

# Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech

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*This Article explores whether contemporary advocates of restrictions on bigoted expression have more in common with contemporary advocates of broad First Amendment rights or with past censors. The critical theorists who would ban some hate speech rely heavily on the equal citizenship principles that radical civil libertarians believe justify almost absolute speech rights. Past censors, however, also relied heavily on principles that libertarians in their generation thought justified almost absolute speech rights. The First Amendment, past and present censors argue, does not fully protect speech inconsistent with what they believe are basic constitutional values. This claim repudiates a basic principle of American constitutionalism, the faith that "self-evident" constitutional values will triumph in the constitutional marketplace of ideas. The ideological marketplace is dysfunctional in communities that do not honor constitutional rights, but such communities do not restrict speech that silences or harms traditionally subordinated groups.*

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## I. INTRODUCTION

Civil libertarians are being challenged to "hav[e] the courage to change [their] ways of thinking when changing times require it."<sup>1</sup> A new wave of racist, sexist, and heterosexist harassment has hit the United States, and the doctrinal tools forged by liberals in the McCarthy and Vietnam eras are unable to deal effectively with or even acknowledge the harm caused by such vulgar expressions. The pestilence of hate speech is particularly prevalent at universities, institutions that ought to be bastions of tolerance and diversity. Fortunately, a solution is at hand for progressives with the capacity to engage in "creative" constitutional thinking. Led by Professors Mari

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1. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L. J. 375, 430.

Matsuda, Catharine MacKinnon, Richard Delgado, Charles Lawrence, and Jack Balkin,<sup>2</sup> critical legal, race, and feminist scholars have reconceptualized First Amendment rights in ways that permit state officials to adopt narrowly tailored<sup>3</sup> restrictions on various forms of racist, sexist, or heterosexual expression.

This new generation of censors claims no connection with those narrow-minded bigots who previously censored advocacy of revolutionary socialism, pacifism, and race equality. Indeed, most critical theorists profess to be "ardent advocates of the freedoms guaranteed by the First Amendment."<sup>4</sup> Matsuda, Delgado, Lawrence, MacKinnon, and Balkin oppose Supreme Court decisions upholding the convictions of persons arrested for opposing World War I or teaching Communism.<sup>5</sup> They claim to take seriously the Supreme Court's recognition of our "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."<sup>6</sup> Their point is simply that hate speech is qualitatively different from the kinds of expression that civil libertarians have historically defended and should continue defending. Indeed, this failure to recognize the

2. For a collection of articles by some of these scholars, see generally Mari J. Matsuda, et al., eds., *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview, 1993); Catharine A. MacKinnon, *Only Words* (Harvard U., 1993); Balkin, 1990 Duke L. J. 375; Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 St. John's L. Rev. 119 (1991); David Kretzmer, *Freedom of Speech and Racism*, 8 Cardozo L. Rev. 445 (1987).

3. Balkin would have us also "rethink the doctrines of vagueness and overbreadth" when analyzing "sexual and racial harassment." Balkin, 1990 Duke L. J. at 425.

4. Id. at 376. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in Mari J. Matsuda, et al., eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 17, 20 (Westview, 1993) (describing the contrasting reactions by "target-group members" regarding racist speech as compared to the attitudes of persons belonging to other groups); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in Mari J. Matsuda, et al., eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 53, 57 (Westview, 1993) (warning that the reasons for protecting racist speech should not be set aside hastily by those who favor regulation).

5. See, for example, *Dennis v. United States*, 341 U.S. 494, 502 (1951) (upholding the constitutionality of a statute used to prosecute members of the Communist Party based on the distinction between "advocacy" and "discussion"); *Gitlow v. New York*, 268 U.S. 652, 654-55, 672 (1925) (refusing to overturn the conviction of a publisher of a Communist newspaper under advocacy provisions of a criminal anarchy statute); *Abrams v. United States*, 250 U.S. 616, 618-19, 624 (1919) (affirming the conviction of Marxist sympathizers for distributing anti-war literature in violation of the Espionage Act).

6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343, 376 (1991) (listing the numerous "exceptions" to free speech that have been carved out by the courts).

unique features of racist, sexist, and heterosexual invective explains the obstinate opposition First Amendment absolutists express to constitutionally legitimate regulations of hate speech.

Contemporary debates over hate speech proposals typically focus directly on the constitutional and political merits of restricting racist, sexist, and heterosexual expression. Proponents of regulation insist that such bans do not violate the First Amendment, do not chill constitutional expression, and will advance the cause of racial equality. The leading critics of calls to regulate bigoted invective, Nadine Strossen, Ronald Dworkin, Nat Hentoff, and Henry Gates, question each claim. In their view, proposed bans on hate speech violate constitutional rights, are more likely to be used against powerless minorities than on their behalf, and do not attack the serious problems that handicap persons of color and members of other historically subordinated groups.<sup>7</sup>

This essay enters the hate speech controversy from a more historical perspective. I am particularly concerned with a debate within the debate—the debate over whether contemporary advocates of various restrictions on bigoted expression have more in common with contemporary advocates of broad First Amendment rights or with past censors. Too often, analyses of the relationships between present proponents of bans on hate speech, present opponents of bans on hate speech, and past proponents of other speech regulations only explore the speech policies that different advocates have advanced in different historical eras. The joint authors of *Words That Wound*, a critical race manifesto that calls for various restrictions on assaultive speech, insist that critical race theorists are friends of the First Amendment because they would protect the rights of powerless political dissidents who criticize government policies.<sup>8</sup> Hentoff's *Free Speech for Me—But Not for Thee*, by comparison, maintains that contemporary proponents of bans on hate speech and past censors share

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7. See generally Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L. J. 484; Ronald Dworkin, *Women and Pornography*, 40 N.Y. Rev. of Books 36 (Oct. 21, 1993); Ronald Dworkin, *The Coming Battles over Free Speech*, 39 N.Y. Rev. of Books 55 (June 11, 1992); Nat Hentoff, *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (Harper Collins, 1992); Henry Louis Gates, Jr., *Let Them Talk*, New Republic 37 (Sept. 20 & 27, 1993). See also Katharine T. Bartlett and Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 Duke L. J. 574, 574 (explaining how the debate over hate speech "focuses only on the most visible forms of racism, and thus misses those more subtle discriminatory practices that pervade our current cultural milieu").

8. Lawrence, *If He Hollers* at 56 (cited in note 4); Matsuda, *Public Response* at 32-34 (cited in note 4).

a common commitment to curbing expression they really detest.<sup>9</sup> What is presently missing from this debate is any serious comparison of the broader principles that animate progressive advocacy of and opposition to campus speech codes, restrictions on pornography, and related measures.<sup>10</sup> Do so-called "First Amendment absolutists" and critical theorists disagree about the application of shared principles, or is their dispute ultimately over fundamentally different theories of free speech? If this dispute is over principle, do the principles advocated by proponents of hate speech regulations resemble those advocated by past advocates of speech regulation, or are those principles consistent with an almost absolute protection for speech on matters of public interest?

This attempt to put the contemporary hate speech controversy into broader philosophical and historical contexts has significant constitutional and political implications. Scholars who would ban racist, sexist, and heterosexist invective insist that government can regulate certain expressions of prejudice without violating First Amendment values, as those values have historically been understood by such progressive organizations as the American Civil Liberties Union ("ACLU"). Lawrence, for example, maintains that "good lawyers can create exceptions and narrow interpretations limiting the harm of hate speech without opening the floodgates of censorship."<sup>11</sup> Thus, critical theorists cannot make their case by establishing that their proposed restrictions on racist and related doctrines would pass muster under the restrictive speech tests announced in *Schenck v. United States*<sup>12</sup> or *Dennis v. United States*.<sup>13</sup> Rather, proponents of campus speech codes and similar content restrictions must demonstrate that their fundamental principles do not also support bans on verbal opposition to a particular war or advocacy of revolutionary socialism. If communities cannot regulate hate speech without abandoning the philosophical and constitutional foundations for

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9. Hentoff, *Free Speech for Me* at 1 (cited in note 7).

10. Critical theorists do not claim to share the constitutional values that underlie conservative attacks on campus speech codes. Indeed, Delgado and Kimberle Crenshaw point out that many (not all) right-wing opponents of "political correctness" are not troubled when restrictions on speech serve business and traditional religious interests. See Delgado, 85 Nw. U. L. Rev. at 377-78 (cited in note 6); Kimberle Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in Mari J. Matsuda, et al., eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, 111, 126-27 (Westview, 1993).

11. Lawrence, *If He Hollers* at 86 (cited in note 4). See Matsuda, *Public Response* at 35 (cited in note 4) (arguing for specific and narrow definition of racist speech that would allow restrictions consistent with the First Amendment).

12. 249 U.S. 47, 52 (1919).

13. 341 U.S. 494, 505 (1951).

protecting vigorous advocacy of unpopular social and political ideas, then critical theorists can no longer pose as friends of the First Amendment. They must either renounce their professed commitment to free speech or their call for bans on racist, sexist, and heterosexist expression.

Part II of this Essay suggests that critical theorists do have much in common with left-wing opponents of bans on hate speech. Critical theorists and their progressive rivals typically espouse some version of radical civil libertarianism. The first radical libertarians, members of Emma Goldman's political and social entourage, were "commit[ted] to individualist anarchism, freethought, and free love."<sup>14</sup> A related strain of radical civil libertarianism flourishes today in the works of Kenneth Karst, Ronald Dworkin, Edwin Baker, David A. J. Richards, Martin Redish, and Steven Shiffrin.<sup>15</sup> These jurists derive free speech rights from the more general right of self-expression and equal citizenship that serves as the foundation for such decisions as *Brown v. Board of Education*,<sup>16</sup> *Griswold v. Connecticut*,<sup>17</sup> and *Roe v. Wade*.<sup>18</sup> Disputes between radical civil libertarians over proposed bans on hate speech have centered on how government should apply the constitutional principle of equal citizenship. Contemporary progressives who oppose restrictions on bigoted expression insist that government respects all citizens equally when all citizens are allowed to express their beliefs. Contemporary progressives who favor some restrictions on bigoted expression insist that government respects all persons equally when officials forbid speech that states or clearly denies that some citizens are not worthy of equal concern or respect. The Fourteenth Amendment, critical theorists maintain, permits and may even require "content regulation of racist speech" that directly challenges our constitutional commitment to equal citizenship.<sup>19</sup>

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14. David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 Stan. L. Rev. 47, 53 (1992).

15. See generally Kenneth L. Karst, *Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion* (Yale U., 1993); Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (Yale U., 1989); Ronald Dworkin, *Taking Rights Seriously* (Harvard U., 1978); David A. J. Richards, *A Theory of Free Speech*, 34 UCLA L. Rev. 1837 (1987); Martin H. Redish, *Freedom of Expression: A Critical Analysis* (Michie, 1984); C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford U., 1989); Steven H. Shiffrin, *The First Amendment, Democracy and Romance* (Harvard U., 1990). Morris Ernst, a New Dealer who fought against censorship and for birth control, is the main link between past and present radical libertarians. See Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 83-86 (Oxford U., 1990).

16. 347 U.S. 483 (1954).

17. 381 U.S. 479 (1965).

18. 410 U.S. 113 (1973).

19. Lawrence, *If He Hollers* at 66 (cited in note 4).

Part III suggests a disturbing parallel between present and past calls for restricting speech. Critical theorists correctly note that earlier proponents of bans on speech would not restrict speech inconsistent with the constitutional principle that all persons are entitled to equal concern and respect. Rather, past censors typically demanded that government forbid speech that was inconsistent with what they thought were fundamental constitutional norms. During the late nineteenth and early twentieth centuries, when most constitutional commentators thought that the Constitution primarily protected the freedom of contract and related liberties, the leading intellectual proponents of restrictions on expression maintained that government could ban speech inconsistent with the Constitution's commitment to private property. During the middle of the twentieth century, when most constitutional commentators maintained that the Constitution primarily guaranteed rights to democratic processes, the leading intellectual proponents of restrictions on expression insisted that government could ban speech inconsistent with the Constitution's democratic commitments. In other words, past proponents of content restrictions have insisted that government has the right to regulate unconstitutional speech, speech that challenges the basic principles of the constitutional order. Critical theorists may be the first scholars who explicitly maintain that the Fourteenth Amendment vests governmental officials with the power to ban unconstitutional speech, and they may present notions of unconstitutional speech that differ from those advocated in the past. Nevertheless, proponents of speech bans have always implicitly relied on related notions of unconstitutional speech when justifying the dominant content regulations of their era.

Part IV examines the constitutional status of unconstitutional speech. Critical race theorists correctly recognize that the Constitution recognizes a category of unconstitutional speech. Such speech is not simply inconsistent with a constitutional provision, decision, or rule. Unconstitutional speech implicitly or explicitly challenges some fundamental value essential to the very being of the Constitution. Nevertheless, Matsuda, Lawrence, and others are mistaken when they assert that the Constitution does not protect advocacy of unconstitutional ideas.<sup>20</sup> The best reading of the American Constitution as a whole is that "self-evident" constitutional principles will compete successfully in the marketplace of ideas

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20. Or that the government may, under the Fourteenth Amendment, ban the expression of unconstitutional ideas.

established by the First Amendment. Indeed, constitutional theory presumes that citizens in a well-functioning constitutional democracy will upon reflection affirm fundamental constitutional values. The ideological marketplace may be dysfunctional in communities where the vast majority of adults do not honor the basic constitutional right of equal citizenship. Such localities, however, do not pass speech restrictions aimed at ensuring that all persons are treated with equal concern and respect.

## II. THE TWO FACES OF RADICAL LIBERTARIANISM

Classical civil libertarians draw a sharp line between democratic inputs and democratic outputs. Zechariah Chafee, Jr., Alexander Meiklejohn, and John Hart Ely maintain that courts must protect rights to democratic processes and the rights of minorities that have no practical or legal access to democratic processes. The classical civil libertarian Constitution, however, permits democratically elected officials to make whatever substantive policies they choose.<sup>21</sup> For this reason, those democratic relativists who support an almost absolute liberty of speech vigorously oppose both the freedom of contract and the right to privacy when mandated by courts, rather than legislatures.<sup>22</sup> Indeed, Ely questions whether in a world in which women vote freely and often, the Constitution should be interpreted as forbidding most gender classifications. If "many women . . . prefer the old stereotype to the new liberation," he maintains, judges have no right to make "substantive wrong-

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21. The major works of classical civil libertarianism include: Zechariah Chafee, Jr., *Free Speech in the United States* (Harvard U., 1941); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford U., 1965); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U., 1980). For related works, see generally Louis Lusky, *By What Right?: A Commentary on the Supreme Court's Power to Revise the Constitution* (Michie, 1975); Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (Prentice Hall, 1966). The *Carolene Products* footnote is the best judicial expression of classical civil libertarianism. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting that "prejudice against discrete and insular minorities" may warrant "more searching judicial inquiry"). For a general discussion of the philosophical and constitutional underpinnings of classical civil libertarianism, see generally Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (U. of California, 1991).

22. See *Carolene Products*, 304 U.S. at 152-53 n.4; Chafee, *Free Speech* at 360-61 (discussing the connection between allowing legislatures to regulate property and contracts, and the need to ensure "liberty of discussion" to provide the integrity of democratic lawmaking); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 937-43 (1973) (objecting to judicial protection of private property and privacy rights).



headedness" the grounds for striking down laws based on traditional sex roles.<sup>23</sup>

The current leading proponents of free speech, by comparison, generally espouse a more radical civil libertarianism that erodes the boundaries between substance and process.<sup>24</sup> Ronald Dworkin maintains that government must treat all persons with "equal concern and respect."<sup>25</sup> Similarly, Kenneth Karst champions "the principle of equal citizenship."<sup>26</sup> In Karst's view, "every individual is entitled to be treated by the organized society as a respected and responsible participant."<sup>27</sup> Unlike classical civil libertarians, Dworkin, Karst, and other radical civil libertarians insist that the Constitution sharply limits the substantive powers of democratically elected officials. "[J]udicial review of governmental action[.]" Karst writes, "should focus . . . on substantive concerns—specifically concerns for the full inclusion of all Americans as equal citizens" and "not so much on 'procedural' questions (such as the representative or deliberative qualities of the legislative process). . . ."<sup>28</sup>

Radical civil libertarians maintain that courts should protect free speech in part because speech plays a crucial role in human development.<sup>29</sup> "[F]reedom of speech is fundamental," Professor C. Edwin Baker declares, "because freedom to engage in self-expressive acts is central to individual liberty."<sup>30</sup> Similarly, Rogers Smith's "rational liberty view" provides full constitutional protection to "forms of self-expression that are part of a person's rational self-development."<sup>31</sup> The leading defenders of expression rights on the late

23. Ely, *Democracy and Distrust* at 167 (cited in note 21).

24. The emergence of radical civil libertarianism in the 1970s was, alas, not acknowledged in the Author's work *Transforming Free Speech* (cited in note 21). The following paragraphs attempt to correct that error.

25. Dworkin, *Taking Rights Seriously* at 272-73 (cited in note 15).

26. Karst, *Law's Promise* at x (cited in note 15).

27. *Id.* See Richards, 34 UCLA L. Rev. at 1867 (cited in note 15) (noting "the abolitionist principles of equal respect").

28. Karst, *Law's Promise* at xi.

29. Most radical civil libertarians also regard free speech as an important element of the democratic process. Unlike classical civil libertarians, however, radical civil libertarians do not believe that the First Amendment only protects political speech, no matter how broadly political speech is defined.

30. C. Edwin Baker, *Of Course, More than Words*, 61 U. Chi. L. Rev. 1181, 1197 (1994).

31. Rogers M. Smith, *Liberalism and American Constitutional Law* 240 (Harvard U., 1985). See Thomas I. Emerson, *Toward a General Theory of the First Amendment* 4 (Random House, 1966) (stating that "[t]he right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual"); Richards, 34 UCLA L. Rev. at 1876 (cited in note 15) (emphasizing "equal respect for their right to exercise the essential moral powers of their rational and reasonable humanity in the formation, exercise, and revision of their ultimate values in living"); Jeffrey Rosen, *The Limits of Limits*, New Republic 35, 38 (Feb.

Warren and Burger courts also gave more weight than did classical civil libertarians to individual interests in free speech. Former Justice Brennan declared in an influential speech at Georgetown University that "[r]ecognition of these rights of expression and conscience frees up the private space for both intellectual and spiritual development free of government dominance. . . ."<sup>32</sup>

Jurists who regard self-expression as a fundamental right are as likely to associate free speech with the right to privacy as with the right to vote. Thomas Emerson, the most influential proponent of broad speech rights in the 1960s and 1970s,<sup>33</sup> helped lead the fight for birth control rights.<sup>34</sup> Justice William O. Douglas's concurring opinion in *Doe v. Bolton*<sup>35</sup> asserted that constitutional expression and abortion rights could both be derived from the more general Fourteenth Amendment right to "autonomous control over the development and expression of one's intellect, interests, tastes, and personality."<sup>36</sup>

Many influential radical civil libertarians maintain that all content based restrictions on free speech violate the constitutional right to autonomy and privacy. "[E]qual respect for persons[.]" David A. J. Richards asserts, "means equal respect for the independence of all speakers" and "[t]his respect is most principled when it guarantees the evaluative and expressive freedoms of the speakers whose speech we most conscientiously reject and despise."<sup>37</sup> Progressive opponents of campus speech codes and related measures insist that the government cannot regulate speech on the basis of any notion of the good society, even a society based on the principles of radical civil libertarianism. Robert Post, for example, asserts that "the value of autonomy . . . requires that all possible objectives, all possible versions of national identity . . . be rendered problematic and open to inquiry."<sup>38</sup> If government must treat its citizens as free and equal

7, 1994) (endorsing an "individualist conception of the First Amendment that would protect self-expression for its own sake" without judging its value).

32. Justice William J. Brennan, Jr., Federalist Society, Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), in *The Great Debate: Interpreting Our Written Constitution* 22 (Federalist Society, 1986).

33. See generally Thomas I. Emerson, *The System of Freedom of Expression* (Random House, 1970); Emerson, *Toward a General Theory* (cited in note 31).

34. Emerson represented Planned Parenthood of Connecticut in oral argument in *Griswold v. Connecticut*, 381 U.S. 479 (1965). See David J. Garrow, *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade* 231-41 (MacMillan, 1994) (discussing the preparation of the briefs in *Griswold*).

35. 410 U.S. 179 (1973).

36. *Id.* at 211 (Douglas, J., concurring).

37. Richards, 34 UCLA L. Rev. at 1899 (cited in note 15).

38. Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. Colo. L. Rev. 1109, 1119 (1993).

people, he declares, then "the notion that racist ideas ought to be forbidden within public discourse . . . is . . . fundamentally irreconcilable with the rationale for [F]irst [A]mendment freedoms."<sup>39</sup> Baker similarly argues that "government must not choose as its end or its means the suppression of expressive options."<sup>40</sup>

Progressive opponents of restrictions on certain expressions of prejudice maintain that campus speech codes, bans on pornography, and similar regulations violate human autonomy and equality. Such measures unconstitutionally discriminate against persons who hold unpopular social or political opinions. "No one[,] Ronald Dworkin maintains, "may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions and example, just because these tastes or opinions disgust those who have the power to shut him up or lock him up."<sup>41</sup> Nadine Strossen insists that "[i]n a society that respects the autonomy and dignity of individuals, all people would be free to express their views, no matter what their views or who they were."<sup>42</sup> Restrictions on speech that are aimed overtly at the tone or manner of presentation may privilege the expressive techniques that established social groups prefer. Karst points out that the "kinds of expression . . . we consign to the category of Unreason" tend to be "(i) speech that rejects the common sense of what 'we all know,' where 'we' are those who share the conventional wisdom and morality; and (ii) modes of expression—from silent sit-ins to noisy demonstrations—that go against the dominant cultural grain."<sup>43</sup> Thus, bans on speech that do not seem to communicate ideas are more likely to burden members of politically powerless groups than to promote vigorous dissent by them. "Political expression at the cultural boundaries[,] Karst notes, "typically is not deliberative, and often is not civil."<sup>44</sup>

Contemporary advocates of restrictions on speech share the radical civil libertarian commitment to equal citizenship. Mary Ellen Gale maintains that "the universal right to self-respect and self-

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39. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267, 291 (1991).

40. Baker, 61 U. Chi. L. Rev. at 1206 (cited in note 30).

41. Dworkin, 40 N.Y. Rev. of Books at 41 (cited in note 7).

42. Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 Harv. C.R.-C.L. L. Rev. 143, 151 (1994). See Richards, 34 UCLA L. Rev. at 1886 (cited in note 15) (stating that "group libel laws . . . discriminate between legitimate and illegitimate expressions of conscientiously held and controversial views criticizing the values in living").

43. Karst, *Law's Promise* at 11 (cited in note 15) (footnote omitted).

44. Id. See Post, 32 Wm. & Mary L. Rev. at 286-87, 303-04 (cited in note 39) (stating that censorship cuts off participation in the process of collective self-determination).

realization" is "the most important of democratic beliefs."<sup>45</sup> Matsuda describes the principle that "[e]ach person . . . is entitled to basic dignity, to nondiscrimination, and to the freedom to participate fully in society" as "central . . . to the Bill of Rights. . . ."<sup>46</sup> Following Emerson and other radical civil libertarian defenders of expression rights, critical theorists emphasize how free speech rights enable persons to participate in society and develop as individuals. Constitutional liberty, Gale claims, must "encompass the freedom to construct an authentic self, who can make her own choices and explore her own possibilities."<sup>47</sup>

Many critical theorists insist that these radical civil libertarian principles justify certain content restrictions on speech that deny the equal citizenship of some members of the American community. Delgado claims that the interest of "personality and equal citizenship" entails "the right of all citizens to lead their lives free from attacks on their dignity and psychological integrity."<sup>48</sup> MacKinnon boldly asserts that the First Amendment cannot protect advocacy of certain doctrines "if real equality is ever to be achieved."<sup>49</sup> "When equality is recognized as a constitutional value and mandate," she declares, "social inferiority cannot be imposed through any means, including expressive ones."<sup>50</sup> Free speech absolutists, in her view, must "seriously reconsider[ ] . . . [t]he current legal distinction between screaming 'go kill the nigger' and advocating the view that African-Americans should be eliminated from parts of the United States. . . ."<sup>51</sup>

Lawrence argues that the Fourteenth Amendment authorizes elected officials to limit advocacy that is inconsistent with the un-

45. Gale, 65 St. John's L. Rev. at 126 (cited in note 2).

46. Matsuda, *Public Response* at 48 (cited in note 4). See Lawrence, *If He Hollers* at 59 (cited in note 4) (suggesting that a broad reading of *Brown v. Board of Education* encompasses the principle of equal citizenship); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in Mari J. Matsuda, et al., eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 89, 92-93 (Westview, 1993) (emphasizing that racism is a breach of egalitarian principles); Delgado, 85 Nw. U. L. Rev. at 383 (cited in note 6) (noting "the values of equal personhood we hold dear"). See also MacKinnon, *Only Words* at 106 (cited in note 2) (noting that when equality is taken seriously, expressive statements are not constitutionally insulated on the ground that ideas cannot be regarded as false).

47. Gale, 65 St. John's L. Rev. at 170 (cited in note 2). See Balkin, 1990 Duke L. J. at 385 (cited in note 1) (discussing the feasibility of applying legal realist critique of rights in First Amendment jurisprudence).

48. Delgado, *Words That Wound* at 110 (cited in note 46).

49. MacKinnon, *Only Words* at 108 (cited in note 2).

50. *Id.* at 106.

51. *Id.* at 108. See Gale, 65 St. John's L. Rev. at 164 (cited in note 2) (discussing the regulation of discriminatory verbal harassment on college campuses).

derstanding of constitutional equality that served as the foundation for the successful legal attack on Jim Crow institutions. Lawrence claims that *Brown v. Board of Education* "reflects the understanding that racism is a form of subordination that achieves its purposes through group defamation."<sup>52</sup> The Supreme Court, in his opinion, "held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the message that Black children are an untouchable caste, unfit to be educated with white children."<sup>53</sup> These legal precedents, Lawrence concludes, "commit[ ] us to some regulation of racist speech."<sup>54</sup> That campus speech codes and other bans on hate speech prohibit private as well as public defamation is immaterial. Lawrence points out that the Supreme Court did not let Southern states abandon public schooling in the wake of *Brown*. The judicial refusal to sustain a system of private segregation in *Griffin v. County School Board of Prince Edward County*,<sup>55</sup> he declares, establishes that "the defamatory message of segregation [should] not be insulated from constitutional proscription simply because the speaker [is] a nongovernmental entity."<sup>56</sup>

Critical theorists maintain that state decisions not to regulate hate speech abridge the equal citizenship rights of persons of color, women, and other victims of assaultive expression. Racist, sexist, and heterosexist invective adversely influences the ways in which persons of color, women, and homosexuals see themselves and are seen by others. "[R]acist speech[.]" Delgado claims, "is the means by which society constructs a stigma-picture of disfavored groups."<sup>57</sup> When bigoted messages flood the marketplace of ideas, those historically disadvantaged persons who are not dissuaded from speaking are typically not heard by the general populace. Not only do "minority children" who "constantly hear racist messages . . . come to question their competence, intelligence, and worth,"<sup>58</sup> but, as Delgado notes, the "system of ideas and images" promoted by hate speech "constructs certain people so that they have little credibility in the eyes of

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52. Lawrence, *If He Hollers* at 75 (cited in note 4).

53. *Id.* at 59 (emphasis in original).

54. *Id.* at 58. See *id.* at 61 (stating that "antidiscrimination laws are primarily regulations of the content of racist speech"); David Cole, *Hate Crimes and the Fine Line*, *Legal Times* 27 (March 15, 1993); Gale, 65 *St. John's L. Rev.* at 152-53 (cited in note 2).

55. 377 U.S. 218 (1964).

56. Lawrence, *If He Hollers* at 65 (cited in note 4). See Matsuda, *Public Response* at 48 (cited in note 4) (arguing that the underlying values of the First Amendment are sacrificed when hate speech is protected); Gale, 65 *St. John's L. Rev.* at 154, 157 (cited in note 2) (discussing an equality-based theory of the First Amendment).

57. Delgado, 85 *Nw. U. L. Rev.* at 387 (cited in note 6).

58. Delgado, *Words That Wound* at 95 (cited in note 46).

listeners.”<sup>59</sup> These biases have created a dysfunctional marketplace of ideas. Gale asserts that “the playing field is not level, but tilted to favor the status quo—in this case, racism and sexism.”<sup>60</sup> Banning certain forms of hate speech, in her view, will simply “remove the tilt and level the field. . . .”<sup>61</sup> Many proponents of bans on hate speech also insist that the invective they would prohibit is not really speech at all. “Racial insults,” Lawrence asserts, “are undeserving of first amendment protection because the perpetrator’s intention is not to discover truth or initiate dialogue, but to injure the victim.”<sup>62</sup> MacKinnon points out that “[p]ornography consumers are not consuming an idea any more than eating a loaf of bread is consuming the ideas on its wrapper.”<sup>63</sup>

Critical theorists claim that officials who refuse to ban hate speech force persons of color and other members of socially marginal groups to pay more than their fair share of the social price for free speech. Matsuda regards “[t]he application of absolutist free speech principles to hate speech . . . [as] a choice to burden one group with a disproportionate share of the costs of speech promotion.”<sup>64</sup> “Tolerance of hate speech,” she adds, “is a psychic tax imposed on those least able to pay.”<sup>65</sup> Several commentators suggest that official toleration of hate speech aggravates the initial harm that such invective is responsible for. Delgado charges that the “failure of the legal system to redress the harms of racism and racial insults conveys to all the

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59. Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 Harv. C.R.-C.L. L. Rev. 169, 171 (1994). See Lawrence, *If He Hollers* at 62 (cited in note 4) (asserting that racist speech “limit[s] the life opportunities of others”); Gale, 65 St. John’s L. Rev. at 148 (cited in note 2) (arguing that “racism and sexism . . . have functioned . . . as an informal system of censorship”); Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 Cornell L. Rev. 1258, 1287 (1992) (claiming that “even when minorities do speak they have very little credibility”); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 Tenn. L. Rev. 291, 295-96 (1989) (stating that pornography subordinates and silences women); Balkin, 1990 Duke L. J. at 421 (cited in note 1) (positing that group harassment intimidates the victim into not fighting back). See also Cass R. Sunstein, *Democracy and the Problem of Free Speech* 219-20 (Free, 1993) (noting that pornographic speech may silence women, but avoiding that claim as a basis for limiting First Amendment rights).

60. Gale, 65 St. John’s L. Rev. at 157.

61. Id. at 158. See Lawrence, *If He Hollers* at 77 (cited in note 4); Delgado, 29 Harv. C.R.-C.L. L. Rev. at 171 (cited in note 59).

62. Lawrence, *If He Hollers* at 68. See Delgado, *Words That Wound* at 107-08 (cited in note 46) (arguing that racial insults inhibit the development of productive members of society). See also Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. Chi. L. Rev. 795, 797, 802, 807 (1993) (discussing what is considered speech and what is considered conduct).

63. MacKinnon, *Only Words* at 16 (cited in note 2).

64. Matsuda, *Public Response* at 48 (cited in note 4).

65. Id. at 18.

lesson that egalitarianism is not a fundamental principle. . . ."<sup>66</sup> Matsuda speaks of "the pain of knowing that the government provides no remedy and offers no recognition of the dehumanizing experience that victims of hate propaganda are subjected to."<sup>67</sup> Progressives who defend the local bigot, in this view, confirm perceptions that victims of hate speech are second-class citizens. "[N]onwhite students feel abandoned[.]" Lawrence reminds radical civil libertarians, "[w]hen the ACLU enters the debate by challenging . . . efforts to provide a safe harbor for . . . Black, Latino and Asian students. . . ."<sup>68</sup>

Nevertheless, none of these admitted evils, standing alone or in combination, meet traditional civil libertarian requirements for banning speech. Much speech attempts to construct a stigma-picture of hated rivals. Garry Trudeau's use of Mr. Butts in *Doonesbury*, for example, is clearly designed to "construct" tobacco executives "so that they have little credibility in the eyes" of the public. The vicious attacks on President Clinton in the right-wing media serve a similar purpose. The marketplace of ideas always favors the status quo, and most speech that favors the status quo disproportionately harms society's traditional losers. Although critical theorists sometimes suggest that the First Amendment only protects the right to criticize state policies,<sup>69</sup> no traditional libertarian has ever suggested that the Constitution offers less protection to speakers who oppose radical social change.<sup>70</sup> Political conservatives have a right to condemn welfare (and "welfare queens") even though such attacks may impose

66. Delgado, *Words That Wound* at 93 (cited in note 46).

67. Matsuda, *Public Response* at 49 (cited in note 4). See Balkin, 1990 Duke L. J. at 377, 381 (cited in note 1) (arguing that "the state has chosen to value the expressive liberty of racists over the feelings of their victims").

68. Lawrence, *If He Hollers* at 86 (cited in note 4).

69. See MacKinnon, *Only Words* at 39 (cited in note 2) (discussing the different treatment of expression considered pornographic and expression that advances the overthrow of government); Gale, 65 St. John's L. Rev. at 134-35, 140-41 (cited in note 2) (noting that the difficulty in distinguishing between speech that makes a statement about government and speech focusing on religion, obscenity, or race). See also Balkin, 1990 Duke L. J. at 425-26 (cited in note 1) (suggesting that weakening the overbreadth doctrine would be appropriate when "the danger is that a vague or overly broad statute will chill conduct by the more powerful party").

70. Limiting speech rights to criticisms of the status quo would inevitably create the problems that the First Amendment was designed to avoid. No agreement exists as to what constitutes the present status quo in the United States. Gale may claim that "today's Nazis [and] Ku Klux Klan members . . . represent an overt expression of covert, or thinly veiled, majoritarian views." Gale, 65 St. John's L. Rev. at 141. More conservative thinkers, however, are likely to see Gale's opinions as more representative of the political mainstream. Furthermore, critical theorists need to consider what should constitute the relevant status quo. For example, would a racist speech be considered a criticism of the status quo if made at the Michigan Law School or in Professor MacKinnon's class? For similar arguments, see Sunstein, *Democracy* at 239 (cited in note 59) (noting the difficulty for the government in determining the status quo).

substantial costs on poor persons and persons of color. Finally, although the pure insult may communicate no ideas, most racist insults do. Lawrence admits that the racial caricature of Beethoven that was partly responsible for the movement to limit speech at Stanford University conveyed the message that persons of color are not capable of musical genius. The defaced poster, he asserts, was "a graphic footnote to the argument . . . that there [are] no significant non-European contributions to be included" in the academic curriculum.<sup>71</sup> However offensive and wrong, this is an idea that is ordinarily subject to First Amendment strictures.

These objections are only fatal to proposed restrictions on hate speech if bigoted invective enjoys the same constitutional protection as other offensive expressions of political beliefs. Proponents of campus speech codes, bans on pornography, and related measures, however, insist that all restrictions on speech need not be content neutral.<sup>72</sup> Matsuda, Lawrence, MacKinnon, and others maintain that the First Amendment does not fully protect the advocacy of racist, sexist, and heterosexist doctrines. The Fourteenth Amendment, these critical theorists state or imply, amended the First Amendment so as to give Congress and state legislatures the power to pass laws restricting expression that denies or threatens the equal citizenship rights of traditionally subordinated groups.

MacKinnon bluntly states that the Constitution does not "require[ ] that the state remain neutral as between equality and inequality. . . ."<sup>73</sup> Her *Only Words* sharply criticizes the view that "the upheaval that produced the Reconstruction Amendments did not move the ground under the expressive freedom, setting new limits and mandating new extensions"<sup>74</sup> and the view that "Fourteenth Amendment equality . . . [can] be achieved while the First Amendment protect[s] the speech of inequality. . . ."<sup>75</sup> MacKinnon thinks that once Americans reinterpret the First Amendment in light of the Fourteenth, they will easily be able to distinguish constitutional restrictions on hate speech from unconstitutional restrictions on the advocacy of progressive reform. "[T]he piously evenhanded treatment of the Klan and [NAACP] boycotters[.]" in her view, ignores the fact

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71. Lawrence, *If He Hollers* at 85 (cited in note 4).

72. For a discussion of the central role that neutrality plays in the modern defense of free speech, see Donald Alexander Downs, *The New Politics of Pornography* 3-8, 146-52 (U. of Chicago, 1989).

73. MacKinnon, *Only Words* at 107 (cited in note 2).

74. *Id.* at 71.

75. *Id.* at 72.



that "the Klan was promoting inequality and the civil rights leaders were resisting it, in a country that is supposedly not constitutionally neutral on the subject."<sup>76</sup>

This perceived conflict between the rights protected by the First and Fourteenth amendments plays a crucial role in virtually all defenses of bans on racist speech. Although other critical theorists do not explicitly claim that the Equal Protection Clause amended the Free Speech Clause, all see "a possibly inescapable tension between our commitments to the First Amendment and to equal protection."<sup>77</sup> First Amendment absolutists who would never ban speech, Gale declares, fail to acknowledge that "the commitment to eradicate racism and ensure equality is part of the same Constitution that protects free expression. . . ."<sup>78</sup> For this reason, constitutional authorities considering whether to adopt or sustain bans on hate speech should resolve this potential constitutional contradiction by giving equal weight to the expression rights recognized by the First Amendment and the authority to promote equal citizenship granted by the Fourteenth Amendment. Although civil libertarians have historically opposed the use of balancing tests in First Amendment jurisprudence, critical theorists claim that justices must balance First Amendment liberties against equal citizenship rights in hate speech cases because elected officials are not simply trying to advance a legitimate social interest, but are seeking to vindicate a constitutional right as important as the right to free expression. "[T]he alternative to regulating racist speech[,]" Lawrence points out, "is infringement of the claims of Blacks to liberty and equal protection."<sup>79</sup>

In short, critical theorists believe that legislatures and universities can ban certain expressions of prejudice because the First Amendment does not fully protect unconstitutional speech, speech that denies or threatens the realization of fundamental constitutional values. Lawrence openly asserts that "white supremacists' conduct or

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76. Id. at 86.

77. Cole, *Legal Times* at 27 (cited in note 54).

78. Gale, 65 St. John's L. Rev. at 166 (cited in note 2). See Lawrence, *If He Hollers* at 56, 71 (cited in note 4) (emphasizing that despite First Amendment protections, many civil libertarians overlook the injury inflicted by racist speech); Balkin, 1990 Duke L. J. at 422-23 (cited in note 1) (noting the First Amendment concerns when damages are awarded for harassment); Delgado, *Words That Wound* at 108-09 (cited in note 46) (stating that "[r]acial insults . . . are severely at odds with the goals of antidiscrimination laws and the commands of the [T]hirteenth [A]mendment").

79. Lawrence, *If He Hollers* at 64. See Matsuda, *Public Response* at 48-49 (cited in note 4) (identifying government protection of hate group activity as a "doctrinal pillar supporting racist speech").

speech is forbidden by the equal protection clause.”<sup>80</sup> Racist speech is no different from racist acts, in his view, because both seek “the institutionalization of the [unconstitutional] ideas of white supremacy.”<sup>81</sup> At the very least, government officials should have the authority under the Reconstruction amendments to limit speech that fails to treat persons of color or other members of historically subordinated groups with equal concern and respect. Delgado asserts that educational institutions have the power to protect core Thirteenth and Fourteenth amendment values by enacting “reasonable regulations aimed at assuring equal personhood on campus.”<sup>82</sup>

Many mainstream proponents of more limited bans on hate speech or pornography rely on similar notions of unconstitutional speech. Cass Sunstein thinks that the First Amendment does not protect “forms of hate speech” that “amount to a denial of the premise of political equality that is central to a well-functioning democracy.”<sup>83</sup> Smith would ban “expression that is noncognitive in form and which in substance conveys an emotive message that has no value or is actually immoral in terms of rational liberty standards.”<sup>84</sup> By comparison “emotive expression aimed at furthering legitimate political, intellectual, or cultural goals,” in his view, “is still too integral to the aims of rational liberty to evoke less than strict scrutiny.”<sup>85</sup> As these passages indicate, Smith does not think that bans on emotive or noncognitive racist speech pass constitutional muster because the First Amendment does not protect emotive or noncognitive speech, and elected officials have the power to decide that some forms of noncognitive speech are worse than others.<sup>86</sup>

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80. Lawrence, *If He Hollers* at 61.

81. *Id.*

82. Delgado, 85 Nw. U. L. Rev. at 346 (cited in note 6). See Sunstein, 60 U. Chi. L. Rev. at 802 (cited in note 62) (discussing the means of balancing both free speech principles and anti-caste concerns).

83. Sunstein, 60 U. Chi. L. Rev. at 814-15.

84. Smith, *Liberalism* at 242 (cited in note 31).

85. *Id.*

86. As Sunstein points out, elected officials may constitutionally determine that some forms of constitutionally unprotected speech are more harmful than others. Sunstein, 60 U. Chi. L. Rev. at 825 (cited in note 62). Although he sometimes suggests that states can regulate violent pornography in order to “diminish[ ] views that contribute to existing inequalities,” Sunstein, *Democracy* at 219 (cited in note 59), Sunstein more frequently claims that “some pornographic materials” can be regulated because, for reasons other than viewpoint, such material “lies at the periphery of constitutional concern.” *Id.* at 215. See *id.* at 215-16, 221, 226 (arguing for the regulation of a narrowly defined class of pornographic materials). For an argument that violent pornography should be banned on similar grounds, see Downs, *The New Politics of Pornography* at 152-55, 162-65, 194-98 (cited in note 72).

Rather, he insists that the Constitution protects emotive or noncognitive speech that communicates constitutionally permissible messages. Unconstitutional emotive or noncognitive speech differs from constitutional emotive or noncognitive speech, in his view, solely because the former communicates unconstitutional beliefs.

Determining the particular manifestations of unconstitutional speech that radical civil libertarians would actually ban is difficult. Different scholars have proposed different regulations. Moreover, many critical theorists combine fairly strong theoretical arguments with fairly modest proposals. MacKinnon and Matsuda clearly state that the First Amendment does not protect the advocacy of specific doctrines, for example, the claim that the Holocaust never happened.<sup>87</sup> Other proponents of narrow content regulations typically focus on constitutionally borderline speech, in particular, insults.<sup>88</sup> Only Smith (and perhaps Gale), however, explicitly states that "communication that is clearly an exposition of ideas . . . merits full [First Amendment] protection."<sup>89</sup> Nevertheless, even these moderate proponents of content restrictions maintain that speech may lose constitutional protection solely because that speech challenges fundamental constitutional norms.<sup>90</sup>

### III. THE PRESENT AND PAST OF UNCONSTITUTIONAL SPEECH

Those critical theorists who would ban certain expressions of prejudice correctly note that past proponents of content restrictions never asserted that the Fourteenth Amendment's promise of equal citizenship amended the First Amendment's guarantee of free speech. Thus, Matsuda, Lawrence, and their allies can claim to have crafted a new exception to free speech principles, one that is derived from the same radical civil libertarian principles that animate much contemporary free speech thought. Radical civil libertarians agree that the Fourteenth Amendment and the Constitution as a whole

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87. MacKinnon, *Only Words* at 98-99 (cited in note 2); Matsuda, *Public Response* at 42 (cited in note 4).

88. See Delgado, *Words That Wound* at 106-09 (cited in note 46); Lawrence, *If He Hollers* at 66-71 (cited in note 4).

89. Smith, *Liberalism* at 242 (cited in note 31). Gale declares that elected officials can "regulat[e] . . . some categories of racist" and similarly prejudiced speech. Gale, 65 St. John's L. Rev. at 164 (cited in note 2). When discussing specific examples, however, she indicates that the Constitution protects all racist speech, no matter how offensive, that "constitutes a contribution to . . . public dialogue about race and racism." *Id.* at 179 (defending the right to deface racially a poster of Beethoven).

90. See notes 83-86 and accompanying text.

protect a broadly understood right to equal concern and respect, a right that encompasses both the liberty to participate as an equal in communal life and the right to choose one's personal lifestyle free from unwarranted communal interference. Proponents and opponents of campus speech codes and bans on pornography apparently disagree only over the application of equal citizenship principles to speech that denies or threatens the equal citizenship rights of some members of the American community.

Philosophical and historical investigation, however, indicates that efforts to regulate unconstitutional speech seriously undermine generally accepted libertarian understandings of First Amendment rights. The argument that critical theorists rely on to justify limiting expression that denies or threatens equal citizenship rights is sound only if constitutional authorities agree that equal citizenship rights are central to the constitutional order. Whether persons have a constitutional right to vilify homosexuals, in their view, depends on there being a constitutional right to engage in gay sex. This claim was recently rejected by the Supreme Court.<sup>91</sup> More significantly, the concept of unconstitutional speech can be used to ban much progressive advocacy. Some radical civil libertarian doctrines will become subject to regulation should the Fourteenth Amendment and Constitution be construed as protecting more conservative values, for example, the values underlying laissez-faire capitalism. Indeed, various notions of unconstitutional speech played crucial roles in past judicial and political efforts to suppress the voices of unpopular political dissenters.

The leading conservative proponents of restrictions on speech during World War I and the Red Scare maintained that persons had no constitutional right to attack what they believed to be the essential principles of republican government.<sup>92</sup> Unlike progressive opponents of restrictions on speech, who relied on a bad tendency test,<sup>93</sup> the

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91. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding that the Constitution does not confer the right to engage in homosexual sodomy).

92. The following discussion of conservative support for restrictions on speech before World War II is a lightly edited version of Graber, *Transforming Free Speech* at 46-48 (cited in note 21).

93. See *id.* at 83-86. The only two Supreme Court opinions to rely explicitly on the bad tendency test, *Debs v. United States*, 249 U.S. 211 (1919) and *Abrams v. United States*, 250 U.S. 616 (1919), were authored respectively by Justices Oliver Wendell Holmes, Jr. and John Clarke. Both jurists were firm opponents of the liberty of contract. See *Lochner v. United States*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting) (stating it is well settled that states may pass laws that interfere with the freedom to contract); John H. Clarke, *Judicial Power to Declare Legislation Unconstitutional*, 9 A.B.A. J. 689, 692 (1923) (claiming that justices should sustain

leading judicial and academic supporters of the "night watchman" state maintained that government in peacetime could only regulate the advocacy of those doctrines that denied fundamental constitutional truths.<sup>94</sup> In *Gitlow v. New York*,<sup>95</sup> for example, Justice Edward Sanborn asserted that the freedom of speech "does not include the right virtually to destroy" those "free and constitutional institutions" that are "the very basis and mainstay upon which the freedom of press rests."<sup>96</sup> The clear and present danger test had no bearing on the case, he maintained, because no one had a constitutional right to advocate revolutionary socialism.<sup>97</sup> Sanborn thought that advocacy of revolutionary socialism could be regulated because of its bad tendency, but only because he first found that revolutionary socialism was unconstitutional speech.<sup>98</sup>

During the same time period, influential proponents of the freedom of contract frequently indicated that the First Amendment did not protect overly strident attacks on private property because such advocacy was also unconstitutional speech. In a 1919 article published by the *Journal of Criminal Law and Criminology*, G. P. Garrett claimed that only the "loyalist of independent mind" and the member of the "political minority" had the right to criticize the government.<sup>99</sup> The advocate of "heresy" was not given this protection. A heretic was defined as a person like Eugene V. Debs who "found his doctrine opposed to the ruling influence of the American spirit."<sup>100</sup> Garrett recommended that the speech of these persons be absolutely prohibited: "without much need as to them for submitting the act to the test of constitutionality, we turn material of this kind into the jails."<sup>101</sup> In a speech given the same year, George T. Page, the president of the American Bar Association, suggested that

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any law that might seem constitutional to a rational man). I have found no judicial opinion authored by a proponent of the freedom of contract which uses the bad tendency test.

94. Some conservative libertarians did insist that government did not have to respect the liberty of speech or contract during wartime. See George Sutherland, *Constitutional Power and World Affairs*, 98-99, 101-04, 111-15 (Columbia U., 1919) (stating that Congress may constitutionally enact restrictions on rights that in times of peace would be intolerable); *Wilson v. New*, 243 U.S. 332, 359 (1917) (holding that emergency conditions during World War I justify federal regulation of hours and wages).

95. 268 U.S. 652 (1925).

96. *Id.* at 668 (quoting *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419 (1918)).

97. *Id.* at 670-71.

98. *Id.* at 668.

99. G. P. Garrett, *Free Speech and the Espionage Act*, 10 J. Crim. L. & Criminology 71, 73-74 (1919).

100. *Id.* at 71.

101. *Id.* at 71-75.

immigration officials should deport unconstitutional speakers.<sup>102</sup> The United States, he argued, must not only insist that the citizen “renounce allegiance . . . to every foreign potentate and power” but the citizen should also be required to abandon “every foreign ‘ism’ and scheme of government not reconcilable with our own.”<sup>103</sup>

Conservative judicial opinions frequently played variations on the theme of unconstitutional speech. Justice Butler’s dissent in *Stromberg v. California*<sup>104</sup> suggested that “the anarchy that is certain to follow a successful ‘opposition to organized government’” might be “a sufficient reason to hold that all activities to that end are outside the ‘liberty’ so protected.”<sup>105</sup> More often, conservative justices merged the doctrine of unconstitutional speech into some less controversial basis for affirming governmental regulation of speech. In *Pierce v. United States*,<sup>106</sup> Justice Pitney declared a prediction that the draft would become mandatory to be false, even though the draft had become mandatory by the time the case came to the Supreme Court.<sup>107</sup> Pitney’s opinion in *Pierce* also hinted that socialism was so evidently false that no person could advocate that doctrine on the basis of its merits.<sup>108</sup> Justice Van Devanter’s dissent in *Herndon v. Lowry*<sup>109</sup> merged the categories of criminal and antirepublican advocacy. Persons who advocated the abolition of republican institutions in the United States, he claimed, were necessarily arguing for a revolution because the American people would never peacefully tolerate such changes.<sup>110</sup> Van Devanter insisted that advocacy of Communism and measures supported by Communists, in particular radical notions of racial justice (by 1930 standards), could influence only those persons whose “past and present circumstances” disabled them from rationally recognizing the obvious fallacies of these policies.<sup>111</sup>

The leading enthusiasts for content restrictions on expression in the next generation relied on a different conception of unconstitutional speech than did conservative proponents of the liberty

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102. George T. Page, *Government*, 5 A.B.A. J. 527, 537 (1919).

103. *Id.* at 537-39.

104. 283 U.S. 359 (1931).

105. *Id.* at 376 (Butler, J., dissenting).

106. 252 U.S. 239 (1920).

107. *Id.* at 251.

108. *Id.* See *id.* at 264 (Brandeis, J., dissenting) (stating that the prediction of the draft was later verified).

109. 301 U.S. 242 (1937).

110. *Id.* at 276 (Van Devanter, J., dissenting) (stating “for all know that such measures could not be effected otherwise”).

111. *Id.*

of contract. By the eve of World War II, most American scholars regarded the Constitution as a democratic document and the Fourteenth Amendment as primarily protecting certain democratic procedures.<sup>112</sup> Progressives and New Dealers thought that advocacy of the most intrusive governmental regulation of commercial affairs was not unconstitutional speech because the Constitution did not privilege any economic arrangements. Instead, those persons who favored regulating the advocacy of certain ideas in the years after the Depression maintained that the Constitution did not protect undemocratic speech, the speech that they thought inconsistent with fundamental Fourteenth Amendment and constitutional values. Proponents of group libel laws in the 1930s and 1940s maintained that undemocratic speech was not as protected by the Constitution as was advocacy of those doctrines supportive or more consistent with fundamental constitutional norms. Karl Loewenstein's calls in the *American Political Science Review* for a more militant democracy insisted that the basic democratic rights set out in the Constitution should be withheld from persons and groups who were not willing to respect those liberties.<sup>113</sup> Political scientists committed to combating fascism, he stated, must recognize that "[i]t is the exaggerated formalism of the rule of law which under the enchantment of formal equality does not see fit to exclude from the game parties that deny the very existence of its rules."<sup>114</sup> In *Democracy and Defamation*, David Reisman made the related claim that the Fourteenth Amendment gave government the power to ban speech that might threaten the Constitution's democratic principles.<sup>115</sup> Elected officials, he wrote, had the right to enact content restrictions on speech "for the active protection and encouragement of that widespread group participation which will give meaning and future to democracy."<sup>116</sup> Anticipating contemporary theorists, Reisman rejected notions that free speech should be regarded only as a liberty against government. In his opinion, it was no longer tenable to "continue a negative policy of protection from the state," because such a policy "plays directly into the hands of the groups whom supporters of democracy need most to

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112. Graber, *Transforming Free Speech* at 165-67 (cited in note 21); Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 197-217, 235-66 (U. of Kentucky, 1973).

113. Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 Am. Pol. Sci. Rev. 417, 424 (1937).

114. Id.

115. David Reisman, *Democracy and Defamation: Control of Group Libel*, 42 Colum. L. Rev. 727, 732 (1942).

116. Id.

fear.”<sup>117</sup> Thus, Reisman urged justices and legislators to scrutinize closely the doctrines advocated by different political dissenters. Censors, he thought, must “be discriminating in judging what sorts of criticism—though mistaken in fact—further the democratic cause and what sorts of defamatory falsehoods hinder it.”<sup>118</sup>

Postwar essays by Carl Auerbach and Harry Jaffa further developed the new understanding that attacks on democratic principles are not fully protected by the First Amendment. Auerbach insisted that “[n]o democratic or constitutional principle is violated . . . when a democracy acts to exclude those groups from entering the struggle for political power which, if victorious, will not permit that struggle to continue in accordance with the democratic way.”<sup>119</sup> Government suppression of Communist speech, he declared, was justified by “the very same interests which freedom of speech itself seeks to secure—the possibility of peaceful progress under freedom.”<sup>120</sup> Jaffa maintained that “Communists and Nazis . . . have no right to the use of free speech in a free society” because free speech “can never be rightfully employed to propose the destruction of either a majority or minority.”<sup>121</sup> In words that echo those of MacKinnon, this doyen of American conservatism declared that “one cannot be equally tolerant . . . of opinions destructive, and of opinions not destructive, of the regime of liberty itself.”<sup>122</sup> Those members of the American Civil Liberties Union who at the time sought to ban fascist expression also claimed that the First Amendment only protected speakers who endorsed the basic principles of constitutional democracy. Margaret DeSilver, an influential liberal philanthropist, insisted that Nazis did not have “the liberty to destroy liberty.”<sup>123</sup>

This brief historical survey suggests that in every age the leading proponents of various bans on certain ideas have insisted that

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117. *Id.* at 780. See Michelman, 56 *Tenn. L. Rev.* at 303-05 (cited in note 59) (noting that a healthy system of freedom of expression needs to protect “against suppression by nongovernmental as well as by governmental power”).

118. Reisman, 42 *Colum. L. Rev.* at 731.

119. Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 *U. Chi. L. Rev.* 173, 195 (1956).

120. *Id.* at 188.

121. Henry J. Jaffa, *On the Nature of Civil and Religious Liberty*, in William F. Buckley, Jr. and Charles R. Kesler, eds., *Keeping the Tablets: Modern American Conservative Thought* 145, 152 (Harper & Row, 1988).

122. *Id.* at 156. Compare MacKinnon, *Only Words* at 86 (cited in note 2) (stating that “speech cases that consider words as triggers to violent action . . . submerge inequality issues further”).

123. Walker, *In Defense of American Liberties* at 116 (cited in note 15) (quoting Margaret DeSilver).



the First Amendment does not fully protect the right to deny or criticize what their generation regards to be fundamental constitutional values. Critical theorists correctly note that they share the basic radical civil libertarian principles that animate the leading contemporary defenders of free speech. What they fail to realize is that the leading opponents of free speech in every generation have typically endorsed the basic principles that have provided the foundations for the leading constitutional defense of free speech in their era. Debates over free speech throughout American history have focused on whether the consensual constitutional paradigm of a particular time supports or forbids bans on speech challenging that paradigm.

For this reason, the leading proponents and opponents of free speech in each generation typically have more in common with each other than with the leading proponents and opponents of free speech in other generations. Conservative thinkers at the turn of the twentieth century agreed that the Constitution protected the freedom of contract. While conservative libertarians understood *Lochner* as establishing a broad sphere of private conduct that the government could not regulate,<sup>124</sup> conservative censors understood *Lochner* as expressing a basic principle of private property that could not be questioned in extremis. Mid-twentieth century thinkers agreed that democracy was the most important constitutional value. Classical civil libertarians understood this commitment to democratic values as requiring the establishment of a marketplace of ideas open to all political and social doctrines; the leading proponents of restrictions on speech in that era insisted that there was no freedom to call for the abolition of democratic government in extremis. Contemporary radical civil libertarians understand the Constitution to guarantee the right of equal citizenship. Proponents of free speech maintain that equal citizens must be equally free to express their personal convictions in any way they please; critical theorists claim that the Constitution does not fully protect speech that denies in extremis the equal personhood of some members of the political community. Thus, the particular use of radical civil libertarian principles to justify restrictions on speech is new. The more general notion that the First Amendment does not fully protect unconstitutional speech, however, is not.

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124. For a discussion of the conservative libertarian tradition, see Graber, *Transforming Free Speech* at 17-44 (cited in note 21).

## IV. THE CONSTITUTIONAL RIGHTS OF UNCONSTITUTIONAL SPEAKERS

Critical theorists and others who endorse some content restrictions on unconstitutional ideas should not be unceremoniously drummed out of the civil libertarian movement. Both classical and radical civil libertarianism encompass much more than a commitment to free speech.<sup>125</sup> On a wide range of issues, from reproductive liberties to the rights of criminal suspects, Matsuda, Lawrence, and other proponents of bans on hate speech endorse positions that are similar, if not identical to, those advocated by the ACLU. Indeed, a strong minority of ACLU members have consistently supported restrictions on unconstitutional speech.<sup>126</sup> Many prominent civil libertarians have sharply disagreed with ACLU decisions to defend other rights. Meiklejohn, for example, opposed efforts to ban religious exercises in public schools.<sup>127</sup> Hence, rather than require critical theorists and their supporters to turn in their ACLU cards, the better approach is to explore more fully whether libertarians of all persuasions should interpret the First Amendment as protecting unconstitutional speech.

Unfortunately, constitutional text and history offer very little help in determining the constitutional rights of unconstitutional speakers. The Equal Protection Clause, combined with the explicit Congressional power to enforce the Fourteenth Amendment, suggest that the national government is authorized to ban hate speech whenever such expression denies or threatens equal citizenship principles. Raoul Berger maintains, with much justification, that the framers of the Fourteenth Amendment thought that Congress would ultimately determine what rights were protected by the post-Civil War Constitution and how those rights were best protected.<sup>128</sup> On this

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125. For a good history of civil libertarianism, see generally Walker, *In Defense of American Liberties* (cited in note 15).

126. *Id.* at 60-61, 64, 83, 116.

127. *Id.* at 220.

128. Raoul Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* 221-29 (Harvard U., 1977). See *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (stating that "[i]t is the power of Congress which has been enlarged Congress is authorized to enforce the prohibitions by appropriate legislation"); Cong. Globe, 39th Cong., 1st Sess. (May 23, 1866), reprinted in *The Reconstruction Amendments' Debates* 221-22 (Va. Comm'n on Constitutional Gov't, 1967) (statement of Senator Howard) (stating that § 5 of the Fourteenth Amendment "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of person or property"). For similar conclusions, see Robert J. Harris, *The Quest for Equality: The Constitution, Congress and the Supreme Court* 53-54 (Louisiana St. U., 1960); Joseph B. James, *The Framing of the Fourteenth Amendment* 184 (U. of Illinois, 1956).

originalist reading, a national ban on pornography or assaultive speech would pass constitutional muster, although state bans might not.<sup>129</sup> The Privileges and Immunities Clause,<sup>130</sup> however, suggests that the Fourteenth Amendment was not intended to weaken whatever rights American citizens previously had to criticize national policies. Many civil libertarians contend that the post-Civil War Constitution nationalized all the freedoms set out in the Bill of Rights.<sup>131</sup> This reading of constitutional text and history supports the claim that the Fourteenth Amendment did not dilute free speech rights, but ensured that states would be required to respect existing First Amendment liberties. On this originalist reading, therefore, if the federal government had no power to regulate hate speech before the Civil War, then state governments lost the power to regulate hate speech after the war.

American political traditions offer no clearer guide to the constitutional rights of unconstitutional speakers. Localities have occasionally passed group libel laws, but those laws have rarely been enforced and have frequently been repudiated by their sponsors.<sup>132</sup> A closely divided Supreme Court did sustain group libel laws in *Beauharnais v. Illinois*.<sup>133</sup> Most commentators, civil libertarian commentators in particular, however, think that *Beauharnais* is no longer good law.<sup>134</sup> More generally, both the scope of free speech

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129. The Supreme Court has ruled that the federal government has more power to adopt race-conscious measures than localities. For decisions sustaining federal affirmative action programs, see *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). For decisions declaring state affirmative action programs unconstitutional, see *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Regents of U. of California v. Bakke*, 438 U.S. 265 (1978). If, however, Berger is correct when he claims that the Framers gave the federal judiciary no independent power to enforce the Fourteenth Amendment, then strict originalists should regard states as free to regulate hate speech in the absence of inconsistent federal legislation. See Berger, *Government By Judiciary* at 221-29.

130. U.S. Const., Art. IV, § 2, cl. 1 (stating "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States").

131. See *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (stating that "one of the chief objects that the provisions of the [Fourteenth] Amendment's first section . . . were intended to accomplish was to make the Bill of Rights applicable to all states"). For scholarly claims that the post-Civil War amendments nationalized all the freedoms set out in the Bill of Rights, see generally Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Duke U., 1986) (exploring the historical context and debate surrounding the adoption of the Fourteenth Amendment); David A. J. Richards, *Conscience and the Constitution: History, Theory and Law of the Reconstruction Amendments* (Princeton U., 1993).

132. See Samuel Walker, *Hate Speech: The History of an American Controversy* 77-100 (U. of Nebraska, 1994) (discussing the rise and fall of group libel in America).

133. 343 U.S. 250 (1952).

134. See, for example, Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 Cal. L. Rev. 297, 330 (1988) (stating that "as a matter of technical precedent *Beauharnais* comes to us as damaged goods"); Strossen, 1990

rights and the affirmative power of government to promote equal citizenship expanded dramatically during the third quarter of the twentieth century.<sup>135</sup> As a result, those on each side of the debates over campus speech codes, bans on pornography, and related measures can point to an established line of judicial decisions and social practices that support their position.

When text and history give conflicting signals, even the strictest originalist or textualist must have recourse to more general theories. Analyses of the constitutional rights of unconstitutional speakers must focus on the relationship between the First Amendment and the constitutional order. On one view, the constitutional order constrains free speech rights. The First Amendment, MacKinnon and others suggest, only protects advocacy of those doctrines that are consistent with fundamental constitutional principles.<sup>136</sup> No constitution, in their view, can give persons the right to subvert the constitutional regime. On a second view, the First Amendment justifies and supports the constitutional order. A sound constitutional democracy, in this view, should be self-perpetuating. Tolerance of unconstitutional ideas demonstrates our constitutional confidence that fundamental constitutional principles will triumph in a democratic marketplace of ideas.

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Duke L. J. at 518 (cited in note 7) (noting that "*Beauharnais* is widely assumed no longer to be good law"); Emerson, *The System of Freedom of Expression* at 396 (cited in note 33) (stating that "little remains of the doctrinal structure of *Beauharnais*").

135. See, for example, *Katzbach v. Morgan*, 384 U.S. 641, 648-58 (1966) (ruling that the federal government has broad power to define and remedy Fourteenth Amendment violations); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968) (ruling that the Thirteenth Amendment gives Congress the power to ban race discrimination in housing); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249-62 (1964) (holding that Congress may use the Commerce Clause to ban race discrimination in places of public accommodation); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-92 (1964) (ruling that public figures cannot win damages for libel unless they prove "actual malice"); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (holding that states may only ban advocacy that is directed to and likely to produce imminent lawless action); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that states must meet a "heavy burden" to justify a prior restraint on speech).

136. See notes 153-56 and accompanying text.

### A. *The Constitutional Case for Banning Unconstitutional Speech*

Proponents of bans on unconstitutional speech derive free speech rights from the inherent contestability of political and moral ideas. Matsuda claims that government should respect the liberties set out in the First Amendment "[b]ecause our ideas about what we want as a society are changing and emergent. . . ." <sup>137</sup> In this world of political and intellectual flux, she argues, "we cannot say that certain ideas are unacceptable." <sup>138</sup> In her opinion, the moral of the civil libertarian story is that "[w]e have no basis for distinguishing good ideas from bad ideas. . . ." <sup>139</sup> Hence, "the only logical choice is to protect all ideas." <sup>140</sup>

This grounding of free speech rights in a thoroughgoing intellectual skepticism does have strong roots in the classical civil libertarian tradition. Many of the most influential defenders of free speech justify a system of free expression by pointing to the impossibility of clearly establishing any truth about matters of public importance. In the passage that many regard as "the greatest utterance on intellectual freedom by an American," <sup>141</sup> Justice Oliver Wendell Holmes, Jr., declared:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . <sup>142</sup>

Learned Hand, another member of the civil libertarian pantheon, similarly described "the spirit of liberty" as "the spirit which is not too sure that it is right." <sup>143</sup>

Matsuda and Lawrence, however, maintain that time has validated at least one fighting faith. Racist speech is a "sui generis" exception to the general civil libertarian rule against content restrictions on speech, they claim, because of "the universal acceptance

137. Matsuda, *Public Response* at 32 (cited in note 4).

138. *Id.*

139. *Id.*

140. *Id.*

141. Max Lerner, *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions* 306 (Little, Brown, 1943). For compilations of other laudatory remarks, see Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* 241 (Viking, 1987); Graber, *Transforming Free Speech* at 108 (cited in note 21).

142. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

143. Irving Dillard, ed., *The Spirit of Liberty: Papers and Addresses of Learned Hand* 190 (Knopf, 3d ed. 1960).

of the wrongness of the doctrine of racial supremacy.”<sup>144</sup> Matsuda asserts: “We know, from our collective historical knowledge, that slavery was wrong. We know that white minority rule in South Africa is wrong.”<sup>145</sup> “Racial supremacy[,]” she concludes, “is one of the ideas we have collectively and internationally considered and rejected.”<sup>146</sup> Lawrence points out that members of the ACLU, in particular, recognize that racist claims are utter nonsense. He notes that “most [F]irst [A]mendment absolutists are reluctant to embrace” the “possible ‘truth’ of racism. . . .”<sup>147</sup> If the content of racist speech is certainly false, critical theorists assert, then a First Amendment committed to discovering truth on matters of public importance should not protect expressions of racial hate, particularly when such speech causes tangible injuries.

This claim that racist doctrines have been universally rejected is, unfortunately, wrong. Tribal politics in Europe, the former Soviet Union, Africa, and the Middle East demonstrate that ideas of racial supremacy are alive, well, and gaining strength in many societies.<sup>148</sup> The picture is no better domestically. Indeed, contemporary calls in the United States for bans on hate speech are typically responses to the national rise in racist incidents.<sup>149</sup> This increase in hate crimes and public expressions of intolerance demonstrate, at the very least, that equal citizenship principles remain open to debate in many American communities. Moreover, as the defeat of the Equal Rights Amendment and President Clinton’s failure to lift the ban on homosexuals in the military indicate, no general social consensus exists on the extent to which women and homosexuals should be treated with equal concern and respect. Racist doctrines are even making a comeback in the academy. Linda Gottfredson of the University of Delaware, for example, maintains that “[s]ocial science

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144. Matsuda, *Public Response* at 37 (cited in note 4).

145. *Id.*

146. *Id.*

147. Lawrence, *If He Hollers* at 75 (cited in note 4).

148. See generally Karen Dawisha and Bruce Parrott, *Russia and the New States of Eurasia: The Politics of Upheaval* (Cambridge U., 1994); Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts* (U.S. Inst. of Peace, 1993).

149. See, for example, Lawrence, *If He Hollers* at 53-55 (cited in note 4) (noting several examples of racist incidents on college campuses); Charles R. Lawrence III, et al., *Introduction*, in Mari J. Matsuda, et al., eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, 1, 1 (Westview, 1993) (citing a report by the National Institute Against Prejudice and Violence that 65% to 75% minority students reported some form of “ethnoviolent harassment”; Matsuda, *Public Response* at 44 (cited in note 4) (commenting on the marked rise of racial incidents on university campuses). See also Delgado, *Words That Wound* at 90 (cited in note 46) (observing “[t]he idea that color is a badge of inferiority and a justification for the denial of opportunity and equal treatment is deeply ingrained”).

today condones and perpetrates a great falsehood," the view that "racial-ethnic groups never differ in average developed intelligence."<sup>150</sup> In her view, "the existence of sometimes large group differences in intelligence is as well-established as any fact in the social sciences."<sup>151</sup> Some persons of color have joined the fray, claiming that African-Americans are more creative intellectually than white persons because persons of color have higher concentrations of melanin in their skin.<sup>152</sup>

A modified version of the certainty thesis, however, can overcome the empirical difficulties that beset claims that modern societies uniformly reject claims of racial supremacy. Racist doctrines are still being debated politically and academically, but the Constitution unequivocally guarantees that all persons are entitled to equal concern and respect. This emphasis on constitutional as opposed to epistemological certainty provides a firmer foundation for bans on racist and sexist speech. MacKinnon, in particular, reads the Constitution's commitment to race and sex equality as demonstrating the triumph of equal citizenship principles in the American marketplace of ideas. The principle of equal citizenship, she suggests, "is not supposed to be debatable to the same degree as is the organization of the economy."<sup>153</sup> In her opinion, a society constitutionally committed to equal citizenship need not subject egalitarian ideals to unnecessary competition, particularly when the expression of contrary ideas defeats egalitarian values. Equality, MacKinnon declares, is a "compelling state interest" that can already outweigh First Amendment rights in certain settings.<sup>154</sup> "[W]hen equality is taken seriously in expressive settings," she concludes, racist and sexist speech is "not constitutionally insulated from

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150. Linda S. Gottfredson, *Egalitarian Fiction and Collective Fraud*, 31 *Society* 53, 53 (March/April 1994).

151. *Id.* Prominent journals continue to be filled with articles debating whether persons of color and women have smaller brain capacities and lower IQs than Caucasians and men. *Intelligence*, in particular, is a haven for scholars interested in the racial and sexual determinants of intelligence. See generally J. Philippe Rushton, *Cranial Capacity Related to Sex, Rank, and Race in a Stratified Random Sample of 6,325 U.S. Military Personnel*, 16 *Intelligence* 401 (1992); C. Davison Ankney, *Sex Differences in Relative Brain Size: The Mismeasure of Women, Too?*, 16 *Intelligence* 329 (1992); John C. Loehlin, *Should We Do Research on Race Differences in Intelligence?*, 16 *Intelligence* 1 (1992); Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (Free, 1994); J. Phillippe Rushton, *Race, Evolution, and Behavior: A Life History Perspective* (Transaction, 1995).

152. For a critical review of melanists and their claims, see generally Bernard R. Ortiz de Montellano, *Melanin, Afrocentricity, and Pseudoscience*, 36 *Yearbook of Physical Anthropology* 33 (1993).

153. MacKinnon, *Only Words* at 39 (cited in note 2).

154. *Id.* at 107 (footnote omitted).

regulation on the ground that the ideas they express cannot be regarded as false."<sup>155</sup>

This defense of hate speech regulations does not depend on the objective falsehood of racial supremacy or a universal condemnation of racism. MacKinnon is undoubtedly certain that all communities should treat women and persons of color with the same solicitude as white men. Her argument, however, only depends on the simpler and clearly correct claim that the Constitution condemns racism. The Constitution, she points out, grants government and citizens a wide variety of policy options.<sup>156</sup> The First Amendment protects the right of all persons to advocate any of these constitutionally legitimate policies. This right is limited, however, to the advocacy of policies and principles that can be adopted within the constitutional order. Persons have no free speech rights, in this view, to advance principles or policies that are fundamentally antithetic to basic constitutional values. Such principles as racism or the divine right of monarchs may be philosophically debatable, but that debate cannot take place within a constitutional order committed to democratic and egalitarian ideals.

Interpreted simply, claims that persons only have a constitutional right to advocate constitutionally legitimate ideas seem either pernicious or silly. No one thinks the national government has the constitutional power to punish persons who attack any constitutional provision or authoritative interpretation of that provision. The First Amendment clearly protects the right to advocate a six year presidential term or criticize the Supreme Court's decisions in free exercise cases. Critical Jewish theorists do not call on Congress to ban verbal attacks on *Engel v. Vitale*<sup>157</sup> because sharp critiques of that decision in many communities cause Jewish parents and children to forego constitutional challenges to prayer in the local public school.

The constitutional rules for amendment set out in Article V seemingly demonstrate that persons must be constitutionally free to criticize any constitutional provision or principle. With one or two present exceptions, the Constitution apparently permits supermajoritarian coalitions to alter, abandon, or contradict every clause in the text.<sup>158</sup> If the Constitution treats all constitutional provisions as

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155. Id. at 106.

156. Id. at 39.

157. 370 U.S. 421 (1962).

158. One exception is evident from the text of Article V, which declares that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Also, as Will Harris points out, the Constitution does not clearly indicate whether Americans may constitutionally



mutable, then, contrary to MacKinnon's claim, the principle of equal citizenship must be as open to debate as the organization of the economy. Thus, the First and Fourteenth amendments do not recognize a category of unconstitutional speech. Advocacy of any idea, no matter how subversive of basic constitutional commitments, is implicitly licensed by the apparent universal scope of Article V.

Prominent constitutional theorists, however, suggest a different notion of unconstitutional speech that is not open to these objections. Walter Murphy points out that the very meaning of "amendment" limits the changes to the Constitution that may be passed in accordance with the procedures outlined in Article V.<sup>159</sup> "To amend[.]" he points out, "means to modify or rephrase, so as to add or subtract."<sup>160</sup> A constitutional clause specifying how the Constitution is to be amended, in this view, only authorizes new provisions that amount to "a rephrasing, modification, or correction[.]" and not additions that amount to "a remaking."<sup>161</sup>

Murphy sees the "provisions of the constitutional document[.]" as "differ[ing] markedly in fundamentality."<sup>162</sup> "Some[.]" he claims, "represent more or less arbitrary arrangements. . . ."<sup>163</sup> These can be amended at will, provided the appropriate amending procedures are used. Other clauses, however, "reflect basic principles of political theory."<sup>164</sup> Murphy contends that "certain rights—for example, to even-handed governmental treatment and to privacy in the sense of being let alone in many intimate relationships—form integral parts of the American 'constitution.'"<sup>165</sup> "Clauses protecting these rights[.]" he concludes, "are not repealable, nor are they amendable so as to weaken them. . . ."<sup>166</sup> Murphy and other scholars who defend the notion of an unconstitutional constitutional amendment agree that the citizens of the United States can radically alter their form of government.<sup>167</sup> Moreover, they debate whether the Supreme Court

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amend the amendment procedure specified in Article V. William F. Harris, *The Interpretable Constitution* 176-87 (Johns Hopkins U., 1993).

159. Walter F. Murphy, *The Nature of the American Constitution* 32 (U. of Illinois, 1989).

160. *Id.*

161. *Id.* See Harris, *The Interpretable Constitution* at 182-83 (cited in note 158).

162. Murphy, *The Nature of the American Constitution* at 23.

163. *Id.*

164. *Id.*

165. *Id.* at 24 (footnote omitted).

166. *Id.* See Auerbach, 23 U. Chi. L. Rev. at 194 (cited in note 119) (noting that the Constitution impliedly excludes any amendment that would exchange its democratic character).

167. Murphy, *The Nature of the American Constitution* at 34-35. See Harris, *The Interpretable Constitution* at 166 (cited in note 158) (discussing the internal restraints on amendability within the Constitution itself).

should ever declare a constitutional amendment unconstitutional.<sup>168</sup> Their point is simply that “the [C]onstitution, broadly or narrowly defined, cannot authorize or legitimate” such radical changes.<sup>169</sup> “Constitutional amendment under Article V[,]” Will Harris observes, “is still change generated from the *inside* . . . bound by the rules of the American constitutional enterprise. . . .”<sup>170</sup>

If the Constitution cannot “authorize or legitimate” amendments that weaken or abolish fundamental constitutional values, then a First Amendment limited to advocacy of constitutionally legitimate change may not protect speech that denies or threatens fundamental constitutional values. The Constitution, arguments for bans on unconstitutional speech suggest, cannot give anyone the right to interfere with the realization of fundamental constitutional principles. Hence, speakers who advocate unconstitutional ideas cannot claim First Amendment protection when they seek to overthrow the constitutional order. Indeed, Harris suggests that Americans might consider a constitutional amendment that prohibits persons who hold fundamentally unconstitutional beliefs from voting or holding political office. Such a rule, he believes, would provide for an “impeachment” of citizens” insufficiently “attached to the Constitution.”<sup>171</sup>

Once Americans recognize that different constitutional provisions have different constitutional status, critical theorists think that their fellow citizens will easily be able to distinguish constitutional bans on hate speech from unconstitutional bans on the advocacy of communism or a balanced-budget amendment. Radical civil libertarians claim that the principle of equal personhood is central to the Constitution in a way that the present economic order and budgetary process are not. The Constitution, Lawrence, Strossen, and others agree, allows Americans to choose any economic system and regards the present budgetary process as one of those constitutional arrangements that is “more or less arbitrary.”<sup>172</sup> Thus, Article V sanctions a balanced budget amendment and amendments that radically redistribute property rights. Article V cannot, however, sanction an amendment repealing the Equal Protection Clause or an

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168. See Harris, *The Interpretable Constitution* at 169 n.3 (questioning whether any institutional interpreter would have constitutional authority to strike a technically valid amendment, despite observable inconsistency with the core of the Constitution).

169. Murphy, *The Nature of the American Constitution* at 33 (cited in note 159).

170. Harris, *The Interpretable Constitution* at 205 (cited in note 158).

171. *Id.* at 203-04.

172. Murphy, *The Nature of the American Constitution* at 23 (cited in note 159).

amendment that abolishes the constitutional right all persons enjoy to equal concern and respect. If the principle of equal citizenship cannot be changed within the present constitutional order, then the present constitutional order should not grant anyone a right to challenge the principle of equal citizenship. At a minimum, the First Amendment ought to give more protection to advocacy that seeks to perfect the existing constitutional order than advocacy that is subversive of that order. For this reason, critical theorists think that government can regulate racist speech even when neither the immediacy nor the degree of threatened harm of such expression would justify regulating constitutionally protected expression.

Proponents of bans on hate speech must still demonstrate that equal citizenship is a fundamental constitutional value. Given the power of racist and sexist ideologies in American political thought,<sup>173</sup> this may not be an easy task. Still, MacKinnon and others seem to have the better of their argument with contemporary ACLU absolutists. All radical civil libertarians agree that equal citizenship is a fundamental constitutional value. When contemporary First Amendment absolutists recognize that Americans cannot adopt policies or constitutional amendments that weaken our constitutional commitment to equal concern and respect, then they will understand why the right to free speech cannot encompass invective that implicitly or explicitly denies the equal citizenship of some members of the American community.

*B. Free Speech and "The Machine That Would Go of Itself"*<sup>174</sup>

Sound theories of the First Amendment must recognize that Americans regard their Constitution as permanent. Although some Framers, Thomas Jefferson in particular, did not believe that one generation could bind another, Americans between 1787 and 1789 ratified a Constitution that they "intended to endure for ages to come."<sup>175</sup> Bans on unconstitutional speech apparently buttress the

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173. See Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 Am. Pol. Sci. Rev. 549, 558-63 (1993) (arguing that inegalitarian ideologies have significantly influenced the substance of American politics).

174. This phrase is borrowed from Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (Knopf, 1986).

175. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). See Merrill D. Peterson, ed., *The Portable Thomas Jefferson* 444-51 (Viking, 1975). For an excellent discussion of the debate over precommitment in early American political thought, see Stephen Holmes, *Precommitment and the Paradox of Democracy*, in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* 195, 199-221 (Cambridge U., 1988).

constitutional order. Citizens are less likely to perceive constitutional weaknesses when unconstitutional speakers lack the right to challenge basic constitutional values.

This interpretation of the relationship between the First Amendment and the constitutional order, however, is seriously flawed. No one thinks that persons who ratify the Constitution, whether in 1789 or 1995,<sup>176</sup> surrender their power to observe that the Constitution is not working. Citizens would clearly want to know if something was so fundamentally wrong with basic constitutional values that the people constituted by that document should reconstitute themselves under a new Constitution. Moreover, Americans who have not been exposed to unconstitutional speech may lack the perspective necessary for a intelligent commitment to the constitutional polity. "The constitutional order can be considered ratifiable," Harris points out, "only in the context of a capacity to envision (and to endorse) a fundamentally different alternative."<sup>177</sup> For these reasons, Constitutions cannot and should not irrevocably bind a people to maintaining a particular constitutional regime.

The Declaration of Independence suggests a different means for permanently enshrining constitutional values, tolerating unconstitutional speech.<sup>178</sup> The famous second paragraph of the Declaration announces that Americans "hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."<sup>179</sup> By "self-evident," Jefferson did not mean to imply that persons could comprehend natural rights without reflecting on philosophical and political ideas. As Garry Wills points out, "there is a labor to be performed in grasping even the self-evident."<sup>180</sup> Jefferson's point was simply that when basic American

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176. As Sandy Levinson points out, every generation of Americans must, in an important sense, decide whether to sign the Constitution. Sanford Levinson, *Constitutional Faith* 180-94 (Princeton U., 1988).

177. Harris, *The Interpretable Constitution* at 166 (cited in note 158). Significantly, Harris suggests that Americans might consider denying the right to vote and hold office to citizens insufficiently attached to constitutional values, but not the right to free speech. See note 171 and accompanying text.

178. Indeed, Murphy maintains that the Declaration of Independence is, in an important sense, part of the Constitution. Murphy, *The Nature of the American Constitution* at 13-14, 25-27 (cited in note 159). See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 105 (1873) (Field, J., dissenting) (explaining that the Fourteenth Amendment was enacted to give practical effect to the Declaration of Independence).

179. Peterson, ed., *The Portable Thomas Jefferson* at 235 (cited in note 175).

180. Garry Wills, *Inventing America: Jefferson's Declaration of Independence* 191 (Doubleday, 1978).

commitments are placed before citizens "in terms so plain and firm," those principles will eventually "command their assent."<sup>181</sup> *The Federalist Papers* express a similar confidence in the rational appeal of basic constitutional principles. Publius declares that "deliberat[ions] on a new Constitution for the United States of America" will establish "whether societies of men are really capable or not of establishing good government from reflection and choice. . . ."<sup>182</sup> Both founding documents suggest that Americans are reasonable people and that reasonable people on reflection will choose the fundamental principles that provide the foundation for the constitutional regime. The First Amendment institutionalizes this faith in the power of constitutional ideals and the intelligence of the American people. The founders of the constitutional order favored a system of free expression because they were certain that basic constitutional norms would inevitably triumph in the Constitution's marketplace of ideas.

A constitutional democracy can only exist in a society whose citizens accept and endorse the basic values of the constitutional order. Moreover, constitutional principles must appeal to people as they are presently constituted, and not a people that must first be reeducated before they can recognize the subtle charms of the Constitution. These people may temporarily succumb to unconstitutional temptations. Hence, constitutional societies often design such institutions as judicial review to uphold constitutional values in times of particular stress.<sup>183</sup> Nevertheless, the idea of precommitment, the idea that constitutional systems should create mechanisms that permit appeals from the present people drunk to the past people sober, presumes that the people will soon sober up and recognize their constitutional transgressions. When citizens do not in the long run retain allegiance to constitutional principles, a constitutional democracy simply fails and must be replaced by another Constitution or form of government.

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181. Peterson, ed., *The Portable Thomas Jefferson* at 235 (cited in note 175).

182. Federalist 1 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 33, 33 (Mentor, 1961).

183. For discussions of how well the judiciary has performed this function, see generally Michael J. Perry, *The Constitution, the Courts, and Human Rights* 91-145 (Yale U., 1982); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 123-33 (Harvard U., 1988); Ronald Kahn, *The Supreme Court & Constitutional Theory, 1953-1993* (U. of Kansas, 1994); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Studies in American Political Development* 35 (Spring 1993); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. of Chicago, 1991).

Properly understood, the system of free expression is as central as the system of checks and balances to the self-regulating machine that the Framers of the Constitution intended to establish. By diffusing power both within the national government and over a large republic of states, the persons responsible for the Constitution sought to create an equilibrium in which no interest or branch of government would become strong enough to create a tyranny.<sup>184</sup> American constitutionalism maintains that a free political process will create a similar equilibrium. Citizens living in a sound constitutional democracy, constitutional and democratic theory suggests, should never abandon their self-evident democratic and constitutional rights. If the basic values of the constitutional order are sound, then the system of free expression will ensure that each successive generation ratifies the constitutional order.

The First Amendment in this vision of constitutional democracy expresses both constitutional certainties and doubts. Some questions are left open to political debate because no right answer can be found in the Constitution. The Constitution says nothing about whether employee mandates are feasible in the health care system and only gives a tentative answer to the proper length of a presidential term. Other questions, however, are left open to debate because free speech creates the only political environment necessary for fundamental constitutional provisions to be consistently endorsed by the people. The correct reply to critical theorists who ask "why tolerate unconstitutional ideas we know to be false," is "why ban competition to constitutional ideas we know to be true?" State officials only ban that which they believe may subvert the citizenry. Radical civil libertarians who tolerate racist ideas share their Constitution's confidence both in the American people and in the self-evidence of equal citizenship ideals. Many persons may be hurt by claims that they are not worthy of full citizenship, but ultimately the system of free expression promises that Americans will be capable of recognizing that all persons are entitled to equal concern and respect.

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184. This theory is most clearly set out in Federalist 10 (Madison) in Rossiter, ed., *The Federalist Papers* at 77-84 (cited in note 182) and Federalist 51 (Madison) in Rossiter, ed., *The Federalist Papers* at 320-25.

*C. The Problem of Market Failure*

Many critical theories regard this faith in the marketplace of ideas as "heroic,"<sup>185</sup> "appealing, lofty, romantic—and wrong."<sup>186</sup> Proponents of equal citizenship and proponents of racism do not, in their view, compete before a neutral people capable of discerning the best vision of their constitutional order. Many radical civil libertarians charge that bigots presently enjoy unfair competitive advantages in the ideological marketplace. Elected officials who for more than two hundred years sent racist, sexist, and heterosexist messages to the citizenry have created a populace instinctively attracted to traditional forms of domination and almost impervious to egalitarian ideals.<sup>187</sup> Advocates of bans on hate speech maintain that continued tolerance of certain expressions of prejudice further magnifies the preferred position of white, male supremacy in American political culture. Avid consumers of pornography who have been trained to see women exclusively as sex objects, for example, may not take seriously a woman's perspective on recent trade problems with Japan, to say nothing of a woman's perspective on comparative worth.

Few civil libertarians of any stripe dispute claims that the present marketplace of ideas is in ill health. Even proponents of free speech who reject governmental efforts to equalize speech through access rights or campaign finance reform recognize that wealthy interests enjoy increasing hegemony in the media and the electoral process.<sup>188</sup> Much evidence also indicates that silencing is a real and disturbing phenomenon, particularly with respect to women. Prominent studies find that women are less likely to speak in class than men, that they are less likely to be asked serious questions, and that their answers are less likely to be taken seriously.<sup>189</sup>

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185. Gale, 65 St. John's L. Rev. at 128 (cited in note 2).

186. Delgado and Stefancic, 77 Cornell L. Rev. at 1288 (cited in note 59).

187. See Gale, 65 St. John's L. Rev. at 152-53 (cited in note 2) (dissolving the libertarian argument privileging private speech and divorcing it from state speech that violates equal rights). See also notes 57-61 and accompanying text.

188. See C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. Pa. L. Rev. 646, 651 (1982) (stating that government restrictions would favor political elites); L. A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 Sup. Ct. Rev. 243, 282 (1983) (noting that "[i]t is hard to dispute that the wealthy seem to enjoy tremendous influence"); Martin H. Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. Rev. 900, 901 (1971) (noting that "the danger of establishing a more-or-less rigidly defined ruling aristocracy of the wealthy has become a very real one").

189. See generally Bernice Resnick Sandler, *The Campus Climate Revisited: Chilly for Women Faculty, Administrators, and Graduate Students* (Ass'n of American Colleges, 1986).

Still, claims that the marketplace of ideas is substantially biased against constitutional principles overlook the political context in which debates over hate speech take place. Too many critical theorists forget that the crucial question is not whether the marketplace of ideas is, in general, too biased against egalitarian ideals, but whether the marketplace of ideas in a community considering whether to ban hate speech is too biased against egalitarian ideals. Citizens may not be adequately exposed to equal citizenship principles in communities whose governing officials refuse to treat many citizens with equal concern and respect. Such communities, however, do not ban hate speech (and when they do, the purpose of such regulations is to mask unconstitutional practices). Citizens who live in communities in which proponents of bans on bigoted invective wield considerable political power, by comparison, are probably already adequately exposed and sufficiently free to accept equal citizenship principles. Indeed, radical civil libertarianism often represents the status quo in settings conducive to bans on hate speech. As Samuel Walker notes, "[r]estrictive codes have been adopted [on college campuses] because the idea has a [pre-existing] well-organized coalition of advocates"<sup>190</sup> that actively espouses the principle of equal concern and respect in numerous settings, typically with the imprimatur of influential faculty and administrators. For these reasons, the obvious breakdown of the constitutional marketplace of ideas in too many regions of the United States cannot justify bans on hate speech in those communities that are likely to consider such measures seriously.

Arguments about silencing suffer from the same failure to consider political context. Frank Michelman correctly notes that a system of free expression may be subverted by both private and public censorship.<sup>191</sup> The notion that government should restrict speech that silences others, however, assumes a highly implausible state of affairs. For an anti-silencing ban on speech to be enacted and appropriate, members of group A must have the private power to silence members of group B in a community where members of (or persons

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For a good summary of recent studies, see Bartlett and O'Barr, 1990 Duke L. J. at 575-81 (cited in note 7).

190. Walker, *Hate Speech* at 16 (cited in note 132). Of course, some students and faculty do refrain from expressing their radical civil libertarian commitments too strongly. At least as many students and faculty, however, probably refrain from making strong attacks on radical civil libertarian principles. Thus, the vast majority of students on most college campuses are probably as exposed to equal citizenship principles as they are to theories that support race and gender domination.

191. Michelman, 56 Tenn. L. Rev. at 304 (cited in note 59).



sympathetic to) group B have the political power necessary to silence members of group A. Such a disjunction between private and public power is philosophically possible, but practically unlikely. Silencing is most likely to occur in communities where members of the silenced group lack both private and public power. Communities that want to hear the voice of outsiders have more effective means at their disposal than bans on the speech of their alleged silencers.

Properly understood, the debate over hate speech is not about how to empower the powerless, but about what proponents of equal citizenship should do when in power. Unfortunately, the constant emphasis on historically subordinated groups in too much critical legal, race, and feminist theory encourages citizens to see themselves exclusively as victims rather than as persons who exercise varying degrees of power in different circumstances.<sup>192</sup> Any political coalition that is willing and able to ban hate speech probably possesses the power necessary to create environments in which their fellow citizens will be free to listen to and endorse their more egalitarian principles.<sup>193</sup> If citizens reject radical civil libertarian principles in these settings, the fault may lie with the principles and not with the citizenry.

#### IV. CONCLUSION

Despite the sound and fury of the hate speech debate, nothing much depends on whether legislatures adopt and courts sustain moderate bans on the expression of unconstitutional ideas. Many European countries regulate group libel. Although these laws do little more than change the phrases that racists use,<sup>194</sup> foreign restrictions on bigoted invective have not inspired a reign of terror. Mild regulations of racial and other epithets are also unlikely to affect the intellectual climate on most campuses. College students avoid saying

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192. For a discussion of how members of the most marginal social groups exercise power on numerous occasions, see generally James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale U., 1985). The failure to acknowledge that victims of power also exercise power is a sure recipe for encouraging abuses of power.

193. When political coalitions with the power to ban racist speech do not adopt other anti-racism measures, their bans on racist speech may be designed more for the purpose of forestalling more serious attacks on racism than for promoting equal citizenship. See Kretzmer, 8 Cardozo L. Rev. at 508 (cited in note 2) (stating that even an efficacious law banning racist speech may not contribute to reducing racial prejudice and discrimination).

194. See *id.* at 507. "In Britain this prohibition on the cruder forms of racist speech forced racists to seek more sophisticated formulations of their propaganda. . . . The result, apparently, was an increase in the appeal of racist propaganda." *Id.*

anything remotely controversial in universities that do and do not ban some expressions of prejudice (except when they are confident that their "controversial" views are, in fact, the status quo). More significantly, the anonymity of modern life and the exorbitant cost of new communication technologies have done more than hate speech to create a citizenry with neither the necessary capacity nor interest for participating actively in the marketplace of ideas.<sup>195</sup> Buffeted by the forces of mass society and the technological revolution, too many Americans at present lack the desire or resources needed to become seriously involved in the social and political life of their communities.

Bans on hate speech do nothing to solve this contemporary crisis of political participation.<sup>196</sup> Equal citizenship ideals are also not likely to be promoted by teach-ins and other programs where students and citizens quickly learn the expected "right" answers. Instead of banning speech, progressives in power need to create fora where all citizens feel free to exchange their ideas. Too many critical theorists, unfortunately, think that most Americans must be reeducated before they should be empowered. The system of free expression, in their view, must be partially suspended until the populace can be trusted to resist the blandishments of racial and other prejudices. The successful use of barely coded racist appeals in recent political campaigns indicates that this pessimistic view of Americans may well be correct. If critical theorists are right, however, then the Constitution is wrong in a way unlikely to be repaired. Constitutional democracy is based on the assumption that citizens as presently constituted will upon reflection endorse basic constitutional values. If radical civil libertarians cannot convince their communities of the virtues of equal citizenship, then the question they need to ask is not how the Constitution might be reinterpreted to create a more hospitable environment for egalitarian ideals, but whether a different constitutional order is possible.<sup>197</sup>

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195. See Graber, *Transforming Free Speech* at 185-87 (cited in note 21). See generally Ronald K. L. Collins and David M. Skover, *The Pornographic State*, 107 Harv. L. Rev. 1374 (1994).

196. Indeed, the notion of silencing may be a conceptual relative to trickle-down economics. Just as some conservatives maintain that we can somehow get more tax revenues by lowering taxes, so some liberals maintain that we can somehow get more speech by prohibiting the expression of some ideas.

197. See Post, 32 Wm. & Mary L. Rev. at 327 (cited in note 39).