## 1NC

### Governmentality K

#### Though Butler is largely based on Foucault’s theory of power, the central problem with the affirmative is that it overlooks Foucault’s lesson about governmentality—the subtle techniques by which subjects are molded in order to become governable

#### The aff is under the mistaken assumption that removing *overt restrictions* on speech will liberate bodies—that overlooks how *neoliberal governmentality* controls the subject *through their freedom*—university students will speak freely, but only as individual consumers and entrepreneurs

**Brown 3**

Wendy Brown (Professor of Political Science at UC Berkley. Professor Brown received her Ph.D in Political Philosophy from Princeton University in 1983. Prior to coming to Berkeley in 1999, she taught at the University of California, Santa Cruz and at Williams College. Her work has been translated into more than twenty languages. She lectures around the world and has held a number of distinguished visiting fellowships and lectureships. Most recently, she has been a member of the Birkbeck Critical Theory Summer School faculty (2012), a Senior Invited Fellow of the Center for Humanities at Cornell University (2013) and a visiting professor at Columbia University (2014)). “Neoliberalism and the End of Liberal Democracy.” Theory and Event 7:1. 2003. <http://lchc.ucsd.edu/cogn_150/Readings/brown.pdf>

3) The extension of economic rationality to formerly non-economic domains and institutions extends to individual conduct, or more precisely, prescribes citizen-subject conduct in a neo-liberal order. Whereas classical liberalism articulated a distinction, and at times even a tension, among the criteria for individual moral, associational, and economic actions (hence the striking differences in tone, subject matter and even prescription between Adam Smith's Wealth of Nations and his Theory of Moral Sentiments), neo-liberalism normatively constructs and interpellates individuals as entrepreneurial actors in every sphere of life. It figures individuals as rational, calculating creatures whose moral autonomy is measured by their capacity for "self-care" -- the ability to provide for their own needs and service their own ambitions. In making the individual fully responsible for her/himself, neo-liberalism equates moral responsibility with rational action; it relieves the discrepancy between economic and moral behavior by configuring morality entirely as a matter of rational deliberation about costs, benefits, and consequences. In so doing, it also carries responsibility for the self to new heights: the rationally calculating individual bears full responsibility for the consequences of his or her action no matter how severe the constraints on this action, e.g., lack of skills, education, and childcare in a period of high unemployment and limited welfare benefits. Correspondingly, a "mismanaged life" becomes a new mode of depoliticizing social and economic powers and at the same time reduces political citizenship to an unprecedented degree of passivity and political complacency. The model neo-liberal citizen is one who strategizes for her/ himself among various social, political and economic options, not one who strives with others to alter or organize these options. A fully realized neo-liberal citizenry would be the opposite of public-minded, indeed it would barely exist as a public. The body politic ceases to be a body but is, rather, a group of individual entrepreneurs and consumers . . . which is, of course, exactly the way voters are addressed in most American campaign discourse.8Other evidence for progress in the development of such a citizenry is not far from hand: consider the market rationality permeating universities today, from admissions and recruiting to the relentless consumer mentality of students in relationship to university brand names, courses, and services, from faculty raiding and pay scales to promotion criteria.9 Or consider the way in which consequential moral lapses (of a sexual or criminal nature) by politicians, business executives, or church and university administrators are so often apologized for as "mistakes in judgement," implying that it was the calculation that was wrong, not the act, actor, or rationale. The state is not without a project in the making of the neo-liberal subject. The state attempts to construct prudent subjects through policies that organize such prudence: this is the basis of a range of welfare reforms such as workfare and single-parent penalties, changes in the criminal code such as the "three strikes law," and educational voucher schemes. Because neo-liberalism casts rational action as a norm rather than an ontology, social policy is the means by which the state produces subjects whose compass is set by their rational assessment of the costs and benefits of certain acts, whether teen pregnancy, tax cheating, or retirement planning. The neo-liberal citizen is calculating rather than rule-abiding, a Benthamite rather than a Hobbesian. The state is one of many sites framing the calculations leading to social behaviors that keep costs low and productivity high. This mode of governmentality (techniques of governing that exceed express state action and orchestrate the subject's conduct toward [themselves] ~~him or herself~~) convenes a "free" subject who rationally deliberates about alternative courses of action, makes choices, and bears responsibility for the consequences of these choices. In this way, Lemke argues, "the state leads and controls subjects without being responsible for them;" as individual 'entrepreneurs' in every aspect of life, subjects become wholly responsible for their well-being and citizenship is reduced to success in this entrepreneurship (201). Neo-liberal subjects are controlled through their freedom -- not simply, as thinkers from the Frankfurt School through Foucault have argued, because freedom within an order of domination can be an instrument of that domination -- but because of neo-liberalism's moralization of the consequences of this freedom. This also means that the withdrawal of the state from certain domains and the privatization of certain state functions does not amount to a dismantling of government but, rather, constitutes a technique of governing, indeed the signature technique of neo-liberal governance in which rational economic action suffused throughout society replaces express state rule or provision. Neo-liberalism shifts "the regulatory competence of the state onto 'responsible,' 'rational' individuals [with the aim of] encourag[ing] individuals to give their lives a specific entrepreneurial form" (Lemke 202).

**Neoliberal rationality engulfs all moral and democratic values through a cold economic calculus, destroying value to life—this undermines political freedoms, which turns the case**

**Brown 3**

Wendy Brown (Professor of Political Science at UC Berkley. Professor Brown received her Ph.D in Political Philosophy from Princeton University in 1983. Prior to coming to Berkeley in 1999, she taught at the University of California, Santa Cruz and at Williams College. Her work has been translated into more than twenty languages. She lectures around the world and has held a number of distinguished visiting fellowships and lectureships.  Most recently, she has been a member of the Birkbeck Critical Theory Summer School faculty (2012), a Senior Invited Fellow of the Center for Humanities at Cornell University (2013) and a visiting professor at Columbia University (2014)). “Neoliberalism and the End of Liberal Democracy.” Theory and Event 7:1. 2003. http://lchc.ucsd.edu/cogn\_150/Readings/brown.pdf

However, invaluable as Marx's theory of capital and Weber's theory of rationalization are in theorizing aspects of neo-liberalism, neither brings into view the historical-institutional rupture it signifies, the form of governmentality it replaces and the form it inaugurates, and hence, the modalities of resistance it outmodes and those that must be developed if it is to be effectively challenged. Neo-liberalism is not an inevitable historical development of capital and instrumental rationality; it is not the unfolding of laws of capital or of instrumental rationality suggested by a Marxist or Weberian analysis but represents instead a new and contingent organization and operation of both. Moreover, neither analysis articulates the shift neo-liberalism heralds from relatively differentiated moral, economic, and political rationalities and venues in liberal democratic orders to their discursive and practical integration. Neo-liberal governmentality undermines the relative autonomy of certain institutions from one another and from the market -- law, elections, the police, the public sphere -- an independence that formerly sustained an interval and a tension between a capitalist political economy and a liberal democratic political system. The implications of this transformation are significant. If Marcuse worried about the loss of a dialectical opposition within capitalism when it "delivers the goods," that is, when, by mid-twentieth century, a relatively complacent middle class had taken the place of the hard-laboring impoverished masses Marx depicted as the negating contradiction to the concentrated wealth of capital, neo-liberalism entails the erosion of oppositional political, moral, or subjective claims located outside capitalist rationality but inside liberal democratic society, that is, the erosion of institutions, venues, and values organized by non-market rationalities in democracies. When democratic principles of governance, civil codes, and even religious morality are submitted to economic calculation, when no value or good stands outside of this calculus, sources of opposition to, and mere modulation of, capitalist rationality disappear. This reminds us that however much a Left analysis has identified a liberal political order with legitimating, cloaking, and mystifying the stratifications of society achieved by capitalism and achieved as well by racial, sexual, and gender superordinations, it is also the case that liberal democratic principles of governance -- liberalism as a political doctrine -- have functioned as something of an antagonism to these stratifications. As Marx himself argued in "On the Jewish Question," formal political principles of equality and freedom (with their attendant promises of individual autonomy and dignity) figure an alternative vision of humanity and alternative social and moral referents to those of the capitalist order within which they are asserted. This is the Janus-face or at least Janus-potential of liberal democracy vis a vis a capitalist economy: while liberal democracy encodes, reflects, and legitimates capitalist social relations, it simultaneously resists, counters, and tempers them. Put simply, what liberal democracy has provided over the last two centuries is a modest ethical gap between economy and polity. Even as liberal democracy converges with many capitalist values (property rights, individualism, Hobbesian assumptions underneath all contract, etc.) the formal distinction it establishes between moral and political principles on the one hand and the economic order on the other has also served as insulation against the ghastliness of life exhaustively ordered by the market and measured by market values. It is this gap that a neo-liberal political rationality closes as it submits every aspect of political and social life to economic calculation: asking not, for example, what does liberal constitutionalism stand for, what moral or political values does it protect and preserve, but rather what efficacy or profitability does constitutionalism promote . . . .or interdict? Liberal democracy cannot be submitted to neo-liberal political governmentality and survive. There is nothing in liberal democracy's basic institutions or values -- from free elections, representative democracy, and individual liberties equally distributed, to modest power-sharing or even more substantive political participation -- that inherently meets the test of serving economic competitiveness or inherently withstands a cost-benefit analysis. And it is liberal democracy that is going under in the present moment, even as the flag of American "democracy" is being planted everywhere it finds or creates soft ground. (The fact that "democracy" is the rubric under which so much anti-democratic imperial and domestic policy is enacted suggests that we are in an inter-regnum, or more precisely, that neo-liberalism borrows extensively from the old regime to legitimate itself even as it also develops and disseminates new codes of legitimacy. More about this below.)

**The alternative is to endorse an oppositional consciousness to neoliberal rationality—this counter-rationality is a starting point for a just future**

**Brown 3**

Wendy Brown (Professor of Political Science at UC Berkley. Professor Brown received her Ph.D in Political Philosophy from Princeton University in 1983. Prior to coming to Berkeley in 1999, she taught at the University of California, Santa Cruz and at Williams College. Her work has been translated into more than twenty languages. She lectures around the world and has held a number of distinguished visiting fellowships and lectureships.  Most recently, she has been a member of the Birkbeck Critical Theory Summer School faculty (2012), a Senior Invited Fellow of the Center for Humanities at Cornell University (2013) and a visiting professor at Columbia University (2014)). “Neoliberalism and the End of Liberal Democracy.” Theory and Event 7:1. 2003. <http://lchc.ucsd.edu/cogn_150/Readings/brown.pdf>

A half-century ago, Herbert Marcuse argued that capitalism had eliminated a revolutionary subject (the proletariat) representing the negation of capitalism; consequently, he insisted, the Left had to derive and cultivate anti-capitalist principles, possibilities, and agency from capitalism's constitutive outside. That is, the Left needed to tap the desires -- not for wealth or goods but for beauty, love, mental and physical well-being, meaningful work, and peace -- manifestly unmet within a capitalist order and to appeal to those desires as the basis for rejecting and replacing the order. No longer could economic contradictions of capitalism inherently fuel opposition to it; rather opposition had to be founded in an alternative table of values. Today, the problem Marcuse diagnosed has expanded from capitalism to liberal democracy itself: oppositional consciousness cannot be generated from liberal democracy's false promises and hypocrisies. The space between liberal democratic ideals and lived realities has ceased to be exploitable because liberal democracy itself is no longer the most salient discourse of political legitimacy and the good life. Put the other way around, the politically exploitable hollowness in formal promises of freedom and equality has largely vanished to the extent that both freedom and equality have been redefined by neo-liberalism. Similarly, revealed linkages between political and economic actors -- not merely bought politicians but arrangements of mutual profiteering between corporate America and its political elite -- do not incite outrage at malfeasance, corruption, or injustice but appear instead as a potentially rational set of linkages between state and economy. Thus, from the "scandal" of Enron to the "scandal" of Vice President Cheney delivering Iraq to Halliburton to clean up and rebuild, there is no scandal. Rather, there is only market rationality, a rationality that can encompass even a modest amount of criminality but also treats close state-corporate ties as a potentially positive value -- maximizing the aims of each -- rather than as a conflict of interest.18 Similarly, even as the Bush Administration fails to come up with WMDs in Iraq and fails to be able to install order let alone democracy there, this is irrelevant to the neo-liberal criteria for success in that military episode. Indeed, even the scandal of Bush's installation as president by a politicized Supreme Court was more or less ingested by the American people as business as usual, an ingestion that represents a shift from the expectation that the Supreme Court is independent of political influence to one that tacitly accepts its inclusion in the governmentality of neo-liberalism. Even John Poindexter, a key figure in the Iran-Contra affair and director of the proposed "Terrorism Information Awareness" program that would have put all Americans under surveillance, continued to have power and legitimacy at the Pentagon until the flap over the scheme to run a futures market on political violence in the Middle East. All three projects are models of neo-liberalism's indifference to democracy; only the last forced Poindexter into retirement. These examples suggest that not only liberal democratic principles but democratic morality has been largely eviscerated -- in neo-liberal terms, each of these "scandals" is framed as a matter of miscalculation or political maneuvering rather than by right and wrong, truth or falsehood, institutional propriety or impropriety. Consequently, the Left cannot count upon revealed deception, hypocrisies, interlocking directorates, featherbedding, or corruption to stir opposition to the existing regime. It cannot count on the expectation that moral principle undergirds political action or even on consistency as a value by which to judge state practices or aims. Much of the American public appeared indifferent to the fact that both the Afghan and Iraqi regimes targeted by Bush had previously been supported or even built by earlier U.S. foreign policy. It appeared indifferent as well to the fact that the "liberation" of Afghan women was touted as one of the great immediate achievements of the overthrow of the Taliban while overthrow of the Baath regime has set into motion an immediately more oppressive regime of gender in Iraq. The inconsistency does not matter much because political reasons and reasoning that exceed or precede neo-liberal criteria has ceased to matter much. This is serious political nihilism which no mere defense of free speech and privacy, let alone securing gay marriage rights or an increase in the minimum wage will reverse. What remains for the Left, then, is to challenge emerging neo-liberal governmentality in EuroAtlantic states **with an alternative vision of the good, one that rejects homo oeconomicus** as the norm of the human and rejects this norm's correlative formations of economy, society, state and (non)morality. In its barest form, this would be a vision in which justice would not center upon maximizing individual wealth or rights but on developing and enhancing the capacity of citizens to share power and hence, collaboratively govern themselves. In such an order, rights and elections would be the background rather than token of democracy, or better, rights would function to safeguard the individual against radical democratic enthusiasms but would not themselves signal the presence nor constitute the central principle of democracy. Instead a left vision of justice would focus on practices and institutions of shared popular power; a modestly egalitarian distribution of wealth and access to institutions; an incessant reckoning with all forms of power -- social, economic, political, and even psychic; a long view of the fragility and finitude of non-human nature; and the importance of both meaningful activity and hospitable dwellings to human flourishing. However differently others might place the accent marks, none of these values can be derived from neo-liberal rationality nor meet neo-liberal criteria for the good. The development and promulgation of such a counter rationality -- a different figuration of human beings, citizenship, economic life, and the political -- is critical both **to the long labor of fashioning a more just future** and to the immediate task of challenging the deadly policies of the imperial U.S. state.

### Case

#### Language doesn’t create reality – they assume the Sapir-Whorf hypothesis, but can’t defend it – means no reason to vote aff

**Roskoski and Peabody 91**

Matthew Roskoski, and Joe Peabody, debate coaches and former debaters writing on theory issues, critiques, and risk management; “A Linguistic and Philosophical Critique of Language “Arguments””; Florida State University; 1991; accessed 07/31/2015; <http://debate.uvm.edu/Library/DebateTheoryLibrary/Roskoski&Peabody-LangCritiques>.

It has become fashionable lately for CEDA debaters to present language "arguments" in CEDA debate rounds. The essential defining element of a language "argument" is that it critiques not the actual arguments of the debater but rather the language or rhetoric the debater offers. It will be our position that such "arguments" are inadequate for several reasons. These reasons cluster around our analysis of the syllogism that comprises language "arguments." The major premise of language "arguments" is that language creates reality, the minor premise is that certain language is undesirable, and the conclusion is that the debater using the unacceptable language ought to be sanctioned with a ballot. We will deny the first premise and offer three reasons why the conclusion is incorrect. Language Does Not Create Reality Language "arguments" assume the veracity of the Sapir- Whorf hypothesis. Usually, this is made explicit in a subpoint labeled something like "language creates reality." Often, this is implicitly argued as part of claims such as "they're responsible for their rhetoric" or "ought always to avoid X language." Additionally, even if a given language "argument" does not articulate this as a premise, the authors who write the evidence comprising the position will usually if not always assume the Sapir-Whorf hypothesis. Perhaps the most common example is the popular sexist language "argument" critiquing masculine generic references. Frequently debaters making this "argument" specifically state that language creates reality. The fact that their authors assume this is documented by Khosroshahi: The claim that masculine generic words help to perpetuate an androcentric world view assumes more or less explicitly the validity of the Sapir-Whorf hypothesis according to which the structure of the language we speak affects the way we think. (Khosroshahi 506). We believe this example to be very typical of language "arguments." If the advocate of a language "argument" does not defend the Sapir-Whorf hypothesis, then there can be no link between the debater's rhetoric and the impacts claimed. This being the case, we will claim that a refutation of the Sapir-Whorf hypothesis is a sufficient condition for the refutation of language "arguments". Certainly no logician would contest the claim that if the major premise of a syllogism is denied, then the syllogism is false. Before we begin to discuss the validity of the hypothesis, we ought first to note that there are two varieties of the Sapir-Whorf hypothesis. The strong version claims that language actually creates reality, while the weak version merely claims that language influences reality in some way (Grace). As Bloom has conceded, the strong version - "the claim that language or languages we learn determine the ways we think" is "clearly untenable" (Bloom 275). Further, the weak form of the hypothesis will likely fail the direct causal nexus test required to censor speech. The courts require a "close causal nexus between speech and harm before penalizing speech" (Smolla 205) and we believe debate critics should do the same. We dismiss the weak form of the hypothesis as inadequate to justify language "arguments" and will focus on the strong form. Initially, it is important to note that the Sapir-Whorf hypothesis does not intrinsically deserve presumption, although many authors assume its validity without empirical support. The reason it does not deserve presumption is that "on a priori grounds one can contest it by asking how, if we are unable to organize our thinking beyond the limits set by our native language, we could ever become aware of those limits" (Robins 101). Au explains that "because it has received so little convincing support, the Sapir-Whorf hypothesis has stimulated little research" (Au 1984 156). However, many critical scholars take the hypothesis for granted because it is a necessary but uninteresting precondition for the claims they really want to defend. Khosroshahi explains: However, the empirical tests of the hypothesis of linguistic relativity have yielded more equivocal results. But independently of its empirical status, Whorf's view is quite widely held. In fact, many social movements have attempted reforms of language and have thus taken Whorf's thesis for granted. (Khosroshahi 505).

**The aff’s theory of subversion can’t escape co-option**

**Nussbaum 99**

Martha Nussbaum, prof of law & ethics @ U of Chicago, The New Republic, 1999, vol 220 (8)

There is **a void, then, at the heart of Butler's notion of politics**. This void can look liberating, because the reader fills it implicitly with a normative theory of human equality or dignity. But let there be no mistake: for Butler, as for Foucault, subversion is subversion, and it can in principle go in any direction. Indeed, Butler's naively empty politics is especially dangerous for the very causes she holds dear. For every friend of Butler, eager to engage in subversive performances that proclaim the repressiveness of heterosexual gender norms, there are dozens who would like to engage in subversive performances that flout the norms of tax compliance, of non-discrimination, of decent treatment of one's fellow students. To such people we should say, you cannot simply resist as you please, for **there are norms of fairness, decency, and dignity** that entail that this is bad behavior. **But then we have to articulate those norms-and this Butler refuses to do.**

**Butler’s method can’t produce successful resistance strategies against institutional violence**

**Nussbaum 99**

Martha Nussbaum, prof of law & ethics @ U of Chicago, The New Republic, 1999, vol 220 (8)

Isn't this like saying to a slave that the institution of slavery will never change, but you can find ways of mocking it and subverting it, finding your personal freedom within those acts of carefully limited defiance? Yet it is a fact that the institution of slavery can be changed, and was changed-**but not by people who took a Butler-like view of the possibilities.** It was changed because people did not rest content with parodic performance: they demanded, and to some extent they got, social upheaval. It is also a fact that the **institutional structures that shape women's lives have changed**. The law of rape, still defective, has at least improved; the law of sexual harassment exists, where it did not exist before; marriage is no longer regarded as giving men monarchical control over women's bodies. These things were changed by feminists who would not take parodic performance as their answer, who thought that power, where bad, should, and would, yield before justice. Butler not only eschews such a hope, she takes pleasure in its impossibility. She finds it exciting to contemplate the alleged immovability of power, and to envisage the ritual subversions of the slave who is convinced that she must remain such. She tells us-this is the central thesis of The Psychic Life of Power-that we all eroticize the power structures that oppress us, and can thus find sexual pleasure only within their confines. It seems to be for that reason that she prefers the sexy acts of parodic subversion to any lasting material or institutional change. Real change would so uproot our psyches that it would make sexual satisfaction impossible. Our libidos are the creation of the bad enslaving forces, and thus necessarily sadomasochistic in structure.

#### Hate speech codes are key to enabling marginalized groups to participate in democratic deliberation

**Gelber 6**

Katharine Gelber (PhD, senior lecturer, politics and international relations, University of New South Wales). Book Review, *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies* by Ian Cram. 2006. <https://espace.library.uq.edu.au/data/UQ_252784/UQ252784_OA.pdf?Expires=1487469079&Signature=LXHfrRseumRROUGIuOGfgaKoe789KH8A~OqEy273H5n0QSoZWBESzhu50eUBWaENqaS-svO8vnEulkexdy88ISHNxeQZdIe58beL4QICU3PSpyCkw5hTCNmq3HVPxvy0viaQXv15bdxGh2S9UjNvfBglxDKbrBh7i9hnOpsVo2Vb-s6hfNaqg9rsUChVT7poguAms3aodJmOyrfkJISBlybIhh00PUpaRiiQMY6vU2IfPJ4yrle1WgFdUpMq78FUPDwuQP2RcWbBowr75uRNyDk7hNh-RLEH0fItmItFFVdtv9ck2rd9znQdBDDLAMyxRU1otVF4Rf250X0J5dVj~A__&Key-Pair-Id=APKAJKNBJ4MJBJNC6NLQ>

II A CIVIC REPUBLICAN BASIS FOR SPEECH REGULATION The overall argument Ian Cram makes is that society works best when decisions are made by informed and equally participatory citizens in a deliberative manner. This is an argument derived from civic republican literature, especially the work by Cass Sunstein.1 Although not original, it is an interesting premise from which to consider the decisions that courts do, and should, make. This framework gives rise to the central questions of what is required for citizens to be able to participate in deliberation and what is the role of the courts in creating and sustaining these conditions. Cram’s central normative claim is that the courts should have a role to play in promoting and ensuring democratic deliberation. This premise is justified through his analysis of the relative usefulness of libertarian, communitarian and civic republican ideas when applied to the regulation of speech, and his conclusion that the civic republican concept of a community of equal citizens participating in democratic deliberative decision-making is ideal. From this premise emerges a path through the maze of competing speech claims, since the centrally conceived task for the courts is to ensure deliberative decision-making, which is reliant upon an informed citizenry. Cram’s argument is counterposed to the ideas of Jeremy Waldron and Adam Tomkins, among others, who have argued that Parliament is the best place for decision-making in contested and controversial areas such as speech regulation.2 Cram points out, as do others, that Waldron’s ideal of legislative decision-making is rose-tinted.3 However, Cram provides a more robust defence of judicial review than simply the pragmatic and empirical claim that parliamentary majoritarianism can, and does, have the potential to infringe on human rights. His defence of judicial review lies more strongly in his view of the particular role that the courts can play in expressing and defining constitutional values such as equality and dignity, as well as liberty.4 The second chapter of the book affirms his view that judicial review has a role to play in ‘promoting the conditions for vigorous democratic debate among a community of political equals’.5 He argues that the roles of judicial review are the result of the shortcomings of majoritarianism in protecting rights, and more interestingly, deliberative democracy’s requirement that all participants — including those with less communicative power — should be able to be heard.6 As a comparativist, Cram also defends jurisdictional differences, adding that judicial review ought to be able to achieve its goal while respecting differences in legal frameworks and political cultures.7 Having advocated this role for the courts, Cram spends the subsequent chapters detailing how this might occur. III HOT TOPICS Individual chapters are devoted to electoral regulation,8 election campaign financing, hate speech, sexually expressive material and commercial speech. In each chapter, Cram interweaves consideration of how decisions in controversial cases have reflected alternative and competing philosophical bases with a critique of those decisions which he argues have fallen short — either in their protection of speech that matters or in their regulation of speech that harms. An example of speech protection is electoral advertising which, however offensive it might be to some people, is an important example of speech which contributes to informing the citizenry of their electoral options at a time when the provision of such information ought to be prioritised over other competing values. In pre-election periods, electors are acutely aware of an imminent contest for office and are arguably more attuned to, and prepared to consider, competing arguments by candidates and parties. So Cram argues that the decision of the House of Lords to uphold a BBC prohibition on the screening of advertisements by the ProLife Alliance9 is an example of only ‘lip service’ being paid to the importance of political speech.10 Since, in his view, speech is important to the extent that it contributes to the development and maintenance of an informed and deliberative citizenry, this decision cannot be justified. An example of speech regulation, in which the harm of speech has been insufficiently recognised, is the presumption in the United States in favour of content-neutrality in First Amendment jurisprudence, such as in RAV v City of St Paul, Minnesota (‘RAV Case’).11 Cram argues that this presumption, which has invalidated hate speech regulation in the United States, risks insufficient recognition of the effects of hate speech on involvement in democratic deliberation by ‘hitherto under-represented groups’.12 Since the purpose of speech regulation is to ensure democratic deliberation, where hate speech threatens that deliberation, its restriction is justified. He argues that constitutional jurisprudence ought to signal ‘the equal worth of groups at the margins of community life’13 and, for the notion of an inclusive society to be meaningful, hate speech ought to be met with an appropriate legal response, which allows for restrictions to be imposed.14 Cram’s arguments concerning sexually expressive material are similarly based on his assessment that such material contributes little to democratic deliberation and thus ought to be more easily regulated.15

#### Hate speech codes are key to silencing the silencers—getting rid of them empowers the conservative forces they critique

**Ma 95**

Alice Ma (A.B. 1989, Harvard and Radcliffe Colleges; J.D. candidate 1995, Boalt Hall School of Law, UC Berkeley). “Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights.” California Law Review, Vol. 83, No. 2. March 1995. <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1679&context=californialawreview>

In truth, equality concerns us all. Unless we respect difference, we are all unequal, and we are all vulnerable to discrimination and prejudice. Although the Fourteenth Amendment was drafted on behalf of the newly freed slaves, its language encompasses all Americans. Its protections, like those of the First Amendment, extend to everyone. We cannot embrace one amendment to the exclusion of the other, however. Neither is meaningful so divorced. The First Amendment's guarantee of free speech must be read in tandem with the Fourteenth Amendment's guarantee of equality. Far from being irreconcilable with freedom of speech, the Fourteenth Amendment's Equal Protection Clause provides a justification for hate speech regulations that preserves First Amendment values and extends speech rights to all. CONCLUSION Racist speech is repugnant to many if not most Americans, whatever their race or ethnicity. So too-rightfully-is censorship. I have argued that the twin goals of eliminating hate speech and protecting free speech are not inconsistent. By prohibiting hate speech, we can create greater speech opportunities for groups that have been traditionally disadvantaged in their speech rights. Hate speech in colleges and universities is especially disheartening because campus communities are among our most enlightened. Even if a young student of color makes it to college, her thoughts, ideas, and opinions may be silenced by racial insults. Because hate speech silences, the illusory "freedom" of speech that protects hate speech necessarily silences hate speech victims. Ipa the same way, "equal" protection is hollow when it ignores the long history of discrimination against people of color. Courts have acknowledged the persuasive force of this argument in the economic, political, and educational arenas. We should now focus the weight of this logic on speech rights. Just as affirmative action programs remedy past discrimination in the areas of public contracting, voting rights, and college admissions, hate speech regulations would remedy past discrimination in the allocation of speech opportunities. As the cost of true freedom, hate speech codes will exact a steep but necessary price. The payback is longterm equality of expression for all speakers, regardless of race or ethnicity. It may be that we lack the will to impose hate speech regulations upon ourselves. The rising tide of conservative voices calling for an end to affirmative action programs suggests nothing less.213 The bleak alternative, however, seems to be nothing more than the status quo or, at best, slow, fitful improvement measured in inches and fractions thereof. We must recognize as a society that it is only by silencing the silencers that we can finally give voice to peoples of all colors.