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REVIEW OF DAVID E. BERNSTEIN'S *YOU CAN'T SAY THAT!—THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS*

IVAN E. BODENSTEINER*

The tension between the First Amendment to the U.S. Constitution and federal, state, and local antidiscrimination laws frequently is overlooked because discriminatory conduct is not viewed as falling within the protection of the First Amendment. Because the First Amendment protects association, as well as speech and the free exercise of religion, and because antidiscrimination laws can limit speech, particularly those laws that reach harassment, and mandate association, the tension is quite common. Professor Bernstein's point is that the tension is widespread and, unfortunately, the antidiscrimination or civil rights laws are trumping the civil liberties guaranteed by the First Amendment. In other words, in his view there is a significant tension and civil rights laws are winning the battle all too frequently.

Intolerant activists are determined to impose their moralistic views on all Americans, regardless of the consequences for civil liberties. These zealots are politically well-organized and are a dominant force in one of the two major political parties. They have already achieved many legislative victories, especially at the local level, where they often wield disproportionate power. Courts have often acquiesced to their agenda, even when it conflicts directly with constitutional provisions protecting civil liberties. Until the power of these militants is checked, the First Amendment's protection of freedom of speech and freedom of religion will be in constant danger.

The clash of civil liberties and antidiscrimination laws has emerged due to the gradual expansion of such laws to the point at which they regulate just about all aspects of American life. This expansion of antidiscrimination laws, in turn, reflects a shift in the primary justification for such laws from the practical, relatively limited goal of redressing harms visited upon previously oppressed groups, especially African Americans, to a moralistic agenda aimed at eliminating all forms of invidious discrimination. Such an extraordinarily ambitious goal cannot possibly be achieved—or even vigorously pursued—without grave consequences for civil liberties.¹

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1. See DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT!—THE GROWING THREAT TO CIVIL*

When courts actually confront the tension between the First Amendment and antidiscrimination laws, frequently the key issue is whether the government has a compelling interest in the antidiscrimination provision that trumps the First Amendment.² Professor Bernstein is critical of the fact that courts, including the Supreme Court, have agreed that there is a compelling interest in eradicating discrimination.³ He believes the courts are too willing to find that the government's interest in eradicating discrimination is compelling.⁴ To be compelling, he says the "interest should be so vital that it would be virtually suicidal for society *not* to limit civil liberties in order to pursue it."⁵ Government interests that are merely important are not sufficient to trump speech and association rights protected by the First Amendment.⁶ Professor Bernstein is particularly critical of liberal law professors and the American Civil Liberties Union ("ACLU"), "with otherwise impeccable civil liberties credentials," for abandoning civil liberties in favor of civil rights based, in part, on a perceived constitutional value of equality reflected in the Fourteenth Amendment.⁷ Even if the Constitution protects such an abstract value, Professor Bernstein says there is no conflict between the First Amendment and the Fourteenth Amendment because the latter prohibits only the states from denying equal protection of the laws and does not address individuals who engage in racist speech.⁸

Professor Bernstein's real concern is with laws that prohibit private discrimination against members of groups which were never viewed as needing the help of the Equal Protection Clause to achieve equality and which, in fact, have done quite well in improving their status in society because of the First Amendment's guarantee of freedom of expression.⁹ Ironically, he says, some are willing to erode the protection of the First Amendment, a vital factor in the drive for equality, for the short-term gain of antidiscrimination laws that can be changed

LIBERTIES FROM ANTIDISCRIMINATION LAWS 1, 4 (2003).

2. As a general matter, restrictions on speech that are content-based are subjected to strict scrutiny when challenged on First Amendment grounds. See, e.g., *Boos v. Barry*, 485 U.S. 312 (1988). This means government can justify the restriction only if it has a compelling interest and the restriction is narrowly tailored to serve that interest.

3. BERNSTEIN, *supra* note 1, at 11.

4. *Id.*

5. *Id.* This is not the current Court's definition of a compelling governmental interest.

6. The difference between a compelling and important governmental interest is less than clear and in many situations reasonable people could differ in their assessment of the government's interest. For example, in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), the Court held that Minnesota had a "compelling interest in eradicating discrimination against its female citizens." However, in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000), the Court held that New Jersey's interests in its "public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association," apparently concluding that New Jersey's interest in banning discrimination by the Boy Scouts based on sexual orientation is not compelling. In another context, an equal protection challenge to the University of Michigan Law School admissions program, the Court held that an educational institution has "a compelling interest in attaining a diverse student body." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

7. BERNSTEIN, *supra* note 1, at 12.

8. *Id.* at 12-13.

9. *Id.* at 14-22.

easily and quickly.¹⁰ While Professor Bernstein overstates the problem, in light of the Court's narrowing interpretation of most civil rights statutes and its approval of many governmental restrictions on speech, his concern is legitimate. Whether or not one agrees with his view of the extent of the problem, his book serves an important function in pointing out a tension that is overlooked or ignored too frequently.

To place the tension between civil liberties and civil rights in perspective, it is important to remember that despite the language of the First Amendment that "[the government] shall make no law . . ." its protection is not absolute.¹¹ The Free Exercise Clause is not only not absolute, it has been rendered relatively meaningless as a source of religious freedom by the Court's decision in *Employment Division, Department of Human Resources v. Smith*.¹² While not absolute, the First Amendment guarantee of freedom of speech, including expressive association,¹⁴ generally trumps government regulation of speech unless government survives heightened scrutiny, i.e., government has a compelling interest in regulating speech and utilizes the least restrictive means of serving its interest.¹⁵ Of course, reasonable people can differ on what is "compelling" and what is "least restrictive." Despite this broad constitutional protection for speech, there are several circumstances where the Supreme Court has upheld a restriction on speech.

One example of such restrictions is found in the so-called unprotected categories of speech, such as obscenity,¹⁶ fighting words,¹⁷ libel and slander,¹⁸ child pornography,¹⁹ and advocacy of illegal activity.²⁰ While it is easy to list the categories, it is often difficult to determine whether speech fits within one of the unprotected categories, such as obscenity.²¹ It is not clear whether making these

10. *Id.*

11. U.S. CONST. amend. I.

12. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961).

13. 494 U.S. 872, 882 (1990) (holding that religion neutral laws of general applicability do not trigger heightened scrutiny when challenged on free exercise grounds). But see *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (holding that a law targeting religious beliefs must satisfy strict scrutiny when challenged on free exercise grounds).

14. See *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("We have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). However, the "right to associate for expressive purposes is not . . . absolute." *Id.* at 623.

15. *Id.*

16. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

17. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

18. See, e.g., *Gertz v. Welch*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

19. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *New York v. Ferber*, 458 U.S. 747 (1992).

20. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

21. *Miller*, 413 U.S. at 24. The Court set the following guidelines for determining whether material is obscene:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether

categories of speech unprotected is justified by a compelling government interest or the low value of the speech, or a combination of the two. While the Court has been reluctant to admit that there is a hierarchy of speech value, it seems quite apparent that political speech ranks higher than pornography or sexually explicit speech.²² If the protection of speech is not absolute, maybe it makes sense to assign constitutional value to speech. As Justice Stevens put it, "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."²³ The problem, of course, is that assigning value is difficult. Until 1975, commercial speech was considered unprotected,²⁴ but in recent years it has enjoyed great protection.²⁵ Content-neutral regulations of speech, such as time, place or manner restrictions, are generally easier for government to justify, with the Court applying a level of scrutiny less than strict.²⁶ This seems acceptable because the speaker is not silenced and, if the regulation is truly content-neutral, there is less chance that the government is suppressing a particular message. Similarly, symbolic speech is more susceptible to regulation if the goal is to regulate the conduct, not the message.²⁷ In addition, government regulation of speech on government-owned property that is treated as a nonpublic forum is subjected to only rational basis review as long as the regulation is not viewpoint-based.²⁸

the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id.

22. See, e.g., *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50 (1976).

23. *Id.* at 70.

24. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (holding that speech is not stripped of its First Amendment protection merely because it is commercial speech).

25. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484 (1976). The intermediate scrutiny standard for commercial speech was articulated by the Court in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

26. See, e.g., *Hefron v. Int'l Soc'y of Krishna Consciousness*, 452 U.S. 640, 648 (1981) (holding reasonable time, place and manner restrictions are approved "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information," (quoting *Virginia Pharm. Bd. v. Virginia Citizen Consumer Council*, 425 U.S. 748, 771 (1971))). See also *Hill v. Colorado*, 530 U.S. 703, 719-20 (2000) (noting that the principle inquiry in determining content neutrality is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

27. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Court noted:

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

Id.

28. See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). See also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-08 (2001) (holding that government can establish a limited public forum and reserve the forum for certain groups or the

Aside from the forum analysis, the context and location in which one chooses to speak may determine whether the speech is protected. Government employees' speech frequently leads to discipline or discharge and their First Amendment claims fail if a court determines that they were not speaking on a matter of public concern or, even if the speech concerns such a matter, a court determines the government's interest, as an employer, in avoiding disruption in the workplace trumps the First Amendment interest.²⁹ In fact, the Court has determined that the government as an employer has a compelling interest in "labor peace."³⁰ Similarly, while students do not leave their First Amendment protection behind when they enter a public school, their right to speak is discounted because of the school's interest in avoiding substantial disruption that interferes with the purpose of the school—education.³¹

The point is simply that the tension between civil liberties and civil rights must be analyzed in light of a rather complex, and maybe not always consistent, body of First Amendment jurisprudence that recognizes many circumstances where restrictions on speech are justified. This does not mean that we should accept more restrictions on speech, or use existing restrictions as a justification for more. Rather, in a world where First Amendment jurisprudence already allows a wide variety of restrictions on speech, including some restrictions resulting from antidiscrimination laws, it may be that most of the restrictions imposed by antidiscrimination laws should be tolerated.

Many discriminatory acts have nothing to do with speech, association, or religion, and this probably explains why the First Amendment is not raised as a defense in most litigation based on the antidiscrimination laws. But, in some circumstances application of an antidiscrimination law clearly implicates the First Amendment. Examples are the laws that treat harassment, including verbal harassment, as a form of discrimination. Assume a private employer hires African American applicants to avoid liability under laws such as Title VII of the Civil Rights Act of 1964³² and 42 U.S.C. § 1981,³³ but tolerates or encourages severe or pervasive verbal racial harassment of these employees by both supervisors and co-workers, knowing that the harassment makes it impossible for the African American employees to perform satisfactorily. Further assume that the verbal harassment consists of the ugliest derogatory comments conveying the message that these minority workers are not wanted in the workplace. Giving the targeted employees a claim based on either of these federal statutes penalizes speech. A separate question is whether application of the federal statutes violates the First Amendment.

If we conclude that application of these federal statutes to this situation violates

discussion of certain topics, as long as it does not discriminate on the basis of viewpoint and the restriction is reasonable in light of the purpose served by the forum).

29. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

30. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 217–32 (1977).

31. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

32. Pub. L. No. 88-352, §§ 701–718, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

33. 42 U.S.C. § 1981 (2000).

the First Amendment, then we are saying that government cannot assure equal opportunity in employment because the First Amendment protects those who decide to drive some employees out of the workplace because of their race. Similar racial harassment may be designed to deny equal opportunity in housing, in violation the Fair Housing Act of 1968 ("FHA"),³⁴ or in education, in violation of Title VI of the Civil Rights Act of 1964 ("Title VI").³⁵ Here too, if we conclude that the First Amendment trumps the FHA and Title VI, we are saying government cannot assure equal opportunity in housing and education. Current First Amendment jurisprudence suggests a First Amendment challenge to the application of the civil rights statutes to the three situations described would trigger strict scrutiny because while the statutes are viewpoint neutral, i.e., they protect anyone who is subjected to harassment because of race,³⁶ the statutes are content-based because they address speech that makes the target too uncomfortable to continue to work, live in a house, or attend school.³⁷ However, the Court's decision in *Roberts v. United States Jaycees* suggests application of the three statutes would be upheld because government has a compelling interest in addressing race discrimination in employment, housing, and education.³⁸

Upholding application of the civil rights statutes in these three situations represents a restriction on speech. Is such a restriction justified? In addition to the compelling government interest argument, one could argue that the speech, intended to harass for the purpose of denying equal opportunity in employment, housing, and education, has a low value and is therefore subject to more restrictions.³⁹ Also, application of the civil rights statutes simply changes the location of the speech because the speakers remain free to express their views on equality outside the workplace, away from the targeted home, and away from the school. They are restricted only insofar as their speech interferes with an individual's access to employment, housing, or an education. The restricted speech is the rough equivalent of a punch in the nose as a means of telling someone she is not welcome because of her race. While we generally accept the principle that the expressive punch in the nose is not protected by the First

34. Pub. L. No. 90-284, §§ 801-819, 901, 82 Stat. 73, 81-90 (codified as amended at 42 U.S.C. §§ 3601-3631 (2000)). A common form of "speech" designed to drive African American families out of their homes is a cross burning. In *Virginia v. Black*, 538 U.S. 343, 347-48 (2003), the Court held "that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form."

35. Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C. §§ 2000d-7 (2000)).

36. Professor Bernstein says "[h]ostile environment law clearly discriminates based on viewpoint." BERNSTEIN, *supra* note 1, at 31. *But see* *Boos v. Barry*, 485 U.S. 312, 319 (1988) (holding that a District of Columbia statute prohibiting display of certain signs within five hundred feet of a foreign embassy was a content based restriction but that the provision was not viewpoint based).

37. *See Boos*, 485 U.S. at 321.

38. 468 U.S. 609, 623-25 (1984) (holding that Minnesota has a compelling interest in eradicating sex discrimination in places of public accommodation).

39. Further, if the speaker's intent is not to communicate ideas, but only to harass and intimidate, the "speech" may be more like conduct not protected by the First Amendment.

Amendment because of the government's interest in protecting individuals from bodily injury and maintaining the peace, it is not clear that the harm caused by the punch in the nose is greater than the harm caused by the verbal harassment.⁴⁰ Of course, we can justify regulation of the conduct by pointing out that the regulation is not aimed at the message, only the means utilized.⁴¹ Similarly, we can argue that the restriction on verbal harassment is not aimed at the message, only the location.⁴²

If the First Amendment precludes application of the civil rights statutes in the situations discussed above, then the government is powerless to address an obvious denial of equal opportunity based on race. Professor Bernstein suggests the free economic market will correct the situation,⁴³ but there is no evidence that this will work. Prejudice is rarely the product of rational behavior and neither the market nor the antidiscrimination laws have eliminated racial discrimination.

Even if one concludes that civil rights statutes aimed at race discrimination in employment, housing, and education trump civil liberties, such a conclusion does not mandate that all antidiscrimination laws trump civil liberties. Professor Bernstein makes the point that antidiscrimination laws have been extended far beyond race.⁴⁴

Once the racial caste system was largely dismantled, and newly organized groups—such as older Americans, gays, and the disabled—began to use civil rights terminology in expressing their demands for government intervention on their behalf, antidiscrimination activists shifted their rhetorical emphasis.⁴⁵ They no longer focused on historical and economic arguments regarding the need to end racial discrimination in employment and places of public accommodation. Rather, they argued that discrimination—as expansively defined by organized interest groups—should be banned as a moral evil.⁴⁶ Once private-sector discrimination was portrayed primarily as a secular sin, rather than as an economic issue, the rhetorical goal of civil rights advocates became the *elimination* of invidious discrimination.⁴⁷

Bernstein argues that the shift in the primary justification for antidiscrimination laws, “from aiding previously oppressed groups to an austere moralism,” led to a

40. See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1205–06 (7th Cir. 1978) (holding that a city ordinance, designed to prohibit a Nazi demonstration was unconstitutional. The court recognized the “psychic trauma” caused by such speech, but concluded the city’s concern with this injury did not justify the ordinances).

41. See *United States v. O’Brien*, 391 U.S. 367, 381–82 (1968).

42. Even as a restriction on location, it does not fit within the time, place and manner analysis because it is not really content-neutral. *But see City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 49 (1986) (treating an adult entertainment ordinance as content-neutral because it was aimed at the secondary effects rather than the content of the films); *Grayned v. Rockford*, 408 U.S. 104, 108 (1972) (upholding an ordinance prohibiting “noise or diversion” near a school that would disturb the “peace or good order of such school”).

43. BERNSTEIN, *supra* note 1, at 15–16.

44. See *id.* at 7 (“Antidiscrimination laws came to protect more and more groups against more and more types of discrimination.”).

45. *Id.* at 7.

46. *Id.* at 8.

47. *Id.* at 7.

broad expansion at all levels of government with antidiscrimination laws "protect[ing] more and more groups against more and more types of discrimination."⁴⁸ It is this expansion of civil rights laws that most concerns Professor Bernstein. He discusses how these antidiscrimination laws have resulted in growing restrictions on speech, including workplace speech,⁴⁹ artistic expression,⁵⁰ political speech,⁵¹ and campus speech.⁵² In some situations, discussed in Chapter Six, he sees the antidiscrimination laws resulting in compelled speech.⁵³ Professor Bernstein is particularly critical of laws, often state or local, banning discrimination in broadly defined public accommodations⁵⁴ and, as a result, threatening the autonomy of private institutions and discouraging the formation of organizations for expressive purposes.⁵⁵ He also sees the effect of antidiscrimination laws on the religious freedom of, for example, religious schools⁵⁶ and landlords,⁵⁷ since they subject themselves to lawsuits when they act based on their beliefs about sexual morality. Another chapter argues that the right of privacy or intimate association is being compromised by the antidiscrimination laws, using attacks on female-only health clubs as an example.⁵⁸ Finally, Professor Bernstein is critical of the ACLU for abandoning its staunch defense of civil liberties when they conflict with civil rights laws.⁵⁹

While the ACLU does not need me to defend it, as a long-time member I struggle with, but am not disappointed by, its decision to avoid an uncompromising position that would automatically result in civil liberties trumping civil rights laws. In First Amendment cases, the Court has sometimes mentioned inequality in access to avenues of expression as a result of the great disparity in resources, but has not attempted to correct the inequality.⁶⁰ If there is such a thing as a marketplace of ideas,⁶¹ those with extensive resources have a better chance of selling their ideas. Downtown street corners have been replaced, to a great extent, by privately owned shopping malls that can restrict speech,⁶² and politicians rely heavily on high-priced television ads to communicate their ideas. While the internet might be an equalizer, at least to some extent, low-income families are less likely to have access to it. The point is simply this—if you are without a job, a home, or an

48. *Id.*

49. *Id.* at 23–34 (Chapter 2).

50. *Id.* at 35–46 (Chapter 3).

51. *Id.* at 47–57 (Chapter 4).

52. *Id.* at 59–72 (Chapter 5).

53. *Id.* at 73–83 (Chapter 6).

54. *Id.* at 85–96 (Chapter 7).

55. *Id.* at 97–110 (Chapter 8).

56. *Id.* at 111–19 (Chapter 9).

57. *Id.* at 121–30 (Chapter 10).

58. *Id.* at 131–44 (Chapter 11).

59. *Id.* at 145–53 (Chapter 12).

60. *See, e.g.,* *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994); *Martin v. Struthers*, 319 U.S. 141, 146 (1943).

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

62. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (holding that action of a privately-owned shopping mall did not constitute government action, subject to the First Amendment).

education because of your race, age, disability, national origin, gender, religion, or sexual orientation, it is unlikely that you see the First Amendment as your savior. If given a choice, you might vote for laws addressing discrimination even at the expense of the freedom of speech that you have no ability to exercise because you have no resources. Freedom of speech and expressive association will be more meaningful when there is greater equality in our society; the marketplace of ideas will be much better when everyone has access. Of course, not all groups seeking the protection of antidiscrimination laws are without resources. Nevertheless, I can understand the reluctance to conclude that civil liberties should always trump civil rights laws aimed at equality, particularly when the enjoyment of civil liberties is extremely difficult for those who do not have "access" to them.

Even if we accept this explanation, it does not answer some of Professor Bernstein's legitimate concerns. Most people would agree that equal access to some things, maybe employment, housing, health care, and education, is more important than equal access to other things, such as certain "public accommodations" and private religious schools. Similarly, people might agree that not all discrimination is equally offensive; implicit in the Court's equal protection jurisprudence, with the standard of review ranging from rational basis to strict scrutiny, is the notion that some types of discrimination, such as racial discrimination, are more offensive than other types, like age.⁶³ Also, civil rights laws reflect the fact that some classifications are more likely to be legitimate than others by providing a "bona fide occupational qualification" defense. If this is true, does the denial of equal access to something of less importance to our well-being in society based on a less offensive classification justify an antidiscrimination law that conflicts with civil liberties?⁶⁴

In chapters two through eleven of his book, Professor Bernstein gives examples of laws and their application to specific situations in which he believes civil liberties are being compromised without sufficient justification. These examples include:

- A Caucasian Department of Energy employee in Texas who "unwittingly spawned a harassment suit when he followed up a southwest Texas training session with a bit of self-deprecating humor," i.e., presenting colleagues who attended the training session with a gag certificate making each recipient an honorary "Coon Ass," a "mildly derogatory slang term for a Cajun," which was prompted by the fact that the area of the training session has a large Cajun population, including the author of the certificate; this led to a hostile environment action by an African American recipient of the certificate;⁶⁵
- the removal of pieces of art from a classroom at Penn State University

63. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

64. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian and Bi-Sexual Group of Boston*, 515 U.S. 557 (1995). While a classification based on sexual orientation is offensive and usually without even a rational basis, access to a parade and the Boy Scouts may not be particularly important.

65. BERNSTEIN, *supra* note 1, at 27-28. The plaintiff prevailed in the trial court and the case was settled while on appeal. *Id.* at 28. In most circuits, it would be difficult for the plaintiff to satisfy the "severe or pervasive" requirement based on the facts given.

and city hall in Murfreesboro, Tennessee in response to complaints from a professor who taught in the classroom and a citizen who passed the art on the way to a meeting in city hall, who found the art offensive, because of a concern about sexual harassment litigation;⁶⁶

- an attempt by a housing rights group "to punish opponents of a proposed public housing project in Berkeley" by filing a complaint with the Department of Housing and Urban Development ("HUD") alleging discrimination based on disability;⁶⁷
- discipline of university professors for what they say in the classroom, because of the university's fear of harassment litigation;⁶⁸
- government agencies dictating what appears in advertisements⁶⁹ and compelling violators of antidiscrimination laws to speak against their beliefs as part of a settlement or remedy;⁷⁰
- treating "private clubs" as "public accommodations" and then compelling them to accept as members persons with whom they would prefer not to associate, i.e., "legally compelled association,"⁷¹ even where such compelled association interferes with the message of an expressive association;⁷²
- requiring a Jesuit university, based on a local law banning discrimination against gays, to extend "university recognition" to two gay student groups;⁷³
- attempting, by application of a Massachusetts fair housing law prohibiting discrimination based on marital status, to force a "devout Roman Catholic" couple to rent an apartment to an unmarried couple, contrary to their religious doctrine because it would facilitate fornication;⁷⁴ and
- application of Madison, Wisconsin's fair housing ordinance to a tenant who sublet three bedrooms to female housemates, but would not sublet a room to a lesbian applicant.⁷⁵

There are many other examples in chapters two through eleven, but this is a representative sample and I believe it is fair to say that, in Professor Bernstein's view, the outcome of each of these cases is less important than the existence of antidiscrimination laws that encourage claims and cause defendants to devote resources to defending such claims.⁷⁶ No doubt, the existence of such laws,

66. *Id.* at 39.

67. *Id.* at 47-49.

68. *Id.* at 66-71.

69. *Id.* at 76-81.

70. *Id.* at 73-76.

71. *Id.* at 85-86.

72. *Id.* at 103-04.

73. *Id.* at 114-15.

74. *Id.* at 121-22.

75. *Id.* at 131-32.

76. If a civil rights claim, based on a federal statute, is frivolous, a prevailing defendant is usually entitled to costs, including attorney fees.

combined with a broad interpretation and aggressive administrative enforcement, can have a chilling effect on potential defendants and their civil liberties because they are concerned about the costs of defending a claim. While overbreadth is a common basis for a First Amendment challenge to restrictions on speech,⁷⁷ it is measured by the language of the law and the courts' interpretation,⁷⁸ not how a particular "timid" person chooses to modify his or her conduct in an effort to steer clear of costly administrative or judicial proceedings.

The first example above involves racial discrimination in the form of harassment in the workplace and, as Professor Bernstein suggests, it probably does not meet the "severe and pervasive" standard, at least not in most circuits.⁷⁹ Nevertheless, he reports that the victim was successful in the trial court and the matter was settled before the appeal was heard.⁸⁰ Whether that result is good or bad, correct or incorrect, does not answer the broader question, i.e., whether laws that prohibit race discrimination, including racial harassment, in employment interfere with constitutionally protected civil liberties. As suggested earlier, because employment is important and the speech of the Department of Energy employee, the gag certificate, is of relatively low value, and because the restriction is limited to the location of the speech, one could reasonably conclude the antidiscrimination law, if it even applies here, should trump freedom of speech.

The situations presented in the second example may represent an unfounded prophylactic reaction by two institutions. While a Penn State professor complained about the *Naked Maja* hanging in a classroom and it was removed, it is not clear that either the professor or students had a viable sexual harassment claim against the university. The real question might be why a university would place in a classroom anything that may cause a distraction. In the other situation, it was the city's decision to remove a painting from city hall that triggered a First Amendment claim by the artist. While the city attorney expressed his concern about a Title VII sexual harassment claim, it is not apparent that Title VII is in play since the complaining party, the one offended by the art, did not work in city hall but was there for a meeting.⁸¹

77. See, e.g., *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

78. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 113-14 (1990).

79. BERNSTEIN, *supra* note 1, at 28.

80. *Id.*

81. There are circumstances under which an employer can be held liable for the acts of non-employees. See *Guidelines on Discrimination Because of Sex: Sexual Harassment*, 29 C.F.R. § 1604.11(e) (2004). See also *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968-69 (9th Cir. 2002) (noting that in the Ninth Circuit "employers are liable for harassing conduct by non-employees 'where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct'") (quoting *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997)); *Rodriguez-Hernandez v. Miranda-Belez*, 132 F.3d 848, 854 (1st Cir. 1998) ("Under Puerto Rico law, an employer is held responsible for 'the acts of sexual harassment towards his employees in the work place by persons not employed by him if the employer or his agents or supervisors knew or should have known of such conduct and did not take immediate and adequate action to correct the situation.'") (internal citation omitted). Even if Title VII applies, it is unlikely that the painting in city hall would be considered actionable sexual harassment.

HUD's pursuit of several individuals who spoke out against a zoning variance for a facility, in response to a complaint alleging a violation of the FHA because the opposition was based on the possibility that the facility might house persons with a disability, is the subject of the third example. While HUD ultimately dropped that investigation because the individuals acted within their First Amendment rights, Professor Bernstein says HUD's vigorous pursuit of the matter, including its referral to the Justice Department for prosecution, demonstrates the agency's disregard of the First Amendment in enforcing the FHA.⁸² A provision in the FHA makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by [other provisions of the Act]."⁸³ The difficulty with this case is that there are lawful reasons for denying a variance and there are unlawful reasons, such as the prospect that persons with a disability will occupy the housing. If in fact the opponents were trying to persuade government officials to deny the variance because of the disability—or race, national origin, sex, or marital status—of the tenants, they would be advocating illegal activity. Advocacy of illegal activity generally is not protected by the First Amendment. In contrast, advocating a change in a section of the FHA clearly would be protected speech.

Disciplining professors, or other employees, for engaging in what might be considered harassment in violation of Title VI⁸⁴ or Title VII⁸⁵ of the Civil Rights Act of 1964, or Title IX of the Education Amendments of 1972,⁸⁶ raises First Amendment issues when the alleged harassment consists of speech. If students at a public college or university claim they are being denied an equal educational opportunity as a result of a professor's in-class attack on them because of their race, gender, or national origin, which may violate one of the civil rights statutes or the Equal Protection Clause, would university-imposed disciplinary action violate the professor's right to freedom of speech? First, assume the harassment is so severe or pervasive that it would in fact give the student a claim. Thus, the issue is whether the First Amendment trumps the right to an equal educational opportunity. Given the fact that the First Amendment is already discounted when applied to employee speech in the workplace, based on the *Pickering-Connick* line of cases,⁸⁷ one could conclude that the government has an interest sufficient to trump the location-based restriction on speech. The government's interest may be considered compelling and therefore sufficient to trump even a full-fledged First Amendment interest. Second, assume the harassment is not so severe or pervasive that it would give the students a claim, but the university disciplines the professor because it wants to enhance its position if there is litigation, i.e., it does not want to be painted as an institution that tolerates harassment by professors. Here the problem is not the civil rights laws; rather, the problem is a university that is overly concerned about litigation by the students and this concern may trigger a

82. BERNSTEIN, *supra* note 1, at 49.

83. 42 U.S.C. § 3617 (2000).

84. *See* 42 U.S.C. § 2000d (2000).

85. *See* 42 U.S.C. § 2000e-2 (2000).

86. Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 42 U.S.C. §§ 1681 to 1688 (2000)).

87. *See supra* note 29 and accompanying text.

meritorious First Amendment claim by the professor against a public university.⁸⁸ As Professor Bernstein suggests, part of the problem is the fact that colleges and universities may adopt vague guidelines prohibiting harassment, thus chilling professors' speech in the classroom.⁸⁹ The remedy for this is better guidelines, not abandonment of the restrictions that attempt to assure equal educational opportunity.

While the compelled speech examples raise First Amendment concerns, at least when the speech is compelled by a court or an administrative agency rather than by a voluntary settlement, there may be a strong governmental interest in compelling speech as a remedy for a violation of a civil rights law.⁹⁰ Where the compelled speech is commercial, it is less protected under the *Central Hudson Gas & Electric v. Public Service Commission of New York* standard.⁹¹

Professor Bernstein sees laws that prohibit discrimination in public accommodations as a serious threat to the autonomy of private organizations, particularly expressive associations, because some states interpret the term "public accommodation" broadly to include, for example, the Boy Scouts of America,⁹² the Rotary Club,⁹³ and the Jaycees,⁹⁴ and to prohibit discrimination on bases not included in Title II of the Civil Rights Act of 1964,⁹⁵ such as gender or sexual orientation. Further, he says state and local laws often have no, or a very limited, exemption for private clubs. Cases based on public accommodations laws raise questions about whether the group really is expressive and, if so, whether forced admission really changes the message.⁹⁶ While Title II of the Civil Rights Act of 1964 and Title III of the Americans with Disabilities Act,⁹⁷ ("ADA") include a "private club" exemption to protect intimate association,⁹⁸ most private clubs do not fit within the exemption because they are not truly private, i.e., they openly solicit members, and anyone who does not fit within the excluded category (African Americans or females) is welcome. If an association is expressive, and

88. A professor would not have a First Amendment claim against a private university because its restriction on speech is voluntary, i.e., not compelled by law, and, therefore, there is no government action.

89. BERNSTEIN, *supra* note 1, at 67.

90. For example, the Court has recognized a compelling interest in government taking race into account in remedying a past violation of a federal statute or the Constitution. *See, e.g., Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

91. 447 U.S. 557 (1980). Under this standard, the Court asks whether the speech is advertising illegal activities or whether it is false or deceptive (unprotected speech), whether the restriction is justified by a substantial governmental interest, whether the law directly advances the government's interest, and whether the regulation is no more extensive than necessary to achieve the government's interest. *Id.* at 566.

92. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

93. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

94. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

95. Pub. L. No. 88-352, §§ 201-207, 78 Stat. 241, 243-46 (codified as amended at 42 U.S.C. §§ 2000a to 2000a-6 (2000)).

96. *See, e.g., Dale*, 530 U.S. at 640; *Roberts*, 468 U.S. at 609.

97. Pub. L. No. 101-336, §§ 301-310, 104 Stat. 327, 353-65 (codified as amended at 42 U.S.C. §§ 12181 to 12189 (2000)).

98. The "private club" exemption is found in 42 U.S.C. § 2000a(e) (2000) (Title II), and 42 U.S.C. § 12187 (2000) (Title III of ADA).

admission of the "unwanted" group would change its expression or message, then the question is whether the government has a compelling justification. In *Roberts* and *Rotary Club*, the Court upheld the application of public accommodations laws to clubs that excluded females,⁹⁹ however, in *Dale* and *Hurley* the Court held that application of such a state law to discrimination based on sexual orientation violated the First Amendment.¹⁰⁰ Maybe the different results are justified by the nature of the organizations, "business" organizations versus a parade and a social organization for young males, as well as government's more consistent effort (at least recently) to eliminate sex discrimination versus its checkered history relating to discrimination based on sexual orientation.

When an antidiscrimination law is applied to religious organizations or individuals claiming that compliance with the law would interfere with their religious beliefs, there is unlikely to be a violation of the Free Exercise Clause, as interpreted in *Employment Division, Department of Human Resources v. Smith*,¹⁰¹ since such laws normally are neutral laws of general applicability and not aimed at a particular religion. Absent a showing that marital status discrimination actually causes a shortage of housing available to unmarried couples, one could conclude that there is no real justification for such laws, or at least no justification for such laws without a religious belief exemption, and municipalities should not adopt such ordinances and thereby avoid the problem. Why burden some landlords' religion if there is not really a problem? Similarly, one might ask why Madison, Wisconsin would include "housemates" in its fair housing ordinance; why impose intimate association absent a strong showing of a problem?

While I believe Professor Bernstein may overstate the tension between civil liberties and civil rights laws, his book is very valuable in that it makes us aware of the tension or at least the potential for a tension. Such awareness may cause legislative and administrative bodies that make such laws and regulations, as well as the courts that interpret them, to more carefully weigh the competing interests in considering civil rights provisions. Even where a particular antidiscrimination law would not violate the Constitution under current interpretation, unless there is a showing of a denial of equal access or opportunity, the better course is to avoid passing laws that accomplish little while restricting or chilling civil liberties. Because educational institutions are in the business of promoting the exchange of ideas, they have a special duty to be sensitive to the potential for a tension between civil liberties and civil rights and to be particularly careful in drafting rules aimed at protecting civil rights.

99. *Roberts*, 468 U.S. at 623; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 547 (1987).

100. *Dale*, 530 U.S. at 655; *Hurley v. Irish-Am. Gay, Lesbian and Bi-Sexual Group of Boston*, 515 U.S. 557, 573 (1995).

101. 494 U.S. 872 (1990).