1-1-1996

Worlds Apart: Reconciling Freedom of Speech and Equality

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ARTICLE

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* An earlier, less-developed version of this Article appeared in abbreviated form in THE PRICE WE PAY (Laura Lederer & Richard Delgado eds., 1995).

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INTRODUCTION

A discourse concerning the relationship between free speech and equality has emerged and expanded in recent years, largely in response to cross burnings in residential areas, the rising incidence of verbal and physical racial attacks on college campuses, and the corresponding promulgation of hate speech regulations.[1] Although the discourse has produced a number of insightful conferences and law review articles, very little dialogue has been produced; instead, more often than not, simultaneous or serial monologues have ensued.[2] In this Article, I will suggest why there has been a lack of meaningful dia-

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[1] The equality concerns occur across a number of trajectories. These concerns find expression in notions of anti-discrimination, anti-gay bashing, anti-sexual harassment and pornography, anti-racist speech, and anti-intimidation measures. While these concerns share normative and analytical foundations, there are also important distinctions. The equality analysis developed in this Article will focus on racial issues and, to a lesser extent, on sexual harassment and gender issues.

[2] The bombing of the federal building in Oklahoma has injected new energy into the ongoing debate about free speech and equality. Many have asserted that the bomber belonged to a militia influenced by hatemongers who spew their invective on various talk shows. Even President Clinton, in a speech before the convention of the American Association of Community Colleges in Minneapolis, asserted as much:

> [Right-wing talk radio hosts] spread hate. They leave the impression that, by their very words, violence is acceptable. . . . Well, people like that who want to share our freedoms must know that their bitter words can have consequences, and that freedom has endured in this country for more than two centuries because it was coupled with an enormous sense of responsibility.

Todd S. Purdum, *Terror in Oklahoma: The President; Shifting Debate to the Political Climate, Clinton Condemns "Promoters of Paranoia,"* N.Y. TIMES, Apr. 25, 1995, at A19.

logue,[3] and the limits of trying to address some of these difficult issues within the existing free speech and equality frameworks.

There are different and distinct narratives for free speech and equality Most of us operate from one of these narratives rather than the other. When a problem arises, one sees the problem from the narrative or world view in which one lives and then proceeds to analyze the problem from that same narrative. In most instances, people are unaware of the extent to which they operate within a particular conceptual framework or even that there are other, competing frameworks. Obviously, if one is either unaware of alternative narratives or is aware but simply asserts the priority of one's own conceptual framework, there is no serious engagement between the competing narratives. This failure is a persistent problem in the effort to address the tensions between free speech and equality[4] For instance, after a series of racial incidents on a college

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[3] Throughout this Article, I will be emphasizing the need for real dialogue. This is not to suggest that all of our concerns can be resolved simply by conversation. I use "real dialogue" in the sense that Professor Richard Bernstein does:

> It would be a gross distortion to imagine that we might conceive of the entire political realm organized on the principle of dialogue or conversation, considering the fragile conditions that are required for genuine dialogue and conversation. Nevertheless, if we think out what is required for such a dialogue based on mutual understanding, respect, a willingness to listen and risk one's opinions and prejudices, and a mutual seeking of the correctness of what is said, we will have defined a powerful *regulative ideal* that can orient our practical and political lives.

RICHARD BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM 162-63 (1983) (emphasis added). Despite my recognition of the importance of language and dialogue, I do not believe the issues we face can be resolved through an idealization of language. Instead, it is the regulative pull of the focus on the conditions of the ideal speech situation that can advance our efforts on the issue of racist speech. *See infra* notes 145-257 and accompanying text.

[4] I question whether the free speech narrative or the equality narrative, as they are currently understood, are appropriate for addressing many of the issues of racist speech. The problem is much more difficult than this. By narrative, I do not mean to suggest that it is simply a story that can be told or not told. Our narrative gives us our world and ourselves. As Oliver Sacks states, "We have, each of us, a life story, an inner narrative — whose continuity, whose sense, is our lives. It might be said that each of us constructs and lives a narrative, that this narrative is us, our identities. If we wish to know a man, we ask, what is his story, " OLIVER SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES 105 (1981). Our narratives do not simply describe the

campus, I often get calls from reporters. They are almost always interested in whether explicit racist incitements might lead to the consideration of policies to limit speech by the college. Very few express concern about the rise of explicit racism and the consequent threat to equal opportunity for minority groups on college campuses. Most of these reporters see the problem through the lens of free speech, because that is the narrative in which they are comfortable or accustomed.[5] This effectively makes them only marginally aware of the race discrimination often present in these incidents. To the extent that they recognize the equal opportunity issues, they see these as trumped by free speech concerns. Their position is not so much thought out as it is reflective, representing their orientation to the world.

We each have, and indeed must have, an orientation to the world. The world only makes sense because of a perspective or world view, which provides the basis for our narratives. There is no such thing as a natural or neutral perspective.[6] These different orientations become a problem only when one's narrative is asserted as the privileged narrative over another narrative.[7] It is this privileging process that is largely

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world, they construct it. As the Harvard philosopher Nelson Goodman asserts: words, symbols, and metaphors are "world-making." Each narrative makes a world. He rejects the position that we can get to the real world behind our narrative, and believes instead that we get to yet another narrative. According to Professor Goodman, there is no language that merely describes the world. *See* NELSON GOODMAN, WAYS OF WORLDMAKING 91-97 (1978); *see also* Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV 2073 (1989) (discussing generally the role of narratives and storytelling in law).

[5] Reporters have a special relationship to the First Amendment. They trade in words. This is one of the reasons for their focus on the speech paradigm. I believe that the free speech narrative, along with the fact that most of the reporters that call are white, leads to this lack of express concern regarding explicit racism on college campuses. It is often acknowledged that our racial experience and situation has an impact on our perspective and on our world view. *See* Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV 295 (1990) (discussing the causes of racism on college campuses). This acknowledged impact of racial experience and situation does not suggest that white reporters cannot have a viewpoint that favors an equality perspective, or that a black civil rights worker cannot favor a free speech perspective.

[6] *See* HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS (David E. Linge trans., 1976); Martha Minow, *Foreword: Justice Engendered*, 101 HARV L. REV 10 (1987) (exploring the "dilemma of difference" in cases before the United States Supreme Court during the 1986 term).

[7] I use "privilege" in this Article to mean one position asserted over another

responsible for what I refer to as simultaneous or serial monologues.[8] In addressing the rise in explicit racist incidents, there is usually a failure to recognize the full dimension of the threat to equality on the one side, and the threat to free speech on the other. Even when there is an apparent acknowledgement that there is more than one framework for addressing this issue, there is seldom a serious effort to consider the claims from anything other than the favored framework.

The conflicting claims from the disfavored framework are usually considered primarily to demonstrate error, not to assess their possible validity This occurs for at least two reasons. First, to consider such claims seriously could have negative implications for the favored framework. Second, the two narratives used to address the issue may be incommensurable. Professor Alasdair MacIntyre describes the dilemma posed by incommensurable claims:

> Every one of the arguments is logically valid or can be easily expanded so as to be made so; the conclusions do indeed follow from the premises. But the rival premises are such that we possess no rational way of weighing the claims of one as against another. For each premise employs some quite different normative or evaluative concept from the others, so that the claims made upon us are of quite different kinds.[9]

While incommensurability suggests that a meaningful comparison of the claims from conflicting frameworks is problematic, it does not mean that comparison without favoring either framework is impossible.[10]

The purpose of this Article is not to show support in favor of free speech or equality, but to suggest that the heart of the problem is the inclination to privilege or favor one framework, perspective, story, or set of metaphors over the others. I will try to suggest an alternative that will aid in providing ground for a serious comparison and dialogue.

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without an adequate and legitimate justification.

[8] Professor MacIntyre describes a similar process and notes the "shrill tone" of the debate because the participant is not engaged in a dialogue. ALASDAIR MACINTYRE, AFTER VIRTUE 8 (1981).

[9] *Id.*

[10] Although Professor MacIntyre suggests incommensurable narratives cannot be compared, this position is challenged by others. *See* BERNSTEIN, *supra* note 3, at 79-108; Drucilla Cornell, *Taking Hegel Seriously: Reflections on Beyond Objectivism and Relativism*, 7 CARDOZO L. REV 139, 152-60 (1985) (discussing the philosophy of science).

Part I describes the different stories told from the free speech and equality perspectives and examines a number of approaches that are used to privilege one narrative over the other.[11] Part II searches beyond the rhetoric of free speech and equality to look at some of their underlying values. Part II will also examine how harm is or is not addressed in each narrative.[12] Part III discusses the role of participation as a mediating value that is central to both free speech and equality.[13] Participation, properly conceived, offers an alternative common story that enhances our understanding of and commitment to free speech and equality.[14] This story allows us to conceive of a way of embracing the interests of free speech and equality without privileging either. In other words, my goal in this Article is to examine critically how we address the tension between free speech and equality, not to attempt to offer a formula for deciding a given case or issue. Part IV sketches out how the approach discussed in this Article could inform our efforts to address the hate speech-induced tension between free speech and equality in two settings, the workplace and the university.[15]

I. THE COMPETING NARRATIVES OF FREE SPEECH AND EQUALITY

We and the world we inhabit are constituted through language.[16] We are given to language before language is given to us. It is through the structure, metaphor, and symbols that our language helps define us and the world in which we live. As scholars explored the importance of language, some hoped that language would be the new foundation for knowledge and moral discourse.[17] This was a false hope, presupposing,

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[11] *See infra* notes 16-144 and accompanying text.

[12] *See infra* notes 145-257 and accompanying text.

[13] *See infra* notes 258-98 and accompanying text.

[14] I am not suggesting that this new common story is real or "truth." It is rather a narrative or version of the world. My claim is that it valorizes the core values of free speech and equality without the privileging that frequently occurs in the current debate.

[15] *See infra* notes 299-348 and accompanying text.

[16] *See generally* GOODMAN, *supra* note 4; LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1953); Cornell, *supra* note 10. Although language is constitutive of the world, it would be a mistake to believe that language describes, reflects, or embodies all. The world is also a reflection of power and material conditions.

[17] *See generally* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY

as it did, a language stable over time and circumstances. In actuality, there are many different stories told in languages that at first glance might seem the same, but that in reality are not. Our language does not only describe the world; it interacts with the world of which it is a part. We not only tell different stories through our narratives, we also inhabit different worlds constructed by our languages.[18] Because language is constitutive of our being, we cannot decide to tell or not to tell our story The narrative in which we live is the world in which we live. Language, however, is also open and contingent; we are not hermetically sealed off from each other. Our stories and worlds are open to revision and change. These changes do not come about simply by appealing to a meta-language; they come about by our real participation in the world we inhabit and wish to inhabit.[19] My effort in this Article is animated by the hope for openness through dialogue and participation, and the necessity of confronting and challenging the danger of domination and privilege.

Free speech and equality are two narratives that in large measure describe two different worlds. In a recent article, Professor Richard Delgado has captured some of the significance of operating from these different narratives. He describes reactions to racial incidents on college campuses, first using the voice of a traditional free speech advocate and then using the voice of a traditional advocate of equal opportunity:

> Persons tend to react to the problem of racial insults in one of two ways. On hearing that a university has enacted rules forbidding certain forms of speech, some will frame the issue as a first amendment problem: the rules limit speech, and the Constitution forbids official regulation of speech without a very good reason. If one takes that starting point, several consequences follow. First, the burden shifts to the other side to show that the interest in protecting members of the campus community from insults and name-calling is compelling enough to overcome the presumption in favor of free speech. Further, there must be no less onerous ways of accomplishing that objective. Moreover, some will worry whether the enforcer of the regulation will

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(1989); ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1975).

[18] DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND 23-48 (1991).

[19] Recognizing the importance of language in constituting the world is not meant to suggest that the world is only language, or that all problems of the world can be solved by using existing language. We must also be mindful of the conditions under which language conflicts arise and are resolved.

> become a censor, imposing narrow-minded restraints on campus discussion. Some will also be concerned about slippery slopes and line-drawing problems [For others "the issue" is the scope of an educational institution's power to promote values of] equal personhood on campus. Now, the defenders of racially scathing speech are required to show that the interest in its protection is compelling enough to overcome the preference for equal personhood; and we will want to make sure that this interest is advanced in the way least damaging to equality.[20]

One tradition tells the story of people asserting their autonomy through participation, free thought, and self-expression in the polity This tradition is very nervous about any government or community constraint.[21] Indeed, there is the suggestion that this is the great evil to be avoided in society The other tradition tells the story of a people whom communities and government colluded to exclude from any meaningful participation in the polity or public institutions. It tells a story of a government that, until recently, actively engaged in efforts to exclude, and now passively stands by while private actors and powerful social forces continue to shut the door to full membership in society This tradition also tells of a long struggle for status, not just as members of the polity, but as complete and respected human beings.[22] Indeed, the great evil to be avoided, as experienced from this framework, is discrimination that undermines or destroys membership.

It is not helpful to ask which of these descriptions is more correct. The assumption that there is some meta-narrative already there, which can be used to decide which is the better narrative, has added to the confusion and lack of dialogue in the current debate.[23] If one inhabits a world in

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[20] Richard Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV 343, 345-46 (1991) [hereinafter Delgado, *Campus Anti-Racism Rules*] (footnotes omitted).

[21] *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-69 *passim* (1989) (arguing for constitutional protection of the freedom of speech based on the liberty theory); *see also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); JOHN S. MILL, ON LIBERTY (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

[22] *See generally* KENNETH L. KARST, BELONGING TO AMERICA (1989); MICHAEL WALZER, SPHERES OF JUSTICE 31-40 (1983).

[23] *See generally* RORTY, *supra* note 17, at 3-22 (discussing the lack of a meta-narrative). Professor Goodman also makes the point that narrative cannot be judged as right or real by some objective language construct because such a

which equality, or the lack thereof, is the primary concern, then equality defines one's perspective; if one inhabits a world in which restraint on self-expression has been the major concern, then the free speech narrative is more compelling. These are not just important stories or perspectives that individuals tell and live, they are also great normative values that live in our Constitution. The question then is not simply which does one choose, but how may these issues be addressed without privileging one narrative over the other?[24]

One may protest that this portrayal of these two stories is necessarily artificial — that the stories have a great deal more in common than they have differences. While this may be true, the differences have fueled the current debate and continue to cause much confusion; the two paradigms often produce conflicting results in the context of racist speech, creating our current problem. Put another way, although the two narratives do not lack commonality or symmetry, real tensions exist in their different versions of the world. The difficulty with identifying, let alone ameliorating, the tensions stems from what may be the incommensurability of the two paradigms.

When two systems are incommensurable, there is no apparent shared measurement to allow for easy comparison, point by point. Even when one finds what appears to be common ground, one must be careful that the commonality is real and not illusory Narratives or frameworks may be incommensurable because they have radically different starting points or goals. Frameworks may be incommensurable because they subscribe to a different method for making truth or value claims. Narratives may also be incommensurable because they describe different worlds. The problem of incommensurability is not just a problem for scholars. As Professor MacIntyre suggests, it is this problem that makes addressing so many contemporary issues so intractable. In noting the different premises used in the debates about just wars, abortion rights, and property distribution, he asserts:

> It is precisely because there is in our society no established way of deciding between these claims that moral argument appears to be necessarily interminable. From our rival conclusions we can argue back

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construct does not exist. *See* GOODMAN, *supra* note 4.

[24] Both free speech and equality are based on the assumption that using power to dominate is not legitimate. To privilege one narrative over the other without legitimating one's choice would therefore be an illegitimate use of power and violate both narratives' norms.

> to our rival premises; but when we do arrive at our premises argument ceases and the invocation of one premise against another becomes a matter of pure assertion and counter-assertion. Hence perhaps the slightly shrill tone of so much of moral debate.[25]

That narratives are incommensurable does not mean they cannot be compared or mediated, but rather there is not a neutral vantage point from which to do this. The ground for comparison must be developed by teasing out from the stories themselves the bases for mediating or fusing the separate horizons.[26] This will only be done, however, after one has given up the false goal of finding a neutral, objective standpoint from which to measure the competing claims of world views and reality.[27]

There have been many attempts to find this perspectiveless place. All have failed. For example, while reason and logic have been pressed into service as the neutral mediators in world view disputes, a number of commentators recently have shown that reason *itself* exists within a context and is historical.[28] We are reluctantly beginning to recognize that if even reason is not stable, we cannot be confident that anyone or anything enjoys a contextual god's eye view Everyone is standing someplace. To make comparisons, therefore, requires that one explore the narratives for differences and commonalities to use in developing possible mediating values or methods. Such commonalities and differences cannot always be discovered. They sometimes require a reconstitution of the narrative through a dialogical process that both discovers and creates difference and commonality.[29]

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[25] MACINTYRE, *supra* note 8, at 8. For a more extensive discussion of the problem, see also ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988) (exploring the conflicting conceptions of justice).

[26] *See* BERNSTEIN, *supra* note 3, at 143-44.

[27] *See generally* RORTY, *supra* note 17; BERNSTEIN, *supra* note 3.

[28] So rationality itself, whether theoretical or practical, is a concept with a history· indeed, since there are a diversity of traditions of enquiry, with histories, there are, so it will turn out, rationalities rather than rationality, just as it will also turn out that there are justices rather than justice.

MACINTYRE, *supra* note 8, at 8; *see also* LLOYD GENOVESE, THE MAN OF REASON (1984).

[29] BERNSTEIN, *supra* note 3, at 96, 161, *see also* Cornell, *supra* note 10, at 160-74 (explaining a dialogism which requires a historical understanding of both sides).

A. How Narratives Are Privileged

When the issue of hate speech and equality was first being discussed by the academic community, I argued that there was no real conflict between the values of free speech and equality I did this, in part, because I believe strongly in both sets of values and could see early on that there was a threat of privileging one set of values over the other. I also argued that there was no principled way of choosing one over the other. I was wrong in my assertion that there was no conflict,[30] but correct that there is no principled way of choosing one over the other. Nor is it desirable merely to choose one set of constitutional values over the other; I continue to believe strongly in both.[31] My goal in this Article is to suggest a framework through which both sets of values can be valorized.

The most common response to the dilemma of the incommensurability of the free speech and equality narratives is simply to favor one over the other. There are a number of ways that this has been done. One way, of course, is simply to deny that there is a conflict.[32] Even as this claim is being made, however, the claimant moves to tell her story and deny others.[33]

A second form of privileging is asserting that one set of values is more important than the other. A number of commentators took this position prior to the current debate, but never in a credible way Occasionally, a commentator indicated implicitly that the asserted priority was so obvious that it was not necessary to support the claim.[34] More often, this position has been justified by assuming that one narrative,

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[30] The way the free speech narrative describes the issues around racist speech and the way the equality narrative describes those same issues are often in direct conflict. *See infra* notes 61-101 and accompanying text.

[31] I am not suggesting that I am neutral or that I have an equal interest or personal grounding in both sets of values. There are a number of times when equality and free speech have worked together without conflict. *See infra* notes 61-101 and accompanying text.

[32] *See, e.g.*, Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 489 (arguing that combatting racial discrimination and protecting free speech can be mutually reinforcing goals).

[33] *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV 267 (1991) [hereinafter Post, *Racist Speech*]; Strossen, *supra* note 32.

[34] *See, e.g.*, Emerson, *supra* note 21 (supporting freedom of speech); BAKER, *supra* note 21, JOHN RAWLS, A THEORY OF JUSTICE (1971).

value, or context is essential or normal, while the other is non-essential, or marginal. One frequently occurring example of this is the claim that free speech is a constitutional concern, while equality is only statutory in the hate speech context.[35] The disfavored narrative may also be characterized as derivative or of lesser value.[36] There are two variations of this. The first takes what could easily be viewed as an equality issue and categorizes it as a speech issue, or the reverse. The other, more subtle, variation of this approach addresses the issue of one narrative, but from the framework of the favored narrative:[37] "We can talk about your issue but it must be my story."

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[35] *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and* Hustler Magazine v. Falwell, 103 HARV L. REV 601, 632-63 (1990) [hereinafter Post, *Public Discourse*] (discussing the prohibition against racial discrimination as an attempt to implement a specific image of communal identity).

[36] Lawrence, *supra* note 33, at 473, recounts a story I told demonstrating this type of privileging. My family and I are vegetarians. My son, Fon, while going through the line for food during Thanksgiving dinner, noted that there was more than one type of stuffing. He turned to the person behind him and asked which stuffing was meat and which was vegetarian. The man responded by pointing to one of the dishes and said this is the regular stuffing and the other is the vegetarian. I spoke up for the benefit of my son and corrected the man that there is no regular stuffing — one was meat and the other vegetarian. Simone de Beauvoir was one of the first modern philosophers to point out that this move to make one thing essential and the other non-essential was a privileging move. *See* SIMONE DE BEAUVOIR, THE SECOND SEX at xxix (1968).

There is also a good discussion of this issue by Minow, *supra* note 6, at 65-66. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

[37] Professor Delgado has addressed this variation in his discussion of the incommensurability of free speech and equality. *See* Delgado, *Campus Anti-Racism Rules*, *supra* note 20.

Addressing one narrative from the framework of the favored narrative is one of the major flaws in the analysis of R.A.V v. City of St. Paul, 505 U.S. 377 (1992). The Court assumed that the major issue in the case was the protection of free speech. One could argue, however, that it would have been at least as valid to analyze the problem from the narrative of equality, which may or may not have produced a different decision, but certainly would have produced a different analysis. In particular, the Court's analysis of the content-bias aspect of the statute was misguided when it was the content that was causing the injury of discrimination. From a larger perspective, the entire doctrine of content neutrality is better understood as an equality issue, as opposed to a free speech issue. *See* KARST, *supra* note 22.

Professor Martha Minow notes that the tendency to essentialize the "norm" reoccurs throughout legal and social categories.

> Legal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, "minority" races to whites, handicapped persons to the able-bodied
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> Such assumptions work in part through the very structure of our language, which embeds the unstated points of comparison inside categories that bury their perspective and wrongly imply a natural fit with the world.[38]

In our legal history, and even today, there is often the assumption that the First Amendment is the essential amendment and the Fourteenth Amendment is the unessential or epiphenomenal amendment.[39] This position leads to three other variations of favoring one position over the other. The first variation places on the disfavored position a burden, such as proving that its position is important or necessary and will not affect the favored position in a significant way The second and similar manifestation calls upon the disfavored position to draw bright lines in an acceptable way that will leave all of the favored framework undisturbed. Failure to do this suggests that the disfavored position must give way to

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[38] Minow, *supra* note 6, at 13.

[39] I am using "unessential" in the sense discussed by Simone de Beauvoir in THE SECOND SEX, when she describes men as being considered essential, and women unessential or the second sex. *See* DE BEAUVOIR, *supra* note 36, at xvi-xviii. This claim may initially appear excessively strong. After all, who would consider equality unessential or derivative?

Although such claims are seldom made explicitly, this assumption is implicit in a number of cases and claims by commentators. *See* Emerson, *supra* note 21. For a commentator who explicitly argues that equality is derivative, see Peter Westen, *The Empty Idea of Equality*, 95 HARV L. REV 537, 542 (1982). Although there have been attempts to privilege equality over free speech, I believe that this is less often the case than the attempt to privilege free speech over equality. For examples of both, see Lawrence, *supra* note 33; Strossen, *supra* note 32. In current discussions that recognize privileging, there is some indication that proponents on both sides are equally guilty of making these arguments. I do not believe this is the case. This approach may give the appearance of being neutral by recognizing privileging on both sides. Implying a false system when there is none, however, can obviously create its own set of problems. *See* Delgado, *Campus Anti-Racism Rules*, *supra* note 20, at 376-80; Strossen, *supra* note 32, at 494.

the essential narrative. The third variation uses the slippery slope argument, which calls for even greater assurances than the other two. This variation suggests that even if one can draw acceptable lines in the current situation, the disfavored narrative must be able to show that the lines will hold in the future and will not be the start of an unacceptable descent.[40]

The slippery slope argument, in one of its forms, goes something like this: "If we allow any exception to free speech, what is to stop the next exception? We will be starting down the slippery slope without a principled stopping place." One response to such an argument is to ask, "what is at the top of the slippery slope and how did it get there?" Professor Frederick Schauer has suggested that slippery slope arguments are not logical arguments, but rather a metaphor to stop real analysis.[41]

In *The Tolerant Society*, Professor Lee C. Bollinger describes how line-drawing and burden of proof arguments are used to favor a position in the context of racist speech:[42] "the line-drawing claim is an appealing argument for any disputant, and especially for the free speech advocate, because of two primary characteristics: First, it shifts the burden of argument onto one's opponents; Second, it seemingly reduces one's responsibility for the result being reached."[43] Regarding line-drawing arguments, Bollinger adds: "[it] is one of the most beguiling methods of obfuscation and diversion in legal argumentation, one that often serves as a convenient disguise for other purposes and motivations."[44] When one privileges a position, there is a sense that the claims and conditions for this position are natural and inevitable. Those who would change them have the heavy burden of showing that there is a compelling reason for

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[40] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 35-39 (1986); Frederick Schauer, *Slippery Slopes*, 99 HARV L. REV 361 (1989).

[41] *See* Schauer, *supra* note 40; *see also* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV 1105 (1989) (discussing the use of metaphor). George Lakoff shows that a large part of our language (story) is metaphorical. *See generally* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980). What often passes for analysis is really metaphor. This problem becomes most acute when claimants are using different metaphors to describe their world.

[42] Although Professor Bollinger does not use the term privilege, the concept is clearly suggested by his analysis of traditional arguments used to advance positions in free speech discussions. *See* BOLLINGER, *supra* note 40, at 43-75.

[43] *Id.* at 38.

[44] *Id.* at 37

the change and that the change will be minor.[45] They have to draw the appropriate line and prove that it will hold.

Many of the discussions about the relationship between the claims of free speech and equality use some form of privileging. In most instances, those who use these techniques are not even aware they are doing so. Nor is it always clear to the person advocating the disfavored paradigm that she has been put on the defensive, not by the force of an argument, but by the force of slipping into the favored narrative.[46] Indeed, the invisibility of privileging often accounts for the force of its position.

An extreme form of privileging is totalizing: making the claim that the language of one narrative accurately describes all worlds. The language is assumed to be universal. Therefore, everything that needs to be said about the world can be communicated through the universal language of the only "complete" narrative. All problems, and indeed all stories, can be unproblematically expressed in the favored framework. This form of privileging clearly rejects the notion that there are such things as contexts or competing narratives. It assumes that the world can be divided up into natural categories that are set out in the language and that this discourse exhausts the possibilities. It is assumed, for example, that the world is completely described by all-encompassing categories, such as rational and irrational, free and unfree, essential and unessential, or material and spiritual.[47] Other possibilities are dismissed as being

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[45] Professor Bollinger goes on to argue that the claim that any regulation of racist speech would destroy a large area of desired speech lacks persuasive force. He notes that most other Western democracies have provisions regulating racist speech. *See id.* at 39. Professor Mari J. Matsuda makes the same observation. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV 2320, 2346-48 (1989) (providing examples of nations that regulate racist speech).

There are claims and counter-claims regarding the impact of these provisions in other countries and the lack of them in the United States. First Amendment advocates often argue that there is less freedom of speech in these other countries and that the provisions add to the racial problem. Equality proponents and citizens of some of these other countries argue that these provisions do not chill desired speech and that the acceptance of racist speech in the United States contributes to our racial problems. *See* David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV 445, 449-506 (1987) (reviewing international anti-hate speech laws).

[46] *See* Lawrence, *supra* note 33, at 474-75.

[47] This is the problem of intelligible essence, which has been discredited. *See* UNGER, *supra* note 17, at 194.

illegitimate or nonsensical.[48] After all, what would it mean to be neither rational nor irrational?

Notwithstanding the vigilant adherence to a totalizing narrative by some, modern philosophers have rejected the claim that there is or can be one narrative that accurately and comprehensively reflects the world.[49] The claim that there is a complete narrative, however, is more than a philosophical error. This totalized narrative operates to marginalize or deny any legitimacy to whatever cannot be adequately expressed in it. This insistence on a unitary voice forces those with other narratives to tell and live someone else's story This totalizing, therefore, robs others of their stories and worlds. The struggle in law and in the larger society over the proper language or narrative, then, is a struggle for legitimacy, law, and power.[50] The law is replete with examples of how people have been coerced through the marginalization or denial of their narratives and the assumption that anything that needs to be said can be stated in existing legal categories.[51]

The Senate Judiciary Committee's response in the Clarence Thomas/Anita Hill hearings may be an example of this. In essence, the Committee insisted that in order for Hill to have credibility, she must explain herself within a male narrative which they may have assumed was complete and natural. This narrative tells the story that normal people, if harassed, will leave.[52] Because Hill did not leave, she must either be judged abnormal, or she must come forward with a good explanation. She never overcame the burden of this negative assumption. It is interesting to note, however, that a number of professional women did not share the negative assumption of the all-male Committee.[53]

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[48] *See* Cornell, *supra* note 10, at 180-81.

[49] *See* DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 17 (1979) (paraphrasing Kurt Gödel's theorem on incompleteness).

[50] *See* Martha Minow, *Listening the Right Way*, 64 N.Y.U. L. REV 946, 951 (1989) (book review of MORE SPEECH by Paul Chevigny).

[51] Theorists not only strongly reject these objective claims made in totalizing, but more specifically, language theorists reject the claim that a language can be both complete and coherent. *See* HOFSTADTER, *supra* note 49.

[52] There is a similar male narrative about rape cases. When women have reported rape to the police, the police often use a male narrative to determine if there has been a real rape. The white male narrative tells the story of a white woman being raped by a strange black man. If the white woman is raped by a white male friend, it may not be a "real rape." For a "real" account of this story, see Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087-88 (1986).

[53] *See* Louise F Fitzgerald, *Science v. Myth: The Failure of Reason in the*

Another example of how this type of totalizing can effectively destroy the voice of "others" is in *Mashpee Tribe v. Town of Mashpee*.[54] The court was to decide if land had been alienated from a tribe in conflict with American law The main issue was whether the people were a tribe. There were a number of legal categorical slots that the Mashpee were required to fill to qualify as such. One requirement was that its members be of one race, and another was that the tribe have a leader. Even though the Mashpee considered themselves a tribe, they could not fit into the necessary categories set up by the American legal system.[55] The tribe failed to prove that it was made up of one race.[56] The court never acknowledged that the tribe did not use racial categories in the same way that the law does to divide the world. The Mashpee lost their voice and land because they did not organize or experience the world in the racial or leadership terms that we do and because they did not fit into the "natural categories" that the court used.

Another, more personal example, may demonstrate the same point about race. I received a fellowship to live and study in Africa for a year. A number of friends, of different races, suggested that it would be interesting and amazing to be in a number of countries where I would be part of the racial majority After being in Africa a short period of time, I was impressed with how different it was from what these friends had suggested. Not only was I in a number of countries where I was part of the racial majority, I was, much more significantly, in countries where the world was not divided up by race. In this country, we have all come to assume that this is the way the world is naturally divided. When I left the large cities, many of the people in Africa could not believe that I could be a functioning person with an identity and not know to which tribe I belonged. It did no good for me to profess that my foreparents had come to the United States as slaves. That was, at best, a weak excuse which still left me without a social identity When I finally complained in frustration that most African-Americans do not know to which tribe or ethnic group they belong, my interlocutors stated with hard-won understanding that I was from the African-American tribe.

Clarence Thomas Hearings, 65 S. CAL. L. REV 1399 (1992) (discussing the Judiciary Committee's questioning of Anita Hill's credibility and behavior).

[54] Mashpee Tribe v. Town of Mashpee, 447 F Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979).

[55] Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 633-36.

[56] *Mashpee Tribe*, 447 F Supp. at 949.

The debate over the abolition of slavery further demonstrates the destructiveness of totalizing. The participants in the debate placed the main issue into the dominant legal narrative of the time: property Because the slaves had been categorized as legal property for some purposes, and it was clear that both the Constitution and fair play required that owners must receive adequate compensation for any property taken, Congress seriously considered before the Civil War a number of schemes for abolishing slavery and compensating slave owners.[57] Put simply, freedom could not come at the expense of property This consequence appeared appropriate from the privileged narrative of property used by the legal system.

In sum, privileging by totalizing,[58] and thus preventing a people from living through their own narrative, does not necessarily deny them the ability to speak or utter.[59] It can, however, deprive people of a voice to make sense of their circumstances and environment, thereby denying them the chance to constitute and maintain their world.[60]

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[57] *See, e.g.*, WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY· THE GREAT BATTLE IN THE UNITED STATES CONGRESS 10 (1996) (describing a speech in which Lincoln explained how the value of slaves as property affected perceptions of slavery).

[58] One response to totalizing is to acknowledge that there are indeed different narratives and that they are all equally valid and incomparable. While this acknowledgement appears to be tolerant of the various narratives, it is really a nod to the status quo. This is because it removes the possibility of criticism of one narrative over another and therefore undermines any possibility of critical change.

[59] Some commentators have assumed that if one can speak, one can participate in the discourse. *See, e.g.*, Post, *Public Discourse*, *supra* note 35, at 634. This is clearly not true, however, except in the most formal sense. If one carries this position to its logical conclusion, it assuredly becomes clear. One can speak or participate, even in the face of the threat of death. Yet coercion would destroy any legitimacy to the claim that one is participating or speaking. The ability to speak does not begin to entail participation in a meaningful sense. A child and an adult can speak to each other, a master to a slave, or an employer to an employee. For a discussion of what is necessary for participation, see *infra* notes 277-83 and accompanying text.

[60] The privileging that usually goes on in the debate about racist speech is often unconscious, sometimes resulting in the loss of the voice of unfavored narrative. There are times, however, when there is a deliberate effort to privilege and to silence. For example, there was often an effort to destroy the language and narrative of Africans subjected to slavery. *See* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL 432 (1976).

B. Privileging and the Free Speech/Equality Debate

When examining the legal scholarship and court cases that address the tension between free speech and equality, one finds that, almost without exception, the commentator or judge moves to a position of favoring free speech or equality by using one or more of the forms of privileging discussed above. There have been a number of important articles written recently on this subject. The works of Professor Charles R. Lawrence and Professor Nadine Strossen provide examples of privileging. One of the reasons to select their work is that, in their respective work and indeed in their lives, they clearly value both sets of principles.

Professors Lawrence and Strossen attempt a dialogue that would avoid favoring one set of values over the other. They were asked to address the issue of racist speech initially at an ACLU Biennial Conference and to respond to each other's comments. They later expanded upon their lively exchange in writing. Professor Lawrence's and Professor Strossen's writings reflect some of the most cogent and subtle articulations of their respective positions. I have learned a great deal from the insightful and fruitful debate between these two friends of mine. Despite their efforts, however, I believe that on a number of critical points, each ends up reflecting the bias of his or her dominant narrative and undermining an opportunity for real dialogue.[61]

Professor Lawrence, in *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, begins by making it clear that he values both free speech and equality [62] He and Professor Strossen would like to avoid the conflict between these two narratives. The way that each would avoid the conflict however, the other finds unacceptable.[63] Indeed, Lawrence argues that the most famous equality case should be read as a free speech case: "*Brown [v. Board of Education]* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys — the message that black children are an untouchable caste, unfit to be

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[61] *See, e.g.*, Lawrence, *supra* note 33, at 466, 475, 481, Strossen, *supra* note 32, at 507-23, 541. I hesitate to use Professors Strossen and Lawrence as examples because I do believe that they have both substantially advanced the effort to embrace both narratives seriously, without privileging one over the other. If I am right that, despite this effort, they slip into privileging one position over the other, this might suggest not only the difficulty of the effort, but also that it is a collective process that can only be worked out over time through committed intellectual and emotional interaction.

[62] *See* Lawrence, *supra* note 33, at 435.

[63] *Id.* at 474; Strossen, *supra* note 32, at 491-92.

educated with white children."[64] Lawrence challenges the often-cited free speech position that there is a clear line between speech and conduct.[65] He argues that racist speech is often one hundred percent speech and one hundred percent conduct.[66] He anticipates that some will claim that *Brown*[67] is of little value in examining racist speech on college campuses because, unlike *Brown*, most of these activities do not involve a state actor. He describes the public/private distinction as blurred under the powers of Congress to address racial discrimination,[68] and attacks this distinction as a monument to preserving American racial discrimination.[69]

Professor Lawrence's argument is subtle and powerful. It gains strength in part from his reformulation of *Brown*. He adds to the power of his position by focusing on both the positive goal of *Brown* of equal citizenship, and on the effort to eliminate a certain type of harm or injury He argues that racist speech can be an injury to both the goals of equality and the goals of free speech. In this part of his discussion, there is a real elegance and force to Professor Lawrence's movement between equality concerns and free speech concerns. He appropriates some of the existing language from the free speech and equality narratives, and reformulates it. His argument for regulating racist speech is put into the First Amendment narrative:

> The second reason that racial insults should not fall under protected speech relates to the purpose underlying the first amendment. If the purpose of the first amendment is to foster the greatest amount of speech, then racial insults disserve that purpose. Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely

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[64] Lawrence, *supra* note 33, at 439 (emphasis in original).

[65] This skepticism is shared by a number of other commentators. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 827 (2d ed. 1988):

> The trouble with the distinction between speech and conduct is that it has less determinate content than is sometimes supposed. All communications except perhaps that of the extrasensory variety involves conduct. Expression and conduct, message and medium, are inextricably tied together in all communicative behavior; expressive behavior is "100% action and 100% expression."

Id. (footnotes omitted).

[66] *See* Lawrence, *supra* note 33, at 444.

[67] Brown v. Board of Educ., 347 U.S. 483 (1954).

[68] *Id.* at 448-49

[69] *Id.* at 445.

> that dialogue will follow. Racial insults are undeserving of first amendment protection because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim.[70]

The discussion of injury caused by racist speech is one of the most poignant elements of Professor Lawrence's analysis. Here he also tries to situate the objection to racist speech within the free speech narrative. It is when he discusses the injury that regulation may cause to free speech that he slips into privileging the equality narrative:

> Our experience is that the American system of justice has never been symmetrical where race is concerned. No wonder we see equality as a precondition to free speech, and we place more weight on that side of the balance aimed at the removal of the badges and incidents of slavery [71]

Whether one agrees with this statement or not, it is clear that it is not from the narrative of free speech. Although Professor Lawrence reformulates *Brown* into a speech case, he subtly moves to trump speech with equality He argues that it is not only appropriate to balance free

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[70] *Id.* at 452. There is one part of the debate that is often repeated regarding the free speech issue. When there is an effort to regulate or curb speech, there is an effort to argue that the subject matter is not speech. Of course, if this is correct, then the difficult question of whether it can be regulated or not is avoided for First Amendment purposes. It seems to me, however, that this is only part of the issue. If there is a real conflict between free speech and equality in constitutional terms, it is not at all clear that, once something is categorized as speech (even speech that would be protected under the First Amendment), the discussion is over. It would seem that where there is a real conflict, one cannot say a priori that speech wins. This is part of the mistake that the Court made in Doe v. University of Mich., 721 F Supp. 852 (E.D. Mich. 1989) (A graduate student at the University of Michigan challenged the constitutionality of the University's policy on discrimination and discriminatory harassment of students.). Of course one cannot say that because there is an injury to equality, equality must win. Either of these approaches would privilege one narrative over the other. Many who would privilege their narrative will be alarmed at this position and see it as radical. The United States Supreme Court, however, has correctly suggested as much. *See* FCC v Pacifica Found., 438 U.S. 726, 747-48 (1978) (discussing that the constitutional protection a communication enjoys may vary, depending on the context of such communication).

[71] Lawrence, *supra* note 33, at 467

speech and equality, but also that equality must prevail.[72] Indeed, he suggests that this position was the point of *Brown*. For those who experience the world from the free speech narrative, it may be too easy to reject Professor Lawrence's claims.[73]

Professor Strossen is no less concerned with avoiding a sharp conflict between free speech and equality She states in the introduction to her article, *Regulating Racist Speech on Campus: A Modest Proposal?*, that universities recognize an obligation to protect and promote both free speech and equal opportunity [74] She tries to avoid an absolutist position and acknowledges that some of the injuries to which Professor Lawrence refers could be regulated.[75] In fact, Professor Strossen argues that we all have an obligation to fight racism, and makes it clear that this has been

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[72] *Id.* at 466-70. A more recent article suggests that while Professor Lawrence continues to operate within the egalitarian narrative, his mode of analysis has shifted to recognize more clearly that a tension between free speech and equality exists. *See* Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV 787, 798 (1992). He nonetheless continues to essentialize equality· "If we are truly committed to free speech, First Amendment doctrine and theory must be guided by the principle of antisubordination. There can be no free speech where there are still masters and slaves." *Id.* at 804. Interestingly, this powerful argument suggests that the only way to dismantle systems of discrimination is through the regulation of speech. Although speech can perpetuate discrimination, other structures can do so as well. Professor Lawrence undermines the cogency of his argument by not acknowledging the role of, for example, the overseer or the law in enforcing the subordination of enslaved African-Americans. Taking his argument to its logical extreme compels the conclusion that discrimination would cease and inequality would vanish once a master began to speak respectfully toward his slaves. Experience and history tell us otherwise. In a paradoxical way, then, Professor Lawrence's argument privileges speech at a more fundamental level even as it essentializes equality.

[73] *See, e.g.*, Post, *Racist Speech*, *supra* note 33, at 307 (arguing that Professor Lawrence does not take seriously the value of free speech). Professor Robert C. Post is implicitly arguing that Professor Lawrence is privileging equality. *See id.* at 313-14. What is interesting is that while Professor Post could be asking that either position be privileged, he ultimately criticizes only the privileging of equality His article, while very useful, is much less sensitive to the value of equality than is Professor Lawrence's piece.

[74] Strossen, *supra* note 32, at 488 (discussing that many universities have promulgated regulations curbing "hate speech").

[75] *Id.* at 490, 498-506.

a priority for the ACLU.[76] She ducks the hard issues, however, by asserting that the First Amendment does not protect much of the speech activity about which Professor Lawrence is concerned.[77] The assumption is, of course, that if it were speech under the First Amendment, it would not be regulated even if it caused the injuries that Professor Lawrence chronicles.

In essence, when she addresses some of the specific concerns that are raised by Professor Lawrence, Professor Strossen writes from a strong First Amendment narrative. Within that narrative, her arguments are persuasive, but the balance she wishes to maintain between a concern for speech and equality is quickly lost. While Professor Lawrence writes about the injury racist speech can cause, Professor Strossen reduces most of these injuries to offense.[78] This is a normal conflict between the two stories. Those in the free speech narrative are extremely reluctant to concede that racist speech is ever any more than offensive, while those speaking from an equality narrative are more likely to speak of racist speech as an injury or wound.[79] Professor Strossen is not entirely unaware of this problem and unsuccessfully tries to avoid the extreme of labeling speech as simply offensive. In her analysis, however, she frequently slips back into this voice of trivializing the harm of racist

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[76] *Id.* at 549-54.

[77] *Id.* at 491.

[78] *See id.* at 497 Although Professor Strossen does, at times, acknowledge the injury speech can cause, she says that type of speech must receive First Amendment protection. *See id.* at 539-41.

[79] Compare, for example, the characterization of the speech in question in Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW U. L. REV 153, 180 (1972) (discussing that individuals are able to reject unwelcomed communication in any form) with Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, 17 HARV C.R.-C.L. L. REV 133, 143 (1982) [hereinafter Delgado, *Words that Wound*] (discussing that mere words, whether racial or otherwise, cause immediate mental or emotional distress). *See also* Lawrence, *supra* note 33, at 461-62 (emphasizing the distinction between the offensiveness of words and the injury inflicted upon the targets of those words). Professor Bollinger is one of the few commentators who tends to embrace the speech narrative but nonetheless acknowledges that racist speech can do more than offend. *See* BOLLINGER, *supra* note 40, at 58-75. Racist speech can indeed injure. It is also interesting to note how individuals experience verbal racial attacks. Although numerous people do not necessarily inhabit the world of categories that legal scholars do, many would object to calling such attacks only offensive. *See, e.g.*, Matsuda, *supra* note 45, at 2327-29 (listing several examples of hate speech and conduct).

speech as offensive. "The essentials of a *Skokie*-type setting are that the offensive speech occurs in a public place Hence the offensive speech can be either avoided or countered."[80]

The significance of this labelling can be seen in comparing Professor Strossen's discussion of *Skokie v. National Socialist Party of America*[81] with that of Professor Bollinger. Bollinger talks about the speech as potentially causing substantial harm, not just offense.[82]

> The entire subject of interaction between speakers and listeners is therefore a matter of considerable complexity We trivialize the problems speech behavior can pose for any individual or community by speaking simply of the risk of the speaker's persuading some weaker minded listeners or of the offense that some listeners will experience.
>
> In this general way, therefore, speech can produce important harms. This, of course, is clearly revealed when speech is explicitly insulting or threatening to particular individuals.[83]

Professor Bollinger supports the decision in *Skokie*, while acknowledging that the injury was greater than merely being offended. He suggests that the characterization of the speech act as merely offensive, rather than actually harmful, makes a very difficult decision seem very easy.[84] Professor Strossen's principal argument against Professor Lawrence's position is that his proposal would change, cut back, and chill free speech. She seems unaware that her approach would limit, if not undermine, equality This oversight is easily made because she argues from the existing narrative of free speech, with only slight acknowledgement of the value of the equality at the point of conflict.[85] She is willing

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[80] Strossen, *supra* note 32, at 497 *But see id.* at 539-41 (recognizing that groups targeted by hate speeches may experience mental or physical harm).

[81] Skokie v. National Socialist Party of Am., 366 N.E.2d 347 (Ill. 1977).

[82] *See, e.g.*, BOLLINGER, *supra* note 40, at 58, 65.

[83] *Id.* at 64-65.

[84] *Id.* at 39.

[85] Professor Strossen's characterization of equality concerns in a free speech voice provides a vivid illustration of this privileging: "[E]quality and free speech go hand in hand. The important goal of combating race discrimination, racial violence, and other forms of discrimination and violence are furthered through free speech " Nadine Strossen, *Liberty, Equality and Democracy: Three Bases for Reversing the Minnesota Supreme Court's Ruling*, 18 WM. MITCHELL L. REV 965, 967 (1992); *see also* Nadine Strossen, *Regulating Sexual Harassment and Upholding the First Amendment — Avoiding a Collision*, 37 VILL. L.

to afford much value and room for equality, as long as it is not in conflict with free speech. For example, while Professor Strossen acknowledges that injury can result from hate speech, she assumes that if the injury runs up against free speech, the injury must be accepted: "[s]tatements that defame groups convey opinions or ideas on matters of public concern, and therefore should be protected even if those statements also injure reputations or feelings."[86] She further states, "there is an inescapable risk that any hate speech regulation, no matter how narrowly drawn, will chill speech beyond its literal scope."[87] She does not seem to be aware that if there is a conflict, the way one describes what can be regulated can have a negative impact on equality

In sum, even when talking about constitutional goals and constraints, Professors Lawrence and Strossen focus on the Fourteenth Amendment and the First Amendment, respectively, if the two narratives conflict.[88] It is also interesting that they, like most commentators, want to avoid the most difficult aspect of the problem: how to resolve the tension when First Amendment protected speech conflicts with the constitutional value of equality Professor Strossen simply denies that such a conflict exists. If forced to acknowledge such a conflict, she would choose to privilege speech.[89] Professor Lawrence would define protected speech so that the disfavored speech is either outside of First Amendment protection, or gives way to equality concerns.[90]

While Professor Strossen argues that Professor Lawrence's proposal would redefine and injure our current understanding of free speech, Professor Lawrence argues that Professor Strossen's approach would restrict our understanding of the Thirteenth and Fourteenth Amendments and retard racial equality Who has the burden of drawing the line in the "appropriate" place and providing the proof that the line will hold? He or she who has the burden will invariably lose. There is no easy, neutral

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REV 757, 781 (1992) (discussing the vital role free speech has played in the feminist movement).

[86] Strossen, *supra* note 32, at 518.

[87] *Id.* at 521.

[88] *See, e.g.*, Lawrence, *supra* note 33, at 457-66; Strossen, *supra* note 32, at 493-94, 507-49.

[89] *See* Strossen, *supra* note 32, at 569

[90] Lawrence, *supra* note 33, at 447-49 This is something that a number of commentators do to avoid the difficult question. One reason why Professor Lawrence may do this is because he realizes that there is a tendency to stop the analysis once the Court finds that the speech at issue is traditionally protected speech.

perspective from which to decide who is right. Each position makes certain assumptions that privilege its perspective.

A third group of commentators has emerged who are referred to as the accommodationists. This groups tries to move beyond the seemingly intractable conflict between the libertarians and egalitarians. Professor Toni M. Massaro's recent article, *Equality and Freedom of Expression: The Hate Speech Dilemma*, epitomizes the accommodationist approach.[91] Professor Massaro acknowledges the tension between free speech and equality[92] and the importance of context and historical legacies in effecting the impact of speech, especially on subordinated groups.[93] Professor Massaro also understands that words can inflict concrete injuries.[94] For these reasons, she and other accommodationists advocate the regulation of some hate speech. Professor Massaro succinctly sums up the nature of such regulation:

> The accommodationist proposals share the common characteristics of being tightly worded, context-specific, and closely tied to the fighting words doctrine and/or the tort of intentional infliction of emotional distress. In essence, the proposals seek to regulate targeted, intentional vilification of a person or small group of persons in a face-to-face encounter on the basis of a protected characteristic.[95]

The accommodationists, however, frequently let their concern for protecting free speech overshadow any concern for equality Professor Massaro states that although bigotry can cause serious liberty losses, she is "prepared to avert [her] eyes in order to promote the free and open discourse ends of the first amendment — at least when the harassment is a general, purely verbal attack "[96] In fact, accommodationists like Professor Massaro can go almost as far as the libertarians in understating the depth of the wounds that speech can inflict and the discrimination that

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[91] *See* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV 211 (1991); *see also* Post, *Racist Speech*, *supra* note 33, at 270 (discussing how restraints on racist speech turn on whether they further the university's educational mission rather than their value in terms of public discourse).

[92] *See* Massaro, *supra* note 91, at 212.

[93] *Id.* at 254.

[94] *Id.*

[95] *Id.* at 249 (footnotes omitted). Professor Massaro also characterizes it as the "'fighting words plus' approach." *Id.*

[96] *Id.* at 254.

speech can perpetuate. Professor Massaro explains that hate speech that could be construed as group libel should not be regulated because, although stereotypes are dehumanizing and reductive, "they are also part of an ideological framework "[97]

Because they typically minimize the extent of speech-induced harm, the accommodationists frequently lapse into privileging, notwithstanding their efforts to compromise between the free speech and equality paradigms.[98] Professor Massaro, likewise, frames her entire discussion in terms of speech despite her attempt to embrace both free speech and equality values. She begins her discussion with a call for "an appropriate balance between the strong claims of civil *discourse* and the strong claims of *untrammeled expression*."[99] This statement, in addition to slanting the debate in favor of free speech, also reflects a disregard for equality concerns and a misunderstanding of the concept of incommensurability By merely seeking "an appropriate balance" between the two conflicting paradigms, Professor Massaro assumes that common points of reference cannot be teased out, that the paradigms cannot actually be engaged, reconceptualized, and evaluated in a dialogical process.[100] Thus, she chooses to remain ensnared in the either/or conceptual trap that induces further privileging. Instead of finding a principled way to mediate the tension between free speech and equality, then, she limits her analysis by moving merely to compromise.[101]

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[97] *Id.* at 255.

[98] Professor Massaro admits that, "the accommodationist position is essentially a civil rights position that works within the existing constitutional framework." *Id.* at 251. As *R.A.V* demonstrates, the constitutional framework, as it is understood today, usually privileges free speech. *See infra* notes 309-21 and accompanying text.

In explaining her support for the Stanford policy for speech regulation, Professor Massaro offers a graphic expression of privileging. "The policy anticipates that the principal remedy for racist and related forms of verbal aggression would remain counterspeech, including public-sponsored education rather than speech suppression." Massaro, *supra* note 91, at 263.

[99] Massaro, *supra* note 91, at 217 (emphasis added).

[100] If Professor Massaro did not make this assumption, she would have at least spoken about trying to tease out the common points of reference.

[101] Professor Jürgen Habermas criticizes such compromising and suggests that it would be appropriate only when there has been a serious effort to develop a meaningful understanding between the different positions and that effort has failed. *See generally* JÜRGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION (1984). Notwithstanding this insight, we overvalue the role of compromise and

Professor Massaro's way of framing the debate, much like the approach used by other accommodationists, is also problematic because it casts equality concerns in terms of "civil discourse," as if the best that can be done to address discrimination is to think and speak in a more "tolerant" narrative. This call for tolerance often has been used to defend the status quo rather than to challenge existing structures and ways of thinking that undermine equality The plea for tolerance also implies that there is no way to truly differentiate between protected and proscribable speech without being arbitrary Therefore, the insinuation goes, we must strive for "civility " However, without the substantive grounding that would come from the discussion-based interaction between and within narratives, "civility" will prove to be a vacuous goal.

C. *Privileging Free Speech in the University*

There have not been many cases in which the courts have had to address the tension between equality and free speech. In the cases where the tension has arisen, the courts have reproduced the problem of privilege exhibited in the Strossen/Lawrence articles, without the sensitivity The analysis in these cases reveals more about how the judges privilege one framework over the other than about how, in a principled way, either to select the "correct" framework or to mediate between them.

Doe v. University of Michigan[102] is one of the first cases that addresses the issue of the tension between racist speech and equality The court in *Doe* quickly moved to privilege the free speech narrative over the equality narrative. The court appeared to recognize the importance of both values and expressed concern for the principle of equality, but then analyzed the case entirely in free speech terms: "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values."[103] While suggesting the need to mediate and balance the values of equality and free speech, the court in fact did neither. Instead, it analyzed the case entirely from the free speech

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undervalue the effort to develop understanding based on real dialogue because we often operate as value skeptics.

[102] Doe v. University of Mich., 721 F Supp. 852 (E.D. Mich. 1989) (In *Doe*, a graduate student brought suit challenging the constitutionality of the University of Michigan's policy on discrimination and harassment of students.).

[103] *Id.* at 853.

narrative, without defending its choice of frameworks or suggesting how to balance the interests.[104]

It is not clear from the decision why the court assumed that the case could be analyzed with so little regard for equality concerns. Perhaps the court assumed the equality injury to be mere offensiveness and not a more substantive harm.[105] What is clear, however, is that the reasoning used by the court privileged free speech in this conflict: "While the court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech."[106] Implicit in the court's reasoning is that racist speech, and indeed injury, can be advanced at the expense of equal educational opportunity I do not take issue with the judgment in this case. I do believe, however, that neither the Constitution nor precedent necessitated privileging of free speech in the court's reasoning. An analysis that took seriously not only the emotional tug of equality,[107] but also the normative and constitutional value of equality, would have to be reasoned differently The court, citing Professor Mari J. Matsuda, acknowledged in an addendum to its opinion that there continues to be a need to address adequately the harm implicated in this case, but it did not attempt to do so.[108]

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[104] *Id.* at 863-64.

[105] In delineating its overbreadth analysis, the Court stated that regulations that punish "speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad." *Id.* at 864. This labeling of the harm caused by speech as simply "offensive" is typical of the free speech narrative and fails to acknowledge the notion likely to be employed by the equality narrative, that the harm in question is more accurately described as the infliction of a wound.

[106] *Id.* at 868.

[107] *See, e.g., id.* at 869 ("This is not an easy legal or moral puzzle, but it is precisely in these places where we feel conflicting tugs at heart and mind.").

[108] *Id.* (citing Matsuda, *supra* note 45). The real substantive flaw that the court found in the speech code was overbreadth. In its statement of the overbreadth case law, none of the cases that it cited involved a conflict between speech and equality. The use of this concept in free speech analysis decisively privileges free speech over equality, since it measures the legitimate scope of the regulation by examining the degree to which it includes protected speech, without regard to its relation to equality. This is not to say that the use of the overbreadth doctrine must privilege free speech, but rather that it will, where a regulation's consequences for equality are not added into the balance.

In the same year that *Doe* was decided, the University of Wisconsin, in response to a series of racist and discriminatory activity, passed a speech code. The code prohibited the utterance of epithets that would demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of an individual or individuals and create an intimidating, hostile, or demeaning environment for education.[109] The code was challenged as a violation of the First Amendment in *UWM Post, Inc. v. Board of Regents.*[110] In finding that the code violated the First Amendment, the court employed the free speech narrative and was even more dismissive of equality concerns than the *Doe* court. Because the court did not recognize the importance or the validity of equality concerns, it proceeded to analyze the case entirely from the free speech narrative. The court's speech analysis had two components: application of the "fighting words" doctrine and application of the balancing test articulated in *Chaplinsky v. New Hampshire.*[111] The application of the fighting words doctrine, of course, contains its own conclusion in this context. The court stated that "[i]t is unlikely that all or nearly all demeaning, discriminatory comments, epithets or other expressive behavior which creates an intimidating, hostile or demeaning environment tends to provoke a violent response."[112] Consequently, some speech regulated by the code is not reached by the "fighting words" doctrine. For this reason, the court found the code unconstitutionally overbroad.[113]

An important aspect of this manifestation of the free speech narrative is the narrow concept of harm that it uses. The only kind of harm that the "fighting words" doctrine recognizes is physical violence in response to speech. This doctrine decisively privileges the free speech narrative over the equality narrative, which is concerned with discrimination and harm to equal educational opportunity No requirement that the discrimination be accompanied by physical harm exists. Indeed, the United States

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In any case, one need not hypothesize about whether the court privileged free speech over equality In its conclusion, the court stated with an air of determinism that "[w]hile the court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech." *Id.* at 868. It is difficult to imagine a more global privileging of free speech over equality.

[109] UWM Post, Inc. v Board of Regents, 774 F Supp 1163, 1165 (E.D. Wis. 1991).

[110] *Id.*

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

[112] *UWM*, 774 F Supp. at 1173.

[113] *Id.*

Supreme Court expressly rejected this approach in *Brown* when it overturned *Plessy v. Ferguson*.[114] Thus, within the free speech narrative generally, and the "fighting words" narrative in particular, the claims of equality with regard to harm cannot be heard. The court in *UWM* refused to recognize psychological harm. It is worth noting, as argued below, that the harm the free speech narrative seeks to avoid is itself a psychic harm.[115]

In the second part of its analysis, the court found that the *Chaplinsky* balancing test did not apply to the conflict at issue, and concluded that even if it had applied, the code would be rendered unconstitutional. After the court stated that the *Chaplinsky* balancing test applies only to content-neutral regulations of speech, it essentially asserted that the code was a content-based regulation. The court noted that "[t]he rule disciplines students whose comments, epithets or other expressive behavior demeans their addressees' race, sex, religion, etc."[116] and "leaves unregulated comments, epithets or other expressive behavior which [do not]."[117] For this reason, the court found it to be clear that "the UW Rule regulates speech based on its content."[118] This reasoning privileges the free speech narrative by ending its analysis with the finding that a particular kind of speech is prohibited, and assumes that this is synonymous with a content-based regulation. The court could have gone a step further and inquired into the purpose of the regulation of certain kinds of speech, in order to see if it reflected not a hostility toward the ideas expressed, but rather a pursuit of some legitimate objective based on the impact of the speech in a particular context. For example, the court could have found that the university wanted to eradicate impediments to the provision of an equal education to groups who have been historically denied educational opportunity, and to end discrimination proscribed by Title VII, and that the code was a content-neutral regulation directed toward that end.[119]

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[114] Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954) (overruling Plessy v Ferguson, 163 U.S. 537 (1896)); *see* Lawrence, *supra* note 33, at 462.

[115] *See infra* notes 225-57 and accompanying text.

[116] *UWM*, 774 F Supp. at 1174.

[117] *Id.*

[118] *Id.*

[119] This is precisely the kind of analysis that the court in Robinson v Jacksonville Shipyards, Inc., 760 F Supp. 1486 (M.D. Fla. 1991) (rejecting "social context" argument as pre-existing atmosphere deterring female employment was contemplated by Title VII), employed in the workplace context. *See* Barnes v Glen Theatre Inc., 501 U.S. 560, 570 (1991) (holding that local statutes requiring nude dancers to wear pasties and g-strings did not violate the

The court casually dismissed each claim the university raised, staying comfortably situated in a framework that was apparently self-evidently correct to the court. When the university raised the Fourteenth Amendment interest, the court failed to consider such a conflict seriously The court asserted that the university had not shown that equal educational opportunity was being affected, and, even if it were, that there was no state action.[120] Although educational discrimination under Title VI does reach private discrimination, it is clear that this court would fail to address the issue seriously [121]

Although I am primarily concerned here with privileging when free speech and equality are involved, it is worth noting that the problem is much broader. For example, while the courts in *Doe* and *UWM* easily dismissed equality and educational concerns in favor of free speech, the Court in *Hazelwood School District v. Kuhlmeier*,[122] however, just as easily dismissed free speech concerns without any of the lofty language about the pre-eminence of expression. In *Hazelwood*, a school refused to allow the student newspaper to publish an article concerning the pregnancy experiences of three of the school students. The Court accepted a number of values, including the pedagogical interest of shielding the high school audience from objectionable viewpoints and sensitive topics as outweighing the free speech interest. The Court framed the issue to produce the desired outcome: "It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression *has no valid educational purpose* that the First Amendment is so directly and sharply implicated as to require judicial intervention."[123] Justice Whites's majority opinion acknowledg-

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First Amendment despite limitations on expressive activity).

[120] *UWM*, 774 F Supp. at 1176.

[121] When the claim was made that the discrimination was like Title VII, the court asserted that the university is not like a workplace, and, even if it were, a statute would have to give way to the Constitution. *See id.* at 1177 This is clearly not an adequate analysis of this issue. Title VII and Title VI were passed pursuant to constitutional power given to Congress. At least one Supreme Court case has held that Title VI and the Fourteenth Amendment are coterminous. *See* Lau v Nichols, 414 U.S. 563 (1974).

In a series of cases where there has been a conflict between First Amendment rights of association and the prohibition against discrimination, the Supreme Court has found that First Amendment interests must yield to the constitutional interest of anti-discrimination. *See infra* notes 169-211 and accompanying text.

[122] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[123] *Id.* at 273 (emphasis added) (citation omitted).

es that there are competing interests in free expression of the students and educational purpose of the school, but he states that any educational purpose will outweigh the free expression interests.[124] Justice White does not inform us why this is true. The school's defense only asserted that the students' expression would interfere with the educational functioning of the school. Yet in *UWM*, the court stated that the school had not proved that racist speech would interfere with equal educational opportunity [125] This proof was not required in *Hazelwood.*

D. Privileging Equality in the Workplace

In the context of employment, a federal court in Florida expressed a radically different view from that of the *Doe* and *UWM* courts about the conflict between free speech and equality In contrast with the two speech code cases described above, the court in *Robinson v. Jacksonville Shipyards, Inc.*[126] addressed a conflict between free speech and equality within the equality narrative by framing the issue as a Title VII case.[127] At issue in *Robinson* was a claim that the pervasive posting of pictures of nude women and ongoing sexual verbal harassment by male employees created a hostile work environment for women. One of the elements of the hostile environment claim is the impact of the harassing behavior on the employee and the work environment. According to the court, the analysis of this element must seek to separate the "mere utterance of [a discriminatory] epithet which engenders offensive feelings in an employee " from conduct that violates Title VII.[128] In articulating the test for a hostile environment claim, the court stated that the harassment "must be sufficiently severe or pervasive 'to alter conditions of [the victim's] employment and create an abusive working environment.' "[129] Specifically, the question is whether the "harassment was sufficiently severe or persistent 'to affect seriously [the victim's]

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[124] *Id.*

[125] *UWM*, 774 F Supp. at 1176.

[126] Robinson v. Jacksonville Shipyards, Inc., 760 F Supp. 1486 (M.D. Fla. 1991).

[127] Title VII, with its roots in the principles of equality articulated in the Fourteenth Amendment, has provided a structure for recognizing psychic harm as substantial and legally actionable.

[128] *Robinson*, 760 F Supp. at 1523 (quoting Rogers v EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

The court in *Robinson* uses the terms "conduct" and "harassing speech" interchangeably.

[129] *Id.* (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

psychological well being.'"[130] Thus, unlike in the speech code cases, the court employed a broad conception of harm which included psychic suffering. In addition, the court focused on the impact of the speech instead of the content.

Like the courts in the speech code cases, the *Robinson* court addressed a privilege. In this case, however, the court privileged the equality narrative by analyzing free speech claims only superficially This privileging occurred in several ways. First, the court argued that "the pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment."[131] This is precisely the converse of the per se rule in favor of free speech as stated in *Doe.*

Second, the court argued that "the regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech."[132] In order to find that the requisite content-neutrality and compelling state interest existed, the court employed the equality narrative. The court stated that the eradication of discrimination in employment furthers the compelling governmental interest of eliminating economic, political, and social barriers that hinder women.[133] By viewing the advancement of the equality of women and the elimination of discrimination, rather than censorship, as the core concerns, the court could view an injunction-induced regulation of speech as satisfying the content-neutrality requirement.[134] This is precisely the converse of the reading of content-neutrality that the court in *UWM* articulated from its speech privileging perspective.

While the *Robinson* court did acknowledge some possibility of a content-neutrality problem, it found this issue minimal compared with the compelling need to overcome discrimination: "To the extent that the regulation here does not seem entirely content neutral, the distinction based on the sexually explicit nature of the pictures and other speech does not offend constitutional principles."[135]

In its most categorical privileging of equality over speech, the court argued that even if the speech were recognized as protected, it would

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[130] *Id.* (quoting Sparks v Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987)).

[131] *Id.* at 1535.

[132] *Id.*

[133] *Id.* (quoting Roberts v United States Jaycees, 468 U.S. 609, 626 (1984)).

[134] *Id.*

[135] *Id.*

have to yield to the compelling interest of "cleansing the workplace of the impediments to the equality of women."[136] Thus, in its analysis of a conflict between protected speech and equality, it acknowledged little harm to free speech principles, and instead focused exclusively on the harm resulting from inequality This leads to the conclusion that in a conflict between speech and equality, equality must prevail.

The United States Supreme Court also privileged equality in a recent case brought by a female employee in response to frequent gender-based epithets and sexual innuendos directed at her by her employer's president. In *Harris v. Forklift Systems, Inc.*,[137] the Court addressed the issue of whether conduct, to be actionable as "abusive work environment" harassment, must seriously affect an employee's psychological well-being or cause an injury [138] The Court described the standard to be applied as "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury "[139] In concrete terms, this standard means that if an employee objectively, in accordance with the reasonable person, and subjectively, in accordance with the actual person, perceives the work environment as hostile or abusive, the conduct is actionable.[140]

The Court determined that the supervisor's behavior created an objectively and subjectively hostile environment, but did so without addressing the tension between free speech and equality in the context of the workplace.[141] In fact, the Court did not even mention free speech concerns in the opinion.[142] Whereas in *R.A.V v. City of St. Paul*,[143] the First Amendment constituted the major hurdle, in *Harris*, the Fourteenth Amendment via Title VII is used as the Archimedean Point

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[136] *Id.* at 1536.

[137] Harris v Forklift Sys., Inc., 510 U.S. 17 (1993).

[138] *Id.* at 21.

[139] *Id.*

[140] *Id.* at 21-22.

[141] The Court's reference throughout to the harasser as being liable for his conduct provides the most concrete manifestation of this. The Court uses conduct even though much of the harassment consisted of hostile comments, in other words, speech: "[w]e need a man as the rental manager"; "dumb ass woman"; and "[let's] go to the Holiday Inn to negotiate [your] raise." *Id.* at 19.

By couching the decision in terms of conduct, the Court tries to forestall the looming conflict between the regulation of sexually harassing speech and the demand for unfettered expression.

[142] *Id.* at 21-23.

[143] R.A.V v City of St. Paul, 505 U.S. 377 (1992).

by which conflicts are assessed and judged.[144] The Court's method of reasoning, therefore, privileges equality In all of these cases, then, the courts take a difficult problem and make it much too simple. They do this by trivializing the disfavored narrative, while placing great weight on the favored narrative. It is not so much that the decisions are wrong, as that we do not know what supports these decisions other than the power of the judge to advance his or her favored story Indeed, unless we develop a more principled way of addressing these issues, we may not be able to discern what is right or wrong.

II. UNDERLYING VALUES

In Part I, I suggested that free speech and equality are two different narratives which may be incommensurable.[145] I have also indicated that most of the debate about issues of increasing racism on college campuses and the response of limits on racist speech has not been a real dialogue but a series of monologues, each privileging one narrative over the other. If the tension between these two principles is to be mediated in a principled way, there must first be an adequate understanding of the values underlying each.

In addition to tensions between the two narratives, there are also internal tensions within each narrative. There is a serious question of whether there is an adequate theory of either free speech or equality Certainly the current theories do not adequately address either the external or the internal tensions. This failure becomes clear when one examines the underlying values and how they interact with each other.

A. Values Underlying Free Speech

No less of a free speech proponent than Professor Thomas I. Emerson has noted that the effort to develop an adequate theory of free speech has not been successful. "Proponents of the 'absolute' or 'literal' interpretation of the first amendment have failed."[146] This failure to articulate a workable general theory, according to Professor Emerson, not only creates confusion, but threatens the "disintegration" of free speech.[147]

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[144] *Harris*, 505 U.S. at 21-23.

[145] *See supra* notes 16-144 and accompanying text.

[146] Emerson, *supra* note 21, at 877

[147] *Id.* Professor Emerson took on the task of developing such a theory and has greatly advanced our understanding of free speech. His theory, however, also

Professor Emerson takes on the task of trying to bring coherence to the theory of the First Amendment. He starts by setting out and defending what he sees as the critical values underlying it. The four principal values that are on his list are as follows: (1) individual self-fulfillment and self-realization, (2) truth finding, (3) participation in decision-making, and (4) balance between stability and change.[148] Professor Emerson sees some of these values, such as self-fulfillment, as primarily individual or liberty values, while he sees others, such as truth finding, as mostly a social value.[149] He suggests that participation is both a social and a liberty interest.[150] Professor Emerson sees the participation value of free speech as being closely tied to autonomy and to the legitimacy of democracy He, therefore, asserts that all must have an equal right to participate.[151]

Professor C. Edwin Baker reformulates and refines Professor Emerson's set of values underpinning the First Amendment, suggesting that there are really only two core values: individual self-fulfillment and participation.[152] Professor Baker describes his perspective as follows: "Emerson's second and fourth values are derivative. Given that truth is chosen or created, not discovered, advancement of knowledge and discovery of truth are merely aspects of participation in change."[153]

Professor Baker does not try to defend in the abstract the values he lists but claims instead that in our constitutional democracy, certain

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continues to be criticized as incomplete and incoherent. *See, e.g.*, BAKER, *supra* note 21, at 47-50, 70-73; BOLLINGER, *supra* note 40, at 43-103.

[148] *See* Emerson, *supra* note 21, at 878-79.

[149] Professor Kent Greenawalt makes a similar distinction. He calls social liberties consequential justification for free speech and individual liberty non-consequential bases for free speech. *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV 119, 127 (1989) [hereinafter Greenawalt, *Free Speech*].

[150] *See* Emerson, *supra* note 21, at 882. When Professor Emerson and others talk about participation, even as an individual interest, they are still not focusing on the constitutive nature of participation. Instead, they are more concerned with the autonomy issue: that an autonomous person should only obey the laws that she had a right to participate in creating.

[151] Professor Emerson's notion of participation, like that of most traditional free speech advocates, is formal. As long as one is not physically restrained from participating, his requirement for participation is met. Professor Frank Michelman is critical of this formalist view of participation and has put forth an alternative, substantive view. *See* Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV C.R.-C.L. L. REV 339, 345-53 (1992).

[152] *See* BAKER, *supra* note 21, at 47

[153] *Id.* at 48.

values are entailed, including equality and autonomy for all citizens.[154] He recognizes that there can be conflict between free speech values, particularly the social value of participation and the liberty value of self-fulfillment.[155] He would resolve this conflict by giving primacy to the liberty value, as opposed to the social value, of free speech.[156] This, however, only pushes the tension to another level; it does not resolve it.

Professor Baker also recognizes that there are a number of different locations for free speech interests, as well as different values. He lists the rights of the listener, audience, and bystander, in addition to the rights of the speaker.[157] It might be more accurate to describe this constellation of interests as communication rights. Just as there can be tension between the different values there can also be tension between the groups.

Some commentators would make the social value of free speech primary to the liberty value to resolve this tension,[158] but this only suggests a new tension.[159] The right to say whatever one chooses can compromise the ability of the group to cohere in order to constitute itself and society The speech of an individual can compromise the rights of the listener.[160] To limit the speaker, however, can threaten her autonomy and self-development. Professor Robert C. Post believes that this tension cannot ultimately be resolved.[161] There is also disagreement among

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[154] *Id.* at 50. Autonomy and equality are what Professor Baker would use as guides to limit speech. He does not recognize the right to use speech to undermine another's autonomy, even though he asserts that speech must be allowed to harm. *Id.* at 58.

[155] Professor Baker, however, mistakenly views free speech and autonomy as atomistic. *See id.* at 47

[156] *Id.* at 22-24.

[157] *Id.* at 67-69; *see also* Greenawalt, *Free Speech*, *supra* note 149, at 143-48.

[158] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 55-56 (1965) (calling the First Amendment the "cornerstone of the structures of self-government"); BOLLINGER, *supra* note 40, at 43-75.

[159] *See generally* BAKER, *supra* note 21, BOLLINGER, *supra* note 40; Emerson, *supra* note 21, Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV 287 (1990) [hereinafter Greenawalt, *Insults and Epithets*].

[160] Post, *Racist Speech*, *supra* note 33, at 273-74.

[161] *Id.* at 289. Although Professor Post recognizes this important tension, he also trivializes it. He discusses the tension in terms of individual rights versus civility. *Id.* at 285-90. Characterizing the issue as a matter of civility, however, undermines what is at stake. Hate speech is not merely something "not nice." Put another way, what destroys people's option to participate collectively and to

theorists about whether the different values of protected speech are of equal importance. Some argue that the essence of free speech is social, political speech.[162] Others insist that it is the liberty right of the individual.[163] Some believe that it depends on the context.[164] Still others believe that the most important right of free speech is the right of willing listeners to hear. These commentators believe speech is about communication and is relational.[165] Theorists who recognize that speech which undermines autonomy or coerces can normally be regulated, however, have not been clear about why racist speech cannot be regulated based on this rationale.[166]

None of the traditional theories on free speech have managed to resolve these internal tensions.[167] Usually these tensions are just ignored. To understand the dangers of an attack on free speech as well as its defense, one must be clear about the underlying values that are at risk and to whom. For example, how should this tension be addressed when the social speech value of the speaker interferes with the liberty value of the listener? Regardless of which value is made primary, there remains an internal tension within free speech that is especially relevant to our approach to racist speech.

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constitute themselves is not simply incivility. Yet Professor Post and other free speech proponents cling to this view of racist speech as uncivil, enabling them to resolve the tension in favor of free speech. The problem with this perspective is that it looks at only at legal constraints and not also at experiential constraints on the right to participate. *See* Michelman, *supra* note 151, at 350-53.

[162] *See, e.g.*, BOLLINGER, *supra* note 40, at 46.

[163] *See, e.g.*, BAKER, *supra* note 21, at 47-51.

[164] *See, e.g.*, KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 14 (1989) [hereinafter GREENAWALT, SPEECH] (recognizing that, in some contexts, free speech is right or wrong, depending on the consequences, while in others, it is right or wrong regardless of the consequences).

[165] Professor Baker notes that we need to protect solitary speech. *But see* BAKER, *supra* note 21, at 51, 54 (arguing for constitutional protection of the freedom of speech based on the liberty theory). Even this speech, however, is relational. When one exists in a language, one is always in a relationship in time and space with a community of seekers.

[166] Professor Baker, for example, would expressly allow speech that coerces and undermines autonomy to be prohibited; but he then goes on to state that racist speech should not be regulated. One can only assume that Professor Baker fails to understand that racist speech does, in fact, often coerce and undermine autonomy.

[167] *See generally* Post, *Public Discourse*, *supra* note 35; Post, *Racist Speech*, *supra* note 33.

Most of the theories and rights that are associated with speech have been shown to be problematic, not only from the equality narrative, but within the speech narrative itself.[168] How one addresses these internal tensions will be, in part, determined by one's normative concept of society and the individual, about which there are many views.

B. Values Underlying Equality

Our constitutional theory of equality is even less adequately developed than our free speech theory [169] In fact, one commentator has

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[168] *See* BAKER, *supra* note 21, at 1-46; BOLLINGER, *supra* note 40, at 43-103. Professor Bollinger argues that most of the justifications supporting free speech are incoherent and do not unequivocally support the proposition for which they are cited. Professor Baker attacks the marketplace of ideas theory that has been important in the development of the classical model for free speech. Professor Bollinger systematically addresses the underlying themes of free speech in the classical model and shows how they are flawed and how they fail to account for the current position on hate speech. He then offers an alternative that has not fared any better than the classical model he attacked. *See, e.g.*, Paul Brest, *How Free Do We Want To Be?* (book review of Bollinger's THE TOLERANT SOCIETY), N.Y TIMES, June 8, 1986, § 7, at 21 (criticizing Bollinger for advocating a "conscientiously ambiguous" doctrine allowing the courts to examine all of the relevant factors); David A. Strauss, *Why Be Tolerant?*, 53 U. CHI. L. REV 1485 (1986) (book review) (disagreeing with Bollinger's classical defense of free speech in THE TOLERANT SOCIETY). For a complete list of reviews of Professor Bollinger's work, see Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV 979 app. (1990). The two values that Professor Baker identifies as being First Amendment values are self-expression and participation. Unrestrained self-expression, however, can destroy the conditions for participation. Professor Post addresses this problem without finding a solution. *See* Post, *Racist Speech*, *supra* note 33, at 302-11.

[169] Our theory of equality within the constitutional legal context is especially thin. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF 107, 176-77 (1976) ("[W]e should become increasingly aware of the role of judicial pronouncement in translating the ideal of equality, the nature of the choices the courts have made, and the explanation for the choices."). *Cf.* john a. powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV 533, 536 (1992) ("Whether substantive equality can serve a legitimate role in rights protection is an important question that must be addressed before 'equality' is summarily rejected."). In this Article, I argue for a richer, more substantive theory of equality. *See also* TRIBE, *supra* note 65, at 1436-1687 ("The central concept of the clause, equality, requires the specification of substantive values

suggested that equality is an empty concept without which we could do just as well.[170] The development of an adequate theory of equality has suffered the double problem of conceptual difficulty and political resistance. Our concept of equality has been animated by a pull for universal participation and meaningful democracy, yet limited by the reality of slavery and racial, gender, and class subordination. It may be that the political problems are largely responsible for our inadequate efforts in the conceptual area. Although the founders of this country appreciated the importance of the concept of equality, it took almost one hundred years and one of the bloodiest wars in this country's history before the concept was written into our Constitution.[171] Almost before the ink had dried, the Court moved to make the constitutional meaning of equality, at best, irrelevant and, at worst, part of the system that would be used to legitimatize the subordination of blacks in America.[172] Justice Marshall, in his *Regents of the University of California v. Bakke*[173] dissent, expressed frustration at the Court's and the country's failure to develop an adequate theory of equality:

> I fear that we have come full circle. After the Civil War, our government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.[174]

What equality means and should mean continues to be one of the most controversial and important issues in our society. The practice of slavery and racism distorted and continues to distort the development of

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before it has full meaning." *Id.* at 1514.); Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law*, 101 HARV. L. REV. 1331, 1384 (1988) (critiquing "society's embrace of formal equality").

[170] *See* Westen, *supra* note 39, at 542.

[171] DERRICK BELL, AND WE ARE NOT SAVED 125 (1987).

[172] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[173] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[174] *Id.* at 402 (Marshall, J., dissenting).

equality as a normative value in our society.[175] It is this history that gives passing plausibility to Justice Holmes's statement that the Fourteenth Amendment argument is an argument of last resort,[176] to Professor Derrick Bell's position that we should drop the use of equality,[177] and to Professor Peter Westen's claim that equality is meaningless and empty.[178]

In reality, equality has not lost all currency in our society; rather, only the formal equality used by the Court and proponents of racial hierarchy has been repudiated.[179] Equality must be contextualized and substantively based.[180] Equality in the abstract, as with all concepts in the abstract, has very little meaning and very little value. As Professor Baker has noted: "Equal protection must have substantive content. That much should be settled by the failure of all attempts to develop a coherent approach to the clause based entirely on process, rationality, or representation reinforcing considerations. The Supreme Court's decisions and the commentators' recommendations inevitably imply underlying substantive value commitments."[181] Professor Laurence Tribe shares a

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[175] *See* BELL, *supra* note 171, at 45-48, 122 (discussing the effects of slavery and racism on the economic and social well-being of African-Americans).

[176] Buck v. Bell, 274 U.S. 200, 208 (1927).

[177] Derrick Bell, *Racial Realism*, 24 CONN. L. REV 363, 377 (1992). Professor Bell's attack on equality is primarily an attack on formal equality, not substantive equality. For a rejoinder to Bell's position, *see* powell, *supra* note 169.

[178] Westen, *supra* note 39, at 547 To the extent that equality is only perceived as formal, much of Professor Westen's and Professor Bell's arguments have force. However, as a number of commentators have argued, equality, as conceived of in the Fourteenth Amendment, is clearly substantive in nature. *See* BAKER, *supra* note 21, at 41-42 (suggesting that although equality does not require a specific level of substantive equality, it must make "equality of auditions as a meritorious policy goal"); KARST, *supra* note 22, at 10 ("In the America where we live, equality matters — a culturally specific and evolving cluster of substantive values, solidly based in a particular society's traditions. Equality, in the abstract, may be value-neutral; the Fourteenth Amendment is not.").

[179] By formal equality, I refer to all the efforts to make equality an abstract concept of symmetry, including color blindness, anti-differentiation, and anti-discrimination modes. Although anti-subordination avoids the empty notion of equality that can be used to advance the domination of minority groups, it also seems to be incomplete.

[180] *See* Crenshaw, *supra* note 169, at 1384.

[181] C. Edwin Baker, *Outcome Equality or Equality of Respect: The*

similar perspective. In writing about the meaning of the Equality Clause of the Fourteenth Amendment, he observes the following: "The central concept of the clause, equality, requires the specification of substantive values before it has full meaning. Not even those committed to Justice Black's strict textual approach to the Constitution could make much sense of the equal protection clause standing alone."[182]

Professor Catherine A. MacKinnon also argues for the adoption of a more meaningful and contextually sensitive conception of equality [183] In her view, American jurisprudence continues to define inequality as difference or differentiation, regardless of whether it is powerful or powerless groups that are being helped or hurt.[184] By extension, she asserts, equality continues to be viewed in a formal rather than a substantive sense.[185] Rigid neutrality, even if it reinforces or proscribes the elimination of social inequality, is consequently mistaken to be equality [186]

Professor MacKinnon cites two cases ruled on by the Canadian Supreme Court[187] to illustrate the adoption of a more helpful notion of equality· "[a notion] directed toward changing unequal social relations rather than monitoring their equal positioning before the law"[188] She asserts that American courts and policy-makers should follow the Canadian Supreme Court's lead by beginning to view, for example, pornography and hate speech regulations as laws "passed to stand behind a comparatively powerless group in its social fight for equality against socially powerful and exploitative groups."[189]

Professor MacKinnon sums up how she thinks equality should be understood, promoted, and protected in America:

Substantive Content of Equal Protection, 131 U. PA. L. REV 933 (1983) (footnotes omitted).

[182] TRIBE, *supra* note 65, at 1514.

[183] CATHERINE A. MACKINNON, ONLY WORDS 85-91 (1993).

[184] *Id.* at 98.

[185] *Id.*

[186] *Id.*

[187] The Queen v Keegstra [1990] 3 S.C.R. 697 (upholding, on equality grounds, a law forbidding the willful promotion of hate propaganda against identifiable groups); The Queen v Butler, [1992] 1 S.C.R. 452 (upholding, on sex equality grounds, a Canadian law because of the potential harm to women and society as a whole).

[188] MACKINNON, *supra* note 183, at 98.

[189] *Id.* at 103.

> In this new model, principle will be defined in terms of specific experiences, the particularity of history, substantively rather than abstractly. It will notice who is being hurt and never forget who they are. The state will have as great a role in providing relief from injury to equality through speech and in giving equal access to speech as it now has in disciplining its power to intervene in that speech that manages to get expressed.[190]

A number of Critical Race Theorists have also articulated a substantive notion of equality.[191] Professor Kimberlé W. Crenshaw, for instance, calls for a more contextualized understanding of equality while critiquing the prevailing formalistic view:

> With society's embrace of formal equality came the eradication of symbolic domination. The removal of formal barriers, although symbolically significant to all and materially significant to some, will do little to alter the hierarchical relationship between Blacks and whites until the way in which white race consciousness perpetuates norms that legitimate Black subordination is revealed. [T]he belief that racial exclusion is illegitimate only where the "White Only" signs are explicit ... makes it difficult to move the discussion of racism beyond the

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[190] *Id.* at 109.

[191] *See* Crenshaw, *supra* note 169, at 1384 ("The removal of formal barriers, although symbolically significant ... will do little to alter the hierarchial relationship between Blacks and Whites ..."); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 68 (1991) (discussing the danger of courts focusing on formal race rather than the "reality of racial subordination"); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1392-96 (1991) (rejecting the "rigid" formalistic approach to accent discrimination in favor of antisubordination); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 758 (supporting the critical race's perspective of race consciousness that "one's position in the structure of race relations makes a qualitative difference in how one sees and experiences the world"); Lawrence, *supra* note 33, at 459 ("Until we have eradicated racism and sexism and no longer share in the fruits of those forms of domination, we cannot justly strike the balance over the protest of those who are dominated."); john a. powell, *The New Property Disaggregated: A Model to Address Employment Discrimination*, 24 U.S.F. L. REV. 363, 382 (1990) (arguing that adoption of a formal notion of equality would "marginalize equality and, more importantly, legalize the domination of minorities in our society").

> societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion.[192]

Likewise, Professor Neil Gotanda asserts that a substantive notion of equality must be embraced if subordination is to be addressed.[193] Without a contextualized conception of equality, "the Court risks establishing a new equivalent of *Plessy v. Ferguson*."[194] Professor Gotanda concludes that formal equality, as manifested by the color blind concept, "is inadequate to deal with today's racially stratified, culturally diverse, and economically divided nation."[195] Moreover, so long as the United States Supreme Court embraces formal equality, it risks "losing legitimacy and relevance in a crucial area of social concern."[196]

While the Court at times appears to have finally recognized that equality must have substantive content, there remains a push for the concept of formal equality This continued push is neither coherent nor neutral.[197] When the formal conceptualization has prevailed, racial minorities have tended to be subjugated in the name of equality For example, the Supreme Court reasoned in *Plessy v. Ferguson*[198] that because there was symmetry — that blacks could not ride in a white rail car and whites would not ride in a black rail car — this was consistent with the requirement of equality under the Fourteenth Amendment.[199]

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[192] Crenshaw, *supra* note 169, at 1384.

[193] Gotanda, *supra* note 191, at 68.

[194] *Id.* at 67

[195] *Id.*

[196] *Id.*

[197] *See* Roy L. Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV 879, at 883-85 (1988) ("Too often formal equal opportunity subordinates each class within Black society, and this subordination fuels the American race problems." *Id.* at 884.).

[198] Plessy v. Ferguson, 163 U.S. 537 (1896).

[199] *Id.* A more recent example of our using formalism to slam the door on minority aspirations is City of Richmond v J.A. Croson Co., 488 U.S. 469 (1989) (holding that the city's award of public contracts using race as the "sole criterion" violates the Fourteenth Amendment). The Bush Administration has also used formal equality and color blindness to oppose the 1990 Civil Rights Act and minority scholarships. *See* Steven A. Holmes, *President Vetoes Bill on Job Rights*, N.Y. TIMES, Oct. 23, 1990, at A1, col. 4 (discussing the President's veto of the job protection measure because it would " 'introduce the destructive force of quotas into our national employment system' ").

Similarly, in *Palmer v. Thompson*,[200] the Court twisted the interest of blacks in integrating a swimming pool. Rather than integrate the pool, the city closed it. Using the concept of formal equality, the Court found that the city's action did not violate equality, because blacks and whites alike were denied use of the pool.[201] Justice White chided the Court for accepting this formal approach to equality, noting that its real message and intent was to maintain racial hierarchy.[202] By closing the pool, the city inflicted a further injury of stigma and perpetuated a badge of inferiority.[203]

The Court, however, has also recognized the need for substantive content to the Fourteenth Amendment. In defending its laws against interracial marriage, the Commonwealth of Virginia argued that the Fourteenth Amendment only required that blacks and whites be treated equally.[204] Adopting the formal equality analysis of *Plessy*, the state reasoned that, since the law applied equally to blacks and whites, it was not constitutionally infirm.[205] The United States Supreme Court rejected this notion and instead found that there is a substantive content to the Fourteenth Amendment that goes beyond the formal question of whether blacks and whites are being treated equally.[206] In *Plyler v. Doe*,[207] the Court noted that one of the substantive purposes of the Fourteenth Amendment is to abolish "class and caste" treatment.[208] Of course in *Brown* itself, the Court, in overturning *Plessy*, rejected the false notion of equality requiring only symmetry.[209] In the last decade or so, however, the Court has begun to move back to a formal conception of equality. From a normative standpoint, such a shift cannot be justified. Moreover, whenever the Court has embraced this formal notion, people of color had to bear the adverse consequences.[210]

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[200] Palmer v. Thompson, 403 U.S. 217 (1971).

[201] *Id.* at 220.

[202] *Id.* at 266-67 (White, J., dissenting).

[203] *Id.*

[204] Loving v. Virginia, 388 U.S. 1, 8 (1967).

[205] *Id.*

[206] *Id.*

[207] Plyler v. Doe, 457 U.S. 202 (1982).

[208] *Id.* at 216-17 n.14.

[209] Brown v. Board of Educ., 347 U.S. 483, 492-94 (1954).

[210] Such a notion of equality undermines racial justice. When the majority of the Court has embraced the concept of color blindness — one expression of formal equality — people of color typically have lost. John a. powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 879, 893 (1995).

An adequate concept of equality, therefore, must encompass more than color blindness, procedural equality, and even anti-discrimination.[211] It must advance equal dignity — the right to be free of domination and subordination. The concept of equality must also accord with what is necessary for membership and equal participation in critical institutions in the real world that we inhabit.

C. *Harm in the Free Speech Narrative*

While the courts and commentators have been mindful of the potential harm that equality can cause if not adequately limited, similar attention has not been paid to the harm that speech can cause.[212] Indeed, part of the reluctance by the courts to define aggressively a substantive content of equality seems to stem from the concern that it might produce undesirable harms.[213] If one is to consider adequately if and when speech should be prohibited, one must consider the harms that speech can cause. The claim that is often made — that speech does not cause real harm, or that the harm it causes is substantially different from non-speech harm — simply does not hold. The insistence that speech causes little or no harm, however, has played a central role in construction of the "fortress" surrounding free speech. Because this error in our view of speech harms is partially grounded in our concept of liberties, we must consider how our view of speech-induced harm has developed.

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[211] *See* MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE 36 (1991) (on the limit of anti-discrimination as a mediating principle for the Fourteenth Amendment); TRIBE, *supra* note 65, at 1436-1687 (suggesting that an antisubjugation principle may be a "more promising theme" in equal protection doctrine); Fiss, *supra* note 169, at 177 ("We should become aware of the fact that the antidiscrimination principle is not inevitable and, indeed, that its predominance may be traceable to institutional values that have little relevance for individual morality.").

[212] *See, e.g.*, MACINTYRE, *supra* note 8; ROSENFELD, *supra* note 211, Michelman, *supra* note 151, at 345-54 (rejecting formalistic arguments against regulation of racist speech).

[213] See the discussion around affirmative action. Those who support affirmative action do not deny that it may produce a harm, but that the harm it might produce does not merit strict scrutiny. *See, e.g.*, ROSENFELD, *supra* note 211, at 163-215; *see also* Regents of Univ of Cal. v Bakke, 438 U.S. 265 (1978) (plurality held that consideration of race as a factor in admission to medical school is acceptable; however, a set-aside program does not meet constitutional muster).

Doing so will enable us to understand fully why racist speech is a social liberty that must be properly weighed.

Freedom of speech is part of the larger, more general narrative of liberty Within this liberty narrative, there is a fairly rich, but also incoherent and contradictory approach to harm. Many of these flaws have substantially contributed to the confusion within the free speech narrative of harm. In looking at how harm has been addressed within the liberty theory in general and how these problems and assumptions affect the way harm is accounted for in the free speech theory, an alternative approach is warranted.

D. Mill's Theory of Liberty

The modern development of the theory of liberty in general and free speech in particular can be traced back to John Stuart Mill.[214] Mill argued that in order for the government to show respect for the individual, it must respect her autonomy and liberty Mill both defined and limited liberty as one's freedom from restraint — having the right to do as one pleases as long as such action does not injure another. These lines of demarcation provided freedom for oneself and security for others. To maintain these conditions was seen as the primary function of the state.[215] Thus, harm plays an important role in the definition and limitation of liberty These requirements for freedom and security are critical to the ideas of Mill and other liberal theorists on how society should be ordered to promote individual liberty[216] Acts that do not interfere with or injure another are what Mill thought of as self-regarding acts. Mill believed that this was the natural boundary for liberty and autonomy[217]

The second part of Mill's theory of freedom relates to what could be called social or utilitarian liberties. These liberties are other-regarding

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[214] MILL, *supra* note 21.

[215] *Id.* at 13-16.

[216] *See, e.g.*, Allen C. Hutchinson & Patrick J. Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV 1477, 1483 (1984) ("Individuals want maximum freedom to pursue their own self-interest. At the same time, they require security from subjective interference of others."); THOMAS HOBBES, LEVIATHAN 86, 139-48 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651) ("By LIBERTY, is understood the absence of external impediments: which impediments, may oft take away part of a man's power to do what he would " *Id.* at 86.).

[217] MILL, *supra* note 21, at 13-17

acts.[218] In contrast to self-regarding acts, they are not natural liberties because they injure or interfere with others. Since these second liberties threaten the security and liberties of others, they require social allocation. The force of this position is rooted in the notion that people are equal. If A is equal to B, A's liberty does not give her the right to injure B with impunity Such an arrangement would deny B her liberty and equality Nor is it adequate in society, in contrast to the hypothetical state of nature, to suggest the response to A's injuring B is to allow B the freedom to injure A in return.[219] Such an arrangement would create a state in which no one, except possibly the strongest, was secure.[220]

Mill understood that there may be a need to allow one person to interfere with or harm another, but that this is a social issue that cannot be justified as a natural liberty Society has no claim on allocating natural liberties. This claim belongs to the individual. The individual, however, does not have a personal claim to social liberties. This claim belongs to society It is society, therefore, that must allocate social liberties based on the question of social utility While Mill believed that there would be some dispute about the distinction between self-regarding and other-regarding acts, he believed that the vast majority of acts were clearly one or the other.[221] He also believed, albeit wrongly, that most liberties are clearly self-regarding. This error has been reproduced in the approach to speech. Within the context of speech, Mill recognized, much like most traditional free speech proponents, that some speech can harm, and that some of these harms should not be allowed.[222] Because he and other liberal theorists have considered this class and sub-class of harms to be very small, however, the harm from speech has seldom received serious attention.

Because Mill defines individual liberty, as opposed to social liberty, as actions that do not interfere with or injure others,[223] the question of which individual liberties should be allowed to harm others does not

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[218] For a discussion of other-regarding property rights, see powell, *supra* note 191, at 372-73 ("Property is never self-regarding in the strong sense. It potentially always affects others and gives the right holder power over others ").

[219] This is the problem with claims that the cure for bad speech is more speech. While this might be useful for bad speech, the cure for injurious speech is not more speech.

[220] *See* HOBBES, *supra* note 216, at 86-87

[221] MILL, *supra* note 21, at 13-17

[222] *Id.* at 54-55.

[223] *Id.* at 13-17

make sense within his framework. By definition, individual liberties do not harm others. When one's action affects others, society has jurisdiction over it. Joseph Singer summarizes Mill's position as follows:

> Mill asserted that the self-regarding theory would generally constitute a sufficient legitimating theory for a liberal legal system. However, he recognized that there might be exceptional cases in which one person's conduct harmed the interest of others; and yet we might still want to allow such conduct despite the injurious consequences. The liberty to inflict such damage without legal redress might be justified by its overall societal utility [224]

As will be discussed below, however, one can credibly assert that much of racist speech does not fall into the category of natural individual liberty

E. Free Speech

Free speech is a special liberty within Mill's framework and within the classical liberty theory It derives its special attributes from three assumptions: (1) it is necessary in the pursuit of truth, (2) it is necessary for self-development, and (3) it does not cause "real or substantial" harm. Although the strength of all of these assumptions has been challenged to some degree,[225] it is this last assumption that concerns us here.

The assumption that speech can cause offensiveness or be an annoyance but not produce substantial harm is a critical position for the special protection of free speech. This assumption makes more plausible the claim that, given speech's significant value, we should be willing to tolerate some inconvenience and discomfort. Even within traditional free speech circles, however, there is usually some recognition that speech can and does cause substantial harm. Consider, for example, the law of libel

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[224] Joseph N. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV 975, 998.

[225] *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 185 (1969). There is an assumption that, because free speech is a specific liberty explicitly named in the Constitution, it is afforded more weight than general, unnamed liberty. Therefore, some harm should be allowed for free speech that is not allowed for general liberty. The limits of these harms have not been adequately developed, but it is assumed that they are not substantial. *See* BOLLINGER, *supra* note 40, at 35-39; GREENAWALT, SPEECH, *supra* note 164, at 14.

or conspiracy These speech acts are regulated in large part because the substantial harm they cause is recognized. Notwithstanding these and other exceptions to the claim that speech does not substantially injure, there is still often the insistence that speech acts do not actually harm.[226]

Professor Bollinger addresses this last assumption. "Whether explicitly or implicitly, the classical defense of free speech views actions, but not words, as capable of inflicting cognizable injury "[227] Although Professor Bollinger is a strong free speech advocate, he is clear that free speech theory cannot continue to rest on this false assumption.

> The entire subject of interaction between speakers and listeners is therefore, a matter of considerable complexity. We trivialize the problems speech behavior can pose for any individual or community.
>
> [S]peech can produce important harms. This, of course, is clearly revealed when speech is explicitly insulting or threatening to particular individuals. [Nor is the harm necessarily immediate or short term.][228]

Many modern free speech commentators are acutely aware of the fact that Mill inadequately addresses harm. Once harm is seriously considered, there is no logically consistent or natural boundary for self-regarding acts within his framework. If other-regarding acts are broadly defined, free speech advocates fear, much of what we value as individual liberties will be destroyed. Put another way, almost all of our acts, even the most private, can be conceived of, and in fact can be, seriously injurious to someone else. This leaves Mill's theoretical foundation, as noted by Professor Baker, in a shambles:

> Despite the widespread appeal of Mill's argument, it lacks criteria for determining when a person's behavior "harms" others or when a person's manner of acting "concerns others." If "feeling harmed" or having one's interactions with others unfavorably "affected" count as criteria for "harm" or for being properly "concerned," then any action,

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[226] For a list of speech exceptions and harms, see GREENAWALT, SPEECH, *supra* note 164, at 143-48; Delgado, *Campus Anti-Racism Rules*, *supra* note 20, at 375-80; Greenawalt, *Insults and Epithets*, *supra* note 159, at 294-307

[227] BOLLINGER, *supra* note 40, at 61.

[228] *Id.* at 64-65.

> no matter how privately undertaken, can be of concern to others, can harm others.[229]

The response that many traditional free speech advocates make to this insight is to try, understandably, to deny most speech harms. Their two main strategies for achieving this are either to trivialize the harm caused by speech[230] or to try to distinguish the harm that speech can cause from other types of harm.[231] Each of these efforts fails. Those who trivialize the harm that can be caused by speech often do so by insisting that speech can be "offensive," which carries a very different connotation from "harmful" or "injurious." The claim that speech injuries are trivial has so little currency that I will not address it here.[232]

The second position, which appears to be stronger, is that speech harms are substantially different from non-speech harms. While at first glance this position seems plausible, it is not. Consider just two of the ways that speech injuries are often claimed to be different. First, traditional free speech advocates allege, speech does not usually injure directly; rather only the reaction to the speech by the listener, if he or she is persuaded by the speech, causes harm. This claim is clearly wrong. Many of the injuries that Professors Lawrence and Matsuda chronicle are direct.[233] Indeed the "fighting words" doctrine recognizes that the injury

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[229] BAKER, *supra* note 21, at 73.

[230] Professor Bollinger makes a similar claim. BOLLINGER, *supra* note 40, at 64. Professor Delgado is largely responsible for moving the current debate on the issue of harm beyond the notion that speech injuries are trivial. *See* Delgado, *Campus Anti-Racism Rules*, *supra* note 20, at 375-80.

[231] A number of commentators take this approach, including BAKER, *supra* note 21, at 55-65 and TRIBE, *supra* note 65, at 1134.

[232] For a discussion of the seriousness of harms caused by speech, see GREENAWALT, SPEECH, *supra* note 164, at 143-48, 298 (stating four concerns about group epithets and slurs: provocation of violence, wounding of person to whom they are directed, offending hearers of the slurs, and reinforcement of prejudice); Delgado, *Campus Anti-Racism Rules*, *supra* note 20, at 375-80 (stating that speech can violate "equal dignity"); Lawrence, *supra* note 33, at 458-66 ("To engage in a debate about the first amendment without a full understanding of the nature and extent of the harm of racist speech risks making the first amendment an instrument of domination rather than a vehicle of liberation." *Id.* at 459.); Matsuda, *supra* note 45, at 2335-41 ("As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating." *Id.* at 2337.).

[233] *See* Lawrence, *supra* note 33, at 452-56, 460-62; Matsuda, *supra* note 45,

may be direct. When the speech is addressed to the victim, the injury is immediate and does not depend on the persuasion of the audience or listener by the idea or truth of the speech.[234]

Second, free speech proponents claim speech injuries differ from non-speech injuries because they result only in non-physical injury Professor Matsuda has challenged this position directly She has shown that racist speech not only can injure but that the injury is both psychological and physical.[235] Although the line between physical and non-physical injury is no more secure than the line between speech and conduct, traditional free speech advocates continue to rely on this distinction. Professor Baker adopts this distinction between physical and non-physical injuries caused by speech acts and non-speech acts. "The key quality distinguishing most harms caused by protected speech acts from most harms caused by unprotected activities is that speech-caused harms typically occur only to the extent that people 'mentally' adopt perceptions or attitudes."[236]

Even if one could sustain the claim that speech injuries are psychic, it would not justify the distinction between speech and non-speech harms. What is at issue is not whether the injury is psychological or not, but how serious the harm is and how it has an impact on important individual and social values. While the desire to distinguish speech harm from non-speech harm is understandable,[237] it is not useful. Ultimately, it is a

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at 2336-38. *Cf.* Greenawalt, *Free Speech*, *supra* note 149, at 145-48 (discussing relevant justifications useful in determining whether communication should be protected as free speech). Consider some of the speech that is now regulated and that injures, such as blackmail. *See* Delgado, *Campus Anti-Racism Rules*, *supra* note 20, at 377-78 (discussing the exceptions to free speech created by the courts in the past century).

[234] For further discussion of the possible immediacy of speech injuries, see BOLLINGER, *supra* note 40, at 61-73 ("[S]peech can produce important harms. This, of course, is closely revealed when speech is explicitly insulting or threatening to particular individuals."); GREENAWALT, SPEECH, *supra* note 164, at 292-301 ("When directed at its object, such language can wound and humiliate and may be designed to provoke retaliation, but, abusive words often make some vague assertion about facts and values.").

In many ways, this is similar to the reluctance to recognize obscenity as speech. It, like racist speech, does not usually allow for deliberation by the listener. I would still argue that a better way of addressing this speech is not by refusing to recognize it as First Amendment speech, but by examining the harm caused by the speech.

[235] *See* Matsuda, *supra* note 45, at 2335-41.

[236] BAKER, *supra* note 21, at 55-56.

[237] Free speech proponents want any harm allowed to restrict speech to be a

weak effort to avoid a difficult dilemma and privileges free speech. Professor Baker, for example, realizes that when one uses his or her liberty, including speech, to harm or coerce another or to undermine their autonomy, it calls into question the legitimacy of the speech acts.[238] A number of commentators who call for regulation of racist speech argue this specific point. One of the values of free speech is the advancement of autonomy Yet speech and specifically racist speech can injure autonomy In recognizing this paradox, Professor Frank Michelman notes that there has yet to be an adequate response:

> If the experiential claim is true, it means that racist speech contributes no less to systemic, race-based impairments of communicative autonomy than it does to impairments of participation in democracy; parallel to the paradoxes of public discourse and democracy is the paradox of autonomy Neither sort of formalist, anti-censorability argument has yet — to my knowledge — fully and successfully faced down either the realist insight or the experiential claim.[239]

The physical/not-physical harm distinction does not address this paradox.

Professor Baker appears to recognize this paradox, but in order to protect a formalist position of speech and autonomy, he understandably fails to face it. "Nevertheless, the respect-for-autonomy rationale for protecting speech does not apply if the speaker coerces the other or if the speaker physically or *otherwise improperly interferes* with the other's rights."[240] After arguing that protected speech should be limited by

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very narrow, well-defined class of harm. This concern is appropriate because the failure to limit such a class of harm could destroy virtually all free speech. If this harm is defined broadly, it is possible to think of some harm produced by almost any utterance. The response, however, cannot simply be to build a fortress around free speech or simply to assert that it is the Archimedean point for our society. Instead, we must identify the values that we are trying to promote with free speech, and examine how limitations on speech would negatively impact on those values. It is not enough, however, to understand how speech values can be harmed by limitations on speech; we must also begin to understand how speech can harm values, including some of the values the free speech tries to promote.

[238] *See* BAKER, *supra* note 21, at 56-66.

[239] Michelman, *supra* note 151, at 353.

[240] BAKER, *supra* note 21, at 56 (emphasis added). Professor Baker's First Amendment theory is one of the most powerful and coherent of those which try to formulate a justification for the current thinking on free speech. Professor Baker also is aware of the problem of privileging speech and takes seriously the

"coercion" and interference with other's rights, Professor Baker later argues that those rights and the definition of coercion must be limited by concern for speech.

> But identification of coercive categories of speech requires great care. People constantly invoke loosely formulated or inappropriately broad notions of coercion to justify regulation of various behavior, including speech of which they disapprove. The inevitable misapplication of this liberty approach to freedom of speech will most likely involve expansive, imprecise notions of coercion — while meaningful limits on government's authority to restrict speech will require a narrow, precise and defensible concept of coercion that is clearly distinguished from the broader notion of harm.[241]

To his credit, Professor Baker does not adopt a positivist notion of coercion, nor does he insist that the coercion must be physical, but instead suggests a normative notion that continues to change as we change. Despite this, his notion of coercion does appear to be illegitimately limited by his notion of free speech. Unless one is ready to believe, which I am not, that speech can never be coercive, Professor Baker's position is not helpful.

There are a number of other serious problems with the position that non-physical injuries do not count. First, this position essentially adopts the flawed reasoning of the Court in *Plessy v. Ferguson*.[242] In defining its holding that separate but equal resulted in no injury to blacks, the Court noted that blacks were in the same position as whites in their physical ability to ride in rail coaches.[243] Whites were restricted from riding in cars with blacks, and blacks were restricted from riding in cars with whites.[244] When pressed about the psychic stigma and the emotional injury, the Court reasoned that there was no such injury, and if there was, it was all in the minds of blacks.[245] One may wonder where else psychic injury would be if not in the mind.

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claim for a substantive notion of equality. I have learned a great deal from examining his material.

[241] *Id.* at 56.

[242] Plessy v Ferguson, 163 U.S. 537 (1896).

[243] *Id.* at 548-49.

[244] *Id.*

[245] *Id.* at 551.

Second, the nineteenth century idea that the body and mind can be easily split off from each other has been called into question by a number of modern theorists.[246] There may be reasons to try to distinguish between different types of harm, but first there must be a recognition that serious injuries, psychic or otherwise, are serious injuries. As Professor Lawrence noted in his discussion of *Brown*, the Court rejected the materialistic view of injury suggested by the Court in *Plessy*.[247] It is clear that the Court in *Brown* was very concerned with the psychic harm that the stigma of segregation inflicted on black children.[248] Even though white children were also segregated, they did not receive the same psychic harm.[249] As in *Brown*, psychic harm was the central concern for the Court in *Loving v. Virginia*.[250] In yet another case, *Palmer v. Thompson*,[251] Justice White's dissent pointed out that racial discrimination causes an injury in the form of psychic harm.[252] In essence, the Court has recognized in a number of cases that, contrary to the nineteenth century notion, one cannot neatly separate psychic injury from physical injury

Even if the two arguments against the distinction between physical and mental/emotional injury were not persuasive, the proponents of free speech could not comfortably rest on such a distinction. One of the main justifications given for not limiting speech is that it would interfere with the self-development of the individual.[253] The Court has acknowledged

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[246] *See, e.g.*, UNGER, *supra* note 17, at 36-41 (supporting the premise that will and desire are not totally independent and together constitute "self").

[247] Lawrence, *supra* note 33, at 441. There are a number of areas in the law that have refused to adopt either the materialism of *Plessy* or the position that physical and non-physical harms can be separate. For instance, legal doctrine recognizes that mental abuse has physical consequences and a hostile workplace can cause psychological injury, which can result in the loss of a job. Likewise, tort law recognizes mental anguish. To claim that racist speech injury is psychological, then, is irrelevant.

[248] Brown v Board of Educ., 347 U.S. 483, 493-95 (1954).

[249] *Id.*

[250] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[251] Palmer v Thompson, 403 U.S. 217 (1971).

[252] *Id.* at 266-69 (White, J., dissenting).

[253] *See* BAKER, *supra* note 21, at 50-51 ("[I]ndividual self-fulfillment and participation in change are fundamental purposes of the First Amendment."); ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 564-66 (1948) (arguing that limiting free speech would create a "national unanimity" where individuals are not free to go about their own tasks).

this value as a justification for not limiting speech. The "basic human desire for recognition" is satisfied through speech as a medium for self-expression and self-realization.[254] This is, however, essentially a non-physical argument. No one suggests that the physical injury to the person whose speech is limited will be any greater than that of the person who is exposed to an emotional or psychic injury caused by speech.[255] If we are concerned, however, with the internal development of our minds and souls, which I believe is appropriate, then distinguishing between a physical and non-physical injury is of little value. The free speech theorist using this argument would have to argue that non-physical injuries to speakers are somehow different from non-physical injuries to non-speakers.

There may be strong arguments for assigning liberty rights to the individual, even to the point of allowing some injuries, but this is a social question that must be resolved through social balancing. There has been no such balancing about speech harm because of the failure to understand adequately these harms. The result of such an enterprise undoubtedly would be to allow certain harms and not others, depending in part on how serious we consider the harm caused by limiting speech, as compared to that caused by allowing it. It is understandable that free speech advocates will want to avoid such a calculus. Indeed, part of the function of calling something a liberty is to avoid this calculus. However, efforts to ground speech as an individual liberty — as opposed to a social liberty, or to make claim that speech is psychic and not physical — does not address this issue of harm or the paradox discussed above.

Consider again, for example, Professor Baker's liberty arguments for free speech. He argues that free speech is necessary for self-expression and actualization, as well as for participation. Professor Baker calls for grounding free speech in the liberty principle as opposed to what he considers the societal or utilitarian focus of the use of speech to find the truth in the marketplace.

> [W]e have an account of the legal order or of the collective whole that commits it to respect individual autonomy or a realm of individual liberty that serves the values of self-fulfillment and participation in change. Moreover, this account of the foundational status of this realm

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[254] Procunier v Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

[255] Obviously, limited speech can injure more than just the speaker, but the claim is still valid.

> of liberty would help explain why utilitarian balancing does not justify limiting First Amendment rights.[256]

By focusing on the value of speech to the individual in her development and autonomy, Professor Baker hopes to avoid this inevitable social calculus. If one uses speech to deny someone self-expression and autonomy to participate, then we again have the paradox. The value we wish to promote by speech is the value that the speech undermines. Moreover, the non-physical, psychic injury that this speech causes is of the same order as the injury that limiting this speech would also cause. Neither Professor Baker's liberty theory nor his harm theory can tell us why we should allow speech under such circumstances.[257]

This discussion of speech and harm has been well within the narrative of free speech. This suggests that even within this narrative, there are strong reasons to reformulate our thinking about free speech and harm. The discussion also reveals that many of the underlying assumptions concerning the relationship of harm and free speech are undeveloped and seriously incoherent. Indeed, one cannot ignore the harms that can be caused by speech without undermining the core values of free speech itself.

III. PARTICIPATION: THE VALUE MEDIATING BETWEEN TWO WORLDS

Harm is a limitation for both free speech and equality, but by itself is too broad a concept to address the tension between the two narratives. One way to consider which harms should be recognized and possibly prohibited, or at least considered in the balancing process, is to focus on speech acts (or equality) that harm other constitutional norms and values. This approach alone, however, turns out not to be helpful. It merely restates the difficulty now being faced in the debate about racist speech within the context of free speech and equality There must be some process, norm, or value that helps us to identify which harms we want to limit without sacrificing either sets of constitutional values when they

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[256] BAKER, *supra* note 21, at 50. I would agree with Professor Baker to the extent that he only addresses the classical utilitarian model of producing the greatest pleasure. However, to the extent that he suggests balancing is inappropriate because the First Amendment is a liberty interest, I believe he is wrong.

[257] I am not using utility in the classical sense. Instead, I am suggesting that this argument must be consequentially related to the world we inhabit and understand.

conflict. This limiting norm or value must be common to free speech and equality, if we are to address the difficulties posed by incommensurability. Participation is such a value and is appropriate to mediate between free speech and equality. Before discussing participation, I would like to state what this mediation does not involve.

It is important to note that the process of mediation between incommensurable paradigms is not simply the application of a set of rules or methodology that can be mechanically applied to resolve the conflict between competing narratives. In fact, one cannot know beforehand if the tension can be mediated. In discussing the tension between negative liberty and equality, Isaiah Berlin warns us against adopting the belief that we can know beforehand that the tension can be resolved.

> The simple point which I am concerned to make is that where ultimate values are irreconcilable, clear-cut solutions cannot, in principle, be found. To decide rationally in such situations is to decide in the light of general ideals, the over-all pattern of life pursued by a man or a group or a society. *If the claims of two (or more than two) types of liberty prove incompatible in a particular case, and if this is an instance of the clash of values at once absolute and incommensurable, it is better to face this intellectually uncomfortable fact than to ignore it, or automatically attribute it to some deficiency on our part which could be eliminated by an increase in skill or knowledge; or, what is worse still, suppress one of the competing values altogether by pretending that it is identical with its rival — and so end by distorting both. Yet, it appears to me, it is exactly this that philosophical monists who demand final solutions — tidiness and harmony at any price — have done and are doing still* When such dilemmas arise it is one thing to say that every effort must be made to resolve them, and another that it is certain *a priori* that a correct, conclusive solution must always in principle be discoverable [258]

Berlin further warns of exaggerating the distance by adopting what Professor Drucilla Cornell terms the myth of the frameworks.[259] Berlin

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[258] BERLIN, *supra* note 225, at 1 (emphasis added) (footnotes omitted). Berlin suggests throughout this book that liberty and equality are two such incommensurable sets of values.

[259] *See* Cornell, *supra* note 10, at 141 (citing KARL POPPER, NORMAL SCIENCE AND ITS DANGERS, IN CRITICISM AND THE GROWTH OF KNOWLEDGE 56 n.8 (1970)).

notes that, in practice, we have been able to communicate with each other without these universal foundations.[260]

Participation plays a central role in justifying the value of both free speech and equality Because this value is used in two different contexts, it is possible that it may mean something quite different. I am concerned both with how participation has been used and how we might use it in relationship to free speech and equality to face the paradox while mediating the tension. This process ultimately will not be monological, but communicative and dialogical. It may suggest how we could collectively approach these issues.

A. Participation and Harm

I will now examine why participation is the appropriate value to mediate between free speech and equality My claim is that participation must be the primary value which, within a particular context, will give shape to free speech and equality The context with which I will be specifically concerned is critical institutions or locations, as exemplified by the workplace and college campus. Harm to participation in this context is of a special order and provides a basis for balancing or limiting liberties that might be allowed in other contexts.

Participation and membership in critical institutions are essential to the development of both social values and the autonomous self.[261] It is necessary for people to participate in a particular institution in order to maintain or constitute their autonomy In other words, to protect individual autonomy, participation injuries must be limited. Further, for participation in these institutions to be meaningful, it must be more than a mere possibility One must look to see what is happening, in fact as well as in law, to see if participation has been limited. The formal notion of participation of traditional free speech advocates is inadequate.[262] Participation must be sufficiently free of domination and subjugation so that the law's norms and values, produced by autonomous and equal beings, have intersubjective legitimacy[263] These norms are necessary

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[260] *See* BERLIN, *supra* note 225, at lii.

[261] *See supra* notes 21 and 215-25 and accompanying text. Although many view participation as only instrumental — furthering general rules, structures, and norms — it is also properly seen as constitutive. If the self cannot participate, it ceases to exist.

[262] *See supra* notes 148-53 and accompanying text for a discussion of formal participation.

[263] Professor Baker notes that when one is coerced, one's expressions are not

to support and define the contextual grounds for individual self-development. The slave and master can apparently participate, but they cannot generate collective valid norms. The concept of harm necessary to preserve this participation must be broader than the material formalism of *Plessy*, where the lack of substantive equality undermined both the autonomous and social value of equality; the concept, however, should not be so broad as to consume free speech, which would also undermine autonomy and the production of intersubjective norms and values.[264]

I am aware that I am moving toward a concept of free speech and equality that may be contested. Indeed, any concept of free speech and equality can be questioned, in part, because of the nature of language and, in part, because these are living, constitutional norms that are not given specific meaning. For the purpose of this Article, I do not intend to try to resolve the debate over the precise meanings of these two sets of constitutional values.[265] My position on these points is much more modest and not so "tidy " I am asserting that participation must be central to any adequate meaning of free speech and equality, not as a matter of philosophical entailment in the abstract, but within the context of our historical, constitutional democracy

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autonomous. BAKER, *supra* note 21, at 56-60 (discussing that respect for individual autonomy requires a "recognition that a person has the right to use speech to develop herself"). A master and slave can participate in a conversation, but it is not the type that values free speech and equality. *See* ROBERTO M. UNGER, PASSION, AN ESSAY ON PERSONALITY 14 (1984) ("of all the circumstances that aggravate this clash between the requirement of self-assertion, the most influential in society is mechanisms of dependence and dominion that turn all social involvements into threats of subjugation").

[264] For a discussion of how a substantive notion of equality, which embodies the concept of anti-subordination, could undermine free speech, see Michelman, *supra* note 151, at 347-52.

[265] For a good discussion about the meaning of free speech, see BAKER, *supra* note 21, at 47-69 (discussing the values of the First Amendment in the context of the liberty theory); Emerson, *supra* note 21, at 878-86 (discussing the functions of free speech in a democratic society). For a good discussion of the constitutional meaning of equality, see KARST, *supra* note 22, at 1-2 (discussing the different aspects of equality as developed in American law and society); Fiss, *supra* note 169, at 108 ("The [Equal Protection] Clause contains the word 'equal' and thereby gives constitutional status to the ideal of equality, but that ideal is capable of a wide range of meanings."); Lawrence, *supra* note 33, at 457-76 (discussing the balance between equality and freedom of expression in racist speech cases).

B. Participation and Free Speech

Although traditional proponents of free speech often disagree on which values underlie the First Amendment, there is virtual consensus on two central principles: participation in the democratic process and self-actualization through self-expression.[266] Much of the debate among free speech proponents focuses on whether speech is primarily a social value, enabling participation in the cultural and political structures, or if speech is primarily a liberty value, promoting self-actualization and self-expression to achieve and maintain autonomy.[267] As I suggested above and will develop more fully below, however, participation is central both as a social (consequential) value and an individual or liberty (non-consequential) value.

The debate about the underlying values of free speech has been informed recently by the work of Professor Habermas and the increasing acceptance of an anti-objectivist stance and an anti-foundationalist stance toward truth and value.[268] Professor Habermas also sees the individual as always situated in culture.[269] According to Professor Habermas, the individual's needs, wants, and identity have meaning only because of the social/cultural context.[270] Indeed autonomy itself is seen in intersubjective, communicative terms.[271] Early proponents of free speech often viewed truth-finding and law-making as essential parts of the social value of free speech.[272] Nonetheless, this notion that truth already exists and is waiting to be discovered has come under increasing attack. Truth is increasingly seen as created instead of discovered.[273] Professor Habermas has used this evolving view of truth to assert that validity of truth or norms is legitimized not simply by its accuracy, but primarily by

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[266] *See* BAKER, *supra* note 21, at 47; MEIKLEJOHN, *supra* note 158, at 54-60; Emerson, *supra* note 21, at 878.

[267] BAKER, *supra* note 21, at 47-60.

[268] THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 59 (1978).

[269] *Id.* at 334.

[270] *Id.*

[271] *See* SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA 282 (1986). Communication is not limited to language; it also includes acts. Our norms and values, and indeed our language, are produced through our intersubjective engagement with each other. *See, e.g.*, Cornell, *supra* note 10, at 169-74.

[272] *See* MEIKLEJOHN, *supra* note 158, at 56-60; MILL, *supra* note 21, Emerson, *supra* note 21, at 881.

[273] BAKER, *supra* note 21, at 13; Greenawalt, *Free Speech*, *supra* note 149, at 130-41.

its communicative production. This in turn has placed greater emphasis on the value of participation. It is through the intersubjective communicative process, when properly structured, that truth claims are made and validated. Professor Habermas indicates under what conditions such claims should have force. As one commentator explains:

> The four conditions of the ideal speech situation are: first, each participant must have an equal chance to initiate and to continue communication; second, each must have an equal chance to make assertions, recommendations, and explanations, and to challenge justifications. Together we can [c]all these the "symmetry condition." Third, all must have equal chances as actors to express their wishes, feelings, and intentions; and fourth, the speakers must act *as if* in contexts of action there is an equal distribution of chances "to order and resist orders, to pormise [sic] and to refuse, to be accountable for one's conduct and to demand accountability from others." Let me call the latter two the "reciprocity condition." While the symmetry stipulation of the ideal speech situation refers to *speech acts* alone and to conditions governing their employment, the reciprocity condition refers to existing *action contexts*, and requires a suspension of situations of untruthfulness and duplicity on the one hand, and of inequality and subordination on the other.[274]

Free speech proponents have used these insights to support the value of free speech that is open to all.[275]

The value of Professor Habermas's approach is often muted by a failure to consider seriously what distorts and invalidates the communicative process in generating truth claims.[276] Professor Habermas asserts that domination and unequal power undermine the validity of truth claims that are produced through this process. He calls for a move toward an

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[274] BENHABIB, *supra* note 271, at 285 (quoting and translating Jürgen Habermas, *Wahrheitstheorien, in* WIRKLICHKEIT UND REFLEXION (H. Fahrenbach ed. 1973)) (footnotes omitted) (emphasis in original) (editorial comment added).

[275] *See* BAKER, *supra* note 21, at 121 (supporting "protection for individually valued practices even when these practices outstrip existing collective preferences"); Paul G. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV 157 (1980) (noting that the two main historical justifications for free speech are the promotion of individualism and free exchange of ideas); Post, *Racist Speech*, *supra* note 33, at 279-85 (arguing that freedom of expression is necessary for the kind of public discourse required by democracy).

[276] *See* Chevigny, *supra* note 275, at 167-68; Post, *Racist Speech*, *supra* note 33, at 288-90.

ideal speech situation where participation is not distorted by power or domination. It should be emphasized that this is not a call for a new language theory, rather it points to the need to identify the condition in which intersubjective language claims have validity The focus of this ideal is the condition for meaningful participation. This ideal requires meaningful equality and mutuality among the participants. Professor Habermas's requirements for ideal speech are closely tied to what is necessary for full participation and membership.[277] His concept of the conditions for participation is very similar to what one commentator calls the postulate of equality

> [A]lthough different values, such as liberty and state neutrality, have assumed a paramount role in certain versions of liberal theory, at the highest levels of abstraction, equality can be viewed as the principal operating norm of liberal theory. At the lower level of abstraction, where such version of liberal theory as the libertarian, contractarian, utilitarian, and egalitarian conceptions operate, there may be disagreements as to whether liberty or equality should be ranked higher than the other. At the highest levels of abstraction, however, all versions of liberal theory are united in rejecting claims of natural hierarchy in favor of assertion that all human beings are in some fundamental sense equal to one another.
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> I shall [to this proposition] refer as the "postulate of equality" [278]

In our liberal society, we recognize the normative foundation of the equal right to participate. If value and truth claims are to have any legitimacy, participation must be open to all as equals and uncoerced. "[There is] no universalizability without participation."[279] The only universal that is recognized, then, is the right to universal participation. Those who wish to limit participation, therefore, have a tremendous burden to overcome.

The traditional notion of participation, simply as a way to find the truth and for autonomous beings to make laws, suffers from another limitation imposed by the underlying assumption that participation is only instrumental. This traditional view holds that participation is used by already autonomous beings to assert their autonomy and to find truth.

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[277] *See* BENHABIB, *supra* note 271, at 282-83; BERNSTEIN, *supra* note 3; ROSENFELD, *supra* note 211.

[278] ROSENFELD, *supra* note 211, at 20.

[279] BENHABIB, *supra* note 271, at 315.

This position is based on the assumption that if one is required to obey laws in which one does not have the opportunity to participate, then one is heteronomous, not autonomous. While this is a useful proposition, it is inadequate because it does not address the role of participation in constituting and maintaining our autonomy If one is denied participation and membership, it is doubtful that one can even develop an autonomous self. This instrumentalist notion of participation as only serving the purpose of self-government has been directly challenged.

> [D]emocracy understood as self-government in a social setting is not a terminus for individually held rights and values; it is their starting place. Autonomy is not the condition of democracy, democracy is the condition of autonomy. Without participating in the common life that defines them and in the decision-making that shapes their social habitat, women and men cannot become individuals.[280]

Indeed, this last statement makes clear that participation is a better mediating value than autonomy because autonomy is itself communicative and requires participation.[281] If one is denied membership and participation, it is doubtful that one can ever develop an autonomous self.

> Although we begin the construction of our identities in our primordial communities of family and tribe individuality itself—as reflected in self-knowledge, self-respect, or self-expression — is attainable only within a community.
>
> Self-expression is possible in solitude but unlikely outside of a cultural matrix.[282]

Participation is not something we simply use; it is through participation that we obtain and maintain our autonomy[283] As Professor Habermas makes clear, our autonomy is communicative. Participation, therefore, has both a social and liberty role.

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[280] BENJAMIN R. BARBER, STRONG DEMOCRACY xv (1984).

[281] Theorists, such as Professor Baker, who draw a sharp distinction between the liberty and social values of speech and associate the liberty value with autonomy fail to consider the social aspect of speech and thus autonomy.

[282] KARST, *supra* note 22, at 191.

[283] *See generally* KARST, *supra* note 22. Professor Karst and a growing number of commentators argue that participation produces and precedes any concept of liberty or equality.

C. *Participation and Equality*

Equality proponents are also increasingly noting the central role of participation. Although some commentators have argued that equality is formal and requires no particular normative content,[284] they confuse equality as a philosophical concept with equality as an historical, constitutional value. Not only does the constitutional value of equality have substantive content, it must.[285] Commentators have argued that there is no way of interpreting or applying the Fourteenth Amendment without some substantive, normative notion of equality.[286] The question that commentators and the Court must address is not whether equality has substantive content, but what that content is.

Participation must play a central value in any substantive concept of equality. Professor Kenneth L. Karst argues that the historical and judicial conception of the meaning of the Fourteenth Amendment is grounded in the right to belong, participate, and be a full member of society. He asserts that this right prompted not only the passage of the Fourteenth Amendment, but also a number of the great decisions by the Court, including *Brown*.[287] One of the evils of segregation, then, was that it denied blacks the right to participate as equal citizens. Slavery is an even more graphic example of being excluded from participation. The refusal to recognize the people held as slaves as full members of society was closely tied to the legal status of slaves as non-persons devoid of autonomy.[288] The dubious non-person status of the slave was reaffirmed by the Court in *Dred Scott v. Sandford*.[289] This harm was not only to the social participation of blacks, but also to their development of self.[290]

The philosopher Michael Walzer makes a similar point about the primacy of the value of participation. He states that the primary good that

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[284] *See* Westen, *supra* note 39, at 537-77.

[285] *See* BAKER, *supra* note 21, at 40, 89-91; KARST, *supra* note 22, at 23-42, 151-72; TRIBE, *supra* note 65, at 1436-1687; Fiss, *supra* note 169, at 107.

[286] ROSENFELD, *supra* note 211, at 136-62; Fiss, *supra* note 169.

[287] *See* KARST, *supra* note 22, at 56.

[288] *Id.* at 43-49.

[289] Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that a "free negro of the African race" is not a citizen within the meaning of the Constitution).

[290] Such an injury not only distorts the identity and autonomy of blacks who are excluded, but also that of whites who are included. This could be called a liberty harm. In addition, the social norms and values that are produced from such inequality lack legitimacy. *See* BELL, *supra* note 171, at 26-50.

a society distributes is not liberty or equality, but membership. It is from membership and the right to participate that all other goods are produced and take on meaning.[291] The basic premise of our constitutional democracy is that all citizens should have an equal right to participate in both political and cultural life.[292]

While the exact, and even the functional, meaning of free speech and equality may remain seriously contested, the centrality of participation to both sets of values is not controversial. Although the importance of participation has been foreshadowed in earlier cases and legal doctrine,[293] its use as a mediating value for free speech and equality may be limited without greater efforts to concretize the use of participation. What participation means in a given society will be determined by the conditions and values within that society Walzer is instructive in addressing this issue. He acknowledges that what is necessary for full membership will depend on the society and the time in history He further states that this fact suggests that one must look at the particular society in concretizing membership and participation.[294]

What is needed in order to be a full member in our society is, at a minimum, a set of real participation rights in critical institutions where autonomy, societal values, and norms are constituted. Participation so conceived is not only instrumental, to find the truth or make laws, it is also intrinsic to the individual's autonomy Participation must, therefore, be open and yet allow the individual to withdraw The cost of membership cannot include subordination and domination. One's participation can be undermined in law and in fact. While voluntary withdrawal from participation is consistent with this value, exclusion is not.

There is an apparent tension in this universal concept of participation that appears to restate the paradox: What if one's participation is based on one's ability to prevent others from participating? As an abstract matter, this is a difficult problem. In the context of our constitutional democracy, it is not. Our constitutional and normative structure is not neutral.[295] The claim that one's participation needs require another not

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[291] *Id.*

[292] *See* WALZER, *supra* note 22, at 31.

[293] *See* Reynolds v Sims, 377 U.S. 533 (1964) (holding that a claim of debasement of the right to vote presents a justiciable controversy under the Equal Protection Clause).

[294] *See* WALZER, *supra* note 22, at 78-79.

[295] Professor Robert M. Cover argues that the Constitution has never been neutral on the issue of race. *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1308 (1982).

to participate simply cannot be honored in our liberal democracy.[296] Although this may appear to be a far-reaching claim, it is not. We accept the claim that one does not have the right to use another against that person's wishes to achieve one's own life plan.[297] There will still be situations where it is not so clear how to proceed when one person's participation interest interferes with another's. It may not be possible to resolve this tension completely by simply appealing to normative values; it certainly should not be resolved, however, by appealing to the traditional free speech or traditional equality narrative. If this tension leads us to a logical bind, it is all the more reason for a communicative approach to engage the tension openly While we will not know beforehand how this paradox will be managed, by contextualizing it and engaging in a communicative process, we can gain important insights. It is useful to remember Berlin's warning not to confuse logical difficulty with what happens in our communicative practice.[298]

IV HATE SPEECH IN THE WORKPLACE AND UNIVERSITY RECONSIDERED

My goal in this Article is not to create a formula that will tell us how to draw lines or to settle cases, but instead to aid in reconceptualizing our approach to resolving the tension between free speech and equality My primary objective has been to show the underlying problem as stemming from attempts to address the issue of racist speech from one favored narrative or another. In addition, I have tried to suggest an alternative approach that does not privilege free speech or equality It might be useful, nonetheless, to sketch out how one could use participation and harm when considering racist speech on campus and in the workplace.

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[296] Professor Michel Rosenfeld correctly argues that the abstract notion of equality, which requires that all be of equal worth, is the foundation of our society. He goes on to argue that claims that require the compromising of the moral autonomy of others must be disregarded. *See* ROSENFELD, *supra* note 211, at 254. This is also required by the equality postulate Rosenfeld argues to be a given in our society Any claim to the right to undermine another's right to participate cannot be honored. Rosenfeld goes on to argue that this right is primary to our situated notion of liberty or equality. *Id.*

[297] MILL, *supra* note 21, at 13-17 (discussing self-regarding acts).

[298] *See supra* notes 258-60 and accompanying text.

Because I have focused on participation in critical institutions, there must be some determination of what is or is not a critical institution. This is not totally uncharted water. The Court, for example, has addressed similar issues in the context of institutions or clubs that discriminate in membership. The Court's analysis has involved determining if there are First Amendment associational rights implicated in these cases. The Court has recognized that First Amendment associational rights, like First Amendment free speech rights, are closely related to individual self-development.[299] Even where such rights are implicated, if the nature of the institution is not private, the Court has balanced the First Amendment interest with the equality interest. Implicitly, the Court has recognized that these institutions are critical if they are public. It should also be added that the Court has not simply relied on a formal notion of public and private.[300] In a number of cases, the Court has found that the First Amendment associational interest is outweighed by the equality interest of being part of public institutions.[301] By inference, recognition of the critical role that public institutions play in our society — as done by the Court in *New York State Club Association v. City of New York*[302] — warrants different treatment from that given to a non-critical private club. Similarly, the Court has long recognized the centrality of school and education as critical institutions and their vital role in maintaining our democratic values.[303] Despite the need to give more thought to what constitutes critical institutions in our society, the workplace and institutions of higher learning have already been appropriately identified. Both the workplace and educational institutions are important spaces in our society for social and individual development. Work and school are essential forms of social participation, and the relationships that occur in

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[299] *See* KARST, *supra* note 22, at 199-200.

[300] Although the Court uses "public" similarly to my use of "critical," I think "critical" is a better term. Unless it is clear that "private" has a non-formal meaning, I think that the private-public distinction in law cannot be defended on normative grounds.

[301] *See* New York State Club Assoc. v. City of New York, 487 U.S. 1, 12-14 (1988) (affirming a local New York law which prevented private clubs and associations from discrimination on the basis of race, sex, creed, and other grounds).

[302] *Id.*

[303] *See* Plyler v. Doe, 457 U.S. 202, 221-23 (1982) (striking down a Texas statute which withheld state funds from local school districts for children not "legally admitted" to the state).

both enhance individual identity and the capacity for autonomy In addition, the construction and development of social values and truths occur in both domains. Participation in particular kinds of work, for example, allows one to participate in the social construction of expectations of groups to which one belongs. Having access to financial resources also serves a number of values related to self-worth and social worth in our society Without financial resources, one's autonomy and social value are seriously called into question in our society Employment, of course, is more than a means to financial resources; it also helps to define us and give our lives meaning. Through her employment, the plaintiff in *Robinson v. Jacksonville Shipyards, Inc.*[304] is able to participate in an ongoing social dialogue about the meaning of gender.

The academy is important both for access to future employment and for the development of individual and social meaning. To deny an individual or group the right to participate in this creation of social values denies a voice in the academic discourse, distorting and de-legitimizing the values that result from this process.[305] Thus, the workplace and college campus are critical institutions for the purpose of the analysis of participation.

I stated earlier that speech and equality can harm, but that this statement alone does not help in resolving the tension between the two narratives. I have also pointed out that harm to participation is a special injury that can undermine both free speech and equality, especially if the injury occurs in critical institutions. Without precisely defining participation, I argue that participation involves individual or constitutive values, as well as social or instrumental values. It is through the ability to participate and belong to critical institutions that we constitute ourselves,[306] and it is through participation that we generate truth, values, and norms. Harm to participation, then, is a constitutional harm that violates both the First and the Fourteenth Amendments' values. Harm to participation undermines the validity of all norms and values that are created in flawed situations.

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[304] Robinson v Jacksonville Shipyards, Inc., 760 F Supp. 1486 (M.D. Fla. 1991).

[305] Because these are scarce goods, like the right to a particular job or school, not all members of society can have them. They still must be distributed, however, in a way that is constitutive of our notion of equality of opportunity and not inconsistent with the value of participation.

[306] *See* BARBER, *supra* note 280, at xv, 150-55.

This points to a different approach when judges and commentators are concerned about issues of racist speech. When the activity or speech in question is being considered, it will still be useful to determine whether the First Amendment protects the speech or if the activity undermines equality, but this analysis will often not be enough.[307]

A. A Reconceptualized Approach

There are a number of other considerations that the analysis in this Article suggests. This is particularly the case if there is a tension between conflicting normative values.[308] One must also consider the harm and the context in which it occurred. In addition, one needs to consider the values that are being promoted by the speech activity and what the alternatives for promoting these values are. This approach also suggests what the disputants might be asked to present to the Court. It would not be enough for a person who wants to engage in activity that harms participation simply to claim that it is protected or a liberty Because it is hurtful, and particularly hurtful to other normative interests, the underlying value that the activity promotes should be considered. The party that is trying to stop the speech or equality activity may be called upon to state how the disfavored activity is interfering with the interest to participate and what the participation interest is.

A reconsideration of *R.A.V.*,[309] provides a chance to illustrate more concretely how to address the conflict between free speech and equality without privileging. In this case, the Court considered the constitutionality of a city ordinance that proscribed abusive speech which would insult, injure, or provoke violence on the basis of race, color, creed, religion, or gender. The Court held that the ordinance was viewpoint discriminatory and therefore unconstitutional.[310]

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[307] I would argue that most speech should be protected by the First Amendment. I would also argue for an expansive, substantive notion of equality that is not co-terminus with anti-discrimination.

[308] I have focused on the tension between free speech and equality. Similar concerns may be raised when there is a tension between free speech and privacy or between equality and church/state concerns.

[309] R.A.V v. City of St. Paul, 505 U.S. 377 (1992).

[310] *Id.* at 381.

The Court privileged free speech by essentializing[311] and by failing to see a conflict with equality In fact, the Court adopted a much more extreme view than libertarians such as Professor Strossen because it did not even acknowledge that equality concerns exist in this case.[312] The Court framed *R.A.V* as raising solely free speech issues,[313] which must

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[311] As the Court explains the reasons for exclusion of "fighting words" from the scope of the First Amendment, it sanctifies and essentializes free speech. It does so by labeling "fighting words" as "'non-speech' element[s] of communication." *Id.* at 386. Through its characterization of proscribable speech — "fighting words" — as not speech, it deftly implies that all "speech" is protected.

The Court's citation to Justice Frankfurter's opinion in Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring) ("fighting words are thus analogous to a noisy soundtrack both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment"), should not be seen as legitimizing its sleight of hand. *R.A.V.*, 505 U.S. at 386. First, Frankfurter's opinion is merely a concurrence, so its precedential weight is questionable. Second, Frankfurter's opinion also privileges free speech. The tension between free speech and equality will never be adequately addressed if American jurisprudence remains mired in the morass of privileging.

[312] The Court portrays the case as involving issues of censorship when the case could just as, if not more, easily be seen as raising issues of equality. The defendants were prosecuted under the St. Paul ordinance for placing a burning cross in the front yard of the home of an African-American family, which had recently moved into a predominantly white neighborhood. The incident took place at night. Such conduct historically has been used to terrorize African-Americans, especially those who had the "audacity" to move into a white area or to speak out against the unequal treatment they have received. The effect of such terror tactics has been and continues to be the impairment of African-Americans' freedom to exercise choice about where they live, send their children to school, and do business. This conduct also impedes the right to freedom from discrimination.

[313] Professor Lawrence provides a powerful critique of the Court's approach to the case.

> The Court was not concerned with how this attack might impede the exercise of the Joneses' constitutional right to be full and valued participants in the political community, for it did not view *R.A.V* as a case about the Joneses' injury. Instead, the Court was concerned primarily with the alleged constitutional injury to those who assaulted the Joneses, that is, the First Amendment rights of crossburners.

Lawrence, *supra* note 72, at 788-89 (footnotes omitted).

be decided solely in accordance with First Amendment principles.[314] The extreme lengths to which the Court privileged free speech are illustrated by its insistence that the speech regulation must be content-neutral even though it fully admits that burning crosses are not constitutionally protected speech. The Court reasoned as if its content-based argument is value neutral, as if the only logical and inevitable conclusion is to strike down the ordinance.[315] The way the Court relied on content-based analysis exemplifies how essentializing free speech can warp judicial thinking. The form of analysis applied by the Court completely ignored issues of equality even though the prohibition of content-based regulations is properly understood as protecting equality· preventing powerful actors or the government from discriminating against members of less powerful groups by suppressing their dissenting voices.[316]

The Court can plausibly assert the objectivity of its decision only by treating free speech principles as foundational and equality concerns as subsidiary or irrelevant. The Court disregarded the significance of equality principles in several ways. Like many traditional libertarians, the Court minimized the concrete harm that speech can inflict.[317] The Court also exhibited its disregard for equality concerns by viewing speech

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[314] This is most dramatically illustrated when the Court tries to address Justice White's argument made in his concurring opinion, which privileges the equality narrative. "This Court itself has occasionally fused the First Amendment into the Equal Protection Clause but at least with the acknowledgement (which Justice White cannot afford to make) that the First Amendment underlies its analysis." *R.A.V.*, 505 U.S. at 385 n.4.

[315] The Court asserts that St. Paul violates the content-neutral requirement by proscribing fighting words that communicate messages of racial, gender, or religious intolerance. "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid " *Id.* at 394.

[316] *See* Police Dep't v Mosley, 408 U.S. 92, 96 (1972) ("There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."); Kenneth L. Karst, *Equality and the First Amendment*, 43 U. CHI. L. REV 20, 29-35 (1975) (arguing for the use of the equality principle to protect against content censorship); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV 189, 201 (1983) (arguing that there is a connection between the content-based/content-neutral distinction and the concept of equality).

[317] The Court declared that "the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out." *R.A.V.*, 505 U.S. at 396.

through a historical lens.[318] The Court's refusal to allow history and context to inform its analysis of the meaning of various speech acts is unjustified on its face. That even the most stridently conservative Justice, Clarence Thomas, has recognized the relevance of history and context, however, reveals this approach to be not only unreasonable but also extreme.[319] Although the Court acknowledged that protecting members of traditionally oppressed groups is compelling, it then quickly raised the specter of censorship to justify its essentialization of free speech.[320] This censorship argument contains flaws in two respects. First, it does not account for the continuing discriminatory practices and attitudes which silence or, in other words, censor excluded groups.[321] Second, this argument does not specify what concrete harm would come from censorship or even what censorship means in real terms. The threat of censorship is simply invoked to end the conversation about other harms, in this case historical discrimination of certain groups and how that bears upon the hate speech controversy The conversation should not end, however, unless one presupposes that free speech is at the top of the slippery slope. In other words, the censorship argument is yet another manifestation of privileging.

To contribute to the mediation of the tension between free speech and equality, the Court would have to overcome its Cartesian Anxiety, which

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[318] In criticizing the ordinance's prohibition of only fighting words that disparage based on race, color, creed, religion, or gender, the Court mocks St. Paul's attempt to account for the qualitatively different injuries caused by hate speech against members of historically oppressed groups. "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *Id.* at 392.

[319] Justice Thomas, while tracing the evolution of the meaning and use of the burning cross in America, admits that the KKK's use of the burning cross cannot be seen reasonably as a religious symbol: "The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate. In my mind, this suggests that this case may not have truly involved the Establishment Clause " Capital Square Review & Advisory Bd. v. Pinette 115 S. Ct. 2440, 2451 (1995) (Thomas, J., concurring).

[320] The Court asserts, "the 'danger of censorship' presented by a facially content-based statute, requires that weapon be employed only where it is 'necessary to serve the asserted [compelling] interest.'" *R.A.V.*, 505 U.S. at 395 (quoting Leathers v. Medlock, 111 S. Ct. 1438, 1444 (1991) and Burson v. Freeman, 112 S. Ct. 1846, 1852 (1992)).

[321] This flaw decimates the Court's analysis because hate speech remains one of the most significant ways of silencing and thus undermining equality and, ultimately, free speech.

has induced the Court's ongoing, elusive quest for discovering the bright lines that would, in theory, infallibly guide legal analysis. The Court would also have to cease its essentialization of speech. An important step for the Court in this process would be to rethink how it applies its content-based analysis. If the Court took a hard look at how it applies the content-based doctrine, it would realize that the doctrine embodies and serves equality concerns.[322] In addition to reconsidering the content-based doctrine, the Court should contemplate its reasoning in *Harris v. Forklift Systems, Inc.*,[323] which articulates equality concerns. Taking these steps would enable the Court to more fully identify the values implicated by hate speech. By teasing out the common points of the incommensurable principles, in this case free speech and equality, the Court could craft a basis for evaluating hate speech and speech regulation. I have suggested that the most helpful way of mediating the tension between free speech and equality, in this context, is by comparing the harm to meaningful participation in critical institutions caused by hate speech and regulation respectively

Under this approach, the Court, rather than approaching the St. Paul ordinance as an ominous limitation of expression, could consider the ordinance in the context of the Jones family's participatory interests as full members of the community The Court should evaluate these interests against the youths' participatory interests in expressing their hatred for African-Americans. This evaluative process should be informed by the nature of race relations in America, historically and today The Court may come to the same conclusion that the ordinance is unconstitutional, although I doubt it. The ordinance does not prohibit the expression of the ideas; rather, it considers when the ideas are expressed, to whom, and the likely effects. Regardless of the result, American jurisprudence would benefit from this contextualized, more thoroughly thought-out approach to issues raised by hate speech.

Although this is a reconceptualized approach, it is not a complete break from what courts already do. One reason, for example, that racial discrimination in the employment or school context is prohibited is because workplaces and schools are critical institutions in our society, and discrimination often injures the ability to participate. One can imagine situations when racial discrimination does not implicate participation in

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[322] This presupposes that the Court ceases to minimize the harms caused by speech and begins a contextualized, historically-informed evaluation of the incommensurability of the free speech and equality paradigms.

[323] Harris v Forklift Sys., Inc., 510 U.S. 17 (1993).

critical institutions. For example, in *New York State Club Association*,[324] there was no question that the clubs discriminated and that there were First Amendment association rights implicated.[325] The case, however, turned on the nature of the club. If it were truly non-critical and private, the discrimination would not impose a barrier to participation. In this case, the Court correctly found that the nature of the club was critical for conducting business, and the associational interests, while present, were not substantial.

This suggests another way the Court might look at racist speech in a particular context. Such an analysis might entail the Court first determining how important the institution or location is for generating individual and social participation values, what the particular participation interests are, and whether they can be adequately exercised in a different context without substantial burden. The Court should also consider the nature of the speech activity and the extent to which this interest is tied to the particular context. If the speech activity injures participation and is not strongly recognized in the particular context, this would weigh in favor of proscribing the speech activity In addition, the Court might examine how the speech activity injures the participation values and if the speech activity itself is also tied to strong participation interests. If the speech activity is closely related to the exclusion of others, such exclusion would militate for less protection of the speech activity by the Court in this context. Alternatives open to the different parties should also be considered. If there are participation interests, both in the speech activity and in injuring the participation of others, then the Court must balance the conflict; the Court must try to accommodate both sets of interests, by assessing the seriousness of the injury on either side and the alternatives available. It may also be relevant whether the participation interests in conflict are of the same order. For example, if the interest on one side is intrinsic and the interest on the other side is instrumental or social, the Court may decide in a particular context to value one over the other or that one is more closely tied to the context itself. In assessing the harm, the Court may also want to consider the formal and non-formal impacts

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[324] New York State Club Assoc. v City of New York, 487 U.S. 1 (1988).

[325] *Id.* There will also be situations where participation interests are implicated and there has not been any showing of discrimination. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (upholding FCC laws with minority ownership preferences on the grounds that congressional and FCC policies do not exist solely as remedies for discrimination).

of the harm. For example, the Court may want to know how the target group experiences the harm.[326]

B. *The Workplace*

In the *Robinson*[327] case, for example, the Court should start its analysis by looking at the context in which this conflict occurs. If the Court finds that this is a critical institution, it should then see if the speech activity of the men injures the social and constitutive participation interests of the women. In order to answer this question, the Court will need to identify what those participation interests are.[328] It will also need to identify what the expressive interests of the men are in this context. If it finds that the men's speech act does injure the participation interests of the women, then the Court must consider how proscribing such activities would injure the interests of the men and how not proscribing the activity would injure the interests of the women. Ideally, the Court would attempt to structure the environment so that the men's participation activity will not be injured or injure the women's participation. As stated above, one group's participation interests should not be honored if they are predicated on the exclusion of others. It would be significant if one could show that by allowing the pictures and sexually explicit statements in the workplace, women would be effectively prevented or disadvantaged from participating in the workplace. This would be especially true if one could show that the men have a number of alternative forums in which to engage in such activity It is also relevant to the extent that the men's and women's participation interests

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[326] This is, in fact, what a federal court attempted to do by considering a reasonable woman standard. Robinson v Jacksonville Shipyards, Inc., 760 F Supp. 1486, 1524 (M.D. Fla. 1991). This is also what Professor Michelman refers to in his discussion of racist speech. He distinguishes between the formalist position, where actual legal barriers exist, the realist position, where informal structures and practices exist that undermine participation, and the experiential position, where the targeted group experiences the racist speech acts in question. *See* Michelman, *supra* note 151, *passim*.

[327] *Robinson*, 760 F Supp. at 1486.

[328] Even if one has an interest or right to participate, it may nonetheless be limited. Consider a courtroom: a non-party or journalist may have a right to be present but not to speak. In a biology lab, a student may have a right to speak but not necessarily about politics. In other words, as exemplified by the workplace, one's participation interests are often functionally related to the context.

are constitutive and individual, as opposed to social and instrumental.[329] In *Roberts v. United States Jaycees*,[330] the Court considered the interests implicated, distinguishing between those interests that were intimate and intrinsic and those that were instrumental or social. The Court accorded more weight to intrinsic interests and, therefore, was willing to sacrifice instrumental associational interests to stop discrimination.[331]

In *Robinson*, the men complained that the removal of the pictures and the proscribing of some speech activity would harm their First Amendment rights. Once the claim that there is another constitutional normative value at issue is credibly raised, however, the men should be asked which First Amendment right or value is being injured.[332] The men may assert that their expressive rights are being injured if they have to remove the posters and stop making sexual comments. It becomes important to examine what their expressive rights are in this context. The court may find, in this situation, that the expressive interests of the workers have been substantially limited.[333] The court might find that the men have a

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[329] This is not to suggest that there is always a clear divide between what I call constitutive and social participation. Despite this fact, it may still be useful to examine the question. To the extent it is clear that the nature of the location in question is instrumental, there is less validity to the claim that proscribing a constitutive participation activity that injures another is a serious violation. One could argue that in the workplace one does not expect to have the same degree of constitutive participation as one does in some locations of a university, or a public or private setting.

[330] Roberts v United States Jaycees, 468 U.S. 609 (1984) (holding that the application of the Minnesota Human Rights Act to the United States Jaycees, requiring them to admit females as regular members, did not violate members' freedom of association).

[331] *Id.* at 617-19

[332] One must be careful not to privilege by simply refusing to recognize the other value, which is what the court did in UWM Post, Inc. v Board of Regents, 774 F Supp. 1163 (E.D. Wis. 1991).

[333] I have used "private" similarly to "critical." Saying that the workplace in this situation is private does not address the issue. The question remains, "is the workplace a critical institution?" Rather than focusing on the private/public distinction, I believe it would be important for the court to consider what the expressive interests in a particular context are and why. To the extent that the interests are limited, they would not weigh in the balance. Even if the workplace is a critical institution, there may be limited expression rights. There are a number of additional concerns that can limit expressive interests, given context and function as illustrated by the extent to which one has the right to express oneself in a courtroom or at a public university in a biology lab.

right to possess or look at pictures of nude women, but nonetheless not where others can see them. In other words, the court's acknowledgment of a right to a certain form of expression does not automatically confer a right to impose such expression on members of a particular group, in this case female co-workers.

What if they asserted that their participation interests in creating norms or truth-finding is being injured? Again, this may not be as strong a claim in the workplace as in other contexts. Indeed, in the *Robinson* context, this claim may be undermined by the acceptance of the employer's prohibition of political pictures and posters without objections.[334] It is not that these men do not have *any* interest in having these posters up. They may have such an interest and be harmed by the removal. The Court should, however, call on the men to state what the interest or harm is and what the analysis is in the context of the claim. Simply asserting free speech rights does not do this.

C. *The University*

The university is a much more complex setting. It has attributes similar to a home, a public forum, a public or private club, a public accommodation, and a workplace. Each of these locations may call for a different treatment under this analysis, and each location may implicate a different set of participation interests. Nonetheless, a similar process of identifying the harms, values, contexts, and alternatives would be useful for each setting. Looking at one of the incidents that has occurred on the Stanford University campus will help to illustrate this. After an argument with a black student about Beethoven's race, two white students defaced a poster of Beethoven, giving him exaggerated black features, and then put the poster on the door of the black student's room.[335] It seems plausible that the speech act was racial and hurtful. If one examines the act under the analysis discussed above, the location of the act does not appear to involve a critical institution, as I have been using the term in this article. It would be difficult, therefore, for the black student to show how his participation interest is being compromised. Although the white students may have an expressive interest in defacing the poster, it is not at all clear that they have an expressive interest in placing the poster on the black student's door.[336] The white students would make a much

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[334] Robinson v Jacksonville Shipyards, Inc., 760 F Supp. 1486, 1494 (M.D. Fla. 1991).

[335] Lawrence, *supra* note 33, at 456 n.101, 479 n.165.

[336] In addition, placing the poster on the door raises private property and

stronger argument for having an expressive interest if they placed the poster on their own door. Under the former facts, the analysis I have offered would not be particularly instructive in resolving this matter, except to make it clear that neither students had clear participation interests present. An additional benefit of the analysis, that I have suggested, is that it also allows for the acknowledgement that there is a possible injury, even if the injury is not ultimately constitutionalized.[337]

One's right to participate and one's autonomy can never be held paramount to the degree that they allow one to destroy another or to use a person against that person's will.[338] Although there are a number of difficult choices that must still be addressed under this approach, the approach makes some of the vexing questions much clearer and easier to address. For example, the targeted racial epithet may not raise serious questions about whether to regulate if such speech activity has a substantial impact on the targeted parties' participation and is not tied to legitimate participation rights of the speaker. Another advantage of this strategy is that it would avoid denying harms and trying to decide acontextually which categories of speech are protected or not. In analyzing such activity, it is useful to look at the value the activity is promoting as well as the injury it is likely to cause. Threatening or intimidating speech often has little expressive value in a particular context. The actor may not be interested in participating in the larger community, or may only be interested in participating in a way that injures the participation interest of others. The person's expressive activity in this instance is often designed not to solicit a response, but to drive the other person out of the community This is, in fact, often the effect.[339] Where social and inherent participation values are implicated,

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trespass issues.

[337] I am aware that there may be other non-participation interests involved in any of these situations. For example, the black student may have privacy and property interests implicated when the poster was placed on his door. It is appropriate to consider such interests, but such an approach is beyond the scope of this Article.

[338] It is for similar reasons that Professor Baker argues that there is no right to speak to an unwilling listener. *See* BAKER, *supra* note 21, at 302 n.41, n.43.

[339] Other commentators have similarly argued that such speech can be regulated. There are a number of reasons given, such as speech is more like an act when it is coercive and when it is a situation-alerter. In most instances, commentators argue that such speech has little expressive value and is not core First Amendment speech. I suggest that this is not always a useful distinction. What this distinction wrongly suggests is that if it were core First Amendment

the state has a constitutional free speech and equality interest in limiting the harm to individuals. This may involve balancing one harm against another, which would be a social, as opposed to a liberty, question. It is specifically this compelling state interest that allows the government to regulate speech acts that are otherwise protected. There also may be good reason to weigh more heavily a participation interest that is constitutive than an interest that is social. It is also clear that some racist speech does directly implicate or injure participation and undermine free speech and equality

D. Is There a Problem with Balancing Rights?

This approach suggests that when activities that otherwise reflect constitutional norms injure First Amendment speech values or Fourteenth Amendment equality values, one must balance the interests. One may object to the notion of balancing in the area of constitutional rights. The notion of rights is that they are something that one has which do not have to be balanced.[340] One can only maintain this position, however, under conditions in which rights do not cause unacceptable harms and do not conflict with other rights. When both of these conditions hold, rights should be given broad protection and should not be balanced. A problem remains, however, because in a number of situations neither of these conditions hold true,[341] especially in the context of racist speech activity

The balancing of constitutional rights generally already occurs,[342] so the question is not whether to do it but rather how to do it in a principled way[343] In other words, the pivotal issue regarding balancing is not whether it should be done, but how to do it. If two values or rights

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speech, it could not be prohibited. This claim cannot be made, however, without considering the harm. First Amendment speech that causes constitutional speech and equality harm can and, at times, should be regulated.

[340] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90-94 (1978) (distinguishing "rights" which are absolute, from "goals" which encourage society to make trade-offs).

[341] For example, speech activity can cause unacceptable harms in cases that involve blackmail or threats. Conflict between rights can take many forms, such as when a speech value, participation, and a non-speech value, privacy, conflict.

[342] *See* DWORKIN, *supra* note 340, at 93.

[343] For a discussion of how to balance competing normative claims, see *id.* Professor Dworkin's analysis, however, is limited by his failure to address how to balance without a metalanguage. Mediating competing narratives does not simply involve compromise. *See* HABERMAS, *supra* note 101.

are incommensurable, there is not an obvious method for balancing them. Balancing between three pounds and five pounds is relatively easy; however, how does one balance between five pounds and the color green? I have argued that participation and harm are the interests that can be used to balance or mediate between free speech and equality They allow for a comparison between some of the free speech interests and some of the equality interests. Even if my effort has not completely succeeded, it seems clear that some alternative to the privileging, in which most commentators and courts have engaged, must be used. The need to identify some mediating approach to afford a real dialogue should be apparent and undisputed.

In fact, some commentators recognize the widespread practice of privileging and its consequences and thus have begun to try to move beyond the either/or conceptual trap ensnaring courts and commentators alike. Professor Delgado, for example, has taken important steps to escape the oppositional framework by ceasing to privilege either the free speech or the equality narratives: "neither value seems logically prior to the other; each is necessary for the full expression of the other. Interpretive communities are necessary for speech; speech is a necessary tool to restore, adjust, and refine community."[344] In so saying, Professor Delgado articulates essentially the same theme of this Article: the need to mediate between free speech and equality through the dialogical engagement of paradigms.

Professor Delgado's thinking seems guided by his adoption of the "interpretive community hypothesis."[345] This hypothesis predicts that responses by the world's societies to ethnic and religious unrest are grounded in the desire for self-preservation.[346] Professor Delgado

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[344] *See* Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV 737, 750 (1993).

[345] This hypothesis is articulated in the ground-breaking book STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992) [hereinafter STRIKING A BALANCE].

[346] *See* Stefancic & Delgado, *supra* note 344, at 748. To illustrate the accuracy of this hypothesis, Professor Delgado compares two countries' responses to hate speech that are discussed in STRIKING A BALANCE, *supra* note 345.

> India, for example, has both a strong commitment to democracy and a recent history of bitter ethnic and religious conflict. The interpretive community hypothesis predicts that such a society would take strong action to curb violence, discourage racist speech, and restore the fragile interpretive community that is part of its democratic heritage and ideals; indeed, it has done this.

expands upon this insight, arguing that there may be no single balance. "The appropriate balance between equality and freedom of expression may be a complex, shifting matrix that includes several different forces ..."[347] Other commentators also recognize the evolving and nuanced nature of balancing and that such balancing is distinct from mere compromising.[348] In fact, mere compromise may produce undesirable results. These observations underscore the postmodernist insight that there can be no transcendental standard by which one can determine if a form of speech should be regulated. Thus, although Professor Delgado does not explicitly propose the promotion of participatory interests as the mediating principle as I have, he nonetheless characterizes the method by which the tension between free speech and equality can be resolved in a similar fashion.

CONCLUSION

The purpose of this Article has been to expose and challenge the privileging that occurs when courts and commentators try to deal with the tension between free speech and equality, and to suggest an alternative. This effort to avoid simply favoring one narrative over the other is made more difficult because of the problem of comparing apparently incommensurable paradigms. What is at stake is more than a philosophical debate about the correct description of the problem. The struggle over language can reproduce all struggles over material wealth, power, and privilege. More is to be gained or lost than a story The concerns of free speech and racial equality are fundamental to our society We bring to these issues a great deal of passion and concern. I assume that there are many others who, like Professors Lawrence and Strossen, realize that it

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Stefancic & Delgado, *supra* note 344, at 748 (footnotes omitted).

Professor Delgado then discusses the former Soviet Union, which has been plagued by a history of centralized, totalitarian rule.

> Such a society would not likely rely on shared expression, dialogue, and other forms of communication to bind itself together. Rather, centralized authority serves that purpose. When intergroup conflict breaks out, the impulse to restore a communicative paradigm will be weak. Consequently, laws against hate speech will not be in force. If they are, they are apt to be used eccentrically, as in the case of dissidents.

Id. at 748-49 (footnotes omitted).

[347] Stefancic & Delgado, *supra* note 344, at 749.

[348] *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986); HABERMAS, *supra* note 101, ROSENFELD, *supra* note 211.

is important to try to embrace both values, and who believe that to prevail by power would make the victory worse than meaningless and without moral force.[349] I address this Article to this group of people in particular.

I have tried to tease out a common ground, a shared story within these two narratives by using participation and harm as mediating principles. This effort not only suggests common values and interests, it also reconceptualizes free speech and equality Indeed it hints at another narrative that is already deeply grounded in free speech and equality This story of the need for participation moves us from two apparently incommensurable narratives toward two sets of values that share a substantial common language. It allows us to valorize the values and goals of free speech and equality, while being able to compare them. In sketching out the common language for free speech and equality in this Article, I recognize that this project is incomplete. I hope, however, that this Article will advance the dialogue concerning the tension between free speech and equality Indeed, if I am right, the problem will not be solved in closed or abstract logic, but must be addressed in an open, dialogical process. These questions must remain open for present and future participants to examine. In other words, I do not intend for the approach I advocate to be a conversation-ending strategy

In claiming that participation and harm are a useful place to begin the effort of mediating this conflict, I have also tried to show that adherence to the general liberal principle undergirding our society requires opportunity for real participation. It is through this participation that our social meaning for liberty and equality are produced and legitimated. Such participation must be mindful of domination and coercion.

My efforts have been informed by the work of two sets of commentators. One group of theorists has begun to move away from the claim that there is no injury caused by speech or equality The second group of commentators has started to recognize that part of the difficulty of dealing with racist speech may be complicated by the problem of incommensurability Neither group adequately addresses the issues of privileging and the need to mediate between the two narratives.[350]

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[349] For one narrative to prevail over another would be in conflict with the entire claim of the Enlightenment foundation, which does not recognize legitimacy in force or domination.

[350] Professors Delgado and Grey expressly address the issue of two incommensurable paradigms in the context of the tension between free speech and equality. *See* Delgado, *Campus Anti-Racism Rules*, *supra* note 20, at 383; Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory*

Indeed, Professor Thomas C. Grey, one of the few scholars who even raises the issue of mediation, ultimately resolves the tension by simply favoring what he calls the civil libertarian narrative.[351] He acknowledges that his effort will leave civil rights advocates unsatisfied. He does not appear to understand, however, that it is precisely because he privileges the free speech narrative that his efforts are unsatisfactory.[352] He tries to show how equality is instrumental, while free speech is intrinsic. It is Professor Grey's inadequate understanding of equality, particularly his failure to understand the constitutive role of participation, that produces this error.[353]

The importance of participation becomes even more apparent if one accepts the assumption that there is no objective truth to which we can appeal in a monological way, either to resolve our conflicts or to know the world. Although most legal commentators appear to have accepted the criticism of foundationalism and natural categories,[354] the implications of this have not been taken seriously in the free speech/equality debate. This Article is an attempt to come to grips with the implications of anti-foundationalist claims: that norms and values are contextually bound and communicatively "redeemed." This insight militates for giving participation the priority in all claims of legitimation strategies. It is not a set meaning of either free speech or equality that defines what is necessary in society; rather it is participation that gives meaning and content to

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Verbal Harassment, 8 SOC. PHIL. & POL'Y 81, 102 (1991) (discussing the tension between civil rights and civil liberties in the context of verbal harassment on college campuses).

Professor Delgado was also one of the first commentators to make explicit the harm that speech can cause. *See* Delgado, *Words that Wound*, *supra* note 79, at 135-49. For a more recent discussion of these injuries, see Lawrence, *supra* note 33, at 458-66; Matsuda, *supra* note 45, at 2326-41.

[351] Professor Grey ultimately resolves the tension by arguing that equality is instrumental and free speech is intrinsic. He therefore resolves the tension within the larger, more "fundamental" free speech narrative. Grey, *supra* note 350. Professor Grey's position seems plausible, then, because he unessentializes equality.

[352] *Id.*

[353] He sees equality mainly as an anti-discrimination norm. For a critique of this position, see KARST, *supra* note 22, at 37-42, 235-42; TRIBE, *supra* note 65, at 1436-1687 He also fails to address the normative foundation of participation. *See* WALZER, *supra* note 22, at 31-35.

[354] *See* RORTY, *supra* note 17, at 3-22; UNGER, *supra* note 17

society, free speech, and equality It is through participation that we engage in what Professor Nelson Goodman calls "worldmaking."[355]

I have, however, suggested more. It is through participation that we are given to ourselves, and our interests and needs are defined and transformed. Participation takes on both an epistemological and ontological significance.

The other mediating interest that I have suggested in this Article is harm. Harm is already recognized in both the free speech and equality narratives. I have argued that there is reason to believe or construct a notion of harm that is similar in both contexts and that is not so broad that it destroys free speech or equality Not all harms are to be avoided, but only a limited class of harms. I have identified the central harm that is to be avoided as the harm to participation and membership and, as a corollary, the harm to communicative self-respect and autonomy There are other harms, such as offense, that will not rise to this level. I have argued that the harm which undermines, distorts, or destroys the ability to participate in critical institutions and locations is of the first order and should be cognizable in and regulated by our jurisprudence.

Even as we approach the ideal conditions for participation, we may not make the correct decision. By trying to mediate the tension between incommensurable narratives, however, we will be getting closer to making decisions the correct way

Free speech and equality should be promoted by this approach, in part, because they support, and are necessary for, participation. When there is a sharp conflict between free speech and equality, I would try to resolve the tension in a way that protects the right of participation.[356] To the extent that privileging takes place without being grounded in a larger social value, it only reflects the preferences, biases, and power of the commentator or judge. This raises serious questions about legitimacy that can undermine participation and democracy

In closing, I would like to underscore the fundamental point I have sought to make in this Article: we must resolve the tension between free speech and equality (and any other incommensurable values) without privileging one narrative over the other. One may question the legitimacy

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[355] GOODMAN, *supra* note 4, at 1, 56.

[356] The most acute tension is likely to come up in public or semi-public settings. However, what is public versus private will also be an issue. For a case where the Court focuses on First Amendment issues, equality issues, and the line between public and private, see New York State Club Assoc. v. City of New York, 487 U.S. 1 (1988).

of participation and harm as appropriate values to mediate this tension. While there is certainly room for debate on this matter, I have made an effort to justify why I believe these to be the best mediating values. This process of substantiating, rather than merely asserting the primacy of certain values, is vital to a truly open and ultimately constructive dialogical process. I have tried to emphasize this point in my discussion by showing that one cannot legitimately assert the superiority of one set of values over others.

I firmly believe in the feasibility of mediating without privileging because, even though we speak from different narratives that describe different worlds, language remains open and all worlds touch at some point. Thus, as we move to mediate these worlds, there is the possibility a common language will be created that describes and transforms the common ground and the different narratives. If such a mediation is to take place, however, the illusion of both the god's eye view and the infinite other must be avoided. The former assumes that there is an objective foundation that relieves one from engaging with the other. It denies the concrete otherness of the other. The latter assumes that there is no way of communicating with the other, that there is no possibility of finding or creating a common and shared language.[357] We must avoid the complimentary illusions of believing that we are radically the same or radically different. We must be suspicious of domination that hides behind radical objectivism and radical relativism. Either position would obviate the need or usefulness of participation.

It is because we are both the same and different that dialogue is necessary and possible.

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[357] For a good discussion of the first problem, see FEMINISM/POST-MODERNISM (Linda J. Nicholson ed., 1990). For a discussion of the second issue, see Cornell, *supra* note 10.