CRITICS OF "FREE SPEECH" AND THE USES OF THE PAST

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INTRODUCTION

The idea of a broadly defined right to free speech is under siege. One attack currently comes from those who see the "liberal" idea of free speech as a threat to equality. The topic is complex and charged with emotion. It surfaces in questions of hate speech, in campus codes that seem to allow punishment even for some political speech not directly aimed at individuals, in discussions of "pornography," and in group libel laws. The issues raised are painful, and the divisions reflect scars left by oppression based on race and sex. (Curiously, the discussion often ignores issues of class and power.)

Some of the critics would return to a test allowing suppression of speech with the "bad tendency" to produce evil results. Others advocate allowing courts to balance the benefits and evils

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Before I became a law school teacher, I represented clients in many cases, and some of these clients were unpopular. My clients included conscientious objectors prosecuted for refusing to serve in the military; students who were prevented from publishing an article on teenage pregnancy and birth control in their school newspaper; a member of the Black Panther party, prosecuted for sale of the party newspaper in downtown Burlington, North Carolina; a member of the Revolutionary Communist party (as court appointed counsel) in a criminal prosecution; students suspended from public school for wearing a Confederate flag emblem to school; clients who objected to the motorist prayer on a state road map; black motorists who had taped over the slogan "first in freedom" on their North Carolina license plates (they did not believe our state was unsurpassed in protection of human liberty); a minister arrested for reading from the Bible in downtown Greensboro to protest a semi-nude stroll on Greensboro's new semi-mall (an ordinance forbade speaking or preaching in downtown Greensboro); and people accused of various crimes including obscenity violations. I also represented women in sex discrimination, equal pay, and harassment cases, a black child denied access to a lake during a class visit, an interracial couple in a housing discrimination case, etc. As Professor Daniel Pollitt, my constitutional law professor, taught years ago, I believe that lawyers have a responsibility to represent unpopular clients.

of speech on an ad hoc basis—protecting speech when the judge thinks the benefits of protection in the particular case outweigh the evil done by the speech. Professor Stanley Fish, for example, embraces ad hoc balancing. Professor Catharine MacKinnon likes the bad tendency test and would replace viewpoint neutrality with a test frankly weighted in favor of the "oppressed" and against "oppressors." Professor Mari Matsuda would also abandon neutrality, often allowing blacks to direct hateful speech at whites, but not vice versa. To protect black students from emotional distress she would (it seems) support banning *Huckleberry Finn* from some classrooms.[1]

This essay will examine these suggestions for basic change in first amendment doctrine in light of history. Since these proposals to restrict the idea of free speech are reactions against current doctrine, I will quickly review some basic free speech doctrine. Then I will look at episodes from the history of freedom of speech, especially at the effort to suppress anti-slavery expression in the years before the Civil War. Finally I will suggest ways that can sometimes be used to transcend current controversies over free speech.

Many advocates of new restrictions on speech based on its ideas or point of view pay little attention to free speech history. As a result, while critics have deepened our understanding by highlighting some of the costs of broad protection for speech that is evil, they have left the benefits of protection and costs of changing it in darkness.

When they ignore free speech history, advocates of restriction have plenty of company. With a few notable exceptions,[2] American legal education has paid too little attention to either the history of liberty or of free speech. In the past powerful interests have sought to limit speech by use of the bad tendency test, by use of ad hoc balancing, by treating political speech as libel, and by demanding protection from emotional distress caused by speech. From the Sedition Act to the crusade against slavery, to the opposition to wars and the draft, elites have ad-

1. Stanley Fish, *There's No Such Thing As Free Speech and it's a Good Thing Too* 127 (Oxford U. Press, 1994); Catharine A. MacKinnon, *Only Words* 104, 76-77 (Harv. U. Press, 1993); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victims's Story*, 87 Mich. L. Rev. 2320, 2358-60, 2369 (1989).

2. A fine historical discussion appears in William W. Van Alstyne, *The First Amendment, Cases and Materials* (Foundation Press, 1991); among general constitutional law casebooks a very good brief introduction appears in William Cohen and Jonathan D. Varat, *Constitutional Law, Cases and Materials* (Foundation Press, 1993).

vanced such doctrines as justifications for suppression of speech, including political speech.

Because history provides vicarious experience, an examination of the history of suppression should be a part of evaluation of plans to revise free speech. The past cannot solve our present problems, but it can provide expanded experience by which to make practical judgments. It also suggests the need to search for new ways of transcending current battles over free speech.

I. FREE SPEECH DOCTRINE AND ITS HISTORY

A. Free Speech Theory

Free speech doctrine embraces the idea of a public domain where government may not suppress discussion because of the ideas advanced, especially on matters of public concern. Matters of public concern should be broadly understood to include all those ordinary and personal matters as to which people seek to structure or transform their lives. Since social action is a primary method of transformation, protection of speech about social action is a central concern of free speech doctrine. In practice, the public domain (used here to mean the area where speech is protected) is bounded by definitions of protected and unprotected content (e.g. political speech and obscenity) and protected and unprotected fora (e.g. in a public park or in a pamphlet, in contrast to someone else's church service).

The idea of a public domain for free speech is implicit in representative government. The argument from democracy is one, but only one, justification for free speech. Other justifications recognize that speech is essential to self-fulfillment, to the advancement of knowledge and the discovery of truth, and to the right to participate in how one's life and society are structured.[3]

One metaphor embraced by advocates of representative government is that of agency. Like all metaphors, at best this one only approximates reality.[4] In the agency metaphor, the people are the principal, elected officials are the agents, and free speech in the public domain is an essential technique by which

3. C. Edwin Baker, *Human Liberty and Freedom of Speech* 47-48 (Oxford U. Press, 1989); Thomas I. Emerson, *The System of Freedom of Expression* 6-7 (Random House, 1970).

4. Public officials may, ideally, be more like a combination of an agent and a trustee than like a pure agent.

the people may consult, set the agenda, and decide on the course of conduct for their agents.[5]

The agency theory has radical implications. Elections, even elections with competing political parties, are not the main measure of democratic government. Instead, democratic government requires free discussion and association so that people can discuss and decide how they collectively would seek to structure their lives. It also requires that information relevant to political choice be available to participants in the political system. To the extent that association, discussion, and dissemination of relevant information are suppressed, government is less democratic.[6] Using the word democracy in this sense, Stuart Sutherland suggests that, because of the Official Secrets Act forbidding government employees from disclosing anything learned in the course of their duties, the United Kingdom is "one of the least democratic countries in the Western world."[7]

The public domain provides a safe space that can be used for many purposes, including discussion and setting agendas.[8] In theory, and to some degree in practice, it is a place where the claims of power may be challenged and the abuses of the powerful exposed.[9] That free speech often falls short of this ideal

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5. E.g., Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 Const. Comm. 359, 367-68 (1991); 1 John Trenchard and Thomas Gordon, *Cato's Letters* 100-03 (6th ed. Da Capo Press Reprint, 1971) (1755); *Address to the Inhabitants of Quebec, 1774*, in 1 *The Bill of Rights: A Documentary History* 222 (Bernard Schwartz, ed., Chelsea House Publishers, 1971); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 Stan. L. Rev. 795, 823 (1985).

6. Historically, government action has not been the only threat to free speech. In spite of judicial decisions on the question, both the text and structure of the Constitution should provide ample power for the national government to protect citizens against private, violent suppression of speech. The Constitution contemplates a republican form of government, not only for the federal government but also for the states. Such a form of government requires freedom to advocate unpopular causes and to join together for collective political action. Anyone, private or public, who acts for the purpose of suppressing speech on matters of public concern, threatens republican government. Successful private suppression destroys republican government. Nor does federal action, limited to suppression of political terrorism, threaten a healthy federalism. In fact, it supports it. States can hardly function as a laboratory for new ideas if the ideas themselves can be silenced by politically motivated violence.

7. Stuart Sutherland, *Irrationality, The Enemy Within* 84 (Penguin, 1992).

8. For a thoughtful discussion of the complexities implicit in this idea see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601 (1990).

9. E.g., J. Anthony Lukas, *Nightmare: The Underside of the Nixon Years* (Viking Press, 1973); Jonathan Schell, *The Time of Illusion* (Alfred A. Knopf, 1975); Russell L. Weaver and Geoffrey Bennett, *Is the* New York Times *"Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 La. L. Rev. 1153, 1174 (1993) (indicating that the British press would not have reported the Watergate story as the Washington Post did and that in general the British media is "far more timid" than the American).

should not surprise us. What *should* surprise us, given the remarkable tenacity of economic and political power, is that it sometimes comes so close.

The concepts of a "public domain" and of protection against censorship based on "content" both conceal problems behind their superficial simplicity. The idea of a public domain implies boundaries. Setting boundaries allows governmental suppression—for those things outside the boundary. So if obscenity is outside the circle of speech in the public domain, that expression about sexuality is unprotected. Since some types of "action" are outside the area of protection, the speech treated as such action is unprotected.[10] The agency model is also problematic. One of its assumptions (and an assumption behind representative government), is that the people represented have an equal right to influence government policy. Realities of wealth, power, and status produce significant deviation from this ideal. Finally the argument derived from democracy contains a paradox. A representative government can make a decision to limit free speech or democracy. But to the extent of the departure, representative government becomes something else. If the departure from free speech is sufficiently substantial, government is no longer democratic or representative.

In American history, the public domain free from censorship has never included all speech. Libel, books about sexual themes, advocacy of birth control,[11] criticism of slavery,[12] criticism of war and the draft,[13] and "false and malicious" criticism of government officials[14] have all, at one time or another, been treated as outside the domain of free speech. Proposals to restrict free speech rights focus on the boundaries of the space allocated to free speech. Changing the boundaries, in turn, involves changes in free speech doctrine, because doctrine sets the boundaries that protect "speech" from suppression. Just such a change is advocated by current critics.

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10. *United States v. O'Brien*, 391 U.S. 367 (1968); on the nature of boundaries, see Post, 103 Harv. L. Rev. 601 (cited in note 8).

11. Kermit L. Hall, *The Magic Mirror: Law in American History* 160-62 (Oxford U. Press, 1989).

12. Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book*, The Impending Crisis: *Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 Chi. Kent L. Rev. 1113 (1993).

13. *Schenck v. United States*, 249 U.S. 47 (1919); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863).

14. *United States v. Cooper*, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865); *United States v. Callender*, 25 F.Cas. 239 (C.C.D. Va. 1800) (No. 14,709); *Lyon's Case*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646).

This essay will focus on efforts to enhance equality by censoring some types of currently protected speech. A major impetus for revising free speech doctrine has been an expressed desire to promote racial and sexual equality. "Equality," like "free speech," is not a self-defining concept. Nor, of course, is it clear that suppressing speech that is currently protected will enhance equality.

Curiously, law professors often devote more attention to advancing equality by limiting speech than to advancing equality through economic change, access to education, guaranteed employment, or for redistribution of wealth. In part this fact may simply reflect the occupational biases of law professors. Law professors most often write about changes in judicial doctrine or in legislation that seem practical. Significant redistribution of resources is unlikely to come from courts. Indeed, there are powerful arguments that substantially redistributing wealth is an inappropriate role for judges. Nor, in the current political climate, is significant redistribution likely to come from the legislature. By conventional wisdom we cannot afford such changes. Changes in free speech doctrine, however, seem cheap. They are unlikely to be accompanied by a tax hike. They come from courts with some regularity, and legislators are often quite ready to initiate changes in free speech doctrine by proscribing expression they find obnoxious.

Historically, free speech has been an aid to those seeking social change. Control of "speech" has been used by those in power to retain power and repress criticism and change. (Of course suppression of speech because of the ideas expressed is only one means of social control.) Those who contest the views of those in power and who advocate change opposed by the powerful have needed and claimed the protection of free speech to advance their ideas. Though the protection is necessary, it may not be sufficient. In addition to the ability to speak, dissenters need the ability to be heard, to be taken seriously, and to share in setting the political agenda.

Modern first amendment doctrine has attempted to protect speech critical of those in power from suppression by creating "general" rules that secure free speech on matters of public concern and limit categories of speech where suppression is permissible. As to matters of public concern, speech may not ordinarily be suppressed because of the ideas—even hateful ideas—it expresses. Even advocacy of lawlessness or violence may not be suppressed unless it is directed to inciting imminent lawless ac-

tion and is likely to incite or produce such action.[15] False and defamatory statements about public officials may not be sanctioned unless intentionally false or published in reckless disregard of the truth.[16] Books dealing with sex may not be suppressed if they contain "serious value."[17]

Conversely, categories of speech subject to suppression have been narrowly defined. Indeed, from the 1930s through the Warren Court, the Court tended to narrow the exceptions to the first amendment—like libel, obscenity, fighting words, and advocacy of lawlessness—and consequently to expand the boundaries of the domain in which speech was protected.

Though the protection of speech by the Warren Court had its limits,[18] protection for dissenters was remarkable. The United States has gone through periods of protection of free speech and periods of repression. Generally repression comes from fear, from perceived threats to national or personal safety.

B. Suppression of Speech in American History

In the late 18th century Congress passed the Sedition Act. The Adams administration used the Act to prosecute supporters of Thomas Jefferson, Adams' likely opponent in the 1800 election. The "false and malicious" criticisms that landed Jeffersonian newspaper editors and a Jeffersonian congressman in jail included charges that Adams was addicted to ridiculous pomp, favored a standing army, and was responsible for excessive debt.[19]

One powerful argument against the Sedition Act was that its suppression of political speech was incompatible with representative government.[20] Jefferson was elected president and pardoned violators; the Sedition Act then expired. From the Sedition Act to the Civil War, Congress passed no legislation limiting speech and press.

Before the Civil War, however, slave states, in effect, made criticism of the institution of slavery a crime.[21] Northern states,

15. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).
16. *New York Times v. Sullivan*, 376 U.S. 254 (1964).
17. *Miller v. California*, 413 U.S. 15 (1973).
18. E.g., *O'Brien*, 391 U.S. 367.
19. *Cooper*, 25 F. Cas. 631; *Callender*, 25 F. Cas. 239; *Lyon's Case*, 15 F. Cas. 1183.
20. Virginia Resolutions, Dec. 21, 1798 in Melvin I. Urofsky, ed., 1 *Documents of American Constitutional and Legal History* 160 (Temple U. Press, 1989). Another argument, rather inconsistent with the first, was that the national government lacked such power over speech because of the First Amendment, but that states retained such power. State governments were, of course, also representative.
21. E.g., Curtis, 68 Chi. Kent L. Rev. at 1130-38 (cited in note 12).

in contrast, refused to enact laws suppressing criticism of slavery. In many ways, the slavery debate provides an eerie mirror image of our current free speech controversies. There, however, the arguments for suppression were used by slaveholders. Since I have told this story at length elsewhere,[22] I will summarize it here.

In 1835, American abolitionists began to advocate immediate, uncompensated abolition of slavery. They sent tracts to leaders in Southern society to convince them to abjure the sin of slavery. The tracts contained both language and woodcut pictures designed to illustrate the cruelty of the slave system. Abolitionists also petitioned Congress, demanding an end to slavery in the District of Columbia.

Many Southerners responded to the abolitionist postal campaign with fury, as did many in the North. Mass meetings throughout the North condemned abolitionists. Northern mobs sacked newspapers and the home of a leading abolitionist. A few years later a mob burned a hall the abolitionists had erected in Philadelphia for free discussion. (Abolitionists had had problems finding places to speak, so constructing the hall was an attempted solution.) Southern states had passed laws that effectively outlawed advocacy of abolition. Critics of abolitionists demanded similar laws in the North, without success. The federal House of Representatives did, however, pass a gag rule to prevent abolition petitions from being read and discussed in Congress.

Opponents of abolition advanced several legal theories to justify their proposed suppression of anti-slavery speech. One theory was group libel. As some Southerners in Congress saw it, abolitionist criticism of slavery held slaveholders up to scorn and derision and suggested that slaveholders were little better than kidnappers or receivers of stolen goods. If individual libel was criminal, so was libel of slaveholders as a group.[23] Some suggested, along with John C. Calhoun, that abolition agitation should be suppressed to protect slaveholders from emotional injury—because the agitation was offensive to their feelings.[24]

In the North and South, advocates of suppression invoked the bad tendency test. The South had experienced several slave revolts, which Southerners thought were inspired by anti-slavery

22. Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 26-56 (Duke U. Press, 1986); Curtis, 68 Chi. Kent L. Rev. 1113 (cited in note 12); Michael Kent Curtis, *The Curious History of Attempts to Suppress Anti-Slavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. — (1995) (forthcoming).

23. Id. E.g., Cong. Globe, 24th Cong., 1st Sess. 119-20, 83, 158 (1836).

24. Cong. Globe, 24th Cong., 1st Sess. 83, 120.

propaganda. Anti-slavery agitation presented slavery as a cruel and exploitative institution. Ideas in abolitionist tracts (and particularly the woodcut illustrations) could, critics of the abolitionists insisted, find their way into the hands of slaves and produce slave revolts. Still another justification for suppressing anti-slavery speech, press, and petition was the threat of civil war. If abolitionism succeeded in making slavery a political issue, Northerners and Southerners warned, the nation would be divided on sectional lines. The ultimate result would be a civil war that drenched the nation in blood. This was a bad tendency indeed.[25]

Although the reasons given for silencing abolitionists were lofty—protecting the public peace and national unity—behind those reasons were the powerful economic interests of the slaveholders and the Northern mercantile classes who traded with them. In 1859, John Bingham, later the main author of section one of the fourteenth amendment, put it this way. "These gentlemen apprehend that if free speech is tolerated and free labor protected by law, free labor might attain . . . such dignity . . . as would bring into disrepute the system of slave labor, and bring about . . . gradual emancipation, thereby interfering with the profits of these gentlemen."[26] Abraham Lincoln warned of the "proneness of prosperity to breed tyrants."[27]

By 1856, Southern demands to expand territory open to slavery had produced a massive party realignment in the North. In that year the Republican presidential candidate John C. Fremont made a strong run for the presidency. Most Southern states refused to tolerate the political dissent represented by the Republican party. In North Carolina, Benjamin Hedrick, a talented professor of chemistry at the University of North Carolina, was driven from his job and the state for publicly supporting Fremont. The *Raleigh Weekly Standard* exalted: "And we now say . . . that no man who is avowedly for John C. Fremont for President, ought to be allowed to breathe the air or to tread the soil of North Carolina."[28]

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25. The argument from the danger of civil war is so plausible, and the eventual Civil War was so horrible, that I feel impelled to point out the other side. To the extent that social change cannot be discussed peacefully and accomplished politically, the only method of change is violence. When the South quarantined itself against anti-slavery expression, it made peaceful change impossible.

26. Cong. Globe, 36th Cong., 1st Sess. 1861 (1860).

27. 2 Abraham Lincoln, *The Collected Works of Abraham Lincoln* 406 (Ray Basler ed., Rutgers U. Press, 1953).

28. *Mr. Hedrick, Once More*, Weekly North Carolina Standard, Nov. 5, 1856, at 1.

In 1857, Hinton Rowan Helper, another North Carolinian, published a book designed to convert the Southern masses to opposition to slavery (though it did not advocate equality for the freed slaves). Helper advocated forming a Southern anti-slavery party, uncompensated emancipation, and colonization—sending the freed slaves to Africa or some equally remote location. Slavery, he insisted, was responsible for the backwardness of the South and the depressed condition of many Southern whites.[29] Soon a group of influential Republicans, including many in the United States House of Representatives, hit upon the plan of condensing Helper's book and publishing it as a campaign document. By 1859, when John Brown launched his raid on Harper's Ferry, the plan to publish an abridgment of Helper's book was well underway.[30]

Helper's book noted that free speech was denied to opponents of slavery in the South, and he protested mobbings and tar-and-featherings. "Free speech," Helper wrote, "is considered as treason against slavery: and when people dare neither speak nor print their thoughts, free thought itself is well nigh extinguished."[31] "Give us fair play," Helper insisted, "secure to us the right of discussion, the freedom of speech, and we will settle the difficulty at the ballot box, not on the battleground—by force of reason, not force of arms."[32] But, he suggested, if slaveholders insisted on violence, non-slaveholders and slaves—quite willing to cut their masters throats—far outnumbered the "lords of the lash."[33]

When Congress convened in 1859, Southerners and Democrats branded Republicans who endorsed Helper's book as criminals and the book itself as the blueprint for the infamous John Brown raid. The critics warned that the book had a very bad tendency—it was incendiary. Republicans could not apply the spark and express astonishment at the explosion. Southern Congressmen announced that, like John Brown, Republican endorsers should be hung.[34]

Republicans made free speech a centerpiece of their political program. Their 1856 campaign slogan was "Free Speech,

29. Hinton Rowan Helper, *The Impending Crisis of the South: How to Meet It* (George M. Fredrickson ed., Harv. U. Press, 1968) (1857) ("*Impending Crisis*").

30. Curtis, 68 Chi. Kent L. Rev. at 1141-44 (cited in note 12).

31. Helper, *Impending Crisis* at 409 (cited in note 29).

32. Id. at 149.

33. Id.

34. See generally Curtis, 68 Chi. Kent L. Rev. at 1144-47 (cited in note 12), a part of the Symposium on the Law of Slavery.

Free Press, Free Men, Free Labor, Free Territory, and Fremont."[35] So it was natural that Republicans responded to the Democratic attack by invoking freedom of speech. Senator Wilson of Massachusetts said, "[I]n Massachusetts we have absolute freedom of speech and of the press. We deal with all public questions, all social questions, all questions that concern the human race. We have nothing there that prevents the fullest and boldest discussion . . . ." Southerners could go there and advocate slavery and be "listened to in peace."[36] Senator Seward contended that "[t]he theory of our system is, that error of opinion may in all cases safely be tolerated where reason is left free to combat it."[37] Others insisted that suppression of anti-slavery speech in the Southern states violated the sacred guarantees of the Constitution for free speech and press.[38] By resolution, Republicans in the Senate insisted on free discussion of the morality and expediency of slavery "and every other subject of domestic and national policy."[39]

Meanwhile in North Carolina, a Wesleyan minister who circulated Helper's book was convicted under North Carolina's statute banning anti-slavery agitation. The statute explicitly used a bad tendency test. For Southerners, books that contributed to slave discontent had a bad tendency indeed.[40] The Supreme Court of North Carolina upheld the conviction. The Court said the book was inflammatory and the legislature could assume that, though circulated only to whites, its "corrupting influence would inevitably reach the black."[41]

In response to these events many Republicans in 1859 and 1860, like abolitionists before them, championed a robust view of free speech. They supported this right even for ideas they considered barbarous and horrible—human slavery and reopening the African slave trade. Republican Senator Hale explicitly rejected the bad tendency test, and implicitly so did many more. They saw suppression of anti-slavery speech as an admission that slavery could not survive free debate. (On this point, but for different reasons, Southerners agreed.) Abolitionists, and later Republicans on the eve of the Civil War, did not attempt to si-

35. Richard H. Sewell, *Ballots for Freedom: Antislavery Politics in the United States 1837-1860* 284 (Oxford U. Press, 1976)

36. Cong. Globe, 36th Cong., 1st Sess. 63 (1859).

37. Id. at 913.

38. Curtis, 68 Chi. Kent L. Rev. at 1155-56 (cited in note 12).

39. Id. at 1157-58.

40. Id. at 1164-5.

41. *State v. Worth*, 52 N.C. (7 Jones) 488, 492 (1860).

lence racists and advocates of slavery. They had faith in the curative power of free discussion. It is a faith that in the closing years of the twentieth century seems to many to be naive.

In the 1866 debates on Reconstruction and the Fourteenth Amendment, Republicans recounted the suppression of free speech in the South. Several leading Republicans suggested that the privileges or immunities clause of the fourteenth amendment would force states to respect the Bill of Rights.[42] Of course, during the Civil War, and over some Republican protests, Abraham Lincoln, to mention one example, did exile a Democratic politician for making an anti-war, anti-black, anti-draft speech.[43] Still, Democratic politicians generally went unpunished for much racist political propaganda and for many harsh criticisms of President Lincoln.

After the Civil War, both Congress and the states enacted new limits on speech. These included statutes proscribing obscenity, defined to include information about contraception.[44] In the nineteenth and early twentieth centuries, disseminating information about birth control was a crime.

With the outbreak of World War I, Congress passed legislation used to suppress anti-war speech.[45] The socialist political leader, Eugene Debs, was jailed for an anti-war speech.[46] Charles Schenck was jailed for circulating, to recruits and others, a leaflet advocating opposition to the draft and suggesting that the draft violated the thirteenth amendment's ban against involuntary servitude.[47] The leaflet did not advocate illegal conduct, but that fact did not save Mr. Schenck. The Supreme Court invoked the bad tendency of their remarks and upheld convictions of anti-war activists. Recollection of Abraham Lincoln's suppression of the anti-war racist speech of Clement Valladigham perhaps made the suppression seem more natural.

Confronted with such suppression of speech, in 1927 in a concurring opinion in *Whitney v. California*,[48] Justice Louis Brandeis drafted what later became some central tenets of modern

42. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* at 34-91 (cited in note 22); Curtis, 68 Chi. Kent L. Rev. at 1174-77 (cited in note 12).

43. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 597-98 (Oxford U. Press, 1988).

44. Hall, *The Magic Mirror: Law in American History* at 161 (cited in note 11).

45. E.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); Laurence H. Tribe, *American Constitutional Law* 842 n.10 (Foundation Press, 2d ed. 1988).

46. *Debs*, 249 U.S. 211.

47. *Schenck*, 249 U.S. 47.

48. *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring.)

free speech doctrine. Brandeis's doctrine substantially extended protection for free expression. Though today some leading advocates of free speech revision have explicitly rejected Brandeis's approach,[49] it is worth quoting him at some length. "Those who won our independence," he said, "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth," and "that without free speech and assembly discussion would be futile." Believing in the power of reason

> they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.
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> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . .[E]ven advocacy of [law] violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.
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> Those who won our independence by revolution were not cowards. . . .To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[50]

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49. MacKinnon, *Only Words* at 103-04 (cited in note 1); see *There's No Such Thing As Free Speech* at 126-27 (cited in note 1) (citing with approval the test in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) whether the gravity of the evil discounted by its improbability justifies such invasion of free speech; the lower court found the Communist threat outweighed the interest in free speech). Although Fish asserts that such an ad hoc balancing test will not always result in suppression, the record is not encouraging. Not only did free speech lose in the Communist case he cites, but the interest in national survival outweighed the free speech interest and so justified expelling Jehovah Witness children from school for refusing to salute the flag. Compare *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) with *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). See Laurent B. Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962). See generally, Michael Kent Curtis, ed., *The Constitution and the Flag: The Flag Salute Cases* (Garland Publishing, Inc., 1993).

50. *Whitney*, 274 U.S. at 375-77 (Brandeis, J., concurring.)

Following the path blazed by Justice Brandeis, in the 1930s and 1940s the Court expanded protection for speech. In the 1950s the Court did depart from the Brandeis rationale and upheld convictions under the Smith Act for advocacy of overthrow of the government by force and violence at some undetermined later date.[51] Around the same time, it upheld an Illinois group libel law.[52] But later decisions substantially extended protection even for speech advocating forcible overthrow of the government.[53] From the 1930s through the 1960s (with substantial backsliding in the 1950s), free speech protection was given to those who opposed powerful and entrenched local and national interests. Those protected included labor organizers, advocates of integration, and opponents of the draft and the war in Vietnam.[54] At the same time the Court protected speech by racists.[55]

The Court applied its precedents uniformly. A decision protecting a civil rights demonstration in Columbia, South Carolina cited a case protecting speech by a racist in Chicago.[56] In 1969, the Court overturned the conviction of a Ku Klux Klan leader on a basis resembling Justice Brandeis' concurring opinion in *Whitney v. California*. The Klansman had said that if the President, the Congress, and the Supreme Court continued to oppress the white race, "there might have to be some revengance taken." He claimed "the nigger should be returned to Africa, the Jew returned to Israel."[57] The per curiam decision reversing the conviction was written by Justice Fortas, and was joined by Justice Marshall, a heroic figure in the civil rights movement and the Court's first black Justice.

II. CURRENT CRITICISMS OF THE MODERN IDEA OF FREE SPEECH

A. Revival of the Bad Tendency Test

Some critics of modern free speech doctrine reject Justice Brandeis's premises in order to eliminate obstacles to regulation they find desirable—from regulation of non-obscene sexual ma-

51. *Dennis v. United States*, 341 U.S. 494 (1951).
52. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).
53. *Yates v. United States*, 354 U.S. 298 (1957); *Noto v. United States*, 367 U.S. 290 (1961).
54. E.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Edwards v. South Carolina*, 37 U.S. 229 (1963); *Bond v. Floyd*, 385 U.S. 116 (1966).
55. *Terminello v. Chicago*, 337 U.S. 1 (1949); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
56. *Edwards v. South Carolina*, 372 U.S. at 238, citing *Terminiello*, 337 U.S. 1.
57. *Brandenburg*, 395 U.S. at 446-47.

terial defined as "pornography" to group libel laws and regulation of hate speech and speech that creates "a hostile learning environment." What is remarkable is not simply that reformers advocate specific additional exceptions, but that in the interest of broad and vague exceptions, some repudiate so much core free speech doctrine. Of course, criticism of the modern idea of free speech is not limited to those on the left. Criticisms of Justice Brandeis's doctrine were also espoused in the early work of Robert Bork.[58]

Brandeis suggested that fear of serious injury alone was insufficient to justify suppression. "What," Catharine MacKinnon asks rhetorically, "has to be added to fear of serious injury to justify doing something about the speech that causes it?"[59] Surely, she implies, that should be enough. In effect, such an approach revives the bad tendency test. Before modern free speech doctrine, some courts had treated a finding that speech had a bad tendency to cause evil results as a sufficient basis to justify suppression. Brandeis replaced this test with a more protective "clear and present danger" requirement.

The Brandeis rule depends on a corollary without which much of the difference between the Brandeis test and the bad tendency test would disappear. The Court has refused broadly to find the fact that speech (not focused on a particular individual) that causes "hurt feelings, offense, or resentment" is sufficient to strip the speech of constitutional protection.[60] If such consequences were regarded as a sufficient injury, much, though by no means all, of the expression Professor MacKinnon would like to reach could be suppressed. So could abolitionist criticism of slaveholders, jokes about political figures, flag burning, wearing "Fuck the Draft" on one's jacket, and a lot more.

Professor MacKinnon has attempted to look at speech at a new conceptual level. While first amendment doctrine focuses on what speech says—what ideas are expressed—and offers broad protection for ideas, she insists on looking at what speech does—at its effects, including its emotional effects and what she claims are its effects on power and subordination. Tendency to

58. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 23-25 (1971).

59. MacKinnon, *Only Words* at 104 (cited in note 1).

60. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2559 (1992) (White, J., concurring). Justice White cited *Texas v. Johnson*, 491 U.S. 397 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988) *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); and *Terminiello v. Chicago*, 337 U.S. 1 (1949). For a case involving a hostile work environment, see *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).

produce bad effects, she implies, justifies suppression. This is a very old conception, not a new one.

Suppression of speech has almost always been based not on concern about what is said, but on concern about effects. The Southern elite insisted on suppressing anti-slavery speech because of concern about effects—slave revolts and civil war. Northerners who advocated suppression similarly were concerned about effects. If fear of the evil effect of speech justifies suppression, the violators of the Sedition Act, the critics of slavery in the South, and the opponents of World War I and the draft were all appropriately convicted. In each case the motive for suppression was fear of evil effects. In each case, from the perspective of the times, there were serious grounds for fear. Today Professor MacKinnon dismisses fear of domestic Communism in the 1950s as "paranoid," but it did not seem so to the decision makers at the time. To a future critic, some of Professor MacKinnon's fears may seem as baseless as the fear of Communism in the 1950s now seems to her. At any rate, the "new" focus on effects of speech—on fear of bad effects—is not simply a matter of adjusting the thermostat in the house of free speech doctrine. It is burning the house down to roast the pig.

Professor MacKinnon virtually endorses the bad tendency test. She warns that the rejection of the bad tendency test and other aspects of current doctrine—viewpoint neutrality, counter speech as the preferred remedy for evil ideas, and the view that "there is no such thing as a false idea"— are being adhered to with "fundamentalist zeal."[61] Free speech, Professor MacKinnon announces, now protects Nazis, Klansmen, and pornographers while doing nothing for their victims.[62] Of course, in recent history, at the same time it protected freedom

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61. MacKinnon, *Only Words* at 76-77 (cited in note 1).

62. Id. at 109. Of course, the First Amendment continues to protect minorities who are not Nazis, Klansmen, or "pornographers." E.g., *Koser v. County of Price*, 834 F. Supp. 305 (W.D. Wis. 1993) (protection of Indians arrested for displaying an American flag on which a picture of a Plains Indian had been superimposed); *Gay and Lesbian Services Network, Inc. v. Bishop*, 832 F. Supp. 270 (W.D. Mo. 1993) (protection of right of gays and lesbians to parade). The question of legal protection accorded to the wicked is a complex one, but one of its many facets has been captured by Robert Bolt:

> Roper: So now you'd give the Devil benefit of law!
> Thomas More: Yes. What would you do? Cut a great road through the law to get after the Devil?
> Roper: I'd cut down every law in England to do that!
> Thomas More: Oh? And when the last law was down, and the Devil turned round on you—where would you hide Roper, the laws all being flat? . . . [D]'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

Robert Bolt, *A Man for All Seasons* 66 (Random House, 1960).

marchers in the South, advocates of homosexuality, and opponents of the war in Vietnam, free speech doctrine was also protecting "Nazis, Klansmen, and [at least some] pornographers."

The practical effect of Professor MacKinnon's rejection of much basic free speech doctrine is unclear because her argument is qualified in curious and seemingly contradictory ways. Sometimes she distinguishes racist speech from pornography, seemingly allowing more protection for racist speech.[63] Claims of inferiority based on group membership, she tells us, can be debated and expressed. But "social inferiority cannot be imposed through any means, including expressive ones."[64] What these statements mean, the reader can explore by reading her book, *Only Words*. What does come through, loud and clear, is hostility to the traditional idea of free speech, with no workable doctrine to replace it.

B. Group Libel

Whatever one thinks of Professor MacKinnon's free speech analysis, there is no doubt about the dangers currently posed by prejudice based on group membership and its exploitation for political purposes. So it is hardly surprising that some believe that the state should be able to punish libel of groups as well as libel of individuals.[65] These critics conclude that the 1952 Supreme Court case of *Beauharnais v. Illinois* was correctly decided after all.[66]

Beauharnais objected to the movement of black families into his Chicago neighborhood, so he prepared a petition to the city council, sponsored by his White Circle League. The petition called on "[o]ne million self respecting white people in Chicago to unite . . . . If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana, of the negro surely will."[67] Beauharnais was punished under an Illinois law that made it criminal to assert the "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any

63. MacKinnon, *Only Words* at 62-63 (cited in note 1).

64. Id. at 106.

65. E.g., Note, *A Communitarian Defense of Group Libel Laws*, 101 Harv. L. Rev. 682 (1988).

66. MacKinnon, *Only Words* at 81-86 (cited in note 1).

67. *Beauharnais*, 343 U.S. at 252. Beauharnais was asking the city counsel to do something that was beyond its constitutional power even in the *Plessy* era. In 1917 the Supreme Court held municipal segregation of neighborhoods by race violated the Fourteenth Amendment. *Buchanan v. Warley*, 245 U.S. 60 (1917). See also the Civil Rights Act of 1866, now 42 U.S.C. §§ 1981 and 1982.

race, color, creed or religion" and to expose them to "contempt, derision, or obloquy or which is productive of breach of the peace or riots."[68]

Justice Frankfurter, speaking for a bare majority of the Court, upheld the statute, using a standard of great deference to the judgement of the legislature.

> [I]f [a libelous] utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.[69]

In short, a plausible legislative belief that group defamation tended to produce evil consequences was sufficient to justify legislative suppression. Because libel is not protected speech, Frankfurter said, Justice Brandeis's clear and present danger test was inapplicable.[70]

At trial, Beauharnais had attempted to prove that his claim of criminal propensities was true. This he was not permitted to do, based on his failure to satisfy the court that he acted for good motives and justifiable ends.[71] There is indeed something deeply repugnant about allowing a jury to find such generalizations about groups to be "true." One evil of generalization is that it ignores individuals and treats all as having negative characteristics possessed by some. All groups contain members with negative characteristics. By contrast, in individual libel actions, truth is now a constitutional defense.[72]

In 1965, Professor Harry Kalven of the University of Chicago Law School noted that the civil rights movement had not sought to advance its goals by group libel laws. Kalven wrote celebrating the decision in *New York Times v. Sullivan*.[73] There the Court announced the central core of its approach to free speech: debate on public issues was to be robust, uninhibited, and wide open.[74] Because of its broad protection for political speech, *New York Times* has been treated as banning most group

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68. 343 U.S. at 251.

69. 343 U.S. at 258.

70. 343 U.S. at 266.

71. 343 U.S. at 265.

72. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

73. Harry Kalven, Jr., *The Negro and the First Amendment* 7-64 (U. of Chi. Press, 1965).

74. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

libel laws.[75] The gains made to date by the Civil Rights Movement and most of the gains made by the Women's Movement were made without restricting free speech doctrine.

C. The Issue of Neutrality

Although advocates of revision often have kind words for group libel laws, they are unwilling to apply such ideas across the board. Indeed, rejection of neutral standards is a characteristic of many calls to revise free speech doctrine.

Professor MacKinnon, for example, explains that in crafting free speech rules we can and should distinguish between the oppressor and the oppressed.[76] Professor Matsuda attempts to draft an exception for hateful racist speech. But she also rejects neutral application. Professor Matsuda would suppress hateful speech by individuals who are members of dominant groups, but not hateful speech directed at dominant groups by non-dominant ones.[77] Blacks could usually indulge in hate speech directed at whites, but not the other way around. Similarly, she would protect the speech of Communists, but not Nazis.[78]

In part Professor Matsuda justifies the different treatment of Communists and Fascists by noting the existence of a substantial number of Communist nations, but not Fascist ones.[79] She sees Communism, apparently, as simply part of the international community. Subsequent events have somewhat undermined this distinction, but did it ever make sense? If, as appears possible, we face a resurgence of Fascism, would that add legitimacy to Fascist speech? At any rate, both Communist and Fascist speech can have bad tendencies, and once in power the ideologies can produce hideous results, as the Holocaust and the killing of millions of people based on economic class in the Soviet Union, Cambodia, and North Vietnam demonstrate. Indeed the history of China during the Cultural Revolution, of the Soviet Union under Stalin, of Cambodia under Pol Pot, and of North Vietnam show that atrocities can be committed in the name of equality.[80] Lack of free speech left such policies unhindered by criticism and unaltered by criticism.

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75. Compare id. with *American Booksellers Assoc., Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) and *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

76. MacKinnon, *Only Words* at 80-86 (cited in note 1).

77. Matsuda, 87 Mich. L. Rev. at 2358 (cited in note 1).

78. Id. at 2359.

79. Id. at 2359-60.

80. E.g., *The Horrors of Mao: The cost of his vision may have been 80 million Chinese lives*, The Washington Post National Weekly Edition, Aug. 1-7 1994, at 6-9.

If applied across the board, group libel laws could silence the champions of the oppressed. If it were criminal libel to portray lack of virtue in any class of citizens, much political speech could be silenced. The economically or politically dominant could not be criticized for pursuing selfish ends to the injury of others, because that would suggest lack of virtue and hold them up to contempt.

Under the standard set in the Illinois group libel law applied in *Beauharnais*, the founding document of the women's rights movement, the Seneca Falls Declaration of Sentiments of 1848, could be subject to criminal sanction. "The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman," the Declaration announced, "having in direct object the establishment of absolute tyranny over her."[81] Since, according to the Seneca Falls Declaration, men had oppressed women and had done so for an evil motive—establishment of absolute tyranny—the Declaration suggests lack of virtue in men. Some modern feminist writing might also be read as defaming men as a group.[82]

The Seneca Falls Declaration is correct at least in so far as it alleges a history of repeated injuries and usurpations of many men toward women. But *Beauharnais* held that truth may not be a defense, at least unless the court finds the motives good and the ends justifiable. If there had been a trial of the authors of the Seneca Declaration, the men making the decision in 1848 likely would have found the Seneca Falls Declaration was not made for "good motives and justifiable ends." Those in power tend to suspect the motives and ends of their critics.

It is natural to try to design the boomerang so that it will not strike the thrower in this way. So Professor MacKinnon suggests that the rationale of the *New York Times* decision restricting libel in the interest of free speech on political subjects was a mistake. The line should be drawn between the oppressor and the oppressed. The principle should be that the ad protesting imprisonment of Martin Luther King was protected not because of broadly applicable principles of free speech, but because the ad promoted equality.[83] By such theories, no doubt, the Declaration of Sentiments could be protected because the defamed

81. *Seneca Falls Declaration of Sentiments and Resolutions* (1848), reprinted in Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History: Cases and Materials* 553-54 (West Pub. Co., 2d ed. 1989)

82. Cf. Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 Const. Comm. 395 (1991).

83. MacKinnon, *Only Words* at 80-86 (cited in note 1).

group was made up of men, a group some (with remarkable oversimplification) may see as homogenous and dominant.[84]

D. The Call for Greater Judicial Discretion

Some critics of current doctrine call explicitly for more discretion. Stanley Fish, for example, suggests that ad hoc balancing of interests should replace the more categorical approach to free speech protection often followed by the Court.[85] Professor Fish cites with approval *U.S. v. Dennis*[86] and suggests asking whether "the gravity of the evil discounted by its improbability justifies such invasions of free speech as is necessary to avoid the danger." His approving citation of a case in which the court found the unlikely danger of communist revolution in the indefinite future sufficient to overcome the interest in free speech tells us a good deal about how Professor Fish's test works. Ad hoc balancing produced decisions that approved jailing of Jehovah Witness children for their refusal to salute the flag.[87] There is also little doubt as to how Professor Fish's test would have worked for abolitionist speech. The danger of civil war was as grave and more likely than the threat of communist revolution. Indeed, one Southern newspaper explicitly suggested a balancing test.

Instead of categorical rules devised in advance, Professor Fish advocates "considering each situation as it emerges," balancing "risks and gains."[88] The problem, of course, is that in the midst of crisis this ad hoc balancing often balances in favor of suppression. Though Fish acknowledges the benefits of a "procedure that requires you to jump through hoops—do a lot of argumentative work—before a speech regulation will be allowed to stand,"[89] he seems not to recognize that ad hoc decision making removes most of the hoops, leaving only a very large one which, historically, has been traversed with ease in times of crisis. Protecting "dangerous" speech is easier for the judge to explain on the basis of predetermined categories, rather than by announcing

84. Seeing all "men" as dominant is oversimple because it ignores class, social status, sexual orientation, race, and psychological type.

85. Fish, *There's No Such Thing As Free Speech* at 127 (cited in note 1). For an example of the categorical approach see *Texas v. Johnson*, 491 U.S. 397 (1989).

86. 183 F.2d 201 (2d Cir. 1950). For another citation of the case with approval, see *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 562 (1976). In *Texas v. Johnson*, 491 U.S. at 409-10, 418, the Court used the Brandenburg test.

87. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). In reversing *Minersville*, the Court followed a more categorical approach. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

88. Fish, *There's No Such Thing As Free Speech* at 111 (cited in note 1).

89. Id. at 113-14.

that, on balance, she or he thought protection best. Categorical protection of speech tends to check the natural tendency of the judge to see the problem through the lens of the hysteria of the moment and of the larger society.

E. Slippery Slopes

Critics of modern free speech doctrine denigrate it as based on the "slippery slope:"

> [I]f we restrict this bad thing now, we will not be able to stop ourselves from restricting this good thing later. One corollary is that everyone has an interest in everyone else's speech being free, because restriction will get around to you eventually; the less power you have the sooner it will get around to you."[90]

Professor MacKinnon apparently believes stating the proposition in this way goes a long way toward showing its absurdity.

Although it is currently fashionable to denigrate the "slippery slope," sociologists and psychologists do suggest that it is easier to persuade people ultimately to engage in actions they would otherwise reject by gradual and initially appealing steps. So there may indeed be a sense in which accepting censorship in a more appealing situation makes the next step easier.[91] There is psychological support for the corollary that we all have an interest in free speech because repression tends to spread.

Critics of current doctrine question whether initially attractive exceptions tend to breed less desirable ones. But some of these critics denigrate the concept of the slippery slope of suppression even as they themselves are sliding down it. Professor Matsuda starts by banning racist hate speech, seemingly including political speech. She ends up apparently banning Mark Twain's *Huckleberry Finn* from schools to protect the sensitivities of black students from a book that uses the word "nigger." She reaches this result even though she forthrightly acknowledges that the book is both a literary classic and an indictment of racism.[92] Her view is particularly ironic because *Huckleberry Finn*

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90. MacKinnon, *Only Words* at 76 (cited in note 1).

91. Sutherland, *Irrationality: The Enemy Within* 96-98 (cited in note 7); Amitai Etzioni, *The Spirit of Community* 175-77, 192-206 (Crown Publishers, 1993) (pointing out both the tendency toward sliding down slippery slopes when tradition is changed, that such a slide it not inevitable, and asserting that very careful notching principles can help avoid the slide).

92. Matsuda, 87 Mich. L. Rev. at 2369 (cited in note 1). Because selection of school books is a much more complex problem than making sale of the book criminal, removal of the book from the school because of content may not be impermissible government censorship. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (Black, J. concur-

is a book about moral transformation in the direction of Matsuda's and my own values. Human contact between Huck and the slave Jim leads Huck to reject the rules of a slave society. To understand the dimensions of Huck's moral transformation, one has to understand the society in which he lives. That, of course, is what the references to "niggers" are about. Can we hope for moral transformation in a society that "protects" young people from the story because of the negative effect of the word?

One reason for clear, strong, narrow, and precise first amendment doctrine is to prevent the slide into dangerous suppression of speech.[93] It is just such precision that some critics—willing to ban speech with a bad tendency to produce evil results, to resort to ad hoc decision making, and to allow censorship of "pornography" which has serious literary, artistic, or political value—fail to provide.

Professor MacKinnon, for example, fails to explain how to prevent the slide. Instead she seems ready to revive the bad tendency test and she blurs current understanding of the distinction between protected speech and suppressible action. She wants to remove the protection for sexually explicit works with serious value, but provides us little guidance as to where the suppression would end.[94]

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ring); but see *Board of Education v. Pico*, 457 U.S. 853 (1982). Just as constitutional protection of speech should not be confused with its acceptability, some violations of the idea of free speech may be wrong, but inappropriate for judicial resolution.

93. Cf. Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361, 366, 370-71 (1985). Schauer distinguishes problems of excess breadth from the slippery slope argument. As he points out vagueness in the principle asserted to reach a desirable result increases the danger of sliding from desirable to dangerous regulation. The same observation seems to apply to excess breadth, though Schauer treats that problem as analytically distinct, perhaps because it seems capable of easier solution. For a thoughtful effort to craft a rule protecting both speech and some victims of hostile and threatening expression, see Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124, 160 n.187 (1992). Professor Amar's proposed ordinance, based on the Thirteenth Amendment would protect racist political speech in a public forum. In my view, however, partly because many victims of harassing and threatening conduct do not fit well in the "slavery" category, a general First Amendment rule is preferable to one based on the Thirteenth Amendment.

94. MacKinnon, *Only Words* at 88 (cited in note 1). On words and action, see *Masses Pub. Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917):

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of the law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom . . . .

Id. at 540

Current obscenity law at least attempts to draw a line. Virtually any pornography, Professor MacKinnon laments, has "value." Of course, the current test requires "serious literary, artistic, political, or scientific value."[95] Far from finding everything has serious value, as Professor MacKinnon's readers might infer, the courts and many juries have found the formula allows the suppression of much if not most sexually explicit material. Since the decision in *Miller*, out of fifty-nine cases making a finding on the issue of obscenity, the federal and state appellate courts protected material as having serious value only five times.[96]

Still the formula (together with the requirement that the work be judged in its entirety) does protect those like Professor MacKinnon who include material that otherwise might meet the test of obscenity in their work.[97] Professor MacKinnon would respond, of course, that her work should be protected because it fosters equality or furthers the cause of the oppressed. While its political content is apparent, whether ideas like those in *Only Words* do in fact further equality or advance the cause of the oppressed is a much more difficult question.[98]

Robust rules against suppression of speech because of its point of view or bad tendency are essential guarantees of individual and political freedom. Thoughtful arguments for revision would recognize that departures from these rules involve serious dangers and that exceptions need to be confined by tough, narrowly drawn, and very careful rules. As the problem of photographs of children engaging in sexual activity shows, that does not mean new exceptions (if very carefully and narrowly drawn) are never appropriate. But good purposes alone are not enough. The road to Hell is paved with good intentions.

Consider, for example, the complaints about abuses under campus codes prohibiting conduct "creating a hostile learning en-

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95. *Miller v. California*, 413 U.S. 15 (1973).

96. These figures are rough, based on a survey of cases in the West Digest. *Miller* is an attempt to provide protection for first amendment values while allowing suppression of much sexually explicit expression. Privacy interests should justify suppression of graphic sexual material whose circulation occurs without the consent, or capacity to consent, of persons pictured.

97. MacKinnon, *Only Words* at 133 n.48 (cited in note 1); *Kaplan v. California*, 413 U.S. 115 (1973) (holding a book with only text (no pictures) can be obscene). For a book using graphic sexual material to illustrate sexual subordination of women in ancient Greece, see Eva C. Keuls, *The Reign of the Phallus: Sexual Politics in Ancient Athens* (Harper & Row, 1985).

98. See Nan D. Hunter and Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al.*, in American Booksellers Association v. Hudnut, 21 U. Mich. J. L. Reform 69 (1987-88); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. Ill. L. Rev. 95, 134-49.

vironment."[99] This standard is extraordinarily vague when applied to classroom readings and discussion and to interchange in dormitories.[100] Leading intellectuals have suggested that abuses under these standards are serious indeed. For example, Professor Elizabeth Fox-Genovese, a founder of the Women's Studies Program at Emory University, says:

> The sex and discriminatory harassment codes have constructed a web of impossible actions and utterances that multiply with each passing day. This is a Kafkaesque world in which, more often than not, you do not know the rules until you have violated them.[101]

She reports that most professors in Southern studies fear to teach *The Clansman*, one of the most "effective ways to convey the quality of early 20th-century racism."[102]

At the University of Minnesota College, Republicans were barred from handing out flyers at their booth at a freshman orientation fair. The flyers contained tasteless jokes and mean-spirited comments about President and Mrs. Clinton and the Clinton administration's sexual orientation policy. The University found the flyers violated the campus non-discrimination policy because they were not respectful of diversity.[103] At Chicago Theological Seminary, a 63-year-old Professor used a story from the Talmud in class to illustrate ideas about sin and state of mind. The seminary found classroom use of the story "verbal conduct of a sexual nature" that created "an intimidating, hostile or offensive" environment. As reported by the New York Times:

> In a discussion of the role of intent in sin, [the Professor] recited a story from the Talmud, the writings that make up Jew-

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99. Cf., e.g., *The First Amendment, Under Fire From the Left*, New York Times Magazine, Mar. 13, 1994, at 41, 44.

100. For an interesting essay on the problem, see William Van Alstyne, *The University in the Manner of Tiananmen Square*, 21 Hastings Const. L.Q. 1 (1993).

101. Elizabeth Fox-Genovese, *Political correctness stifles thought and speech*, News & Record (Greensboro, N.C.), May 1, 1994, at F1.

102. Id.

103. David P. Bryden, *Campus Free Speech Fiasco*, 2 Minn. Scholar 9 (1994). Examples of the jokes and statements include the following:

> Reporter: Mr. President, now that you are elected, what do you really think about Roe v. Wade? Slick Willie: I really don't care how the Haitians get home."

and

> Q. What happened when Bill Clinton got a shot of testosterone?
> A. He turned into Hillary.

David Bryden also reports that the flyers mocked the Administrations's sexual orientation policies. "A mock tax form listed categories for 'married homosexual filing separate returns' and 'married inter-species filing jointly.' "

> ish civil and religious law, about a man who falls off a roof, lands on a woman and accidentally has intercourse with her. The Talmud says he is innocent of sin, since the act was unintentional.[104]

Some advocates of revision insist that they cannot be held responsible for abuses under the standards they advocate. We know that the current first amendment "ideology" limits such abuses. Those who advocate different standards might explain how the standards they propose will avoid similar abuse. Alternatively, they might explain why suppression of discussion of affirmative action or of racist speech in American history should not be a matter of concern. Courts have properly held that hostile, threatening, and coercive speech that is aimed at an individual is not constitutionally protected. So the need to deter such conduct does not require broader rules.

F. The Criticisms in Light of History

An historical perspective also suggests that there is much to be said for the corollary that those with less power who advocate change do need the protection of free speech. According to Professor MacKinnon, American understanding of free speech was largely shaped by McCarthy era attempts to restrict Communist speech in the 1950s. The effect of this experience, she suggests, provides much of the current rationale for free speech ideology.[105] The reader might infer that the experience of the 1950s is a narrow basis for justifying a doctrine. Justice Brandeis, of course, wrote well before the 1950s so it is likely that he was thinking of a longer history and a more pervasive pattern. At any rate, Professor MacKinnon says the doctrinal edifice constructed by the Court is unsuccessful. It has failed to guarantee "free and equal" speech.[106]

In fact, of course, the history of free speech is far more extensive than that of the McCarthy era. And while this history cannot tell us what to do, it may at least broaden our perspective and give us a larger context for evaluation. It shows how doctrines like the bad tendency test have been used in the past. In doing so, it shows why courts have become leery of the bad tendency test.

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104. Dirk Johnson, *A Sexual Harassment Case to Test Academic Freedom*, N.Y. Times, May 11, 1994, at D23.

105. MacKinnon, *Only Words* at 74-77 (cited in note 1).

106. Id. at 77. For an article focusing both on the problem of threatening racist speech and the history of liberty, see Amar, 106 Harv. L. Rev. at 151-57 (cited in note 93).

At critical times, broad ideas of free speech have provided support or protection for progressive political dissidents. Departures from those ideas have provided rationales for suppression.

One thing we see from looking at history is that what Professor MacKinnon calls "paranoid" attempts "to shut up"[107] people are hardly limited to the McCarthy era. But the more deeply one understands the times, the better one can understand the plausibility of fears that led to suppression. At the time they are expressed, these fears always look powerful and compelling. It was for this reason that Justice Brandeis was loath to justify suppression based on fear of serious injury or the simple bad tendency of speech.

The prosecutions under the Sedition Act of 1798, for example, were based on fear of serious injury from the bad tendency of criticisms of governmental officials. "If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government," Justice Samuel Chase warned a Sedition Act jury.[108] His view accorded with an English decision holding that if government had a bad reputation, it could not subsist—a great evil indeed.[109] At this early stage in the history of the Republic, concerns about the instability of government had a certain plausibility.

Later in American history, the bad tendency test was invoked to justify suppression of anti-slavery speech. It was also used to justify punishing a newspaper for criticizing an outrageously anti-democratic state supreme court decision in favor of a powerful utility monopoly. Among other things the state court had found a constitutional amendment allowing home rule (and public power) for Denver to be unconstitutional![110] The bad tendency test was also used to justify punishing members of the Socialist Party for parading with a red flag,[111] to punish publishers of a nudist newspaper that advocated a boycott of the "prudes"

107. MacKinnon, *Only Words* at 75 (cited in note 1).

108. *United States v. Cooper*, 25 F. Cas. 631, 639 (C.C.D. Pa. 1800) (No. 14,865).

109. *R. v. Tutchin* (1804), quoted in 2 James Fitzjames Stephen, *A History of the Criminal Law of England* 318 (Macmillan and Co., 1883). For one view of First Amendment history, see Michael Kent Curtis, *Reading the First Amendment by the Light of the Burning Flag*, in 1 *The Constitution and the Flag: The Flag Salute Cases* at xix (cited in note 49).

110. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

111. *Commonwealth v. Karvonen*, 106 N.E. 556, 557 (Mass. 1914).

who insisted on prosecution of their nudist colony, and to punish opponents of World War I and of the draft.[112]

The proponents of restricting free speech doctrine today may believe they have a ready answer to the history of attempts to suppress anti-slavery speech. They may argue that anti-slavery speech should have been protected, but not because of a broad theory of free speech like that endorsed by abolitionists and later by leading Republicans. Instead, they might say it should have been protected because it supported equality or the cause of the oppressed. The problem with this argument is that historically their approach—protect abolitionist speech because it is good or advocates equality—would never have worked.

The crucial test came over demands that Northern legislatures pass laws suppressing abolitionist speech and associations. In the end the North refused to pass these laws, even though abolitionists were quite unpopular and support for equality for blacks was slim indeed. The effort failed because many held a belief in broad free speech for discussion of public issues, a belief often ahead of the law from the courts. Although many conceded that abolitionist speech had bad tendencies, and most seemed to think the nation would be much better off without it, they feared that the precedent of suppressing abolitionist speech would inevitably spread. In the language of today's critics, they could be ridiculed as embracing the idea of the slippery slope. There is a more sympathetic way of understanding their concerns. Northerners were unwilling to trust suppression of speech to doctrines increasing the discretion of public officials for fear that this discretion would be abused.[113]

The effort of 1835-36 to suppress abolitionist speech didn't fail in the North because of judicial decisions and certainly not because abolitionist speech was seen as worthy. Instead it failed because of a consensus that suppression of political speech with bad tendencies was too dangerous to undertake. Had the public been convinced that such scruples were foolish, the widespread distaste for abolitionists, together with the conviction that abolitionist doctrines were dangerous indeed, would probably have resulted in suppression.[114]

Professor Fish announces that free speech is "just the name we give to verbal behavior that serves the substantive agendas we

112. *Fox v. Washington*, 236 U.S. 273, 276-277 (1915); see *Schenck*, 249 U.S. 47; *Debs*, 249 U.S. 211.

113. Michael Kent Curtis, 89 Nw. U. L. Rev. at — (cited in note 22).

114. Id.

wish to advance . . . ."[115] It is hard to be sure just what Professor Fish means here. Surely he is not suggesting that Justices Fortas and Marshall, for example, labeled the speech of Klansmen "free speech" because they wished to advance the Klan agenda. Perhaps he only means that they favored broad protection of free speech (even for Klansmen) because they believed such broad and neutral protection essential to protection of progressive social ideas. But if so, then free speech doctrine becomes something more than a quest for narrow political advantage. It becomes a framework for decisions as opposed to a system producing only a favored outcome. In that way free speech is like democracy.

Professor Fish concludes his essay on the non-existence of free speech with morally neutral advice about rhetoric. Contest the relevance of free speech principles fashioned by your enemy, "but if you manage to refashion [free speech ideas] in line with your purposes, urge them with a vengeance."[116] To the extent that Professor Fish convinces the public or lawyers that free speech is "merely the name given to political agendas we wish to advance," then the persuasive power of free speech doctrine will shrivel and die. Urging free speech ideas "with a vengeance" only when it suits your purposes, as Professor Fish recommends, fails in the end. It is hard simultaneously to expose free speech as nothing more than politics advancing a narrow partisan agenda and to expect invocation of free speech to offer you any protection—unless your agenda is already quite popular and powerful, in which case, of course, you don't need the protection of free speech doctrine anyway.

III. RETHINKING THE CONTROVERSY OVER HATEFUL SPEECH

A. Free Speech and Abuses of Power

Of course, as my fourteen-year-old son reminds me, abolition of slavery is hardly a current topic. Perhaps social progress has now reached its pinnacle, though critics of the idea of free speech do not seem to think so. If not, we may need space to protect the speech of minorities and of those who are too far ahead of their times. For women, disfranchised and denied many legal rights, free speech has been a prime weapon in the long struggle for liberation. The same was true, as the crusade against

115. Fish, *There's No Such Thing As Free Speech* at 102 (cited in note 1).
116. Id. at 114.

slavery and the battle for civil rights shows, for Americans of African descent. Free speech will not always insure progress, but discretion to suppress unorthodox ideas because of their "bad tendencies" can facilitate suppression of progressive (as well as regressive) ideas. (As we have seen, it is most doubtful that a rule to protect only progressive ideas or the interests of subordinated groups will work.) Indeed, discretion to suppress speech has been abused again, and again, and again. Truth does not always conquer falsehood. But it needs at least a fighting chance.

The powerful use governmental and private power in many ways to maintain their position. It is human nature to see conditions that protect one's position and advantages as natural and just. The pattern of suppression of speech in the interest of privilege is sufficiently pervasive to justify tough prophylactic rules against suppression. Those rules do not guarantee that advocacy of the interests of the less powerful will succeed. Though necessary, merely preventing suppression may not alone be sufficient. But broad theories that permit suppression of ideas in the public domain because they have a "bad tendency" can be sufficient to stifle progressive change. Suppression can guarantee that advocates for the less powerful will fail. The suppression of the more democratic ideas of the Leveller party in England in the seventeenth century may not have been required to defeat demands for much increased franchise. But it was enough.

The advocates of first amendment revision have made important contributions. They have led us to re-examine our assumptions. They have pointed to the real pain inflicted by some speech and have reminded us that evil ideas may have evil consequences. They remind us that we are morally responsible for the harm our speech causes. They have shown that in the context of the school and the job, free speech issues raise difficult problems. Because of the role of the school in transmitting basic values, and because one of those values is the value of freedom of expression and another is equality, free speech issues in schools and colleges raise difficult and paradoxical problems. But in their broad rejection of basic first amendment ideas, some revisionists understate (or ignore) the high price of jettisoning current doctrine and ignore the historic justifications for protecting speech.

However we resolve the troubling and painful issues of racist speech, sexist speech, hateful speech, and speech that creates "a hostile learning environment," we will profit from a broader appreciation of the history of free speech in America and the

historic function of free speech doctrine. Those in power are always tempted to suppress speech that threatens their power. Reduced protections for speech may give them the means to act on that temptation.

The enactment of campus codes banning a "hostile learning environment" shows that at least on the campuses enacting them, advocates of the codes have substantial political power. In those places, at least, they may be dominant. If one function of free speech is to protect against abuses of power—even power exercised for the best purposes—such codes should not be immune from very careful first amendment scrutiny. Similarly Professor MacKinnon complains that critics of free speech orthodoxy and opponents of exploitation of women in pornography remain unpublished.[117] It is a curious claim indeed, especially in a book published by the Harvard University Press.

In any event, a broader focus counsels hesitation in fundamentally revising or narrowing existing protections. Free speech should protect a broad range of discussion of public issues. Citizen activists, for example, have been confronted with libel suits for their complaints to government officials.[118] Apple growers, with some funding from the Chemical Industry, have sued CBS for its report on the health risks of Alar.[119] Monsanto has sued a dairy for truthfully stating on its milk label simply that it does not use artificial bovine growth hormone.[120] Far from adhering with "fundamentalist zeal" to the theory that there is no such thing as a false idea, as Professor MacKinnon suggests, the Court has departed from it so as to encourage such lawsuits.[121] If large interests can silence citizen critics, if makers of potentially dangerous products can discourage reporting and truthful consumer information by suit and threat of suit, then public dialogue on impor-

117. "Those who are hunted down, stigmatized, excluded and unpublished are the women who oppose [exploitation of women in pornography.]" MacKinnon, *Only Words* at 104 (cited in note 1).

118. George W. Pring and Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937 (1992). Penelope Canan, Michael Hennessy, and George W. Pring, *The Chilling Effect of SLAPPS: Legal Risk and Attitudes Toward Political Involvement*, 6 Research in Political Sociology 347 (1993).

119. *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928 (E.D. Wash. 1992).

120. Marian Burros, *The Debate Over Milk and an Artificial Hormone: More Milk, More Confusion: What Should the Label Say?*, N.Y. Times, May 18, 1994, at C1. Monsanto insists that because the artificial hormone is harmless to people a label saying it is absent is misleading. Whether the problems the hormone causes cows lead to increased use of anti-biotics that do show up in the milk was not discussed in the Times article.

121. *Milkovich v. Lorain Journal Co*, 497 U.S. 1 (1990), suggests that a statement of opinion may be unprotected if it can be read as implying a statement of fact that can be proved false. Many statements of opinion might fit this category.

tant issues will be impoverished. Important regulatory and market checks on abuse of power will disappear.

Before we decide that the *New York Times* rule as currently applied is too strong, perhaps we should consider whether it is sometimes too weak. Before we create a rule making it a crime to portray lack of virtue in a subordinate group, perhaps we should consider whether those in power will resist the temptation to adapt the rule and apply its protections to themselves.

B. The Issue of Equality of Access

Of course this is not to say that new exceptions are never appropriate, that civil libertarian ideas of free speech are above criticism, or that the doctrine as applied by the courts is perfect. None of that is so. Instead, it is to suggest that exceptions to broad protection for speech are inherently dangerous and likely to produce unintended negative consequences. For that reason, changes should be approached with the greatest care and with a deep historical understanding of the purposes served by, for example, the views of Justice Brandeis.

But before we congratulate ourselves too fully on the current state of the law, we should pay careful attention to the concerns of thoughtful critics of current doctrine. They have important things to say about the inequalities and lack of access that characterize our current system of freedom of expression. Access to speech and restriction of speech because of the ideas expressed are fundamentally different questions.

Access raises issues like the concentration of media ownership, the effect of advertising revenue on the subjects covered by the media, campaign finance reform and the effect of wealth on the political process, the participation of corporations in politics on the same terms as individuals, and the importance of the public forum as a place where those with limited resources can express their views.[122] The issues here recall the late media critic A. J. Liebling's epigram: Freedom of the press extends only to those who own one.

In issues of access, the equality vision raises the question of the appropriate metaphor for free speech. Is free speech a mar-

122. See, e.g., William Greider, *Who Will Tell the People: The Betrayal of American Democracy* (Simon & Schuster, 1992); Mark Hertsgaard, *On Bended Knee: The Press and the Reagan Presidency* (Farrar Straus Giroux, 1988); Ben H. Bagdikian, *The Media Monopoly* (Beacon Press, 2d ed. 1987); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (U. of Calif. Press, 1991); *The Public Mind with Bill Moyers*, Shows 1-4, Nov. 8, 15, 22, and 29, 1989 (Journal Graphics Inc.)

ketplace of ideas? If so, is the market, if not a monopoly, in fact at least an oligopoly in which competition is severely limited? Should our metaphor instead be the town meeting? In the town meeting (ideally) all points of view would get expressed, but wealth and power would not mean that some points of view exclude or overwhelm others.[123]

Mark Tushnet has suggested that the Court is using free speech doctrine much as the *Lochner*[124] court used substantive due process, to entrench the privileges of economic power. *Lochner*, he suggested, protected economic investments. Treating unlimited campaign expenditures as speech protects the investments of the powerful in politicians, a simple way to protect economic privilege.[125]

I am sympathetic to access concerns, and I believe those who raise them have identified a major problem. Whether cures exist and whether they would be worse than the disease is another matter.

Professor MacKinnon is right in saying that free speech doctrine has not guaranteed free and *equal* speech. This observation does not support proposals to revise rules prohibiting censorship based on content or viewpoint. Arguments for greater equality of access are fundamentally different from demands to shrink the domain of free speech because of the ideas expressed. Greater access does not involve direct exclusion of topics from the public dialogue because of content or point of view. Proponents of greater equality of access seek to expand both the subjects discussed and the number and range of participants in the dialogue, not to restrict them. Such proposals, however, can, and often do, involve restrictions on quantity of speech by some in the interests of equality. They involve potential dangers to free speech as well as benefits. Efforts to expand access raise crucial and difficult issues and deserve much more public attention. Unlike the free speech revisionists, most access advocates do at least accept the basic principles of the First Amendment.

It is natural to react with distress to decisions that protect wearing "Fuck the Draft" slogans on one's jacket, that protect burning the American flag as a political protest, and that allow statements like one in Hustler Magazine purportedly about Mr.

123. See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Kennikat Press, 1948).

124. *Lochner v. New York*, 198 U.S. 45 (1905).

125. Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1387 (1984). The generalization is somewhat less powerful after *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

Jerry Falwell's "first time." But in the wars of the First Amendment there will always be front lines. Changing doctrine to allow more suppression moves the location of the front line and exposes speech, once thought clearly protected, to the artillery of the censors. Changes in doctrine have costs as well as benefits.

C. New Directions

Can we, as Calvin Massey asks, really triumph over the darker sides of a nature by repression instead of dialogue and understanding?[126] Perhaps we should instead consider different approaches to some problems raised by freedom of speech. Do we teach basic rules of nonviolent communication?[127] Do we teach avoidance of name calling, respect for those with different views, and not to assume that those who disagree with us act from evil motives? Do we seriously teach communication skills and study peacemaking?[128] Could we consider treating many disagreements about a hostile learning environment as legitimate disagreements among people of good will? If so we could use techniques of mediation[129] and discussion to explore and understand our differences, instead of relying on punishment and coercion. Do we recognize that none of us has a monopoly on virtue or on progressive ideas?

As an example of how a different approach could be used, we might consider the controversy about students who wore Confederate flag patches to school. Some schools responded by encouraging student dialogue about what the Confederate flag meant to those who wore it and also what the Confederate flag meant to black students. They coupled the dialogue with discussion of guarantees of liberty. Schools following this approach probably did more for improved race relations than those that simply responded by repressing the flag wearers. The flag wearers and the black students had very different ideas about the meaning of the Confederate flag. After learning what the Con-

126. Calvin R. Massey, *Pure Symbols and the First Amendment*, 17 Hastings Const. L.Q. 369, 375-76 (1990).

127. Marshall B. Rosenberg, *A Model for Nonviolent Communication* (New Society Publishers, 1983).

128. Gray Cox, *The Ways of Peace: A Philosophy of Peace as Action* (Paulist Press, 1986). Cf. Sherod Miller et al., *Straight Talk: A New Way to Get Closer to Others by Saying What You Really Mean* (Rawson, Wade Publishers, 1981).

129. Neil H. Katz and John W. Lawyer, *Communication and Conflict Resolution Skills* (Kendall/Hunt, 1985).

federate flag meant to black students, some white students decided to stop wearing it.[130]

Our goal must be acceptance of the equal citizenship of people who are different—because of race, sex, creed, or sexual orientation. True acceptance requires a change in the way people think: it is a problem of conscience. As William Walwyn wrote (on the subject of religious toleration) in 1644:

> [T]he conscience, being subject only to reason (either that which is indeed, or seems to him which hears it to be so), can only be convinced or persuaded thereby. Force makes it run back and struggle. It is the nature of every man to be of any judgement rather than him that forces.[131]

The psychological fact of resistance to compulsion should lead us to look for alternative methods.

Consider the case of the University of Pennsylvania student, distressed by noisy students outside his dormitory window, who when other entreaties failed, yelled that the students were "water buffaloes."[132] The student insists that he did not intend the remark as a racist slur, and I take him at his word. The black students who heard the remark, quite naturally, interpreted it as a racist slur. Soon the yelling student found himself charged with racial harassment. The University and the students who charged him found themselves cast in the role of suppressors of speech. The case became a cause, and I think it did much more harm than good to the cause of racial harmony.

What if, instead, both sides—both with grievances (noise and insult)—had been sent to mediation. The African American students could have explained what the words meant to them and why. The student who yelled the epithet might have explained how he felt about the disruption of his studies by noise. With wise guidance, both might have understood the other's perspectives and have reconciled. From my experience with mediation, I would be optimistic about understanding and reconciliation instead of increased hostility. But until universities seriously study

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130. Nat Hentoff, *The Boy With a Confederate Flag on His Back*, Village Voice, July 5, 1988, at 31. I appeared as counsel for students wearing the Confederate flag patch and played a part in crafting settlements that emphasized use of dialogue and techniques like mediation. The Confederate flag had very different meanings to some of the students wearing it and to black students.

131. William Walwyn, *The Compassionate Samaritane* (1644) in David Wootton, ed., *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* 251 (Penguin Books, 1986).

132. Laurence R. Stains, *Speech Impediment*, Rolling Stone, Aug. 5, 1993, at 45.

peacemaking themselves, they may find it difficult to teach to their students.

Hateful speech causes emotional pain and other negative effects. The rules against a hostile learning environment suppress free discussion and intellectual inquiry. If there is an escape from the dilemma, if there is hope for common ground, the dilemma must be transcended rather than simply solved.

In *A Guide for the Perplexed*, E. F. Schumacher, notes that basic human problems are divergent problems, incapable of simple logical resolution:

> Education presents the classical example of a divergent problem, and so of course does politics, where the most frequently encountered pair of opposites is "freedom" and "equality," which in fact means freedom *versus* equality. For if natural forces are left free, i.e., left to themselves, the strong will prosper and the weak will suffer, and there will be no trace of equality. The enforcement of equality, on the other hand, requires the curtailment of freedom—*unless something intervenes from a higher level.*[133]

The factors Schumacher points to are love, empathy, participation mystique, understanding, and compassion, factors also emphasized by Gray Cox when he provocatively suggests that there are *Ways of Peace*, ways that can be learned, followed, and taught.[134] In the end, these ways can accomplish far more than censorship could ever hope to.

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Advocates of fundamental change in free speech doctrine are influential. They have to be taken seriously because they address important and difficult issues and because they are widely published in influential places. The idea of free speech is not perfect, and it has always offered shelter to the expression of evil ideas. The system tends to support reigning orthodoxies because economic power tends to shape the political system and the system of free expression[135] because of problems of access, and also because of the strength of intellectual inertia. But suppression

133. E.F. Schumacher, *A Guide for the Perplexed* 123-24 (Harper & Row, 1977) (emphasis in original).

134. See also William Walwyn, *The Power of Love* (1643), in 2 William Haller, ed., *Tracts on Liberty in the Puritan Revolution 1638-1647* at 271 (Colum. U. Press, 1934)

135. James Harrington, *The Art of Lawgiving in Three Books* (1659) excerpted and reprinted in Wooten, ed., *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* 395-417 (cited in note 131); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1405-09 (1986).

because of the ideas expressed only compounds this problem. Free speech is essential if reigning orthodoxies are to be changed.

Unfortunately many current criticisms and responses lack historical and psychological perspective. Greater historical perspective would enrich the debate and counsel hesitation in jettisoning the basic ideas of free speech. A psychological perspective—and also a spiritual one, for they are two sides of the same coin—suggests the need to look for ways to transcend the dilemma.