Chicago-Kent Law Review

Volume 74
Issue 2 *Symposium on Taking Legal Argument Seriously*

Article 16

April 1999

Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity

David A.J. Richards

CONSTITUTIONAL LEGITIMACY, THE PRINCIPLE OF FREE SPEECH, AND THE POLITICS OF IDENTITY

DAVID A.J. RICHARDS*

INTRODUCTION AND METHODOLOGY

The theory of free speech is a natural subject of interdisciplinary and comparative study for both political philosophers and lawyers. First, it has a highly abstract component, in which issues of general normative philosophy are at stake (for example, competing arguments of utilitarian or perfectionist teleological consequentialism versus those of deontological natural rights); second, it has an historical and contextual component, in which free speech is embedded in an historically evolving tradition of constitutional thought, including both political and legal arguments made over time about its proper meaning. The proper balance between these two components (political theory and interpretive history) differs in various legal systems, all of which are committed in some form to free speech. Nations with written constitutions and judicial review (the United States, Canada, Germany, and the nations governed by the European Convention of Human Rights) give greater play to abstract normative argument than a nation like the United Kingdom, in which free speech is a principle of common law in light of which supreme parliamentary law is interpreted;[1] and those nations with long traditions of judicial review under written constitutions with highly abstract language (like the United States) refer more often to both abstract arguments of political theory and the long history of their interpretive experience than nations (such as Germany) with relatively recent post-World War II written constitutions (with U.S.-

* Edwin D. Webb Professor of Law, New York University. The argument of this article is extensively developed in DAVID A.J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY (forthcoming 1999).

1. For a good treatment of this question, with specific focus on the British law of free speech, see ERIC BARENDT, FREEDOM OF SPEECH (1985). In addition to its own common law of free speech, the United Kingdom is a signatory to the European Convention for Human Rights and, to the extent required by the Convention, is governed by its written guarantees and interpretive institutions. *See generally* MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS (1995).

style judicial review) in which guarantees have been drafted in somewhat more specific terms.[2] The two components of the study of free speech will accordingly interact in different ways depending on such distinctions. For example, the normative theory of utilitarianism may naturally fit the British constitutional landscape of free speech, while a deontological theory of rights may be the better account of both American and German constitutionalism. However, even systems (like Germany and the United States) that appeal to a comparable rights-based deontological theory and judicial review may, as we shall see, quite differently interpret such theory in ways that bear directly on central issues of free speech (for example, the constitutionality of group libel laws).

This article addresses both components of the theory of free speech from an American constitutional perspective on these issues. In the course of my argument, I thus state and criticize several general normative theories of free speech (namely, utilitarian and perfectionist consequentialism and the argument from democracy), and then present a third view (free speech as toleration) and discuss its substantial merits both as a political theory and as an account of America's historically continuous interpretive experience. I bring the force of my argument into sharper focus in the form of a defense of one of American constitutionalism's quite distinctive views (namely, that the principle of free speech renders group libel laws problematic).

My account is by no means defensive of all current American judicially enforceable views of principles of free speech, but it is concerned to defend certain of them both against the different views taken in other nations (committed as well to principles of free speech) and, in particular, against recent American doubts expressed usually from the political left. These doubts take the following form: tensions between American principles of free speech (as currently understood) and principles condemning the political expression of irrational prejudice (racism, sexism, and homophobia). In particular, current constitutional skepticism about laws protecting groups from communicative insults to their group identity illegitimately advances

2. For example, Article 5 of the German Basic Law textually distinguishes freedom of speech and of the press (in Article 5(1)) from freedom of art, research, and teaching (in Article 5(3)), imposing specific textual limitations on the former (in Article 5(2)) but no such limitations on the latter. *See* BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 7 (1987). In contrast, Article 10 of the European Convention on Human Rights provides a general guarantee of the right to freedom of expression (in Article 10(1)), subject to general restrictions applicable to this right in general (in Article 10(2)). *See* JANIS ET AL., *supra* note 1, at 471.

irrational prejudice for reasons of free speech that are without merit.[3] Indeed, in one form of the argument, the very integrity of principles of antidiscrimination is said to require the constitutionality of group libel laws, because these principles themselves condemn, for example, state-sponsored apartheid as a form of constitutionally unjust group libel.[4]

Responses to these claims usually argue from the perspective of defensible principles of free speech.[5] I agree with many of these arguments and will support many of them in the work that follows. But such arguments can only be appreciated in their full and proper force if they are integrated structurally with a larger understanding of their important place and role in the understanding of antidiscrimination principles themselves. The interest of the recent doubts about the current state of American law in free speech is that its proponents argue from the perspective of advancing the purposes of antidiscrimination principles. We should not underestimate the dimensions that this challenge represents to a reasonable interpretive consensus that had been painfully achieved through the experience of the common grounds in the struggle for respect for civil liberties and against racism, a consensus brilliantly stated as a precious doctrinal legacy to posterity by Harry Kalven, Jr.[6] If the challenge is to be met, it must be met in the terms of the consensus it challenges, which is as much an interpretive issue of principle about the evil of racism (and sexism and homophobia) as an issue of free speech. The argument of this article arises as much from a concern about compromising principles of antidiscrimination as principles of free speech. The questions, if I am right, are structurally connected.

The problem in free speech theory arises, I believe, from the uncritical allegiance of recent academic free speech theory to the argument from democracy.[7] On this view, both the purposes and

3. For a useful compendium of such recent arguments, see MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) [hereinafter WORDS THAT WOUND]. *See also* FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION (David S. Allen & Robert Jensen eds., 1995)

4. *See generally* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND, *supra* note 3, at 53.

5. For a compendium of such arguments, see HENRY LOUIS GATES, JR., ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994) [hereinafter SPEAKING OF RACE, SPEAKING OF SEX].

6. *See* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965).

7. For three recent notable examples, see OWEN M. FISS, THE IRONY OF FREE SPEECH (1996) [hereinafter FISS, THE IRONY OF FREE SPEECH]; OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996) [hereinafter FISS,

scope of free speech must be understood as in service of political democracy. It is from this vantage point that neither restrictions on group libel nor those on campaign expenditures are regarded as raising free speech issues. The inference runs as follows: free speech advances democracy; group libel or campaign finance laws advance democracy; therefore, group libel and campaign finance laws do not raise free speech issues. Now, it must be obvious that much of the argument here rides on what counts as democracy, a contestable concept if there ever was one; for example, the argument for democracy can, depending on your view of democracy, be as plausibly used against as for the constitutionality of campaign finance laws. In order to understand the implications of the theory for free speech, much will turn on how richly or thinly the concept is parsed. One area of ongoing controversy (free speech) is thus analyzed in terms of another area (democracy) that is even more controversial, a feature of the argument from democracy that does not bode well for its critical power as an account of the legitimate role principles of free speech must play in limiting the scope of democratic politics. Where a good theory of free speech would underscore the tension between free speech and democracy, this theory eliminates the tension without any sense of loss. If the argument from democracy is as inadequate an account of the principle of free speech, as I argue it is, we will have to take seriously, in a way the argument from democracy does not, the independent values served by free speech, against which the legitimacy of democratic politics must be assessed.

We will also have to take seriously something the argument from democracy does not, namely, cumulative American historical experience about the important role free speech has played in addressing the most fundamental injustices of American constitutional democracy, including the structural injustice underlying American racism, sexism, and homophobia. To do so, we must investigate, as central to the proper understanding of the value and weight of free speech, its connections to the theory of antidiscrimination. Just as we interrogate a theory of free speech that drains it of its critical normative power, we question as well an associated theory of our principles of antidiscrimination that fails to address both the nature of and appropriate remedies for the underlying constitutional evil—what I call the structural injustice of

LIBERALISM DIVIDED]; and CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

moral slavery. I have argued at length elsewhere[8] that such structural injustice involves two features: first, the abridgment of the basic human rights of a group of persons; and second, its unjustly circular rationalization in terms of dehumanizing stereotypes sustained by such abridgment (including attempts to suppress criticism of such structural injustice by its privatization, as not properly speakable or even unspeakable and therefore unthinkable).[9] Our constitutional principles of antidiscrimination condemn the expression through law of prejudices arising from such structural injustice.

I link the questions of free speech and antidiscrimination both in the way I explicate the constitutional evil of discriminatory prejudice and address, on that basis, the question of remedy. The evil of discriminatory prejudice is its insult to identity on constitutionally inadequate, suspect grounds. In particular, such prejudices enforce dehumanizing stereotypes of race (racism), gender (sexism), or gendered sexuality (homophobia) as the stigmatized terms of one's identity as an African-American, woman, or gay or lesbian. I have thus argued that the construction of such structural injustice crucially turns on the abridgment of basic human rights to the stigmatized group, in particular, basic human rights of conscience, speech, intimate life, and work. The abridgments of conscience and speech play an especially pivotal role because they eliminate the voices and views that most reasonably might protest the unjust terms of identity imposed on them. On this view, abridgment of free speech is an important feature of the background structure of discriminatory prejudice.

In terms of this background, I believe we must understand the affirmative role guarantees of human rights in general, and rights of conscience and speech in particular, play as constitutionally reasonable remedies for such an evil (namely, stereotypical dehumanization). Group libel laws are, from this perspective, constitutionally problematic because they enlist the state at exactly the wrong point, enforcing its judgments of stereotypical harm in ways that replicate and do not deconstruct the underlying cultural evil. In each area (racism, sexism, homophobia), the stereotypical

8. For my earlier studies of this question, see DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS (1993) [hereinafter RICHARDS, CONSCIENCE AND THE CONSTITUTION]; and DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW (1998) [hereinafter RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION].

9. *See* RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 8, at 368.

evils in question can only be responsibly addressed in the domain of conviction by the voice and outlook of protesting individuals who self-organize in their own terms to protest such evils in what I call the politics of identity. I understand such politics broadly to include not only political action and protest of the conventional sort, but the manifold forms of cultural politics that include forging new cultural narratives that more responsibly do justice to the lives and experience of persons who have suffered from and struggled against structural injustice. It is only such cultural politics, conducted on the responsible terms of principle required by the principle of free speech, that can, in my judgment, reasonably remedy the immense cultural evils inflicted by patterns of structural injustice. In this domain, the interposition of state judgments keyed to alleged group harms from speech not only fails responsibly to address the evil, but worsens it.

The interest of this account of the principle of free speech is, in contrast to others, its linkage of the principle to protest against the terms of structural injustice. Free speech, on the account I offer of it, is based on the inalienable right to conscience also protected by the religion clauses of the First Amendment, and takes on special force in making space for conscientious convictions that protest fundamental injustice, including protest of constitutional institutions themselves. A theory of this sort has a certain reasonable scope and force, but it applies only within its own terms. It thus addresses and condemns blatant forms of state censorship in the domain of conviction, but it does not apply to or limit reasonable state concerns for evils outside this domain. For example, it does not condemn reasonable legislative attempts to regulate expenditures in political campaigns in order to advance constitutionally legitimate goals of political equality.[10] It is one of the unacceptable consequences of the uncritical dominance of the argument for democracy in thought about free speech that the constitutionality of such legislation has been assessed in terms of it. Usually, such assessment has been fatal to such legislation on the ground that it unconstitutionally interposes the state in the constitutionally protected area of political speech; more recently, forms of the same argument have been urged (somewhat paradoxically) in support of the constitutionality of such legislation. We need to transcend the terms in which this important issue has been unfortunately cast. The argument I offer here gives a way of thinking about this issue that suggests current American judicial

10. *See* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 215-19 (1986).

treatment of this and related matters, as an issue of free speech principle, is uncritically wrong.

As I earlier observed, the theory of free speech has both an abstract component of political theory and an historical and contextual component, in which free speech is embedded in an historically evolving tradition of constitutional thought. An American constitutional perspective on free speech brings these components into relationship in an historically evolving tradition of constitutional interpretation of a written Constitution enduring over two hundred years, including both political and legal arguments made over time about its proper meaning. Contemporary American constitutional interpretation ascribes meaning to written texts that are often highly abstract (for example, "freedom of speech" in the First Amendment) reflecting and revising background historical understandings of Lockean political theory of the conditions on legitimate government, including respect for the inalienable human right of conscience and other basic rights. The interpretation of such abstract texts draws upon not only the background history and political theory at the time of their ratification, but also the interpretive practice (of both judicial and political argument) of those texts, including significant amendments thereto, over time. The Constitution of 1787, as amended by the Bill of Rights of 1791, largely imposed guarantees of basic human rights only on the federal government, leaving state power to constitutional scrutiny largely under applicable state constitutional guarantees of human rights.[11] In the wake of the Civil War, various principles of the Reconstruction Amendments extended national guarantees of basic human rights to both the states and to the national government.[12] But the understanding of what those basic rights were and how they should be understood, even after the Reconstruction Amendments, has changed over time, sometimes quite dramatically. A good theory of constitutional interpretation must integrate all these elements (text, history, political theory, interpretive practice), including an informative understanding of how and why basic constitutional principles have been differently contextualized over time. Presumably, a theory of constitutional interpretation will be a better one to the extent it both explains more of the interpretive domain (including the relations among basic

11. *See generally* DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989).

12. *See generally* RICHARDS, CONSCIENCE AND THE CONSTITUTION, *supra* note 8.

constitutional values) and also, when there is intractable interpretive conflict, affords reasonable normative criteria in terms of which such conflicts may be assessed. Any good constitutional theory must thus be both explanatory and normative.

The motivation for the theory of free speech here proposed is better to meet such criteria than competitor theories both as a theory of free speech and of the structural connections of free speech to other constitutional principles of values. I have elsewhere argued that free speech, on the theory I offer of it, offers unifying principles, based on the argument for toleration, that explain and integrate basic constitutional rights of conscience, speech, and intimate life.[13] I extend that argument here to elaborate the argument for toleration, central to my understanding of free speech, to explain as well the role free speech plays in identifying and debunking the structural injustice of moral slavery condemned by various principles of the Reconstruction Amendments. A constitutional theory surely better meets appropriate methodological criteria of adequacy when it both illuminates the structure of each constitutional value (for example, free speech, or religious liberty, or equal protection) and, at the same time, explains how each such value structurally relates to underlying common conceptions and principles.

If the ambition of constitutional theory is so general, why free speech? Certainly, in the long perspective of American constitutional history, free speech only began to enjoy serious federal judicial enforcement in the twentieth century and, even then, largely after World War II. Such increasingly aggressive judicial enforcement itself requires interpretive explication both as a commentary on our contemporary sense of basic constitutional principles and on our sense of normative deficits in our constitutional tradition with consequences we self-consciously want not to repeat. An historically self-conscious theory of American constitutional interpretation must thus address earlier interpretive mistakes, examining with care the larger consequences of such mistakes for related constitutional principles. For example, the failure to extend respect for basic rights of free speech to abolitionist advocacy in the antebellum period, on terms of principle, uncritically enforced the hold of both American slavery and racism on the American public mind at the intolerable sacrifice of basic constitutional values of respect for universal human rights, sowing the seeds of the Second American Revolution, the Civil

13. *See generally* RICHARDS, *supra* note 10.

War.[14] The value we place on free speech is and must be informed by an interpretive mistake of such tragic dimensions, which cannot be of interest only to Americans but must engage the reasonable attention of any people that frames its constitutional identity in terms of respect for basic human rights. No constitutional tradition, including that of the United States, can be regarded as uniformly progressive or enlightened. Indeed, a theory of basic constitutional values of human rights will surely be a better critical guide to the extent it helps us understand today how disastrous mistaken interpretations of human rights have been in our constitutional tradition and how self-blinding they have been in our betrayals of the most fundamental principles of constitutional government.

I focus here on free speech because the growing federal judicial protection of its principle in the twentieth century has, in my judgment, been the interpretive model that has guided and framed the interpretation of related constitutional principles (including principles of religious liberty, constitutional privacy, and equal protection). The answer to "Why free speech?" is thus importantly set by our contemporary self-understanding of the legitimate agenda of judicially enforceable constitutional principles. It is a datum of our interpretive practices that the judicial protection of free speech has played such a role as a model for the protection of related constitutional principles, and it is therefore a reasonable interpretive demand on constitutional theory that it explain "Why free speech?"

Of course, any interpretive practice may be challenged, and it is not an acceptable answer to appeal, positivistically, to a practice as self-validating. It is at this point that the historical and contextual component of a theory of free speech must engage with its abstract component of political theory. The question "Why free speech?" is a free standing question of normative political theory that engages philosophical interest in political justice whether or not those claims of justice are embodied in constitutional law. But if those claims are embodied in constitutional law, as they are under American constitutionalism, such normative political theory plays a crucial role in our interpretive understanding of the normative basis, if there is one, for the priority accorded free speech in the historically evolving American interpretive practice.

14. *See* RICHARDS, CONSCIENCE AND THE CONSTITUTION, *supra* note 8, at 15, 21, 109, 110, 116-18, 121, 134, 136-37, 144.

I. FREE SPEECH AND THE ARGUMENT FOR TOLERATION

Why free speech? I address this question of the priority of free speech here from the perspective of normative political theory. On the basis of a criticism of several alternative views, I present a more defensible view, one based on the argument for toleration.

A. Utilitarian Models of Free Speech

Utilitarian models of free speech take a wide variety of forms, such as John Stuart Mill's classically complex and nuanced arguments in *On Liberty*[15] to Oliver Wendell Holmes's crude appeal to the amoral deliverances of Social Darwinian competition in his dissent in *Abrams v. United States*.[16] The abstract structure of these arguments is that protection of free speech is justified because over all (its tendency to advance truth and the like) it promotes the greatest net balance of pleasure over pain among all sentient beings. But such arguments will not justify principles of free speech of the sort that American constitutional law now requires. The net aggregate of pleasure over pain is often advanced, not frustrated, by the restriction of speech. Large populist majorities often relish (hedonically speaking) the repression of outcast dissenters—the numbers and pains of dissenters are by comparison small—and there is often no offsetting future net aggregate of pain over pleasure to make up the difference. Holmes's more skeptical and less humane utilitarian vision may therefore reflect a sounder balancing of the competing utilitarian consequences than Mill's. For Holmes, free speech values should protect only those "puny anonymities"[17] unlikely to harm anyone and from whom something might be learned; they would not protect a more politically effective speaker (like the challenge of a Eugene Debs to American involvement in World War I or comparable dissenters to the Vietnam War later) whose threat to existing institutions and policies was clear and whose benefit to those institutions and policies was unclear.[18] But that approach is decidedly

15. *See* JOHN STUART MILL, ON LIBERTY 15-74 (Alburey Castell ed., 1947) (1859).

16. 250 U.S. 616 (1919) (Holmes, J., dissenting).

17. *Id.* at 629 (Holmes, J., dissenting).

18. This interpretation of Holmes's views on free speech is not inconsistent with the rather more expansive language of his dissent in *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."), if that language is to be contextually understood in terms of the protection of a political group of fringe left-wing

not the current approach to free speech protection in American constitutional law, and rightly so.[19] The credible critical challenge to American war policies in both cases was precisely the dissenting speech most worthy of protection. Otherwise, free speech protection would be extended only to the incredible fatuities of the lunatic fringe.

B. Perfectionist Models of Free Speech

For reasons already suggested, John Stuart Mill's liberal theory of free speech and private life seems to many more normatively powerful than the utilitarian grounds he urges in support of it. In particular, nothing in the structure of utilitarian argument (which gives equal weight to all pleasures and pains) can reasonably explain the normative priority Mill, like most liberals, accords speech. Mill's conclusions seem sounder than his normative premises, which suggests that his premises should be reformulated in some way more likely to lead to supporting his conclusions.[20]

One appealing solution along these lines is to retain the teleological character of utilitarianism as a kind of moral theory but to revise the conception of what is aggregated. Utilitarianism is a form of teleological moral theory: right conduct is defined as the aggregate of goods or evils, where goods are understood as pleasures and evils as pains. Such a proposed alternative form of teleological moral theory is perfectionism: right conduct is defined as the aggregate of goods or evils, but goods are now defined as human excellences and evils as human degradations. The liberal normative appeal of such a conception is better to understand the kind of normative weight Mill accords speech as a higher pleasure, thus entitled, in his conception, to a greater utilitarian weight over lower pleasures.[21] Such a conception hardly coheres well with what many, including Mill, claimed to find normatively appealing in utilitarianism as a moral theory: its equal weighting of pleasures or pains as such (whatever their sources).[22] If, from this perspective, "everybody to

socialists whom Holmes regarded as, in contrast to Debs, politically impotent.

19. *See, e.g.*, Watts v. United States, 394 U.S. 705 (1969) (anti-draft speech, including threats to kill President Johnson, held constitutionally protected); Bond v. Floyd, 385 U.S. 116 (1966) (speech of Julian Bond protesting Vietnam War held constitutionally protected).

20. *See, e.g.*, C.L. TEN, MILL ON LIBERTY (1980).

21. *See* JOHN STUART MILL, UTILITARIANISM 9-33 (Oskar Piest ed., 1957) (1861).

22. *See id.* at 76-78.

count for one, nobody for more than one,"[23] presumably the pleasure of speech for one should be no greater than that of a good meal for another (at least hedonically understood); and there seems no natural way to accord speech the kind of priority over other values that liberal political theories, including Mill's, mean to accord it.

Perfectionism, however, has no difficulties in claiming that certain activities are more excellent or worthy than others. It precisely resists what it takes to be the philistinism of utilitarian normative theory, insisting that certain activities (involving our higher human faculties, like speech) are more excellent and thus more worthy to be pursued, whether they yield aggregate pleasure or not over all. We have then a teleological normative theory that can give us the normative priority of free speech that we are looking for, one that better explains and justifies Mill's liberal principles of free speech and personal autonomy.

The problem, however, is that any form of perfectionism, understood as an ultimate foundation of normative theory, takes as its starting point interpretations of excellences in living that threaten to be highly personal or even sectarian, imposing controversial values in violation of the liberal imperative of equal concern and respect. To this extent, perfectionism is an insecure basis for a liberal political theory. On perfectionist grounds alone, there seems little way to choose between more liberal interpretations of such premises (as by Haksar[24] and Raz[25]) and illiberal interpretations (Finnis[26] and George[27]). Finnis thus condemns as moral evils abortion, contraception, and consensual homosexuality not in terms of reasonable arguments accessible to all but in terms of sectarian arguments internal to a certain version of Catholic moral theology.[28] If Finnis is wrong about the reasonable force of his arguments for those outside his religious tradition (as he clearly is), how can we be sure that any perfectionist litany of foundationally ultimate perfectionist goods and evils is not similarly either confused or

23. *Id.* at 76.

24. *See* VINIT HAKSAR, EQUALITY, LIBERTY, AND PERFECTIONISM (1979).

25. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

26. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

27. *See* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993).

28. *See* David A.J. Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457 (1987); David A.J. Richards, *Perfectionist Moral Theory, the Criminal Law, and the Liberal State*, 13 CRIM. JUST. ETHICS 93 (1994) (reviewing GEORGE, *supra* note 27).

question-begging in ways that threaten the most basic values of the liberal state? If we want to do better justice to Mill's liberalism, we must seek elsewhere for a more secure foundation for the priority of free speech in constitutional democracy.

C. The Argument from Democracy

In light of the controversies among substantive normative political theories already discussed, one appealing move is to look away from substantive political theory entirely and seek salvation in democratic political processes. The political process model of free speech conceives the core function of such speech to be the protection of the democratic political process from the abusive censorship of political debate by the transient majority who has democratically achieved political power.[29] In the form of this view offered by John Hart Ely, the appeal of the theory is its forthright response to the democratic objection to judicial review.[30] On this model, judicial review on free speech grounds does not run afoul of the democratic objection to judicial review; judicial review here protects the integrity of democracy itself from the illegitimate attempt of a transient majority to entrench its own power by manipulating the agenda of political debate in its own favor. The judiciary does not, on Ely's view, illegitimately impose on democratic majorities a substantive value, but legitimately insists upon and monitors a view of democratic procedural fairness.[31]

The very coherence of this approach to free speech protection requires a background conception of democratic legitimacy, i.e., forms of political power that democratic majorities may and may not legitimately exercise. But the idea of democracy is essentially contestable; views differ as to what is and what is not essential to a well-functioning democracy or, conversely, what counts as democratic "pathology" for purposes of determining the legitimate scope of free speech.[32] For example, recent proponents of the argument from

29. For an early influential statement of this view, see ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1948).

30. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-104 (1980).

31. *See id.*

32. For a range of perspectives on the democratic pathologies that free speech should remedy, see FISS, LIBERALISM DIVIDED, *supra* note 7, at 9-46; and Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

democracy (Cass Sunstein[33] and Owen Fiss[34]) claim that it shows, among other things, that regulations of campaign financing should not raise free speech issues, on the ground that such regulations better insure a well-functioning and properly responsive political democracy.[35] I agree that such regulations should not be regarded as violating free speech principles but fail to see how such a result can be forthrightly squared with the argument from democracy. Indeed, it was the very force of the argument from democracy in the thinking of the Supreme Court that led it, I believe, to take the view in *Buckley v. Valeo*,[36] which Sunstein, Fiss, and I criticize, namely, that restrictions on campaign expenditures violate free speech. Within the framework of the argument from democracy, the Court's reasoning is at least as plausible as its democratic critics, indeed perhaps more so. On one plausible interpretation, the argument from democracy construes political speech to be core protected speech, in particular, protected from infringement by politicians trying to self-entrench their political power. But, restrictions on campaign expenditures can plausibly be regarded as falling in this domain: attempts to interfere with resources closely related to political speech in ways that favor the political interests of politicians in retaining or gaining power. It was an uncritical commitment to the argument from democracy that led the Court to the position in *Buckley* now so widely criticized, assimilating, as it did, regulation of campaign expenditures to a constitutionally problematic self-entrenchment of political power by skewing political dialogue. The ostensibly democratic argument to the contrary emphasizes quite rightly, in support of such legislation, reasonable substantive values of political equality,[37] but fails to engage the barriers that the argument from democracy itself puts in the way of pursuing such a goal in the domain identified by the argument as the core of protected free speech. At this point, the preferred conception of democracy is no longer procedural in Ely's sense at all but substantive in a way that suggests independent substantive principles against which the legitimacy of democracy is being tested. The whole point of the argument for democracy, as a

33. *See* SUNSTEIN, *supra* note 7.

34. *See* FISS, THE IRONY OF FREE SPEECH, *supra* note 7; FISS, LIBERALISM DIVIDED, *supra* note 7.

35. *See* FISS, THE IRONY OF FREE SPEECH, *supra* note 7, at 11; FISS, LIBERALISM DIVIDED, *supra* note 7, at 28-29; SUNSTEIN, *supra* note 7, at 93-101.

36. 424 U.S. 1 (1976). For my criticism, see RICHARDS, *supra* note 10, at 215-19.

37. *See, e.g.*, SUNSTEIN, *supra* note 7, at 94-101.

way of avoiding substantive political theory, is now idle. Substantive political theory is now doing all the work, albeit through a dark glass.

The point may be generalized as an objection to the argument from democracy as a theory of free speech. The legitimate scope of democratic debate may be interpreted either broadly or narrowly. The narrow interpretation limits such debate to the issues directly in controversy in political campaigns among the main contenders for majoritarian political power.[38] The broader interpretation construes such debate as extending to any possible public issue, including the very legitimacy of political power in general and democracy in particular.[39] Neither of these interpretations provides a secure and convincing basis for the priority of speech as a constitutionally protected interest. The narrow interpretation trivializes free speech by restricting its scope to consensus politics; it thus excludes from protection precisely the dissenting discourse outside the political mainstream often most crucial to critical examination of central issues of justice and the common good. The broader interpretation seems to compromise democratic legitimacy by protecting attacks on the very foundations of such legitimacy, including attacks on free speech itself. If such attacks should be protected, as current American law indeed requires,[40] it seems rather strained to justify such protection on the ground that it invariably advances democracy when the speech it allows may sometimes self-consciously aim to subvert it. We value such speech intrinsically, certainly not because it always advances democratically determined policies and aims.

This latter point suggests that we value democracy or, to be more precise, democratic constitutionalism to the extent that it respects independent substantive values of free speech; and those values cannot themselves be plausibly understood in terms of perfecting the majoritarian political process. C. Edwin Baker recently put this point in terms of a substantive value of equal respect for the moral self-determination of all persons and assessed the legitimacy of democracy, to the extent it is legitimate, as a political process that realizes that independent value.[41] Kent Greenawalt advanced a similar argument in

38. *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 30-31 (1971). As a federal judge, Bork later offered a more expansive interpretation of this requirement. *See* Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984).

39. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-63.

40. For a pertinent discussion, see RICHARDS, *supra* note 10, at 178-87.

41. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-51 (1989).

terms of the remarkable American constitutional commitment to principles of religious liberty and the important place of free speech in giving proper expression to these principles.[42] To the extent free speech must give expression to the communicative interests of liberty of conscience, the limitation of protection of free speech to politics is clearly inadequate. As Greenawalt puts the point: "Once freedom of religious ideas is acknowledged, distinguishing protected speech from unprotected speech, say about science or personal morality, becomes almost absurd."[43]

From the perspective of Baker and Greenawalt, constitutionally legitimate political power must respect substantive spheres of moral independence like liberty of conscience (including all matters of fact and value fundamental to the exercise of conscience); the right of free speech, through which persons exercise their constructive powers of moral independence, must correlatively extend to all such matters. The limitation of free speech protection to politics is, on this view, illegitimate because it allows forms of censorship that deprive persons of the inalienable liberties essential to the moral self-government of a free people. Many of these liberties are not political in nature. The limitation of free speech protection to the political is, therefore, illegitimate because it fails the ultimate test of rights-based constitutional legitimacy: the equal protection of the basic rights of free persons.

Baker and Greenawalt suggest (in my view quite rightly) a larger research project about the principles of democratic constitutionalism. Those principles cannot, as a matter either of sound interpretation of American constitutional tradition or of defensible democratic political theory, be understood on the political process model of perfecting the majoritarian political process, i.e., rendering the political process more truly majoritarian (and therefore democratic). As an interpretive matter, the constitutional tradition regards all forms of political power (including the power of democratic majorities) as corruptible; it subjects such power to a system of institutional constraints (including judicial review) designed to harness such power to the legitimate ends of government, namely the respect for human rights and the use of power to advance the public good.[44] A perfected political majoritarianism,

42. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 177-79 (1989).

43. *Id.* at 178.

44. For extensive development and exploration of this theme in American constitutionalism, see RICHARDS, *supra* note 11.

often hostile to respect for both human rights and the public good when involving minorities, cannot be the measure of constitutional legitimacy. As a matter of democratic political theory, political process models usually rest on a form of preference utilitarianism. Such utilitarianism not only has already mentioned defects as an account of current American law; it has independently been subjected to searching contemporary criticism as an inadequate normative theory of equality. Part of this criticism has been that its theory of equality fails to give adequate expression to the place of respect for human rights in the normative idea of treating persons as equals.[45] We need an alternative view of democratic constitutionalism that better captures, both as a matter of sound interpretation and of defensible political theory, the ways in which constitutional principles subject the exercise of political power to scrutiny and constraint.

D. The Toleration Model of Free Speech

We need to return to substantive normative political theory, but of a non-teleological, deontological sort, that better captures the normative structure of constitutional argument in terms of a set of principles that recognize basic human rights to be accorded all persons as equals, prior to the legitimate pursuit of other political goals and purposes. At this point, I want to sketch such an alternative view, explain its roots in American constitutional thought, and consider some of its distinctive consequences for the understanding of the place and role of free speech in American constitutional law.

The theories of religious liberty and free speech are natural starting points for an alternative research project for constitutionalism because the American doctrines of religious liberty and free speech are pivotal constructive components of the kind of reasonable public argument in terms of which exercises of political power must be justified if they are to be constitutionally legitimate. Constitutional argument in the United States has a dignity and weight distinctive from ordinary political argument because it addresses the fundamental question of what lends legitimacy to any exercise of political power. It was fundamental to this constitutional project from its inception not only that all forms of political power were corruptible, but that they had been and were corruptible in a distinctive way. Corruptible political power had deprived persons of the capacity to know, understand, and make

45. The now classic contemporary treatment of this point is JOHN RAWLS, A THEORY OF JUSTICE (1971).

effective claim to their basic human rights by entrenching sectarian views as the measure of what could count either as a legitimate conviction or as an expression of such conviction. As a consequence, political power had been distorted from its proper role in the pursuit of the justice of equal rights and advancing the interests of all alike in pursuit of the public good.[46] The argument for religious toleration was, for leading American constitutionalists like Thomas Jefferson and James Madison,[47] a model for both the corruptibility of political power (subverting the inalienable right to conscience) and its constitutional remedy (namely, depriving the state of any power to enforce or endorse sectarian religious belief, unless in service of a compelling secular purpose reasonably accessible to all as based on general goods irrespective of other philosophical or religious disagreements). In effect, the exercise of political power for religious ends had entrenched a sectarian conception of religious truth as the measure of all reasonable inquiry about religious matters; it thus had deprived persons of their inalienable human rights reasonably to exercise their own moral powers about such matters. Such exercises of political power entrenched a kind of self-perpetuating political irrationalism that deprived people of reasonable government; political power was exercised in ways that neither respected people's right to reasonable self-government in their own moral and religious life, nor subjected its own power to reasonable criticism in terms of equal justice and the public good. Arguments of constitutional principle have the weight that they do precisely because they subject such corruptions of political power to appropriate constraint in service of the reasonable justification of political power in terms of respect for rights and the use of political power to advance justice and the public good.

The principle of free speech plays the central role it does among constitutional principles and structures because it deprives the state of power over speech based on self-entrenching judgments of the worth or value of the range of speech that protects the inalienable right to conscience, i.e., sincere convictions about matters of fact and value in which a free people reasonably has a higher-order interest. That interest is nothing less than the free exercise of the moral powers of their reason through which persons give enduring value to their lives and communities.[48] Speech in the relevant sense must be free from certain

46. For a general development of this theme, see RICHARDS, *supra* note 11.
47. For further discussion, see RICHARDS, *supra* note 10, at 111-16.
48. *See generally* DAVID A.J. RICHARDS, A THEORY OF REASONS FOR ACTION (1971).

forms of state control to insure that censorious state judgments are not the measure of reasonable discussion in society at large and to allow the broadest possible exercise of the reasonable powers of a free people consistent with both respect for their human rights and their rights as citizens to hold political power accountable in terms of its respect for such rights and the public good. If constitutional argument depends for its dignity and weight on subjecting political power to such independent tests of reasonable justification, free speech is the foundation for the practicability of such justification; it insures a constitutional space for the kind of reasonable public argument against which, on grounds of constitutional legitimacy, all forms of political power must be subject to open debate and criticism. It would, of course, doom the entire project to emptiness and triviality if the state's majoritarian judgments of the worth or value of speech were the procrustean measure to which all such discourse must be fitted.

The nerve of this argument is implicit in the way James Madison argued that the principle of free speech is an elaboration of the argument for liberty of conscience as an inalienable human right.[49] The argument for religious toleration was, as I earlier suggested, that the state may have no power over religion because enforceable state judgments about the worth or value of particular religious beliefs fail to respect the right of persons reasonably to make such judgments for themselves. The idea is not that the state is always mistaken in judging certain religious views to be false or noxious; rather, judgments of that sort cannot, in principle, be made by a state committed to respect for the right of people reasonably to exercise their own judgment in these matters. In his seminal formulation of the Virginia Bill for Religious Freedom, Jefferson put the point thus:

> [T]o restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because [the civil magistrate] being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.[50]

In effect, abridgment of religious liberty could not be justified on sectarian grounds but could only be justified on independent grounds of preventing harms to secular general goods like life, liberty, and property. As Jefferson put the point, "[I]t is time enough for the rightful

49. *See* RICHARDS, *supra* note 11, at 173-82.

50. Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 545, 546 (Julian P. Boyd ed., Princeton Univ. Press 1950).

purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order"; the normal means for rebuttal of noxious belief, consistent with respect for the right of conscience, is "free argument and debate."[51] As he wrote elsewhere: "[I]t does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[52] The limitation of the exercise of state power to the protection of general goods expresses respect for the diverse ways that people may interpret and weigh life, liberty, and property consistently with the independent exercise of their moral powers.

Madison saw that the same argument justified a special protection for speech because the state was inclined to make and enforce the same kinds of illegitimate judgments about the worth of the speech through which we express, develop, and revise conscientiously held beliefs. Accordingly, the principle of free speech took the form of a prohibition against the enforcement of state judgments about the truth or worth of what is said (thus anticipating the contemporary free speech doctrine forbidding content-based restrictions on speech).[53] The criterion for the abridgment of speech was the same as Jefferson's criterion for the abridgment of religious liberty; speech may be abridged only "when principles break out into overt acts" inflicting secular harms (a criterion anticipating the highly demanding contemporary American requirements for satisfaction of the "clear and present danger" test, namely, the danger of some imminent, nonrebuttable, and very grave secular harm).[54]

Madison's expansive view of protection derives from a deontological contractualist conception of political legitimacy; state power is only acceptable when it acts in ways that no person, understood to have basic higher-order interests in rational and reasonable self-government, could reasonably reject.[55] From this perspective, conscience is an inalienable human right constitutionally immune from political power because, consistent with this contractualist conception, it is the right that enables persons, on terms of equal respect, to be the sovereign moral critics of values, including political

51. *Id.* at 546.

52. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., 1954) (1787) (footnote omitted).

53. *See* RICHARDS, *supra* note 10, at 165-227.

54. *See id.* at 178-87.

55. *See* T.M. Scanlon, *Contractualism and Utilitarianism*, *in* UTILITARIANISM AND BEYOND 103, 103-28 (Amartya Sen & Bernard Williams eds., 1982).

values like the legitimacy of government. Constitutionally guaranteed respect for this right insures that free and equal persons are the ultimate judges of whether the government respects their rights and pursues the public good in a way that justifies obedience and, if so, on what terms and to what extent. The scope of free speech protection, thus understood, must in its nature be much more expansive than the actual cases when political power is illegitimate or, more extremely, when revolution might be justified. The point of free speech is not that revolution is often justified on grounds of rights-based political illegitimacy, but that the deliberative question of ultimate political legitimacy must, consistent with respect for the inalienable right to conscience, be always vividly addressed to the public mind of a free people if they are to be the ultimate free and equal sovereigns in terms of whose just claims political power must be searchingly tested and held accountable. Persons could not reasonably reject this constitutional principle because it insures the only reasonable basis for holding political power accountable to the basic requirements of its own legitimacy. But the protections of speech—which are also protections of conscience—cannot be limited to religious speech narrowly understood (as Jefferson, for example, supposed).[56] Madison's objection to the prosecutions brought by the federal government under the Alien and Sedition Act of 1798 was that they sought to enforce a suspect judgment of the worth of speech (notably, speech critical of the government) that improperly allowed the government's own beliefs about the legitimate scope of political criticism to settle the issue of what people might and should find reasonable.[57] This was, of course, the same abuse of state power Jefferson noted in religious persecution. If anything, the temptations to such abuse would be as at least as great in the case of speech expressly critical of the state. Accordingly, speech should enjoy at least a comparable kind of protection.[58] Nothing in Madison's argument, however, endorses, as Sunstein quite mistakenly supposes,[59] the argument from democracy as the measure or limit of free speech.

56. For Jefferson's quite restrictive conception of the scope of free speech (in contrast to his expansive protection of religious liberty), see LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 42-69 (1973).

57. *See* James Madison, *Report on the Virginia Resolutions*, *in* 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 546-80 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippencott 1888).

58. For a recent important historical study of the background of early American journalism that was the context of Madison's argument, see JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM (1988).

59. *See, e.g.*, SUNSTEIN, *supra* note 7, at xvi-xx, 18-23.

Madison's defense of free speech is, as we have seen, rooted in the argument for toleration, which extends the protection of free speech as broadly as the underlying right to conscience and threats thereto. These included, as Madison made clear, seditious libel laws, not because such laws were political, but because they so politically threatened the moral integrity of the underlying right of conscience. What Madison clearly takes to be the underlying grounds for an expansive protection of speech (moral independence of conviction), extending to blatant political threats (like seditious libel laws), has been quite erased, means inverted into ends, doing interpretive justice neither to our Madisonian history nor political theory.

The scope of Madisonian protection is clearly responsive to an evolving public understanding of the extent of reasonable conscientious debate about values. As the scope of reasonable application of the idea of protected conscience widens, so must the scope of free speech. Such background shifts may thus explain the expanding class of expressions to which the American judiciary now applies the guarantees of free speech and free press. For example, subversive advocacy[60] and group libel[61] are now fully protected; and much that was traditionally excluded from free speech protection—fighting words,[62] defamation of individuals,[63] obscene materials,[64] and advertising[65]—is now more fully protected. Madison himself expanded the scope of the argument from free conscience to protect public criticism both of religion and of the state; and the modern judiciary has further expanded the argument to protect expressions of dissent from suppression by majorities essentially motivated by hostility to such dissent, rather than by the desire to combat clear and present dangers of secular harms. As Madison clearly saw, the pattern of intolerance familiar in unjust religious persecution occurs as well in the censorship of speech; and the modern United States Supreme Court has correctly understood that the same protections fundamental to our Jeffersonian conception of religious liberty apply, as a matter of principle, to free speech.

The theory quite cogently explains, for example, something that

60. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

61. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

62. *See* Gooding v. Wilson, 405 U.S. 518 (1972).

63. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). For an illuminating recent commentary on this development in American constitutional law, see ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1991).

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

65. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

both the utilitarian and political process models have difficulty in explaining, namely, the inclusion of subversive advocacy in free speech protection. From a utilitarian perspective, as Holmes himself clearly saw, speech advocating the subversion of constitutional institutions, at least when made by a socialist political leader of the eloquence and effectiveness of Eugene Debs,[66] is sufficiently dangerous to warrant suppression on utilitarian grounds ("puny anonymities" are quite another matter[67]). And from the political process perspective, as earlier suggested, why should speech—itself subversive of democracy—be protected at all? But from the perspective of the toleration model here proposed, subversive advocacy, precisely because it makes substantive claims that go to the very legitimacy of constitutional government, is at the very core of free speech protection. Such advocacy conscientiously addresses the public conscience of the community in terms of putative failures to so respect rights and the public good that disobedience, indeed revolution, is justified. From the perspective of a conception of free speech rooted in respect for freedom of conscience about ultimate issues of value like justice and the right to rebel, that is the speech most worthy of protection. It raises the questions of public conscience central to a free society; the constitutional guarantee of the moral independence of such speech and speakers from state majoritarian censorship insures that the legitimacy of state power is subject to searching and impartial testing in terms of its respect for universal human rights and the public interest. It is very much the point of such robust protection of free speech that, precisely because of such protection, the claims of subversive advocates thus protected will be tested by the deliberative judgment of a people empowered by their freedom responsibly to assess such claims. Often they will reject such claims as false and unjustified; sometimes, they will accept them. The meaning of free speech is the impartial moral independence of the testing.

The theory of free speech proposed here straightforwardly explains, in a way in which other views do not, the special priority of free speech and our grounds for skepticism about certain state abridgments of speech. The speech protected is coextensive not with all speech, or with speech as such, but with the independent communication of willing speakers and audiences sincerely engaged in the critical discussion and rebuttal central to the conscientious

66. *See* Debs v. United States, 249 U.S. 211 (1919).

67. *See* Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

formation, revision, and evaluation of values in living against the background of the threats to such moral independence identified by the argument for toleration. The constitutional priority accorded free speech, thus understood, is given weight in terms of a deontological contractualist political theory of equal respect for persons. The theory thus explains, in a way utilitarianism cannot, the weight accorded our interest in speech as opposed to our other interests, and explains, in a way perfectionism cannot, the egalitarian basis of this interest in the role conscience plays in the higher-order moral interests of all persons. It also explains, in a way the argument from democracy cannot, how and why this interest extends beyond the political narrowly or broadly construed to include our moral interests as persons.

On the other hand, the theory suggests reasonable limits on the scope of protection of free speech. For example, some communications do not serve such independent conscientious expression and rebuttal about critical values. Some may bypass reflective capacities (subliminal advertising); others do not express sincere evaluative convictions but knowingly make false statements of fact (fraud and knowing or reckless defamation of individuals[68]); and still others state true facts in which there is no ground for a reasonable interest from the perspective of the critical expression and discussion of general values. Because of the fundamental structural importance of the protection of the right to conscience to political legitimacy, the line between protected and unprotected speech should be drawn in the way that gives the broadest reasonable protection to moral independence in the expression and discussion of values; speech should be regarded as unprotected only on a strong showing of no reasonable ground for protection on this basis. In such cases of unprotected speech, the state may, consistent with the principle of free speech, pursue legitimate secular interests such as protection from consumer fraud and protection of individual reputation and privacy, harms to individuals not subject to rebuttal in public debate in the way in which disagreements over values are. It is therefore not an objection to a theory of free speech grounded in the communicative independence of our rational powers that the theory fails to accommodate such legitimate regulatory interests; the theory, properly

68. By reckless defamation, I mean not mere negligence in stating a false fact but subjective awareness that a fact stated is likely to be false. On my view, both knowledge of the falsity of one's statements of fact or awareness of likely falsity thereof remove such statements from the core of free speech protection, since in both cases the statements are not the sincere expression of conviction. In contrast to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and subsequent cases, my view does not turn on the speech being about public officials or figures and would tend wholly to immunize conscientious public speech from abridgement by libel actions of any kind.

understood, gives them proper weight.[69] In general, free speech has the priority we accord it against a background of reasonable state regulations (including fair time, place, and manner regulations[70]) that afford a supportive framework of communicative dialogue among free, rational, and equal persons and a constitutionally reasonable pursuit of legitimate state interests without prejudice to free speech.

Correspondingly, our skepticism about state power over speech is rooted not in a general suspicion of the state as such but in a desire to avoid specific evils that our constitutional tradition identifies in historically familiar patterns of persecutory state intolerance of moral and political criticism. This explains the background principle of toleration that prohibits the state's enforcement of its own judgments about the critical worth of public speech. Laws condemned by this principle include not only seditious-libel laws that prohibit either express or implied criticism of the government. This principle condemns as well state prohibitions of speech motivated by the offense taken by groups of citizens at the critical advocacy of values of other groups; such prohibitions improperly substitute state enforcement of general views believed to be true for the play of the critical moral powers of free and equal people engaged in responsible discourse.

II. THE UNCONSTITUTIONALITY OF GROUP LIBEL LAWS

It is this reason of principle that may explain and justify why group libel laws (laws making it a criminal or civil wrong to engage in defamation of racial, ethnic, or religious groups) are currently constitutionally suspect in the United States.[71] The reason is this: The principle of free speech, properly understood, discriminates among kinds of interests that may enjoy weight in the balance of political argument about free speech (for example, consumer protection or reputational integrity or privacy) and disentitles certain other interests to any weight whatsoever. These latter interests include offense taken at the exercise of the right of conscience itself, i.e., arguments for the

69. For a somewhat fuller development of this theme, see RICHARDS, *supra* note 11, at 195-201; and RICHARDS, *supra* note 10, at 188-226.

70. For a somewhat fuller development of this point, see RICHARDS, *supra* note 10, at 173, 194, 217, 220, 225.

71. The constitutionality of such laws (directed at general normative claims) must be distinguished from the question of laws directed against ad hominem insulting epithets of a sort contextually highly likely to lead to violence, so-called "fighting words." *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). However, constitutional protection of offensive public speech, making general claims, may require that the latter laws be narrowly construed. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972).

repression of conscientious speech based on offense taken at the general evaluative merits of what is said, in effect, a kind of general "ideological fighting words."[72] A free speech balancing consequentialism predicated on giving weight to such interests (triggered by offense of this sort) may be radically misconceived. Whatever a clear and present danger may reasonably mean, it cannot, consistent with respect for the right to conscience, mean this. The conception of "harms" (sufficient to justify state action) in this case is defined by the objection that offended people take to the conscientious advocacy of certain general views, and the enforceable state judgments are based on this sense of offense. At bottom, the offense taken at a form of conscience (viewed as corrupt) is sufficient to abridge the exercise of conscience. Such a ground for repressive state action is, in principle, unacceptable, for the same reason that the equal moral independence of conscience is, in principle, immune from state power. The state can, consistent with respect for conscience, no more proscribe conscientious moral convictions on such a basis than it can religious or political convictions. Disagreements about issues of conscience (including the corruption of conscience) must, in a free society, be resolved through the free exercise of conscience in debate that appeals to free public reason. Conscience can only be free in this way if a putative error in conscience is not a sufficient basis for state censorship in the domain of conscientious conviction and expression.

If this argument is based on a proper understanding of the right to conscience as an inalienable human right, it will clarify its force and weight to contrast its American interpretation of these matters with the ostensibly rights-based forms of constitutionalism that take a different view of the constitutionality of group libel, indeed that accept group libel as itself a protection of rights. German constitutionalism is usefully illustrative. This constitutional system, like many others,[73] justifies the prohibition of group libel in rights-based terms of another right defined either as "the right to inviolability of personal honour"[74] or a general guarantee that "[t]he dignity of man shall be inviolable."[75] This general

72. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 95 (Jamie Kalven ed., 1988).

73. *See, e.g.*, JANIS ET AL., *supra* note 1, at 471 app. A (Article 10, European Convention for the Protection of Human Rights).

74. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, *supra* note 2, at 7 (Article 5(2)) (limits on the scope of protection of the rights of free speech and press under Article 5(1)).

75. *Id.* at 6 (Article 1(1)) (setting general limits on otherwise absolute rights like the right of art and science, research, and teaching under Article 5(3)). For an example of judicial balancing of this sort, see Mephisto Case, Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal

framework of free speech analysis in Germany is older than the current German constitutional order. Its current sense is, however, framed by a distinctive feature of current German constitutionalism, its commitment to militant democracy; on this view, democracy must be protected against groups and persons that would subvert its general constitutional principles.[76] As I earlier suggested, some rights (like that of individual reputation, and of privacy) may reasonably be legally protected to the extent they do not conflict with the right of free speech. But these rights in their nature fall in spheres (willfully false statement of facts about individuals or statement of private facts in which there is no reasonable public interest) that do not trench upon the core interests of free speech, the conscientious discussion and criticism of public matters of fact, and value by people free of improperly censorious state judgments about the worth or value of such discussion. But the German rights of honor or dignity are not similarly so limited.[77] Rather, the state may prohibit conscientious expression of general evaluative views essentially on the ground that persons experience such expression as disrespectful.[78] In effect, the scope of public debate is to be circumscribed to the measure of ideological inoffensiveness to important persons and groups in society (as those persons and groups are defined by the state).

People do often identify themselves with some larger group with

Constitutional Court] 30 (1971), 173 (F.R.G.), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 309-12, 426-30 (1989).

76. *See* BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, *supra* note 2, at 7 (Article 5(3)) (obligation of loyalty of university teachers to the constitution), 8 (Article 9(2)) (prohibition of associations directed against the constitutional order), 13 (Article 18) (abuse of rights like free speech can lead to forfeiture of such rights), 15 (Article 20(4)) (in the absence of any available alternative, all Germans given right of resistance against anyone attempting to overthrow the constitutional order), 15 (Article 21(2)) (on the basis of a finding of the Constitutional Court, unconstitutionality of political parties directed against the basic democratic order). For associated legal developments, see generally Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies"*, 85 MICH. L. REV. 277 (1986).

77. The problem is not limited to group libel alone; German constitutional law, like that of other European countries, permits its individual libel laws to encompass disparaging value statements about public figures. For a case illustrative of this approach, see *Street Theatre Case*, BVerfGE 67 (1984), 213 (F.R.G.), *translated in* KOMMERS, *supra* note 75, at 431-36. For the contrasting American approach, see *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

78. It would be a closer case if group libel laws were limited to knowingly false statement of facts about groups, statements that therefore do not express conviction and therefore are not sincere expressions of conscience. In my judgment, the constitutionally relevant difference between such a more circumscribed form of group libel action and an individual libel action would be that the former is embedded in general debate about values that can be rebutted in the usual way; in contrast, individual libel is targeted at an individual as such and can only be adequately rebutted by the forms of legal actions through which persons uphold their reputation. For this reason, even a more circumscribed form of group libel action would violate the principle of free speech. I am indebted to Thomas Franck for this clarification of my thinking.

whom they associate their self-respect; they take a lively interest in how they take such groups and thus themselves to be represented and discussed in the public culture of their societies, and sometimes experience reasonable indignation at such discussions as forms of heresy, blasphemy, or group libel challenging their essential values in living, indeed the very core of their identities. Such indignation cannot, however, count as a harm sufficient to limit free speech protection, as it would be if such indignation gave rise to a right of sufficient force (as it does under German law) to limit the scope of application of the right of free speech. The German constitutional theory wrongly counts the occasion of such indignation as a secular evil from which free people may, like threats to physical integrity, be protected. In fact, a proper understanding of free speech as toleration regards such occasions as precisely the kinds of spiritual challenge to public discussion and debate that the tradition of free speech should protect and encourage. Otherwise, the essential public rights and responsibilities of a free and democratic people (indeed, the core of their inalienable rights) are illegitimately transferred to others, who protect citizens from even hearing speech they might find offensive. A people, thus protected, may privately gain in peace of mind, but such privatization deprives a free people of the inalienable public liberties and responsibilities of citizenship that alone dignify them as a people worthy of freedom (reasonably confronting the central issues of public conscience of their age and culture). For this reason, such indignation should, consistent with the values of free speech, express itself not in censorship but in creative forms of voluntary organization to rebut such arguments in the usual way. As we have seen, the principle of free speech is grounded in skepticism about the corruptibility of political power in the domain of the conscientious expression of public values; state judgments about the worth or value of speech in this domain fail to allow proper scope to the reasonable debate of morally independent and free persons about public matters of fact and value. Such reasonable skepticism extends as well to state abridgments of speech ostensibly grounded in protecting groups from disrespectful speech. The point is not that such speech is not sometimes disrespectful of groups and persons or that conscience is not sometimes corrupt but that the prohibition of such speech by the state makes the state the improper enforcer of that respect as the arbiter of what counts as a good or bad conscience in a domain of public debate where enforcement of this kind contemptuously usurps the sovereign right of persons to be the ultimate critics of value in living. Respect for liberty of conscience requires of us the minimal civic courage of

overcoming the fear of hearing views we detest and disallowing such fears of freedom as the basis of state censorship. Such a risk, if it is a risk, is reasonably borne if we, as free people, both understand and value the foundational role in a just polity of the sovereign public and reason about issues of conscience it makes available to all on fair terms.

The interposition of the state in these matters enlists state power in the support and legitimation of what counts as a group identity and the proper respect owed that identity as the measure of what can count as reasonable public debate about such matters. But, the state's judgments in this domain are no more impartially reasonable than they are in the area of religion or politics; the state here enforces inevitably crude majoritarian stereotypes of group identity on a par with similarly illegitimate enforceable state judgments about true religion and good politics. The relationship between individual and group identity must, in a free society, be open to the fullest range of reasonable discussion and debate on terms that allow persons to question, debate, and renegotiate their evaluative understanding of value in living on their own terms, including the relationship between their sense of themselves as individuals and as self-identified members of various groups. Perhaps the relationship between individual and group identity will be more reasonably contestable in a society as ethnically diverse and ideologically pluralistic as the United States than it is in more homogeneous societies; even in more homogeneous societies, the terms of individual and group identity must, in those that are free societies, be open to broad and robust discussion and debate to allow the fullest range of public intelligence and imagination reasonably to be available to all on terms that respect moral autonomy and individuality. Otherwise, essential issues of public debate about value in living—the very terms of one's moral integrity—will be truncated to the measure of unreflective and often oppressive majoritarian stereotypes.

Much serious discussion of public values could, in virtue of the German rights of honor or dignity, give rise to state protection of persons who take offense at such discussion. The general structure of German constitutional argument imposes a duty on the state to protect rights.[79] In effect, the legitimacy of state power turns, like the comparable American Lockean constitutional theory,[80] on the way in

79. For judicial elaboration on this point, see *Schleyer Kidnapping Case*, BVerfGE 46 (1977), 160 (F.R.G), *translated in* KOMMERS, *supra* note 75, at 362-63; *Abortion Case*, BVerfGE 39 (1975), 1 (F.R.G.), *translated in id.* at 348-59; and *Princess Soraya Case*, BVerfGE 34 (1973), 269 (F.R.G.), *translated in id.* at 131-36.

80. *See generally* RICHARDS, *supra* note 11.

which the state organizes and protects the basic rights of its people, including their basic rights of conscience, life, personal security, and the like. To this extent, the German constitutional theory is normatively appealing on grounds of its commitment to the protection of human rights. But the interpretation of this theory to include protection from offensive discussion rests on an inadequate understanding of the weight of free speech in such an overall theory of constitutional legitimacy. This interpretation does not take seriously the nature of the right of free speech in question, precisely because respect for this right requires a principled skepticism about abuses of state power in a certain domain. In short, the central concern of free speech is not protection by the state but from the state. In the area of free speech, however, the German interpretation of this theory of the state as the positivistic source and protector of rights here subverts such protection by its legitimation of an improper state role, an illiberal moral paternalism in the domain of conscience directed at protecting people from offense to their convictions, in effect, from challenge and debate. Such "protection," if carried to its logical extreme, might homogenize the complacencies of a public opinion that concurs on bromides and symbolic gestures of group solidarity; it does not empower people responsibly to understand, claim, and enforce their human rights as free and reasonable people.

There is a larger point worth making here, associated with the relationship of this view of free speech to the idea of defensive democracy. The protection of human rights, if it means anything, cannot be limited in its scope to those who, in the view of the state, support and do not subvert the constitutional order. A constitutional order, ostensibly grounded in the protection of human rights, must extend human rights to all subject to its political power. German constitutionalism undoubtedly espouses this general constitutional theory and surely self-consciously means to transcend more traditional German national ideologies constructed around rights-skeptical polarities of friends and enemies[81] often founded on retaining the purity of the nation's allegedly constitutive ethnic homogeneity.[82] But the

81. For a clear statement and defense of such a German national ideology, see CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., 1976). For an illuminating account of Schmitt's life and work, including his complicity with the Nazi regime, see JOSEPH W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH (1983). Schmitt's complicity with the Nazis places him, like Heidegger, among the leading German intellectuals of their period now very much under critical scrutiny in Germany and elsewhere as part of a tradition that the new German constitutional order very much wants to repudiate. On Heidegger, see VICTOR FARIAS, HEIDEGGER AND NAZISM (1989). It would be paradoxical indeed if German constitutional doctrines like defensive democracy were, as I suggest, very much an unconscious thrall to such a now repudiated tradition.

82. For a development of this idea as central to the modern idea of political democracy, see

German constitutional ideology of defensive democracy is in tension with its more fundamental commitment to inalienable human rights; indeed, its terms suggest the return of the repressed, the older ideology of friends and enemies that it surely means constructively to transcend. Correlatively, its limitation of the right to free speech (by rights of honor or dignity) is unjustifiable for the same reason. The protection of the right to conscience, as an inalienable human right, must extend to all persons within the scope of its principle, namely, those who conscientiously express views on matters of public value and fact. Respect is owed them as persons who originate views and claims and who have the right to authenticate themselves by speaking conscientiously in their own voice and their own terms. The principle of free speech requires that each person is guaranteed the greatest equal liberty to exercise this right in its proper domain consistent with a like liberty for all. It subverts the principled moral force of this right to truncate its protection in terms of some range of views that are politically or morally mainstream and others that are not. This makes ideological conformity, not respect for the human rights of all persons (whatever their convictions), the measure of membership in the constitutional community. As I earlier argued, respect for a right like free speech enjoys its greatest moral force when it extends its protection even to subversive advocates who challenge its authority; the same point applies here to group libel. Respect for the moral sovereignty of dissenters from mainstream views makes the best statement that could be made about the constitutive inner morality of a constitutional community based on respect for human rights.

There is legitimate political power enough to deal with those dissenters who would move beyond dissent to overt acts that threaten the rights of others (for further discussion, see below). Most dissenters do not do so, and many non-dissenters will threaten such acts. The principle of free speech insists that the mere offense taken at dissenting views cannot be the measure of a clear and present danger sufficient to justify the abridgment of speech. Jefferson's earlier cited point about religious liberty applies here as well: "[the civil magistrate] being of course judge of that tendency will make his opinions the rule of judgment,"[83] thus falsely and mischievously conflating ideological dissidence with overt acts that violate rights.

The issue of constitutional principle may be more abstractly stated.

CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY 9 (Ellen Kennedy trans., 1985).

83. Jefferson, *supra* note 50, at 546.

The principle of free speech arises from an historical skepticism, rooted in rights-based political theory, about the uses of state power to homogenize public opinion by the use of its coercive power to criminalize heresy or blasphemy or seditious libel and the like. In each case, criminal prohibitions of thought and speech were based on state judgments about the worth or value of thought and speech (on the ground of a putative corruption of conscience); such judgments both unreasonably limited the scope of thought and discussion to the measure of the dominant political orthodoxy and correlatively deprived persons of their inalienable rights reasonably to think and discuss public matters as free people. The principle of free speech, based on rights-based skepticism about such enforceable political judgments, must extend to all such judgments, including those based on the offense taken by persons to conscientious views expressed by other persons. Such constitutional concern must apply not only to group libel prosecutions but to prohibitions analogously based on disrespectful thoughts and speech.

This understanding properly includes not only the inclusion of subversive advocacy in the scope of protected speech (for reasons already examined), but group libel as well.[84] Such laws make it a criminal or civil wrong to engage in defamation of racial, ethnic, or religious groups. Such laws require a demonstration that claims made about certain groups subject its members to a false disparagement of social esteem like the harm inflicted on a person by a libel of him as an individual.[85] But, the analogy to individual libel is defective in ways of the gravest constitutional concern. Individual libel actions have two distinctive features: they require the publication of false facts, often known to be false or easily ascertainable as such; and belief in such false facts by the audience disparages the reputation of the individual expressly written or spoken about. But the communications, restricted by group libel, express general conscientious views of

84. Despite earlier views to the contrary, *see, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952), cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which strike down subversive advocacy statutes applied to speech fomenting racial and religious hatred and bigotry, suggest that group libel statutes directed against the expression of false racial or religious stereotypes, as such, would be similarly unconstitutional. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding unconstitutional a city ordinance condemning placing on public or private property a symbol that arouses anger on the basis of race, color, creed, religion, or gender, here applied to a crossburning on a black family's lawn); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (holding unconstitutional the attempts of Skokie, Illinois, a heavily Jewish community, to stop a pending march of the Nazi party in Skokie).

85. For a classic defense, see generally David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942).

speakers and audiences, whose nature and effect both depend on evaluative conceptions. Group libel actions, in contrast to individual libel actions, require the state to make abstract evaluative judgments about the value of what is said and about the legitimacy of the objection taken to the assertions. These state judgments about the nature and effect of communicative utterances place group libel laws at the heart of the values of free speech. In effect, a broad range of personal grievances at hearing conscientious views opposed to one's own (and rebuttable as such) triggers state prohibitions. Inevitably, such laws impose state restrictions in the core area of evaluative conceptions appealing to the moral powers of speakers and audiences on the basis of state judgments of the worth of such conceptions, thus usurping the sovereign moral judgment of the people.[86]

Such state usurpation of moral judgment is of special concern from the perspective of the role of free speech in the ethical empowerment of the politics of identity. Group libel laws thus rest on enforceable state judgments of group harm in the domain of conviction, judgments that interpret what can and should count as the stereotypical harms inflicted by structural injustice. Such majoritarian judgments, if enforced through law in the domain of speech, mandate a kind of orthodoxy of appropriate tribalization in the terms of public discourse. Public claims disrespectful of groups are subject to state prohibition. But, this empowers the state to determine not only what discourse is properly respectful and what is not, but what groups are entitled to such protection and what are not. But such state-enforced judgments introduce stereotypical political orthodoxies as the measure of human identity, thus removing from public discourse precisely the contest of such stereotypical boundaries that a free people often most reasonably requires. The identity of no moral person can be exhaustively defined by their ethnicity or race or gender or sexual preference or any of the other terms of common group identification familiar today. The social force such group identifications often have today unreasonably diminishes both the range of diversity and individuality that exists within such groups and the similarities between members of such groups and the groups with which they are contrasted. To enforce such identifications through law in the domain of conscience censors from public discourse precisely the kind of discourse that best challenges them. Such state censorship of a range of discourse stifles, in

86. For my earlier criticism of these laws, see RICHARDS, *supra* note 10, at 190-93; for a similar criticism, see KALVEN, *supra* note 6, at 7-64.

turn, the empowering protests of individuals to that discourse through which they express, demand, and define their individuality as persons against such stereotypical classifications.[87] Paradoxically, it is precisely the groups that the state may regard itself as most reasonably protecting from group libel (the most historically stigmatized groups, like blacks in the United States, or Jews in Europe, or women and sexual minorities generally) that should, as a matter of free speech principle, most reasonably be constitutionally immunized from such protective state power. Ralph Ellison's *Invisible Man* pled for racial justice in America in these eloquent terms: "Our task is that of making ourselves individuals. The conscience of a race is the gift of its individuals . . . ."[88] If the struggle against the stereotypical indignities of racism (or anti-Semitism or sexism or homophobia) is essentially a struggle for individuality, free speech rightly requires that the terms of emancipation must be the empowering responsibility of individuals, including the voluntary organizations through which they define themselves and their struggle. Otherwise, ethical protest degenerates into a tribalism that may uncritically, in the name of rectifying one prejudice (racism), inflict another (anti-Semitism).[89]

The politics of identity arise from ethically transformative protest of the terms of one's moral slavery. It is the very making of such rights-based claims, in one's own voice, that challenges one's dehumanization as not a bearer of human rights, making space for the free exercise of one's moral powers in the reasonable criticism of such structural injustice. Only a principle of free speech, which insists on equal treatment of all conscientious convictions, insures both the legitimacy and the integrity of such politics of identity. On the one hand, in terms of legitimacy, it alone assures all contestants to these debates the normatively required respect for each and every person's right to conscience, which is inalienable in the sense that it is each person's responsibility (not to be surrendered to any other person, let alone to the state); such equality in the domain of conscience, particularly in

87. On the important strand of American free speech thought emphasizing expressive authenticity, see STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990). Unfortunately, Shiffrin wrongly isolates this romantic Emersonian strand of thought from the neo-Kantian theorists, like myself, who find in American neo-abolitionist transcendentalism a clear and enduring strand of Kantian thought, argument, and practice. *See generally* RICHARDS, CONSCIENCE AND THE CONSTITUTION, *supra* note 8.

88. RALPH ELLISON, INVISIBLE MAN 354 (1989).

89. For a recent claim along these lines, see DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 57-59, 80-84, 103-05 (1997).

areas of ongoing controversy and debate over basic questions of justice, expresses the standpoint of public reason that aspires, to the extent feasible, to legitimate political power (including criticisms and reforms thereof) in terms that can be reasonably justified to all, as free and equal persons and citizens.[90] On the other hand, from the perspective of integrity, such egalitarian responsibility empowers the reasonable demands and criticisms of the politics of identity from a more demanding critical standpoint morally independent of the state; such moral independence affords a public standpoint of impartiality that promotes more reasonable public discussion and debate, on terms of principle, of the dehumanizing stereotypes that unjustly rationalize the cultural entrenchment of structural injustice; it better insures, from the standpoint of those subjected to such stereotypes, that those stereotypes are more reasonably contested as the insult to individuality that they are. Such stereotypes of race or gender or gendered sexuality naturalize injustice in complex cultural constructions that often mask the fact of their unjust cultural construction.[91] We need more, not less, open and robust discussion and debate about such cultural constructions. The kind of state power invoked by group libel laws, precisely because it claims a transparent understanding of what counts as a group harm in the domain of conscience, unreasonably censors such debate when it is most needed. The state (so complicitous with the construction of structural injustice) has no such transparent understanding in this domain that it can legitimately claim. Only the most robust and free discussion of these issues can reasonably confront us with the cultural depth and complexity of structural injustice, implicating not only abridgments of the right to conscience and speech but the rights to intimate life and work as well through the enforcement of dehumanizing stereotypes of unjust sexualization that often privatize such injustice. It is an important cultural fact about the entrenchment of such structural injustice that its political force has been traditionally unspoken and even unspeakable. The American principle of free speech has played the role it has in the understanding and remedy of such entrenchment by insisting on both the right and responsibility of protesting voice as alone adequate reasonably to break the silence that entrenches structural injustice. The observance of the principle of free speech, in the terms I have defended it, does not retard the remedy of

90. For development of this contractualist theme, see RICHARDS, *supra* note 10, at 57-63.

91. For fuller discussion on the cultural construction of structural injustice (in the areas of anti-Semitism, racism, sexism, and homophobia), see RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 8.

structural injustice; it is, rather, the terms of principle that guarantees both the legitimacy and integrity of the politics of identity so important to advancing the understanding and remedy of structural injustice.

These concerns for the legitimacy and integrity of the politics of identity may be most vivid for a pluralistic, largely immigrant culture like that of the United States. Generations of Americans have recurrently had to endure the ordeal of Americanization, encountering nativist prejudice against their ethnic or racial group and determining how, if at all, their identity as Americans would interact with their identity as an African American or as an immigrant from Italy or Eastern Europe, and the like. In a constitutional culture as rights-based as the United States, Americans, whatever their ethnicity or race, reasonably strive to be individuals, but individuals enriched by the cultural depth of their diverse heritages or the struggle reasonably to construct their heritages (as reflected, for example, in the development of women's and gay studies[92]). A people, thus constituted, finds the principle of free speech, as I have discussed it, the natural terms in which a diverse and robust public culture will afford them both the freedom and rationality critically to reflect on the values and dis-values of their American and their ethnic and other identities and to weave together a sufficiently complex tapestry adequate to express the authentic moral identity of a free person. This is not the American bleached WASP, but the American who weds convictions of universal human rights to the cultural and human depth such rights, properly understood, make possible.

The principle of free speech plays the role it has and does in a reasonable politics of identity because of the normative links of its principle to the underlying inalienable right to conscience as articulated by the argument for toleration and the theory of structural injustice. The cultural entrenchment of structural injustice crucially turns on both the abridgment of the basic human right of conscience of a class of persons and the irrationalist stereotypes that rationalize such abridgment. The politics of identity, grounded in the right to free speech commensurate with the underlying right to conscience, addresses both wrongs: it demands the right and responsibility of protest, and it thus reasonably criticizes the uncritical force dehumanizing stereotypes have been unjustly allowed to enjoy. On the grounds of such protest, further remedies for structural injustice are, of course, reasonable. Nothing in

92. *See generally id.* For an important development in the genre of gay studies, see JONATHAN DOLLIMORE, SEXUAL DISSIDENCE: AUGUSTINE TO WILDE, FREUD TO FOUCAULT (1991).

the argument proposed here debars such remedies in any way; indeed, the role for free speech in the politics of identity, here defended, clarifies both how and why such remedies should be pursued.

Such points may seem obvious, but they have not been to the recent scholars who have urged rethinking the unconstitutionality of group libel laws in order better to combat structural injustice. Such scholars believe that such laws not only better combat racism and related evils, but suggest that defense of such laws must itself exemplify a refusal to take seriously reasonable remedies for structural injustice.[93] One formulation of this objection even claims that, if group libel laws are constitutionally suspect, so too must be judicial decisions and laws that strike down racial segregation and anti-miscegenation laws and other forms of racial discrimination.[94] Each claim requires careful examination.

The first claim is asserted axiomatically: group libel laws *must* remedy structural injustice in virtue of the content of group libels expressing, for example, racial or religious hatred. The axiomatic force of the claim dissolves, however, on analysis. First, the claim assumes a competence in the state to identify transparently what counts as such a libel in the domain of conscience, which is, as I have argued, undefended and quite indefensible. Second, it assumes, from an already controversial claim about what counts as group libel, that such claims, as claims, inflict harm. But, this assumption conflates two questions that the principle of free speech, rooted in the inalienable right to conscience, correctly separates, namely, the content of conscientious conviction and inflicting secular harms on persons. The state may, of course, act to prevent the infliction of secular harms, but the principle of free speech demands skepticism about state judgments about harms inhering in convictions and speech expressing such convictions unless and until there is a clear and present danger of such secular harms. As I have elsewhere observed,[95] persons are not propositions or the propositions they believe; it is a vicious political fallacy to assume that our contempt for false evaluative convictions may justly be applied to contempt for the persons who conscientiously hold and express such views. Such persons are not, as if by definition, outside the civilizing community of humane discourse. There is legitimate political power to deal with those who move beyond conviction to overt acts which

93. For a compendium of such views, see WORDS THAT WOUND, *supra* note 3.
94. *See* Lawrence, *supra* note 4, at 53-88.
95. *See* RICHARDS, *supra* note 10, at 192.

threaten the rights of others. Not all those who entertain such convictions do so, and many lacking such convictions will threaten such acts. The principle of free speech insists that the offense taken at convictions cannot be the measure of a clear and present danger sufficient to justify the abridgment of speech.

It is revealing that sometimes this axiomatic claim is interpreted as a way of squaring the principle of free speech of the First Amendment with the guarantee of equal protection of the Fourteenth Amendment.[96] The idea appears to be that group libels instantiate the prejudices condemned by equal protection and are thus overall (interpreting free speech in light of equal protection) less worthy of constitutional protection. The argument, of course, proves too much, encompassing surely much conventional religious conviction that is at least sometimes racist and quite often sexist and homophobic, let alone anti-Semitic. The argument is no more plausible if further elaborated, as it sometimes is,[97] in terms of the role such libels allegedly play in silencing dissent. Allegation here masks not merely lack of evidence but our cumulative historical experience to the contrary (the American principle of free speech has advanced both the legitimacy and integrity of the politics of identity; the experience of other nations with group libel laws, applied in the United Kingdom, for example, to advocacy by black power leaders, suggests such laws, if anything, delegitimate the politics of identity).[98] Nothing in the Fourteenth Amendment, properly understood, repeals the principle of free speech based on the argument for toleration. Indeed, the central principle of free speech requires, consistent with the argument for toleration, an equal respect for all forms of conscience, an equal protection in the domain of conscience further elaborated and certainly not repealed by the equal protection clause of the Fourteenth Amendment.[99] The theory of structural injustice, which elaborates the argument for toleration, best explains how they are related,[100] defining the role of free speech as a remedy for structural injustice.

Nothing in the argument for toleration or the theory of structural

96. *See, e.g.*, FISS, THE IRONY OF FREE SPEECH, *supra* note 7, at 25-26.

97. *See id.*

98. On this point, see KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 145 (1995); and Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, *in* SPEAKING OF RACE, SPEAKING OF SEX, *supra* note 5, at 181, 225-26. On the Canadian judicial treatment of such laws, see GREENAWALT, *supra*, at 64-70.

99. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

100. On this point, see RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 8.

injustice supports the claim that the unconstitutionality of group libel laws also casts in doubt the judicial decisions and laws opposing American apartheid. The theory of structural injustice brings the argument for toleration to bear on the criticism of an unjust pattern of cultural entrenchment, which, of course, includes abridgment of the principle of free speech, but of much else besides. The proper understanding of the remedy for such structural injustice includes, as I have argued, a principle of free speech that extends to group libel laws, but also the deconstruction of the practices (including racial segregation and anti-miscegenation laws) that rationalized such structural injustice. It was an important feature of the arguments of the politics of identity, on the basis of the American principle of free speech, that such rationalization importantly turned on cultural practices (like apartheid) that masked structural injustice as facts of nature. Such practices were certainly not understood as convictions or speech expressing such convictions, though, like all practices, they were based on, indeed gave expression to, convictions. To say that these practices are, on critical examination, importantly cultural and are unjust (imposing harms on a class of persons for inadequate reasons) is not to say that they are, as group libel laws are, understood by both speakers and audiences to be communicatively addressed to the domain of conscientious conviction. Otherwise, the guarantees of free speech (extending to all convictions whether true or false) would protect as well all policies based on such convictions (whether just or unjust), which is absurd; in effect, everything cultural becomes speech; a principle of free speech that thus condemns everything is as vacuous as one that condemns nothing. The principle of free speech addresses communications understood by speakers and audiences to be addressed to the domain of conviction, imposing a high burden of constitutional skepticism on state judgments of the worth of convictions in this domain unless there is a clear and present danger of secular harms. Nothing in the reasonable understanding of the basis or scope of this skepticism extends to the judicial decisions and policies attacking American apartheid, which impose secular harms (depriving persons of basic human rights). Rather, the principle of free speech, as I have defended its scope and limits, has advanced understanding of the cultural entrenchment of such structural injustice (the naturalization of injustice) and the appropriateness of remedies therefore including the decisions and laws invalidating the cultural practices of American apartheid.

The principle of free speech is consistent with a robust state power to prevent secular harms, including the harms inflicted by violation of

basic human rights. Structural injustice is such a harm. Its harms include both the systematic abridgment of basic human rights to a class of persons and the inadequate grounds of stereotypical dehumanization that rationalize such abridgment. The state, itself complicitous with such structural injustice, has both the legitimate power and responsibility to take measures to remedy such harms. As I have argued, such measures certainly include the constitutional invalidation of both race-based segregation and anti-miscegenation laws, both of which importantly constructed the stereotypical dehumanization in terms of which abridgment of basic rights was rationalized.

Such remedies importantly included a public responsibility, consistent with the equal protection clause of the Fourteenth Amendment, to advance basic education in democratic values like toleration of minorities and antidiscrimination, including the forms of desegregation mandates required by *Brown v. Board of Education*.[101] Such mandates remedy the long American history of apartheid by insisting that basic education no longer reflect and reinforce such racial barriers but affirm a common education in values of mutual respect; in this way, these mandates remedy one of the important ways in which dehumanizing stereotypes of race were enforced as the unjust basis for structural injustice. Other reasonable remedies include a curriculum which educates in the values of equal respect, including some historical sense of the American construction of structural injustice and the struggles to overcome and correct it. Education of this sort must include, to do justice to such struggles, a sense of the importance and responsibilities of free speech, including, especially when students are more mature, the values of academic freedom. A reasonable balance must be struck between insisting on civility in discourse in academic environments without compromising the important free speech values of academic freedom, which are also part of the mission of liberal education in a free society.[102]

Appropriate remedies, based on secular harms, also include the passage and enforcement of antidiscrimination laws applicable both in the public and private spheres. Discriminatory actions inflict the harm of depriving people of their equal rights and opportunities on inadequate grounds. The structural injustice, which underlies such

101. 347 U.S. 483 (1954).

102. For criticism of some recent university speech codes for not striking a balance properly sensitive to values of free speech, see RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 244-60 (1996). *See also* Strossen, *supra* note 98, at 181-256.

harms, is enforced in part by the ways in which it privatizes injustice. Accordingly, the laws forbidding the infliction of such harms must apply both in the public and private sphere because this scope is alone adequate to remedy the nature of the harm inflicted.

There is, further, no sound reason of moral or constitutional principle why, where appropriate, affirmative action should not be an appropriate remedy for the cultural entrenchment of structural injustice. The principle underlying suspect classification analysis under the equal protection clause of the Fourteenth Amendment cannot reasonably be interpreted in terms of an immutable and salient characteristic, an interpretation that would render constitutionally suspect any use of such a characteristic (including ameliorative affirmative action plans).[103] Rather, the principle of suspect classification analysis condemns the expression through law of the dehumanizing prejudices that rationalize structural injustice.[104] Affirmative action programs do not violate this principle but better effectuate it when they give appropriate weight to, for example, racial classifications as a remedy for the force such prejudices have uncritically been permitted to enjoy in limiting access to basic rights, opportunities, and resources. In particular, such programs reasonably remedy the harms of such injustice when they give appropriate weight to the unjust cultural force race has been permitted to enjoy in framing remedies for structural injustice, for example, race-sensitive opening of opportunities appropriately to rectify a culture of racist exclusion and marginalization.

There is, finally, a compelling secular basis for the exercise of state power aggressively to protect citizens from actions threatening the rights of others (including inchoate crimes like conspiracy) motivated by irrational hatred and prejudice, including forms of ad hominem racial harassment.[105] While groups that advocate racist dehumanization cannot, consistent with free speech principles, be subjected to penalty for such advocacy, there are often other acceptable grounds on which they may be subject to law, including taking steps in concert, subject to the law of conspiracy, to inflict harms on racial minorities. Thus, while all Justices of the Supreme Court agreed on diverse grounds that a form of group libel law could not constitutionally be enforced against a cross burned on the lawn of a black family, they also conceded that such acts

103. For further discussion of this point, see RICHARDS, CONSCIENCE AND THE CONSTITUTION, *supra* note 8, at 170-77.

104. For an extended defense of this view, see RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 8.

105. For an illuminating study of these issues, see generally GREENAWALT, *supra* note 98.

could have constitutionally been prosecuted on other grounds, including terroristic threats, arson, and criminal damage to property.[106]

The American constitutional objection to group libel laws is based on their failure reasonably to meet the standards set by the argument of principle that we call free speech. The unconstitutionality of group libel and similar laws leaves open, indeed stimulates and encourages, both the legitimacy and integrity of the politics of identity, for example, the kind of rebuttal of racist and anti-Semitic speech so prominently part of the American political landscape through the activities of such organizations as the NAACP, the Anti-Defamation League, and many others.

I recognize that there is venerable authority for not extending the principle of toleration to the intolerant[107] and that the modernist European nightmare of anti-Semitism[108] might be supposed to offer continuing contemporary support for such a view at least in circumstances comparable to those of Weimar Germany (in fact, the Weimar democracy did not evenhandedly protect the free speech of the right and the left and certainly did not use the legitimate powers it had to protect rights at threat from racist injustices).[109] Most contemporary constitutional democracies, including Germany itself, understandably take the view that the institutions of constitutionalism must self-defensively protect themselves against the modernist demons of populist racism by refusing such groups certain constitutional liberties. On this view, limitations in free speech protection foster, against the historical background of the powerful role of populist racist fascism in European politics leading to World War II, a much needed public education in constitutional values, making precisely the kind of statement that must be made about the ultimate ethical values of respect for the human dignity of all persons.

American free speech law undoubtedly has its grave critical defects,[110] but its view of group libel offers a plausible alternative

106. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 379-80 & n.1 (1992).

107. For useful discussion, see RAWLS, *supra* note 45, at 216-21.

108. *See generally* RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS (rev. ed. 1985).

109. For useful discussion of those circumstances and their background, see JACOB KATZ, FROM PREJUDICE TO DESTRUCTION: ANTI-SEMITISM, 1700-1933 (1980); and PETER PULZER, THE RISE OF POLITICAL ANTI-SEMITISM IN GERMANY AND AUSTRIA (1988).

110. The treatment by the United States Supreme Court of the relationship between free speech and economic power is one of the areas of the gravest doubt both as a matter of sound interpretation of American history and as an argument of democratic political theory. For an elaboration of this view, see RICHARDS, CONSCIENCE AND THE CONSTITUTION, *supra* note 8, at 215-19. In this domain, the German constitutional theory of the duty to protect rights, including economic rights,

interpretation of the principle of free speech to the common view elsewhere about group libel. American interpretive experience suggests that a sound argument of principle not only protects such anti-constitutional speech (for the reasons already examined at length) but, properly understood, renders such protection a more effective instrument of ultimate public education in enduring constitutional values, in particular, the place of the basic human rights of conscience and speech in a free and democratic society of equal citizens. In American circumstances, the principle of free speech—extended to blatantly racist and anti-Semitic advocates like the KKK[111]—has remarkably energized and empowered the battle for racial justice and religious toleration under the rule of law, a story ably told by Harry Kalven in *The Negro and the First Amendment.*[112] An American constitutionalist, like Kalven, would defend our position as a matter of principle.[113] An argument of principle based on respect for conscience must understand the moral ground on which it stands, one which includes in its conception of what a community of principle is all persons who conscientiously exercise their moral powers and who recognize their ultimate responsibility to depend on themselves (not the state) to exercise their moral powers in defense of rights. The principle of free speech rests on the basic human right of each citizen, consistent with the like equal right of all, to be the ultimate critic of the legitimacy of state power. The principles of our tolerance are most in need when the dissent is most radical, not when it is most conventional. Our commitment to this kind of free testing of the legitimacy of our institutions will be measured by the degree to which we extend our right of free thought even to the radical dissent of moral barbarians who would provoke us to their immorally exclusive measure of insularity, parochialism, and faction. Our principles are, I believe, best and most reasonably affirmed when we resist the temptation to respond to bigots in kind and insist on embracing them in an inclusive moral community that recognizes in all persons what some of them might willfully deny to others, the equality of all persons as free and reasonable members of a political community of principle. Protecting the rights of the speakers

may be a much better interpretation of the theory of constitutional legitimacy that both Germany and the United States share. For a recent, often compelling critique of the Supreme Court's treatment of campaign financing and related matters along these lines, see MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991).

111. *See, e.g.*, Brandenburg v. Ohio, 359 U.S. 444 (1969); *cf.* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (American Nazi Party).

112. KALVEN, *supra* note 6.

113. *See generally* KALVEN, *supra* note 72.

and speech we hate affirms the deeper fraternal bonds of a political community based on universal human rights. In the case of the right of free speech, the response, as a matter of principle, to hate should be, if not the inhuman demands of universal love, at least the humane demands of tolerance and mutual respect.