuses).

[FN99]. Kim Campbell & Noel C. Paul, Campuses Struggle to Define Free Speech, Christian Sci. Monitor, Mar. 27, 2001, at 16. See generally Nat Hentoff, The Hecklers' Veto, Wash. Post, Dec. 26, 1998, at A19 (criticizing campus protestors who shout down speakers with whom they disagree).

[FN100]. See, e.g., Student Press Law Center, SPLC Newspaper Theft Forum, at http://www.splc.org/newspapertheft.asp (last visited Nov. 19, 2003) (discussing newspaper thefts at college campuses) (on file with the North Carolina Law Review).

[FN101]. R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.).

[FN102]. Id. at 698.

[FN103]. Id. at 699; see David Vienneau, Supreme Court Divided in Upholding Hate

Law, Toronto Star, Dec. 13, 1990, at A1, available at http://www.newportal.cedrom-sni.com/partenaires/payment/eSelectReceive.asp?NoTrans=14230.htm (on file with the North Carolina Law Review).

[FN104]. R. v. Butler, [1992] 1 S.C.R. 452, 454 (Can.).

[FN105]. Mirko Petricevic, Preaching ... or Spewing Hate?; A Thin Line Separates the Right of Canadians to Free Expression and the Crime of Promoting Hatred, The Record(Kitchener-Waterloo, Ontario), Feb. 1, 2003, at J8, available at 2003 WL 5180300.

[FN106]. See id.

[N107]. Id.

[FN108]. Ian Hunter, Worshiping the God Equality, Globe & Mail (Toronto, Canada),July 5, 2001, at A15.

[FN109]. Susan Martinuk, Religious Freedom Goes Public, Sort Of, Nat'l Post, May 21,2001, at A14, available at 2001 WL 20484044.

[FN110]. Ont. Human Rights Comm'n v. Brockie, [2002] 96 C.R.R. (2d) 92.

[FN111]. Royal Hamel, Can Christians Let the Gospels Be Muzzled?, Guelph Mercury (Ontario, Canada), Oct. 4, 2002, at B5, available at 2002 WL 26223201.

[FN112]. Zachary Margulis, Canada's Thought Police, Wired, Mar. 1995, at 54, http://www/wired.com/archive/3.03/canada.html (last visited Nov. 19, 2003) (on file with the North Carolina Law Review).

[FN113]. See id.

[FN114]. Am. Civil Liberties Union, Dep't of Pub. Educ., Why the ACLU Opposes Censorship of "Pornography" (Dec. 11, 1994), reprinted by Electronic Fronteir Foundation, at http://www.eff.org/Censorship/aclu_opposes_porno_censorship.article

(on file with the North Carolina Law Review).

[FN115]. British Columbia Human Rights Code, R.S.B.C., ch. 210, <section>2(1) (1996)(Can.).

[FN116]. For the text of the remarks, see Transcript of UBC Professor Sunera Thobani's Speech at the Conference, Women's Resistance: From Victimization to Criminalization (Oct. 1, 2001), at www.casac.ca/conference01/conf01_ thobani.htm (on file with the North Carolina Law Review).

[FN117]. Post Police Get Hate-crimes Complaint Against Thobani, Nat'l Post, Oct. 10, 2001, at 13, available at 2001 WL 28025026.

[FN118]. Ben Wildavsky, The Divide Over Day Care, Nat'l. J., Jan. 24, 1998, at 67(noting that this is an "economic-policy truism"), available at 1998 WL 2088828.

[FN119]. See Jason F. Shogren & Dermot J. Hayes, Resolving Differences in Willingness to Pay and Willingness to Accept: Reply, 87 Am. Econ. Rev. 241, 243 (1997).

[FN120]. Yolanda Woodlee, Top D.C. Aide Resigns Over Racial Rumor, Wash. Post, Jan.27, 1999, at B1.

[FN121]. See, e.g., Browne, Workplace Censorship, supra note 4, at 584-85 (recounting various examples).

[FN122]. See, e.g., Brounstein v. Am. Cat Fanciers Ass'n., 839 F. Supp. 1100, 1106(D.N.J. 1993) (involving a Jewish woman turned down for membership in a cat fanciers' club).

FN123]. See, e.g., State ex rel. Sprague v. City of Madison, 555 N.W.2d 409, 415 Wis. Ct. App. 1996) (upholding a damages award against a woman who refused to share her house with a lesbian).

[FN124]. See, e.g., Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 349 E.D.N.Y. 1998) (denying summary judgment to a Christian school that fired a teacher who became pregnant out of wedlock).

[FN125]. See Ronald J. Krotoszynski, Jr., Dissent, Free Speech and the Continuing Search for the "Central Meaning" of the First Amendment, 98 Mich. L. Rev. 1613, 1631(2000) (noting that "a government empowered to silence racist dissenters is equally empowered to silence progressive dissenters," and that the free speech principle is vital to minority groups).

[FN126]. See Weinstein, supra note 83, at 90.

[FN127]. See Suzanna Sherry & Daniel Farber, Beyond All Reason: Some Radical Lawyers Are Making an Unenlightened Assault on the Truth, Two Minnesota Professors Argue, Star Trib. (Minneapolis), Feb. 9, 1998, at 19A (noting that critical legal scholars are teaching their students "that the United States is irredeemably racist and sexist").

[FN128]. For example, according to two recent polls, only twenty-six percent of American women consider themselves feminists, and sixty-five percent do not. Karlyn Bowman, The Third Stage of Feminism: Gloria Who?, Roll Call, July 16, 1998 at 14, available at 1998 WL 2900220 (reporting on a poll conducted for Time Magazine); USA Today Poll: Mothers, Daughters See Brighter Future, USA Today, Feb. 17, 1999, at 10A, available at 1999 WL 6834617.

[FN129]. William Graham Sumner, Democracy and Plutocracy, in On Liberty, Society, and Politics: The Essential Essays of William Graham Sumner 140 (Robert Bannister ed., Liberty Press 1992) (1985).