

## HATE SPEECH AND GOVERNMENT SPEECH

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The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

—Justice Antonin Scalia, *R.A.V. v. City of St. Paul*<sup>1</sup>

Americans recently lived through the year of the noose. In December 2006, a series of events in Jena, Louisiana pushed the noose into the foreground of the national consciousness. White students at the local high school hung three nooses in a tree called “the white tree,” after the race of the students who regularly gathered under it. The nooses were apparently intended to warn African American students away from sitting there. Six African American students had retaliated by assaulting several of their white classmates. The white students who hung the nooses were suspended for three days and assigned a week of disciplinary classes, while local authorities charged the six African American students involved in the assault with a variety of serious crimes, including attempted murder.<sup>2</sup> Civil rights advocates were enraged at the treatment of the “Jena Six” and staged a number of protests.<sup>3</sup>

The incident touched off not only a round of debate over race relations in America but also, it appears, a spate of hate speech incidents featuring nooses.<sup>4</sup> An African American professor at Columbia

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1 505 U.S. 377, 392 (1992).

2 The students were also initially charged as adults. See Richard G. Jones, *In Louisiana, a Tree, a Fight and a Question of Justice*, N.Y. TIMES, Sept. 19, 2007, at A14.

3 Peter Whoriskey, *Thousands Protest Blacks' Treatment*, WASH. POST, Sept. 21, 2007, at A1.

4 See Marisol Bello, *“Jena 6” Case in Louisiana Spurs Copycats*, USA TODAY, Oct. 10, 2007, at 3A; Darryl Fears, *In Jena and Beyond, Nooses Return as a Symbol of Hate*, WASH. POST, Oct. 20, 2007, at A1.

University Teachers College found a noose pinned to her door.<sup>5</sup> A noose appeared slung over a tree branch near an African American student community center at the University of Maryland.<sup>6</sup> Nooses were found at two locations in the town of Hempstead on Long Island, New York, including at the police department.<sup>7</sup> Nooses were hung from the lockers of two black supervisors in the New York City Parks Department.<sup>8</sup> At a construction site in Philadelphia, an employee allegedly shook a noose at an African American worker and said he wanted to hang someone.<sup>9</sup> Many more such incidents received media attention,<sup>10</sup> and no doubt still more took place. Capping off the year, in January 2008, a golf commentator remarked that Tiger Woods's competitors should "lynch" him. She issued an apology, and her network suspended her.<sup>11</sup> The controversy was prolonged when *Golfweek* magazine, reporting on the story, ran a photograph of a noose on its front cover. The action provoked a second outcry, and the editor responsible for the image was fired.<sup>12</sup>

The series of incidents provoked unsurprisingly strong reactions from African American leaders and advocates for civil rights. The

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- 5 Elissa Gootman & Al Baker, *Noose on Door at Columbia Prompts Campus Protest*, N.Y. TIMES, Oct. 11, 2007, at B3; Rich Schapiro, Alison Gendar & Tracy Connor, *"Despicable Act" on Columbia's Campus*, DAILY NEWS (New York), Oct. 10, 2007, at 5.
- 6 Avis Thomas-Lester, *Racial Incident Leads to Dialogue at U. Md.*, WASH. POST, Sept. 14, 2007, at B5.
- 7 Bill Hutchinson, *Cops Probe Nooses Hung on Forklift at L.I. Garage*, DAILY NEWS (New York), Oct. 18, 2007, at 18; Collin Nash, *Three Suspended in Noose Case*, NEWSDAY, Feb. 6, 2008, at A18. In the nearby town of North Hempstead, highway department workers were later disciplined for tying equipment together with a noose. *Id.*
- 8 Michael Amon, *Nooses Found at Rockaway Beach Work Site*, NEWSDAY (New York), Oct. 28, 2007, at A32.
- 9 Annette John-Hall, *Of Nooses and Swastikas and Living Tokens of Hatred*, PHILA. INQUIRER, Oct. 19, 2007, at B1.
- 10 The foregoing list is by no means exhaustive. See, e.g., *Discovery of Nooses Prompts Call for Military Investigation*, WASH. POST, Sept. 26, 2007, at A2 (reporting that in Connecticut, "[n]ooses were left in a bag belonging to a black Coast Guard cadet and in the office of a white officer who conducted race relations training"); Erin Einhorn et al., *Noose Left at Qns. Park*, DAILY NEWS (New York), Oct. 24, 2007, at 24 (reporting a police investigation of a noose found hanging from a tree in a park); Susan Kinzie, *Hanging Doll Investigated as Hate Crime*, WASH. POST, Apr. 4, 2008, at B6 (noting the investigation of a black doll hanging from a noose at the University of Richmond); Dave McKibben, *Nooses at Cal State Fullerton Denounced*, L.A. TIMES, Nov. 16, 2007, at B4 ("The discovery of several nooses at a tolerance rally has upset the normally tranquil Cal State Fullerton campus."); Jennifer Medina, *Noose Sent to Black Principal at Brooklyn School*, N.Y. TIMES, Oct. 23, 2007, at B2 (stating that an African American principal received a noose and a "racially charged letter" including racial slurs and the words "white power forever").
- 11 See Jaime Cardenas, *Tilghman Suspended for Woods "Lynch" Comment*, L.A. TIMES, Jan. 10, 2008, at D6.
- 12 Richard Sandomir, *Golfweek Fires Editor Because of Cover*, N.Y. TIMES, Jan. 19, 2008, at D7.

Reverend Al Sharpton called for Congress to expand U.S. hate crime law.<sup>13</sup> On the other side, free speech advocates cautioned against censorship as a way of addressing the problem. Opined one editorialist, “Americans appear to have forgotten the difference between hateful speech and hateful action. And when we lose sight of that distinction, we lose what should be most distinctive about America itself.”<sup>14</sup>

The debate over how to address hate speech is by now familiar, each side entrenched in its position. Since the 1980s, when scholarly and political advocacy for the regulation of hate speech began to gather momentum, debate on the topic has been strongly polarized, with one side advocating regulation in the name of equality and the other denouncing regulation as censorship. This Article proposes a middle way: government speech.

The two sides in the debate over hate speech might be called the anti-subordination camp and the free speech camp. Those in the anti-subordination camp understand hate speech to be a means of perpetuating systematic discrimination and oppression of minority groups. They are skeptical of the First Amendment and its emphasis on unfettered debate and protection of unpopular speech; they see “freedom of speech” as a screen that protects racism, homophobia, misogyny, and other forms of discrimination. They urge that the equality values of the Fourteenth Amendment must not be sacrificed in the name of the First Amendment. Those in the free speech camp are, for their part, skeptical of the proposition that it is possible or advisable to regulate only that speech which contributes to subordination. They point out, first, that defining a category of “hate speech” will be difficult: how can you ban racist speech without fear of chilling a protected discussion of racial difference? They also observe that allowing the government to suppress a particular viewpoint, even one that is unequivocally condemned by a majority of the population, opens the door for further government censorship. The right way to counter these hateful ideas is to allow them to be tested in the field of open debate, where they will eventually be refuted conclusively and wither away. Moreover, those in the free speech camp are inclined to see any law passed to protect a particular group from verbal insult as a political sop to minorities, a pacifying measure that plays to the ignoble demands of race politics while diverting attention

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13 Devlin Barrett, *House Panel Weighs Jena 6 Case on Tuesday*, ASSOC. PRESS, Oct. 16, 2007.

14 Jonathan Zimmerman, Op-Ed., *Hateful Speech Isn't Hateful Action*, CHRISTIAN SCI. MONITOR (New York), Sept. 27, 2007, at 9.

from more fundamental problems. And so debate between the two camps has ended at an impasse.

For a number of years, legal doctrine took the free speech line, effectively rendering further debate moot. In 1985, the Seventh Circuit voided an anti-pornography law that was aimed at images that showed women enjoying sexual subordination.<sup>15</sup> The 1992 Supreme Court decision *R.A.V. v. City of St. Paul* then struck down the Minnesota city's anti-hate speech law as unconstitutional viewpoint discrimination.<sup>16</sup> The door appeared to be closed on efforts to use law to regulate hateful language, symbols, and images until the 2003 decision *Virginia v. Black*, when the Court found that an anti-cross burning statute did not constitute impermissible content or viewpoint discrimination.<sup>17</sup> The Supreme Court made extensive findings about the long history linking cross burning to racially-motivated violence and found that Virginia could ban burning a cross with intent to intimidate as a "particularly virulent form of intimidation."<sup>18</sup>

In the wake of 2007's proliferation of hate speech incidents involving nooses, a number of state and city legislatures have introduced or passed laws proposing to ban the display of nooses with the intent to intimidate.<sup>19</sup> These measures are being developed to conform to

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15 *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

16 505 U.S. 377 (1992).

17 538 U.S. 343 (2003). The Court reconciled its holding with *R.A.V.* by emphasizing that *R.A.V.* had noted that content discrimination that "consists entirely of the very reason the entire class of speech at issue is proscribable" did not run afoul of the First Amendment, *id.* at 361 (citing *R.A.V.*, 505 U.S. at 388), and by finding that the statute at issue did not draw any distinction based on viewpoint because it did not turn on the motivation behind the intent to intimidate, *Black*, 538 U.S. at 362-63. The Court therefore disagreed with the Virginia Supreme Court's finding that "the Virginia cross-burning statute 'is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.*'" *Id.* at 351 (quoting *Black v. Commonwealth*, 533 S.E.2d 738, 742 (2001)).

18 *Black*, 538 U.S. at 352-57, 363.

19 Connecticut passed a law making it a crime to place a noose on public property or on private property without written consent of the owner if the perpetrator has the intent to intimidate or harass another person on the basis of religion, national origin, alienage, color, race, sex, sexual orientation, blindness, or physical disability. 2008 Conn. Acts 185 (Reg. Sess.) (amending CONN. GEN. STAT. § 46a-58 (2008)); see *House Passes Noose Bill*, ASSOC. PRESS, Apr. 24, 2008. New York State passed a law that makes it aggravated harassment in the first degree to draw or display a noose, "commonly exhibited as a symbol of racism and intimidation," on public or private property without the express permission of the owner, with the intent to harass, annoy, threaten or alarm another person on the basis of race, color, national origin, ancestry, gender, religion, religious practice, age, disability, or sexual orientation. 2008 N.Y. Laws 3020 (amending N.Y. PENAL LAW § 240.31 (2008)); see *Law Makes Noose Display a Felony*, N.Y. TIMES, May 16, 2008, at B2. The noose will join the swastika and the burning cross on the list of symbols the display of which (with the intent to harass or intimidate) elevates a crime from second- to first-degree ag-

*Black's* rule,<sup>20</sup> and they demonstrate that regulation is still the method of choice for combating hate speech. We can expect that opponents of hate speech regulation will continue to oppose such laws. If *Black's* rule is tested in further litigation, the question of what forms of legal regulation of hateful speech are constitutionally permissible may receive a new or more fully defined doctrinal answer. But that answer is not likely to satisfy both the anti-subordination and free speech camps. Outright regulation of hate speech will never resolve the theoretical and doctrinal differences between those who advocate the principle of anti-subordination and those who advocate the values of free speech. Meanwhile, America's commitment to protecting hate speech makes it an anomaly among liberal democracies.<sup>21</sup>

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gravated harassment. Compare N.Y. PENAL LAW § 240.30 (2008) (defining aggravated harassment in the second degree), with N.Y. PENAL LAW § 240.31 (2008) (defining aggravated harassment in the first degree). A similar bill passed the Maryland House but died in the State's Senate. H.R. 41, Reg. Sess. (Md. 2008), available at <http://mlis.state.md.us/2008rs/billfile/hb0041.htm> (last visited Mar. 28, 2010) (tracing the bill's legislative history and noting that it passed the House but did not get past the hearings stage in the Senate). The Maryland bill would have prohibited placing a noose or a swastika on public or private property with the intent to threaten or intimidate any person or group without the permission of the owner. See *id.*; *Maryland Lawmakers Add Nooses, Swastikas to Hate Crime Law*, ASSOC. PRESS, Mar. 19, 2008. A bill was introduced in the Missouri Senate that would add nooses to the existing statute criminalizing burning a cross with intent to intimidate. S.B. 763, 94th Gen. Assembly, 2d Reg. Sess. (Mo. 2008). North Carolina passed a bill specifying that nooses are included in the category of "exhibits" that it is unlawful to display with the intent to intimidate others. 2008 N.C. Sess. Laws 197 (amending N.C. GEN. STAT. §§ 14-12.12 to 14-12.15). Louisiana passed a law prohibiting the display of a noose with intent to intimidate on the property of another, a highway, or a public place. H.R. 726, Reg. Sess. (La. 2008) (codified at LA. REV. STAT. ANN. § 14:40.5 (2010)). Among the cities that considered legislation are: Philadelphia (see Vernon Clark, *Add Minority Workers, Unions Told*, PHILA. INQUIRER, Dec. 14, 2007, at B9 (noting that the "City Council unanimously passed Councilman Darrell L. Clarke's measure to punish the display of hate symbols, including nooses, burning crosses and swastikas"); Jeff Shields, *Displaying Symbols of Intimidation Could Bring Jail Time: A City Council Bill Would Prohibit Displaying Nooses, Swastikas, and Other Tokens of Hatred*, PHILA. INQUIRER, Oct. 26, 2007, at B4); Washington D.C.; and New Orleans (see Marisol Bello, *Racial Harassment Cases Rise Sharply*, USA TODAY, Feb. 6, 2008, at 3A (noting that bills had been introduced in New Orleans and Washington, D.C.)).

<sup>20</sup> The state laws all ban the display of a noose with the intent to intimidate, consistent with *Black's* holding that in order to be proscribable as a "true threat," a speaker's use of a burning cross must be carried out with intent to threaten the target. *Black*, 538 U.S. at 359–60, 365. Maryland's, New York's and Connecticut's laws also contain a trespassing element: in order to fall under the statute, the noose must be displayed on public or private property without the owner's permission. Connecticut's and New York's laws, however, do contain an element of viewpoint discrimination that might run afoul of *R.A.V.*: they ban the display of a noose with intent to intimidate on the basis of the target's race, religion, or sexual orientation (among other characteristics).

<sup>21</sup> See Adam Liptak, *Freedom to Offend Outside U.S., Hate Speech Can be Costly*, N.Y. TIMES, June 12, 2008, at A1 (contrasting attitudes toward free speech in America with those in Europe

But government speech offers a third path. In the aftermath of the controversy provoked by the *Golfweek* noose cover, President George W. Bush made a public statement emphasizing the powerful symbolic value of the noose. “The noose is not a symbol of prairie justice, but of gross injustice,” he said at an event celebrating the career of Congressman John Lewis. “Displaying one is not a harmless prank. And ‘lynching’ is not a word to be mentioned in jest.”<sup>22</sup> Bush’s remarks represent an attempt to advise the nation of the historically determined meaning of the noose and to admonish against using the symbol in an ignorant or ill-considered manner. Those who may have displayed nooses as a joke, he hoped, would take his words to heart.<sup>23</sup> The effectiveness of Bush’s message can, of course, be debated. But his gesture points to a third possibility for addressing the problem of hate speech, one that may split the difference between the dangers of language regulation and the rigidity of First Amendment absolutism.

As the Supreme Court recently confirmed in *Pleasant Grove City v. Summum*, government speech is unfettered by the First Amendment prohibition on content- and viewpoint-discrimination.<sup>24</sup> Government speech can be used deliberately to discourage and deter the use of hateful language. The government speaks to its citizens in myriad ways: through the speech of elected officials, through the dissemination of information, by exercising regulatory and editorial control over channels of mass communication, and by educating the nation’s students. It communicates its messages not only directly, through

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and Canada). Recently, Jeremy Waldron revisited the dilemma in his review of Anthony Lewis’s book, *Freedom for the Thought That We Hate*. “It is not clear to me that Europeans are mistaken when they say that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack. . . . [T]he position of minority groups as equal members of a multiracial, multiethnic, or religiously pluralistic society is not something that anyone can take for granted.” Jeremy Waldron, *Free Speech & the Menace of Hysteria*, N.Y. REVIEW OF BOOKS, May 29, 2008 (reviewing ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* (2007)). Waldron noted that America’s commitment to protecting hate speech makes it an outlier among liberal democracies.

<sup>22</sup> Michael Abramowitz & Hamil R. Harris, *At Black History Month Event, Bush Denounces Noose Displays*, WASH. POST, Feb. 13, 2008, at A2; Steven Lee Myers, *Bush, at Commemoration, Says Nooses are Symbol of “Gross Injustice,”* N.Y. TIMES, Feb. 13, 2008, at A18.

<sup>23</sup> The idea that the spate of noose incidents in 2007 was largely a series of pranks or stupid jokes was a common and much-debated theme in media coverage of and commentary on the events. See, e.g., Peter Applebome, *Racial Crisis? Or Just Rope in the Hands of Fools?*, N.Y. TIMES, Oct. 14, 2007, at A37; Adrienne T. Washington, *Noose Is No Prank, and Not To Be Tolerated*, WASH. TIMES, Sept. 11, 2007, at B2; Yolanda Woodlee, *Ex-Worker Calls Noose Incident an Overblown, “Stupid Prank,”* WASH. POST, Jan. 26, 2008, at B5.

<sup>24</sup> 129 S. Ct. 1125, 1131 (2009).

statements and advertisements, but also indirectly, through such channels as subsidizing private speakers and disallowing certain speakers in fora it controls. In nearly all its operations, it takes positions on contested social and political issues.

Government speech is so pervasive and powerful that commentators have feared that it is *too* effective as a means of influencing the citizenry. Social liberals have worried that the government will use its powerful voice to enforce a conservative orthodoxy. Free speech absolutists have worried that government speech, directly or indirectly, inhibits private speech. The predominant focus of the existing literature on government speech, therefore, is on how appropriately to limit it: which doctrinal tests will most effectively distinguish between “valid” government expression (however defined) and unacceptable government cooptation or domination of individual voices?<sup>25</sup>

Less well explored are ways in which government speech might be a normative good rather than a necessary evil.<sup>26</sup> While a number of scholars have acknowledged that the government does play an essential and positive role in educating the citizenry, they generally do so on the way to advancing proposals about how to prevent government speech from encroaching on individual expression and autonomy. This Article observes that government speech offers a valuable opportunity to influence social meanings and affect norms of conduct—and, moreover, that it is a fact of life that the government *does* influence social meanings and affect norms of conduct—and makes the case that this opportunity can be more deliberately and effectively exploited. This Article will explore the possibilities and limitations of using government speech to reduce the incidence of hate speech and so offer a way out of the impasse scholarly discussion has so far reached. While before, arguments for regulation have been opposed by arguments against it, this Article proposes to pair an argument for intervention with a permissible mode of intervention.

Precisely because government speech is uniquely pervasive and persuasive, it can be used effectively to disseminate a message; and

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25 See, e.g., THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 698–99 (1970); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384 (2001); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 545 (1996).

26 The two studies that have most extensively explored the positive value of government speech are Joseph Tussman’s *Government and the Mind* (1977) and Mark Yudof’s *When Government Speaks* (1983). They have primarily discussed the role the government can play in inculcating civic virtues generally. See *infra* note 246 and accompanying text. Tussman notes that his project “evokes such immediate and powerful hostility that I have become a bit gun shy.” JOSEPH TUSSMAN, GOVERNMENT AND THE MIND, at v (1977).

because government expression is not binding on citizens as laws and court decisions are, it does not amount to impermissible content or viewpoint regulation. The anti-subordination and free speech camps have been at loggerheads not over the substantive value of hateful language but over the wisdom and constitutionality of using regulations to ban it. The predominant emphasis of First Amendment doctrine is on protecting citizens from direct restraints on their expression: the state may not intervene in public discourse to silence or disadvantage a certain viewpoint. But government speech does not operate by placing affirmative limits on the expression of individuals; it can throw normative weight against hate speech but stop short of establishing a rigid prohibition on it. Government speech may therefore offer a way to address hate speech without running afoul of First Amendment values.

Because government speech stops short of a prohibition, it may not satisfy those in the anti-subordination camp who desire a strong, affirmative intervention against hate speech. Regulation alone, these advocates may argue, is a powerful enough measure to combat it. On the other side, it may be objected that the fact that non-prohibitive government actions taken to deter hate speech are permissible under First Amendment doctrine does not necessarily mean that they are desirable in light of free speech values. Many commentators have pointed out that First Amendment rights may be compromised as readily through affirmative as through negative measures: the government can silence speech and distort debate by conditioning its offer of subsidies on an individual's agreement to communicate, or not to communicate, a given message.<sup>27</sup> Such observers will be suspicious of any proposal that the government deliberately sets out to deter expression, even or especially through non-regulatory methods. A central tenet of First Amendment theory, after all, is that the government cannot play favorites among viewpoints.

These concerns are valid. But the overwhelming scholarly emphasis on curtailing government excesses has meant that virtually no sus-

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<sup>27</sup> See generally Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984) (detailing the manner in which the government uses its power to allocate resources to influence constitutionally protected choices and proposing a framework for assessing the constitutionality of "allocational sanctions"); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996) [hereinafter Post, *Subsidized Speech*] (discussing the constitutional questions raised when the government subsidizes speech); Redish & Kessler, *supra* note 25 (proposing an analytical structure for assessing the constitutionality of government subsidies of speech); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 622-53 (1980) (assessing government subsidies of speech under an "eclectic" analytic framework).



tained attention has been given to the ways in which government speech might have a positive influence on expression while still respecting the values of free speech. We accept that, on the one hand, the government may not sanction individuals for expressing disfavored viewpoints, and also that, on the other hand, the government can and will function as a participant in the marketplace of ideas. Our understanding of government speech is thus organized around the two poles of coercion and participation. But does there exist, between these poles, a zone of permissible influence, where the government speaks *in order to* deter expression but does so while respecting individuals' freedom to resist that discouragement?

Any independent participant in public debate seeks to deter, in a sense, the expression of those with whom she disagrees. The difference, in the case of the government, is that its monopoly on a variety of forms of power and channels of communication means that its participation consistently risks becoming coercion. Rather than policing the line between the two, this Article sets out to explore it, with the goal of discovering which forms of persuasion might be especially effective against hate speech. This Article will explore those characteristics of government speech that make it so uniquely influential as an arbiter of social meanings and ask how this power can be used to reduce the use of hateful language by citizens. How might the government set out to quell speech but yet stop short of violating free speech values?

Part I will survey the positions taken by the free speech and anti-subordination camps and sketch the reasons why their debate has ended in an impasse. It will include a brief history of the rise and fall of efforts to regulate hate speech and conclude with a discussion of the Supreme Court's cases addressing hate speech regulation, arguing that the form the doctrine currently takes, though it favors free speech, also reflects the tension between the two positions. Part II lays out a typology of forms of government speech that are constitutionally permissible that might be used to deter or undermine the force of hate speech. The typology is not intended to be exhaustive; rather, it seeks to present an array of interventions that range from the merely precatory to the arguably coercive. After Part II proposes alternatives, Part III evaluates them, anticipating the arguments that will be made by both free speech advocates and anti-subordination advocates against each possible form of government intervention. The goal of this section is to discover which anti-hate speech tactics might be acceptable to both camps. Is there a range of forms of government speech that are adequately effective while also being adequately respectful of free speech values? Which forms should be

ruled out as undesirable, and why? Part IV briefly draws out some conclusions based upon this exploration.

### I. THE IMPASSE

In 1993, Catharine MacKinnon observed that “[t]he law of equality and the law of freedom of speech are on a collision course in this country.”<sup>28</sup> Her assessment was prompted by the struggle over hate speech regulation, which was, at the time, at a fever pitch. From the late 1980s through the early 1990s, there was an outpouring of commentary calling for legal restrictions on the use of language that conveys a message of hate and exclusion to marginalized groups. Codes were proposed, and in some cases passed, banning the use of slurs, epithets, symbols that convey threatening meanings, and the like.<sup>29</sup> The predominant focus of much of this literature was on racist language, but analysis of the problem of hateful language need not be, and indeed was not, confined to race. At the same time that scholars such as Richard Delgado and Mari Matsuda called forcefully for the regulation of racist speech,<sup>30</sup> MacKinnon and Andrea Dworkin called for a ban on pornography, or images that depict and so perpetuate the subordination of women.<sup>31</sup> Other writers have been concerned with hate speech directed against groups defined by religion or sexual orientation.<sup>32</sup> The common theme among these various arguments<sup>33</sup> was that punitive legal sanctions can and should be imposed

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<sup>28</sup> CATHARINE A. MACKINNON, ONLY WORDS 71 (1993).

<sup>29</sup> See *infra* notes 96–98 and accompanying text.

<sup>30</sup> Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 89 (1993) (arguing for a tort action for racial insults); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in MARI J. MATSUDA ET AL., *supra* at 17 (1993) (proposing criminal and administrative sanctions for racist speech).

<sup>31</sup> See Catharine A. MacKinnon & Andrea Dworkin, *Minneapolis: Memo on Proposed Ordinance on Pornography*, in IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 253 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997).

<sup>32</sup> See, e.g., William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the "Hate-Speech" Debate from a Lesbian/Gay Perspective*, in HENRY LOUIS GATES ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES 294 (1994) (arguing that when the homosexual community has achieved legal equality it has been through the First Amendment, not through the Fourteenth).

<sup>33</sup> There are important differences among these different groups' experiences of marginalization and subordination that should not be obscured. See, e.g., Matsuda, *supra* note 30, at 22–23 (“Although I believe [hate speech against women, gays and lesbians requires] public restriction, these forms also require a separate analysis because of the complex and violent nature of gender subordination and the different way in which sex operates as a

when speakers use hateful language or images to malign and threaten members of marginalized groups. Without such sanctions, the Fourteenth Amendment's promise of equality could never be fulfilled, for speech is a pervasive and powerful means of perpetuating inequality.<sup>34</sup>

As MacKinnon observed, a collision of sorts was taking place, in the sense that these proposals met with forceful opposition. Such groups as the ACLU and a significant number of legal scholars countered that anti-hate speech regulations amount to censorship of unpopular speech.<sup>35</sup> At a deeper level, however, MacKinnon's prophecy that First Amendment and Fourteenth Amendment law would violently, meaningfully clash went unfulfilled. She argued that two of our strongest constitutional norms coexisted in a state of conflict that had long gone unrecognized.<sup>36</sup> Her prediction and hope was that this tension would erupt into an outright conflict that would force upon us the necessity of recognizing that the doctrines are incompatible in their current form: we cannot have equality without some

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locus of oppression. The deadly violence that accompanies the persistent verbal degradation of those subordinated because of gender or sexuality explodes the notion that there are clear lines between words and deeds."); Serena Mayeri, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045 (2001) (tracing the evolution of arguments analogizing race and gender from the 1960s to the present). The regulation of racist speech may also raise different issues from the regulation of sexist or homophobic speech because of the particular status of race discrimination under the Constitution. Akhil Amar, for example, has argued that the Thirteenth Amendment's ban on slavery and involuntary servitude may lend extra force to the argument that racist speech can be banned. Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 155-60 (1992). Amar notes that while the Thirteenth Amendment bans all slavery, not just the enslavement of African Americans, it has long been understood to especially target race-based slavery. *Id.* at 156. Without wishing to elide the differences among racism, sexism, homophobia, religious discrimination, and other forms of discrimination, this Article will treat hate speech as a problem afflicting numerous marginalized groups that have certain common features that can be usefully analyzed.

<sup>34</sup> See MACKINNON, *supra* note 28, at 72 (arguing that "[b]oth [First Amendment and Fourteenth Amendment law] show virtually total insensitivity to the damage done to social equality by expressive means and a substantial lack of recognition that some people get a lot more speech than others").

<sup>35</sup> See *infra* notes 73-77 and accompanying text.

<sup>36</sup> MacKinnon explains that the conflict had gone unnoticed because historical developments had led us to see each as a largely negative imperative. She observes that positive interventions in favor of equality have not been undertaken in the name of the Fourteenth Amendment but under the Commerce Clause or the state police power, so the Fourteenth Amendment has been invoked only negatively. MACKINNON, *supra* note 28, at 73-74. Meanwhile, First Amendment doctrine in its contemporary form emerged in response to government efforts to censor political subversion; the entire area of doctrine is thus focused on preventing self-interested government overreaching. *Id.* at 74-76.

regulation of speech.<sup>37</sup> Instead of a thoroughgoing reconsideration of the content and shape of the constitutional norms of equality and free speech, however, we reached an impasse. Arguments in favor of hate speech regulation were brought up short by the strong First Amendment prohibition on content discrimination. That is where we still find ourselves, more than fifteen years on.

A. *Anti-Subordination Arguments for the Regulation of Speech*

Members of the anti-subordination camp have made their view clear: the First Amendment, as currently understood, is an active impediment to achieving equality in the United States. Hate speech causes harms that are a direct affront to equality norms. When it targets an individual, that person is made to feel inferior and vulnerable on the basis of her membership in a group.<sup>38</sup> When it targets the group as a whole, it perpetuates the opinion that group members are inferior and appropriately subordinated.<sup>39</sup> Moreover, hate speech is detrimental to the effective functioning of the “marketplace of ideas” that the First Amendment is designed to protect. Hate speech effectively silences would-be participants from subordinated groups. Not only does this mean that inequality will be still further perpetuated because members of marginalized groups will be prevented from effectively making political claims, it also means that in the area of hate speech, the First Amendment works to subvert itself. The First Amendment prohibition on laws regulating hate speech undermines the Amendment’s core value of free and equal democratic debate be-

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37 MacKinnon forecast that this state of affairs would lead “[t]o a new model for freedom of expression in which the free speech position no longer supports social dominance, as it does now . . . . The state will have as great a role in providing relief from injury to equality through speech and in giving equal access to speech as it now has in disciplining its power to intervene in that speech that manages to get expressed.” *Id.* at 109.

38 Writers have chronicled the immediate and long-term emotional and psychological distress that victims of hate speech experience. *See, e.g.,* Delgado, *supra* note 30, at 93–96.

39 Scholars have also focused on the damage suffered by the target group as a whole when a pattern of hateful speech against them exists in society. Mari Matsuda, for example, observes that racist speech is part of an interrelated set of practices that “[keep] selected victim groups in subordinated positions.” Matsuda, *supra* note 30, at 23. One way of thinking about the group harm has been to focus on group libel. *See* Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77 (1984); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985); David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942).

cause it prevents the rectification of the subordination that silences key participants.<sup>40</sup>

Those in the anti-subordination camp share certain theoretical commitments that undergird their definition of hate speech and their understanding of how it works its harms. First, they observe that hate speech, as distinct from ordinary acts of disparagement and aggression, invokes enmity against a recognizable, subordinated group.<sup>41</sup> This quality is indeed essential to its character as a manifestation of discrimination. A number of scholars have argued that it is not possible to use hate speech against a person who is not a member of a historically subordinated group.<sup>42</sup> Hate speech achieves its effects by reminding the target of her vulnerability by virtue of her status as a group member.<sup>43</sup>

Theories of hate speech also assume that specific words, symbols, and propositions acquire, over time, uniquely potent status as signifiers of exclusion, persecution, and degradation.<sup>44</sup> Paradigmatic examples of such potent language include burning crosses and words such as “nigger,” “kike,” and “fag.” This assumption is not always made explicit in discussions of hate speech, and, indeed, some scholarly definitions of hate speech have a broader reach. Mari Matsuda,

<sup>40</sup> The foregoing paragraph draws on Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 272–77 (1991) [hereinafter Post, *Racist Speech*] (summarizing the existing literature). Post also discusses the “deontic” harm that can be said to be caused by racist speech because of its intrinsic incompatibility with the value of equality and the specific harm it causes to educational communities. *Id.* at 272, 275–77; see also Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1512 (1996) (cataloguing the theories of harm advanced by proponents of hate speech regulation).

<sup>41</sup> See Delgado, *supra* note 30, at 94 (“Racial insults, relying as they do on the unalterable fact of the victim’s race and on the history of slavery and race discrimination in this country, have an even greater potential for harm than other insults.”).

<sup>42</sup> Matsuda excludes racist speech against whites (for example, Malcolm X’s attacks on “white devil[s]”) from her category of proscribable speech because whites have not historically suffered from slavery or discrimination. Matsuda, *supra* note 30, at 38–39.

<sup>43</sup> See Delgado, *supra* note 30, at 94 (“Verbal tags provide a convenient means of categorization so that individuals may be treated as members of a class and assumed to share all the negative attitudes imputed to the class. . . . Racial insults also serve to keep the victim compliant.”); Matsuda, *supra* note 30, at 24–25 (“One subconscious response [to hate speech] is to reject one’s own identity as a victim-group member. . . . Target-group members must either identify with a community that promotes racist speech or admit that the community does not include them.”).

<sup>44</sup> See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in MARI J. MATSUDA ET AL., *supra* note 30, at 53, 74 (“Black folks know that no racial incident is ‘isolated’ in the United States. That is what makes the incidents so horrible, so scary. It is the knowledge that they are *not* the isolated unpopular speech of a dissident few that makes them so frightening. These incidents are manifestations of an ubiquitous and deeply ingrained cultural belief system, an American way of life.”).

for example, identifies racist speech by three characteristics: “1. The message is of racial inferiority[;] 2. The message is directed against a historically oppressed group[;] 3. The message is persecutory, hateful, and degrading.”<sup>45</sup> Matsuda’s definition potentially encompasses any statement expressing the idea that an historically oppressed race is inferior to others when that message is degrading (as messages of inferiority are likely to be). But most examples given by scholars advocating hate speech regulation center around totemic words and symbols that are particularly freighted, by history, with hateful meaning.<sup>46</sup> When scholars do argue for banning “rational” or “cold” (as Matsuda puts it) hate speech, the speech that they propose banning tends to have acquired its particular power to harm because of its historical association with discrimination.<sup>47</sup> Matsuda, for example, states that she advocates criminalizing pseudo-rational statements about Jews such as “monetary conspiracy theories [and] tales of mysterious cartels,” assertions which have, historically, been used to incite racial hatred and to justify both non-violent and violent forms of persecution.<sup>48</sup> Without that historical connection, “cold” or even “hot” speech that makes derogatory assertions about a particular group lacks any special power to instill fear or a sense of subordination and remains merely insulting.<sup>49</sup> Words may acquire this power by being used not only in connection with acts and threats of violence but also in connection with the routine, dismissive gestures, and deeds that accompany thoroughgoing social subordination.<sup>50</sup>

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<sup>45</sup> Matsuda, *supra* note 30, at 36.

<sup>46</sup> See, e.g., Delgado, *supra* note 30, at 94 (“No other use remains for such words as ‘nigger,’ ‘wop,’ ‘spick,’ or ‘kike.’”); Lawrence, *supra* note 44, at 67–68 (“The experience of being called ‘nigger,’ ‘spic,’ ‘Jap,’ or ‘kike’ is like receiving a slap in the face.”).

<sup>47</sup> See Matsuda, *supra* note 30, at 42 (“I am inclined to criminalize the cold-blooded version of anti-Semitic literature. Given the historical record, this ‘cold’ version is just as hateful, for all its tone of distorted rationality, as the ‘hot’ name-calling versions. To call the Holocaust a myth is to defame the dead, as Elie Wiesel has so eloquently put it.”).

<sup>48</sup> *Id.* at 41. Matsuda observes that “these texts take their hateful meaning from their historical context and connection to violence.” *Id.* at 42.

<sup>49</sup> This assumption explains the distinction Matsuda makes between rationally argued anti-Semitism and the speech of “the dead-wrong social scientist” who sincerely argues from flawed empirical evidence for racial inferiority; Matsuda excludes the latter’s statements from her category of proscribable speech. See *id.* at 40–42. To the extent that advocates of hate speech regulation would ban *all* statements that imply the inferiority of a given group, this Article does not share their definition or its premises. Some such limitation seems necessary if hate speech is to be addressed as a discrete problem apart from generalized discrimination.

<sup>50</sup> As theorist Judith Butler explains, “[t]he racial slur is always cited from elsewhere, and in the speaking of it, one chimes in with a chorus of racists, producing at that moment the linguistic occasion for an imagined relation to an historically transmitted community of racists.” JUDITH BUTLER, *EXCITABLE SPEECH* 80 (1997) [hereinafter BUTLER, *EXCITABLE*].

Hate speech also draws on the present reality of subordination to accomplish its harms. Charles Lawrence, for example, distinguishes between racist speech and ordinary speech because pervasive discrimination renders the target of racist speech relatively powerless to respond. “The racist name caller is accompanied by a cultural chorus of equally demeaning speech and symbols,” he writes. “Each individual message gains its power because of the cumulative and reinforcing effect of countless similar messages that are conveyed in a society where racism is ubiquitous.”<sup>51</sup> The speaker employing hateful speech purports to speak not only for herself but for the collective, as though voicing the contempt felt by all for members of the target’s group.

If language draws on existing inequalities for its power to wound, it also reinforces inequalities in a number of ways. At the moment of communication, advocates of hate speech regulation point out, the victim of hate speech is made to feel inferior, self-doubting, threatened.<sup>52</sup> Moreover, hate speech naturalizes discrimination. The casual use of racist, sexist or homophobic epithets and the ubiquity of words and images that figure the inferiority of marginalized groups present the subordinate status of those groups as an inevitable fact about the world, something preexisting for which there is already a name.<sup>53</sup>

Performance theorists have stressed the constitutive role language plays in establishing social identities and relations. Theorists such as Judith Butler portray a world that is not made up of autonomous individuals who choose what to become, but rather in which preexist-

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SPEECH]. She further explains: “[I]njurious names have a history, one that is invoked and reconstituted at the moment of utterance, but not explicitly told. . . . The name has, thus, a *historicity*, what might be understood as the history which has become internal to a name . . . : the sedimentation of its usages.” *Id.* at 36; see also MACKINNON, *supra* note 28, at 59–60 (“[T]he social reality of language in use determines what it conveys and means and does, such that to say these words do not have this meaning or do these things is to say that this social reality does not exist.”). Mari Matsuda puts this point in the terms of individual experience: “The Japanese-American executive who resigns in protest when his employer starts publishing anti-Japanese slogans to improve sales knows that there is a connection between racist words and racist deeds.” Matsuda, *supra* note 30, at 24.

51 Lawrence, *supra* note 44, at 68–69.

52 See Delgado, *supra* note 30, at 94–95 (“Verbal tags thus make it easier for their users to justify their own superior position with respect to others. Racial insults also serve to keep the victim compliant. . . . Social scientists who have studied the effects of racism have found that speech that communicates low regard for an individual because of race ‘tends to create in the victim those very traits of “inferiority” that it ascribes to him.’ . . . Because they constantly hear racist messages, minority children, not surprisingly, come to question their competence, intelligence, and worth.”).

53 See MACKINNON, *supra* note 28, at 31 (“Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right . . .”).

ing cultural forms, including linguistic norms, determine the shape that identities take.<sup>54</sup> The speaker using hateful speech reiterates the fact of hierarchy, of a social structure in which some groups are superior and others inferior—indeed, this social structure exists by virtue of speakers’ continual use of language that makes it present. Hate speech is said to “perform” subordination in the sense that it calls it into being.<sup>55</sup> Butler explains, “[H]ate speech . . . does not describe an injury or produce one as a consequence; it is, in the very speaking of such speech, the performance of the injury itself, where the injury is understood as social subordination.”<sup>56</sup> Or, as Matsuda writes: “Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.”<sup>57</sup>

If one accepts some or all of the foregoing propositions about the relationship between language and subordination, regulating hate speech follows logically from a serious commitment to equality.<sup>58</sup> Without the regulation of hate speech, the system of laws intended to combat discrimination only incompletely addresses the problem.<sup>59</sup> Scholars in the anti-subordination camp have assailed what they see as First Amendment orthodoxies that, in the name of neutrality, provide cover for the perpetuation of discrimination. Like MacKinnon,

54 Butler explains, “Sociological discussions have conventionally sought to understand the notion of the person in terms of an agency that claims ontological priority to the various roles and functions through which it assumes social visibility and meaning.” But “[t]o what extent,” she asks, “do *regulatory practices* of gender formation and division constitute identity, the internal coherence of the subject, indeed, the self-identical status of the person?” JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 22–23 (1990).

55 See MACKINNON, *supra* note 28, at 13 (“Social inequality is substantially created and enforced—that is, *done*—through words and images. Social hierarchy cannot and does not exist without being embodied in meanings and expressed in communications.”); Charles R. Lawrence III et al., *Introduction*, in MATSUDA ET AL., *supra* note 30, 1, 9 (“[R]acism achieves its purpose by the construction of meaning. . . . We are acted upon and constructed by racist speech.”).

56 BUTLER, *EXCITABLE SPEECH*, *supra* note 50, at 18.

57 Matsuda, *supra* note 30, at 36. While Butler gives a powerful explication of Matsuda’s theory, she ultimately resists the conclusion that a prohibition on hate speech is either necessary or desirable.

58 Charles Lawrence, for example, sees *Brown v. Board of Education* as a case about speech: “*Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys . . .” Lawrence, *supra* note 44, at 59. Its holding that separate but equal is unconstitutional entails the conclusion that messages of racial inequality generally are prohibited under the Fourteenth Amendment. *Id.* at 59–62.

59 See, e.g., Delgado, *supra* note 30, at 90 (“The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted.”); Lawrence et al., *supra* note 55, at 7 (describing hate speech as “part of an integrated arsenal of weapons of oppression and subordination”); Matsuda, *supra* note 30, at 23 (detailing “the implements of racism,” of which racist speech is one).



the authors of *Words That Wound* argue that “the [F]irst [A]mendment arms conscious and unconscious racists . . . with a constitutional right to be racist.”<sup>60</sup>

Proponents of hate speech regulation argue that the Thirteenth<sup>61</sup> and Fourteenth<sup>62</sup> Amendments require qualification of the general First Amendment proscription on content- and viewpoint-discrimination by the government.<sup>63</sup> The Constitution, on this view, is not neutral when it comes to discrimination.<sup>64</sup>

Moreover, members of the anti-subordination camp claim, hate speech undermines crucial free speech values. They observe that hate speech itself does not promote the exchange of ideas because it does not convey its message through rational argument, nor can it be refuted through rational argument.<sup>65</sup> By its very nature, therefore, hate speech does not deserve First Amendment protection. Moreover, hate speech either silences members of marginalized groups or devalues their opinions when expressed.<sup>66</sup> The free and equal exchange of ideas that, according to First Amendment orthodoxy, will

<sup>60</sup> Lawrence et al., *supra* note 55, at 15.

<sup>61</sup> Amar, *supra* note 33, at 155–60 (arguing that the Thirteenth Amendment’s prohibition on “badges of servitude” might profitably be invoked to defend anti-hate speech ordinances); Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389 (2004) (proposing that a federal ban on hate speech could be grounded in the Thirteenth Amendment).

<sup>62</sup> MACKINNON, *supra* note 28, at 71–74 (describing the “tensions and intersections” between First Amendment speech and Fourteenth Amendment equality); Lawrence, *supra* note 44, at 86 (noting that there are “competing constitutional values expressed in the [F]irst and [F]ourteenth [A]mendments”).

<sup>63</sup> See Lawrence et al., *supra* note 55, at 15 (“Racism is just another idea deserving of constitutional protection like all ideas. The [F]irst [A]mendment is employed to trump or nullify the only substantive meaning of the [E]qual [P]rotection [C]lause, that the Constitution mandates the disestablishment of the ideology of racism.”).

<sup>64</sup> As Amar points out, this argument may, at least as an initial matter, make a stronger case for regulating racist speech against African Americans than for regulating hateful speech against other groups. Amar, *supra* note 33 at 156–57.

<sup>65</sup> As Charles R. Lawrence III observes, a racist epithet conveys immediate injury and so is more like the disvalued category of “fighting words” that does not receive First Amendment protection than it is like the rational public discourse that the First Amendment most values. Lawrence, *supra* note 44, at 67–68. And hate speech is “preemptive”: “words of response to such verbal attacks may never be forthcoming because speech is usually an inadequate response.” *Id.* at 68.

<sup>66</sup> *Id.* at 83–85 (arguing that the civil libertarian viewpoint fails to take into account the extent to which hate speech marginalizes certain speakers in public debate); see also Post, *Racist Speech*, *supra* note 40, at 275 (noting the argument that “racist expression harms the very marketplace of ideas that the [F]irst [A]mendment is designed to foster”).

eventually uncover the truth,<sup>67</sup> is forever handicapped by the absence of these voices.<sup>68</sup>

On a doctrinal level, these claims take the form of the argument that hate speech is not protected speech at all. Rather, it is a category of utterance akin to “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words,” categories that the Supreme Court, in *Chaplinsky v. New Hampshire*, deemed to be “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>69</sup> Such speech can be regulated without running afoul of the First Amendment.<sup>70</sup> In a related claim, advocates of regulation further argue that hate speech is not “speech” at all but in fact a kind of action.<sup>71</sup> It may

67 The virtue of the “marketplace of ideas” has long been an article of faith in First Amendment theory. The metaphor was first advanced by Justice Holmes in his dissent in *Abrams v. United States*. “Persecution for the expression of opinions seems to me perfectly logical,” he noted. “If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

68 See MACKINNON, *supra* note 28, at 78 (“Speech theory does not disclose or even consider how to deal with power vanquishing powerlessness; it tends to transmute this into truth vanquishing falsehood, meaning what power wins becomes considered true.”).

69 315 U.S. 568, 572 (1942). Mari Matsuda proposes that hate speech be established as its own low-value category of speech. Matsuda, *supra* note 30, at 35 (“I believe racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.”). Lawrence argues that racist speech is “the functional equivalent of fighting words.” Lawrence, *supra* note 44, at 66–71. Delgado argues that hate speech is low-value speech because it makes no contribution to the ascertainment of truth. Delgado, *supra* note 30, at 107–09.

70 As the Supreme Court stated, “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky*, 315 U.S. at 571–72. *But see* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *infra* notes 100–03 and accompanying text.

71 MACKINNON, *supra* note 28, at 23 (“Pornography is not restricted [under her proposed anti-pornography ordinance] because of what it says. It is restricted through what it does.”). On the limitations that must necessarily be imposed on the meaning of “speech” for First Amendment purposes, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981), and Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

therefore be prohibited just as perjury, blackmail, and conspiracy are.<sup>72</sup>

*B. Free Speech Arguments Against the Regulation of Hate Speech*

Opposition to proposals to regulate hate speech has been forceful. Critics of these proposals have written from a variety of perspectives: some reject the theoretical premises of proponents of regulation, while others accept them but conclude that effective regulation is infeasible or undesirable.

The strong civil libertarian case against regulation finds its arguments squarely in First Amendment doctrine. The civil libertarian view, as, for example, Nadine Strossen explains, takes it as fundamental that free speech is “indivisible”—that is, regulators will not be able to draw lines cordoning off speech that expresses a particular viewpoint, however discredited and invidious, without opening the way for the suppression of any speech that legislators happen to disfavor. This is the basis of the content-neutrality principle.<sup>73</sup> To maintain this strict protection of *all* ideas while also allowing the government to go about the basic task of protecting itself and its citizens from harm, First Amendment doctrine appropriately distinguishes between speech and conduct and between advocacy and incitement.<sup>74</sup> Free speech must be allowed up to the point that it causes injurious *conduct* to take place. The civil libertarian position denies that hate speech is properly understood to be conduct. “Although undoubtedly harmful,” Strossen writes, “the utterance of disparaging remarks cannot be equated fairly with the systematic denial of all rights to a group of human beings.”<sup>75</sup> Speech that tends to cause violence or other violations of the law is appropriately punishable only at the point when it becomes express incitement; mere advocacy is protected.<sup>76</sup>

Moreover, even assuming that it would be desirable to suppress hate speech, civil libertarians worry that any regulations drafted with

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72 For the most sustained discussion of the distinction between speech and action and the reasons why the First Amendment countenances the punishment of crimes committed verbally, such as blackmail, see KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

73 Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 533–34.

74 *Id.* at 531–41.

75 *Id.* at 533.

76 *Id.* at 532–33; *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (invalidating a statute that punishes “mere advocacy”).

this goal in mind would chill speech that the First Amendment should protect, either because the regulations would be vague, or because they could be enforced discriminatorily.<sup>77</sup> The proper approach, under this view, is to protect all speech and expect that in the long run, hateful ideas will die a natural death in the “marketplace of ideas.”<sup>78</sup> As Judge Frank Easterbrook wrote in his opinion striking down Indianapolis’s anti-pornography law (which adopted language proposed by Professors MacKinnon and Dworkin), “[u]nder the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be.”<sup>79</sup> The civil libertarian view thus combines a strong emphasis on prophylaxis—we must avoid all content- and viewpoint-based regulation, because once we allow any we will chill speech and fall down the “slippery slope” to free-ranging government censorship—with a firm belief in the virtues of free and vigorous public debate.

Other First Amendment theorists, in accord with the civil libertarian view, have elaborated the positive values promoted by protecting even hateful speech. In *The Tolerant Society*, Lee Bollinger argues that through the difficult process of accepting such extreme demonstrations as a parade of American Nazis,<sup>80</sup> society learns the key democratic virtue of tolerance.<sup>81</sup> Vincent Blasi makes the related argument that participating in the unfettered exchange of ideas promotes positive character traits such as “inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil.”<sup>82</sup> In particular, he warns against the complacency that regulating hate speech may engender. “[C]onfronting falsehood and evil profoundly shapes the character of a person or a society,” he writes, and “such an experience is short-circuited by censorship.”<sup>83</sup> He continues,

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77 Strossen, *supra* note 73, at 527–28; *see also* *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that the University of Michigan’s anti-hate speech policy violated the First Amendment because it was overbroad and impermissibly vague).

78 *See supra* note 67 (considering the “marketplace of ideas” metaphor in the history of the First Amendment).

79 *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 327–28 (7th Cir. 1985).

80 *See* LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 12–42 (1986) (relating the history of the Skokie controversy); *see also infra* note 94 and accompanying text.

81 Bollinger asserts that “a willingness to compromise and a willingness even to accept total defeat are essential components of the democratic personality.” *Id.* at 117. He explains that the right result was reached in the Skokie controversy because it is through tolerating even—or especially—intolerant speech (such as that of the Nazi demonstrators) that we best learn this virtue. *Id.* at 124–33.

82 Vincent Blasi, *Free Speech and Good Character*, 46 *UCLA L. REV.* 1567, 1569 (1999).

83 *Id.* at 1573–74.

[T]he disturbing tendency, illustrated by our recent efforts to control racism on college campuses, is to think the day's work is done when the self-congratulatory code is enacted. The passage of laws too often has the quality of a moral shortcut, and too often diverts what could be honest, if stressful, exchanges that might actually impact beliefs into shallow forensic contests over legal coverage.<sup>84</sup>

Both Bollinger and Blasi stress the values taught through the process of confrontation; regulation of hate speech might conduce to the atrophying of our civic capacities.<sup>85</sup>

A final sub-group of free speech advocates make arguments that are particularly worth noting because they share many of the premises of those who advocate for hate speech regulation. The civil libertarians, as well as to a great extent Bollinger and Blasi, treat hateful speech as speech that puts forth a proposition, albeit despicable, that can eventually be defeated by counter-propositions. But other scholars, more fully committed to the proposition that hateful speech can be an essential way in which discrimination is made real and maintained, have nevertheless resisted proposals for regulation.

Some worry about the implications of the claim to authority that is entailed in deciding what speech does and does not deserve to be heard. Robert Post, for example, notes that state regulation of the formation of racial identity risks imposing a monolithic vision of that identity on a group of people who are diverse and likely do not share perfect consensus about their defining characteristics.<sup>86</sup> The possibilities of distortion and power-grabbing are simply too abundant here.

Other scholars have questioned the wisdom of regulation out of concern for its effect on language use generally. Judith Butler and Amy Adler, for example, both accept the theory that words and symbols are constitutive of social reality and so can be powerful aids to and means of discrimination.<sup>87</sup> Nevertheless, both Butler and Adler

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<sup>84</sup> *Id.* at 1574.

<sup>85</sup> *Cf. generally* JOHN DURHAM PETERS, *COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION* (2005) (tracing liberal free speech advocates' recurring preoccupation, beginning with Saint Paul, with society's confrontation of—and mastery over—noxious and evil ideas).

<sup>86</sup> *See* Post, *Racist Speech*, *supra* note 40, at 293–98, 306–09.

<sup>87</sup> Indeed, for Butler, the very existence of the individual depends on being recognizable to others, who only recognize those people and things for which they already have names. *See* BUTLER, *EXCITABLE SPEECH*, *supra* note 50, at 5 (“[T]o be addressed is not merely to be recognized for what one already is, but to have the very term conferred by which the recognition of existence becomes possible. One comes to ‘exist’ by virtue of this fundamental dependency on the address of the Other. One ‘exists’ not only by virtue of being recognized, but, in a prior sense, by being *recognizable*.”). Butler has questioned, for ex-

resist regulation of hateful speech. Instead, both stress the possibility of subversive use of the same words, epithets and symbols that elsewhere tend to reinforce existing structures of subordination.<sup>88</sup> Adler points out that while proponents of regulation tend to assume that the words and symbols of hate speech have only one possible meaning, in fact the subversive use of such words as “nigger” and “queer” has become a powerful tactic of marginalized groups.<sup>89</sup> Butler shares this concern, observing that the meaning of names and words generally is never fixed, and a hateful epithet or pornographic image can be reinterpreted or reused in a way that resists, rather than perpetuates, subordination.<sup>90</sup> Regulation would forestall the possibility of such subversive uses of hateful speech and so would shut down the process of provocation, critical thought, and linguistic change that they initiate. This process may be, in the long term, a more effective way to counter hate speech because it undermines its hateful meaning rather than taking it as an incontrovertible fact.

The potential costs of regulating hate speech thus include the possibility of creeping government censorship, but also extend well beyond it. By adopting a prohibition on hateful language, we would risk undermining not only our freedom of expression but also key citizenship values and the generative mutability of language itself.

### C. *The Doctrinal Response*

After the two camps in the debate had staked out their positions, legal doctrine came down on the side of free speech, with the Supreme Court striking down an anti-hate speech law in the 1992 decision *R.A.V. v. City of St. Paul*. The issue was taken as resolved, but in

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ample, whether there is such a thing as sex outside of the discursive formations that give us such categories as “male” and “female.” See BUTLER, *GENDER TROUBLE*, *supra* note 54.

88 Butler writes,

I wish to question for the moment the presumption that hate speech always works, not to minimize the pain that is suffered as a consequence of hate speech, but to leave open the possibility that its failure is the condition of a critical response. If the account of the injury of hate speech forecloses the possibility of a critical response to that injury, the account confirms the totalizing effects of such an injury. Such arguments are often useful in legal contexts, but are counter-productive for the thinking of nonstate-centered forms of agency and resistance.

BUTLER, *EXCITABLE SPEECH*, *supra* note 50, at 19.

89 She observes that leftist artists, in particular, have brought these words back with a vengeance in works that “make the viewer uncomfortable, [that] force her to question the meaning of the work and to confront other speech she may encounter with greater suspicion.” Adler, *supra* note 40, at 1544.

90 “[I]f the text acts once, it can act again,” Butler writes, “and possibly against its prior act. This raises the possibility of *nsignification* . . . .” BUTLER, *EXCITABLE SPEECH*, *supra* note 50, at 69.

2003, the Court found that an anti-cross burning statute—one that the Virginia Supreme Court had itself struck down under *R.A.V.*—did not run afoul of the First Amendment’s general prohibition on content- and viewpoint-discrimination. In its current form, legal doctrine reflects the tension between the values of anti-subordination and free speech.

The problem of how to address the harms caused by hate speech has occupied courts’ and commentators’ attention at least since the 1930s and 40s, when observation of the tactics used to vilify racial and national groups in Nazi Germany prompted a desire to control such speech in America.<sup>91</sup> In the 1952 case *Beauharnais v. Illinois*, the Supreme Court upheld a group libel statute that banned speech that “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion.”<sup>92</sup> The holding of *Beauharnais*, however, was significantly undermined by subsequent decisions. The 1964 decision *New York Times v. Sullivan* drastically altered the status of all libel claims in light of First Amendment values.<sup>93</sup> And in 1978, efforts to prevent demonstrators from marching through the village of Skokie, Illinois wearing Nazi uniforms, displaying swastikas, and bearing signs printed with white supremacist slogans were defeated, an episode that suggested that the principles of *Beauharnais* were now seriously in doubt.<sup>94</sup>

The early 1980s, however, witnessed a revival of efforts to develop legal strategies to prohibit and punish hate speech, and throughout

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91 See David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 728 (1942) (discussing the role of defamation in rise to power by the Nazis in Germany).

92 343 U.S. 250, 251 (1952) (quoting Ill. Rev. Stat., ch. 38, § 471 (1949)).

93 376 U.S. 254 (1964). *Beauharnais* had upheld that aspect of Illinois’ group libel law that provided that the defense of truth was not adequate to defeat a claim; the defendant also had to show that “the publication be made ‘with good motives and for justifiable ends.’” *Beauharnais*, 343 U.S. at 265. *New York Times v. Sullivan* held that not only does the First Amendment require that a defense of truth be sufficient to defeat a claim of libel, the plaintiff must also prove that the defendant made the false statements “with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times*, 376 U.S. at 280.

94 *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied 439 U.S. 916 (1978). The Seventh Circuit distinguished *Beauharnais* on the ground that the statute at issue there aimed to prohibit speech that would provoke a breach of the peace and so could be classed as “fighting’ words,” which the First Amendment does not protect. *Beauharnais*, 578 F.2d at 1204. It also expressed considerable doubt that the “fighting words” category of unprotected speech, established in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), still survived as a valid exception to First Amendment protection. *Beauharnais*, 578 F.2d at 1204 (“It may be questioned, after cases such as *Cohen v. California*, . . . *Gooding v. Wilson*, . . . and *Brandenburg v. Ohio*, . . . whether the tendency to induce violence approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today.”).

the decade scholarly and public concern with hate speech intensified. The strategies advanced include establishing a tort action for racial insults,<sup>95</sup> adopting municipal and state regulations banning expression intended to incite racial hatred,<sup>96</sup> and adopting similar rules on college campuses.<sup>97</sup> The most successful of these was the effort to regulate speech on college campuses, with well over one hundred schools adopting some kind of anti-hate speech rule.<sup>98</sup> This trend provoked intense controversy, however, and a number of campus speech codes were found by lower courts to violate the First Amendment as overbroad.<sup>99</sup> Meanwhile, any momentum to regulate hate speech on the level of municipal or state law was halted when the Supreme Court, in the 1992 case *R.A.V. v. City of St. Paul*, struck down a city ordinance that banned the display of “a burning cross[,] or Nazi swastika, [or other symbol that] one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender.”<sup>100</sup>

Justice Scalia, joined by four other justices, held that the statute represented impermissible viewpoint discrimination. The Court rejected the anti-subordination camp’s argument that hate speech could be banned as a sub-category of “fighting words.” It accepted the proposition that “fighting words” are proscribable because of their “nonspeech” aspects (their tendency to provoke violence)<sup>101</sup> and the Minnesota Supreme Court’s finding that the statute in question

95 See Delgado, *supra* note 30; see also Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990) (discussing the history of tort actions for discriminatory and persecutory speech and the implications of the Model Communicative Tort Act for future, similar actions); Dean M. Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267 (1982) (arguing that the tort of outrage, also known as intentional infliction of emotional distress, “has great potential as a means of recovery for persons injured by racist conduct and as a method for changing racist beliefs and attitudes”).

96 See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

97 See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) (discussing the constitutional problems presented by university speech codes prohibiting slurs and disparaging remarks directed against persons on account of their ethnicity, religion, or sexual orientation); Lawrence, *supra* note 44 (discussing university speech codes); Strossen, *supra* note 73 (describing the rise of university speech codes and arguing against them).

98 See David Rieff, *The Case Against Sensitivity*, ESQUIRE, Nov. 1990, 120 cited in Post, *Racist Speech*, *supra* note 40, at 268 n.7 (noting that in the last two years 137 American universities had passed proscriptions on hate speech).

99 See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F.Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

100 505 U.S. 377, 380 (1992).

101 *Id.* at 386.



banned only speech “that itself inflicts injury or tends to incite immediate violence.”<sup>102</sup> Nevertheless, the Court, per Justice Scalia, held that it was unconstitutional to regulate this category of speech in a content-discriminatory manner. The fact that “fighting words” are considered low-value speech, Justice Scalia explained, did not mean that “they are . . . entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”<sup>103</sup> The decision was widely understood to close the door on hate speech regulation.

The Supreme Court’s 2003 decision in *Virginia v. Black*, however, may have reopened it slightly. In *Black*, the Court held that a cross burning that is intended as a threat can constitutionally be proscribed. To square this conclusion with *R.A.V.*’s holding that cross burnings (among other forms of symbolic expression) cannot be proscribed when calculated to arouse anger, alarm, or resentment on the basis of race, the Court cited dicta from *R.A.V.* Justice Scalia had explained that content-based discrimination within low-value categories of speech is permissible “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.”<sup>104</sup> The *Black* court found that threats conveyed by burning a cross are a particularly invidious kind of threat and so can be singled out for regulation in accordance with this principle.<sup>105</sup> The *Black* opinion also distinguished *R.A.V.*, holding that unlike the ordinance in the previous case, the Virginia statute applied without regard to the viewpoint of the cross burner: “It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion . . . .”<sup>106</sup> Scholars have questioned the cogency of this distinction;<sup>107</sup> what is clear from reading the *Black* decision, in any event, is that the tension between anti-

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102 *Id.* at 380 (citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)).

103 *Id.* at 383–84.

104 *Virginia v. Black*, 538 U.S. 343, 361 (2003) (citing *R.A.V.*, 505 U.S. at 388).

105 “The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate,” the *Black* court held, “because burning a cross is a particularly virulent form of intimidation.” *Id.* at 363.

106 *Id.* at 362.

107 See Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575, 603–07 (2005) (discussing the Supreme Court’s change in position between *R.A.V.* and *Black*); Stephen G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1295–1310 (2005) (discussing the same issue); Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech: A Comment on Virginia v. Black*, 54 CATH. U. L. REV. 1, 24 (2004) (discussing the same issue); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 207–09 (discussing the same issue).

subordination and free speech values remains acute. The opinion attempts to adhere to the central doctrinal requirements of free speech: racist threats can only be banned because they constitute an especially pernicious harm, not because of the “idea” of racism itself. But at the same time, its holding is driven by an awareness that certain words and symbols pose an especially grave threat to the community precisely because of the history of racism. The Court’s finding that cross burnings are an especially potent class of threats was based in large part on a survey of the history of the Ku Klux Klan. After reviewing the extensive pattern of racially motivated violence undertaken by the KKK throughout the twentieth century,<sup>108</sup> the Court found that “the history of violence associated with the Klan shows that [when a target is threatened with a burning cross,] the possibility of injury or death is not just hypothetical.”<sup>109</sup> Cross burnings “had special force given the long history of Klan violence.”<sup>110</sup> The Court concluded, “when a cross burning is used to intimidate, few if any messages are more powerful.”<sup>111</sup> *Black* thus appeared to give new life not only to the doctrinal possibility of regulating hate speech but to the very theories of signification and interpretation upon which proponents of regulation have long relied.<sup>112</sup> The Supreme Court had finally recognized the nexus between history, meaning, and intimidation.

In the wake of 2007’s epidemic of hate speech incidents involving nooses, a number of states have passed laws that ban the display of a noose with the intent to intimidate.<sup>113</sup> According to *Black*’s revision of *R.A.V.*, such laws are constitutionally permissible because they ban threats made using a symbol that, because of its historical association with discriminatory violence, is particularly threatening and disruptive of the social order. These statutes would run afoul of *R.A.V.*, of course, were they to predicate criminality on the intent to harm or intimidate *because of* the target’s race, gender, sexual orientation or religion. This trend suggests that we may see regulation of threatening expression symbol-by-symbol, word-by-word, supported by legislative or judicial findings in each case that the symbol or word is associated with historical oppression and so especially tends to provoke outbursts of violence. But can a statute that prohibits burning a cross

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108 *Black*, 538 U.S. at 352–57.

109 *Id.* at 357.

110 *Id.* at 355.

111 *Id.* at 357.

112 *See supra* notes 44–51 and accompanying text.

113 *See supra* note 19 and accompanying text.

with the intent to intimidate really be said to be “viewpoint neutral”? Is it not effectively decreeing that intimidation based on racist beliefs is unworthy of a place in public discourse? Proponents of free speech may eventually force a confrontation with the logically awkward compromise *Black* forged between anti-subordination and free speech. The effort to steer a middle path between anti-subordination and free speech, however, need not lead us back into these tortuous questions, for there is another option. The government might make non-regulatory interventions against hate speech through its own expression.

#### D. A Definitional Note

It will be useful, before going forward, to state clearly the definition of hate speech that this Article adopts and to situate that definition against the background of the arguments and doctrine just discussed. Matsuda’s definition is a good starting point. To recap, she defines hate speech as expression that conveys a persecutory, hateful, and degrading message of the inferiority of a historically oppressed group.<sup>114</sup> Hate speech includes both totemic words and symbols, even if used casually, and discourse that, although it does not employ a hot-button epithet or symbol, nevertheless conveys a persecutory message of inferiority. It also includes threats of violence motivated by the target’s membership in a group of historically oppressed persons, although since such speech can be regulated under *Black*, this sub-category is of less interest for the purposes of this Article.

This definition may not satisfy free speech advocates, who will worry that it is vague at the borders and risks encompassing protected speech. For example, one common objection to anti-hate speech codes<sup>115</sup> that could be raised here is that speech that is “degrading” may more properly be classed as simply offensive speech, which the First Amendment protects.<sup>116</sup> There are, indeed, real difficulties with establishing a clear definition of hate speech. Rather than a cause for consternation at the outset, however, this fact is one more reason to explore a non-regulatory approach to combating hate speech. Defi-

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114 See *supra* note 45 and accompanying text.

115 See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (holding that a school district’s anti-harassment policy was overbroad for “prohibiting disparaging speech directed at a person’s ‘values’”).

116 See *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment . . .”).

nitional questions are especially important in First Amendment doctrine because, to avoid a “chilling effect,” speakers need to know the precise perimeters of the banned category of speech.<sup>117</sup> Government speech focused on combating hate speech, however, which places no affirmative limitations on individual expression, need not share this preoccupation.

## II. GOVERNMENT SPEECH: SOME FORMS OF INTERVENTION

Recall George Bush’s admonition, made in the wake of a year of highly publicized noose incidents, that speakers should understand the violent history in which the noose is implicated and avoid using the symbol as a prank or threat. Or consider if a similar statement were made by Barack Obama now.<sup>118</sup> Such a statement offers something to both the anti-subordination and the free speech camps. The President lends his authority to the cause of anti-subordination: he makes a strong statement that certain words and symbols can acquire a particular power to threaten or wound through their historical association with discrimination and violence, and he asserts that speakers should refrain from using these freighted terms. On the other hand, his act respects free speech values because his imprecation is not regulation: it is not backed up by threat of punishment if speakers choose to ignore his plea. Of course, such a statement also may be found lacking by each camp: the anti-subordination camp will see hortatory statements by executive officials as too weak an intervention, while free speech absolutists will worry that the cumulative effect of abundant precatory speech can amount to a kind of censorship through indoctrination. But government speech steers a middle path between inaction and censorship.

A public statement by the executive is only one of many expressive options available to the government. Government speech is a broad

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117 See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 115 (1980) (noting that the goal of speech protection can be “defeated . . . by defining the categories of unprotected speech . . . too vaguely, thereby inviting . . . erosion”); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 13 (observing that under a two-tier system of free speech protection, a great deal of weight is placed on the accuracy of our definitions of categories— “[i]f the obscene is constitutionally subject to ban because it is worthless, it must follow that the obscene can include only that which is worthless”).

118 Cf. *Obama Speaks Out on “Noose” Magazine Cover*, PR NEWswire, Jan. 18, 2008, <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=109&story=/www/story/01-18-2008/0004739124&edate=> (quoting then-presidential candidate Obama: “We have to have a culture that understands that there’s nothing funny about a noose. That’s a profound history that people have been dealing with and those memories are ones that can’t be played with.”).

category that includes any government action that communicates or subsidizes the communication of a particular message. It encompasses activities from appropriating taxpayer money to campaign for or against specific legislative measures to deciding who gets access to public fora such as theatres and broadcasting frequencies to offering a program of subsidies for expression—for example, funding for the arts—that makes content-based decisions among qualified applicants. The government can be said to “speak” when it pays for speech directly, when it provides access to public property for the communication of a given message, or when an elected official voices her opinion on a given issue.

This Part will catalogue a number of constitutionally permissible forms of government expression that could be used to intervene against hate speech. They are: 1) precatory and hortatory speech by government officials and bodies, 2) commemorative expression, 3) public education, 4) government subsidies of private speech and selective control of expression in non-public fora, and 5) advisory and investigatory statements. The list offered is not by any means exhaustive. Rather, the examples have been chosen to highlight important theoretical and doctrinal questions. For each type of government speech proposed, two questions will be addressed: first, briefly, how would this kind of government intervention work as a means of deterring or discouraging hate speech? Second, is it constitutional? What limits, if any, does doctrine impose? Discussion of the effectiveness of the various types of speech will be preliminary here and taken up at greater length in the next Part. The central goal of this Part is to lay out an array of permissible options.

The First Amendment gives the government a great deal of latitude to engage in its own expression. As the Supreme Court declared recently in *Pleasant Grove City v. Summum*, “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”<sup>119</sup> Commentators have generally agreed that it makes little sense to think of the government as having a *right* to speak, in the sense of an entitlement that would outweigh a citizen’s First Amendment right even in the public forum.<sup>120</sup> But both courts and scholars have agreed that, by virtue of necessity, the government’s *ability* to speak cannot be unduly hampered.<sup>121</sup> Government

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119 129 S. Ct. 1125, 1131 (2009).

120 See, e.g., MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 42–50 (1983).

121 See *id.* at 41 (“It is absurd . . . in the modern contexts, to adopt the position that government speech, in its many manifestations and irrespective of its advantages, is an illegiti-

speech doctrine, accordingly, draws a distinction between occasions when the government is properly understood to be speaking as a participant in the marketplace of ideas and those when it is acting as a regulator of private speech. When it regulates, the government is subject to strict limitations about content- and viewpoint-neutrality. But norms of content- and viewpoint-neutrality do not apply when the government is itself a participant in public debate, whether an elected official speaks herself or the government subsidizes expression. As the Supreme Court wrote in *Rosenberger v. Rector and Visitors of the University of Virginia*, “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes [and] it may take . . . appropriate steps to ensure that its message is neither garbled nor distorted.”<sup>122</sup>

The distinction between government as regulator of and government as participant in the marketplace of ideas, however, proves difficult to draw in a consistent manner. Over the last several decades, the Court has attempted to distinguish between: 1) when a given publicly owned space is a public forum and when it is not,<sup>123</sup> 2) when the government may and may not require individuals to convey its

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mate enterprise in a liberal democratic state. To do so would strip government of a primary means of protecting and enhancing democratic values, . . . of improving its leadership capacity; of enforcing its public policies; and in the end, of securing its ability to survive.”); Shiffrin, *supra* note 27, at 606 (“[T]here can be no room for a non-religious establishment clause. . . . Government has legitimate interests in informing, in educating, and in persuading. . . . An approach that would invalidate all controversial government speech would seriously impair the democratic process.”).

122 515 U.S. 819, 833 (1995). Explaining the apparent tension between this degree of latitude and the general First Amendment prohibition on content discrimination, Robert Post usefully distinguishes between managerial domains and public discourse. When the government is working to “achieve objectives that have been democratically agreed upon,” it may place limitations on the expression of individuals who serve as its agents, and ordinary First Amendment norms such as viewpoint-neutrality do not apply. But when individuals are participating in public discourse, their freedom to express their views must be protected. Post, *Subsidized Speech*, *supra* note 27, at 164–76.

123 See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding that a state university had created a public forum by making its facilities available to student groups and so could not constitutionally exclude religious groups from that forum); *Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976) (holding that a military base may constitutionally exclude a group who wished to distribute political pamphlets and make political speeches, even if the military has invited other speakers onto the base, because a military base is not a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (holding that the city need not allow political advertising in its transit system because a public forum had not been created by selling advertising in buses); see also Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238 (discussing the Supreme Court’s rulings regarding speech in public fora).

messages,<sup>124</sup> and 3) when a given program simply subsidizes speech to convey the government's message and when it regulates the expression of private individuals.<sup>125</sup> The specific holdings and doctrinal tests in this area are animated by two central concerns: ensuring government neutrality when speech in a given forum is properly considered "public discourse," and ensuring that the government is not coercing individual speakers. The overarching principle is that the government should not be telling people what to say, whether by excluding speakers from debate when they have the wrong viewpoint or by forcing them to express the right one. Despite this doctrinal concern with preventing coercion, in practice some constitutionally permissible forms of government expression approach regulation. They lay down an explicit norm, and non-government speakers are given to understand that adverse consequences might follow upon violation of it.

Some of the more direct, and perhaps more effective, interventions against hate speech may therefore raise substantial free speech concerns. The examples that follow are roughly ordered along a continuum from those that raise virtually no serious questions of First Amendment doctrine or principle to those that present grave concerns for free speech—in other words, from precatory to quasi-prohibitive. As we will see, however, it will at times be difficult to identify the point at which a form of government speech crosses the line from imprecation to coercion.

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124 *Compare, e.g.,* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that the state may not require students to recite the Pledge of Allegiance), *and* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that the state of New Hampshire could not require unwilling citizens to display the state motto, "Live Free or Die," on their license plates), *with* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (holding that the government may compel citizens to subsidize a given government message), *and* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (holding that a deputy district attorney can constitutionally be disciplined for complaining and later testifying that a search warrant had been improperly obtained because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions.").

125 *See, e.g.,* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (holding that the government could constitutionally require that the NEA take into account "general standards of decency" when making decisions about which artists will receive public funding for their work); Rust v. Sullivan, 500 U.S. 173, 180 (1991) (upholding a statute that specified that all projects funded by Title X of the Public Health Service Act are forbidden to "encourage, promote or advocate abortion as a method of family planning"); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 541 (1983) (upholding a statute that exempted veterans' organizations from a general prohibition on lobbying by tax-exempt organizations).

A. *Precatory and Hortatory Statements by Government Officials and Bodies*

This category contains government speech that states an express position on how citizens should speak without making any binding rule or offering any particular subsidy. President Bush's statement about nooses is one example of a precatory statement by a government official. The category is, however, broad and runs from the purely hortatory, such as a condemnation of noose "pranks," to speech that maps out a government agenda and so may predict, or even set in motion, more direct reprisals for engaging in the condemned speech. The examples considered here—including Congressional resolutions and statements guiding prosecutorial discretion—demonstrate not only the variety of ways the government, without passing laws or offering grants, routinely endorses or condemns certain ways of speaking, but also that precatory speech can have a greater impact on individual speakers than may at first be apparent.

To begin with the purely hortatory mode: it is common for executive officials to speak out in response to high profile incidents to condemn racist speech. New York City Mayor Michael Bloomberg, for example, made condemnatory statements after a noose was hung on a professor's office door at Columbia Teachers College.<sup>126</sup> Legislative and judicial officials also commonly engage in precatory speech. Indeed, in response to the outbreak of noose incidents in 2007, the entire United States federal legislature voiced its disapprobation. In December of that year, both the House and the Senate passed resolutions citing the history of lynching in America and stating that "the hanging of nooses is a horrible [the Senate used the word 'reprehensible'] act when used for the purpose of intimidation."<sup>127</sup> And often,

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<sup>126</sup> See Gootman & Baker, *supra* note 5.

<sup>127</sup> S. Res. 396, 110th Cong. (2007); H.R. Res. 826, 110th Cong. (2007). The House Resolution reads:

Whereas in the past two months, nooses have been found in a North Carolina high school, a Home Depot in New Jersey, a Louisiana school playground, the campus of the University of Maryland, a Columbia University professor's office door and a factory in Houston, Texas;

Whereas the Southern Poverty Law Center has recorded between 40 and 50 suspected hate crimes involving nooses since September;

Whereas since 2001, the Equal Employment Opportunity Commission has filed more than 30 lawsuits that involve the displaying of nooses in places of employment;

Whereas nooses are reviled by many Americans as racist symbols of lynchings that were once all too common;

Whereas according to Tuskegee Institute, more than 4,700 people were lynched between 1882 and 1959 in a campaign of terror led by the Ku Klux Klan;



members of the judiciary have, in court opinions, explicitly condemned hate speech at the same time that they protect it. Writing for the Seventh Circuit in the Skokie case, for example, Judge Pell declared (before going on to affirm the right of Nazi demonstrators to march in the village of Skokie, Illinois), “We would hopefully surprise no one by confessing personal views that NSPA’s beliefs and goals are repugnant to the core values held generally by residents of this country, and, indeed, to much of what we cherish in civilization.”<sup>128</sup>

As the label “precatory” suggests, the most basic way such interventions might be expected to counter hate speech is by pleading with members of the public to think carefully about the way they use language. Public officials possess moral authority—some more than others—and individuals may heed the message that hateful language can inflict serious harms when it comes from a local or national leader. In a more general sense, such statements help to create a climate of value in which hate speech is disapproved. Some obvious objections can be anticipated: is it realistic to suppose that an individual who is inclined to use hateful language will be swayed by a plea made by a public official? Is it not more likely that many of those who use hate speech do so at least in spite of or even because of the fact that they are violating norms of civilized discourse? These objections will be discussed in detail below; for now, it is worth at least acknowledging the possibility that government speech might effect straightforward suasion.

The way the Supreme Court framed its holding in *Virginia v. Black* also made it possible for precatory government speech to interact di-

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Whereas the number of dead lynching victims in the United States exceeds the amount of people killed in the horrible attack on Pearl Harbor (2,333 dead) and Hurricane Katrina (1,836 dead) combined; and

Whereas African-Americans, as well as Italians, Jews, and Mexicans, have comprised the vast majority of lynching victims and only when we erase the terrible symbols of the past can we finally begin to move forward: Now, therefore, be it *Resolved*, That it is the sense of the House of Representatives that—

(1) the hanging of nooses is a horrible act when used for the purpose of intimidation and which under certain circumstances can be criminal;

(2) this conduct should be investigated thoroughly by Federal authorities; and

(3) any criminal violations should be vigorously prosecuted.

H.R. Res. 826.

<sup>128</sup> Collin v. Smith, 578 F.2d 1197, 1200 (7th Cir. 1978). Judge Pell went on: “As judges sworn to defend the Constitution, however, we cannot decide this or any case on that basis. Ideological tyranny, no matter how worthy its motivation, is forbidden as much to appointed judges as to elected legislators.” *Id.* Catharine MacKinnon calls such an approach the “speech you hate” test: the more you disagree with the content, the more important it becomes to protect it. You can tell you are being principled by the degree to which you abhor what you allow.” MACKINNON, *supra* note 28, at 75.

rectly with the regulation of hate speech. The Court upheld the central prohibition contained in Virginia's anti-cross-burning statute on the theory that the First Amendment allows content-based discrimination within low-value categories of speech when the content-based standard singles out the most harmful or valueless instances of speech in that category. In order for a legislature to come to such a conclusion, and for courts to accept their reasoning as valid, there must be some sense of consensus that hate speech is especially harmful, both to the victims and to the polity as a whole. The repeated iteration of this conviction by elected officials can help forge and give voice to that consensus.

An example taken from the Establishment Clause context suggests that legislatures might also try to directly influence ongoing litigation. In 1997 both the House and the Senate passed resolutions stating their view that the Ten Commandments "have had a significant impact on the development of the fundamental legal principles of Western Civilization" and "set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society."<sup>129</sup> The resolutions were passed with the stated intent of expressing Congress's support for Alabama Supreme Court Justice Roy Moore's display of the Ten Commandments in his courtroom, which was at the time the subject of litigation. They speak directly to the application of the *Lemon* test to public displays and monuments that might be understood to violate the Establishment Clause: a crucial issue in such cases is whether the installation's meaning can be understood as endorsing religion.<sup>130</sup> Congress intervened to express its view that the Ten Commandments have important secular meaning and that their display does not violate the Establishment Clause. In turn, the Supreme Court cited these resolutions in a subsequent case upholding the constitutionality of a similar display of the Decalogue.<sup>131</sup> Precatory speech by government officials, then, can influence the application of legal doctrine by the courts. Statements made by members of the executive or legislative branches about the especial virulence of hate speech could simi-

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<sup>129</sup> S. Con. Res. 13, 105th Cong. (1997); H.R. Con. Res. 31, 105th Cong. (1997).

<sup>130</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (stating that a court, in assessing whether a given installation or display is an unacceptable endorsement of religion, must consider both its subjective and objective meanings).

<sup>131</sup> See *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (citing the Congressional resolutions after observing that "[t]he Executive and Legislative Branches have also acknowledged the historical role of the Ten Commandments").

larly pave the way for prosecuting such speech under statutes patterned after Virginia's anti-cross-burning law.

In general, no significant First Amendment or other constitutional problems are presented by the purely hortatory speech of public officials. No individual is restrained from speaking as she pleases when, say, the President asks the country to stop displaying nooses, so it is difficult to imagine the contours of an argument that free speech doctrine or values are offended. Even in cases where officials single out an individual speaker for opprobrium, strong doctrines of immunity protect them. The Speech or Debate Clause renders members of the legislature immune from liability so long as they are pursuing lawmaking objectives,<sup>132</sup> and the doctrines of executive and judicial immunity are similarly strong.<sup>133</sup>

At times, however, precatory statements go beyond condemnation and pleas to the citizenry to behave in a certain way; legislative and executive officials (and perhaps occasionally the judiciary) will at times call for government action. For example, the House and Senate anti-noose resolutions called for the investigation and prosecution of any criminal violations involving nooses. Around the same time, the House Judiciary Committee held hearings in 2007 at which Democrats lambasted the Justice Department for failing to take adequate action against hate crimes.<sup>134</sup> Using this kind of precatory and hortatory government speech to intervene against hate speech poses more complex First Amendment issues.

Such speech, though still precatory in the sense that it is merely a request for action, might more precisely be described as "agenda-setting." The goal is to instigate the reordering of legislative and prosecutorial priorities. Such statements might legitimately be expected to chill speech: a person who believes that prosecutors are actively seeking to punish, under existing criminal laws, individuals who display nooses would be wise to choose a different way to convey her message (whatever it is). If her message is one of race-based animosity or intimidation, of course, from the anti-subordination perspective this "chilling" is desirable. But if it is unconstitutional under *R.A.V.* to ban hate speech outright, does an announcement by the executive that the Justice Department intends to make it a priority to prosecute people under existing criminal laws when they use hate speech raise constitutional problems?

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132 U.S. CONST. art. I, § 6, cl. 1; *see also* *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975) (defining the contours of this immunity).

133 *See* EMERSON, *supra* note 25, at 700–08.

134 Marisol Bello, *Copycat Nooses Raise Outcry*, USA TODAY, Oct. 17, 2007, at 3A.

Although it is difficult to establish a claim that prosecutorial discretion has been abused,<sup>135</sup> the selective prosecution of a defendant because she has exercised her First Amendment rights does represent a constitutional violation.<sup>136</sup> In theory, the systematic use of prosecutorial discretion to target those who express, for example, anti-gay views under statutes of general application would be constitutionally impermissible. Existing federal law and most states' laws, however, already contain provisions criminalizing many instances of intimidation motivated by discrimination based on race, sex, gender identity, and other identity-based reasons, and enhancing penalties for committing other crimes with a discriminatory motive.<sup>137</sup> These laws have withstood constitutional challenge.<sup>138</sup> Making it a priority to apply these laws in cases where—as was urged by the House Judiciary Committee—a noose was used arguably improperly targets a particular mode of expression. But assuming a court were to reach the First

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<sup>135</sup> In general, separation of powers concerns lead courts to refrain from questioning exercises of prosecutorial discretion. *Wayte v. United States*, 470 U.S. 598, 607 (1985). A defendant may, however, attempt to show that this discretion has been employed in a way that violates her constitutional rights. *Id.* at 608. (Most commonly, defendants assert violations of the Equal Protection Clause. *E.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979)). Courts begin with a presumption that the prosecutor has validly used her discretion, and it can only be rebutted with “clear evidence.” *Armstrong*, 517 U.S. at 464–65; *see also* *McClesky v. Kemp*, 481 U.S. 279, 297 (1987) (“Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.”).

<sup>136</sup> *See* *Arcara v. Cloud Books*, 478 U.S. 697, 707 n.4 (1986) (stating that a viable claim of selective prosecution might exist if a district attorney were shown to have a “speech suppressive motivation or policy”).

<sup>137</sup> *See, e.g.*, 18 U.S.C. § 245 (2009) (making it a crime to willfully cause bodily injury to any person (or to attempt to do so) because of, *inter alia*, his race, color, religion, national origin, gender, gender identity, sexual orientation, or disability); U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2004) (enhancing the penalty for any crime when the victim or property was selected because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person). The Obama Administration has made prosecuting hate crimes a priority. Carrie Johnson, *Justice Official Vows Action on Hate Crimes*, WASH. POST, Dec. 22, 2009, at A6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/21/AR2009122103333.html>. In 2009, Congress passed, and President Obama signed, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expanded federal hate crimes law to cover crimes motivated by the victim's actual or perceived gender identity and eliminated the requirement that the victim be engaged in a federally protected activity. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, div. E, §§ 4701–4713, 123 Stat. 2835–44 (2009).

<sup>138</sup> 18 U.S.C. § 245 has been held a valid exercise of Congress's power to enforce the Thirteenth Amendment's ban on badges and incidents of slavery. *United States v. Allen*, 341 F.3d 870, 883–84 (9th Cir. 2003). The Federal Sentencing Guidelines provision has been upheld against First Amendment challenge. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

Amendment question, having gotten beyond the general deference to prosecutorial discretion, such a content-based exercise of discretion could be defended under *Virginia v. Black*. Just as a state legislature can single out those threats it deems especially virulent for prohibition, it is arguably permissible to prosecute those acts of discriminatory intimidation and violence that are perpetrated using a symbol that the prosecutor deems especially pernicious.<sup>139</sup> While precatory speech designed to solicit government action in the form of increased prosecutions of hate speech might well be expected to chill the use of certain words and symbols, then, neither that speech nor any ensuing government action could likely be barred by a court.

It will be difficult to draw a clear line between “hortatory” executive speech and “agenda-setting” executive speech. A President might say, in the wake of an incident like that involving Tiger Woods or the “Jena Six,” that he condemns racist speech and that he expects all members of his administration to share his condemnation. A prosecutor hearing such a statement and taking it to heart might then seize any opportunity to demonstrate explicit disapprobation of hate speech—for example, choosing to prosecute most assiduously and publicly threats against an African American President’s life that are couched in virulently racist terms. So speech that is hortatory in form may have the capacity to shape agendas.

One final observation on precatory government speech: although our discussion of this category ends here, the division between this least coercive kind of government speech and the most coercive is admittedly artificial. The advisory and investigatory statements that arguably present the greatest danger to First Amendment freedoms are, in a sense, merely precatory speech. So the catalog of possible interventions will come full circle.

### *B. Commemorative Expression*

Government speech routinely takes the form of commemorative expression: the erection of monuments, the naming of official holidays and other commemorative days, or the choice of whom to portray on postage stamps and currency. All of these forms of speech are

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<sup>139</sup> Such an argument would, however, be in tension the First Amendment’s general rule against giving significant discretion to law enforcement officials in speech-related matters. The First Amendment’s prohibition on vagueness, for example, is founded in part on the principle that “[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

intended to mold the values of the citizenry. As Sanford Levinson has explained in his thoughtful book *Written in Stone*, one crucial task of the government is to forge a sense of community in a society that is fractured by innumerable differences. Monuments, flags, images, and mottos on coinage and stamps, are all means through which the government fashions an image of community, or “ways by which regimes of all stripes take on a material form and attempt to manufacture a popular consciousness conducive to their survival.”<sup>140</sup> The government therefore selects which values to legitimate and which persons to make into emblems of the community. The Supreme Court recently acknowledged as much in *Pleasant Grove City v. Summum*, writing that for placement in public parks, “[g]overnment decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture.”<sup>141</sup> In its commemorative speech, the government’s acts of both inclusion and exclusion convey messages about the meanings of historical events, the importance of persons, and, by extension, the dignity and value of different groups.

While similar to executive speech in its hortatory nature, commemorative speech also differs from it in important ways. Commemorative speech is, or purports to be, collectively authored. While an elected official speaks before the audience of voters as their representative, she also always speaks as herself, vulnerable to rejection by voters and able to reject their views in turn. A monument or image on a stamp, on the other hand, speaks as the disembodied voice of the community. Those who dissent from its message can protest against it, but in doing so they do not have the assurance of responsiveness that direct accountability of the speaker can give. And because a primary function of commemorative speech is to mold the community’s sense of its shared history and collective identity, the prospect of dissenting from it is more fraught. At the same time that it can be understood as an exhortation to embrace the values represented by the person or event the speech commemorates, it also always claims to say what the community *is*. To reject the statement that commemorative speech makes is to situate oneself, at least as of

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140 SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 87 (1998); see also *id.* at 83–90 (discussing the fallacy of the concept of a neutral state and summarizing some of the many ways government speech acts to shape social consciousness).

141 129 S. Ct. 1125, 1134 (2009).

the start of debate, as an outsider—as one who does not partake of the community’s shared identity.

Commemorative speech could readily be used to intervene against hate speech by molding the public’s sense of collective identity: it can portray the community as one which values difference and does not tolerate hate. The power of commemorative speech to shape community identity has already received sustained attention in Levinson’s work. He has explored the manner in which commemorative speech that conveys a message of inequality or intolerance can undermine the guarantees of the Fourteenth Amendment’s Equal Protection Clause. He observes that “[i]t is almost impossible to view” states that incorporated the Confederate battle flag into their state flags in the 1950s and 60s “as motivated by anything other than the desire to engage in ‘the annoyance or oppression of a particular class’ that even the Supreme Court of *Plessy v. Ferguson* pronounced itself ready to restrain.”<sup>142</sup> Levinson’s book concludes that despite the potentially damaging effects of such displays, it is not for courts to impose, as from above, rules about what monuments mean and which meanings are acceptable.<sup>143</sup> He contemplates, however, various ways in which the message of a monument to the Confederate dead might be countered, including erecting competing monuments.<sup>144</sup>

Building on this work, this Article proposes a next step: why not turn the tables and use such symbols to *promote* equality? We need not see commemorative speech as primarily a threat to equality that can, at best, be resisted. If we accept that the images and symbols that are endorsed by those in power or that otherwise have widespread currency do in fact alter relations of power between people, then commemorative speech might be an effective intervention against hate speech.

Any attempt to use commemorative government speech in this way does have to take into account the specific form that commemorative speech takes. Commemorative speech tends to evoke values through synecdoche: a member of the community stands in for the whole, or a single episode from history stands in for a larger period.

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<sup>142</sup> LEVINSON, *supra* note 140, at 100.

<sup>143</sup> Levinson asks “how much we want courts to supply legally privileged readings—backed up by the force of the state—of culturally contested icons”; moreover, “whatever the value of courts—and constitutions—in limiting tangible oppression, they are quite limited in their actual power when what is at stake is the politics of cultural meaning. I think it unwise, as a general matter, to encourage judicial intervention in circumstances where the consequences are unlikely genuinely to advance one’s overall social or political agenda and, indeed, are likely to provoke an unfortunate backlash.” *Id.* at 97, 104.

<sup>144</sup> *Id.* at 111–29.

The choice of *which* individual, *which* episode, to endow with the aura of collective veneration that only the state can confer is what codes the monument, stamp, or other emblem with meaning. To speak in the idiom of commemoration, therefore, the government must discover representative individuals and events that evoke identifiable values. To a certain degree the community will learn the history that commemorative speech teaches, so it is not strictly necessary that citizens already embrace the individual or event commemorated as representative. But the form of the message that commemorative speech can communicate is somewhat limited: it tells us that *X* is worthy of admiration, *X* embodies *Y* qualities, and we in turn value *Y* qualities in ourselves and our community. The qualities we are taught to value can be abstract—patriotism, valor, learning—or they can be aspects of group identity—gender, race, national origin. Usually both kinds of messages are intermingled, so that we learn lessons about who constitutes the community at the same time that we learn which values the community aspires to embody.

As a form of intervention against hate speech, therefore, commemorative speech is a blunt instrument. It must operate through broad claims about representativeness and shared value. Commemorative speech can work to instantiate the values of equality and dignity by elevating members of historically marginalized groups to the status of state honoree. To the extent that citizens internalize the message conveyed by, for example, a statue of Martin Luther King, they will come to see African Americans as full members of the community and equal civil rights for all races as a value to be embraced. These beliefs might then, in turn, shake a speaker's confidence in the efficacy of hate speech—the less certain she is that a given group is in fact subordinate, the less powerful the language of subordination will appear to her. Of course, resistance to the meaning the statue conveys could provoke hate speech with renewed energy: a speaker who feels threatened by the ascendancy of a marginalized group might cling to hateful speech against them as a way of maintaining her superior status. But it is possible that over time, commemorative speech can contribute to the diffusion of belief in equality.

Commemorative speech also can have a negative mode, in that it can honor victims. The message of such commemorations is cautionary: by invoking the memory of individuals who suffered at the hands of past members of the community, it reminds present members to avoid the perversions of value that allowed acts of persecution to take place. A more specific intervention against hate speech could be undertaken by establishing memorials to victims of hate crimes.



The message would be to disvalue individual acts of domination motivated by prejudice.<sup>145</sup>

As for the constitutionality of this use of commemorative speech, like precatory speech it is largely immune from challenge. When courts confront a case challenging the government in its role as an omnipresent arbiter of social and cultural values, they often decline to hear the issue.<sup>146</sup> The Eleventh Circuit, faced with a Thirteenth and Fourteenth Amendment challenge to Alabama's display of the Confederate battle flag over the state house, held that the choice of which flag to fly was "political" and not subject to judicial review.<sup>147</sup> It similarly denied a First Amendment challenge to the inclusion of the Confederate battle flag in the Georgia state flag, holding that the plaintiff had "pointed to no government action that 'requires affirmation of a belief and an attitude of mind.'" <sup>148</sup> As the Supreme Court

145 One objection to memorials to victims of hate crimes is that they perpetuate an image of members of marginalized groups *as* victims. This is a posture which rights activists have historically been eager to transcend.

146 The major exception to this rule is the Establishment Clause. The Supreme Court's Establishment Clause cases represent perhaps its most sustained effort to come to terms with the potentially coercive nature of symbolic expression, in particular the display of monuments and other installations in public spaces. In *Lynch v. Donnelly*, for example, Justice O'Connor, concurring, evaluated the significance of the display of a crèche in a park: "Endorsement [of a particular religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). She proposed that whether the message sent by public monuments and installations is one of endorsement of a given religion, and so a violation of the *Lemon* test, be evaluated by determining their "objective" significance to the community. *Id.* at 690. However, as Steven Shiffrin observes, there is no Establishment Clause limiting non-religious government expression. Shiffrin, *supra* note 27, at 606.

147 *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990); *see also* *Augustus v. Sch. Bd. of Escambia County*, 507 F.2d 152 (5th Cir. 1975) (reversing district court's order enjoining school district from using Confederate flag and the name "Rebels" for the school's athletic teams).

148 *Coleman v. Miller*, 117 F.3d 527, 531 (11th Cir. 1997) (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)). The court went on:

"For example, there is no evidence that Georgia requires appellant to carry or display the flag or to participate in ceremonies honoring the flag. The mere fact that appellant may on some occasions be required to enter public buildings that fly the Georgia flag does not infringe upon his First Amendment rights because entering public buildings does not manifest any particular attitude or belief and does not associate appellant with the flag's message."

*Id.*

Levinson too concludes that there is no valid legal argument by which a court could order, for example, the South Carolina government to abandon the Confederate battle flag as a public symbol. Although he concedes that convincing arguments have been made that the Fourteenth Amendment provides the basis for a challenge to monuments

held in *Pleasant Grove City v. Summum*, “[p]ermanent monuments displayed on public property typically represent government speech,”<sup>149</sup> and as such are not subject to the First Amendment’s Free Speech Clause.<sup>150</sup> The First Amendment, outside of the area of religion, does not command government neutrality, and the state is allowed to promote specific values in the architecture of public space.

### C. Education

One obvious way that the government can speak out to inhibit or undermine hate speech is to devote time in school curricula to the relevant issues. Education is widely understood to be a primary way in which government inculcates values in its citizens. Why not commit political capital and government funds to designing and implementing programs in public schools, the goal of which is to reduce the incidence of hate speech? In the wake of the 2007 string of noose incidents, Representative Steve Cohen of Tennessee suggested precisely this tactic: he proposed that, as one aspect of its response, Congress should explore inserting provisions for education about the history of discrimination into the No Child Left Behind Act.<sup>151</sup>

A significant number of cases involving hate speech arise in the school context.<sup>152</sup> Anecdotal evidence suggests that in at least some portion of these incidents, the students using racist or otherwise hateful language fail to understand fully its significance.<sup>153</sup> Education about the history of discrimination and violence against marginalized groups that emphasizes the interrelation between language and subordination would dispel such ignorance. If lack of knowledge is in-

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that perpetuate reverence for a racist and oppressive regime, LEVINSON, *supra* note 140, at 94, he doubts that such legal challenges are feasible or advisable. *Id.* at 77–90.

149 129 S. Ct. 1125, 1132 (2009) .

150 *Id.* at 1131.

151 *Jena 6 and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 63 (2007) (Representative Cohen asked Professor Charles Ogletree: “Do you know if there’s anything that we should look into putting into the No Child Left Behind Law, if there’s anything there now, maybe to mandate education that requires courses on tolerance or some courses on civil rights history, Holocaust history or things like that to teach all children in the United States about such episodes of racial and ethnic intolerance?”).

152 The incidents that sparked the “Jena 6” controversy are a good example. *See also* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1362 (10th Cir. 2000) (chronicling a series of incidents of race-based conflict and harassment at a high school).

153 *See, e.g., In re Ryan M.*, No. A111901, 2006 WL 2054071 (Cal. Ct. App. July 25, 2006) (involving a student prosecuted under threat statute for giving pro-KKK literature to African American student; he later explained that he did not comprehend the threatening implications of his flyer).

deed at the root of some incidents of hate speech, then the number of such incidents would be reduced overall. And in general, inculcating in students an understanding that language can be beneficially used as a medium that expresses and encourages toleration or invidiously used as a medium that enacts and perpetuates discrimination would, in the long term, give us a citizenry that uses language more sensitively and responsibly.

Unlike precatory and commemorative speech, however, government speech through education raises significant First Amendment questions. The area in which judges have perhaps made the greatest effort to develop standards distinguishing acceptable government control over the instantiation of values from improper censorship is education. It is widely recognized that the government has discretion to design curricula, establish or take away extracurricular activities, select the contents of school libraries,<sup>154</sup> and indeed under certain circumstances proscribe speech that would, in other contexts, be protected.<sup>155</sup> At the same time, some interventions by school authorities have nevertheless been struck down as inappropriate efforts to enforce an orthodoxy of belief.

The law regarding whether schools may institute outright prohibitions on hate speech is unsettled. Students retain First Amendment rights in school,<sup>156</sup> but those rights are not coextensive with the rights of an adult participating in public debate.<sup>157</sup> In recent years, challenges to school anti-hate speech and anti-harassment policies have had differing outcomes in the circuit courts. In the 2000 decision *West v. Derby Unified School District*, the Tenth Circuit affirmed the con-

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<sup>154</sup> See *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (explaining while the state has the power to regulate schools, it may not prohibit teachers from teaching theories of which the state simply disapproves); *Pierce v. Hill Military Acad.*, 268 U.S. 510, 534 (1925) (reiterating that the State has the power to regulate schools); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (noting that the power of the State to compel attendance and make reasonable regulations “is not questioned”); see also *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (“We have . . . acknowledged that public schools are vitally important ‘in the preparation of individuals for participation as citizens,’ and as vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’” (citing *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979))).

<sup>155</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“We have . . . recognized that the First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings.’”).

<sup>156</sup> *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (“Our cases make clear that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.”).

<sup>157</sup> *Morse*, 551 U.S. at 403–05; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681–83 (1986).

stitutionality of a school policy forbidding the possession of written or printed material that is “racially divisive or creates ill will or hatred,” both facially and as applied to a student who had been disciplined for drawing a Confederate battle flag.<sup>158</sup> The court found that the history of high racial tension at the school made it reasonable for school authorities to conclude that the student’s expression threatened to provoke further conflict and so met the requirement, set forth in *Tinker v. Des Moines Independent Community School District*, that student speech must “substantially interfere with the work of the school or impinge upon the rights of other students” before it can be suppressed.<sup>159</sup> And the Ninth Circuit, in its 2006 decision *Harper v. Poway Unified School District*, found that it was constitutional for a school to require a student to remove a T-shirt that read, “Homosexuality Is Shameful,” since this speech interfered with the rights of gay and lesbian students to be free from harassment in their learning environment.<sup>160</sup> In contrast, in 2001, the Third Circuit, in *Saxe v. State College Area School District*—with then-Judge Alito writing—found that a school anti-harassment policy that prohibited, *inter alia*, “any unwelcome verbal, written or physical conduct which offends, denigrates, or belittles an individual” on the basis of race, religion, color, national origin, gender, sexual orientation, disability, or “other personal characteristics” was unconstitutional.<sup>161</sup> The court found the policy improper because there was no showing of threat of a substantial disruption and, with respect to *Tinker*’s provision for banning speech that impinges upon the rights of other students, the policy was overbroad.<sup>162</sup>

The Supreme Court’s 2007 decision *Morse v. Frederick*, however, casts doubt on the circuit courts’ application of *Tinker*’s rule.<sup>163</sup> In *Morse*, the Court confirmed that schools are allowed to prohibit speech that would be protected in public discourse when that speech would disrupt the school’s educational endeavors,<sup>164</sup> but it appeared to relax *Tinker*’s requirement that a threat of substantial disruption be

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158 206 F.3d 1358, 1361 (10th Cir. 2000).

159 *Id.* at 1366 (quoting *Tinker*, 393 U.S. at 509).

160 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated and remanded with instructions to dismiss appeal as moot*, 549 U.S. 1262 (2007).

161 *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202–203, 216–18 (3d Cir. 2001).

162 *Id.* at 216–18.

163 In *Harper*, *Saxe*, and *West*, the circuit courts followed a three-step analysis of speech in the school context, holding that speech can be restricted under *Tinker* if it is substantially disruptive or impinges upon the rights of others, under *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), if it is indecent or lewd, or under *Kuhlmeier*, 484 U.S. 260, if it might reasonably be taken to be endorsed by the school. See *Harper*, 445 F.3d at 1176–77; *Saxe*, 240 F.3d at 211–14; *West*, 206 F.3d at 1366.

164 *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

shown. While school administrators may not suppress speech out of “undifferentiated fear or apprehension of disturbance” or “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,”<sup>165</sup> the Court explained, a “serious and palpable” problem afflicting the student body may justify a ban on certain speech.<sup>166</sup> Under *Morse*, then, it is possible that a school could simply ban hate speech if administrators reasonably thought that it would interfere with the school’s educational task. On the other hand, *Morse* emphasized that school officials have a legitimate interest in preventing drug use and made clear that speech cannot be prohibited simply because it is “offensive,”<sup>167</sup> leaving the door open for a challenge to an anti-hate speech code.

If a rule banning hate speech in public schools is of questionable validity, what then is the constitutional status of an educational program designed to decrease the incidence of hate speech? The answer to this question is, again, unsettled. On the one hand, such a program might be challenged by invoking the 1982 Supreme Court case *Board of Education, Island Trees Union Free School District v. Pico*. In *Pico*, the plaintiffs challenged the Board of Education’s removal of ten books from the high school and junior high school libraries after members of the Board attended a conference held by an organization of conservative parents.<sup>168</sup> The Court held that this action was a violation of the First Amendment, although no theory of why this was so or what standard should be used to assess when such violations had occurred commanded a majority of the Court. The plurality opinion, written by Justice Brennan, conceded that school boards generally have discretion to manage school affairs and even to inculcate values in students.<sup>169</sup> The plurality stressed that students have a First Amendment right to receive information, and it found that this right

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<sup>165</sup> *Id.* (citing *Tinker*, 393 U.S. at 508–09).

<sup>166</sup> *See id.* The Court also noted that “the rule of *Tinker* is not the only basis for restricting student speech.” *Id.* at 406.

<sup>167</sup> *Id.* at 408.

<sup>168</sup> 457 U.S. 853, 856 (1982). The organization, Parents of New York United (PONYU), distributed lists of “objectionable” books. The nine books removed from the high school library were: Kurt Vonnegut, Jr., *Slaughterhouse Five*; Desmond Morris, *The Naked Ape*; Piri Thomas, *Down These Mean Streets*; Langston Hughes, ed., *Best Short Stories of Negro Writers*; Oliver LaFarge, *Laughing Boy*; Alice Childress, *A Hero Ain’t Nothin’ but a Sandwich*; Richard Wright, *Black Boy*; Anonymous, *Go Ask Alice*; and Eldridge Cleaver, *Soul On Ice*. The book removed from the junior high school library was: Jerome Archer, ed., *A Reader for Writers*. The board also found that another listed book, Bernard Malamud’s *The Fixer*, was taught to seniors at the high school. *Id.* at 856–57 n.3.

<sup>169</sup> *Id.* at 863–64.

was violated by the Board's action.<sup>170</sup> Justice Brennan's opinion focused on the unique status of the school library and the act of removal of the books, limiting its holding to this set of facts.<sup>171</sup> Justice Blackmun, concurring, disputed the analytic usefulness of the plurality's focus on the library and its distinction between removing books and choosing which books to acquire. He would have rested the finding that the Board's action violated the First Amendment on its intent: "the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons."<sup>172</sup>

*Pico* may be construed as applying only in the library setting or as prohibiting only an act that deprives students of information to which they previously had access (removing books rather than refraining from buying books). Under these readings, school administrators have full control over school curricula, school boards could freely adopt educational programs intended to reduce the incidence of hate speech. If, however, Justice Blackmun's application of a broad intent standard is taken to be the holding of *Pico*, the dispositive factor in determining when a First Amendment violation has occurred in the school context is the government's intent.<sup>173</sup> An educational program that avowedly had the purpose of decreasing the incidence of a certain kind of speech might be subject to challenge.<sup>174</sup> Indeed,

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170 *Id.* at 866–67.

171 *Id.* at 871–72.

172 *Id.* at 879 (Blackmun, J., concurring). Justice Blackmun rejected the idea that "the right at issue here is somehow associated with the peculiar nature of the school library." *Id.* at 878. Chief Justice Burger dissented. Like Justice Blackmun, he doubted that the plurality's distinction between removing books and refraining from purchasing books was capable of principled application; he would have held that the school board's discretion encompassed the ability to select the materials used to educate students. "[I]f the First Amendment commands that certain books cannot be *removed*," he asked, "does it not equally require that the same books be *acquired*? Why does the coincidence of timing become the basis of a constitutional holding?" *Id.* at 892 (Burger, C.J., dissenting).

173 *See id.* at 877 (Blackmun, J., concurring) ("[T]he State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons."); *see also id.* at 871 (Brennan, J.) ("[W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.")

174 Edward Rubin has recently argued in favor of a "disparagement principle." Taking as his point of departure Judge Newman's concurring opinion in the Second Circuit's disposition of *Pico*, on which Justice Blackmun drew in his Supreme Court concurrence, he argues the constitutional line should be drawn between "criticism" and "disparagement." "Criticism simply states that a particular view is wrong or that it should not be followed.

in contrast to *Pico*, where the central First Amendment right at stake for students was the right to receive information, anti-hate speech educational initiatives arguably have the objective of suppressing a certain category of speech—the impermissibility of which as a government objective is perhaps the most historically well-established aspect of First Amendment jurisprudence. As the plurality wrote in *Pico*, “[o]ur Constitution does not permit the official suppression of ideas.”<sup>175</sup> Programs that made their pitch to avoid hateful forms of expression in explicit terms—along the lines of “Just Say No” abstinence and anti-drug use initiatives—might be especially vulnerable, but if an intent standard is to be taken seriously, even a constructive educational program designed to educate students about the history of hate speech and its consequences might be challenged if that program were avowedly aimed at reducing the incidence of hate speech.

Such an interpretation of *Pico* is problematic, however. The exercise of envisioning the application of an intent standard in this context reveals the standard’s limitations. All education about values entails lessons, implicit or explicit, about how to speak.<sup>176</sup> If we posit that attributes of the good citizen include toleration for differences, respect for others, and a belief in equality, does it make sense to prohibit a school board from deciding that one important manifestation of these attributes is the way citizens speak to one another and attempting to foster that manner of speaking?

Indeed, this outcome would be in tension with the Supreme Court’s holding in another case, *Bethel School District v. Fraser*. There, the Court approved a school’s application of its rule against obscene speech in part because one of the valid functions of a school is “teaching high school students how to conduct civil and effective public discourse.”<sup>177</sup> The Court further stated that one of the legitimate interests the school had in punishing the student’s speech was

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Disparagement declares that this view is unacceptable, that it is beyond the limits of acceptable debate and acceptable thought.” Edward L. Rubin, *Jon Newman’s Theory of Disparagement and the First Amendment in the Administrative State*, 46 N.Y.L. SCH. L. REV. 249, 266 (2003).

175 *Pico*, 457 U.S. at 871.

176 *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986) (“The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.”).

177 *Id.* at 688 (Brennan, J., concurring); *see also id.* at 681 (noting the goals of public education include “prepar[ing] students for citizenship” and “inculcat[ing] the habits and manners of civility”).

that “[b]y glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students.”<sup>178</sup> If speech can be banned outright in order to promote a discourse of mutual respect free of derogatory “verbal content,” then surely a constructive educational program may be put in place to discourage hate speech.

*D. Government Subsidies and Control of Non-Public Fora*

The issue of government subsidies has been a contentious one: the Supreme Court’s decisions about when the government may condition the receipt of a benefit on the content of the recipient’s expression have occasioned an outpouring of critical scholarly commentary.<sup>179</sup> The government’s ability to make content-based rules about expression in fora that it controls has similarly spawned difficult cases in the past.<sup>180</sup> There are also many ways subsidies might be used to combat hate speech and many fora that the government controls. In this area, it is therefore easier to reverse the order of analysis: to ask first what kind of intervention against hate speech would be constitutionally permissible, and then to ask how such an intervention might work.

The government is allowed to subsidize speech selectively.<sup>181</sup> It can also, the Supreme Court has held, condition the receipt of government funding on an individual’s agreement to engage in, or to refrain from engaging in, the expression of a particular message. In the controversial 1991 decision *Rust v. Sullivan*, the Court upheld a statute that specified that all projects funded by Title X of the Public Health Service Act are forbidden to “encourage, promote or advocate abortion as a method of family planning.”<sup>182</sup> The Court held that this

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178 *Id.* at 683.

179 *See supra* note 27.

180 For example, the Supreme Court has decided a number of cases concerning the validity of school rules prohibiting the use of school property or school funds for religious expression; it has consistently found that these educational fora are public and so content-based restrictions are invalid. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that a university’s policy to withhold funds for the costs of printing a student newspaper with a religious perspective violated the First Amendment); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that a school district’s decision to prohibit a group from using a school to show a religious film series violated the First Amendment); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a university’s policy of preventing religious groups from holding meetings in university facilities violated the First Amendment).

181 *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) (upholding a statute that exempted veterans’ organizations from a general prohibition on lobbying by tax-exempt organizations).

182 500 U.S. 173, 180 (1991).



requirement furthered the government's legitimate interest in promoting a value judgment it had made.<sup>183</sup> In *National Endowment for the Arts v. Finley*, the Court similarly held that the government could constitutionally require that the NEA take into account "general standards of decency" when making decisions about which artists will receive public funding for their work.<sup>184</sup> It would be impossible, Justice O'Connor wrote, to carry out the project of government funding for the arts while remaining absolutely neutral toward content.<sup>185</sup>

Justice Scalia, concurring in the result in *Finley*, asserted that it is simply impossible for the government to abridge individual First Amendment rights by paying for speech.

It is the very business of government to favor and disfavor points of view . . . [a]nd it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures . . .); or by advocating it officially (establishing an Office of Art Appreciation . . .); or by giving money to others who achieve or advocate it (funding private art classes . . .). None of this has anything to do with abridging anyone's speech.<sup>186</sup>

On this view, the statute *did* engage in outright viewpoint discrimination in administering the NEA program, but it was nevertheless constitutional.

Commentators have criticized the Court's holdings in *Rust* and *Finley* and in particular have assailed the view that government subsidies simply add more speech to the marketplace without restricting any individual's speech.<sup>187</sup> But while *Rust* and *Finley* were deeply un-

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183 *Id.* at 193.

184 524 U.S. 569, 572 (1998).

185 *Id.* at 585. O'Connor explained: "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose 'artistically excellent' projects. . . . As the dissent below noted, it would be 'impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression.'"

186 *Id.* at 598 (Scalia, J., concurring).

187 *See, e.g.,* Post, *Subsidized Speech*, *supra* note 27, at 169–76; Redish & Kessler, *supra* note 27, at 573–81. The justices themselves have left open the opportunity to rethink this question on a case-by-case basis. Justice O'Connor's majority opinion in *Finley* found that the decency standard did not constitute viewpoint discrimination on its face, although she reserved the question of whether it might be applied in a discriminatory way. *See Finley*, 524 U.S. at 586–87 (1997). Seth Kreimer, examining the problem of government subsidies in the First Amendment context and beyond, argues convincingly that the distinction between "sovereign" actions, which place binding rules on individuals, and "proprietary" actions, in which the government merely acts as a marketplace participant disposing of its property, is illusory. *See Kreimer, supra* note 27, at 1314–26. He suggests that the appro-

popular decisions among scholars because of the particulars of each case, many agree in principle that the government should be able to promote its viewpoint when carrying out policy and that it must adopt a content-neutral position only when its actions restrict the freedom of expression of individual speakers.<sup>188</sup>

Under public forum doctrine, the government is similarly granted latitude to use its property as it chooses to carry out its legitimate functions *as* a government, even when this means making content-based rules about expression. But once the government is properly understood to be underwriting public discourse, it can no longer discriminate among speakers. Courts distinguish between “traditional public fora” (streets, parks, and so on), created or “limited” public fora (spaces into which the government has invited speakers to communicate their messages), and non-public fora (government property that has not been opened to the public for such use).<sup>189</sup> Content- or viewpoint-based restrictions placed on speech in traditional public fora will be subject to strict scrutiny.<sup>190</sup> And once the government has made its property available to the general public for expressive purposes, the same standards apply.<sup>191</sup> The government is not required to open all of its property to all speakers, however, and it may selec-

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appropriate analytic paradigm is the difference between a threat and an offer: “Threats are allocations that make a citizen worse off than she otherwise would be because of her exercise of a constitutional right. Offers merely expand her range of options, leaving the citizen better off.” *Id.* at 1300–01.

188 See Post, *Subsidized Speech*, *supra* note 27, at 168–76, 183–84. But see Owen Fiss, Comment, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2097, 2101 (1991) (arguing that “[i]t is . . . appropriate to assume that the effect of a denial of a grant is roughly equivalent to that of a criminal prosecution, in that each tends to silence the artist or, in the case of exhibitions, make the artist’s work unavailable to the general, museum-going public”; and proposing that judges should assess the constitutionality of allocative decisions by requiring the government to subsidize marginalized viewpoints in order to ensure “a debate on national issues that is ‘uninhibited, robust, and wide-open’”).

189 See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (“The existence of a right of access to public property [depends] on the character of the property at issue.”).

190 See *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *Grayned v. City of Rockford*, 408 U.S. 104, 116–17 (1972) (holding that the state may only place reasonable content-neutral restrictions, such as time, place, and manner restrictions, on speech in public fora; “[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”); see also Stone, *supra* note 123 (discussing the current status of First Amendment jurisprudence concerning individuals’ right to use alternative channels of communication).

191 *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981) (“[The] Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.”).

tively allow speech in fora that it controls up until the point when it has admitted a sufficient number of speakers to create a “limited” public forum.<sup>192</sup> In *Greer v. Spock*, for example, the Supreme Court held that the military could ban political campaigners and protestors from Fort Dix because “the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum.”<sup>193</sup> The government will have its own messages to communicate to its soldiers—for example, about military values and proper soldierly conduct—and need not allow competing ones air time. As Steven Shiffirin points out, “[i]t is frivolous to posit any general ‘fairness doctrine’ with regard to military training.”<sup>194</sup>

However contested borderline cases in these areas are, both government subsidy doctrine and public forum doctrine thus establish a range of clearly permissible government speech. The government may condition subsidies on the recipient’s willingness to communicate a particular point of view; and the government may communicate whatever message it chooses in fora that it controls. Both of these powers could be used to institute education and advocacy programs designed to counter hate speech.

The government can, as *Greer* holds, impose rules banning hate speech within government fora such as military bases. It is less well-established that the government can ban hate speech in public workplaces, but the possibility remains open. Under the rule of *Garcetti v. Ceballos*, unless an employee is speaking “as a citizen on a matter of public concern,” she has no First Amendment cause of action if her employer sanctions her for her speech; when she does speak on a matter of public concern, that speech may only be restricted if it places a burden on the public employer’s ability to effectively con-

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192 See *Greer v. Spock*, 424 U.S. 828 (1976) (holding that a military base may exclude protestors); see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (holding that the city need not allow political advertising in its transit system because “[h]ere, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce.”).

193 424 U.S. at 838.

194 Shiffirin, *supra* note 27, at 578–79. Shiffirin explains, for example, that the “military is entitled to train soldiers and to instruct them in the perils of drug abuse. Whether the military relies upon its own speakers or invites civilians to promote its point of view should have no bearing on whether political candidates may have access to the base. Indeed, elementary considerations of orderly administration and military discipline suggest that a speaker wanting classroom access to speak about the merits of drug use would properly be given short shrift.” *Id.* at 578.

duct its business.<sup>195</sup> The public employer bears a heavier burden of justification when it imposes a prior restraint on speech.<sup>196</sup> Public employers are subject to the anti-discrimination provisions of Title VII<sup>197</sup> and so must take steps to prevent hostile work environment claims<sup>198</sup>—including, perhaps, instituting rules against the use of hateful language. And arguably, incidents of hateful speech in the public workplace can create a sufficiently toxic atmosphere to impede the functioning of the organization. But at least one lower court has found that such interests do not justify a rule prohibiting the display of such symbols as the Confederate battle flag.<sup>199</sup> At any rate, the government certainly could institute educational programs in the workplace that, like those proposed for schools, inform employees about the history of discrimination that lies behind potent words and symbols.

The government subsidy area offers room for more far-reaching measures. The government could condition the receipt of subsidies on individuals' willingness not only to refrain from hate speech but further to advocate against it. The government has, on at least one past occasion, denied tax breaks to speakers who espouse white supremacist views.<sup>200</sup> This approach could be made systematic in the same way that, during desegregation, the IRS required organizations claiming non-profit status to eschew race discrimination.<sup>201</sup> Or, if tying tax-exempt status for non-profits to their willingness to disclaim

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195 547 U.S. 410, 418 (2006); *see also* *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995) ("Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.").

196 *Nat'l Treasury Employees Union*, 513 U.S. at 468.

197 42 U.S.C. §§ 2000e(b), 2000e-16(a); *see also* *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1948–49 (2008); *Florida v. Long*, 487 U.S. 223, 228 n.1 (1988).

198 *See Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008) (holding that a federal employer may be liable on a hostile work environment theory).

199 *See* *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131 (D. Kan. 2002); *cf.* *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (finding a public college's sexual harassment policy unconstitutionally vague). *But see* *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430, 1441 (C.D. Cal. 1994) (stating, in dicta, that "[d]efendants are, of course, free to proscribe offensive behavior or language which may result from the 'sex-role stereotyping'").

200 *See* *Nat'l Alliance v. United States*, 710 F.2d 868, 873 (D.C. Cir. 1983) (denying the publishers of a white supremacist newsletter tax-exempt status as an "educational" organization because their materials did not fit within the statutory definition of "educational"; the court found that "the fact that there is no reasoned development of the conclusions . . . removes it from any definition of 'educational' conceivably intended by Congress. The material may express the emotions felt by a number of people, but it cannot reasonably be considered intellectual exposition.").

201 *See* *Allen v. Wright*, 468 U.S. 737, 740 (1984) (stating that federal tax law denies tax-exempt status to private schools that discriminate on the basis of race).

hateful speech were considered too coercive,<sup>202</sup> Congress (or, indeed, a state or municipal government) could establish a new tax incentive rewarding businesses and non-profits that agreed to educate their employees and members about the harms hate speech causes to minorities, women, and LGBT individuals. Another tactic the government can use is to condition its contracts with private employers on their willingness to adopt anti-hate speech rules and educational programs.<sup>203</sup>

The effect of these measures would be twofold. They would increase the amount of education citizens receive informing them about the history of discrimination in the United States and about the harms of using hateful language against that background. And

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202 See *supra* notes 186–87 and accompanying text. Tax-exempt status, the argument would go, is just too important to non-profits for us to view this as a subsidy designed to encourage such education. The Supreme Court has also been reluctant, in the past, to allow overly onerous conditions to be attached to the receipt of federal funds. In *FCC v. League of Women Voters*, the Court struck down a law preventing all noncommercial educational stations that receive federal grants from “editorializing.” 468 U.S. 364 (1984). Even a network receiving a nominal amount of federal funding, the Court observed, was entirely prohibited from such speech, an arrangement that required too significant a sacrifice of free expression for the receipt of federal largesse. Any requirements that religious organizations promote certain views or educate their members in certain ways would also risk running afoul of the Establishment Clause.

203 In the wake of a noose incident at a construction site at the Washington Nationals baseball stadium, there was talk of proposing a law that would prohibit the city from entering into contracts with companies that have proven histories of discrimination. See Yolanda Woodlee, *Ex-Worker Calls Noose Incident an Overblown, ‘Stupid Prank,’* WASH. POST, Jan. 26, 2008, at B5 (quoting D.C. Council member Kwame R. Brown to this effect). In Philadelphia, after the noose incident at the Comcast tower construction site, City Council members required unions to draft plans to increase their diversity. See Vernon Clark, *Add Minority Workers, Unions Told*, PHILA. INQUIRER, Dec. 14, 2007, at B9. The extensive use of government subsidies to effectively regulate private employers does raise distinct constitutional questions. Some scholars have argued that existing workplace discrimination law is itself unduly restrictive of free speech. See Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); see also Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 689–93 (1997) (discussing this debate and arguing that the constraints on expression imposed by anti-discrimination law are appropriate in the workplace because of its unique status as a “satellite domain” of public discourse”). The Supreme Court has never confronted the issue of whether anti-discrimination measures that regulate pure speech (as distinct from, for example, coercion or harassment) raise First Amendment problems and has continued to uphold them on other grounds. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206–09 (3d Cir. 2001) (reviewing the relevant law in the area); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1, 2 (1994) (reviewing *Harris v. Forklift*, 114 S.Ct. 367 (1993), and referring to it as “the dog that didn’t bark—a clue (but no more than that) to some of the First Amendment mysteries surrounding prohibition of sexually harassing speech”).

they would increase the number of people who work in environments with strong norms against hate speech.

*E. Advisory and Investigatory Statements*

At times the government engages in speech that, though it does not lay down a legally binding rule, ultimately has a restrictive or punitive effect. Examples include non-binding agency actions, investigations undertaken by agencies or Congress, and publications issuing out of such investigations. In all of these cases, individual speakers are given to understand that if they violate the norm the government has articulated, adverse consequences may or will follow. None of these forms of government expression, however, is clearly unconstitutional.

Agencies routinely issue advisory letters, write interpretive rules, make findings on factual issues, and take other kinds of action that, though they may caution individuals and businesses against certain kinds of behavior, do not have binding legal force. Often, these actions cannot be challenged until they are enforced against someone.<sup>204</sup> At the same time, they may have a cognizable “chilling” effect on speech. For example, the FCC publishes a “policy statement” that sets forth the agency’s position on indecency in broadcasting and lists quotations that it considers indecent and patently offensive.<sup>205</sup> Broadcasters are advised to steer well clear of similar statements. The National Hispanic Media Coalition has recently called upon the FCC to investigate anti-Hispanic hate speech on the radio, and it includes in its definition of hate speech “false facts” that create a climate of prejudice.<sup>206</sup> Eugene Volokh points out that even non-regulatory FCC

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<sup>204</sup> See M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383, 1445 (2004) (“Guidance is relatively cheap to produce; it does not require the agency to present its view to the public for comment or to a court for evaluation. Of course, it also does not formally bind any particular actor or group of actors, but it may still be effective at influencing conduct. A party attempting to challenge the terms of the guidance will probably have a difficult time—a court may decide that a challenge is not ‘ripe’ until the agency takes an action based on the guidance.”).

<sup>205</sup> See, e.g., FED. COMM’NS COMM’N, POLICY STATEMENT, FCC 01-90, INDUSTRY GUIDANCE ON THE COMMISSION’S CASE LAW INTERPRETING 18 U.S.C. § 1464 AND ENFORCEMENT POLICIES REGARDING BROADCAST INDECENCY (2001), available at <http://www.fcc.gov/Bureaus/Enforcement/Orders/2001/fcc01090.pdf>.

<sup>206</sup> Petition for Inquiry Filed on Behalf of the National Hispanic Media Coalition, Jan. 28, 2009, available at <http://www.law.georgetown.edu/Clinics/ipr/documents/PetforInquiry-HateSpeech.pdf>.

action in this regard could chill speech since radio stations that are found to rig or slant the news can lose their broadcasting license.<sup>207</sup>

Even more aggressive tactics were undertaken in the 1980s by the Department of Justice under Attorney General Edwin Meese. Meese established the Attorney General's Commission on Pornography, an investigative body. After hearing testimony that a number of large publishers and retail stores were producing and distributing pornography, the Commission sent letters to companies whose names had been mentioned on Department of Justice letterhead informing them that it had been alleged that they were purveying pornography and advising them that they could respond to this allegation before the Commission drafted a final report in which purveyors of pornography would be identified. The category of "pornography" was not limited to constitutionally unprotected obscenity but included constitutionally protected sexually explicit material.<sup>208</sup>

Taking a cue from these episodes,<sup>209</sup> advocates for the deterrence of hate speech might consider soliciting the Department of Justice (or some other agency) to undertake a non-prosecutorial investigation of incidents of hate speech. While the Department already investigates and prosecutes crimes involving hateful language and motivated by discrimination, it cannot prosecute hate speech on its own when not linked to criminal activity. A "hate speech commission" could, however, single out speakers who used hate speech for investigation and public exposure. Being named by such a commission as someone who uses hate speech, or as an organization or company that promotes or countenances it, would presumably cause significant reputational harms. This intervention could therefore deter hate speech, as well as contribute to a climate of disapprobation of it.

Such non-binding agency actions are constitutionally permissible—even if they target protected First Amendment activity—so long as they do not entail any concrete sanctions. In *Penthouse International*

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<sup>207</sup> Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1235024659.shtml> (Feb. 19, 2009, 01:24 EST).

<sup>208</sup> See *Penthouse Int'l v. Meese*, 939 F.2d 1011, 1012–14 (D.C. Cir. 1991).

<sup>209</sup> Similarly, in *Block v. Meese*, the D.C. Circuit upheld the Department of Justice's practice, authorized by the Foreign Agents Registration Act, of classifying certain films distributed by entities designated as "foreign agents" under the Act as "political propaganda." 793 F.2d 1303, 1311 (D.C. Cir. 1986). Then-Circuit Judge Scalia wrote, "[w]e know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content. Nor does any case suggest that uninhibited, robust, and wide-open debate consists of debate from which the government is excluded, or an uninhibited marketplace of ideas one in which the government's wares cannot be advertised." *Id.* at 1313 (quotation marks omitted).

*v. Meese*, the D.C. Circuit found that the actions of the Meese Commission did not violate the First Amendment because the publishers were not threatened with prosecution.<sup>210</sup> Such a course of action crosses the line into unconstitutionality when it appears either that there is no factual basis for listing someone as having engaged in the disapproved kind of speech<sup>211</sup> or when the agency action veers too close to threatening or actually bringing about prosecution.<sup>212</sup> To withstand constitutional challenge, then, non-binding agency actions must not only stop short of imposing any sanctions, they must also steer clear of collaboration with any government body that might bring a prosecution, and they must ensure that any findings they make public have an adequately established basis in fact.

Similar to the activities of the Meese Commission, but presenting different doctrinal questions, are investigations undertaken by Congress. In addition to its power to legislate, Congress has the power to conduct investigations<sup>213</sup> and to issue reports.<sup>214</sup> Congress's investigative power was notoriously abused in the 1950s by the House Un-American Activities Committee (HUAC), which, under the vindictive

210 "At least when the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass the distributor threatens anyone's First Amendment rights," the court wrote. 939 F. 2d at 1016. "[I]t cannot reasonably be said that appellant had a *clearly* established constitutional right to be free of such deliberate and calculated pressure if no threats of legal sanctions were employed." *Id.* at 1017.

211 *See* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (holding that organizations suspected of Communist sympathies had an actionable claim against arbitrary classifications by the Attorney General).

212 An injunction was sustained against a state anti-obscenity commission that not only threatened people with prosecution but also actually gave names to the police in *Bantam Books v. Sullivan*, despite the fact that the agency in question did not itself impose any sanctions. 372 U.S. 58 (1963). The Supreme Court wrote: "[T]hrough the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.* at 67.

213 *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process.").

214 Article I, Section 5 of the Constitution provides that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same . . ." U.S. CONST. art. I, § 5. In addition, Congress may, free from judicial interference or restraint, publish reports or statements. *See* *Methodist Fed'n for Soc. Action v. Eastland*, 141 F. Supp. 729, 731 (D.D.C. 1956) (stating that "nothing in the Constitution authorizes anyone to prevent . . . Congress from publishing any statement"). *But see* *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) (holding that the Public Printer and the Superintendent of Documents may be enjoined from publishing a report when that report would impinge upon the First Amendment rights of individuals and bears no relation to any legislative purpose).



stewardship of Senator Joseph McCarthy, subpoenaed and interrogated suspected Communists and Communist sympathizers. Non-government organizations then compiled “blacklists” of the names of those who had admitted to being members of or associated with the Communist Party and, often, the names of those who simply refused to testify. People who were blacklisted were often subsequently unable to find work.<sup>215</sup> The government also issued publications of its own warning against the Communist threat, in some cases naming particular organizations as likely fronts for Communist activities.<sup>216</sup>

It would be possible to use these same powers to combat hate speech. Congress could form a standing committee which could use its investigative powers to inquire into the scope and nature of the problem. Such a committee could issue reports that the government would then pay to publish and distribute. To the extent that Congress accomplished these tasks without naming individuals and specific organizations, its activities would likely be uncontroversial and would resemble precatory speech in most relevant aspects. But Congress could also go further by compiling lists of organizations, publications, and individuals that promulgate hate speech and disseminating those lists. Targeting speakers more specifically would obviously be a more powerful weapon against hate speech than making generalized statements about the problem. Those singled out would be burdened with the opprobrium of government accusation and, to the extent that members of their own communities disapprove of hateful language, with the censure of their peers, customers, employees, members, or potential readers. A hate speech “blacklist” could create powerful incentives to refrain from using inflammatory, discriminatory language.

Despite the near-universal condemnation of HUAC and McCarthy era anti-Communist tactics, no doctrinal rule prevents Congress from dusting them off for use again. The Speech or Debate Clause and separation of powers concerns protect Congress from liability for or injunction against anything it might publish so long as the publication is reasonably related to a legislative objective.<sup>217</sup> The Supreme

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<sup>215</sup> Histories of the McCarthy era abound. For a concise recent summary, see Daniel J. Steinbock, *Designating the Dangerous: From Blacklists to Watch Lists*, 30 SEATTLE U. L. REV. 65, 70–73 (2006).

<sup>216</sup> In one case, for example, the government issued a pamphlet called “The Communist Party of the United States—What It Is—How It Works—A Handbook For Americans,” which named the Methodist Federation for Social Action as a religious front for the Communist Party. See *Methodist Fed’n*, 141 F. Supp. at 730 (describing the contents of said pamphlet).

<sup>217</sup> See *Methodist Fed’n*, 141 F. Supp. at 731 (“By express provision of the Constitution, members of Congress, ‘for any Speech or Debate in either House . . . shall not be questioned

Court has similarly held that Congress has broad investigative powers.<sup>218</sup> These powers are not unlimited: both publications and investigations must be related and in furtherance of a legitimate legislative task.<sup>219</sup> In *Watkins v. United States*, the Supreme Court overturned the conviction for contempt of Congress of a witness who had refused, before HUAC, to answer questions about his past activities. Chief Justice Warren's opinion recognized that First Amendment rights can be infringed by non-criminal investigative activity—merely calling someone as a witness to testify, he observed, can have a chilling effect on speech.<sup>220</sup> When First Amendment freedoms are endangered by a Congressional investigation, courts will read the committee's charter narrowly and limit its power to issue compulsory process to those subjects properly within its purview.<sup>221</sup> In *Hentoff v. Ichord*, a district court applied a similar analysis to the publication of a report by the House Committee on Internal Security that listed the names of members of "revolutionary" groups (such as the Black Panther Party, Students for a Democratic Society, and the Student Non-Violent Coordinating Committee) along with the names of institutions where they had

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in any other Place.' It would be paradoxical if members could be questioned in any other place for statements in a document which both houses have ordered published.") (internal citation omitted); EMERSON, *supra* note 25, at 702–03 (discussing *Methodist Federation* and legislative immunity generally).

- 218 *Watkins*, 354 U.S. at 187 ("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.").
- 219 *Id.* (holding that Congress has "no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."); *see also* *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975) (explaining the parameters of the "legitimate legislative sphere").
- 220 *Watkins*, 354 U.S. at 197–98 ("The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. . . . That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction.").
- 221 In *Watkins*, the court held that petitioner could not be convicted under a federal criminal statute for refusing to comply with an order issued by Congress because the underlying mission of HUAC was defined too vaguely; witnesses would be unable to determine when their questioners were acting within the scope of the committee's proper authority and when they had exceeded it. *Id.* at 201–16.

been invited to speak and the amount of any honoraria they had been paid.<sup>222</sup> Finding that the report served no legitimate legislative end but rather was avowedly intended “to inhibit further speech on college campuses by those listed individuals” and others of similar political inclination, the court, while conceding that it lacked the authority to enjoin the publication of the list in the Congressional Record or by members of Congress, did enjoin its publication for wider distribution by the Public Printer and the Superintendent of Documents.<sup>223</sup> In order to fall safely within the realm of constitutionally permissible action, then, any investigative activities of a Congressional committee, as well as ensuing publications, should fall well within a clearly-worded authorization from Congress. Assuming that they did so, however, they should pass First Amendment scrutiny and would be a powerful weapon.

All of these forms of advisory and investigatory government expression verge on the regulation and punishment of speech. The sole difference between such measures and outright prohibitions on speech is that the government, having articulated a norm, relies upon other actors—either the speaker herself or the general public—to enforce that norm through censorship and retribution. Looked at another way, however, these are simply more directed forms of precatory speech. As the D.C. Circuit stated in *Penthouse International v. Meese*, “[a]s part of the duties of their office, [government] officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate.”<sup>224</sup>

### III. ASSESSING THE OPTIONS

The foregoing Part has presented a menu of options, some of which will no doubt be found by some readers to be unpalatable. All of them are constitutionally permissible, however, as long as certain limits are observed. The remaining task is to assess their desirability as a matter of policy. Because the path proposed is intermediate, both the free speech and the anti-subordination camps are likely to raise objections. Using government speech to deliberately deter hate speech may go too far for First Amendment absolutists and not far enough for those who wish for strong measures regulating speech in order to promote equality. These anticipated objections will be ad-

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222 318 F. Supp. 1175, 1180–82 (D.D.C. 1970).

223 *Id.* at 1182.

224 939 F.2d 1011, 1015 (D.C. Cir. 1991).

dressed in turn. At the same time that this Part will address practical concerns about efficacy and freedom of expression, however, part of its goal is to reconsider, on the one hand, the assumption that regulation is a uniquely effective way to intervene against hate speech, and on the other hand, the assumption that the First Amendment will trump equality concerns once we are outside the context of regulation.

Before beginning this discussion, it is important to acknowledge one objection with which this Article will *not* engage at length: that hate speech, as mere language, plays only a negligible role in perpetuating inequality, so that the very enterprise of attempting to combat it is irrelevant. This Article takes the relationship between language and subordination to be mutually sustaining: the power of language to wound derives from the reality of subordination, while subordination is made present, again and again—and thus perpetuated—through the use of denigrating language. No attempt is made to persuade readers who reject this premise in its entirety to change their views.

This assumption also bears on the question of how interventions against hate speech might work. If one accepts the premise that hate speech, in order to work its harms, depends on a complex relationship between linguistic conventions and past and present actual subordination, then it follows that those harms can be combated not only directly but indirectly. On the one hand, the government can take steps intended to deter individuals from engaging in this type of speech by simply trying to establish a norm that it is wrong. It can signify to speakers that other members of their community find the speech reprehensible or otherwise detract from its appeal. On the other hand, the government can take steps intended to undermine the power that this kind of speech has—in other words, to intervene somehow in the system of signification that allows an individual speaker to call on the shared history of inequality and violence that makes hateful speech so particularly wounding. The two kinds of intervention may not be equally effective in bringing about an immediate reduction in the incidence of hate speech, but for various reasons the most effective tactics may not be the most desirable.

#### *A. Anti-Subordination Concerns*

The two primary complaints that can be expected from the anti-subordination camp are: first, that government speech is inadequate as a form of intervention; and, second, that such measures will, to

varying degrees, promote backlash as perceived instances of the government favoring “special interest” groups.

The argument of inadequacy is straightforward: because government speech, in all of the forms listed above, attaches no actual sanction to hate speech, it cannot be as effective as regulation. There are already fairly well-established social norms against the use of racist, homophobic, and misogynistic epithets and symbols; what we need, the argument will go, is not more toothless assertions that citizens should tolerate diversity but instead meaningful prohibitions backed by the coercive power of the state. And even conceding that censorship can never fully achieve its aim—that the speech that the government bans will never be wholly eradicated—the very fact that government actors are unwilling to back up their imprecations to speak respectfully with the real power of legislation may itself undermine the anti-hate speech message.<sup>225</sup>

This critique will be directed especially forcefully at those forms of government speech that promise no specific benefit and establish no rule. Precatory government speech is already routine, as the flurry of public condemnations of noose incidents by executive and legislative officials shows. Perhaps at best it is an echo of sentiments already voiced by others in the community; or it is obligatory, rote, or worse, cynical grandstanding. Commemorative speech celebrating diversity, it can be argued, has also become a familiar fact of life without altering the realities of discrimination in this country. Moreover, it is at best an indirect way of getting at the problem of hate speech. There are too many steps between seeing Sacajawea on a gold dollar coin and deciding to expurgate one’s vocabulary of racial slurs.

In the educational realm, too, one might assert that schools have been speaking the language of diversity for many years without making an appreciable difference in the attitudes of students. Students take their cues about what is acceptable from their peers and families, not from educators. While in a limited number of cases students who use hateful speech may simply be ignorant of the full implications of the words and symbols they use, many of the students (and future citizens) who do so may already be alienated from their school as well as their community and therefore disinclined to take to heart lessons about civil discourse. In general, school education initiatives aimed at altering behavior have uncertain prospects of success, as the persis-

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<sup>225</sup> Cf. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996) (arguing that the lack of public support for non-incarceratory criminal sanctions is due to the widespread sense that alternative sanctions fail to adequately express condemnation).

tence of drug use and unplanned pregnancies among adolescents at test.<sup>226</sup>

While these arguments that precatory and commemorative speech and educational initiatives will be inefficacious pose significant challenges, they perhaps depend on an overly simple view of how both regulations and government speech interact with social and linguistic norms. To begin with, arguments of inadequacy presumably would contrast government speech with the harder-hitting measure of outright prohibition. But this argument begs the question of how effective regulation itself is, in practice, when there is a public appetite for the banned expression.<sup>227</sup> As Michael Holquist has observed, censorship creates a sophisticated audience that reads for what is absent as much as what is present in a text.<sup>228</sup> Regulation alone can never banish the specter of the disapproved meaning, but rather always invokes it.<sup>229</sup> Indeed, a prohibition on a sign can increase its power, as the frisson of the broken rule becomes inseparably part of the meaning of violating a taboo. One might posit that the closer to universal a ban on using a word or symbol becomes, the more powerfully shocking the use of that word or symbol is. Moreover, battles over regulating hate speech, at their highest pitch, are understood by those who resist regulation as struggles not for the right to inflict injury through language but rather as struggles over the basic validity of a group's viewpoint. As we have seen, for example, some of the most hard-fought recent battles have been over the right of Christian students to forcefully express the view that homosexuality is a sin. An outright ban on hate speech risks enhancing the urgency with which the cen-

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226 See, e.g., Laura Beil, *Abstinence Education Faces an Uncertain Future*, N.Y. TIMES, July 18, 2007, at A1 (reporting that while rates of abstinence among teenagers have risen in recent years, it is not clear that the change is due to the millions of dollars of federal money spent over the same period on abstinence programs in schools).

227 Efforts to regulate child pornography, for example, suggest that success will only be partial. Even as Congress has expanded the legal tools available for prosecuting child pornography-related offenses and enhanced penalties in this area, see, e.g., *United States v. Morace*, No. 09-4007, 2010 WL 476655, at \*4 (4th Cir. Feb. 11, 2010) (noting this trend), the business of purveying child pornography has grown, see, e.g., Robert D. Richards & Clay Calvert, *Untangling Child Pornography from the Adult Entertainment Industry: An Inside Look at the Industry's Efforts to Protect Minors*, 44 CAL. W. L. REV. 511, 513 (2008) (noting estimates that Internet sales of child pornography currently amount to \$3 billion per year and are continuing to grow).

228 Michael Holquist, *Corrupt Originals: The Paradox of Censorship*, 109 PMLA 14, 14 (1994).

229 See *id.* at 17 ("Any act of censorship, like any sign, is riven in its heart by a fatal division: the prohibition that separates what is banned from what is permitted also fuses them; the signifying sound and the signified meaning are at once divided and joined within the linguistic sign. Censorship and the sign are each constructed out of two different things that have in common only the necessity to occur together.").

sored group asserts its views—since the group perceives that its very legitimacy in the public realm is at stake—and this may foster the persistent use of hateful language.

And at the same time, a dismissal of precatory government speech as routine and cynical is too facile. As the Supreme Court has observed, speech by elected officials is a crucial element of democratic accountability.<sup>230</sup> What politicians say (and fail to say) in response to incidents involving hateful language will be weighed by citizens when the next elections come around. Statements by elected officials on the topic of hate speech might occasion fierce debates over the meaning of symbols and the seriousness of the harm they inflict, a process that could itself help create a climate in which citizens treat hateful words and symbols with more caution. Perhaps more subtly, citizens expect that politicians will not take a stand censuring a given viewpoint unless it is held by a decided minority. The precatory speech of elected officials is therefore understood to reflect back to the public its own preferences. This kind of government speech, the public understands, will only occur if it is politically sayable. The politically sayable, in turn, stands in a complex, interdependent relationship with the socially sayable, which in turn stands in a complex, interdependent relationship with actual subordination.

It may be true that politicians will say little that they do not know, in advance, commands the support of the majority of their constituency. On the other hand, an elected official's willingness to speak out against hate speech will signal to her constituents that she *has* majority support for her viewpoint. The "silent majority" will then find it harder to believe that it is indeed a majority. The effect of elected officials articulating their opposition to hateful language may be to erode the sense of tacit consensus on which speakers who deploy it must ultimately rely. The potential effectiveness of such interventions may be greater when directed at hate speech against groups that have made less progress toward full equality. Precatory statements against hate speech by elected officials draw less attention and are more likely to appear banal when the sentiment expressed is already widely acknowledged as correct. Speech against racism has perhaps become a political commonplace. But the same cannot be said of speech against homophobia. Imagine the public reaction if President Bush had spoken out consistently against anti-gay hate speech, stand-

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<sup>230</sup> See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (“[O]f course, a government entity is ultimately accountable to the electorate and the political process for its advocacy. . . . If the citizenry objects, newly elected officials later could espouse some different or contrary position.”) (internal citation and quotation marks omitted).

ing shoulder-to-shoulder with gay-rights activists and calling on citizens for toleration of same-sex relationships and gender non-conforming individuals. Such precatory speech would have prompted an outcry and threats of political recriminations, but also, one hopes, it would have caused a reevaluation, in some quarters, of the hierarchy that classes LGBT individuals as inferior.

Nor should the possibility that Americans might be influenced by precatory speech on the subject of race-based hate speech be dismissed out of hand. One might well be skeptical when a President with an undistinguished record of promoting civil rights<sup>231</sup> takes the occasion of a commemoration of the career of a distinguished and popular civil rights activist to speak out against a hate speech controversy that erupted in the world of professional golf. But stirring words from a president possessed of great moral authority might well be expected to have some effect on the language habits of the citizenry. (Consider, as a portent of what is possible in this regard, then-presidential candidate Barack Obama's widely praised speech about race relations in America.<sup>232</sup>)

These same arguments extend to the criticism that commemorative speech will be redundant and ineffectual. The claim is that individuals who engage in hateful speech often do so with full knowledge that the words or symbols they use are disapproved by the community at large. A memorial reminding citizens of the suffering of those on the receiving end of prejudice might reinforce a general climate of tolerance without having much effect on the pockets of anger and prejudice from which hate speech emanates. But like the words of a public official, commemorative speech functions as a representation to the community of what its views and values are and of who is a member. When the image presented is one of diversity and tolerance, the would-be racist's confidence in the universality of her views may be ever-so-slightly undermined.

The argument that education will be inefficacious assumes that students who engage in hate speech will not respond to any interven-

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231 See, e.g., OFFICE OF CIVIL RIGHTS EVALUATION, U.S. COMMISSION ON CIVIL RIGHTS, DRAFT REPORT, REDEFINING RIGHTS IN AMERICA: THE CIVIL RIGHTS RECORD OF THE GEORGE W. BUSH ADMINISTRATION, 2001-2004 (2004), available at [www.law.umaryland.edu/marshall/usccr/documents/cr12r24.pdf](http://www.law.umaryland.edu/marshall/usccr/documents/cr12r24.pdf) (recounting President George W. Bush's civil rights record); Charlie Savage, *Civil Rights Hiring Shifted in Bush Era*, BOSTON GLOBE, July 23, 2006, at A1 (noting that the Bush administration filled the Justice Department's Civil Rights Division with people with strong conservative leanings and little experience in civil rights).

232 See Jeff Zeleny, *Obama Urges U.S. to Grapple with Race Issue*, N.Y. TIMES, Mar. 19, 2008, at A1 (describing the "sweeping assessment of race" in Obama's speech).



tion by their teachers. This assumption, however, is no more credible than the proposition that many young people acquire racist, sexist and homophobic views passively, through repeated exposure to discriminatory comments and actions. Children and adolescents may often be imitative, subject to great pressure to conform socially, but this does not mean that they are incapable of revising their opinions upon receipt of new information. A well-designed program teaching students about the historical facts of discrimination and discriminatory violence and informing them of the connection between the words they hear used casually and that history might well lead them to rethink the use of hateful language. Moreover, education about hate speech would have the benefit of giving potentially empowering information to targets of hate speech. While no amount of education can erase the sting of actual subordination and exclusion, knowledge may nevertheless offer the victim some small comfort. To know that such speech is condemned by one's community and to be enabled to think critically about it is surely better than to have no such resources.

A case can, then, be made that precatory speech, commemorative speech, and education would be more effective than one might initially believe. Those interventions that one might expect to be more forceful, meanwhile—government subsidies, control of non-public fora, and advisory and investigatory statements—may in fact be less effective than they at first appear. The government does have significant influence over, for example, public employees, and the U.S. government is the largest employer in the nation, with two percent of the working population on its payroll.<sup>233</sup> Add to that the number of private employers whose businesses depend on government contracts, and then add the number of organizations who would benefit from a tax incentive, and the potential impact of instituting anti-hate speech rules in non-public fora and incentives to create anti-hate speech educational programs begins to appear formidable.

A more challenging question, however, is what such measures would add to existing discrimination law. Expression involving burning crosses and nooses routinely crops up in hostile work environment claims.<sup>234</sup> As courts have applied Title VII, a hostile work environment claim is made out by showing a pattern of discriminatory

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<sup>233</sup> Federal Jobs Net Career Center, <http://federaljobs.net> (last visited Mar. 28, 2010).

<sup>234</sup> *See, e.g.*, *Tademy v. Union Pac. Corp.*, 520 F.3d 1149 (10th Cir. 2008); *Abner v. Kansas City S. R.R. Co.*, 513 F.3d 154 (5th Cir. 2008); *Woodard v. PHB Die Casting*, 255 F. App'x 608 (3d Cir. 2007); *Isaac v. N.C. Dep't. of Transp.*, 192 F. App'x. 197 (4th Cir. 2006).

incidents; a single instance of hate speech will not suffice.<sup>235</sup> Employers, however, have significant incentives to prohibit such expression, as they will be held liable if an employee successfully establishes a hostile work environment claim and, on the other hand, may establish an affirmative defense to such a claim by, in part, showing that they have exercised reasonable care to prevent harassing behavior.<sup>236</sup> Government action prompting the explicit adoption of anti-hate speech rules and the implementation of anti-hate speech education may add only slightly to these existing incentives. On the other hand, the question of what incremental effect government subsidies and strategic regulation of non-public fora will have on hate speech is difficult to assess without empirical data. How many workplaces already have firm anti-hate speech rules in place? How many engage in anti-hate speech education? It seems unlikely that there is no room whatsoever for expansion of such programs.

In the case of advisory and investigatory statements, there appears at first to be good reason to believe that these measures would be effective. Senator McCarthy's name has become notorious in part because his enterprise did succeed in punishing numerous individuals by ruining their careers and causing them to be socially ostracized. The activities of Edwin Meese's Commission on Pornography led 7-Eleven stores and other retailers to pull adult magazines from their shelves.<sup>237</sup> In both of those cases, however, a combination of factors was present that may not exist in the case of hate speech: there was a mainstream industry or distribution channel on which the disapproved speakers depended for their livelihood (entertainment, in the case of the McCarthy blacklist, and publishers and retail stores in the case of Meese's report); the speakers could therefore be influenced via the actions of large private entities, such as corporations; and the

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<sup>235</sup> See Estlund, *supra* note 202, at 695–97 (noting that the standard for a hostile work environment claim “almost always requires an accumulation of incidents”); *cf.* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206–11 (3d Cir. 2001) (observing, in the education context, the differences between the pattern of incidents involving derogatory speech necessary to establish a harassment claim under anti-discrimination law and the single instances of speech that could offend an anti-hate speech code).

<sup>236</sup> See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); see also Estlund, *supra* note 202, at 697–99; Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 310 (1996) (noting that “though the law facially imposes liability only when the speech is ‘severe or pervasive,’ in practice employers can effectively defend themselves only through zero-tolerance policies”).

<sup>237</sup> See Matthew L. Wald, “Adult” Magazines Lose Sales as 8,000 Stores Forbid Them, N.Y. TIMES, June 16, 1986, at A1.

threat of negative public perception or boycott was a powerful influence on those entities.

While there are certainly commercial publications, radio shows, and websites that frequently use hateful language, it is not clear that the purveyors of such expression are so situated that a blacklist could in fact significantly harm them. Fewer of them, perhaps, depend for their livelihood on customers who would be shocked to discover that they deploy hate speech and would then engage in a boycott. It seems equally likely that this is a self-sustaining niche market.

In both this case and the case of conditional government subsidies and non-public fora, then, the difficulty may be that the norm against hate speech that is already in place is doing as much work as it can do. But again, the argument that propaganda and blacklisting would be fruitless depends on as-yet-unknown facts. Diligent research might uncover connections between mainstream businesses and hateful language that are sufficiently embarrassing to motivate action.

Another question, however, is whether the mere fact of being cited in a government report would have any deterrent effect on users of hate speech. This concern also raises the problem of backlash. Just as regulation may increase the appetite for hate speech, a comprehensive and proactive program of government speech targeting hate speech might inflame racial tensions if it were seen as pandering or favoritism. Resentment could fuel more, not less, hate speech. This concern is particularly relevant to the more apparently punitive types of government intervention: blacklisting and agency action after the model of the Meese Commission. There is good reason to pause before recommending the adoption of tactics for which there are such ready pejorative labels: “McCarthyist,” “witch hunt,” and so on.

But the backlash argument can be taken too far. Non-regulatory interventions against hate speech have the advantage of being soft, rather than hard, rules. An anti-hate speech “blacklist” would function as a formal statement of condemnation of those who incite or trade on, for example, racial hatred without bringing actual punitive sanctions to bear on such persons. Any effort to deter a particular kind of conduct will of course have more complex effects than simply reducing its incidence, but in comparison to regulation, government speech might be expected to produce less resentment and ensuing resistance.

This brings us back to the question of efficacy. Eventually, perhaps, the social system reaches a kind of semiotic equilibrium, where the weight of the prohibition (legal or cultural) is balanced by the allure, at the margins, of using the banned speech. If such an equilib-

rium has been reached in the case of hate speech—most people think it is reprehensible, while a few people feel compelled to engage in it, whether for the sake of the shock or because the very consensus against it increases the need to push back—then simply reiterating disapproval of hate speech will do nothing to reduce its incidence.

If this is the case, then it might appear that regulation is the only satisfactory alternative. This would be so not because regulation will effectively deter hate speech—for we have posited that regulation will never quell the appetite for hate speech—but because in the absence of the possibility of deterrence, nothing short of punishment will do. Society must express its moral disapproval of hateful speech by exacting retribution. Taking punitive action also conveys to the victim of hate speech the message that society recognizes the insult to her dignity that she has suffered and so is an important way to reinforce the constitutional value of equality.

History suggests, however, that the amount of hateful speech does fluctuate over time. Perhaps then we have not reached the moment where prohibition and punishment are the only weapons left in our arsenal. The quantity of hate speech might rise or fall because it is an imitative behavior, as the spate of noose-related incidents in 2006–2007 suggests.<sup>238</sup> Those forms of government speech that educate citizens about the deeper meaning of hateful language they might use casually would perhaps help contain such an epidemic. The quantity of hate speech we experience will also depend on general beliefs about the level of prejudice in society and the extent of actual subordination. While those who speak hatefully do not do so because they think society in general approves their speech, they must on some level believe that they are reiterating a shared, unspoken belief about who is an insider and who is an outsider, who is—or deserves to be—dominant in the socio-cultural hierarchy and who is subordinate. They rely on these assumed truths of status for the effect of their speech. So those forms of government intervention that subvert or

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<sup>238</sup> The Southern Poverty Law Center, which tracks hate crimes, noted that after the much-publicized events in Jena, Louisiana, the number of incidents involving nooses spiked, going from twelve or so a year to roughly seventy. Michael Abramowitz & Hamil R. Harris, *At Black History Month Event, Bush Denounces Noose Displays*, WASH. POST, Feb. 13, 2008, at A2. Filings of claims of racial harassment with the EEOC increased 24% in the same year as the “Jena 6” incident. The EEOC’s Chairwoman Naomi Earp commented that although the agency does not keep statistics breaking down harassment incidents according to the language and symbols used, nooses seemed more prevalent in such incidents in 2007; she speculated that the general rise and the rise in noose displays were due in part to the visibility of the Jena case. Bello, *supra* note 19.

undermine racist speakers' confidence that they are backed by consensus may also, over time, make a meaningful difference.

### B. *Free Speech Concerns*

The predominant arguments we can expect the free speech camp to make are that any intentional manipulation of private speakers' expression by the government is suspect, and that many of the proposed measures go far beyond benign admonition and amount to reprehensible, if technically doctrinally permissible, censorship. Even those measures that appear more moderate can cumulatively have a stultifying influence on the free and equal exchange of ideas. Free speech advocates have consistently evinced discomfort about the indirect effect that precatory and educational government speech has on individual expression. Commentators have worried that the government can distort debate by "drowning out" other voices, given its superior funds, the pervasive presence it has in public discourse, and the monopoly it often has on channels of communication.<sup>239</sup> Without suppressing any individual speaker's viewpoint, the government might simply overwhelm it by iterating its own viewpoint more often and more loudly.<sup>240</sup> While the capacity for the government to dominate public debate is a legitimate source of concern, however, that does not mean that all interventions are to be shunned. When there

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<sup>239</sup> EMERSON, *supra* note 25, at 712 ("[I]t is very easy to visualize situations in which the government's voice may overwhelm or displace all others and thus seriously distort the system of free expression. This occurs mainly when the government has a monopoly or near-monopoly over the media or institutions of communication."); LEVINSON, *supra* note 140, at 80 ("[T]he main threat posed by the state is that it will become an overweening tutor of the public, molding a distinct consciousness, and subtly (or not so subtly) delegitimizing others who would wish to play a similar tutelary role.").

<sup>240</sup> A few cases have been brought claiming that individuals have a constitutional right of access to space in media of communication so that their voices are not overpowered. The Supreme Court, however, has generally been reluctant to mandate access to the media in order to guarantee that minority viewpoints are heard. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a statute granting political candidates the right to equal space to reply to criticisms by a newspaper violated the First Amendment). In *Buckley v. Valeo*, the Court explicitly rejected the idea that the First Amendment allowed the suppression of speech to prevent the "drowning out" of less powerful voices, at least among private speakers. 424 U.S. 1, 48–49 (1976). "[T]he concept that [the] government may restrict the speech of some . . . in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources . . ." *Id.* (internal quotation marks omitted). Steven Shiffrin questions whether a "drowning out private sources" model can usefully guide courts. Shiffrin, *supra* note 27, at 595–601. Owen Fiss, on the other hand, believes that the government should take steps to ensure that minority and marginalized viewpoints are heard in public debate. *See* Fiss, *supra* note 187.

is an affirmative constitutional value to promote—here, equality—we should perhaps be more bold when treading in the shadow of the First Amendment.

To begin with, even the most coercive forms of government speech can be defended from a First Amendment perspective. Advisory and investigatory speech, when it relies on the marketplace and economic pressures to achieve its goal of deterring speech, can be understood as simply filling an information gap in order to allow consumers to bestow their money and time on speakers with whom they do not have a major ideological difference. In the 1950s, for example, sentiment in the marketplace of ideas was strongly anti-Communist, so that being identified as a Communist or Communist sympathizer made it difficult to obtain work, but this was arguably merely a logical effect of majority sentiment. Looked at one way, a blacklist facilitates the matching of sentiment against a viewpoint with speakers who espouse it.<sup>241</sup> If, in retrospect, the anti-Communist feeling of the time appears paranoid and hysterical, this may be best understood as a failing of the citizenry rather than a failure to enforce the Constitution. The First Amendment is strongly countermajoritarian in that it protects speakers from punishment when they express universally reviled, hateful views. Need the Constitution go further and protect such speakers from all adverse consequences that follow upon maintaining a deeply unpopular viewpoint? If not, does the Constitution prevent the government from facilitating the majority's expression of disapproval?

These questions are not easy. At the root of free speech advocates' discomfort with such interventions is a basic unease with the prospect of the government intentionally favoring or disfavoring any single viewpoint. The government has a unique ability to control what we know and to mold the norms that govern social and political life. Through activities such as disseminating or withholding information, defining school curricula, or selecting the subjects of public monuments, the government can influence citizens' perception of the facts of their world, of what is normal behavior and what is aberrant, of which values are endorsed and which are disfavored, of who is a member of the polity and who is not. Commentators addressing

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<sup>241</sup> Indeed, Martin Redish has recently published a study of HUAC and McCarthy-era tactics such as blacklisting that concludes, contrary to received opinion, that there are strong First Amendment arguments in favor of them. In particular, the blacklists that were maintained by non-government parties represented an exercise of *those* parties' First Amendment rights to free expression and association. MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* (2005).

government speech have almost universally expressed concern that this kind of expressive activity can amount to a kind of thought control.<sup>242</sup> As Levinson, MacKinnon, and others have observed, outright censorship has grown increasingly rare, but the government retains the power to instantiate an orthodoxy of opinion and values through non-prohibitive means.<sup>243</sup> This power is arguably greater precisely because it does not take the form of an outright prohibition that can be openly critiqued and defied.

It has proved exceedingly difficult to use legal doctrine, or indeed any means, to rein in the manipulative effects of such expression. The very ubiquity of government expression is both a source of its potency and one guarantee of its immunity from First Amendment restraints. The government provides information to the citizenry through myriad channels, including public education, subsidies for and regulation of the media, congressional and agency findings of fact, selective transmission of information about government activities, and so on. The constant flow of this information could hardly be staunched without a radical transformation of the role of government, and even filtering it—assuming we could agree on the standard to be used in a filtering process—would seem to require a shadow government whose job was to assess the content of all government communications.

But even accepting that it is not possible to monitor all government speech for viewpoint-neutrality, it is perhaps offensive to free speech values to undertake a programmatic government effort to quell a specific viewpoint. This is, in essence, the principle articulated in Justice Blackmun's *Pico* concurrence: the First Amendment abhors a government *intent* to suppress speech.<sup>244</sup> One might retort

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<sup>242</sup> Mark Yudof makes this point most fully. "Substantial dangers lurk, even in democratic countries, in government's sweeping power to communicate. . . . There is the danger that government communications will be employed to falsify consent. In a democratic polity, it is one thing to employ mass communications to *implement* decisions that in some loose sense represent the majority will. It is quite another thing to attempt to *fashion* a majority will through uncontrolled indoctrination activities. The line is a blurred one." YUDOF, *supra* note 120, at 15; *see also* Shiffrin, *supra* note 27, at 568; Bezanson & Buss, *supra* note 25, at 1491–96.

<sup>243</sup> LEVINSON, *supra* note 140, at 80–81; MACKINNON, *supra* note 28, at 77.

<sup>244</sup> *See also* YUDOF, *supra* note 120, at 15, 164–73 (arguing that government speech should be designed to enhance autonomous decision making by citizens, while—as difficult as it may be in practice to make this distinction—government speech that tends to undermine citizens' ability to make well-informed and independent choices should be avoided or suppressed); Post, *Subsidized Speech*, *supra* note 27, at 185 (noting our discomfort with government "decision rules" that are inconsistent with the ideal that there should be a free marketplace of ideas).

that as government “thought control” is inevitable, it is better to be explicit about the agenda being promoted. More cynically, one could claim that it is pointless for the Left, in contrast to the Right (as exemplified by, for instance, Edwin Meese), to be squeamish about deploying the government’s resources to instantiate an orthodoxy of opinion. Such responses, however, paper over real dissimilarities that may be of constitutional moment. There is a large difference between accepting that all of our information and opinions are to some degree influenced by government action—that the “state of nature” form of political discourse is unrecoverable<sup>245</sup>—and attempting to implement a unified program of indoctrination. It may be infinitely more tolerable to live under a set of somewhat ramshackle institutions working at cross purposes ineffectually than to live under an efficient and undivided power. (The design of our system of government—which is characterized by federalism and separation of powers—is predicated on this belief.) By the same token, the haphazard effect of government action on speech is perhaps preferable to deliberate manipulation.<sup>246</sup>

All of these concerns flow from a generalized commitment to free speech. But First Amendment values are not the only ones at stake in the particular case of hate speech. On the other side of the argument is the Fourteenth Amendment value of equality. Concerns

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245 See TUSSMAN, *supra* note 26, at 93–99 (discussing the ways in which the “free” public forum is constituted by government actions).

246 Not everyone would agree. There has been a recent surge of interest, led by Cass Sunstein and Richard Thaler, in what they call “libertarian paternalism.” Their argument, which aims to redeem the concept of paternalism, departs from the recognition that the environment in which individuals make choices—choices that in theory should be governed strictly by their preferences—is *already* structured by government action to influence their decisions. The existing default rule—to use one of Sunstein and Thaler’s examples, whether enrolling in an employee savings plan requires opting in or whether it is automatic and employees can opt out—will influence conduct, regardless of which way it is set. Since there is no truly neutral position for the state to take, they ask, why should it not set the default rule in the way that it believes will conduce to the best choices? Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159–60 (2003). Lawrence Lessig has pointed out that the law can set “default rules” in the realm of social meaning: laws can alter the significance of certain actions by mandating behavior. Lessig uses the example of laws requiring individuals to wear seatbelts: the choice to wear a seatbelt can signify an insulting lack of trust in one’s driver if it is free, while if the law mandates seatbelt use putting one on becomes an ambiguous gesture—it might be motivated by fear of the driver’s incompetence, or it might be motivated by desire to avoid a fine—and so it is deprived of its insulting force. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 998–1000 (1995). One can imagine applying Sunstein and Thaler’s method to social meaning: systematically exploring which laws tend, through such “default setting,” to reinforce discrimination and the use of hateful language and altering them.



about deliberate government influence on speech through means that are constitutionally permissible fall into the penumbra of the First Amendment rather than striking at its center. This is territory, certainly, where the First Amendment commends caution. But with good reason, may we not venture forward? There are real differences among the values that one might seek to instantiate through programmatic government expression. The question, “Should the government use its speech to try to discourage the view that unborn fetuses are persons?” demands a different kind of analysis from the question, “Should the government use its speech to try to promote equality and tolerance?”<sup>247</sup> As an initial matter, the value of equality is constitutionally recognized. Moreover, tolerance is arguably not a substantive value but a practice that is a condition of democracy. And in this sense, the First Amendment too would be served by intervention.<sup>248</sup> Without tolerance and equality, debates in general about other substantive issues of public concern will be hampered.

On this view, the principles articulated by Justice Blackmun in *Pico* or by the district court in *Hentoff v. Ichord* sweep too broadly. It is not the case that wherever the government intends to quiet a particular group of speakers the Constitution is offended. Nor would it necessarily be true that, wherever an act of government expression is undertaken “with the hope and expectation that [other citizens] would bring social and economic pressures” to bear to discourage a group of speakers,<sup>249</sup> a court should intervene. Rather, the determination of whether the First Amendment compels us to disapprove such government expression—as a matter of principle no less than as a matter of doctrine—would depend on exactly what value the government sought to promote. When it is another constitutional value, First Amendment concerns should not be allowed alone to dictate our conclusion.

#### IV. CONCLUSION: WHERE DOES THIS LEAVE US?

It is time to draw some conclusions. The pragmatic policy recommendations this Article will make are relatively straightforward: precatory government speech, commemorative speech, and educa-

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<sup>247</sup> See YUDOF, *supra* note 120, at 54 (arguing that schools should promote critical thinking and “such values as tolerance, civility, liberty, equality, respect for individual dignity, participation in political decisions, freedom of expression, freedom to own and dispose of property, and respect for minority interests”); see also TUSSMAN, *supra* note 26, at 51–85 (arguing that the government should use its “teaching power” to inculcate civic virtues).

<sup>248</sup> See *supra*, notes 66–68 and accompanying text.

<sup>249</sup> *Hentoff v. Ichord*, 318 F. Supp. 1175, 1178 (D.D.C. 1970).

tion should all be used more extensively as means of intervening against hate speech. The free speech concerns weighing against their use are weak: none attach a benefit or detriment to the content of speech. Of these three, precatory speech and education have perhaps the most unexplored potential. As we have seen, the category of precatory speech is not limited to condemnatory sound bites; it includes a number of ways that the government branches spur one another to action and help forge consensus about the nature of social practices and values. It may also, over time, actually shift the ground under the hateful speaker's feet, robbing her of her confidence that she can invoke an entire system of subordination by using a few cheap words. And education offers a crucial opportunity to counteract the spread of hateful language through unreflective imitation and absorption of discriminatory attitudes. Fitfully, the government is already using both of these modes of expression to counteract the problem of hate speech. A more focused, consistent, and self-aware approach can enhance the efficacy of these interventions.

The strategic use of government subsidies and the regulation of non-public fora to prevent hate speech could also be explored more fully. In the examples considered—workplace rules and education programs—it was not clear that this tactic would significantly alter existing practices. But there may be other areas in which there is more ground to be gained.

When it comes to the most apparently coercive forms of government speech—advisory and investigatory statements—the benefits may not outweigh the detriments. As discussed above, there are weighty First Amendment and Fourteenth Amendment arguments in favor of creating, for example, a congressional committee charged with investigating and identifying those who promote hatred towards a given subordinated class. On the other hand, history suggests that such measures would be divisive and could conduce to a climate of paranoia and mutual accusation. The business of using the platform of government speech to name names and issue warnings would also, most likely, be messy: non-judicial government actors are not bound to follow the rules of procedure that have been developed in the courts to promote accurate fact-finding and guard against partiality. For all of these reasons, as a practical matter, this last category of government expression seems best avoided as a means of intervening against hate speech.

Beyond these pragmatic observations, there are more general points to make. This Article began with a consideration of the impasse that the debate between the anti-subordination camp and the free speech camp had reached. In exploring a middle way, the fore-

going discussion has also sought to question some of the basic assumptions of each side. On the anti-subordination side, the emphasis on regulation should be reevaluated. Punitive government action may offer retribution for the harm suffered by a victim of hate speech; but regulation is, at the same time, a crude intervention in the complex and subtle relationship between language and subordination. It is not the only, and may not be the most effective, way to combat hate speech. On the free speech side, we must recognize that if a deliberate government intervention against a particular kind of expression raises constitutional concerns, so too does government passivity in the face of linguistic acts that perpetuate subordination and inequality. The clash between the First Amendment and the Fourteenth Amendment has been resolved in the First Amendment's favor in the area of regulation. Outside that core area, a compromise may be in order.