Liberalism, Speech Codes, and Related Problems
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Liberalism, Speech Codes, and Related Problems

One of my purposes is to defend the constitutionality of narrowly drawn restrictions on hate speech.

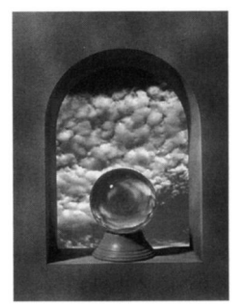
BY CASS R. SUNSTEIN

DAN SEARS

Cass Sunstein delivers his address at AAUP's annual meeting in Chapel Hill, N.C.

THE LAW HAS RARELY BEEN at odds with academic freedom.[1] In recent years, however, the development of campus "speech codes" has created a range of new controversies. In these remarks, one of my purposes is to defend the constitutionality of narrowly drawn restrictions on hate speech, arguing in the process against the broader versions that have become popular in some institutions. My most general goal is to set the dispute over speech codes in the broader context of the liberal commitment to freedom of speech and academic pluralism. Through this approach it may be possible to overcome the "all or nothing" tone that has dominated much of public and even academic discussion. In the process of defending some narrow restrictions on hate speech, it will be necessary to say a good deal about the principle of neutrality in constitutional law, academic life, and perhaps elsewhere.

The discussion will obviously bear on the subject of academic freedom. The subject is complex in part because no academic institution can avoid making certain controversial substantive judgments; because those judgments will intrude on some forms of freedom; and because those intrusions will interfere with speech. If we understand the hate speech controversy in this light, we will be pushed away from an attractive and commonly held vision of academic freedom—what might be called a neutral or skeptical vision in which all comers are accepted. We might be led to endorse instead a nonneutral, substantive view that embodies three defining commitments: political equality; a mild version of liberal perfectionism; and an insistence on exposure to a wide range of conceptions of the good and the right, so long as all of these are supported by reasons. I will offer some preliminary remarks on the relationship between the "speech code" controversy and these commitments.



ACADEMIC FREEDOM AND THE FUTURE OF THE UNIVERSITY
Second in a series

I. Low-Value and High-Value Speech

It is almost certainly necessary to distinguish between different forms of speech in terms of their relationship to Constitutional ideals. Current constitutional law does indeed make such distinctions, asking whether speech qualifies as "low-value" or "high-value." Some speech lies at the free speech "core." Such speech may be regulated, if at all, only on the strongest showing of harm. Other speech lies at the periphery or outside of the Constitution altogether. This "low-value" speech may be regulated if the government can show a legitimate, plausible justification.

Ordinary political speech, dealing with governmental matters, unquestionably belongs at the core. Such speech may not be regulated unless there is a clear and present danger, or, in the Supreme Court's words, unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[2] Under this standard, a speech containing racial hatred, offered by a member of the Ku Klux Klan, is usually protected; so too with a speech by a member of the Black

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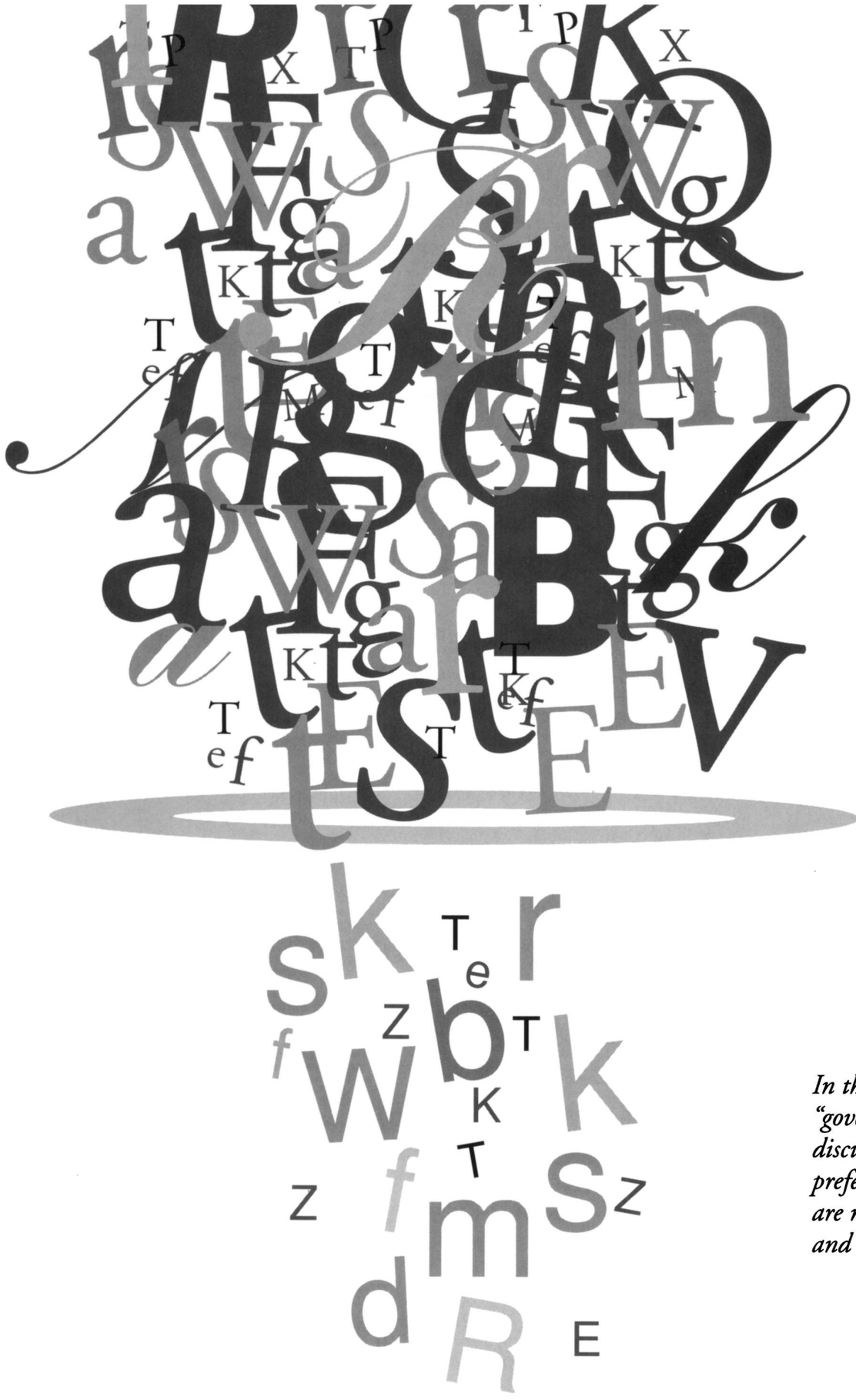


In the system of "government by discussion," private preferences and beliefs are not taken as fixed and static.

Panthers, or by neo Nazis during a march in Skokie, Illinois, the home of many survivors of concentration camps.

But much speech falls into the periphery of constitutional concern. Commercial speech, for example, receives some constitutional protection, in the sense that it qualifies as "speech" within the meaning of the first amendment. Truthful, nondeceptive advertising is generally protected from regulation. But government may regulate commercial advertising it if it is false or misleading. There are many other kinds of "low-value" speech. Consider threats, attempted bribes, perjury, criminal conspiracy, price-fixing, criminal solicitation, private libel, unlicensed medical and legal advice, sexual and racial harassment. All these can be regulated without meeting the ordinary, highly speech-protective standards.

The Supreme Court has not set out anything like a clear theory to explain why and when speech qualifies for the top tier. At times the Court has indicated that speech belongs in the top tier if it is part of the exchange of ideas, or if it bears on the political process.[3] But apart from these ambiguous hints, it has failed to tell us much about its basis for deciding that some forms of expression are different from others.

It does seem that any well-functioning system of free expression must ultimately distinguish between different kinds of speech.

Is a two-tier First Amendment inevitable or desirable? Some people claim to be free speech absolutists—they think they believe that all speech is protected, or that speech can be regulated only if the government can show overwhelming harm. But it does seem that any well-functioning system of free expression must ultimately distinguish between different kinds of speech by reference to their centrality to the First Amendment guarantee.

Begin with a truly absolutist position: Anyone may say anything at all at any time. A moment's reflection should show that this position could not be seriously maintained. It would not make sense to forbid government from regulating perjury, bribes, threats, fraudulent real estate deals, unlicensed medical and legal advice, willfully false advertising, and many other forms of expression. Realistically speaking, our choices are a range of nonabsolutionist approaches.

It is tempting to resist this conclusion by proposing that the speech that is unprotected is "really" not speech at all, but merely action. When someone attempts to bribe a government official, perhaps he is "acting," or perhaps the regulation of criminal solicitation is "ancillary" or "incidental" to the regulation of conduct. But as stated, I think that this suggestion is unhelpful. Criminal solicitation and attempted bribes are speech, not action. They may lead to action; but by themselves they are simply words. If I tell you that I want you to help me to commit an assault, I have spoken words; if I say that I will give you $10,000 if you vote for me, I have merely talked; if I say "Kill!" to a trained attack dog, I have done something regulable, but I have still just spoken. If these things are to be treated as action—that is, if they are not to be protected as speech—it is because of their distinctive features. This is what must be discussed. The word "action" is simply a placeholder for that unprovided discussion.

So much for the speech-conduct distinction. The only nonabsolutist alternative to an approach that looks at free speech "value" would be this: All speech stands on basically the same footing. We will not look at value at all. The only relevant issue is one of *harm.* Speech may be regulated if government can make a demonstration that the speech at issue will produce sufficiently bad consequences. Would it not be possible, and desirable, to have a "single tier" first amendment, in the sense that all speech is presumed protected, but we allow government to regulate speech in those rare cases where the harm is very great?

The answer is that it would not be plausible to say that all speech stands on the same footing. For example, courts should not test regulation of campaign speeches under the same standards applied to misleading commercial speech, child pornography, conspiracies, libel of private persons, and threats. If the same standards were applied, one of two results would follow, and both are unacceptable.

The first possible result would be to lower the burden of justification for governmental regulation as a whole, so as to allow for restrictions on misleading commercial speech, private libel, and so forth. If this were the consequence, there would be an unacceptably high threat to political expression. Upon a reasonably persuasive showing of harm, government could regulate misleading campaign statements, just like it can now regulate misleading proxy statements. A generally lowered burden of justification would therefore be intolerable.

The second possible result is that courts would apply the properly stringent standards for regulation of political speech to (for example) conspiracies, criminal solicitation, commercial speech, private libel, and child pornography. The central problem with this approach is that it would ensure that government could not control speech that should be regulated. A system in which the most stringent standards were applied across the board

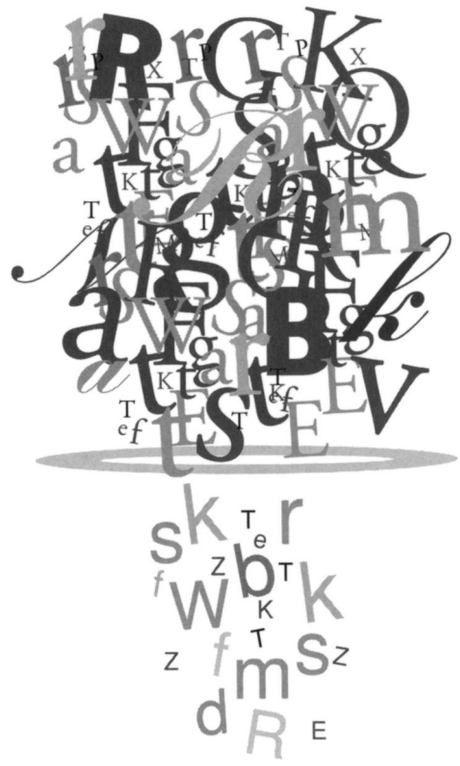
would ensure that government could not regulate criminal solicitation, child pornography, private libel, and false or misleading commercial speech, among others. The harms that justify such regulation are real, but they are insufficient to permit government controls under the extremely high standards applied to regulation of political speech.

If courts are to be honest about the matter, an insistence that "all speech is speech" would mean that they must eliminate many currently unobjectionable and even necessary controls—or more likely that judgments about value, because unavoidable, would continue to be made, but covertly. We will soon see that this claim bears directly on the questions raised by speech codes and by academic freedom generally.

Thus far I have suggested that a workable system of free expression ought to make distinctions between different sorts of speech; but it remains to decide by what standard courts might accomplish this task. To support an emphasis on politics, we need to define the category of political speech. For present purposes I will treat speech as political *when it is both intended and received as a contribution to public deliberation about some issue.* By requiring intent, I do not mean to require a trial on the question of subjective motivation. Generally this issue can be resolved simply on the basis of the nature of the speech at issue. By requiring that the speech be received as a contribution to public deliberation, I do not mean that all listeners or readers must see the substantive content. It is sufficient if some do.

An approach that affords special protection to political speech, thus defined, is justified on numerous grounds. Such an approach receives firm support from history—not only from the constitutional framers' theory of free expression, but also from the development of that principle through the history of American law. There can be little doubt that suppression by the government of political ideas that it disapproved, or found threatening, was the central motivation for the clause. The worst examples of unacceptable censorship involve efforts by government to insulate itself from criticism. Judicial interpretations over the course of time also support a political conception of the First Amendment.

This approach also seems likely to accord fairly well with our initial or considered judgments about particular free speech problems. Any approach to the First Amendment will have to take substantial account of those judgments, and adjust itself accordingly. Of course we are not unanimous in our considered judgments. But it seems clear that such forms of speech as perjury, bribery, threats, misleading or false commercial advertising, criminal solicitation, and libel of private persons—or at least most of these—are not entitled to the highest degree of constitutional protection. No other general approach unifies initial or preliminary judgments about these matters as well as a political conception of the First Amendment.



In addition, an insistence that government's burden is greatest when political speech is at issue responds well to the fact that here government is most likely to be biased. The premise of distrust of government is strongest when politics are at issue. It is far weaker when government is regulating (say) commercial speech, bribery, private libel, or obscenity. In such cases there is less reason to suppose that it is insulating itself from criticism.

Finally, this approach protects speech when regulation is most likely to be harmful. Restrictions on political speech have the distinctive feature of impairing the ordinary channels for political change; such restrictions are especially dangerous. If there are controls on commercial advertising, it always remains possible to argue that such controls should be lifted. If the government bans violent pornography, citizens can continue to argue against the ban. But if the government forecloses po-

An insistence that "all speech is speech" would mean that the courts must eliminate many currently unobjectionable and even necessary controls.

litical argument, the democratic corrective is unavailable. Controls on nonpolitical speech do not have this uniquely damaging feature.

Taken in concert, these considerations suggest that, in a liberal democracy, government should be under a special burden of justification when it seeks to control speech intended and received as a contribution to public deliberation. This does not mean that government is unconstrained when it attempts to regulate other speech. Recall that government cannot regulate speech because it is persuasive; recall too that offense at ideas is an illegitimate ground for legal controls. Always the government must be able to make a strong showing of harm. For this reason art, literature, and scientific speech will generally be protected from government controls even if some of these fall within the second tier. Of course these statements will leave ambiguities in hard intermediate cases.

II. Liberalism and Speech on Campus

If campus speech restrictions at public universities cover speech that is part of social deliberation, they might well be seen as unconstitutional.

I have tried thus far to set out some of the features of a well-functioning system of free expression. In that system, political speech belongs in the top tier; more speech, not censorship, is the remedy for speech that threatens harm; only an emergency can support suppression. Nonpolitical speech is also protected, but it can be regulated on the basis of a lesser showing of harm. Here too the government must point to something other than persuasiveness or offense at the content of ideas.

We can use this discussion as a basis for exploring the complex problems resulting from recent efforts to regulate hate speech on campus. Some regulations are often associated with alleged efforts to impose an ideological orthodoxy on students and faculty, under the rubric of "political correctness." Perhaps radical left-wing campuses, under pressure from well-organized groups, are silencing people who disagree. Are the campus speech codes constitutional?

To the extent that we are dealing with private universities, the Constitution is not implicated at all, and hence all such restrictions are permissible. This is an exceptionally important point. Private universities can do whatever they like. They can ban all speech by Republicans, by Democrats, or by anyone they want to silence. But many private universities like to follow the Constitution even if they are not required to do so. In any case, public universities are subject to the Constitution, and so it is important to try to establish what the first amendment means for them.

A. A Provisional Thesis

On the approach provided thus far, we can offer an important provisional conclusion: If campus speech restrictions at public universities cover not merely epithets, but speech that is part of social deliberation, they might well be seen as unconstitutional for that very reason.[4] At least as a presumption, speech that is intended and received as a contribution to social deliberation is constitutionally protected even if it amounts to what is sometimes classified as hate speech—even if it is racist and sexist.

Consider, for example, the University of Michigan's judicially invalidated ban on "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status, and that...creates an intimidating, hostile, or demeaning environment for educational pursuits...." This broad ban forbids a wide range of statements that are part of the exchange of ideas. It also fails to give people sufficient notice of what statements are allowed. For both reasons, it seems invalid.

In a famous case, Justice Frankfurter, speaking for a 5–4 majority of the Supreme Court, rejected this view. *Beauharnais v. Illinois*[5] upheld an Illinois law making it unlawful to publish or exhibit any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, which [publication] exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." The law was applied to ban circulation of a petition urging "the need to prevent the white race from becoming mongrelized by the negro," and complaining of the "aggressions, rapes, robberies, knives, guns, and marijuana of the negro."

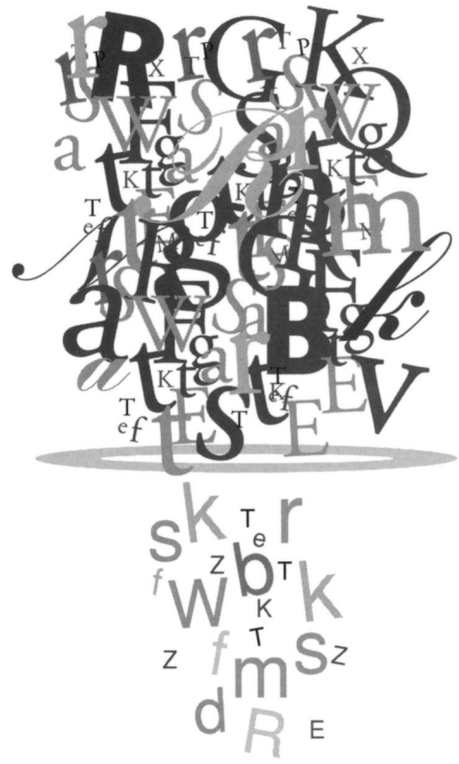
In upholding the law, Justice Frankfurter referred to a range of factors. He pointed to the historical exclusion of libel from free speech protection; to the risks to social cohesion created by racial hate speech; and to the need for judicial deference to legislative judgments on these complex matters. Many countries in Europe accept the same analysis and do not afford protection to racial and ethnic hate speech. But most people think that after *New York Times v. Sullivan*,[6] *Beauharnais* is no longer the law. In *New York Times*, the Court indicated that the law of libel must be evaluated in accordance with the constitu-

tional commitment to robust debate on public issues. The conventional view—which the Supreme Court has not directly addressed—is that racial hate speech contains highly political ideas, that it belongs in the free speech "core," and that it may not be suppressed merely because it is offensive or otherwise harmful.

There are real complexities here. In its strongest form, the defense of *Beauharnais* would point toward the contribution of hate speech to the maintenance of a caste system based on race and gender. A principal point here would be the effect of such speech on the self-respect of its victims and also the relationship between such speech and fears of racially-motivated violence.[7] I cannot fully discuss this issue here; but I think that *Beauharnais* was incorrect. No one should deny that distinctive harms are produced by racial hate speech, especially when it is directed against members of minority groups. It is only obtuseness—a failure of perception or empathetic identification—that would enable someone to say that the word "fascist" or "pig" or "communist," or even "honky," produces the same feelings as the word "nigger." In view of our history, invective directed against minority groups, and racist speech in general, create fears of violence and subordination—of second-class citizenship—that are not plausibly described as mere offense. As I have noted, most European countries, including flourishing democracies committed to free speech, make exceptions for such expression. In many countries, including our own, it is possible to think that racial and ethnic hate speech is really *sui generis*, and that it is properly treated differently.

But there are strong counter-arguments. If we were to excise all of what is described as hate speech from political debate, we would severely truncate our discussion of such important matters as civil rights, foreign policy, crime, conscription, abortion, and social welfare policy. Even if speech produces anger or resentment on the basis of race, it might well be thought a legitimate part of the deliberative process, and it bears directly on politics. Foreclosure of such speech would probably accomplish little good, and by stopping people from hearing certain ideas, it could bring about a great deal of harm. These are the most conventional Millian arguments for the protection of speech.

From all this it seems that the University of Michigan ban was far too broad. On the other hand, it should be permissible for colleges and universities to build on the basic case of the epithet in order to regulate certain narrowly defined categories of hate speech. Standing by themselves, or accompanied by little else, epithets are not intended and received as contributions to social deliberation about anything. We are therefore dealing with lower tier speech. The injury to dignity and self-respect is a sufficient harm to allow regulation. (See my discussion below of the Stanford regulation.)



Standing by themselves, epithets are not intended as contributions to social deliberation about anything.

It is now possible to offer a provisional conclusion. A public university should be allowed to regulate hate speech in the form of epithets. But it should be prohibited from reaching very far beyond epithets to forbid the expression of views on public issues, whatever those views may be. I will qualify this conclusion shortly, but it seems like a good place to start.

B. The Question of Neutrality

But are restrictions on hate speech impermissibly selective? In *R.A.V. v. St. Paul*, the Court invalidated a law directed against a certain kind of hate speech, principally on the ground that it discriminated on the basis of subject matter. The case involved an act of cross-burning on a private yard. All the justices agreed that the content-neutral trespass law could be applied against that act; the question was whether a special "hate speech" law was

constitutional as applied to that act.

As interpreted by the Minnesota Supreme Court, the relevant law banned any so-called "fighting words" that produced anger or resentment on the basis of race, religion, or gender. In invalidating the act, the *R.A.V.* Court emphasized that the law at issue was not a broad or general proscription of fighting words. It reflects a decision to single out a certain category of "fighting words," defined in terms of audience reactions *to speech about certain topics.* Is this illegitimate? The point bears on almost all efforts to regulate hate speech, on campus and elsewhere.

The Supreme Court's basic idea is this: Whether or not we are dealing with high value speech, government cannot draw lines on a partisan basis. It cannot say, for example, that libel of Democrats will be punished more severely than libel of Republicans, or that obscenity will be regulated only if it makes fun of the president. A law of this sort would be "viewpoint-based," that is, *it makes the viewpoint of the speaker the basis for regulation.* To that extent it is invalid. Moreover, the government is sharply constrained in its ability to limit speech on certain subjects. It could not, for example, ban speech about AIDS. "Subject-matter" restrictions are more neutral than viewpoint-based restrictions. They are not *per se* invalid, but they are treated with considerable skepticism. For the Supreme Court, the major problem with the Minnesota law was that it was an impermissible subject-matter restriction.

Controlling speech is, in one sense, a defining characteristic of the university.

To the distinction between low-value and high-value speech, then, we must add that the First Amendment limits the government's line-drawing power. The government must not be impermissibly selective, even if it is regulating low-value speech. Hence in the *R.A.V* case, the Court concluded that St. Paul had violated the First Amendment, not because it had regulated constitutionally protected speech, but because it had chosen to regulate only "fighting words" of a certain, governmentally disapproved sort, and allowed the rest to flourish.

In his dissenting opinion, Justice Stevens argued that St. Paul had not made an impermissible distinction, since the harms underlying the regulated speech were sufficiently distinctive. He wrote that "race-based threats may cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the president is justifiable because of the place of the president in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order." In his view, "[t]hreatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot…; such threats may be punished more severely than threats against someone based on, for example, his support of a particular athletic team." Thus there were "legitimate, reasonable, and neutral justifications" for the special rule. But Justice Stevens spoke only for himself, and his view was firmly rejected by the majority.

The question then becomes whether university restrictions on hate speech are impermissibly selective. A university might well, post-*R.A.V.*, be forbidden from singling out for punishment speech that many universities want to control, such as (a) a narrowly defined category of insults toward such specifically enumerated groups as blacks, women, and homosexuals, or (b) a narrowly defined category of insults directed at individuals involving race, sex, and sexual orientation. How would restrictions of this kind be treated?

Under current law, a restriction that involves (a) is viewpoint-based, and to that extent even worse than the restriction in *R.A.V.* itself. On the analysis of the *R.A.V.* Court, restriction (a) tries to silence one side in a debate. A restriction that involves (b) is a subject matter restriction, not based on viewpoint. But it too is impermissibly selective in exactly the same sense as the restriction invalidated in the *R.A.V.* case.

It is possible to say that the conclusions in *R.A.V.* are incorrect in principle, because there are sufficiently neutral grounds for restrictions (a) and (b).[8] Perhaps a university could neutrally decide that epithets directed against blacks, women, and homosexuals cause distinctive harms. But this conclusion is hard to reconcile with the *R.A.V.* decision.

C. The Special Place of the University

Colleges and universities do, however, have some arguments that were unavailable to St. Paul, Minnesota. In order to make the conclusions thus far more than provisional, we have to address those arguments. If *R.A.V.* does not apply to the campus, it might be because public universities can claim a large degree of insulation from judicial supervision. That claim to insulation is closely connected to the idea of academic freedom.

1. *In general.* The largest point here is that colleges and universities are often in the business of controlling speech, and their controls are hardly ever thought to raise free speech

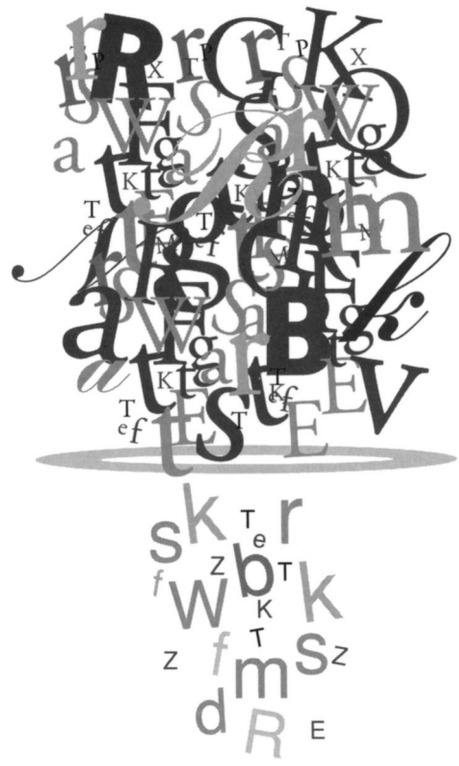
problems. Indeed, controlling speech is, in one sense, a defining characteristic of the university. There are at least four different ways in which such controls occur.

First, universities impose major limits on the topics that can be discussed in the classroom. Subject matter restrictions are part of education. Irrelevant discussion is banned. Students cannot discuss the presidential election, or Marx and Mill, if the subject is math. Schools are allowed to impose subject matter restrictions that would be plainly unacceptable if enacted by states or localities.

Second, a teacher can require students to treat each other with at least a minimum of basic respect. It would certainly be legitimate to suspend a student for using consistently abusive or profane language in the classroom. This is so even if that language would receive firm constitutional protection on the street corner. The educational process requires at least a measure of civility. Perhaps it would be unacceptable for universities to ban expressions of anger or intense feeling; the notion of civility should not be a disguise for forbidding irreverence or disagreement. But so long as requirements of civility are both reasonable and neutral with respect to viewpoint, a university may limit abusive or profane comments within the classroom.

The problem goes deeper, for—and this is the third kind of academic control on speech—judgments about quality are pervasive. Such judgments affect admissions, evaluation of students in class and on paper, and evaluation of prospective and actual faculty as well. Academic decisions about quality will of course be based on a conception of appropriate standards of argument and justification. These standards involve judgments about merit or excellence that would of course be unacceptable in the setting of criminal punishment or civil fine, but that are a perfectly and nearly inescapable legitimate part of the educational function. At least this is so if there is no discrimination on the basis of viewpoint, that is, if the person involved in making the assessment offers judgments on the basis of standards of quality that are applied neutrally to everyone (an ambitious aspiration, and one that is conceptually complex).

But there is a fourth and more troublesome way in which universities control speech, and this involves the fact that many academic judgments are viewpoint-based, certainly in practice. In many places, a student who defends fascism or communism is unlikely to receive a good grade. In many economics departments, sharp deviation from the views of



Adam Smith may well be punished. History and literature departments have their own conceptions of what sorts of arguments are retrograde or beyond the pale. Viewpoint discrimination is undoubtedly present in practice, and even if we object to it in principle, it is impossible and perhaps undesirable for outsiders to attempt to police it.

Thus far I have mostly been discussing students; but much the same is true for faculty members. Universities can impose on their faculty restrictive rules of decorum and civic participation. A teacher who refuses to teach the subject, fails to allow counter-arguments, treats students contemptuously, or vilifies them in class, can be penalized without offense to the Constitution. The job performance of teachers consists mostly of speech. When that performance is found wanting, it is almost always because of content, including judgments about subject matter and quality, and sometimes because of viewpoint.

It is worthwhile pausing over this point. Initial hirings, tenure, and promotion all involve subject matter restrictions, and sometimes viewpoint discrimination in practice. All this suggests that universities are engaged in regulating speech through content discrimination and at least implicit viewpoint discrimination. The evaluation of students and colleagues cannot occur without resort to con-

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tent, and it would be most surprising if viewpoint discrimination did not affect many evaluations.

These examples do not by any means compel the conclusion that any and all censorship is acceptable in an academic setting. A university can have a good deal of power over what happens in the classroom, so as to promote the educational enterprise, without also being allowed to decree a political orthodoxy by discriminating on the basis of viewpoint. If a public university were to ban students from defending (say) conservative or liberal causes in political science classes, a serious free speech issue would be raised. There are therefore real limits to permissible viewpoint discrimination within the classroom, even if it is hard to police the relevant boundaries. Certainly the university's permissible limits over the classroom do not extend to the campus in general. We could not allow major restrictions on what students and faculty may say when they are not in class. A university could not say that outside of class, students can talk only about subjects of the university's choice.

From these various propositions, we might adopt a principle: *The university can impose subject matter or other restrictions on speech only to the extent that the restrictions are closely related to its educational mission.* This proposition contains both an authorization to the university and sharp limitations on what it may do. There is a close parallel here with decisions about what to include or exclude from libraries and about how to fund the arts; in all these contexts, certain forms of content discrimination are inescapable. But in cases in which the educational mission is not reasonably at stake, restrictions on speech should be invalidated. Certainly this would be true in cases in which a university attempts to impose a political orthodoxy, whether inside or outside the classroom. We might react to the existence of implicit viewpoint discrimination by saying that it is hard for courts to police, but nonetheless a real offense to both academic aspirations and free speech principles.

Just as a university might ban the use of profanity in class, so it might stop racial epithets and similar expressions of hatred or contempt.

2. *Educational requirements and hate speech.* How does this proposition bear on the hate speech issue? Perhaps a university could use its frequently exercised power over speech in order to argue for certain kinds of hate speech codes. Perhaps it could say that when it legitimately controls speech, it does so in order to promote its educational mission, which inevitably entails limits on who may say what. Perhaps a university could be allowed to conclude that its educational mission requires unusually firm controls on hate speech, so as not to compromise the values of education itself.

The university might emphasize in this regard that it has a special obligation to protect all of its students as equal members of the community. This obligation calls for restrictions on what faculty members may say. The university might believe that certain narrowly defined forms of hate speech are highly destructive to the students' chance to learn. It might think that black students and women can be effectively excluded by certain forms of hate speech. Probably a university should be given more leeway to restrict hate speech than a state or locality, precisely because it ought to receive the benefit of the doubt when it invokes concerns of this kind. Surely the educational mission ought to grant the university somewhat greater room to maneuver, especially in light of the complexity and delicacy of the relevant policy questions. Courts might also hesitate before finding viewpoint discrimination or impermissible selectivity. Perhaps there should be a presumption in favor of a university's judgment that narrowly defined hate speech directed at blacks or women produces harm that is especially threatening to the educational enterprise.

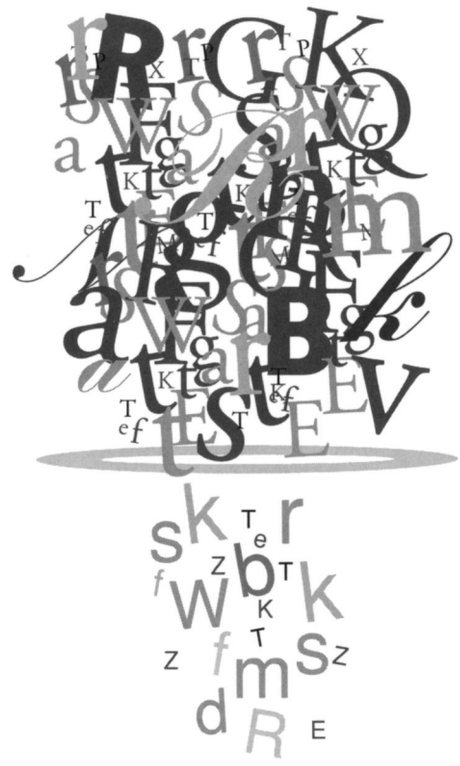
THIS CONCLUSION IS BUTTRESSED BY two additional factors. First, there are numerous colleges and universities. Many students can choose among a range of alternatives, and a restriction in one, two, or more imposes an extremely small incursion into the system of free expression. Colleges that restrict a large amount of speech may find themselves with few students, and in any case other institutions will be available. Second, the Constitution is itself committed to the elimination of second-class citizenship, and this commitment makes it hard to say that an educational judgment opposed to certain forms of hate speech is impermissibly partisan.

3. *Details.* I think that an analysis of this kind would justify two different sorts of approaches to the issue of hate speech on campus. First, a university might regulate hate speech, narrowly defined, as simply a part of its general class of restrictions on speech that is incompatible with the educational mission. On this approach, there would be no restriction specifically directed against hate speech—no campus "speech code"—but a general, suitably defined requirement of decency and civility, and this requirement would regulate hate speech as well as other forms of abuse. Just as a university might ban

the use of profanity in class, or personally abusive behavior on campus, so it might stop racial epithets and similar expressions of hatred or contempt. This is not to say that students and teachers who violate this ban must be expelled or suspended. Generally informal sanctions, involving conversations rather than punishment, are much to be preferred. But the Constitution should not stand as a barrier to approaches of this sort, so long as the university is neutral in this way.

Second, courts should allow narrowly defined hate speech restrictions even if those restrictions are not part of general proscriptions on indecent or uncivil behavior. For example, Stanford University now forbids speech that amounts to "harassment by personal vilification." (Stanford is a private university, free from constitutional restraint, but it has chosen to comply with its understanding of what the First Amendment means as applied to public universities.) Under the Stanford rule, speech qualifies as regulable "harassment" if it (1) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin, (2) is addressed directly to the individual or individuals whom it insults or stigmatizes, and (3) makes use of insulting or "fighting" words or nonverbal symbols. To qualify under (3), the speech must by its "very utterance inflict injury or tend to incite to an immediate breach of the peace," and must be "commonly understood to convey direct and visceral hatred and contempt for human beings on the basis of" one of the grounds enumerated in (2).

The Stanford regulation should not be faulted for excessive breadth. It is quite narrowly defined. If a public university adopted it, the major constitutional problem, fueled by the outcome in *R.A.V.*, would not be breadth but unacceptable selectivity. Why has the university not controlled other forms of "fighting words," like the word "fascist," or "commie," or "bastard"? Does its selectivity show an impermissible motivation? Shouldn't we find its selectivity to be impermissibly partisan? I do not think that we should. A university could reasonably and neutrally decide that the harms caused by the regulated fighting words are, at least in the university setting, more severe than the harms caused by other kinds of fighting words. I conclude that public universities may regulate speech of the sort controlled by the Stanford regulation and probably go somewhat further, and that such restrictions should not be invalidated as impermissibly selective.



We can also use this discussion as a basis for exploring the question of the university's power over employees, arising out of the highly publicized decision of the City University of New York to remove Dr. Leonard Jeffries as chair of the black studies department at City College. Jeffries had reportedly made a range of apparently anti-Semitic remarks, blaming rich Jews for the black slave trade, complaining that Russian Jews and "their financial partners, the Mafia, put together a financial system of destruction of black people," and claiming that Jews and Italians had "planned, plotted, and programmed out of Hollywood" to denigrate blacks in films. Could the City University take these remarks as a reason to remove Jeffries from his position as department chair? (We should agree that removal could be justified if, as some say, it was a response to an inadequate record of publication, to poor research, or to low-quality work.)

We can imagine a range of statements that might make job performance quite difficult.

THE ANSWER DEPENDS ON WHETHER the removal was based on an effort neutrally to promote educational goals, or whether it was instead an effort to punish the expression of a controversial point of view. In the abstract this question is hard to answer, but it can be clarified through ex-

amples. Under the First Amendment, a public university could not fire a mathematics professor because he is a Republican, extremely conservative, or a sharp critic of the Supreme Court; such a discharge could not plausibly be connected with legitimate concerns about job performance. Even if the mathematics professor was a department chair, these political convictions are unrelated to job performance.

On the other hand, a university could surely fire the head of an admissions committee who persisted in making invidiously derogatory comments about blacks, women, and Jews. It would be reasonable for the university to say that someone who makes such comments cannot perform his job, which includes attracting good students, male and female, and of various races and religions. The discharge of the admissions head would not really be based on viewpoint; it would be part of a viewpoint-neutral effort to ensure that the head can do what he is supposed to do. Much the same could be said of a university president or many other high-visibility public employees. Consider the fact that the president, or a governor, is freely permitted to fire high-level officials who make statements that compromise job performance, even if those statements are political in nature; if the Secretary of State says publicly that the president is a fool, or even that the president's policy toward Russia is senseless, the president can tell the Secretary to seek employment elsewhere.

There will be no substantial interference with the system of free expression if universities are given the narrow authority for which I have argued.

It seems to follow that a university could remove a department chair if his comments make him unable successfully to undertake his ordinary duties as chair. The governing principle seems to be this: *A university can penalize speech if and only if it can show that the relevant speech makes it very difficult or impossible for the employee adequately to perform his job.* Whenever a university seeks to punish speech, it should face a large burden to show that it is behaving neutrally, and not trying to punish a disfavored point of view. On this approach, teachers and researchers will almost always be protected. Controversial political statements will not be a sufficient basis for punishment or discharge. A political science professor may criticize (or endorse) the president without becoming less able to perform the job, and most teachers will be able to say whatever they like without subjecting themselves to the possibility of discipline. It follows that the City College could not punish (as it apparently tried to do) a philosophy professor for publishing the view that blacks are, on average, intellectually inferior to whites. It also follows that the City College could not remove Professor Jeffries from his tenured position merely because of actually or apparently anti-Semitic statements.

But we can imagine a range of statements that might make job performance quite difficult, at least for someone in a high-level administrative position—statements, for example, expressing general contempt for students and colleagues, a refusal to participate in the academic enterprise, or hatred directed against people who are part of the university community. Perhaps such statements would not be sufficient to allow discharge from a faculty position; but they could make it hard for the relevant speakers to perform as deans, as admissions officers, or as chairs of departments. In the Jeffries case, the best argument in favor of the City University of New York would be that it is difficult for someone to succeed as chair of a prominent black studies department if he has made sharply derogatory statements about members of other groups defined in racial, religious, or ethnic terms. This argument would not allow Jeffries to be discharged from his position as professor, but it should allow him to be removed from the position as department chair, which involves a range of distinctive tasks. It follows that on the facts I have assumed, the City College did not violate Jeffries's First Amendment rights. Of course the case would be different if Jeffries could prove that the City College was reacting not to impaired job performance, but to its own disapproval of Jeffries's point of view.

An opposing principle would take the following form. *A university should not be permitted to burden or to deny benefits to an employee on the basis of the employee's point of view, even if the point of view does damage job performance.* On this view, people who disapprove of the point of view—students, other faculty, potential contributors—should not be permitted to enshrine their own views by affecting the university's decisions about employees. We might argue for this principle on the ground that there should no "heckler's veto" against unpopular opinions. We should not have a system in which people who dislike a certain point of view can stop dissenters from assuming prominent positions in the university.

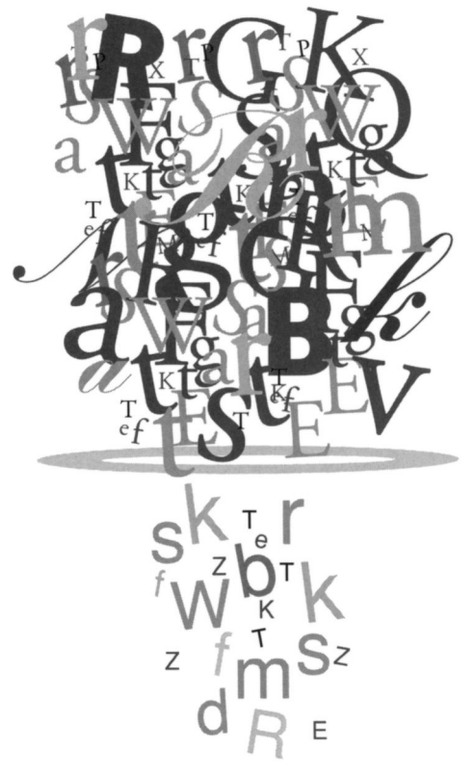
This argument is not without force, but I do not think that it should be adopted. Everyone seems to agree that the president and the governor may make hiring decisions on the basis of viewpoint; it would not make sense to disable the president from ensuring that high-level employees do not try, through

speech, to undermine the president's program. Any resulting interference with the system of free expression seems minimal, and the president has a strong need for a loyal staff. Similarly, universities have powerful and legitimate reasons to expect their employees to perform their jobs, especially if those employees are engaged in highly public administrative tasks, and especially if professors who are not performing administrative tasks are realistically not threatened. At least under ordinary circumstances, there will be no substantial interference with the system of free expression if universities are given the narrow authority for which I have argued. I conclude that outside of legitimate judgments about quality and subject matter, universities may punish employees for their speech only in a narrow set of circumstances—almost always involving highly public, administrative positions—in which the relevant speech makes it difficult or impossible for employees to perform their jobs.

It follows from all this that the national government should abandon its efforts to subject private universities to the constraints of the First Amendment. This is an area in which national authorities should proceed with caution. Of course we could imagine experiments that we might deplore. But there is no reason for the federal government to require uniformity on this complex matter.

Conclusion

A system of free expression should be designed to safeguard the exchange of ideas. This understanding calls for protection of much of what might be considered "hate speech"; but it also allows restrictions on speech that amounts to epithets. There are some additional complexities in the academic setting. Universities are pervasively and necessarily engaged in regulation of speech, and this fact complicates many existing claims about hate speech codes. In the end I suggest that the test is whether the restriction on speech is a legitimate part of the institution's educational mission, understanding that ideal by reference to the commitment to liberal education. This mission is not neutral among different conceptions of the good. It embodies a substantive project (though the project is one that allows exposure to a wide range of competing conceptions). This understanding would not permit speech codes to endanger the exchange of ideas, but it would allow for mildly broader restrictions than would be acceptable for states and localities.



NOTES

1. I do not discuss here the issues raised by the claim that academic freedom forbids certain governmental intrusions into the affairs of the university, though some of what I say does bear on those issues.

2. Brandenburg v. Ohio, 395 U.S. 444 (1969).

3. New York Times v. Sullivan, 376 U.S. 254 (1964) (invoking democratic goals); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (invoking exchange of ideas).

4. See Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991).

5. 343 U.S. 250 (1952).

6. 376 US 254 (1964).

7. See Charles R. Lawrence, "If He Hollers Let Him Go," 1990 Duke L.J. 431; Mari Matsuda, "Public Response to Racist Speech," 87 Mich. L. Rev. 2320 (1989); Richard Delgado, "Words That Wound," 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

8. I try to offer an argument to this effect in Cass R. Sunstein, *Democracy and the Problem of Free Speech* (forthcoming from The Free Press, September 1993).

Both freedom and lack of freedom are socially constructed; they are an outcome of human practices.