On the 50th Anniversary of *Tinker v. Des Moines*: Toward a Positive View of Free Speech on College Campuses

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ABSTRACT: Fifty years ago, the Tinker *case confirmed the free speech rights of students and identified the classroom as "peculiarly the marketplace of ideas." Upholding the students' right to protest the Vietnam War,* Tinker *was one of many Supreme Court decisions to establish the First Amendment as an ally in movements for freedom, justice, and equality.*

Today, by contrast, free speech has become a mantra for alt-right groups who frequently spread hateful messages on college campuses. Although hate speech is clearly harmful, eradicating it is difficult under current First Amendment law, and many question whether efforts to limit hate speech could harm the very marginalized groups they are intended to protect.

Although banning hate speech may not be feasible, there are alternative ways to think about free speech that can ameliorate much of the damage that hate speech causes. First Amendment canon holds that the answer to speech you do not like is not suppression but "more speech." As it has been interpreted, however, this is a negative view of free speech in which the government's role is mainly to get out of the way and let the chips fall where they may.

I argue for a more positive view of the government's role in dealing with hate speech on college campuses. It suggests that universities should take affirmative steps to encourage "more speech" on campus and spread the burdens of free speech across the public who benefits from it. Under this view, universities can protect the free speech rights of all individuals, mitigate the harm hate speech causes to specific groups and individuals, and actively encourage a more robust marketplace of ideas on their campuses.

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I. INTRODUCTION

In February of 2019, I sat on a dais at the University of Iowa with local celebrities John and Mary Beth Tinker, who, as kids and anti-Vietnam War activists, defended their free speech rights all the way to the Supreme Court. The occasion was a panel discussion to celebrate the 50th anniversary of the Court's decision in *Tinker v. Des Moines Independent Community School District*. The *Tinker* Court upheld the youths' right to engage in peaceful and non-disruptive protest in public schools and famously confirmed "that [n]either

students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1]

My role, as the invited law professor on the panel, was to provide legal context for the Court's decision. As John and Mary Beth Tinker reflected on their experiences in the protests and ensuing litigation, however, it seemed that my presence was somewhat superfluous: They knew almost as much free speech law as I did. And yet, their perspective was different from mine. Although they are strong supporters of the First Amendment, their primary concern has not been on the development of free speech law, but on the activism for peace and social justice that the law has allowed them to pursue. For them, the First Amendment largely has been a means to those ends. Thus, even when they won a Supreme Court case—doing *as teenagers* something most career lawyers can only dream of—they confessed that it felt like a hollow victory. Their school protests had taken place in the early stages of the Vietnam War, at a time when they dared to hope that taking a stand could head off the worst of it. But by the time the Supreme Court upheld their right to protest it, the war had dragged on for several years with tens of thousands of lives lost.

Listening to the Tinkers that evening, one might have thought that social justice activists would be natural devotees of the First Amendment. At the end of the event, however, a student asked a question that turned that assumption on its head. The question related to an incident that had recently occurred on the University of Iowa campus. Just five days earlier, a student organization called Young Americans for Freedom ("YAF") had held a demonstration on campus in which the group displayed a banner that read "Build the Wall." This demonstration just happened to occur during a University public relations campaign that asked students to tweet about why they love the University of Iowa at #iLoveUIowa. Following the YAF demonstration, student organizers launched a counter campaign on Twitter known as #DoesUIowaLoveMe. The campaign, which later expanded widely to other social media, criticized University officials for allowing YAF's "Build the Wall" display and quickly evolved into a platform to air more general grievances related to diversity, equity, and inclusion at the University.[2]

Referring to this incident, the student at the *Tinker* event asked the panelists, "How can students be expected to love the University when the

1. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Although *Tinker* is credited with establishing students' free speech rights in schools, the majority opinion stated that "[t]his has been the unmistakable holding of this Court for almost 50 years." *Id.*

2. *See* Jeremy Bauer-Wolf, *#DoesUIowaLoveMe*, INSIDE HIGHER ED (Feb. 27, 2019), https://www.insidehighered.com/news/2019/02/27/u-iowa-students-launch-digital-campaign-around-minority-issues-campus [https://perma.cc/R87D-WP3E]; Charles Peckman, *#DoesUIowaLoveMe? UI Students Ask Question in Social-Media Movement*, DAILY IOWAN (Feb. 27, 2019), https://dailyiowan.com/2019/02/27/doesuiowaloveme-ui-students-ask-question-in-social-media-movement [https://perma.cc/W8DE-A8DN].

University tolerates speech like 'Build the Wall?'" One of the panelists, a representative of the ACLU, responded by congratulating the students on speaking out against the message they found offensive. Yet, none of us provided a satisfying answer to the fundamental issues at the heart of the student's question: Why would people and institutions apparently committed to diversity, equity, and inclusion support a First Amendment that allows offensive or hateful speech against marginalized groups? And more broadly, how do universities—and society more generally—foster the robust exchange of ideas that has been a central part of our democracy for more than 200 years, while protecting people disadvantaged by that history from the very real harm that expression causes?

In the current political moment, the First Amendment has become a mantra for hate groups. The University of Iowa is just one of many colleges and universities confronting the campus free speech wars.[3] At Berkeley, masked protesters hit and pepper-sprayed members of the crowd when Milo Yiannopoulos visited there.[4] At Middlebury College, a protest of Charles Murray's talk resulted in violence against a faculty member.[5] At Claremont McKenna, a mob of "around 300 people[] prevented [people] from entering the building" where journalist and political commentator Heather MacDonald was supposed to speak.[6] As a preventative measure, the University of Florida paid hundreds of thousands of dollars for security when white nationalist Richard Spencer went to speak at its campus.[7]

At campuses around the country, left-leaning student groups have criticized their colleges or universities for upholding the First Amendment

3. Alina Tugend writes:

> It has happened across the country, at small private colleges and large public universities: an invited guest is heckled or shouted down or disinvited because of opposing political views. And the incident is followed by a competing chorus of accusations about the rights of free speech versus the need to feel safe and welcome. It's something those in higher education have grappled with for decades. But after the 2016 presidential election and the increasing polarization of the country, the issue has taken on a new resonance.

See Alina Tugend, *Colleges Grapple with Where—or Whether—to Draw the Line on Free Speech*, N.Y. TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/education/learning/colleges-free-speech.html [https://perma.cc/8SGR-7BGP]; *see also* Jonathan Haidt, *Intimidation Is the New Normal on Campus*, CHRON. HIGHER EDUC. (Apr. 26, 2017), https://www.chronicle.com/article/Intimidation-Is-the-New-Normal/239890 [https://perma.cc/WRA4-KJ44] ("[W]e are witnessing the emergence of a dangerous new norm for responding to speakers who challenge campus orthodoxy.").

4. *See* Haidt, *supra* note 3 (describing events at Berkeley, Middlebury, and Claremont McKenna).

5. *See id.*

6. *See id.*

7. *See* Jeremy Bauer-Wolf, *Lessons from Spencer's Florida Speech*, INSIDE HIGHER ED (Oct. 23, 2017), https://www.insidehighered.com/news/2017/10/23/nine-lessons-learned-after-richard-spencers-talk-university-florida [https://perma.cc/86AW-EHGW].

rights of controversial groups or individuals.[8] Although violent tactics are never appropriate, who can blame students for being angry and confused? Speakers like Richard Spencer and the marchers in Charlottesville explicitly spread hatred for non-whites and non-Christians to such an extent that even many leaders on the right have condemned their conduct.[9] Moreover, younger college students might be mystified as to why their universities would tolerate these fountains of hatred on their campus—after all, they have been educated in the values of diversity, equity, and inclusion but not in the intricacies of First Amendment doctrine. And *none* of these students have lived long enough to remember a time when free speech was the rallying cry for the Civil Rights movement.

The literature on the First Amendment and hate speech is some of the richest in all of legal scholarship. I do not purport to address all of it in this Essay. Rather, my experience in higher education administration has shown me that university officials need concrete guidance for how to think and talk about free speech issues on college campuses. Many higher education administrators feel that their hands are tied because the First Amendment allows them no real recourse to curb hateful speech on their campuses. I show, however, that although banning hate speech may not be possible, there are nevertheless meaningful steps university administrators can take to foster the robust exchange of ideas while also supporting diversity, equity, and inclusion efforts on their campuses. In this Essay, I confront the issues from the perspective of someone who has both knowledge of the First Amendment as well as experience in university governance and administration related to free expression on college campuses.

I begin with a brief introduction of First Amendment principles and a discussion of how the *Tinker* case and other cases have shaped the campus free speech issue. Then, I argue that while there are good critiques of the First Amendment's protection of hateful speech, there are also formidable legal

8. *Id.*

9. *See, e.g.*, Dartunorro Clark, *Democratic, Republican Lawmakers Decry Trump's Latest Charlottesville Remarks*, NBC NEWS, https://www.nbcnews.com/politics/white-house/not-my-president-lawmakers-decry-trump-s-latest-charlottesville-remarks-n793021 [https://perma.cc/47ZT-8Z3Y] (last updated Aug. 16, 2017, 11:33 AM) (quoting numerous Republican leaders, including Senators Lindsey Graham and Mitch McConnell, then-Senator Jeff Flake, then-House Speaker Paul Ryan, and then-Ohio Governor John Kasich, as condemning hatred and white supremacy); Matt Ford, *'We Must Reject Hate'*, ATLANTIC, https://www.theatlantic.com/politics/archive/2017/08/charlottesville-political-reaction/536676 [https://perma.cc/S5E9-X6NM] (last updated Aug. 12, 2017, 8:50 PM) (reporting on statements and tweets by Republican lawmakers, including Senators Marco Rubio and Cory Gardner, and then-Senator Orrin Hatch, opposing hate and bigotry); Hilary Hanson, *Politicians Condemn Hate, Violence in Wake of White Supremacist Rally*, HUFFPOST https://www.huffpost.com/entry/white-supremacist-rally-charlottesville-politicians_n_598f2c1de4b08a247274a813 [https://perma.cc/4VTS-R958] (last updated Aug. 13, 2017) (reporting that Republican National Committee Chairwoman Ronna McDaniel and Republican Virginia gubernatorial candidate Ed Gillespie both denounced the hatred that sparked the Charlottesville rally).

problems and other considerations militating against creating exceptions to that protection. I argue for reconceptualizing the government's role in free speech in a positive way. This new approach would affirmatively encourage more speech while spreading the burdens of free speech across society as a whole. In this light, I discuss several steps that universities can and should take to comply with First Amendment law and enhance their educational mission while preventing and remedying the very real harm that hateful speech can cause.

II. FIRST AMENDMENT PRINCIPLES

Few areas of law have been as debated or highly theorized as the First Amendment. I do not purport to do justice to that rich and voluminous literature here. Nevertheless, before tackling a complex subject like hate speech, it is helpful to give readers at least a broad sense of the framework in which it operates.

Generally speaking, there are three competing theories underlying the First Amendment's protection of free speech.[10] First, the marketplace of ideas theory treats free speech as a means of fostering the creation of new knowledge and the discovery of truth. "Among the most enduring themes in the history, literature, and legal doctrine concerning freedom of speech is the view that speaking and writing deserve special legal, constitutional, and political protection because the unfettered exchange of ideas advances truth and knowledge."[11]

The marketplace theory or metaphor originated with Justice Oliver Wendell Holmes' famous dissenting opinion in *Abrams v. United States*, in which he said "the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]"[12] Remarking on the importance of this language, one scholar opined that "[n]ever before or since has a Justice conceived a metaphor that has done so much to change the way

10. *See, e.g.*, Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011) (arguing "that the scope of the First Amendment extends only to those forms of speech . . . that implicate constitutional values," and identifying three possible theories that reflect those values including the marketplace of ideas, "individual autonomy[,] and . . . democratic self-government" (footnote omitted)).

11. *See* Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1161 (2015) (footnote omitted) (exploring ways one might empirically test the marketplace of ideas theory).

12. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). As many scholars have observed, this idea echoes John Milton's famous quote: "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?" JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND 69 (1644).

that courts, lawyers, and the public understand an entire area of constitutional law."[13]

Second, the individual autonomy theory of free speech is based on the idea that there is an individual right, based on personal dignity, to express oneself and to share one's thoughts with others. For instance, Justice Brennan has attempted to justify a broad liberty-based speech right as an end in itself, saying that "freedom of speech is . . . intrinsic to individual dignity[,] . . . particularly so in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect."[14]

Third, the democratic self-governance theory protects speech as a means of protecting individual participation in a democratic form of government, including engaging in discourse that shapes government and holds it accountable to the people.[15] This theory finds support in the First Amendment's hierarchy of speech, in which speech on matters of public concern typically receives the strongest protection. As the Supreme Court has said, "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'"[16]

To be sure, there are differences among these three theories,[17] and each can claim superiority in explaining aspects of First Amendment doctrine. For instance, because the purpose of the marketplace of ideas theory is to create knowledge and find truth, it has difficulty justifying doctrinal protection of

13. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 824–25 (2008) (footnote omitted) (arguing for integration of Holmes' marketplace metaphor with institutional economics); *see* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7–9 (1992). Baker observes that "[t]he marketplace of ideas theory consistently dominates the Supreme Court's discussions of freedom of speech. Marketplace imagery ('competition of ideas,' the value of 'robust debate') pervades judicial opinions and provides justification for the courts' first amendment 'tests.'" BAKER, *supra*, at 7.

14. *See* Herbert v. Lando, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting); *see also* BAKER, *supra* note 13, at 24 (arguing that "freedom of speech may be defensible, not because of the marketplace of ideas' supposed capacity to discover truth, but because freedom of speech embodies respect for the liberty or autonomy and responsibility of the participants").

15. *See, e.g.*, Post, *supra* note 10, at 482–83.

16. *See* Snyder v. Phelps, 562 U.S. 443, 452 (2011) (citations omitted) (first quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); then quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" (internal quotation marks omitted) (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978))).

17. For example, the marketplace theory focuses on protecting the speech itself while the liberty view focuses on protecting the speaker. Alexander Meiklejohn famously said that, under the marketplace theory, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 26 (1960). By contrast, the late C. Edwin Baker, a proponent of the liberty theory argued that "the important concern is that society deny no one the right to speak." *See* BAKER, *supra* note 13, at 24.

false ideas or bad opinions.[18] Autonomy theory is better suited to that task, as it is premised on individual liberty to express oneself. Yet, the democratic self-governance theory is arguably better than the autonomy theory at explaining why speech on matters of public concern is more protected than purely private speech.[19]

What is most important for present purposes, however, is what all of these theories have in common. All of them—as well as First Amendment case law—afford robust protection for free speech. The law holds that the government should not decide which messages are allowed and which ones are prohibited. Most importantly, absent a compelling justification, the government should not regulate speech based on the content of the speech or the viewpoint expressed. The operative principle, as the Supreme Court held in *Whitney v. California*, is that when people hear speech they do not like or with which they disagree, "the remedy to be applied is more speech."[20]

A. THE BARNETTE *CASE*

Before *Tinker*, the main case touching on the question of free speech in schools was *West Virginia Board of Education v. Barnette*. *Barnette* was a World War II-era case decided in 1943, and it involved the ability of the government to inculcate primary school students with "American" values and ideals, including requiring them to salute the American flag.[21] "[T]he West Virginia legislature [had] amended its [laws] to require all schools therein to [include] courses . . . 'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism . . . .'"[22] "The Board of Education . . . adopted a resolution . . . that all teachers and [students]" had to salute the American flag, and "that refusal to salute the Flag [would] be regarded as an act of insubordination."[23] In fact, the punishment for a student's refusal to salute the flag was the child's expulsion and possible criminal prosecution of the child's parents.[24] A group of Jehovah's Witness families brought suit alleging that the requirement to salute the flag violated their rights of free exercise of religion and free expression under the First Amendment.[25]

18. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) ("The First Amendment recognizes no such thing as a 'false' idea." (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974))).

19. *See Snyder*, 562 U.S. at 451–53.

20. *See* Whitney v. California, 274 U.S. 357, 373–79 (1927) (Brandeis and Holmes, J. J., concurring).

21. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 625–26 (1943).

22. *Id.* at 625.

23. *Id.* at 626.

24. *See id.* at 629–30.

25. *See id.*

The Supreme Court agreed with the families and held that the Board of Education's flag salute requirement was unconstitutional.[26] The Court seemed to rest on a more general principle of freedom of belief and expression, rather than focusing on the religious aspect of the case. It said: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[27]

Two aspects of the *Barnette* case were quite profound, especially for the 1940's and in wartime. The first was a progressive view toward civic education. The State had argued for deference to the school authorities' need to control students and educate them with particular beliefs.[28] In response, the Court said that school authorities "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[29] The second view was a rejection of national security and unity as a justification for "coerc[ing] uniformity of sentiment."[30] The Court decried the government's attempt to force cohesion, comparing it with "the Roman drive to stamp out Christianity" and "the Inquisition, as a means to religious and dynastic unity."[31] The Court explained: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."[32]

In retrospect, the Court's *Barnette* decision might make its later *Tinker* decision seem obvious, but there are differences in the facts of the two cases that might have led to a different result in *Tinker*. For one thing, compelling students affirmatively to state a belief (as in *Barnette*) could have been viewed as more egregious than telling them to refrain from expressing their own beliefs during school hours (as in *Tinker*), because requiring an affirmative pledge means either changing one's own contrary beliefs or lying. Indeed, the *Barnette* Court opined, "[i]t would seem that involuntary affirmation could be

26. *See id.* at 642 (affirming the lower court's judgment enjoining enforcement of the West Virginia Regulation because "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

27. *Id.*

28. *Id.* at 630–31.

29. *Id.* at 637.

30. *Id.* at 640.

31. *Id.* at 641.

32. *Id.*

commanded only on even more immediate and urgent grounds than silence."[33]

Moreover, it was possible, at least in some circumstances, that the expression of a particular, unpopular viewpoint might be more disruptive to the school than a student's silent refusal to salute the flag. So when the *Tinker* case arrived at the Supreme Court's door, there was still a real question about whether schoolchildren had First Amendment rights to express themselves in schools or whether those rights were largely subject to the discretion of school authorities charged with maintaining the order and decorum of the school.

B. THE TINKER *CASE*

In *Tinker*, a group of junior high and high school students in Des Moines, Iowa decided "to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve."[34] School officials discovered the students' plans and passed a regulation prohibiting the wearing of armbands and imposing suspension for any student who refused to remove the armband after being asked to do so.[35] The students were aware of the rule when they wore the armbands to school a couple of days later.[36] All of the students were "suspended from school until they would come" to school "without the[] armbands."[37] The students did not return until after New Year's Day, when their "planned period for wearing the armbands . . . expired."[38]

The *Tinker* Court famously said "that [n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[39] But the Court did not protect the students' speech solely as a matter of protecting individual rights; its opinion contains elements of the marketplace of ideas and democratic self-governance theories as well. The Court explained that education "is not confined to the supervised and ordained discussion which takes place in the classroom" led by teachers.[40] Rather, "personal intercommunication among the students. . . . is also an important part of the educational process."[41] Describing "[t]he classroom [as] peculiarly the 'marketplace of ideas,'" the Court reasoned that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust

33. *Id.* at 633.
34. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 506.
40. *See id.* at 512.
41. *Id.*

exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[42]

Ultimately, the Court seemed to espouse a vision of free speech in schools that is more akin to a rough-and-tumble playground than an orderly marketplace:

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, . . . and our history says that it is this sort of hazardous freedom—this kind of openness —that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> [Thus,] [i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[43]

Rather, there must be evidence that it would cause "material[] and substantial[] interfer[ence] with" schoolwork or discipline.[44] Because there was little to no evidence of disruption in *Tinker*, the Court held the school was wrong to punish the students' speech.[45]

Just a few years after *Tinker*, the Court applied its rule to the college context.[46] Although some later cases have ruled against students' speech,

42. *See id.* (citations omitted) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

43. *Id.* at 508–09 (citation omitted).

44. *See id.* at 512–13 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

45. *See id.* at 514.

> There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Id. at 508.

46. *See* Healy v. James, 408 U.S. 169, 180 (1972) (citing *Tinker* for the proposition "that state colleges and universities are not enclaves immune from the sweep of the First Amendment").

those cases are distinguishable,[47] so it seems unlikely that they represent a general trend away from the strong free speech protection that *Barnette* and *Tinker* articulated. Thus, the prevailing rule is that absent a "material and substantial" disruption to the functioning of a school, or some other compelling interest, public schools may not restrict students' speech or require them to profess allegiance to government-ordained messages. Indeed, some cases indicate that the educational mission of schools and universities warrants special solicitude toward allowing competing ideas in classrooms and on campuses.[48]

III. CAMPUS FREE SPEECH WARS AND THE PROBLEM OF HATE SPEECH

Thanks to *Tinker* and *Barnette*, few people today would doubt a college student's right to engage in peaceful protest or to resist endorsing a university's ordained message. Instead, the recent campus free speech wars have revolved around protests of controversial messages perceived as hate speech and universities' willingness to allow those messages.

The Supreme Court took up the issue of hate speech a few years ago in *Snyder v. Phelps*. There, members of the Westboro Baptist Church picketed a Marine soldier's funeral, displaying signs with messages like "God Hates the USA/Thank God for 9/11," "God Hates Fags," "Priests Rape Boys," and "Thank God for Dead Soldiers."[49] The soldier's father filed suit against church members, alleging violations of state law including defamation and intentional infliction of emotional distress.[50] The jury found for the plaintiff and awarded substantial damages.[51]

47. In one case, the Court held that school officials were permitted to cut stories about teen pregnancy from the school newspaper because people could believe that the school approved of the message. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988) ("The question whether the First Amendment requires a school to tolerate particular student speech —the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."). More recently, in 2007, the Roberts Court held that school officials could punish a student for a banner that he displayed at an off-campus event that read "Bong Hits 4 Jesus," which the Court said reasonably could have been interpreted as advocating illegal drug use. *See* Morse v. Frederick, 551 U.S. 393, 397, 408–09 (2007) (noting that "[t]he danger here is far more serious and palpable" than the generalized fear of disturbance in *Tinker* because "[t]he particular concern to prevent student drug abuse at issue here, embodied in established school policy . . . extends well beyond an abstract desire to avoid controversy" (citation omitted)).

48. *See Healy*, 408 U.S. at 180 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" (second alteration in original) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960))).

49. *See* Snyder v. Phelps, 562 U.S. 443, 448 (2011).

50. *See id.* at 449–50.

51. *See id.*

The Supreme Court reversed the trial court judgment on First Amendment grounds, holding that the Westboro Baptist Church members could not be punished for their hateful messages.[52] It explained that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[53] Although Westboro's signs were crude and hateful, their content "plainly relate[d] to broad issues of interest to society at large, rather than matters of 'purely private concern.'"[54] The Court elaborated that "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight —the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[55]

The Court acknowledged that the Westboro messages were harmful but nevertheless held that it could not prohibit or punish the speech:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[56]

The Court's decision to protect such hateful speech on a matter of public concern demonstrates the strength of the free speech principle and shows the difficulty universities have in attempting to ban hate speech on campus, despite the harm it may inflict.

A. THE HARM OF HATE SPEECH

As the *Snyder* Court acknowledged, hate speech can cause serious harm. Most obviously, it causes harm to the individuals or groups targeted by the speech. Hate speech attempts to degrade, ridicule, or intimidate targeted individuals and groups, which can make it difficult for them to lead full lives.[57]

52. The court of appeals reversed the trial court, and the Supreme Court affirmed the appeals court's decision. *See id.* at 450–51, 461.

53. *Id.* at 452 (citing Connick v. Myers, 461 U.S. 138, 145 (1983)); *see supra* note 16 and accompanying text.

54. *Id.* at 454 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985)) (distinguishing between this speech and other speech related to matters of purely private concern, such as the credit report related to a private construction contractor in *Dun & Bradstreet*, 472 U.S. at 762).

55. *Id.*

56. *Id.* at 460–61.

57. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134 (1982) (arguing for a tort remedy for injuries caused by racist speech).

They might avoid speaking out or going to public places for fear of insult and intimidation.[58] One scholar has argued that individuals or groups affected by hate speech "are likely to feel alienated from the wider society, to lead shadowy lives, and to feel trapped in a cramped mode of being."[59]

If these harms seem abstract, consider Richard Delgado and Jean Stefancic's work arguing that victims of "[f]ace-to-[f]ace [h]ate [s]peech" suffer physical effects including muscle tightening "and inability to sleep," while others suffer depression "and impairment of work or school performance."[60] More ominously, some scholarship shows how many episodes of genocide, including against the Tutsis in Rwanda and the Jews during the Holocaust, were preceded by hate speech that demeaned the ultimate victims.[61]

There is also the potential harm to our social fabric as a whole. As Jeremy Waldron articulates at length in *The Harm in Hate Speech*:

> [T]here is a sort of public good of inclusiveness that our society sponsors and that it is committed to. We are diverse in our ethnicity, our race, our appearance, and our religions. And we are embarked on a grand experiment of living and working together despite these sorts of differences. . . .
>
> Hate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be. . . . In doing so, it creates something like an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word . . . .[62]

58. *See* JEREMY WALDRON, THE HARM IN HATE SPEECH 5 (2012) (arguing that hate speech causes harm to minority groups' dignity, which he describes as "their social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society"); *see also* Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 37, 44 (Michael Herz & Peter Molnar eds., 2012) ("Targets of hate speech understandably feel nervous in public spaces lest they should be humiliated. They are afraid to speak their minds and behave normally . . . .").

59. Parekh, *supra* note 58, at 44.

60. Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 361–64 (2009) [hereinafter Delgado & Stefancic, *Four Observations*] (footnote omitted) (arguing that the evaluation of the harm of hate speech has been incomplete and describing numerous types of injuries); *see also* RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 13–14 (Routledge 2018) (2004) (detailing a broad survey of legal treatment of injurious speech).

61. Delgado & Stefancic, *Four Observations*, *supra* note 60, at 363 (footnote omitted) (citing ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 9–79 (2002)).

62. WALDRON, *supra* note 58, at 4. Waldron argues that hate speech might be conceptualized as a form of "group libel." *See id.* at 39–41.

Similarly, another scholar argues that hate speech "lowers the tone of public debate, coarsens the community's moral sensibility, and weakens the culture of mutual respect that lies at the heart of a good society."[63] Moreover, "[i]t creates barriers of mistrust and hostility between individuals and groups, plants fears, obstructs normal relations between them, and in general exercises a corrosive influence on the conduct of collective life."[64]

B. THE CRITIQUE OF THE "MORE SPEECH" PRINCIPLE FOR COMBATTING HATE SPEECH

While many agree it is better in the long run to refute harmful speech than to suppress it, they also recognize limitations to this argument.[65] One criticism of the "more speech" principle has been that underrepresented minorities who are frequently the targets of hate speech do not have the same ability to speak back and be heard as wealthier, privileged, and more powerful groups.[66]

This observation tends to delegitimize, or at least diminish, the marketplace's capacity to render truth. This concern may be somewhat less salient today, however, given nearly ubiquitous internet and social media access. The #DoesUIowaLoveMe case is an example of how the "more speech" principle can work in the social media context to bring about conversation and the impetus for change. There, students' response to the YAF's "Build the Wall" demonstration provoked a wider conversation about important issues. Some students confronted the YAF group directly during their demonstration, debated issues with them, and told them they were spreading racist messages. The Vice Chair of YAF claimed that the demonstration "was not an attack on any race or people group."[67] He said, "[o]ur members were very polite and respectful, and we had great conversations with students on both sides of the aisle about this delicate issue of border security."[68]

Some students upset by the YAF group's display complained to the administration and started a social media campaign. The campaign began with comments about the display but quickly expanded into a broader conversation about campus culture related to diversity, equity, and inclusion. Some contributions provided illuminating anecdotes. One student said that when he participated in a promotional photo shoot for the University, he was asked to put away his computer that had a rainbow pride sticker on it because it was "too controversial."[69] Another complained about gender dynamics in a

63. Parekh, *supra* note 58, at 44.

64. *Id.*

65. *See, e.g.*, *id.* at 48–49.

66. *See id.*

67. Peckman, *supra* note 2.

68. *Id.*

69. *See* Aimee Breaux, *The University Asked Why #iloveUIowa. Students Asked #DoesUIowaLoveMe?*, IOWA CITY PRESS-CITIZEN, https://www.press-citizen.com/story/news/

prominent academic program.[70] Others commented on more general issues, saying that the administration needs to recruit more faculty and students of color and needs to be more receptive to complaints of sexual assault.[71] University President Bruce Harreld and Vice President for Student Life Melissa Shivers responded with a joint statement, saying, "We respect our students as they communicate their frustrations and experiences at the University of Iowa. We are committed to hearing their concerns and improving our campus climate."[72]

The #DoesUIowaLoveMe organizers released a statement saying their "intention was to build a coalition with the mission of cultivating and promoting a platform that allows underrepresented students to speak their truth and share their experiences."[73] The statement thanked those who had shared their experiences, saying, "[w]ithout your stories, our individual voices would have remained silenced—our voices have only been amplified because of your presence and power."[74] Ultimately, the campaign provides a model for how social media can facilitate dialogue and strengthen voices that have traditionally been marginalized.

It should be noted, however, that requiring people injured by hate speech to "speak back" comes at a price. When I have talked to undergraduate students about the First Amendment's more speech principle, they frequently question why the burden should be on them to respond to hateful speech and why they are forced to tell their painful truths over and over. It should not continually be their job, they contend, to educate ignorant or malicious people. Put another way, although the benefits of free speech may accrue to society as a whole, "[t]he costs of hate speech . . . are not spread evenly across the community that is supposed to tolerate them."[75]

A second critique of the more speech principle is that, even if the marketplace were equally accessible to all points of view, it is naïve or overly optimistic to think that truth will always win out in a contest with falsity.[76] Bhikhu Parekh has observed that the marketplace "operates against the background of prevailing prejudices."[77] Therefore, "[w]hen racist, anti-Semitic, and xenophobic beliefs are an integral part of a society's culture, they

education/university-of-iowa/2019/02/26/hawkeye-twitter-love-hate-relationship-students-university-of-iowa/2990821002 [https://perma.cc/V6CF-DN38] (last updated Feb. 28, 2019, 6:49 AM).

70. *See id.*

71. *See id.*

72. Peckman, *supra* note 2.

73. *Id.*

74. *Id.*

75. *See* WALDRON, *supra* note 58, at 7 (second alteration in original) (quoting his own earlier essay published in the London Review of Books).

76. *See, e.g.*, Parekh, *supra* note 58, at 48.

77. *Id.*

appear self-evident, commonsensical, and obvious, and therefore enjoy a built-in advantage over their opposites."[78]

Parekh's references to "background" beliefs that have a "built-in advantage" of persuasion are consistent with evolving human behavioral science on implicit bias and confirmation bias. According to this research, people often have "implicit" cognitive biases related to race, gender, and other characteristics that are inherent and automatic rather than rational and deliberative.[79] To make matters worse, people tend to give more weight to a new message or experience that "confirms" pre-existing beliefs than they would give to a contrary message.[80] Not only does the foregoing research indicate that implicit bias can contribute to hate speech, but there is also research suggesting that hate speech can contribute to implicit bias,[81] leading to a potentially intractable circularity.

Finally, even if the "more speech" principle does eventually lead to refuting falsehoods and bias, the victims of hate speech may suffer a great deal of harm in the interim. Thus, although this approach may sometimes bring about its intended result, the road is long, the result is uncertain, and the process is painful. One could legitimately wonder whether it would be better to eradicate the harmful speech in the first place.

C. WHY NOT CREATE AN EXCEPTION FOR HARMFUL HATE SPEECH?

Hate speech causes serious and irreparable harm, no doubt surpassing some other legally actionable harms. So why not ban it? Mari Matsuda, one of the early critical race theorists to call for legal sanctions against hate speech, describes the issue this way:

> The kinds of injuries and harms historically left to private individuals to absorb and resist through private means is no accident. The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live. This absence of law is itself another story with a message, perhaps unintended, about the relative value of different human lives. A legal response to racist speech is a statement that victims of racism are valued members of our polity.[82]

78. *Id.*

79. *See, e.g.*, Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 447–48 (2005); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506–14 (2005); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007).

80. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (describing a number of "heuristic" biases or shortcuts that the intuitive brain uses to process information and make decisions, sometimes incorrectly).

81. *See, e.g.*, Delgado & Stefancic, *Four Observations*, *supra* note 60, at 365–66.

82. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321–22 (1989) (footnotes omitted).

College students tend to agree that hate speech should not be protected. In a 2018 Gallup/Knight Foundation survey, a majority of college students said protecting free speech rights and protecting diversity and inclusion were both important to democracy.[83] When put to a choice between the two values, however, diversity and inclusion won out over free speech by a margin of 53 percent to 46 percent.[84] Interestingly, the students' responses were sharply divided by their race, gender, and political orientation. Male and Republican students strongly preferred free speech, while female, diverse, and Democratic students strongly leaned toward diversity and inclusion.[85] In an earlier version of the same survey, out of more than 3,000 college students nationwide, 69 percent favored "policies that restrict slurs and other language that is intentionally offensive to certain groups."[86] Similarly, in a 2017 survey by the Foundation for Individual Rights in Education ("FIRE"), only "35% of students [thought] hate speech should be protected by the First Amendment."[87]

Universities have worked hard to promote diversity, equity, and inclusion on their campuses. Although it has been challenging to move the needle on numerical indicators—such as the number of underrepresented minority students and faculty, retention and graduation rates for underrepresented minority students, and so on[88]—universities have made great strides in promoting diversity, equity, and inclusion as important values in campus culture. Thus, many underrepresented minority college students today have come to trust their officials to look out for them, and they are upset when the officials do not act to prevent or punish hate speech on their campuses. Prominent Harvard professor and civil rights activist Henry Louis Gates, Jr. explains that "the new academic activism" needs "to know that the[ir]

83. GALLUP/KNIGHT FOUND., FREE EXPRESSION ON CAMPUS: WHAT COLLEGE STUDENTS THINK ABOUT FIRST AMENDMENT ISSUES 8 (2018), *available at* https://knightfoundation.org/wp-content/uploads/2020/01/Knight_Foundation_Free_Expression_on_Campus_2017.pdf [https://perma.cc/WVP5-8YTF].

84. *Id.* at 9.

85. *See id.*

86. KNIGHT FOUND. & NEWSEUM INST., FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS 12 (Gallup 2016), *available at* https://www.knightfoundation.org/wp-content/uploads/2020/01/FreeSpeech_campus.pdf [https://perma.cc/CH2N-AE68].

87. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (FIRE), SPEAKING FREELY: WHAT STUDENTS THINK ABOUT EXPRESSION AT AMERICAN COLLEGES 5 (2017), *available at* https://www.thefire.org/presentation/wp-content/uploads/2017/10/11091747/survey-2017-speaking-freely.pdf [https://perma.cc/Y2L8-GK6L].

88. *Facts & Figures: College Students Are More Diverse than Ever. Faculty and Administrators Are Not*, ASS'N. AM. CS. & U. (Mar. 2019), https://aacu.org/aacu-news/newsletter/2019/march/facts-figures [https://perma.cc/L8RK-Y24K].

institutions . . . [stand] behind them."[89] He adds, "I have difficulty imagining this sentiment expressed by activists in the '60s, who defined themselves in a proudly adversarial relation to authority and its institutions. Here is the crucial difference this time around. The contemporary aim is not to resist power, but to enlist power."[90]

It is easy to see how these students would question why universities tolerate hate speech against the underrepresented people that the universities purport to care about. This apparent dissonance is not limited to universities. The ACLU, whose longstanding mission is to advocate for civil rights and civil liberties, nevertheless supports a First Amendment broad enough to protect some hate speech.[91] The same is true of the liberal Justices on the Supreme Court. The *Snyder* opinion itself, which allowed the Westboro Baptist Church to propagate hateful messages during a soldier's funeral, garnered an overwhelming 8–1 majority, with the one dissenting Justice being the conservative-leaning Justice Alito.[92] The following Section considers why many civil rights advocates support broad free speech protection even when it allows hate speech against underrepresented and disadvantaged people.

D. (GOOD) ARGUMENTS FOR NOT BANNING HATE SPEECH

The *Snyder* decision illuminates one major difficulty with restricting speech that may be deemed hateful or offensive—there is substantial overlap between hate speech (broadly defined) and speech on matters of public importance, the latter of which falls at the core of First Amendment protection.[93] As the Westboro Baptist Church's crude messages regarding gays in the military and the Catholic Church show, a good deal of hate speech is intertwined with personal opinions about political issues or policy decisions.

The "Build the Wall" demonstration provides another classic example of this dilemma. It is obvious why people of color on campus, particularly the Latinx population, would find the message hateful, especially in the current climate. And yet, that message also has a substantial political component, as elected representatives in Congress and the White House were debating it as

89. Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC (Sept. 20, 1993), https://newrepublic.com/article/149558/let-talk [https://perma.cc/BDJ3-CT2G] (critiquing critical race theorists' arguments for prohibiting hate speech).

90. *Id.*

91. *See, e.g.*, *Speech on Campus*, ACLU, https://www.aclu.org/other/speech-campus [https://perma.cc/2A9F-WX6E] ("When we grant the government the power to suppress controversial ideas, we are all subject to censorship by the state. Since its founding in 1920, the ACLU has fought for the free expression of all ideas, popular or unpopular. Where racist, misogynist, homophobic, and transphobic speech is concerned, the ACLU believes that more speech—not less—is the answer most consistent with our constitutional values.").

92. *See* Snyder v. Phelps, 562 U.S. 443, 458–59 (2011); *id.* at 463 (Alito, J., dissenting).

93. *See id.* at 454 (majority opinion).

a policy and funding issue at the time.[94] As such, there is no question that it is protected speech on a matter of public concern.

By contrast, other categories of unprotected speech, such as threats and obscenity, are limited in ways that reduce their encroachment into matters of public concern. For example, to be actionable, threats typically require a reasonable belief of intent and ability to carry out a threat of unwelcome physical contact.[95] Even the First Amendment exception for defamation, which sometimes targets public officials, is limited in important ways. For instance, defamation applies only to statements that can reasonably be interpreted as stating actual facts about a person, and, at least when it comes to suing the media for defamation regarding matters of public concern, only to statements that are provably false.[96]

Therefore, it is important to recognize that the commonly used label "hate speech" cannot be treated as a one-size-fits-all category. Speech that constitutes a genuine threat or harassment directed at particular persons is not protected speech, and it is appropriately prohibited by just about all university conduct codes.[97] Likewise, speech that provokes or incites an imminent violent response is also likely not protected and may be prohibited.[98] In contrast, speech that comments on a matter of public concern, such as a political issue, is likely protected even if it is considered hateful or offensive by some.[99]

In the middle of the spectrum of protected and prohibited speech is a broad category of speech that generally attempts to incite hatred against a group of people based on a category such as race, gender, religion, sexual orientation, and the like. This type of speech includes epithets and other

94. *See* Meg Wagner et al., *Trump Declares National Emergency to Fund the Wall*, CNN: POL., https://www.cnn.com/politics/live-news/government-shutdown-february-2019/index.html [https://perma.cc/2BMA-56DF] (last updated Feb. 15, 2019, 4:02 PM).

95. *See, e.g.*, Office of the Dean of Students, *Code of Student Life (2019–2020 Academic Year)*, U. IOWA, https://dos.uiowa.edu/policies/code-of-student-life [https://perma.cc/E69R-KG94] (prohibiting assaultive behavior, which it defines as "[a]ny unwelcome physical contact that is intentional or reckless," and prohibiting "[t]hreatening behavior . . . when a reasonable person in the position of the other party would believe that the person making the threat intended to carry out the threat and had the ability to carry out the threat").

96. *See generally* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (reviewing the Court's defamation precedents in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), among others).

97. *See, e.g.*, Office of the Dean of Students, *supra* note 95 (describing threats of assault, undue harassment, stalking, and hazing as prohibited).

98. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement). I say these categories are "likely" not protected because the fighting words doctrine has not been applied in nearly 50 years, and the incitement doctrine requires a high standard of imminence to avoid officials using public safety concerns as a reason to suppress controversial speech.

99. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 365 (2003) (describing "political speech [as] at the core of what the First Amendment is designed to protect").

invectives that are commonly recognized as insulting or degrading to a group of people or that promote the idea of superiority of a group over others. It is this category of speech that engenders the most serious debate over the constitutional status of "hate speech" and on which I will focus my attention here.

1. The Problem of Driving Hate Groups Underground

Although today the First Amendment is frequently invoked to protect speech on the right—including alt-right hate speech—many liberal free speech advocates worry that banning hate speech could have unintended consequences and could even hurt the very marginalized groups that the prohibition is intended to protect.[100]

One concern is that banning hate speech will merely drive hate groups underground, where it is more difficult to monitor their conduct and combat their ideas.[101] Without the speech that constitutes the most common evidence of hateful bias, society may become unaware of the need to combat ideas that can give rise to mistreatment. There are, however, important counterarguments to this concern. For instance, one scholar has argued that driving these groups underground deprives them of "the oxygen of publicity and the aura of public respectability," which can "make[] their operations [and recruitment] more difficult."[102]

Banning hate speech and driving groups underground might also have other negative but less appreciated consequences. For instance, those who claim their free speech rights have been denied can claim victim or martyr status, which tends to make them more sympathetic and less accountable. Further, limiting the right to speak can alienate other people—for example, white moderate liberals—who support robust free speech protection but would otherwise be valuable allies of marginalized groups.

2. The Problem of Definition and Vagueness in Speech Laws

A second concern is that robust speech protection has been an indispensable ally in social justice movements. *Tinker* provides a classic example of such an alliance, as *Tinker* involved the use of the First Amendment to protect a liberal protest against the Vietnam War.[103]

100. *See* Floyd Abrams, *Hate Speech: The Present Implications of a Historical Dilemma*, 37 VILL. L. REV. 743, 753 (1992).

101. *See e.g.*, Joanna Plucinska, *Hate Speech Thrives Underground*, POLITICO, https://www.politico.eu/article/hate-speech-and-terrorist-content-proliferate-on-web-beyond-eu-reach-experts [https://perma.cc/WU9P-PDAF] (last updated Feb. 14, 2018, 2:59 PM) ("[W]ith increased scrutiny on mainstream sites, alt-right and terrorist sympathizers are flocking to niche platforms where illegal content is shared freely . . . .").

102. Parekh, *supra* note 58, at 52.

103. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

Numerous other cases leading up to *Tinker* also demonstrate the importance of First Amendment protections of free speech and free association to the advancement of civil rights and justice. In the 1950s and 60s, state courts—mostly in the South—upheld state officials' attempts to sue or prosecute civil rights activists, only to be reversed by the Supreme Court on First Amendment grounds. For example, in *NAACP v. Alabama* ex rel. *Patterson*, the Alabama Attorney General's Office sued the NAACP to prevent them from operating in the state unless they filed certain information with the state government.[104] The state's action would have forced the NAACP either to expose and endanger its members or to stop operating in the state altogether.[105] Fortunately, the Supreme Court held that the First Amendment right of free association (as applied to the states through the Fourteenth Amendment) protected the NAACP from having to turn over a list of its members and other records to the government.[106]

Civil rights and social justice movements have always needed strong free speech protection to survive because these movements challenge the status quo and threaten existing power structures.[107] Nadine Strossen, former President of the ACLU, provides numerous examples of attempts to put down such advocacy by those who loathed it or feared its consequences.[108] For example, she shows that in the early 1800s, Southern states passed laws prohibiting anti-slavery speech, saying it defamed the South and was dangerous because it was likely to cause violent slave rebellions.[109] Additionally, Planned Parenthood's founder Margaret Sanger was imprisoned for advocating for women's rights and reproductive freedom, ideas which many saw as hostile and threatening to traditional religious and moral values.[110]

More recently, the Black Lives Matter movement has been targeted as a potential source of illegal speech. Some people have lobbied the Southern Poverty Law Center, which monitors hate group activity across the country, to designate Black Lives Matter as such a group.[111] The Republican National Committee and some state legislatures also have considered condemning

104. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 451–52 (1958).

105. *Id.*

106. *Id.* at 466. See also, for example, *NAACP v. Claiborne Hardware Co.*, in which a local Mississippi chapter of the NAACP organized a boycott of local businesses that the chapter believed were treating its members unequally. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889 (1982). The lower state court and Supreme Court of Mississippi declared the boycott illegal, but the U.S. Supreme Court overturned the state courts' decision and held that the First Amendment protected the non-violent boycott tactics. *Id.* at 889–91, 895, 915.

107. NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 15–16 (2018).

108. *Id.* at 16–17.

109. *Id.* at 16.

110. *Id.* at 16–17.

111. *See id.* at 17.

Black Lives Matter in the course of discussing proposed resolutions against bigotry and racial hatred.[112]

These examples show the reflexive nature of speech rights. Speech that advocates for civil rights can be characterized as hateful or harmful speech against the ruling class, warranting prohibition. Additionally, it is worth noting that court decisions protecting hate speech have been used as a precedent or reason to protect civil rights and vice versa. The Supreme Court used its 1949 *Terminiello v. Chicago* decision,[113] which protected the free speech rights of a man who made racist and anti-Semitic comments, as a precedent in the 1960's to protect civil rights demonstrations.[114] Moreover, the ACLU won a case in favor of neo-Nazi demonstrators in Skokie, Illinois by arguing that the laws attempting to block those demonstrations "could have been used to stop Martin Luther King, Jr.'s confrontational march into Cicero, Illinois, in 1968."[115] In fact, Dr. King's last speech, which he gave the day before he was killed, was a plea for the First Amendment right to protest:

> All we say to America is, "Be true to what you said on paper." If I lived in China or even Russia, or any totalitarian country, maybe I could understand the denial of certain basic First Amendment privileges, because they hadn't committed themselves to that over there. But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of the press. Somewhere I read that the greatness of America is the right to protest for right.[116]

If speech rights can be applied equally to protect opposing viewpoints, then the corollary is that speech prohibitions can be applied equally to punish them. The University of Michigan's speech code during the 1980's provides a cautionary tale. The code prohibited any speech or conduct "that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion,

112. *See id.*

113. *See* Terminiello v. Chicago, 337 U.S. 1, 3–6 (1949) (reversing a conviction for a breach of the peace because speech that "'invites dispute . . . or creates a disturbance'" violated the constitutional right to freedom of speech).

114. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 552 (1965) ("[A]s in *Terminiello* and *Edwards* the conviction under this statute must be reversed as the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly."); Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963) (citing *Terminiello* and overturning convictions of black civil rights activists for a breach of the peace related to their peaceful protests against segregation and discrimination).

115. *See* STROSSEN, *supra* note 107, at 16.

116. *See* James Hohmann, *The Daily 202: MLK's Final Speech—Delivered 50 Years Ago Today —Was Full of Timely and Timeless Teachings*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/04/03/daily-202-mlk-s-final-speech-delivered-50-years-ago-today-was-full-of-timely-and-timeless-teachings/5ac2ed2c3ofb042a378a303e [https://perma.cc/ZE9G-LRZ7] (emphasis omitted).

sex, sexual orientation," or other characteristics.[117] During the short period that "code was enforced, more than twenty blacks were charged . . . with racist speech. . . . [But] not a single instance of white racist speech was punished."[118] One black student was even punished for using the phrase "white trash" while talking to a white student.[119] Even if the black students were not ultimately punished, the prospect of being charged with racist speech could chill their willingness to speak out.

Likewise, European hate speech restrictions, which are often the envy of anti-hate speech activists,[120] have also been used against underrepresented groups. For instance, "[i]n 2015, France's highest court upheld the . . . conviction[s] of . . . []Palestinian activists [merely] for . . . . [w]earing T-shirts that [said] . . . 'Long live Palestine, boycott Israel,'" on the ground that the messages were anti-Semitic and therefore "provoke[d] discrimination, hatred or violence toward a person or group of people on grounds of their origin."[121] According to an opinion piece in The Guardian, Britain's Public Order Act 1986 allowed one person to be prosecuted for calling Scientology a "cult" and another for criticizing Islamic governments' persecution of LGBT people.[122] And Nadine Strossen has argued that in Canada, "[t]he subjective concepts at the heart of all 'hate speech' laws—in this case, 'degrading' and 'dehumanizing'—empowered police officers, judges, and other officials to target works that were inconsistent with their

117. *See* Doe v. Univ. of Mich., 721 F. Supp. 852, 856, 867–69 (E.D. Mich. 1989) (holding the speech code unconstitutional).

118. Gates, *supra* note 89.

119. *Speech on Campus*, *supra* note 91.

120. *See, e.g.*, Parekh, *supra* note 58, at 52; Julie C. Suk, *Denying Experience: Holocaust Denial and the Free-Speech Theory of the State*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 58, at 144; *see also* Mila Versteeg, *What Europe Can Teach America About Free Speech*, ATLANTIC (Aug. 19, 2017), https://www.theatlantic.com/politics/archive/2017/08/what-europe-can-teach-america-about-free-speech/537186 [https://perma.cc/5LVS-4GUT] (depicting an example of hate speech in America that would not be tolerated in Europe).

121. *See, e.g.*, Glenn Greenwald, *In Europe, Hate Speech Laws Are Often Used to Suppress and Punish Left-Wing Viewpoints*, INTERCEPT (Aug. 29, 2017, 10:42 AM), https://theintercept.com/2017/08/29/in-europe-hate-speech-laws-are-often-used-to-suppress-and-punish-left-wing-viewpoints [https://perma.cc/J375-BAK2]. For another example involving the laws of Hungary, see THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 58, at 1–7 (describing concerns, following the election of a right-wing supermajority in Hungarian parliament in 2010, that "[t]he members of the media board that will implement and enforce the new [hate speech] laws were all appointed by the governing supermajority, raising a threat that enforcement of these provisions will be arbitrary or skewed–for example, the limitations on racist expressions might be applied primarily, or disproportionately, *against* those who would attack racism").

122. *See* Timothy Garton Ash, *Britain Needs More Free Speech. Change This Law Now*, GUARDIAN (June 6, 2012, 2:43 PM), https://www.theguardian.com/commentisfree/2012/jun/06/section-5-harassment-free-speech [https://perma.cc/RZP2-4H4Z] (arguing that although the Public Order Act was "[i]ntended to protect us from harassment," it "has become a licence [sic] for the harassment of ordinary citizens by the police").

own values," and many of these officials "indicated that they considered any depiction of same-sex intimacies to inherently satisfy these criteria."[123]

These examples demonstrate problems inherent in defining who or what hate speech laws are supposed to protect. Furthermore, vagueness in statutory language exacerbate these problems. Prohibitions against speech that is "stigmatizing," "degrading," "insulting," "humiliating," "hateful," or the like are necessarily contextual and defy crisp definition.[124] As a result, they leave room for subjectivity and discretion in their application, which can lead to abuse.

Some have argued that we can avoid these problems by penalizing only speech targeted at "historically oppressed group[s]."[125] However, Henry Louis Gates, Jr. has challenged the feasibility of defining who constitutes a historically oppressed group:

> [T]he test of membership in a "historically oppressed" group is either too narrow (just blacks) or too broad (just about everybody). Are poor Appalachians . . . "historically oppressed" or "dominant group members"? Once we adopt the "historically[] oppressed" proviso, I suspect, it is a matter of time before[] a group of black women in Chicago are arraigned for calling a policeman a "dumb Polak." Evidence that Poles are a historically oppressed group in Chicago will be in plentiful supply: the policeman's grandmother will offer poignant firsthand testimony to that.[126]

The Israeli-Palestinian example, discussed in connection with France's hate speech law above,[127] provides another example of the difficulty of defining who is a historically oppressed group. The Jewish people surely can claim that title, but arguably so can the Palestinians—at least over the past several decades. Likewise, Christians also have been persecuted historically, even

123. STROSSEN, *supra* note 107, at 91.

124. *See, e.g.*, *id.* at 72–73 ("The inescapable fact is that the very subject matter of 'hate speech' laws—a disfavored, disturbing, and feared emotion—is insusceptible to precise, narrow definition. In part for that reason, every campus 'hate speech' code that courts have reviewed has been struck down on vagueness or overbreadth grounds, including codes that were drafted by or with the assistance of faculty First Amendment experts . . . ."); Robert Post, *Legitimacy and Hate Speech*, 32 CONST. COMMENT. 651, 652 (2017) ("One of the difficulties of discussing hate-speech laws is the notorious indeterminacy of their reach." (footnote omitted)). *But see* Parekh, *supra* note 58, at 54 (responding that vagueness and potential abuse are a concern for any area of the law and that "[a]n independent judiciary, a representative legislature, a popularly accountable government, a free press, and so on are our best protection against misuse of laws, including the ban on hate speech").

125. *See, e.g.*, Matsuda, *supra* note 82, at 2357. Building on Delgado's call for a private tort remedy for racist speech, see *supra* note 57, Matsuda "rejects an absolutist first amendment position" and suggests that "public as opposed to private prosecution [] is also an appropriate response to racist speech." *See* Matsuda, *supra* note 82, at 2321.

126. *See* Gates, *supra* note 89.

127. *See supra* note 121 and accompanying text.

though some Christians themselves are guilty of persecuting and provoking others.

3. The Problem of Democratic Legitimacy

Beyond the challenge of defining which groups have been historically oppressed, banning hate speech against these groups also raises other issues. Most fundamentally, does the legitimacy of democratic self-governance require letting all people assert themselves in the democratic process, regardless of their views?[128] Or does it instead require affording greater protection for politically marginalized groups in order to level the playing field in the democratic process?[129] There is typically a good deal of disagreement about whether to enact any particular law, and in a democracy, a law has legitimacy only if there is a basis on which the law can be enforced against those who disagree with it. This legitimacy usually depends on how the law is adopted, including whether it is the result of open debate and fair processes.

4. The Problem of Content and Viewpoint Discrimination

Hate speech laws could also run afoul of First Amendment doctrine. Specifically, they could constitute either content or viewpoint discrimination, which are presumptively unconstitutional in First Amendment jurisprudence.[130]

The constitutionality of such a rule would likely depend on the application of two related Supreme Court cases. In *R.A.V. v. City of St. Paul*,

128. *E.g.*, *Interview with Robert Post*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 58, at 25–26 ("In the abstract, of course, we can say that to the extent that a state firmly commits to a particular identity, so much so that it prohibits persons from thinking or communicating about any other identity, then it *pro tanto* ceases to be a democratic state because it refuses to be responsive to what its citizens are actually thinking and so withdraws from the project of self-governance."); *see* James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 530–31 (2017) (arguing that in a democracy the enforcement of laws against those who disagree with them is legitimate only if they were enacted as the result of unrestricted debate and fair processes); *see also* Ronald Dworkin, *Foreword*, *in* EXTREME SPEECH AND DEMOCRACY v–ix (James Weinstein & Ivan Hare eds., 2009) (similar to Weinstein).

129. *See, e.g.*, Post, *supra* note 124, at 657 ("Of course hate speech itself may damage democratic legitimation. . . . A particularly virulent form of harm is the sense among target groups that they are excluded from, or not entitled to participate in, the relevant demos. To the extent that hate speech instills this sense of marginalization and distrust, it also corrodes democratic legitimation."); *see also* Jeremy Waldron, *The Conditions of Legitimacy: A Response to James Weinstein*, 32 CONST. COMMENT. 697, 699–700 (2017) (arguing that hate speech laws would "contribute positively to democratic legitimacy by" preventing factions from stirring up hatred against each other in the democratic process and that such laws would not completely exclude participation in the democratic process).

130. It might also mean, at least in some cases, that a person's freedom to speak would depend on the person's race, gender, or other characteristics, which could be problematic under the Equal Protection Clause.

the Court reviewed a city ordinance banning symbols or objects—including a burning cross—that would "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[131] The Court held the ordinance unconstitutional, reasoning that it constituted content-based discrimination because it banned only messages about "specified disfavored topics."[132] On the other hand, in *Virginia v. Black*, the Court upheld a law banning cross-burning "with the intent to intimidate."[133] There, the law was permissible because it was intended and likely to be perceived as a threat of violence, not because it was associated with a particular subject matter.[134] These decisions are factually similar, but they had different outcomes based on differences in the proffered governmental reasons for the speech prohibitions.[135] It seems unlikely, however, that even *Black*'s more permissive rule would provide constitutional cover for banning wide-ranging forms of hate speech that do not constitute threats, harassment, or intimidation.

5. The Problem of Public Distrust in Government Enforcement

Finally, even if these hurdles could be overcome, many would not trust the *government* to make and enforce the proper distinctions in speech. Jamal Greene has reported data showing an overwhelming decline over the past 50 years in people's trust in the government to do the right thing, as well as a correlation between that distrust and people's toleration of hate speech.[136] He explains, "[a] people who believe that government usually cannot be trusted will not lightly task that same government with prosecuting citizens for offensive speech."[137] Similarly, Frederick Shauer argues that robust freedom of speech reflects, among other things, "distrust of the ability of government to make the necessary distinctions" and "an appreciation of the fallibility of political leaders."[138]

Recent incidents tend to underscore the pessimism about the government as an "epistemic arbiter" of speech.[139] When Colin Kaepernick, a

131. R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).

132. *See id.* at 391–92.

133. Virginia v. Black, 538 U.S. 343, 363 (2003).

134. *See id.* at 362–63.

135. In *Virginia v. Black*, the Supreme Court attempted to distinguish *R.A.V.* on the ground that the Virginia anti-cross burning statute condemned cross burning with an intent to intimidate generally and did not make distinctions based on views about race, gender, or other "specified disfavored topics." *See id.* at 362 (quoting *R.A.V.*, 505 U.S. at 391).

136. *See* Jamal Greene, *Hate Speech and the Demos*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 58, at 106–07.

137. *Id.* at 106 (footnote omitted).

138. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 86 (1982).

139. This is Brian Leiter's phrase. *See* Brian Leiter, *The Case Against Free Speech*, 38 SYDNEY L. REV. 407, 434 (2016) ("[L]ooking to the State to be epistemically reliable arbiters of speech, with an eye to maximising [sic] social welfare, is a dangerous illusion. Capitalist democracies, given

former quarterback for the San Francisco 49ers, and other players refused to stand during the national anthem at NFL games beginning in 2016, President Trump said they should be fired and "shouldn't be in th[is] country."[140] Kaepernick defended his actions, saying "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color."[141] He later said, "I'm not anti-American . . . I love America. I love people. That's why I'm doing this. I want to help make America better."[142] When Kaepernick was not signed to another contract despite admirable performance statistics, Trump bragged that he was responsible because NFL owners feared public criticism from Trump.[143]

Similarly, in 2018, Republican Kansas Governor Jeff Colyer called for the University of Kansas to remove an American flag painted with an image of a divided United States.[144] The artist had said that her work was meant as a comment on the United States as "a deeply polarized country."[145] Creative Time commissioned the work as part of its series of flags entitled "Pledges of Allegiance."[146] Creative Time issued a statement after the flag's removal that said: "Art has a responsibility to drive hard conversations. . . . '[sic]Pledges of Allegiance' was begun to generate dialogue and bring attention to the pressing issues of the day. The right to freedom of speech is one of our nation's most dearly held values. It is also under attack."[147]

The Governor, by contrast, viewed the artwork as a "disrespectful display of a desecrated American flag" and "demand[ed] that it be taken down immediately."[148] Just hours later, KU Chancellor Doug Girod moved the flag from where it had flown atop a flagpole to an exhibit inside an art museum.[149]

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their pathologies as diagnosed by the Left and the Right, cannot be trusted to do the job." (footnote omitted)).

140. *See* Victor Mather, *A Timeline of Colin Kaepernick vs. the N.F.L.*, N.Y. TIMES, https://www.nytimes.com/2019/02/15/sports/nfl-colin-kaepernick-protests-timeline.html [https://perma.cc/D7Z6-T9HV] (last updated Nov. 20, 2019).

141. *Id.*

142. *Id.*

143. *See* Jemele Hill, *The War on Black Athletes*, ATLANTIC (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/why-trump-targeted-colin-kaepernick/579628 [https://perma.cc/9MSX-QF9S]. Interestingly, The Atlantic reported "[t]he real irony is that as Trump has gleefully claimed victory for forcing Kaepernick's unemployment, the president also may have gift-wrapped a winning case for the athlete" in his grievance case against the NFL. *See id.*

144. *See* Katy Bergen, *KU Flag Removal 'Smacks of Censorship': ACLU, Free Speech Advocates Defend Art Piece*, KANSAS CITY STAR, https://www.kansascity.com/news/politics-government/article214761030.html [https://perma.cc/44RQ-XSVB] (last updated July 12, 2018, 7:59 PM).

145. *See id.*

146. *See id.*

147. *Id.*

148. Emma Whitford, *The Flag and Free Expression*, INSIDE HIGHER ED (July 13, 2018), https://www.insidehighered.com/news/2018/07/13/university-kansas-removes-art-after-governor-finds-it-disrespectful-was-about-public [https://perma.cc/G6LJ-SURF].

149. Bergen, *supra* note 144.

Although the Chancellor cited safety concerns for the move, free speech advocates "said the decision 'smacks of censorship.'"[150]

At worst, these conservative attacks on liberal speech are blatant hypocrisy. After all, "[o]f late, Republican politicians have generally portrayed themselves as champions of unabashed free speech on campus."[151] For instance, just a year before his comments criticizing Kaepernick's activism, Trump had blasted the University of California, Berkeley because of campus protests there against Milo Yiannopoulos.[152] He later issued an executive order barring colleges from receiving federal funds if they unduly restrict free speech on their campuses.[153] In words that could have described his very own bullying of Kaepernick, he said "universities ha[d] tried to restrict free thought, impose total conformity, and shut down the voices of great young Americans."[154]

At best, these incidents show that officials are imperfect humans who are often unable to see how meaning and message are relative to their own place in the world. White, male, conservative officials may regard the flag as a tribute to members of the military who have served their country, and therefore see painting on that flag, or failure to salute the flag, as disrespecting that patriotic sacrifice. By contrast, young black athletes might see the flag as a symbol of the country's high ideals of freedom and equality, and therefore see kneeling before it as a patriotic attempt to draw attention to the ways in which current practices do not live up to those ideals.

However one characterizes such incidents, they demonstrate the problem of allowing elected officials to determine which speech should be protected. Although student activists might trust their *universities* to draw the "right" lines (from their point of view) on free speech, they do not seem to realize that universities are answerable to higher state and federal officials, whom they might not trust and whose politics may change dramatically in a single election cycle. The First Amendment is partly about being able to speak truth to power, and who is in power at any given time—as in the transition from President Obama to President Trump—can change dramatically in a short period of time.

Ultimately, the distrust of government to pick and choose which speech should be protected highlights the virtue of the First Amendment's principle

150. *Id.* (describing reaction of executive director of the Kansas ACLU). FIRE also criticized KU's decision to remove the flag, saying that universities often use safety concerns as a justification for censorship but it often turns out just to be a public relations move. Whitford, *supra* note 148.

151. *Id.*

152. *See* Osita Nwanevu, *Trump's Free-Speech Executive Order and the Right's Fixation on Campus Politics*, NEW YORKER (Mar. 22, 2019, 2:18 PM), https://www.newyorker.com/news/current/trumps-free-speech-executive-order-and-the-rights-fixation-with-campus-politics [https://perma.cc/F82N-AZWT].

153. *See id.*

154. *See id.*

of content neutrality. Content neutrality prohibits the government from discriminating against protected speech based on its content, no matter what the message is or where the speaker falls on the political spectrum.[155]

6. Is the University a Special Case?

Even if hate speech can be regulated in some aspects of American life, the question remains whether it can or should be restricted in institutions of higher learning.

The university's academic mission makes it a special case, but not an easy one. On the one hand, Mari Matsuda has argued that the university setting presents a good case for punishing hate speech because students are young, vulnerable, and essentially a captive audience while at the university.[156] One can also see how students' exposure to hateful speech in their dorm room, classroom, or elsewhere on campus could significantly affect their ability to learn, contrary to the academic mission of the university.[157] Students' distance from home, family, and traditional support networks can exacerbate these effects.

On the other hand, the mission of higher education is to create and disseminate knowledge by fostering a robust exchange of ideas. Thus, most universities are strongly committed to academic freedom, which is sometimes in tension with making students comfortable in their learning environment. Faculty strive to challenge students' existing beliefs, expose them to new ideas, and prepare them for the world they will enter upon graduation. Faculty efforts to provoke debate can sometimes offend students, which raises issues of the scope of academic freedom.

Although there are few clear rules, existing case law suggests that the Court would protect such speech in most cases. The Supreme Court has said that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[158] And thus, "[academic] freedom is . . . a special concern of the First Amendment."[159]

155. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that "[t]he principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys" (citation omitted)).

156. *See* Matsuda, *supra* note 82, at 2370–71.

157. *See generally* Delgado & Stefancic, *Four Observations*, *supra* note 60 and accompanying text (discussing how hate speech can result in impaired performance at school and work).

158. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see also* Healy v. James, 408 U.S. 169, 180–81 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." (citation omitted)).

159. *See Keyishian*, 385 U.S. at 603. While there is some debate about whether academic freedom is an enforceable, individual First Amendment right, it has at least been treated as an important First Amendment value warranting consideration in free speech issues affecting

Tinker also described the classroom as "*peculiarly* the 'marketplace of ideas[,]'" and said that "[t]he Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas."[160] *Barnette* espoused a similar view about the importance of free expression in the mission of education. The *Barnette* Court reasoned that the fact that school authorities "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[161]

College is a transformative time for young people, and, as the *Tinker* Court observed, students learn from their fellow students as well as from their teachers. For many students, college is the first time they have lived and learned among students of diverse races, religions, backgrounds, and political perspectives. If universities create the right environment, they might do more to reduce hateful beliefs and intolerant attitudes through education than through outright prohibitions and punishment.[162]

IV. TOWARD A POSITIVE VIEW OF FREE SPEECH ON COLLEGE CAMPUSES

In free speech jurisprudence, the government's role is often framed in the negative—the government's main responsibility is to *do nothing*. If we accept that banning hate speech is off the table, at least for the moment, we can start to reimagine speech and the government's role in speech in a more positive way. That new vision starts by questioning implicit assumptions in First Amendment jurisprudence in order not only to combat hate speech and the harm it causes, but also to enhance the marketplace of ideas and the liberty to speak for all.

Building on the work of other First Amendment scholars, I want to suggest two overarching principles that can radically reshape the way we think about free speech and the government's responsibility for ensuring it.

college professors. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (acknowledging "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests" and explicitly declining to "decide whether the analysis we conduct [in the present case] would apply in the same manner to a case involving speech related to scholarship or teaching").

160. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (emphasis added).

161. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). The *Barnette* Court held that the Constitution protected the students' refusal to salute the flag. It is worth noting how similar the students' expression there was to Kaepernick's recent refusal to stand during the national anthem, indicating the continued relevance of the World War II-era case to advocacy and young people in modern times.

162. *See, e.g.*, STROSSEN, *supra* note 107, at 157–82 (providing numerous examples of non-censorial means of addressing hate speech, including education, that can be more effective than governmental bans).

A. SPREADING THE BURDENS OF FREE SPEECH

As the First Amendment is currently understood, there is a sharp asymmetry in the benefits and burdens of free speech. Free speech benefits the public as a whole, but when that speech injures a particular person, that individual alone must bear the costs. As Frederick Schauer has argued, this model of speech protection is both unnecessary and undesirable:

> [E]xisting understandings of the First Amendment are based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay it. This assumption, however, seems curious. It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries. And when in some situations those who bear the cost are those who are least able to afford it, there is even greater cause for concern. If free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech.[163]

This asymmetry is a natural consequence of the negative view of free speech. If the government can play no role in regulating speech, then of course the burdens of speech fall where they may, which usually means on the targets of harmful speech. For instance, tort law, the area of law most directly responsible for compensating victims for harms done to them, cannot constitutionally redress harms caused by protected speech. The victims of harmful speech must bear the costs of speech because there is no legal mechanism for redistributing them.

So, is there a way that the government can distribute the costs of free speech without subjecting speakers to tort liability or other penalties for engaging in protected speech? Consider Mark Tushnet's observation that when the government pays for police security for controversial speakers that might provoke violence, it constitutes public subsidization of the costs of free speech.[164] This security protects the safety of not only the individual speaker but also of the audience members and passersby. Thus, the public is providing resources to prevent or reduce the harm of free speech to those most likely to suffer it.

Likewise, there are several things universities can do to prevent or mitigate the harm of hate speech to marginalized groups. When state universities invest in these measures using taxpayer and tuition dollars, the community at large shares in the burdens of free speech.

For instance, similar to paying for security, universities can invest in other creative ideas—such as alternative programming or entertainment—to keep the campus safe during particularly dangerous speaker events. Although

163. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992).

164. *See id.* at 1355 n.108.

universities generally should strive for peaceful engagement and civil debate across differences, they might understandably try to avoid violent confrontations at events with extreme speakers. The Southern Poverty Law Center, which has a long and venerable history of monitoring hate groups around the country, has advised against engagement with these speakers.[165]

There are also less direct but equally compelling ways to mitigate the harm of hate speech to targeted marginalized groups. The research website fivethirtyeight.com sorted through and categorized the demands made by students at 51 U.S. campuses where racial protests had occurred.[166] Interestingly, only seven of the 51 schools included speech restrictions in their demands, causing it to come in at number 12 out of 13 demands.[167] "The most common demand[] [was] to increase the diversity of [faculty] . . . ."[168] Students at "38 [out] of 51 schools" listed increased faculty diversity among their demands, making it over five times more important to the affected students than speech restrictions.[169] Similarly, students at 21 schools wanted to increase the diversity of the student body.[170] Funding for cultural centers was listed for 25 schools and expanding mental health resources was included for 15 schools.[171]

Clearly, all these initiatives are valuable and worth doing outside the context of the hate speech issue, and I do not suggest that such initiatives should be treated as merely a cost or byproduct of protecting free speech. I do suggest, however, that university administrators need to think honestly and holistically about how budgetary and policy decisions instantiate university commitments to the academic mission, free speech, and diversity, equity, and inclusion. Strategic investment in faculty and student recruitment, as well as other support mechanisms, can help to achieve a more diverse and inclusive

165. *See The Alt-Right on Campus: What Students Need to Know*, S. POVERTY L. CTR. (Aug. 10, 2017), https://www.splcenter.org/20170810/alt-right-campus-what-students-need-know [https://perma.cc/7RTB-TF67]; *see also* Chris Quintana, *An Anti-Hate Group Has This Advice for When the Alt-Right Comes to Campus*, CHRON. HIGHER EDUC. (Aug. 10, 2017), https://www.chronicle.com/article/An-Anti-Hate-Group-Has-This/240901 [https://perma.cc/4WN4-KL7R] (providing "advice for students on how best to respond when a controversial speaker from the alt-right comes to campus"). Engaging with these speakers not only risks violence but also gives them greater exposure and allows them to play the victim. *See* Quintana, *supra*.

166. *See* Leah Libresco, *Here Are the Demands from Students Protesting Racism at 51 Colleges*, FIVETHIRTYEIGHT (Dec. 3, 2015, 11:29 AM), https://fivethirtyeight.com/features/here-are-the-demands-from-students-protesting-racism-at-51-colleges [https://perma.cc/L75A-U4KZ] (analyzing data from the 51 schools listed as of 2015 on TheDemands.org website, which now lists demands from over 100 colleges and universities).

167. *See id.* Of course, it is possible that the students did not list speech prohibitions in their top demands because they knew the First Amendment would not allow it. Nevertheless, the non-speech demands are clearly important to these students.

168. *Id.*

169. *See id.*

170. *See id.*

171. *See id.*

campus where all students feel empowered to engage in the kind of robust debate that the First Amendment protects and that universities are designed to foster.

Moreover, when underrepresented minority students and others feel that the university is truly invested in them, they can more easily dismiss or discount hateful rhetoric as aberrant. In addition, being able to talk to faculty role models, student life administrators and staff, mental health counselors, and other underrepresented minority students can help to reduce the impact of hate speech when it occurs and empower students to respond with more speech.

1. Bias Response Teams

The idea of spreading the costs of free speech in order to provide public support for those harmed by hate speech might also lead us to think differently about existing debates. Consider the controversial example of bias response teams. Bias response teams are typically groups of people who receive reports of offensive conduct or speech, such as hate speech, on college campuses.[172] They exist in some form on more than a third of college campuses, but there is a wide variation regarding the name, composition, and activities of these teams.[173] Bias response teams have been heavily criticized as antithetical to free speech and the educational mission on the ground that they punish or chill free expression.[174]

According to the FIRE Bias Response Report from 2017, nearly half of these teams include members of law enforcement while only about a quarter include faculty.[175] This composition raises concerns about chilling speech and impairing academic freedom.[176]

Every team solicits "reports of bias concerning race or religion, and most invite reports concerning sex, sexual orientation, gender identity or expression, . . . and so on."[177] Interestingly, 14 percent of these teams also invite bias reports related to "political affiliation."[178] This category may result from a well-intended desire to allow political conservatives to report bias when they feel targeted on liberal-leaning campuses. Nevertheless, it raises concerns

172. *See* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (FIRE), BIAS RESPONSE TEAM REPORT 2017, at 6 (2017) [hereinafter FIRE], *available at* https://www.thefire.org/presentation/wp-content/uploads/2017/03/01012623/2017-brt-report-corrected.pdf [https://perma.cc/5X29-XSG7].

173. *See id.* at 7.

174. *See, e.g.*, *id.* at 20–23; Joseph W. Yockey, *Bias Response on Campus*, 48 J.L. & EDUC. 1, 18–26 (2019) (describing a variety of potential negative effects of bias response teams).

175. FIRE, *supra* note 172, at 8.

176. *See id.*

177. *Id.* at 7.

178. *See id.*

about chilling political speech, which, as previously discussed, receives the strongest First Amendment protection.

Many policies define reportable "bias incidents" broadly. FIRE's report concludes that "[t]he net effect is that broad definitions of 'bias' invite reports of any offensive speech, whether or not it is tethered to a discernable form of bias, thereby inviting scrutiny of student activists, organizations, and faculty engaged in political advocacy, debate, or academic inquiry."[179] Yet, the report observes that only about half of the institutions surveyed "acknowledged freedom of speech, freedom of inquiry, or academic freedom in the descriptions or policies of their Bias Response Teams."[180]

Clearly, bias response teams vary widely, and some of them raise legitimate and serious concerns related to freedom of speech and academic freedom. However, by recognizing the need to spread the costs of free speech in order to provide support to those affected, we might see positive potential for these programs if modified appropriately. We might recognize the need to provide some kind of support system to mitigate harm by providing a sympathetic ear and other resources to the reporting party, or to use the reported data to educate the campus on norms of equity, inclusion, and civility. Such a support system could even play a valuable role in encouraging counterspeech and in helping those injured by speech to understand how the First Amendment constrains a university's ability to punish the speech.

If a university chooses to have such a reporting system, it should invest in thoughtful policies and processes to reduce conflicts with free speech and academic freedom. First, in composing its team, the university should favor faculty and staff over law enforcement members. Second, the university should train responsible personnel on what constitutes protected speech and on appropriate responses. Except in cases involving true threats, harassment, or other unprotected speech, appropriate responses to reports of harmful speech should focus on supporting the reporting party, not on punishing or correcting the reported speaker.[181] Indeed, a university risks litigation if it does otherwise. The Sixth Circuit recently held that even where corrective actions (such as an invitation to meet with the reported speaker) fall short of actual discipline, they can still chill speech, and this injury is sufficient to give the speaker standing to challenge the constitutionality of the program.[182]

179. *Id.*

180. *Id.* at 8.

181. *See id.* at 28 ("Universities would do best to focus on how they can help the reporting student, not on the reported speaker. Unless a community member has engaged in conduct *unprotected* by the First Amendment or academic freedom, any institutional response to bias should avoid uninvited intervention with the speaker and instead focus on providing resources to the reporting student.").

182. *See* Speech First, Inc. v. Schlissel, 939 F.3d 756, 765–66 (6th Cir. 2019) (response team's invitation to meet with reported speaker, coupled with ability to refer the speaker to university disciplinary office or police, objectively chills speech giving rise to sufficient threat of harm for purposes of establishing standing).

Third, the university should include a statement about freedom of expression and academic freedom prominently on the website or other portal where reports are made. Consider the University of Iowa's statement on its Campus Inclusion Team website:

> As an educational and research institution, the University of Iowa is also fully committed to free inquiry and vigorous debate. Free expression, academic freedom, and diversity of perspectives are all crucial to the fulfillment of our core mission. The robust exchange of diverse ideas is the essence of a public research university.
>
> Our commitments to free expression and an inclusive community are not mutually exclusive. Indeed, throughout our nation's history, the rights of free speech and association have been indispensable to the causes of civil rights, justice, and equality. Likewise, academic freedom has allowed faculty, primarily through teaching and research, to challenge entrenched ideas and assumptions without fear of reprisal.
>
> While free expression and inclusion ordinarily go hand in hand, we acknowledge that one person's free speech may sometimes cause another to feel disrespected, excluded, or unwelcome on our campus. The CIT provides resources and support for those who are hurt by another's words or actions. Consistent with constitutional law and other principles, however, the university does not investigate or punish speech unless the speech constitutes harassment, intimidation, or another violation of university policy. In this way, the University of Iowa stands firmly behind principles of free speech and academic freedom while it strives to create a caring and inclusive environment for all students, staff, and faculty.[183]

Fourth, the university should think carefully about the language it uses in describing the team and its scope of responsibilities. As Professor Joseph Yockey has written, "[c]ouching the program as a 'response team' . . . brings to mind a policing or disciplinary function. Common . . . terminology that refers to parties as 'perpetrators,' 'victims,' and 'investigators'—along with the fact that many teams include members from law enforcement—further reinforces this perception."[184]

183. Campus Inclusion Team, *Freedom of Expression*, U. IOWA, https://inclusionteam.uiowa.edu/freedom-of-expression [https://perma.cc/23J6-WRRJ].

184. Yockey, *supra* note 174, at 40. Professor Yockey also suggests limiting the definition of bias incidents to legally-recognized categories of bias and to situations in which speech or conduct is so "severe" or "pervasive" that it "substantially interfere[s] with" another's educational experience. *See id.* at 43. Yockey quotes from two cases in which the Supreme Court defined actionable harassment in the educational context. Because harassment typically crosses the line into a campus conduct code violation, however, it will often invoke more formal disciplinary

Universities must treat bias reporting programs with care to avoid punishing or chilling protected speech. If done correctly, however, these programs might help to mitigate the harm of hate speech and educate campuses on the relationship between the values of free speech and diversity, equity, and inclusion. As such, this example helps to illustrate how a positive perspective of speech might lead us to rethink the government's role in distributing and mitigating the burdens of speech.

The bottom line is that if society as a whole benefits from speech, then society as a whole should bear the costs of that speech. By thinking creatively and positively about free speech and the government's role in it, we can spread the costs of free speech through public subsidization of measures that would mitigate the harm to particular targeted individuals and groups.

B. TAKING "MORE SPEECH" SERIOUSLY

For all the emphasis on the "more speech" principle in First Amendment jurisprudence, it is striking how this principle is typically described in negative terms—it is what should happen *instead of government regulation*. In practice, this has traditionally meant that government must get out of the way and leave the targets of hate speech to fend for themselves.[185] Courts and government officials rarely talk about "more speech" as a *positive* goal that requires effort and resources to achieve.

What would it look like if universities took the "more speech" principle seriously? Coupled with the previous suggestion to spread the costs of free speech, it would mean intentionally devoting resources to diversify the faculty and student body, encourage speech, and enhance the marketplace of ideas on college campuses. For example, universities could develop curricula to explore the First Amendment and the "more speech" principle in freshman Rhetoric or other classes. They also could provide training for faculty and students in how to facilitate and engage in challenging conversations generally, including around issues of race, gender, sexual orientation, religion, and so on.

In addition, universities could instruct or encourage their lecture committees to put together more multi-speaker events such as debates and panel events. Hosting multiple speakers at a time would facilitate dialogue on important issues of the day as well as model informed and civil debate on controversial subjects. These events would also encourage audience members to listen to opposing points of view that they might ordinarily avoid because they only attend events with a speaker with whom they know they agree. It

procedures than bias reporting structures typically provide. The issue is how to respond to harmful speech that does not rise to the level of a conduct code violation.

185. *See generally* Katharine Gelber, *Reconceptualizing Counterspeech in Hate Speech Policy (With a Focus on Australia), in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 58, at 198, 210, 215–16 (observing that the conception of counterspeech in the free speech debate is "unnecessarily narrow" and arguing for a broader conception of "supported counterspeech").

is also possible that by hosting different kinds of speakers—including, for example, more mainstream conservatives—universities might make themselves less of a target for hate groups.

University administration might also play a direct role in encouraging more speech. As discussed earlier, one of the criticisms of the "more speech" principle for addressing hate speech is that marginalized groups often feel less empowered to speak back. Administrative offices like the Office of the Ombudsperson, a Diversity Resource Center, or a modified bias reporting program could educate individuals in counterspeech. For example, they could train students in how to talk directly to fellow students or faculty about speech they feel has harmed them in some way.

Finally, university administrators should also engage in "more speech" themselves in order to reaffirm the university's commitment to community values. The Supreme Court has consistently upheld the government's right to do so in its government speech jurisprudence. Some scholars have argued that university officials should refrain from making public statements on issues because taking an institutional position might stifle debate among individuals on campus.[186] Although this might make sense with regard to universities taking a position on, say, the conflict in the Middle East, it seems an unnecessarily cramped view with regard to issues directly affecting the campus community. When community members or visitors speak in a way that clearly violates established campus values, a university should be free to condemn that speech in a message of its own.

In making public statements about hateful messages on campus, administrative officials should refrain from repeating the content of those messages. Oftentimes, it is a very small number of people who are spreading the hateful messages, and sometimes those people are not even part of the campus community. Thus, the administration should be careful not to inadvertently give the speaker a wider audience or inflict additional harm on targeted individuals or groups.

Of course, the university must also refrain from punishing protected speech. It is critical that universities protect speech consistently and evenhandedly regardless of whether the speech comes from the left or the right. Protecting liberal speech but not conservative speech, or vice versa, can lead to charges of hypocrisy and undermine the administration's credibility as a champion of free speech, academic freedom, and higher education.

Rather, the university should consistently press two messages simultaneously: first, that it stands firmly behind everyone's right to speak freely without fear of punishment; and second, that it disagrees with hateful

186. *See, e.g.*, GEOFFREY R. STONE, SPEAKING OUT! REFLECTIONS ON LAW, LIBERTY AND JUSTICE 434 (2010) (arguing that individual faculty members, students, staff, and others are free to state their own personal positions but that the university itself should not take an official position that might "stifle" debate).

speech and reaffirms its institutional commitment to clearly established community values, such as treating one another with mutual respect. When possible, these messages should come from the President or Chancellor in order to reinforce their importance and consistency across campus.[187] By guaranteeing the right of free speech for all speakers while also reaffirming university values, university officials can protect individual speech rights, mitigate the harm of hate speech, and contribute to more speech and the marketplace of ideas.

V. CONCLUSION

Fifty years ago, the *Tinker* case confirmed the free speech rights of students and proclaimed that the classroom is "peculiarly the marketplace of ideas." Upholding the students' right to protest the Vietnam War, *Tinker* was one of many Supreme Court decisions to establish the First Amendment as an ally in movements for freedom, justice, and equality.

Today, by contrast, free speech has become a mantra for alt-right groups who want to spread hateful messages on college campuses. Although hate speech is clearly harmful, eradicating it is difficult. Laws prohibiting hate speech might discriminate on the basis of content or viewpoint and are also often subjective and vague. Thus, even well-intended efforts to limit hate speech have often been turned against the very marginalized groups they were expected to protect.

Although banning hate speech may not be feasible, there are alternative ways to think about free speech, even within the existing framework, that can ameliorate much of the damage that hate speech causes. First Amendment canon holds that the answer to speech you do not like is not suppression but "more speech." As it has been interpreted, however, this is a negative view of free speech in which the government's role is mainly to get out of the way and let the chips fall where they may.

I argue for a more positive, dynamic view of the government's role in enhancing free speech. Under this view, universities can protect the free speech rights of all individuals, mitigate the harm hate speech causes to specific groups and individuals, and actively encourage a more robust marketplace of ideas on their campuses.

187. For example, University of Florida President Kent Fuchs spent many thousands of dollars on security in order to allow Richard Spencer to speak there, but "[he] tweeted, 'I don't stand behind racist Richard Spencer. I stand with those who reject and condemn Spencer's vile and despicable message.'" Bauer-Wolf, *supra* note 7.