Winter 1997

Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence

Christina E. Wells
University of Missouri School of Law, wellsc@missouri.edu

REINVIGORATING AUTONOMY: FREEDOM AND RESPONSIBILITY IN THE SUPREME COURT'S FIRST AMENDMENT JURISPRUDENCE

*Christina E. Wells**

Introduction

Several influential scholars agree that individual autonomy—the concept of people as rational, self-deliberating actors—has been a driving force behind the Supreme Court's protection of speech and expression.[1] A lively debate has arisen, however, as to whether autonomy *should* underlie free speech jurisprudence. Some commentators favor the Court's approach, arguing that freedom from government censorship is critical to our development as individuals and our capacity for self-governance.[2] In contrast, other scholars contend that First Amendment jurisprudence should focus less on protecting individual autonomy. They argue that the Court should occasionally uphold government regulation of speech, especially

---

* Associate Professor, University of Missouri School of Law; B.A., University of Kansas, 1985; J.D., University of Chicago, 1988. I want to thank Kent Gates, Michelle Cecil, Bill Fisch, Al Neely, Phil Peters, and Bob Pushaw for their invaluable comments and suggestions. I would also like to thank Rikki Jones and Dan Blegen for their helpful research and editorial criticisms. Finally, I am grateful for the generous support provided by the William C. Myers, Jr. and the Gary A. Tatlow Memorial Faculty Research Fellowships through the Missouri Law School Foundation.

[1] *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 141 (1993) ("[P]rinciples of autonomy have an enduring and important role to play in the theory and practice of free expression."); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986) ("[T]he freedom of speech guaranteed by the first amendment amounts to a protection of autonomy—it is the shield around the speaker.") (paraphrasing Harry Kalven) [hereinafter Fiss, *Free Speech and Social Structure*]; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233–34 (1992) (noting that "[f]reedom of expression is properly based on autonomy"); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279–80 (1991) (noting that the First Amendment is designed to protect democracy which is based on autonomous norms); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–55 (1991) (arguing that the "persuasion principle" found throughout the Supreme Court's jurisprudence is based on autonomy). *But see* Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1172 (1993) (arguing that the Supreme Court's free speech jurisprudence "is much richer and more complex than the autonomy model would suggest").

[2] *See, e.g.*, Fried, *supra* note 1, at 233 (noting that autonomy means that "the state has no claim to dominion over our minds: what we believe, what we are persuaded to believe, and (derivatively) what others may try to persuade us to believe"); Post, *supra* note 1, at 282 (arguing that "self-determination requires the maintenance of a structure of communication open to all").

regulation designed to remedy distortions in the current "marketplace of ideas"[3] or to otherwise "insure the richness of public debate."[4]

The autonomy debate has raged in First Amendment scholarship in recent years, both generally and in specific contexts such as hate speech,[5] broadcast regulation,[6] and campaign finance reform,[7] and the debate is far from resolution. The intractability of the two sides is largely due to the impoverished notion of autonomy that dominates the debate. By grounding the Court's autonomy rationale in its antipathy toward content discrimination of speech,[8] the debate posits autonomy as personified by isolated and self-interested individuals acting with little or no regard for

---

[3] *See* SUNSTEIN, *supra* note 1, at 28–43 (arguing generally for regulation of speech in a manner similar to New Deal legislation); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) ("The state [should] . . . counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy.") [hereinafter Fiss, *Why the State?*].

Justice Holmes first alluded to the "marketplace of ideas" in his dissent in *Abrams v. United States*, noting "that the ultimate good desired is better reached by free trade in ideas—the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The Court has since used Holmes's rhetoric in several free speech cases. *See* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257–59 (1986); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980); Red Lion Broad., Co. v. FCC, 395 U.S. 367, 390 (1969).

[4] Fiss, *Why the State?*, *supra* note 3, at 791; *see also* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 267 (1992) ("[I]n some circumstances, what seems to be government regulation of speech actually might promote free speech . . . .").

[5] *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434 ("At the center of the [hate speech] controversy is a tension between the constitutional values of free speech and equality."). *Compare* Fried, *supra* note 1, at 233–50 (arguing generally that the Court's focus on autonomy prevents regulation of hate speech) *with* SUNSTEIN, *supra* note 1, at 193 ("When speech helps to contribute to the creation of a caste system, the State can legitimately and neutrally attempt to respond . . . .").

[6] *See, e.g.*, Fiss, *Why the State?*, *supra* note 3 (making anti-autonomy arguments in the context of broadcast regulation); Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373 (1993) (discussing autonomy rationale in context of broadcasting); R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269 (1993) (making anti-autonomy arguments in the context of broadcast regulation).

[7] *See, e.g.*, SUNSTEIN, *supra* note 1, at 93–101 (arguing for regulation of campaign contributions and expenditures in order to promote political deliberation and equality); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1069–74 (1985) (questioning arguments that the State should be able to regulate campaign finances in the name of political equality). For a review of the relevant arguments regarding the First Amendment and campaign financing, see Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1260–69 (1994).

[8] The Court's prohibition against content discrimination essentially forbids the government from suppressing speech based upon "the message it conveys." Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987); *see, e.g.*, Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969). For a more thorough discussion of this principle, see *infra* Part III.A.

their community or the welfare of other individuals. The debate thus pits a rather unsympathetic version of autonomy against the needs of the community and the welfare of its citizens in a manner that is largely irresolvable.

A closer examination of the structure of the Court's free speech jurisprudence, however, reveals that it reflects a far richer and more complex concept of autonomy—one based on the rights and responsibilities of personhood that is generally associated with Immanuel Kant. Autonomy in this sense is not about atomistic individuals but about social creatures entitled to respect for their dignity. In turn, members of society are responsible for respecting the dignity of others. As such, Kantian autonomy attempts to reconcile, rather than divorce, individuality and community. With this understanding of autonomy, we can reexamine the scholarly debate, in particular the still hotly contested issue of hate speech regulation. An analysis of free speech cases in light of Kantian autonomy refutes the assumption that the Court has elevated the speech rights of individuals over the needs of the community. On the contrary, the Court's jurisprudence attempts to reconcile individuality and community.

Part I of this Article explores the conception of autonomy that scholars have generally attributed to the Court and discusses problems with that conception. Part II sets forth an alternative, Kantian conception of autonomy and discusses its implications for a system of laws regulating free expression. Part III analyzes the Court's free speech jurisprudence and its autonomy rationale. It specifically examines both the Court's distinction between content-based and content-neutral regulations of speech[9] and its approach to *low-value* speech,[10] demonstrating that they reflect a Kantian notion of autonomy. Finally, Part IV discusses the implications of Kantian autonomy for hate speech regulation, specifically focusing on the Court's controversial decision in *R.A.V. v. City of St. Paul.*[11] This final Part demonstrates that a Kantian notion of autonomy may be able to bring people on both sides of the debate closer together regarding autonomy's place in the Court's free speech jurisprudence.

---

[9] Content-based restrictions limit speech based upon its message. Content-neutral restrictions may impact speech but are not aimed at its content. The Court judges these regulations under different standards, applying strict scrutiny to content-based regulations while reviewing content-neutral regulations under a more lenient standard. For a more thorough discussion, see *infra* Part III.A.

[10] The Court has created several categories of speech that it considers to be of lesser value than other speech protected by the First Amendment. Such categories include: speech inciting unlawful action; fighting words; obscenity; libel; and commercial speech. Unlike high-value speech, the Court does not review regulations of low-value speech to determine whether they are content-based or content-neutral. Instead, the Court has developed tests unique to each category of low-value speech to determine whether regulations are constitutional.

[11] 505 U.S. 377 (1992) (striking down St. Paul ordinance banning racially hateful fighting words). For a more thorough discussion of *R.A.V.*, see *infra* Part IV.B.

I. The Conception of Autonomy Emerging from the Scholarly Debate

A central issue in the autonomy debate has been whether the government's regulation of speech can improve the quality of public discourse. Scholars on both sides of the issue agree that the Court is antipathetic toward such regulation, and emphasizes that its current jurisprudence is particularly hostile toward government suppression of speech based upon its content.[12] Thus, the debate's focus is whether the Court's approach is defensible.

Scholars who generally favor[13] the Court's approach point out that our "status as rational sovereign[s] requires that [we] be free to judge for [ourselves] what is good and how [we] shall arrange [our] li[ves] . . . ."[14] Thus, the Court's hostility toward government suppression of speech is essential to preserve public discourse and, ultimately, our capacity for self-governance.[15] In contrast, scholars criticizing the Court's unrelenting antipathy toward government regulation of speech agree that it stems from a desire to protect autonomy,[16] but view the consequences negatively. According to these commentators, the Court's desire to erect a "shield around the speaker"[17] actually distorts public debate and undermines democracy, primarily by ignoring the fact that the State is not the only threat to speech.[18] They argue that in today's era of huge media corporations

---

[12] *See, e.g.*, Fiss, *Free Speech and Social Structure*, *supra* note 1, at 1408–09 (noting that the Court's "rule against content regulation . . . stands as the cornerstone of the Free Speech Tradition"); Fried, *supra* note 1, at 233–34 (asserting that Court's First Amendment jurisprudence is hostile toward "impositions by government"); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993) ("The Supreme Court has been largely hostile to this agenda, objecting to its tendency to achieve its purposes through the suppression of individual speech."); Strauss, *supra* note 1, at 334–35 (noting that the "persuasion principle," which "holds that the government may not suppress speech on the ground that the speech is likely to persuade people" has heavily influenced the Court's free speech jurisprudence); *see also* cases cited *supra* note 8.

[13] I use the term "generally favor" to indicate that these scholars tend to agree with the Court's antipathy toward suppression of speech based upon its content. That is not to say that they necessarily agree with every aspect of the Court's jurisprudence.

[14] Fried, *supra* note 1, at 233.

[15] *See, e.g.*, *id.* at 233 (noting that autonomy does not "requir[e], indeed self-respect forbids, that I cede to the state the authority to limit my use of my rational powers"); Post, *supra* note 12, at 1116 ("Censorship cuts off its victims from participation in the enterprise of autonomous self-government . . . ."); Strauss, *supra* note 1, at 356 (noting that "violations of the persuasion principle infringe human autonomy: they manipulate people by, in part, taking over their thinking processes . . . .").

[16] *See, e.g.*, Fiss, *Free Speech and Social Structure*, *supra* note 1, at 1409–10.

[17] *Id.* at 1409.

[18] *See, e.g.*, SUNSTEIN, *supra* note 1, at xix, 93 ("[A]utonomy, guaranteed as it is by law, may itself be an abridgement of the free speech right . . . . My special concern is that the First Amendment is sometimes used to undermine democracy."); Fiss, *Free Speech and Social Structure*, *supra* note 1, at 1409–13 (discussing generally tension between autonomy and rich public debate paradigms).

and social inequality, it is far too easy for politically or economically powerful speakers to corner the speech market, thereby distorting debate as much or more than any government regulation.[19] Instead of focusing on autonomy, which exalts the speaker's rights[20] and is consistently hostile to government regulations, these scholars conclude that we should view "the state not only as an enemy but also as a friend of speech . . . . When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment."[21]

One of the most striking aspects of the debate is the conception of autonomy that underlies it. Both sides assume that the Court's hostility toward content discrimination is the best example of its concern for protection of autonomy. Autonomy in this sense translates into individual freedom from government interference. Moreover, once conceived of as a negative liberty, autonomy becomes closely associated with speakers; as the debate is framed, autonomy in the Court's free speech jurisprudence means freedom of the speaker to say whatever she wants.[22] It is this

---

[19] *See, e.g.*, Fiss, *Why the State?*, *supra* note 3, at 787–90 (noting that current public debate is dominated by large television networks and newspaper corporations who can ignore or silence particular viewpoints); Sunstein, *supra* note 4, at 270–72 (discussing various distortions of debate created by private actors). Professors Fiss and Sunstein use the broadcasting context to illustrate their belief that private actors are as much a threat to speech as are government actors. One can extend the argument, however, to any instance in which there is inequality of resources or social or political power. *See* Fiss, *Free Speech and Social Structure*, *supra* note 1, at 1410–12 (discussing problems that scarcity and social inequality pose for current free speech jurisprudence); *see also* Lawrence, *supra* note 5, at 466–72 (noting the problems that racism and unequal social power pose in the free speech context).

[20] *See* Fiss, *Free Speech and Social Structure*, *supra* note 1, at 1408–13 (arguing that the Court's jurisprudence exalts the liberty of the speaker over the collective self-determination of the community); *see also* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 115 (1992) (noting the "primacy of individualism" in much of the Court's free speech jurisprudence).

[21] Fiss, *Free Speech and Social Structure*, *supra* note 1, at 1416; *see also* SUNSTEIN, *supra* note 1, at xix (arguing that "government controls on the broadcast media, designed to ensure diversity of view and attention to public affairs, would help the system of free expression. Such controls could promote both political deliberation and political equality.").

[22] Detractors of autonomy believe that it focuses too much on the speaker's rights. *See, e.g.*, Fiss, *Free Speech and Social Structure*, *supra* note 1, at 1408–13. It is not as clear whether supporters of the Court believe that autonomy only involves the rights of speakers. Much of their rhetoric suggests that they view autonomy as the right to be free from government interference with our thought processes. *See, e.g.*, Fried, *supra* note 1, at 233. Such a view of autonomy focuses not only on the speaker but also on the audience's right to hear information. Moreover, it is also unclear whether these scholars believe that the *Court's* conception of autonomy is listener-oriented. Professor Strauss, for example, puts forth his own audience-oriented version of autonomy. *See generally* Strauss, *supra* note 1. Yet he maintains that the Court's jurisprudence is currently "well suited to consider free speech issues when the claim to freedom of expression is based on the rights of the speaker." David A. Strauss, *Rights and the System of Freedom of Expression*, 1993 U. CHI. LEGAL F. 197, 198.

Ultimately, by concentrating on only one aspect of the Court's jurisprudence—free-

characterization of autonomy that makes the debate so intractable. Labeling autonomy solely as the right of the speaker conjures up images of atomistic individuals saying whatever they wish with little regard for the needs of others.[23] Scholars thus associate autonomy with the lone speaker defending her right to shout racial epithets or the large corporation defending its right to donate huge sums of money to political candidates. Both invoke the label "freedom of speech" while ignoring the substantial emotional harm and distortion of public debate such speech can cause. Under the terms of the debate, one is forced to choose between being either pro-autonomy *or* pro-community. Society, and more importantly the Supreme Court, apparently cannot value both ideals.

But does the debate accurately portray the concept of autonomy reflected in the Court's free speech jurisprudence? Scholars are at least partially correct in locating an autonomy rationale in the Court's hostility toward government censorship. Their mistake, however, is focusing *only* on that aspect of the Court's jurisprudence.[24] In order to fully understand the Supreme Court's conception of autonomy, one must examine the overall structure of the Court's jurisprudence, which encompasses not only the Court's principle against content discrimination but also its treatment of low-value speech. That examination reveals a richer and more complex notion of autonomy, one that focuses not only on freedom from government interference but also on private citizens' relationships with

---

dom from government interference with speech—pro-autonomy scholars have at least *allowed* the debate to be labeled as one pitting the rights of speakers against the rights of others and the community. *See, e.g.*, Gardbaum, *supra* note 6, at 381 ("[I]n the First Amendment context, the value of autonomy tends to be equated (by its proponents and opponents alike) automatically and exclusively with the autonomy of speakers.").

[23] Criticism of the notion of autonomy as embodying selfish individualism is not limited to the free speech context. Rather, it has been the basis of a broader jurisprudential debate over the nature of liberal theory. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47–48 (1991) (criticizing the liberal image of the "rights-bearer as a self-determining, unencumbered individual, a being connected to others only by choice"); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 182 (1982) (criticizing the liberal notion of people as "unencumbered selves").

[24] Scholars' emphases on the Court's prohibition against content discrimination is largely understandable. Over the last few decades the Court has paid increasing attention to its prohibition against content discrimination. *See, e.g.*, Paul B. Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 204 (1982) ("Since its announcement [in 1972], the constitutional principle limiting the power of government to distinguish speech according to its content has played a significant role in the Supreme Court's decisions."); Stone, *supra* note 8, at 46 ("The content-based/content-neutral distinction plays a central role in contemporary first amendment jurisprudence."). Indeed, some of the Court's recent cases appear to make that principle the most important aspect of its jurisprudence. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that the government cannot engage in selective content discrimination against speech even if that speech was otherwise unprotected by the First Amendment); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

each other. This conception of autonomy is far removed from atomistic individualism. Instead, it recognizes that we are social beings with rights and responsibilities. This critical insight may provide a middle ground to the debate's otherwise rigid division between autonomy and community.

II. Autonomy in Kant's Moral and Political Theory

The conception of autonomy underlying the Court's free speech jurisprudence derives primarily from Immanuel Kant's moral and political philosophy. I rely on Kant not only because he was "arguably the most important moral philosopher of the modern period"[25] but also because his "extraordinarily powerful [theory] . . . still seems to many thoughtful people to be an essentially correct view."[26] This Part discusses the major themes of Kant's philosophy and its general implications for a system of free expression.[27] Part III then discusses the Court's actual free speech jurisprudence and its relation to Kantian philosophy.

A. Kantian Theory

In the Kantian ethic, "every rational being exists as an end in himself."[28] Thus, Kant equates autonomy and personhood. Scholars interpret autonomy, in this sense, as less a right than a capacity of persons to "make and act on their own decisions."[29] Significantly, our innate autonomy (or freedom or dignity)[30] does not leave us entirely free to act to satisfy our desires. Rather, each individual's autonomy implies an obligation to respect the freedom of others and imposes responsibility when we fail to

---

[25] ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY xiii (1989).

[26] *Id.*

[27] A complete analysis of Kantian philosophy is beyond the scope of this Article. My modest aim here is to highlight Kant's key ideas, especially as they relate to autonomy.

[28] IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46 (Lewis W. Beck trans., Bobbs-Merrill 1959) [hereinafter KANT, FOUNDATIONS].

[29] Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 878 (1994) [hereinafter Fallon, *Autonomy*]; *see also* JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 80 (1970) (noting that in Kantian theory "[t]he worth of a rational being, and thus the worth of man, consists . . . in his autonomy from the course of mere phenomenal nature. For his dignity consists in his being a self-legislative member in a realm of ends."); SULLIVAN, *supra* note 25, at 235 (defining Kantian autonomy as "the ability and obligation of a person to act on rational principles of his or her *own* adoption").

[30] As one scholar has noted, "[i]n Kant's moral theory it is usually possible to use the word 'autonomy' in place of 'freedom.' An autonomous person is one who judges and acts freely . . . by principles of reason alone." SULLIVAN, *supra* note 25, at 46. Similarly, Kant's philosophy tends to treat the concepts of autonomy and freedom as interchangeable with the concept of humans' inalienable dignity. *See id.* at 193–95 (discussing concepts of autonomy and dignity with respect to Kant's universal moral law). I also will use freedom, dignity, and autonomy interchangeably when discussing Kantian notions of autonomy.

do so.[31] Kantian autonomy is considered to be a foundation for moral precepts—in other words, what we *ought* to do given the innate dignity of all persons. Nevertheless, autonomy is not a concept limited to the moral realm. Instead, Kant's notion of autonomy has a significant place in his political theory, defining not only the role of the State but also the legal rights and obligations of citizens toward each other.[32]

According to Kant, the ultimate justification of the State is to protect the autonomy of its citizens.[33] As an initial matter, our innate autonomy

---

[31] *See* KANT, FOUNDATIONS, *supra* note 28, at 49 (noting that our inherent freedom operates as "the supreme limiting condition on the freedom of the actions of each man"); *see also* Fallon, *Autonomy*, *supra* note 29, at 891 (noting that ascriptive Kantian autonomy "implies responsibility for harms voluntarily committed against others"); SULLIVAN, *supra* note 25, at 47 ("For Kant, the term 'autonomy' denotes our ability and responsibility to know what *morality* requires of us and our determination not to act immorally.").

According to Kant, all of our moral judgments must be universalizable: we must act in a way consistent with a moral law that we would apply to ourselves and not just others. Given that people are ends in themselves, morality requires that we act respectfully of the personhood or autonomy of all others. As Kant notes:

> Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will . . . . Thus if there is to be a supreme principle and a categorical imperative for the human will, it must be one that forms an objective principle of the will from the conception of that which is necessarily an end for everyone because it is an end in itself. Hence this objective principle can serve as a universal practical law. The ground of this principle is: rational nature exists as an end in itself.

KANT, FOUNDATIONS, *supra* note 28, at 46–47. For a more thorough discussion of Kant's notion of universalization, see MURPHY, *supra* note 29, at 65–86.

[32] Some scholars disagree with the claim that autonomy underlies Kant's political theory. Professor Fletcher, for example, agrees that Kant's moral theory derives from notions of autonomy, *see* George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 541 (1987) (noting that Kant's moral theory is grounded in a concept of "absolute human worth"), but asserts that his political theory is not "an application and extension of [Kant's] moral concepts," *id.* at 553. Despite Professor Fletcher's interesting argument, I am persuaded by the weight of scholarship that treats both Kant's moral and political philosophy as stemming from the idea of autonomy. *See, e.g.*, MURPHY, *supra* note 29, at 56 (stating that Kant's "'supreme principle of morality' . . . bears on the theory of right" which is the basis of his political philosophy); SULLIVAN, *supra* note 25, at 258–59 (arguing that Kant's "moral law appears . . . as the political Principle of Right"); Peter Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559 (1987) (arguing generally that the notion of autonomy in Kant's moral theory also appears in his political theory); Ernest J. Weinrib, *Law as Idea of Reason*, *in* ESSAYS ON KANT'S POLITICAL PHILOSOPHY 15, 41 (Howard L. Williams ed., 1992) (noting that the "concept of right [in Kantian political theory] presupposes the equal status of free wills").

[33] *See, e.g.*, IMMANUEL KANT, ON THE COMMON SAYING: 'THIS MAY BE TRUE IN THEORY, BUT IT DOES NOT APPLY IN PRACTICE', *reprinted in* KANT: POLITICAL WRITINGS 61, 74 (Hans Reiss ed. & H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991) [hereinafter KANT, THEORY & PRACTICE] (discussing the "*freedom* of every member of society as a *human being*" as a foundation of the civil state); *see also* SULLIVAN, *supra* note 25, at 240 ("Kant's most significant contribution to the development of classical liberal theory . . . is his claim that the *justification* of the state ultimately must rest on *moral* grounds, on the innate freedom of each person . . . .").

surely limits the powers of the State against us; a government recognizing the autonomy of its citizens necessarily derives its authority from the rational consent of the governed.[34] Thus, the State has no power to coerce us to act consistently with its independent conception of what is right or good. Rather, its laws must respect our ability to deliberate and our capacity to choose.[35] Viewed in isolation, this aspect of Kantian theory seems to support the concept of autonomy emerging in the scholarly debate, which embodies only the right of individuals against the government. But Kant's political philosophy is not so one-sided.

Recognizing that the actions of autonomous individuals operating in a society can clash, Kant believed that the State could bring its coercive power[36] to bear against its citizens and thereby limit their freedom, in one, and only one, circumstance—when some citizens' actions infringe upon the freedom of others, and coercion is necessary to preserve the others' autonomy.[37] Such coercive action by the State preserves the dignity of its citizens by ensuring that individuals act in a manner that respects the

---

[34] *See, e.g.*, IMMANUEL KANT, THE METAPHYSICS OF MORALS (1797), *reprinted in* KANT: POLITICAL WRITINGS, *supra* note 33, at 131, 139, 163 [hereinafter KANT, METAPHYSICS OF MORALS] ("[T]he Supreme power originally rests with the people . . . . [Each citizen has the] lawful *freedom* to obey no law other than that to which he has given his consent."). Not surprisingly, Kant believed that the only moral government—the only government recognizing the autonomy of its citizens—was a republic. *Id.* at 163.

[35] Kant criticized a paternalistic government, even one that acts out of benevolence:

> A government might be established on the principle of benevolence towards the people, like that of a father towards his children. Under such a *paternal government* . . . the subjects, as immature children who cannot distinguish what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgement of the head of the state as to how they *ought* to be happy, and upon his kindness in willing their happiness at all. Such a government is the greatest conceivable *despotism*, i.e. a constitution which suspends the entire freedom of its subjects, who thenceforth have no rights whatsoever.

KANT, THEORY & PRACTICE, *supra* note 33, at 74; *see also* KANT, METAPHYSICS OF MORALS, *supra* note 34, at 161–62 (noting that autocratic government is most dangerous to free will and autonomy).

[36] As used here, the term "coercive power" refers to both the State's power to define and punish illegal actions and its power to enforce civil obligations, such as contracts. Kant discusses both types of coercion throughout his political theory. *See, e.g.*, KANT, METAPHYSICS OF MORALS, *supra* note 34, at 154–59 (discussing the right of criminal punishment); IMMANUEL KANT, THE PHILOSOPHY OF LAW 48 (W. Hastie trans., T. & T. Clark, Law Publishers 1887) (discussing enforcement of debt collection as based in the Principle of Right).

[37] *See* KANT, METAPHYSICS OF MORALS, *supra* note 34, at 134. Kant notes:

> [I]f a certain use to which freedom is put is itself a hindrance to freedom in accordance with universal laws (i.e., if it is contrary to right), any coercion which is used against it will be a *hindrance* to a *hindrance of freedom*, and will thus be consonant with freedom in accordance with universal laws—that is, it will be right. It thus follows by the law of contradiction that right entails the authority to apply coercion to anyone who infringes it.

freedom of others.[38] Thus, the capacity for autonomy creates a moral entitlement that imposes an obligation, enforceable by the State, to respect the autonomy of other persons.

There is, however, a significant limitation on the State's ability to enforce this obligation. The State may protect our freedom from infringement by others, but only with respect to external actions and not with respect to the motives for such actions.[39] As Professor Roger Sullivan explains, the State may "constrain the citizens from violating the respect due others, but it cannot insist that they do so because they respect them."[40] This limitation is important because it implies a distinction between acceptable and unacceptable State uses of coercion. State coercion designed to preserve each citizen's autonomy from unwarranted interference comports with a general respect for the autonomy of all citizens. But coercion designed to bring internal motives in line with respect for such freedom imposes the State's view of what is right or good on its citizens.[41]

Id. Importantly, only the State is entitled to use coercion to preserve freedom. Individuals are not so entitled. *See, e.g.*, KANT, THEORY & PRACTICE, *supra* note 33, at 75 ("[N]o-one can coerce anyone else other than through the public law and its executor, the head of the state . . . .").

[38] According to Kant, "[e]very action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is *right*." KANT, METAPHYSICS OF MORALS, *supra* note 34, at 133; *see also* KANT, THEORY & PRACTICE, *supra* note 33 at 75–76 ("All right consists solely in the restriction of the freedom of others, with the qualification that their freedom can co-exist with my freedom within the terms of a general law . . . ."). The "Principle of Right" is thus a slightly altered version of Kant's universal moral law. *See supra* note 31. It is the Principle of Right that permits the only acceptable State coercion against its citizens. *See* SULLIVAN, *supra* note 25, at 242 ("Such coercion, used to protect everyone's outer exercise of freedom equally by outlawing coercion by individuals, is the only permissible limitation on the freedom of the individual.").

[39] Kant made clear that "[t]he concept of right . . . applies only to those relationships between one person and another which are both external and practical." KANT, METAPHYSICS OF MORALS, *supra* note 34, at 132–33. Thus,

> although [the] law imposes an obligation on me, it does not mean that I am in any way expected, far less required, to restrict my freedom *myself* to these conditions purely for the sake of this obligation. On the contrary, reason merely says that individual freedom *is* restricted in this way by virtue of the idea behind it . . . .
>
> If it is not our intention to teach virtue, but only to state what is *right*, we may not and should not ourselves represent this law of right as a possible motive for actions.

Id. at 133–34. In this sense, Kant's Principle of Right is a slightly restricted version of his moral law which does concern itself with the motives for our actions.

[40] ROGER J. SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS 24 (1994).

[41] Not only is any attempt to coerce our internal motives illegitimate, it is, as a practical matter, impossible. *See* IMMANUEL KANT, THE END OF ALL THINGS, *reprinted in* PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 93, 102 (Ted Humphrey trans., Hackett Publishing Co. 1983) ("[I]t is contradictory to *command* someone not only to do something but to do it willingly.").

Thus, our obligations to each other, while legally enforceable, are still tempered with the ability to believe what we wish.

Viewing Kantian political theory as a whole, one sees a different view of autonomy than that which has emerged in the autonomy debate. Rather than focusing on autonomy as a right to be free from interference, Kant sees autonomy as an innate capacity of each person, which imposes obligations on us as members of an organized society. As such, Kantian autonomy is not the right of atomistic individuals working toward their own personal goals. Rather, autonomy recognizes that people are "inherently social being[s who] . . . live and move and have their being in a public forum."[42]

B. Implications for a System of Free Expression

What would a system of laws designed to facilitate free expression look like if based upon a Kantian conception of autonomy? While Part III discusses many of the nuances of such a system as it exists in the Supreme Court's jurisprudence, a broad sketch of some of the more significant aspects of that system is appropriate here for a better understanding of its overall foundation.

As an initial matter, such a system would not focus on the rights of the speaker qua speaker but on the integrity of our thought processes as individuals and members of a community. Our thought processes are integral to our capacity for deliberation and self-governance. Ensuring their integrity is thus a necessary aspect of any system of laws built upon Kantian autonomy. Given that we develop our thought processes by communicating with others, and thereby develop our capacity for self-governance, protecting public expression is especially important. As Kant asks, "[H]ow much and how accurately would we *think* if we did not think, so to speak, in community with others to whom we *communicate* our thoughts and who communicate their thoughts to us[?]"[43] Thus, we should protect

---

[42] Weinrib, *supra* note 32, at 41; *see also* SULLIVAN, *supra* note 25, at 260 (noting that Kantian theory "insist[s] that we must think of our moral destiny as part of a larger whole encompassing first all our fellow citizens and then all mankind"); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1566 (1996) ("[I]n the transition from [Kant's] moral philosophy to political philosophy, Kant insists that we must now appreciate that there are others in the world besides ourselves . . . .").

[43] IMMANUEL KANT, WHAT IS ORIENTATION IN THINKING, *reprinted in* KANT: POLITICAL WRITINGS, *supra* note 33, at 237, 247; *see also* IMMANUEL KANT, AN ANSWER TO THE QUESTION: 'WHAT IS ENLIGHTENMENT?,' *reprinted in* KANT: POLITICAL WRITINGS, *supra* note 33, at 54, 55 (suggesting the need "to make *public use* of one's reason in all matters"); HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 40 (Ronald Beiner ed., 1982) (noting that Kant "believe[d] that the very faculty of thinking depends on its public use; without 'the test of free and open examination,' no thinking and no opinion-formation are possible. Reason is not made 'to isolate itself but to get into the community with others.'") (footnote omitted).

those who publicly express themselves because of their contributions to the development of the rational capacities of both the speaker and her audience.[44]

Obviously, protection from overreaching state censorship is essential to the public exercise of our rational faculties.[45] A system of free expression based on Kantian autonomy, however, would not merely concern itself with protection against government suppression. Because the State's purpose is to preserve the dignity of its citizens, such a system would also ensure that citizens use speech consistently with autonomy. The State can and should regulate speech that, by attempting to override the thought processes of other individuals, disrespects their rational capacities.[46] Such speech does not facilitate, but rather detracts from, the public exercise of reason and is therefore the proper subject of the State's coercive powers.

Determining when speech is coercive is no easy task. The task is made more difficult by the fact that the State must walk a fine line between regulating the external and internal aspects of speech. The State must regulate speech because of the coercive impact it has on our thought processes, not because of any particular idea that is expressed. The ability to test ideas through public communication is a necessary aspect of autonomy; we cannot relinquish it to the State or any other person. Deeming speech coercive because the government or its citizens dislikes or finds harmful the ideas expressed imposes an orthodoxy and cuts off debate in an impermissible manner.

In sum, a system of free expression based on a Kantian notion of autonomy involves more than the freedom of the speaker to speak as she wishes. Rather, it involves the ability and responsibility of individuals, as part of a community, to engage in dialogue in order to develop their rational capacities.

---

[44] *See* ARENDT, *supra* note 43, at 39 (noting that Kantian theory does not conceive of the right to speak as merely "the right of an individual to express himself and his opinion in order to be able to persuade others to share his viewpoint" but as a way to develop our reasoning abilities).

[45] Kant argued strongly for citizens' rights to express themselves, especially in matters critical of government. *See, e.g.*, KANT, THEORY & PRACTICE, *supra* note 33, at 85 (noting that "freedom of the pen" is critical to safeguard the rights of citizens against the government) (emphasis omitted).

[46] I base this argument on Kant's moral and political theory, but it is, to some extent, my extension of his principles. Kant clearly argued against government suppression of speech, but his views on regulation of private coercive speech are less developed. Nevertheless, Kant's philosophy, especially his belief that laws permitting lying would make a just State impossible, supports regulation of such speech. *See* IMMANUEL KANT, ON A SUPPOSED RIGHT TO LIE FROM ALTRUISTIC MOTIVES, *reprinted in* CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS ON MORAL PHILOSOPHY 346 (Lewis W. Beck trans., Univ. of Chicago Press 1949).

III. Autonomy as Reflected in the Structure of the Supreme Court's Free Speech Jurisprudence

My argument that the Court's jurisprudence reflects an autonomy rationale is subject to a few important caveats. First, I do not offer Kantian autonomy as a universal rationale explaining all of the Court's free speech jurisprudence. Indeed, there are so many intricacies to free speech doctrine that identifying a completely unifying principle may be impossible.[47] Kantian autonomy, however, largely explains at least two of the major "organizing principles"[48] of the Court's jurisprudence: the Court's review of regulations for content discrimination and its designation of certain speech as low-value.[49] Moreover, Kantian autonomy can illuminate those areas of jurisprudence on which the scholarly debate has concentrated.

Second, I do not assert that the Court has explicitly adopted Kantian autonomy as the basis of its doctrinal organizing principles. Other than Justice Brandeis's famous statement that "the final end of the State [is] to make men free to develop their faculties,"[50] few Justices have explicitly invoked such a concept.[51] Indeed, other factors arguably contradict my

---

[47] *See* HARRY KALVEN, JR., A WORTHY TRADITION 3 (1988) ("The Court has not fashioned a single, general theory which would explain all of its decisions . . . ."); Post, *supra* note 1, at 278 (noting that "first amendment doctrine . . . is a vast Sargasso Sea of drifting and entangling values, theories, rules, exceptions, predilections").

[48] The term "organizing principles" is Professor Williams's. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991) (defining "organizing principles as the multi-doctrinal themes the Supreme Court has recently begun using to clarify and give structure to the confused 'doctrinal web' surrounding First Amendment jurisprudence").

[49] Professor Williams would add the Court's *public forum* doctrine as a third pervasive structure to the two listed in the text. *See id.* at 616 n.2. To be sure, the Court's public forum doctrine is a major tenet of its First Amendment jurisprudence. However, it adds little to the analysis in this Article. The public forum doctrine is primarily designed to ensure that speakers have access to public property while still maintaining reasonable administration of government activities occurring on that property. Thus, in public fora—property such as streets and parks that have traditionally been open to speech activities—the Court generally applies its other traditional speech analyses. In other words, the Court applies its content-based/content-neutral and low-value speech approaches to resolve freedom of speech issues. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983). However, in nonpublic fora—those which are not traditionally associated with speech activities and in which the government has a greater interest in managerial control such as prisons and fairgrounds—the Court gives wide deference to decisions to restrict speech absent viewpoint discrimination. *See id.* at 46–49. While there is room for disagreement regarding whether a forum should be deemed public or nonpublic and whether the Court has been wise to allow the government so much latitude in nonpublic fora, such issues are beyond the scope of this Article. For my purposes, the public forum doctrine's importance is that it attempts to assure that all speakers have some public outlet for speech and that it applies the other two organizing principles in public fora. Both are consistent with notions of Kantian autonomy as discussed further in this Part.

[50] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[51] Only Justice Douglas's dissenting opinion in *Poe v. Ullman* explicitly relies upon

argument. For example, several Justices have eschewed a jurisprudence based on Kantian autonomy.[52] In addition, to the extent the Court has adopted an autonomy rationale, it has been hopelessly inconsistent, sometimes viewing the First Amendment as protecting speakers' rights[53] and sometimes as protecting listeners' rights.[54]

But the Court's manifestation of Kantian autonomy does not lie in the Court's rhetoric or in the beliefs of independent Justices. My argument is that the Court's overall structural approach and reasoning when resolv-

---

Kantian notions in the free speech context. *See* Poe v. Ullman, 367 U.S. 497, 514 (1961) (Douglas, J., dissenting). A search for the term "Kant" in Westlaw's SCT and SCT-OLD databases, which contain Supreme Court cases released for publication from 1790 to the present, turned up seven other opinions which include citations to Immanuel Kant. *See* Morgan v. Illinois, 504 U.S. 719, 752 (1992) (Scalia, J., dissenting); Delaware v. Van Arsdall, 475 U.S. 673, 697 n.9 (1986) (Stevens, J., dissenting); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 665 n.41 (1985) (Stevens, J., dissenting); Bell v. Wolfish, 441 U.S. 520, 581 n.10 (1979) (Stevens, J., dissenting); Lindsey v. Normet, 405 U.S. 56, 68 n.14 (1972); Baker v. Carr, 369 U.S. 186, 261 n.11 (1962) (Clark, J., concurring); Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133, 134 (1915).

[52] Justice Holmes, for example, was no fan of Kant's political theory, instead arguing that the law should recognize that people act on "justifiable self-preference." OLIVER WENDELL HOLMES, THE COMMON LAW 41, 41–44 (1923); *see also* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1267–83 (1983) (discussing Justice Holmes's jurisprudence and his "disdain" of a Kantian rationale for the law). Indeed, Justice Holmes's reference to speakers as "poor and puny anonymities," even in his opinions arguing for protection of speech, implies far less respect for human dignity than a Kantian rationale. *See* Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

Of the current Court, Chief Justice Rehnquist is the most obvious anti-Kantian candidate. His willingness to uphold even the most paternalistic regulations of speech, *see, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) (Rehnquist, C.J.) (upholding government regulation banning recipients of federal funds from counseling about the availability of abortion as a method of family planning); Posadas de P. R. Assocs. v. Tourism Co., 478 U.S. 328 (1986) (Rehnquist, C.J.) (upholding Puerto Rico statute banning casino advertising aimed at its citizens), is clearly inconsistent with a Kantian rationale. *See* Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1764 (1995) (arguing that *Posadas* and *Rust* are inconsistent with an autonomy rationale).

[53] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) ("[T]he concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is wholly foreign to the First Amendment."); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("'[I]t is a prized American privilege to speak one's mind.'") (quoting Bridges v. California, 314 U.S. 252, 270 (1941)); Kovacs v. Cooper, 336 U.S. 77, 80–81 (1949) (characterizing the right as the speaker's freedom to "express his views on matters which he considers to be of interest to himself and others").

[54] *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 791 n.31 (1978) ("The First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what the people may hear.") (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976)); Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748, 763–64 (1976) (noting the importance to the consumer of the "free flow of . . . information" regarding consumer drug prices); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (upholding access rules pertaining to broadcasters and noting that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount").

ing free speech issues is remarkably consistent with a Kantian ideal. Moreover, explicit recognition of a relationship between Kantian autonomy and the Court's free speech jurisprudence might alleviate some of the Court's doctrinal and rhetorical inconsistencies. The remainder of this Part outlines the most critical aspects of free speech doctrine insofar as they relate to Kantian autonomy.

A. The Court's Distinction Between Content-Based and Content-Neutral Regulations of Speech

The Court's approach to content-based and content-neutral regulations of speech distinguishes between government regulations that "limit communication because of the message it conveys"[55] (content-based regulations) and government regulations that affect speech but are not aimed at its content (content-neutral regulations).[56] The Court heavily disfavors content-based regulations, striking them down unless the government can show that the law is narrowly drawn to meet a compelling state interest.[57]

---

[55] Stone, *supra* note 8, at 47. Such regulations often restrict the expression of a particular viewpoint (e.g., a law restricting only anti-abortion speech), but they may also regulate the discussion of entire subject matters, such as a law restricting all discussion of abortion in public places.

[56] Two primary forms of such content-neutral restrictions exist. First, laws may aim to regulate expression but do so in a way that has nothing to do with the message conveyed, such as a law banning the use of amplified sound-trucks in private residential areas). *See* Kovacs v. Cooper, 336 U.S. 77 (1949) (holding that the regulation of sound trucks was constitutional). Second, such laws may aim at regulating conduct but have an incidental effect on expression, such as a law banning the burning of draft cards. *See* United States v. O'Brien, 391 U.S. 367 (1968) (upholding conviction of defendant for burning his draft card on the grounds that the government's interest in assuring the continuing availabity of draft cards was sufficient to override defendant's claim that his act was protected as symbolic speech). Prior to the Court's decision in Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment, though applied to prohibit demonstrators from sleeping in a park where a permitted round-the-clock demonstration intended to call attention to the plight of the homeless was in progress), the two forms of content-neutral regulations were thought to be judged under different standards. The Court upheld regulations aimed directly at expression under a standard similar to the one enunciated in *Clark*. *See* United States v. Grace, 461 U.S. 171, 177 (1983) (noting that the Court will uphold time, place, and manner regulations of speech if they are "content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" (citing Perry Educ. Ass'n. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983))). The Court, however, upheld regulations aimed at conduct but incidentally affecting expression only if they were within the constitutional power of the government, furthered an important or substantial government interest that was unrelated to the suppression of free expression, and were no broader than essential to further the government interest. *See, e.g.*, O'Brien, 391 U.S. at 377. In recent years, however, the Court has made clear that the *Clark* test applies in both situations. *See* Ward v. Rock Against Racism, 491 U.S. 781, 797–98 (1989). For criticism of the Court's current approach to content-neutral regulations, see Williams, *supra* note 49, at 636–54.

[57] *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502

In contrast, the Court reviews content-neutral regulations under the more lenient standard of intermediate scrutiny, upholding the regulations as long as they "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[58] The differing treatment of content-neutral and content-based regulations and the differing standards applied to each reflect that aspect of Kantian autonomy that requires the State to respect our thought processes.

The fact that content-based laws violate Kantian autonomy is best reflected in the purposes for which so many of those laws are enacted.[59] For example, the government often regulates speech because it does not trust individuals to make correct decisions if exposed to certain information.[60] Distrust of the ability of citizens to make decisions is antithetical to autonomy,[61] and the Court has invalidated numerous content-based laws that have such paternalistic justifications.[62] Also, government officials

---

U.S. 105 (1991) (invalidating law requiring any entity contracting with a criminal to publish a depiction of the crime to turn over income under the contract to the Crime Victims Board); Widmar v. Vincent, 454 U.S. 263 (1981) (holding unconstitutional university regulation barring religious organizations from using university facilities for religious purposes); Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972) (invalidating law banning all picketing except labor picketing near schools).

[58] *Clark*, 468 U.S. at 293, *quoted in Ward*, 491 U.S. at 791; *see also* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523–24 (1994) (examining whether, in light of *Clark*, an injunction against anti-abortion protesters should be prohibited as motivated by a content-based purpose).

[59] *See* Williams, *supra* note 49, at 618 (noting that the Court and scholars alike believe that "the special danger in cases of content discrimination lies in the fact that the government's purpose is connected to the 'communicative impact' of the speech regulated").

[60] *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748, 768 (1976) (dealing with State fear that information regarding drug prices might adversely influence consumer decision making); Whitney v. California, 274 U.S. 357, 371 (1927) (dealing with State fear that advocacy of communism would prompt people to attempt to overthrow the government).

[61] *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 31 [hereinafter Fallon, *Harassment*] ("To censor speech on the ground that the listener could not be trusted to evaluate its content would . . . affront the listener's autonomy in most cases."). Professor Fallon specifically bases his argument on what he calls "ascriptive" autonomy, *id.* at 30, a concept that he links directly to Kant. *See* Fallon, *Autonomy*, *supra* note 29, at 878. He further believes that "claims of ascriptive autonomy predominate in First Amendment doctrines dealing with the public forum, with governmental regulation of the traditional media, and with people's use of their homes and similarly private facilities to express themselves uninhibitedly." Fallon, *Harassment*, *supra* at 36.

[62] *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 791–92 (1979) ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments . . . . [I]f there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment."); *Virginia Citizen's Consumer Council*, 425 U.S. at 770 ("It is precisely this kind of choice, between the dangers of suppressing information,

often justify content-based restrictions by arguing that they protect citizens from offensive speech,[63] under the premise that citizens ought not to have to deal with unpleasant or abhorrent words and ideas. Attempts to protect citizens from disagreeable speech treat adults as children and deny their capabilities to withstand or counter unpleasant events. Further, they allow those holding a dominant viewpoint in society to silence or restrict the dissemination of views with which they disagree, thereby making the government a vehicle for private citizens' disrespect for the thought processes of others. Not surprisingly, the Court has also found this justification wanting.[64] Finally, the government may enact content-based restrictions simply because it disapproves of the speaker's point of view.[65] Such restrictions amount to governmental attempts to substitute its thoughts for those of its citizens, in effect determining for us which views are right and wrong. Again, the Court has recognized that such justifications are illegitimate.[66] Thus, by protecting against the improper motivations generally underlying content-based regulations of speech,[67] the Court's doctrine reflects a consciousness of our inalienable dignity and a desire to protect this dignity from coercive government incursions.

The Court's more lenient approach to content-neutral standards similarly fits within a Kantian autonomy rationale, as such restrictions do not usually impinge upon our innate dignity in the same manner as content-based limitations. Improper government motivation is less of a danger with content-neutral restrictions because, by definition, these regulations

---

and the dangers of its misuse if it is freely available, that the First Amendment makes for us."); *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 212 (1983) (noting that the Court has "long embraced an 'antipaternalistic' understanding of the first amendment").

[63] In *Cohen v. California*, California argued that it could "legitimately act . . . in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest." Cohen v. California, 403 U.S. 15, 21 (1971).

[64] *See id.* at 24, 26 (reversing defendant's conviction for disturbing the peace based upon his wearing a jacket with a "Fuck the Draft" logo).

[65] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 410 (1989) (discussing statute banning flag desecration in circumstances where the State believed "such conduct will lead people to believe that the flag does not stand for nationhood . . . or that the concepts reflected in the flag do not in fact exist"); Abrams v. United States, 250 U.S. 616, 617 (1919) (discussing federal statute prohibiting citizens from provoking or encouraging resistance toward the United States).

[66] *See, e.g.*, *Johnson*, 491 U.S. at 418 (striking down Texas's flag-burning statute); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (striking down law prohibiting public utilities from using monthly bill inserts addressing "controversial issues of public policy").

[67] The government obviously does not enact all content-based laws with improper motives. However, the likelihood of such motives has led the Court to require compelling justifications for all content-based regulations. Erecting a wall around speech in order to protect the integrity of our thought processes is consistent with a Kantian autonomy rationale. I disagree with Professor Stone who, while recognizing the strong distrust of government running through the Court's free speech jurisprudence, specifically eschews an autonomy rationale with respect to that distrust. *See* Stone, *supra* note 1, at 1173.

must be justified without reference to the content of expression. In the context of a law regulating the decibel levels of sound trucks, for example, such a justification might be that trucks blaring their messages in private residential neighborhoods are significant invasions of privacy.[68] That justification is relatively neutral, applies to all speech regardless of its message, and leaves open other opportunities of expression. Thus, the government does not appear to be regulating speech in a manner designed to coerce our thought processes.[69] Of course, ostensibly impartial justifications for content-neutral regulations can be pretextual: the government's real motive behind the law could be disapproval of the speaker's viewpoint.[70] Nevertheless, much of the time, the government's neutral justifications are legitimate efforts to balance expression with other important concerns, such as order or privacy. Furthermore, the Court does not merely rubber stamp content-neutral laws but applies intermediate scrutiny in order to ensure that content-neutral laws do not suppress speech inappropriately. To the extent that content-neutral regulations have a severe impact on viewpoints or speakers, the Court has been willing to strike down such regulations.[71]

Thus, the Court's approach to content discrimination is consistent with the Kantian desire to ensure the integrity of thought processes inte-

---

[68] *See* Kovacs v. Cooper, 336 U.S. 77, 81 (1949) (stating that purpose of ordinance banning use of sound trucks was to protect people from unreasonable noise and interference while in the privacy of their homes or businesses).

[69] Content-neutral regulations may have a much greater impact on the total quantity of speech than content-based regulations because they have the potential to restrict the free flow of information far more than restrictions on a single viewpoint. Thus, one could argue that such restrictions should be at least as disfavored as content-based restrictions. *See* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981). From the perspective of Kantian autonomy, however, such an impact is less of a problem than government attempts to impose its will upon its citizens, as is the case with content-based restrictions. Thus, content-neutral regulations are properly reviewed under a lesser standard. Moreover, the Court has shown a willingness to strike down even content-neutral laws that severely limit communication. *See, e.g.*, City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) (striking down law banning homeowners from displaying signs on their property); *see also* Stone, *supra* note 61, at 190 & n.5 (discussing cases in which the Court has found content-neutral laws unconstitutional because of the severe restriction on communication). In this sense, the Court's jurisprudence is consistent with the Kantian desire to ensure some public exercise of reason. *See supra* notes 43–44 and accompanying text.

[70] In *United States v. O'Brien*, 391 U.S. 367 (1968), for example, it appeared that the legislature's motives in criminalizing draft card burning were far less related to the ostensible goal of maintaining easy administration of the selective service system than they were to "put[ting] a stop to [a] particular form of antiwar protest, which [Congress] deemed extraordinarily contemptible and vicious." Dean A. Alfange, Jr., *The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 15.

[71] *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 143, 146–47 (1943) (striking down municipal ban on distribution of door-to-door circulars because the method of distribution was essential to poorly financed and often unpopular causes); *see also* Stone, *supra* note 8, at 81–86 (discussing the Court's approach to cases in which viewpoints are negatively impacted by content-neutral regulations).

gral to our capacity for autonomy. The Court's approach to content-based and content-neutral regulations, however, reflects only one aspect of Kantian autonomy—protection from State interference with our thought processes. One sees the other aspect of Kantian autonomy—regulating private citizens' attempted coercion of our thought processes—in the Court's approach to low-value speech.

B. The Court's Approach to Low-Value Speech

Although its First Amendment jurisprudence is generally protective of speech, the Court has never assumed that all speech is of equal value. Instead, the Court has created certain categories of low-value speech that it believes deserve less protection than other speech. Examples of such low-value speech are: speech that incites unlawful activity; fighting words; obscenity; and, to some extent, commercial speech and libel. Unfortunately, the Court has provided little guidance with respect to what speech should be considered low-value.[72] Its only consistent statement is that low-value speech is "no essential part of any exposition of ideas and is of such slight social value as a step to the truth that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality."[73] That statement, although explaining why the Court has created categories of low-value speech, does not explain *when* speech falls into those categories. Not surprisingly, scholars have widely criticized the Court for creating low-value categories which many believe have no place in First Amendment jurisprudence.[74] In addition, the Court's failure to

---

[72] *See, e.g.*, SUNSTEIN, *supra* note 1, at 125 ("[T]he Court has yet to offer anything like a clear principle to unify the categories of speech that it treats as 'low value.'"); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 334–35 (1995) (noting that the Court has never "explained what characteristics it considers in determining the value of speech"); Stone, *supra* note 61, at 194 (determining that "[t]he precise factors" used by the Court to determine when speech is low-value "remain somewhat obscure").

[73] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1948). The Court's description of speech as having no social value first appeared with respect to its fighting words doctrine. However, the *Chaplinsky* language, or variants thereof, has appeared in almost all of the low-value speech cases. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."); Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952) ("[L]ibelous . . . utterances are no essential part of any exposition of ideas."); Valentine v. Chrestenson, 316 U.S. 52, 54 (1942) (noting that "purely commercial advertising" does not amount to the "exercise . . . of communicating information and disseminating opinion").

[74] *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 326 (1970) (arguing that the Court's approach to low-value speech is incompatible with First Amendment principles); STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 44 (1990) ("[T]he very concept of low-value speech is an embarrassment to first amendment orthodoxy.") (footnote omitted); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 31 (1975) (arguing that the Court's

define specifically when speech becomes low-value has engendered much debate over the salient characteristics of such speech.[75]

Despite scholars' concerns, there is a unifying principle to the Court's low-value speech analysis that also illuminates its legitimate place in free speech jurisprudence. A close examination of the Court's approach to the various categories of low-value speech reveals that it is consistent with a Kantian notion of autonomy. Specifically, the Court has attempted to carve out as low-value speech that disrespects other citizens' thought processes, thus making it a proper subject for State regulation.[76] Furthermore, and consistent with Kantian autonomy, the Court has made a strong effort to limit State regulation only to speech that invades rather than *appeals* to our rationality. The remainder of this Part examines the Court's doctrine in five specific areas of low-value speech: incitement of illegal action; fighting words; obscenity; libel; and commercial speech.

---

approach is "radically inconsistent with the principle of equal liberty of expression"). *But see* SUNSTEIN, *supra* note 1, at 126 ("[A]ny well-functioning system of free expression must ultimately distinguish between different kinds of speech by reference to their centrality to the First Amendment guarantee."); Stone, *supra* note 61, at 195 n.24 ("The low value theory . . . is an essential concomitant of an effective system of free expression.").

[75] *See, e.g.*, Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 554 (1989) (suggesting several alternative theories for the Court's value distinctions among types of speech); Shaman, *supra* note 71, at 333–37 (discussing Court's approach to low-value speech and commentators' attempts to make sense of it); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603–04 (setting forth four-factor analysis for determining when speech is low-value).

[76] Few, if any, scholars have maintained that an autonomy rationale underlies the Court's low-value speech jurisprudence. Indeed, given the Court's rhetoric regarding "order and morality," I suspect that many scholars would agree with Professor Sunstein's statement that "any autonomy-based approach would make it difficult or impossible to distinguish between different categories of speech." Sunstein, *supra* note 4, at 303 (footnote omitted). However, at least two scholars argue that some government regulation of private speakers is consistent with an autonomy rationale, although not necessarily with a Kantian one. Professor Strauss argues that under an autonomy rationale one can regulate some coercive or manipulative speech. Strauss, *supra* note 1, at 362–68. Professor Baker similarly recognizes that an autonomy rationale may allow regulation of coercive speech. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 55–56 (1989).

Both scholars' theories differ from mine. Professor Strauss, although arguing that we should be able to regulate some coercive and manipulative speech in the name of autonomy, apparently does not believe that the Court's current low-value speech jurisprudence is firmly grounded in such a rationale. Strauss, *supra* note 1, at 361–63 (noting libertarian bias of Court's "persuasion principle" and suggesting alterations to allow regulation of private, coercive speech). Professor Baker, although arguing that coercive speech can be regulated consistent with an autonomy rationale, nevertheless appears to characterize autonomy largely as a speaker's right. BAKER, *supra*, at 54, 59 ("[T]o the extent that speech is involuntary, is not chosen by the speaker, the speech act does not involve the *self*-realization or *self*-fulfillment of the speaker . . . . [Respect for autonomy] is belied unless each person has a right to decide on and employ speech . . . for realizing substantive values and visions.").

1. Incitement of Illegal Action

The Court's doctrine regarding incitement provides an excellent illustration of the autonomy rationale in its low-value speech jurisprudence. According to the Court, the government can suppress speech advocating unlawful conduct only if "it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action";[77] mere "abstract teaching" of the moral necessity of such action will not sustain punishment.[78] For example, the State may punish speech designed to whip an angry mob into a violent and destructive frenzy, but it may not punish a political rally in which the speaker advocates violence as a tool for revolution.

The Court's requirement of imminent lawless action is easily justified as based upon concern for autonomy. Speech designed to incite immediate violence or lawless action does not appeal to our thought processes.[79] Rather, it disrespects our rationality and is designed to elicit an unthinking, animalistic response.[80] Thus, the Court's test protects our collective thought processes and imposes consequences on speakers who violate the freedom of citizens to think rationally. Acceptable state action, however, does not include punishing mere advocacy of unlawful action. Speech designed to persuade people to violate the law is not coercive in the same sense as speech designed to incite imminent lawlessness; the former contributes to rather than detracts from our deliberative processes, even if the idea advocated is perceived as undesirable. Punishment of such speech is an unreasonable impediment to our public exercise of reason, as the Court has recognized numerous times.[81] Thus, the Court's incite-

---

[77] Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (striking down Ohio criminal syndicalism statute); *see also* Hess v. Indiana, 414 U.S. 105, 108 (1973) (reversing conviction for disorderly conduct because defendant's statements at an antiwar rally were "nothing more than advocacy of illegal action at some indefinite future time"); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (reversing conviction for threatening President because defendant's words were merely "a kind of very crude offensive method of stating a political opposition to the President").

[78] *Id.*

[79] The distinction between coercive and persuasive speech is not easily drawn and defining such a distinction is well beyond the scope of this Article. That the Court believes the distinction can be made, however, supports my argument that its jurisprudence is consistent with Kantian autonomy. For a view on when speech is coercive, see BAKER, *supra* note 75, at 54–69.

[80] *See* Strauss, *supra* note 1, at 339 (arguing that speech inciting imminent lawless action "bypass[es] the rational processes of deliberation"). Judge Learned Hand originally made the distinction between incitement, which is a "trigger[] of action," and advocacy, which is a "key[] of persuasion." Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

[81] *See, e.g.*, *Hess*, 414 U.S. at 108; *Watts*, 394 U.S. at 708; Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 685 (1959) (striking down state law requiring the denial of licenses to show films which portray "acts of sexual immorality . . . as desirable").

ment doctrine maintains a narrow line to protect our rationality from both private and state interference.

2. *Fighting Words*

One can view the Court's approach to fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"[82]—in the same vein. In the Court's eyes, such words do "not in any proper sense communicat[e] . . . information or opinion";[83] rather, they are more akin to physical assaults.[84] As such, fighting words do not appeal to our rational or deliberative capacities. They are instead designed to induce us to react violently and without thinking, much as a punch in the mouth induces the victim to respond in an unthinking manner.

The fact that the Court refuses to consider offensive speech as being low in value further bolsters the autonomy rationale argument. In order to qualify as fighting words, speech must "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[85] The State cannot ban speech that does not rise to this level simply because people are offended or angered by the ideas expressed.[86] Distasteful or abhorrent speech, while often unpleasant or even painful, does not coerce or manipulate others to react in an immediately violent or irrational manner. In fact, offensive speech often expresses emotions that persuade others regarding the speaker's point of view[87] or at least invite debate.[88] Thus, as with its incitement doctrine, the Court has attempted to distinguish between speech that invades the dignity of others, for which the speaker must bear the consequences, and speech that must be free from state interference in order to protect our thought processes from state coercion.

---

[82] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[83] *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

[84] *See id.* (characterizing fighting words as "personal abuse"); *see also* David S. Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 MD. L. REV. 555, 588 (1976) (noting that fighting words are "similar in nature to a physical attack").

[85] Gooding v. Wilson, 405 U.S. 518, 523 (1972); *see also* City of Houston v. Hill, 482 U.S. 451, 461–62 (1987).

[86] *See* Texas v. Johnson, 491 U.S. 397, 418 (1989) (striking down Texas law prohibiting defacement of the flag in a manner that would "seriously offend" other persons); Cohen v. California, 403 U.S. 15, 26 (1971) (refusing to uphold defendant's breach of peace conviction based upon the offensiveness of "Fuck the Draft" logo).

[87] *See Cohen*, 403 U.S. at 25–26; *see also* Strauss, *supra* note 1, at 342–43 (noting that offensive speech may be persuasive and discussing limits on government regulation of such speech).

[88] *See Johnson*, 491 U.S. at 408–09 ("Our precedents . . . recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'") (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

3. Obscenity

The Court's obscenity doctrine is also consistent with Kantian autonomy. In *Roth v. United States*,[89] the Court held that obscenity did not enjoy First Amendment protection because it is "utterly without redeeming social importance."[90] In so holding, the Court defined obscenity as "material which deals with sex in a manner appealing to prurient interest."[91] Significantly, the *Roth* Court took great pains to distinguish obscenity from portrayals of sex expressing "ideas having even the slightest redeeming social importance,"[92] including unorthodox, controversial, or hateful ideas, which the Court believed should enjoy full constitutional protection. By requiring that obscene material have a "prurient" appeal, the Court's jurisprudence targets expression that is intended to appeal to our physical rather than our mental capacities, just as fighting words are like a physical assault rather than speech.[93] The Court's attempt to distinguish speech that disrespects our thought processes from sexually oriented speech that nevertheless appeals to our rational nature is analogous to the Court's line drawing with incitement and fighting words. Both distinctions allow the State to protect against and punish private interference with our deliberative capacities while still maintaining unfettered dialogue, even on topics that some might find uncomfortable.

Claiming that the Court's approach to obscenity is consistent with Kantian autonomy is not without controversy. Three potential counterarguments are especially important in that respect. First, many scholars contend that the Court's determination that obscenity has no value actually violates our autonomy by imposing a dominant viewpoint regarding acceptable lifestyles.[94] Like these scholars, I find troubling the notion that

---

[89] 354 U.S. 476 (1957).

[90] *Id.* at 484.

[91] *Id.* at 487. The Court has since refined the *Roth* standard. Currently, it defines obscenity as that material which appeals to a prurient interest, depicts sexual conduct in a patently offensive manner, and lacks serious, redeeming social value. *See* Miller v. California, 413 U.S. 15, 24 (1973).

[92] *Roth*, 354 U.S. at 484.

[93] *See* EMERSON, *supra* note 74, at 496 (noting that an obscene communication "imposed upon a person contrary to his wishes, has all the characteristics of a physical assault"); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 625 (1990) (noting the similarity of the "prurient interest" and "fighting words" standards in the Court's determination that speech is low-value); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 926 (1979) (arguing that, by definition, obscenity "*is* sex" and not speech).

[94] *See, e.g.*, Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1565 (1988) (criticizing suppression of obscenity as based in "moralistic paternalism") (citing J. FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 189 (1985)); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1182 (1983) (noting that "obscene pornography constitutes a political-moral vision"); David A.J.

obscenity is worthless, but the debate over obscenity's actual value is beyond the scope of this Article. The important fact is that the Court has attempted to carve out only a small portion of material for suppression based upon its belief that such information invades our thought processes. Most sexually oriented speech remains untouched. In fact, the Court has gone out of its way to protect such speech when it believes the government to be engaging in unreasonable censorship.[95] Thus, regardless of whether obscenity actually is valueless, the Court's reasoning is consistent with a Kantian notion of autonomy.

Second, one could argue that the Court's current standard for judging obscenity belies my argument regarding Kantian autonomy. While the *Roth* standard characterized obscenity as without social value,[96] current doctrine defines obscenity as that material which appeals to a "prurient" interest and that merely lacks "serious" social value.[97] Thus, one could conclude that the Court's current obscenity jurisprudence is not limited to speech which invades our thought processes. While the Court appears to have relaxed its standard regarding social value, its maintenance of the "prurient" interest requirement in both definitions nevertheless suggests that it is at least trying to limit state regulation to speech that in some way coerces or disrespects our rationality.

Finally, one could argue that the Court's heavy reliance on history and accepted social practice[98] in formulating its obscenity doctrine is inconsistent with an autonomy rationale. To be sure, history played a large role in the Court's decision not to accord obscenity First Amendment protection. But the Court's modern definition clearly deviates from historical definitions of obscenity, which encompassed far more literature, art, and other useful information than the Court's current definition.[99]

Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 82 (1974) (noting that there "is no reason whatsoever to believe that the freedom to determine the sexual contents of one's communications or to be an audience to such communications is not as fundamental to . . . self-mastery as the freedom to decide upon any other communicative contents").

[95] American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (striking down as viewpoint discrimination an antipornography ordinance banning graphic and sexually explicit portrayals of women as inferiors or subordinates).

[96] *See supra* note 88 and accompanying text.

[97] *See supra* note 91.

[98] In ruling that obscenity was "outside the protection intended for speech and press," the *Roth* Court relied heavily on the fact that obscenity was illegal in most states at the time Congress ratified the Constitution. Roth, 354 U.S. at 483. For a more thorough review of the treatment of obscenity throughout history, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 904–08 (2d ed. 1988).

[99] *See, e.g.*, United States v. One Book Entitled *Ulysses*, 72 F.2d 705, 709 (1934) (Manton, J., dissenting) ("Who can doubt the obscenity of [Joyce's classic novel?] . . . [T]he test of obscenity . . . is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a

Thus, the Court's attempt to narrow the definition of obscenity to that which has a "prurient" appeal, although influenced by history, is at least partly compatible with autonomy concerns.

4. Libel

Although the Court originally maintained that "libelous . . . utterances are no essential part of any exposition of ideas,"[100] it currently gives substantial protection to false statements of fact regarding public officials and public figures.[101] The Court's extension of First Amendment protection to such statements, however, had little to do with a belief that they have any value as speech. Indeed, the Court has explicitly stated that such statements have little, if any, First Amendment value.[102] Rather, the desire to avoid chilling potential speakers by building a protective wall around speech on public issues, especially criticism of the government, largely drove the Court's decisions.[103] Such reasoning is consistent with a Kantian view of autonomy.

The Court's decision that libelous utterances are valueless protects our thought processes from private coercion. As Professor Strauss has noted:

---

publication of this sort may fall."). Professor Rabban has noted that contemporary judges expansively interpreted the term "obscene" to include materials "opposing legal regulation of marriage and . . . providing sexually explicit information about contraception." David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 53 (1992). Indeed, Anthony Comstock, the father of an act which prohibited using the interstate mails to deliver "obscene" materials, made no distinction between "commercial pornography and serious works about sex by libertarian radicals who expressed controversial views." *Id.* at 58.

[100] Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952).

[101] *See* New York Times v. Sullivan, 376 U.S. 254, 280 (1964) (holding that First Amendment requires public official seeking damages for libel prove that statement was made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion) (holding that *Sullivan* standard applies only to "speech on 'matters of public concern'") (citations omitted); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342–43 (1974) (applying *Sullivan* standard to false statement of facts made about public figures).

[102] The *Sullivan* Court originally intimated that false statements of fact have some value. *See Sullivan*, 376 U.S. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (citations omitted). In later cases, however, the Court retreated from this statement to hold that libelous statements have little or no value. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless . . . ."); *Gertz*, 418 U.S. at 340 ("[T]here is no constitutional value in false statements of fact.").

[103] *See Hustler*, 485 U.S. at 52 (noting that the Court's actual malice rule provides "breathing space" for free expression); *Sullivan*, 376 U.S. at 279 (discussing the fear that strict libel laws would deter true speech as well as false statements of fact).

> Lying is the clearest case of . . . coercion-like, autonomy-invading manipulation . . . . When a speaker tells a lie in order to influence the listener's behavior, the metaphor of commandeering the listener's mind, and making it serve the speaker's ends instead of the listener's, seems especially appropriate. The speaker really does inject her own false information into the thought processes of the listener for the purpose of making those processes produce the outcome that the speaker desires.[104]

In other words, false statements of fact are designed not to persuade or appeal to our rational senses but to override them and unreasonably damage the libeled person's reputation as a result.[105] Consequently, we can hold persons making those statements responsible for such invasions.

Some might argue, however, that the Court's refusal to extend protection of defamation law to public figures and officials except in extreme circumstances argues against an autonomy rationale. After all, if lies invade our thought processes, why should lies about public officials and figures be any different? The answer rests in the issue of seditious libel that played an important role in *Sullivan*.[106] In that case, an Alabama official used libel law not to protect a personal reputation but to shut down criticism of the government by members of the civil rights movement.[107] In such a circumstance, libel law did not protect autonomy from invasion by private citizens but became a tool of the government to suppress speech that it disliked. Recognizing the dangers of such misuse and its chilling effect on speech,[108] the Court established its requirement that public officials show actual malice[109] before recovering damages.[110] Thus, one can view the actual malice standard as the Court's attempt to walk the same fine line it has walked in other low-value speech areas. It

---

[104] Strauss, *supra* note 1, at 366.

[105] In this way, libelous utterances are similar to fighting words. *See* TRIBE, *supra* note 98, § 12-12, at 861 (noting that "libelous speech [has long been] regarded as a form of personal assault"). Professor Post comes to a similar conclusion noting that defamatory communications violate what he calls the "rules of civility" because they "threaten . . . the self of the defamed person (causing, among other things, symptoms of 'personal humiliation, and mental anguish and suffering')." Post, *supra* note 93, at 618 (quoting *Gertz*, 418 U.S. at 350).

[106] New York Times v. Sullivan, 376 U.S. 254 (1964).

[107] *See id.*; *see also* ANTHONY LEWIS, MAKE NO LAW 5–45 (1991) (reviewing the social and historical context in which the *Sullivan* case arose); TRIBE, *supra* note 98, § 12-12, at 863 ("[T]he inescapable conclusion [in light of Sullivan's lawsuit] was that Alabama's 'white establishment' had taken the opportunity to punish The New York Times for its support of civil rights activists: the South was prepared to use the law of libel to stifle black opposition to racial segregation.").

[108] *See Sullivan*, 376 U.S. at 276–79.

[109] The Court defined "actual malice" as statements made with knowledge or reckless disregard of their falsity. *See id.* at 280.

[110] *See id.* at 279–80.

attempts to preserve our deliberative capacities from invasive lies by imposing liability for such lies but also seeks to keep the government from suppressing disagreeable speech.[111]

5. *Commercial Speech*

As with libel, commercial speech[112] was once thought to have no value[113] but now enjoys substantial First Amendment protection.[114] Insofar as Kantian autonomy is concerned, the Court's decisions are directly aimed at State coercion of our thought processes. Indeed, antipathy toward State paternalism has been a central focus of the Court's commercial speech decisions.[115] Yet there is also an element of protecting our thought processes from private coercion. The Court has made it clear that States are free to regulate false, misleading, and deceptive advertising, stressing

---

[111] The extension of the actual malice standard to public figures is somewhat problematic in this respect. Public figures clearly do not pose the same danger with respect to seditious libel as do public officials. In addition, the Court has been inconsistent in applying its rationale in such cases. Originally, at least one member of the Court based his extension of the actual malice standard to public figures partly on the notion that "[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred" and that public figures, while not holding office, are "nevertheless intimately involved in the resolution of important public questions." Curtis Publishing Co. v. Butts, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring). In more recent years, however, the Court has based its extension on other rationales: the ability of public figures to defend themselves against libelous statements and the voluntary nature of their participation in public issues. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974). Even here, though, the Court has noted that "public figures have thrust themselves to the forefront of particular public controversies *in order to influence the resolution of the issues involved.*" *Id.* at 345 (emphasis added). One could conclude, then, that even with public figures, the Court is concerned with a powerful group of people attempting to suppress newsworthy speech with which they disagree.

[112] The Court generally defines commercial speech as that which does "no more than propose a commercial transaction." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

[113] *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[114] *See Virginia Citizens Consumer Council*, 425 U.S. at 762 (holding that commercial speech is not so removed from the exposition of ideas as to completely lack First Amendment protection).

[115] The *Virginia Citizens Consumer Council* Court soundly rejected the State's argument that consumers might act against their interests if given drug price information, noting that "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia Citizens Consumer Council*, 425 U.S. at 770. Just this year, the Court reaffirmed its antipaternalism sentiment in the commercial speech context. *See* Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); *see also* Strauss, *supra* note 1, at 343–45 (implicating an anitpaternalistic rationale by describing the Court's refusal to regulate commercial speech that may "persuade people to do things that are harmful to [them].").

that "[u]ntruthful speech, commercial or otherwise has never been protected for its own sake."[116] As with libelous statements, the Court's pronouncement reflects a desire to protect against invasive lies and deception that attempt to override rather than appeal to our thought processes. As with other areas of low-value speech, however, the Court has drawn a line between acceptable government regulation of lies and unacceptable attempts to regulate thoughts.

C. Kantian Autonomy and the Court's Free Speech Jurisprudence

Thus far, I have argued that the structure of the Court's First Amendment jurisprudence is consistent with a Kantian autonomy rationale, although not in the narrow sense espoused by many scholars. Although the Court's doctrine clearly presumes a sphere of liberty from state regulation, the focus of most scholars' autonomy arguments, its doctrine regarding low-value speech shows that the right to say what we wish is not the only aspect of autonomy encompassed IN the First Amendment. Instead, notions of autonomy impose upon all of us an enforceable responsibility not to invade the thought processes of others by using speech in a coercive manner.

What conclusions can we draw regarding the fact that the Court's decisions are consistent with Kant's theory of autonomy? First, thinking of autonomy as encompassing liberty and responsibility reveals that the Court's First Amendment jurisprudence is about dialogue. Autonomy is not about atomistic, selfish individuals but about people with different ideas and strong disagreements coming together as members of a community to discuss issues.[117] That discussion need not be passionless,[118] but it must not be coercive if we are to maintain our status as autonomous individuals in a civilized society.

---

[116] *Virginia Citizens Consumer Council*, 425 U.S. at 771–72.

[117] Like Kant, at least one modern commentator has noted that "[s]peech . . . is the process by which we think together." Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 984 (1995). Professor Post makes a similar argument, noting that "[t]raditional First Amendment doctrine guarantees that democratic dialogue will remain continuously available to the potential contributions of its individual participants. Autonomy, properly understood, signifies that within the sphere of public discourse and with regard to the suppression of speech the state must always regard collective identity as necessarily open-ended." Post, *supra* note 12, at 1122. His reasoning appears to apply to citizens' attempts to cut off dialogue as well. The Court's First Amendment doctrine ensures that our continuing discussion as a community is safe from both government and private coercion.

[118] As Professor Sherry has pointed out, "pure ratiocination is not the only form that reasoning can take." Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 455 (1996). Rather, reason has many components, including, even during the Enlightenment period in which Kant wrote, a practical one. *See id.* at 455–57 & n.7.

Second, the Court's jurisprudence acknowledges that some issues are better left to a sphere of moral obligations. The idea that the First Amendment has something to do with moral obligations might seem odd given that, textually, its concerns are clearly legal—i.e., it is specifically directed toward determining the acceptability of laws regulating speech. However, the Court's attempt to walk the fine line of protecting society from coercive private speech without allowing government censorship involves an element of moral rather than legal obligation. For example, while the Court is willing to allow criminal punishment of fighting words, it will not punish speech merely because we are offended by it. Fighting words may be offensive but that is not why the State may regulate them. Instead, it may regulate fighting words because they go beyond being offensive *ideas* and invade our thought processes by instigating an unthinking, physical response. Such words are appropriate for legal regulation. But offensive speech, although we may disagree with it, conveys an idea. To allow the State to suppress it is to abdicate our moral responsibility to discuss our disagreements and try to resolve them. Only individuals living in a community can come to a determination of what is right and wrong. In this sense, although the First Amendment (and the rhetoric of the Court's opinions) is couched in terms of law, it does recognize an element of moral obligation with respect to speech.

IV. Viewing Hate Speech Through the Lens of Kantian Autonomy

This new understanding of autonomy may be able to resolve the apparent conflict between autonomy and other values that lies at the core of the scholarly debate. Although the autonomy debate has taken place in several contexts,[119] I focus only on hate speech, defined as "expression that abuses or degrades others on account of their racial, ethnic or religious identity."[120] I do so because the controversy over hate speech regulation has been a dominant presence in both scholarly[121] and

---

[119] *See supra* notes 5–7 and accompanying text.

[120] Steven J. Heyman, *Introduction: Hate Speech Regulation and the Theory of Free Expression*, *in* 1 HATE SPEECH AND THE CONSTITUTION, ix (Steven J. Heyman ed., 1996). I have used Professor Heyman's definition mainly for simplicity's sake. Although hate speech encompasses far more than ethnic and religious hatred, much of the debate has taken place in that context.

[121] For a review of articles published prior to 1991, see Post, *supra* note 1, at 267 n.5. For a sampling of more recent articles on hate speech, see Akil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992); John M. Blim, *Undoing Our Selves: The Error of Sacrificing Speech in the Quest for Equality*, 56 OHIO ST. L.J. 427 (1995); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994); Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135 (1994); Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L.

public[122] debate and because the Court's most recent encounter with the issue in *R.A.V. v. City of St. Paul*[123] is still the subject of widespread discussion and criticism.[124]

A. The Hate Speech Debate

The format of the hate speech debate parallels the scholarly debate discussed in Part I. Critics of hate speech regulation point out that proposed restrictions amount to government censorship of an abhorrent viewpoint, and thus invade our thought processes.[125] In contrast, those who favor regulation of hate speech argue that such speech is irrational and coercive, causing severe emotional and psychological damage.[126] Thus,

---

REV. 1887 (1992); Elena Kagan, *Regulation of Hate Speech and Pornography after* R.A.V., 60 U. CHI. L. REV. 873 (1993); Charles R. Lawrence, III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992); Massey, *supra* note 20; and Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795 (1993).

[122] *See, e.g.*, John Wiener, *Words That Wound: Free Speech For Campus Bigots?*, 250 NATION 272 (1990); Lee Dembart, *At Stanford, Leftists Become Censors*, N.Y. TIMES, May 5, 1989, at A35; Henry Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37; Anthony Lewis, *Words Matter*, N.Y. TIMES, May 5, 1995, at A31; Mari Matsuda, *On the Internet, Silence Some to Save Others*, NEWSDAY, June 1, 1995, at A34; Jonathan Rauch, *In Defense of Prejudice*, HARPER'S, May 1995, at 37; George Will, *Liberal Censorship*, WASH. POST, Nov. 5, 1989, at C7.

[123] 505 U.S. 377 (1992).

[124] *See, e.g.*, Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281 (1995) (criticizing generally *R.A.V.* majority's reasoning); Susan M. Gilles, *Images of the First Amendment and the Reality of Powerful Speakers*, 24 CAP. U. L. REV. 293, 295–96 (1995) (criticizing *R.A.V.* majority for "ignoring the relative power of speakers"); Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 931–40 (1996) (criticizing generally *R.A.V.* decision); Juan F. Perea, *Strange Fruit: Harassment and the First Amendment*, 29 U.C. DAVIS L. REV. 875, 876 (1996) ("The abstruse majority opinion in *R.A.V.* . . . ignores the real victims of the episode."); N. Douglas Wells, *Whose Community? Whose Rights?—Response to Professor Fiss*, 24 CAP. U. L. REV. 319 (1995) (criticizing *R.A.V.* Court's failure to allow regulation of hate speech and proposing a solution based on an international approach); *see also* articles *supra* note 121.

[125] *See, e.g.*, Fried, *supra* note 1, at 245–46 (noting that those who promulgate campus speech codes "assign to themselves the authority to determine which ideas are false and which false ideas people may not express as they choose"); Massey, *supra* note 20, at 195 ("By identifying particular ideas as incompatible with public discourse, [those who favor regulation of hate speech] impose a censorship on public discourse that is fundamentally incompatible with autonomous self-governance.").

[126] *See, e.g.*, Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77, 122 (1984) (characterizing hate speech as "linguistic abuse" and "the kind of fascism which aims at political and economic annihilation of groups"); Lawrence, *supra* note 5, at 452–53 (arguing that hate speech is coercive in much the same manner as fighting words). For general descriptions of the harms caused by hate speech, see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135–49 (1982), and Mari J. Matsuda, *Public Response To Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336–41 (1989).

they argue that regulation of such speech is legitimate for the same reasons that regulation of fighting words is legitimate.[127] Scholars favoring regulation further maintain that hate speech silences its victims, thereby detracting from, rather than contributing to, public deliberation.[128] Suppression of speech in this instance is necessary to preserve the integrity of public discourse and to ensure that "the victims of racist speech are heard."[129] At the bottom of both arguments in favor of regulation is the understanding that hate speech is a substantial barrier to racial equality.[130] Given the nature and history of racism in this country, scholars argue that progress in social equality may have to "com[e] at the expense of the right of free speech, at least as it has been conceptualized in the modern tradition."[131] Thus, the hate speech debate pits autonomy against another of our foundational rights—equality. As one scholar has noted, "[w]e seem to face a 'tragic choice' in which we cannot defend free speech without sacrificing [civility and equality], and cannot protect [civility and equality] without doing violence to the ideal of free speech."[132]

Perhaps recognizing that the Court would not allow a complete excision of hate speech from public discourse[133] and attempting to alleviate the tragic choice between liberty and equality, a number of people advocate narrower regulations of hate speech. Most commonly, drafters of such regulations track the language of the Court's fighting words doctrine by

---

[127] *See* Lawrence, *supra* note 5, at 451–53.

[128] *See* Lawrence, *supra* note 5, at 452–54; Delgado & Yun, *supra* note 121, at 877, 883–85. For an excellent review of the arguments regarding silencing, see Post, *supra* note 1, at 306–08. To some extent the coercion and silencing arguments are linked, at least insofar as the coercive effect of the speech results in the silencing of the victim. Professor Post has reviewed the relationship between the silencing and coercion arguments in detail. *See id.* at 302–09.

[129] Lawrence, *supra* note 5, at 481.

[130] *See, e.g.*, Lawrence, *supra* note 5, at 458 (noting the link between racist epithets, vilification, and inequality).

[131] Blim, *supra* note 121, at 429 (footnote omitted).

[132] Heyman, *supra* note 120, at xiv (footnote omitted); *see also* Blim, *supra* note 121, at 429 (noting that supporters and detractors of hate speech regulation appear to view free speech and equality "as potentially competing interests").

[133] The modern Court would surely strike down broad bans on speech that degrades on the basis of race as being overly broad or as violating its principle against content discrimination of speech. Indeed, even the four concurring justices in *R.A.V.*, while criticizing the majority's reasoning in striking down a hate speech ordinance, would have ruled it unconstitutional as overly broad. *See infra* note 138.

In fact, many scholars arguing for regulation of hate speech appear to acknowledge that complete censorship of all racially hateful speech is neither possible nor desirable. *See, e.g.*, Matsuda, *supra* note 126, at 2357 ("[We should] argue long and hard before selecting a class of speech to exclude from the public domain . . . . In order to respect first amendment values, a narrow definition of actionable racist speech is required."); Sunstein, *Words, Conduct, Caste*, *supra* note 121, at 825 ("I do not argue for broad bans on hate speech. Most such bans would indeed violate the First Amendment because they would forbid a good deal of speech that is intended and received as a contribution to public deliberation.").

creating a regulation that explicitly bans racially hateful fighting words.[134] By grounding the ban on hate speech in a category of otherwise unprotected speech, proponents of such regulation hope to avoid allegations of broad censorship of ideas while still punishing the most assaultive and harmful forms of hate speech. Such proponents believed that the regulation promoted an agenda of social equality without infringing upon our First Amendment freedoms.[135] It was just such a law that came before the Court in *R.A.V.* and which, on first glance, appears to have split the Justices down much the same lines as the scholarly debate.

B. Reviewing R.A.V.

The city ordinance in *R.A.V.* prohibited the display of any "symbol . . . including, but not limited to, a burning cross or Nazi swastika, which 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."[136] However, in order to avoid the problem of overbreadth in the regulation of offensive speech,[137] the majority accepted the Minnesota

---

[134] Many such attempts at narrow hate speech regulations have appeared on college campuses. For example, the Stanford University code provides:

> Speech or other expression constitutes [prohibited] harassment by personal vilification if it:
> (a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
> (b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
> (c) makes use of insulting or "fighting" words or nonverbal symbols . . . "which by their very utterance inflict injury . . ." [and] are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1304–05 (3d ed. 1996) (setting forth Stanford regulation); *see also* Lawrence, *supra* note 5, at 450–57 (describing how Stanford regulation is consistent with the fighting words doctrine).

Proponents of hate speech legislation have also based their arguments for regulation on other forms of low-value speech. *See, e.g.*, Delgado, *supra* note 126 (arguing for creation of a tort for racial insults much like the tort of intentional infliction of emotional distress); Lasson, *supra* note 126 (arguing in favor of laws that prohibit racial defamation).

[135] *See* Grey, *supra* note 124, at 902–06 (discussing purpose of Stanford speech code); Lawrence, *supra* note 5, at 449–57 (discussing need for and constitutionality of regulating discriminatory fighting words).

[136] ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990). R.A.V., the minor defendant, was charged under the ordinance after burning a wooden cross in the yard of a black family living on the block where he was staying. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

[137] For a discussion of the Court's refusal to allow punishment of speech merely because it is offensive, see *supra* notes 85–88 and accompanying text.

court's construction of the statute to reach "only those expressions that constitute 'fighting words' within the meaning of *Chaplinsky*."[138] Thus, the issue that ultimately divided the Court is whether St. Paul could regulate only racially hateful[139] fighting words while leaving other kinds of fighting words unpunished.

The majority holds the statute to be unconstitutional, primarily because it regulates fighting words based upon the racially hateful viewpoint they express.[140] Although reaffirming that fighting words are low-value speech,[141] the Court rejects the notion that St. Paul could selectively regulate them.[142] Instead, the Court notes that while "areas of [low-value] speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—. . . they are [not] categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[143] In the majority's view, St. Paul had attempted to regulate fighting words not because of their "'nonspeech' element of communication"[144] but because they conveyed the idea of racial hatred to particular audiences. Thus, the majority concludes that the ordinance is impermissibly content- and viewpoint-based.[145]

---

[138] *R.A.V.*, 505 U.S. at 381 (citing *In re* Welfare of R.A.V., 464 N.W.2d 507, 510–11 (Minn. 1991)). Justices White, Blackmun, O'Connor, and Stevens would have eschewed the narrow construction and ruled the ordinance unconstitutional on overbreadth grounds. *See R.A.V.*, 505 U.S. at 411 (White, J., concurring).

[139] In addition to racially hateful fighting words, the St. Paul ordinance encompassed fighting words based upon gender, religion, creed, and color. *See* ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990). I use "racially hateful" mainly for ease of reference and because racial hatred was the context in which the case arose.

[140] The majority's actual words are that the ordinance is unconstitutional "in that it prohibits otherwise permitted speech solely on the basis of the *subjects* the speech addresses." *R.A.V.*, 505 U.S. at 381 (emphasis added). Like Professor Kagan, however, I believe that the majority's concern lies mainly with viewpoint discrimination, in other words, that the ordinance is an attempt to punish only certain, abhorrent views regarding race. *See* Kagan, *supra* note 121, at 889 n.47; *see also R.A.V.*, 505 U.S. at 390–94 (discussing ordinance's viewpoint bias).

[141] Until *R.A.V.*, some commentators doubted whether the Court's fighting words doctrine remained good law, especially because the Court had not upheld a fighting words conviction since *Chaplinsky*, 315 U.S. 568 (1942). *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 510. After *R.A.V.*, however, the Court's fighting words doctrine appears to be alive and well, at least in the narrowed form discussed in its post-*Chaplinsky* cases. *See supra* notes 82–88 and accompanying text.

[142] *See R.A.V.*, 505 U.S. at 384.

[143] *Id.* at 383–84.

[144] *Id.* at 386. The Court likens fighting words to a noisy sound truck, noting that "[e]ach is . . . a 'mode of speech'; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment." *Id.* (citations omitted).

[145] *See id.* at 392. The Court was especially moved by the city's stated desire to send a message that "group hatred . . . is not condoned by the majority." Brief for Respondent at 25, R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (No. 90-7675). "The point of

This reasoning causes great dismay among the four concurring justices who accuse the majority of "cast[ing] aside long-established First Amendment doctrine . . . and adopt[ing] an untried theory."[146] Arguing that the Court's jurisprudence had long allowed for regulation of low-value speech based upon its content, they find it "inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil . . . but that the government may not treat a subset of that category differently without violating the First Amendment."[147] The majority's approach, they claim, elevates the Court's prohibition on content regulation to unreasonable heights[148] and ignores "the City's judgment that harms based on race, color, creed, religion, and gender are more pressing public concerns than the harms caused by other fighting words."[149] Indeed, the concurring Justices are so dissatisfied with the majority's approach that they condemn it as "legitimat[ing] hate speech as a form of public discussion."[150]

C. A Kantian Perspective

After *R.A.V.*, one might conclude that the scholars engaging in the autonomy debate have been right all along. Specifically, the Court really does conceive of autonomy as the right of atomistic individuals to say whatever they wish even if it harms others. The concurring Justices apparently see that concept in what they label the "new absolutism in the

---

the First Amendment," the majority notes, "is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *R.A.V.*, 505 U.S. at 392.

[146] *R.A.V.*, 505 U.S. at 398 (White, J., concurring). Justices Blackmun and O'Connor joined Justice White's opinion. Justice Stevens joined all but Part I.A. thereof. *See id.* at 397; *see also id.* at 417 (Stevens, J., concurring) (eschewing the "absolutism" of Justice White's assertion that the majority ignores longstanding jurisprudence regarding low-value speech).

[147] *Id.* at 401 (citations omitted).

[148] *See id.* at 400 (White, J., concurring) ("Today . . . the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are 'not within the area of constitutionally protected speech.'") (quoting Roth v. United States, 354 U.S. 476, 483 (1957)); *id.* at 415 (Blackmun, J., concurring) ("[B]y deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach . . . ."); *id.* at 422 (Stevens, J., concurring) ("Disregarding the vast body of case law, the Court today . . . applies the prohibition on content-based regulation to speech that the Court had until today considered wholly 'unprotected' by the First Amendment—namely, fighting words.").

[149] *Id.* at 407 (White, J., concurring). Justice White elaborates, noting that "[a] prohibition on fighting words . . . is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, a message that is at its ugliest when directed against groups that have long been targets of discrimination." *Id.* at 408–09 (White, J., concurring) (citation omitted).

[150] *R.A.V.*, 505 U.S. at 402.

prohibition of content-based regulations."[151] But such an argument does a disservice to the majority opinion, for upon closer examination one can see that the majority's reasoning is consistent with a richer, Kantian notion of autonomy. Some of the *R.A.V.* Court's rhetoric clearly provides fuel for the concurring Justices' claim. Indeed, the majority's legal analysis opens with an almost strident statement regarding the evils of content discrimination,[152] thus seemingly enshrining that concept (and underlying notions of individualism) as the only significant aspect of the Court's jurisprudence. But the majority never holds that its principle against content discrimination prohibits all regulation of racially hateful fighting words. Indeed, the Court makes quite clear that such speech could be punished under a neutral fighting words statute.[153] In that sense, its reasoning is consistent with a Kantian notion of autonomy, which calls for regulation of speech that attempts to override our thought processes.

The Court's concern regarding viewpoint discrimination within the category of fighting words, far from being about atomistic speakers, is similarly consistent with Kantian autonomy. That notion of autonomy requires the government to maintain a fine line between regulating speech that invades our thought processes and regulating speech that appeals to those thought processes. By regulating only racially hateful fighting words, the St. Paul ordinance fell on the wrong side of that line. The ordinance's selective focus made it appear to regulate speech because of the idea of racial hatred expressed rather than because of the coercive effect associated with fighting words.[154] Such an attempt to excise an abhorrent viewpoint from public discourse violates the public exercise of reason that is at the core of Kantian autonomy.[155] Thus, the majority's focus on view-

---

[151] *Id.* at 422 (Stevens, J., concurring).

[152] *See id.* at 382 ("The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations of speech are presumptively invalid.") (citation omitted). The Court's offhand statement that fighting words "sometimes . . . are quite expressive indeed," *id.* at 385, is similarly misleading. Under a Kantian theory, fighting words can be regulated because of their invasive effect on our thought processes. By referring to their potentially expressive nature, however, the Court lends credence to the argument that our First Amendment freedom is mainly a speaker's right.

[153] *See id.* at 394–96.

[154] *See id.* at 396 ("[T]he only interest distinctively served by the content limitation is that of displaying the city council's hostility towards the particular biases thus singled out."); *see also* Kagan, *supra* note 121, at 899–900 ("When the government regulates within [a] category [of speech] on the basis of a viewpoint extraneous to the category . . . there is reason to suspect that the government is acting not for the reasons already found by the Court to be legitimate, but rather out of hostility to a message.").

[155] One could argue, of course, that the idea of racial hatred is itself coercive and thus can be excised from public discourse in a manner consistent with Kantian autonomy. Such an argument, however, conflicts with Kantian autonomy in that it presupposes the rightness or wrongness of an idea prior to the exercise of our reason. *See* Heyman, *supra* note 117, at 888–92; *see also* Post, *supra* note 1, at 310 ("[I]t is fundamentally incompatible with public discourse to excise specific ideas because they are . . . deemed to be coercive.").

point discrimination does not elevate that principle above all others but merely attempts to walk a tightrope of preventing private coercive speech while nevertheless avoiding government censorship, just as the Court has done throughout its low-value speech analysis.[156]

Perhaps the most significant fact to recognize about *R.A.V.* is its consistency with the Kantian notion of people as social creatures whose capacity for autonomy includes responsibility to others. As a legal matter, we can and should regulate vicious and hateful speech when it amounts to an invasion of our thought processes. Such circumstances might include imposing punishment on hate speech when it falls within the rubric of fighting words, incitement to riot, intentional infliction of emotional distress,[157] and intimidation.[158] Far from being an illegitimate censorship of speech as some scholars claim,[159] punishment of hate speech under such neutral laws is necessary to preserve the equal dignity of all individuals and to promote public discourse.[160]

Laws that specifically target only racially hateful speech, however, are a different matter. As a normative issue, we must continue to discuss the morality of racism. To allow the State to ban communication of the idea of racial hatred admits that we are incapable of making rational decisions about that issue, an admission antithetical to Kantian auton-

---

[156] In this sense, the Court's concern over the St. Paul ordinance is similar to its concern regarding regulation of offensive speech. Although the latter involves overly broad regulations and the former an underinclusive law, both appear to step over the boundary of regulating coercive speech and into the realm of regulating ideas.

[157] The status of intentional infliction of emotional distress as a category of low-value speech is somewhat unclear. After *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" However, commentators seem to agree that the tort is available to private citizens when speech intentionally causes emotional distress. *See* Fallon, *Harassment*, *supra* note 60, at 10–11 & n.54; Post, *supra* note 90, at 662.

[158] The Court has never explicitly recognized intimidation as a category of low-value speech. Its doctrine has, however, repeatedly assumed that some forms of intimidation, such as threats, are completely beyond the reach of the First Amendment. *See* Watts v. United States, 394 U.S. 705 (1969); *see also* Fallon, *Harassment*, *supra* note 60, at 13 ("[T]he Supreme Court—along with nearly everyone else—has generally treated it as self-evident that some verbal acts [including threats] get no protection."). Threats, like the categories of low-value speech, attempt to coerce or circumvent our rational nature. As such their regulation is consistent with Kantian autonomy. For a different view regarding when threats should be considered beyond the rubric of the First Amendment, see KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 249–59 (1989).

[159] *See, e.g.*, Strossen, *supra* note 141, at 508–17 (arguing that the Court's fighting words category and the tort of intentional infliction of emotional distress generally allow for government censorship of speech).

[160] It is possible that some speech which does not fall within these categories will nevertheless be punished. While that is a problem of enforcement over which we must be watchful, it is not a reason to refuse to regulate hate speech that does fall within regulable boundaries.

omy.[161] In so doing, we absolve ourselves of the responsibility to discuss and try to resolve the very significant problem of racial hatred. After all, if we are incapable of making rational decisions, we cannot possibly be held accountable for failing to rid ourselves of racism. But responsibility for racial hatred does not lie with the State; it lies with us. And while the State can regulate invasive manifestations of that hatred (even those manifested through speech), only we can eradicate the idea of racial hatred by the Kantian exercise of our public reason through communication.

Conclusion

The Court's use of an autonomy rationale has taken something of a beating lately. Given the impoverished concept of autonomy that most scholars attribute to the Court's jurisprudence, such an occurrence is not surprising. The image of isolated individuals pursuing selfish goals with little or no thought for personal responsibility is disturbing considering that we live in a society rather than a state of nature. Unfortunately, that image tends to be the one most often associated with autonomy, not just among free speech scholars but among the general public as well.[162] And because "[a]utonomy is an ideal with distinctive importance in modern life,"[163] many have come to defend even this meager conception vehemently.

---

[161] This is not to say that all viewpoint discrimination is *necessarily* inconsistent with Kantian autonomy. While a thorough discussion is beyond the scope of this Article, one could fashion an argument that, in certain contexts, regulation of particular viewpoints does not amount to the excision of a particular idea but rather amounts to regulation of invasive conduct. Thus, one might be able to argue that workplace harassment laws are not concerned about ideas but with the particularly coercive effect of such speech in the workplace environment. Such an argument is similar to the Court's previously announced doctrine that protects a "captive audience" from offensive speech because of the context in which the speech occurs. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion) (ruling that a city's decision not to subject users of the local rapid transit system to the "blare of political propaganda" is constitutional). In contrast, the ordinance at issue in *R.A.V.* criminalized racially hateful fighting words that were part of public discourse, a situation where captive audience concerns do not come into play. Thus, the regulation aimed at suppressing particularly abhorrent ideas in a manner inconsistent with Kantian autonomy. For other arguments regarding the importance of context in free speech jurisprudence, see KENT GREENAWALT, FIGHTING WORDS 81, 86–87 (1995) (discussing the importance of context in free speech analysis of workplace harassment); Mary Becker, *How Free is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 872–73 (1996) (noting the distinction between regulation of public discourse and workplace harassment); and Fallon, *Harassment, supra* note 60, at 38–41 (discussing generally the importance of context in free speech jurisprudence).

[162] As an extreme example, the Montana Freemen's recent self-proclaimed secession from organized society was mainly orchestrated in the name of "freedom." *See* John Balzar, *A Little Too Much Freedom?*, L.A. TIMES, Apr. 8, 1996, at A1 (discussing the "growing hunger for absolute freedom, which could also be called grand self-indulgence, [that] produced the . . . 'freemen'").

[163] Fallon, *Autonomy, supra* note 29, at 902–03. Professor Fallon explains that "[i]n

But notions of autonomy need not be so empty. Rather, a complete measure of autonomy recognizes that it is not merely a right but a moral entitlement to freedom. In turn, this implies a responsibility to respect the autonomy of others. Despite scholars' claims, the Court's free speech jurisprudence has implicitly incorporated such a notion of autonomy. Understanding this fact may allow us to reassess our understanding of the meaning of the term "freedom of speech." A refurbished notion of autonomy reveals that "freedom of speech" does not mean using speech in any manner we see fit. Rather, we are morally and legally obligated to use speech in a manner that respects the thought processes of others. It also means, however, that we cannot cede to the State our ability and obligation to discuss and attempt to resolve the pressing issues of our time.

---

the cacophony of pluralist culture, the 'idea has entered very deep' that every person possesses her own originality, and that it is of 'crucial moral importance' for each to lead a life that is distinctively self-made." *Id.* (quoting CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 28–29 (1992)).