

force of law to silence dissenting views, the law would hegemonically impose the perspective of only *some* women.

The same logic, I believe, holds true for racial groups. We must distinguish race as a biological category from race as social category. Even if unfortunately "the attempt to establish a *biological* basis of race has not been swept into the dustbin of history,"¹⁵⁴ it would nevertheless be deplorable to construct First Amendment principles on the basis of a biological view of race. What is most saliently at issue is rather "race as a social concept": "The effort must be made to understand race as an *unstable and 'decentered' complex of social meanings constantly being transformed by political struggle.*"¹⁵⁵ To the extent that the social meaning of race is thus profoundly controversial¹⁵⁶—and it is controversial not merely for members of minority groups but also for the entire nation¹⁵⁷—the individualist premises of public discourse will ensure that it remain open to democratic constitution.

This lack of closure may of course be threatening, for it casts the creation of group identity upon the uncertain currents of public discourse. The safe harbor of legal regulation may, by contrast, appear to promise members of minority groups more secure control over the meaning of their social experience. But that promise is illusory, for it is profoundly inconsistent with the analysis of racism prevalent in the contemporary literature. To the extent that racism is viewed as pervasive among whites, and to the extent that whites, as a dominant group, can be expected to hold the levers of legal power, there would seem little reason to trust the law to establish socially acceptable meanings for race. Such meanings cannot be determined by reference to easy or bright-line distinctions, as for example those between positive or negative ascriptions of group identity. The work of figures as diverse as William Julius Wilson,¹⁵⁸ Shelby Steele,¹⁵⁹ and Louis Farrakhan¹⁶⁰ illustrates how highly critical characterizations of racial groups can nevertheless serve constructive social purposes. To vest in an essentially white legal establishment the power to discriminate authoritatively among such characterizations and purposes would seem certain to be disempowering.¹⁶¹

The conclusion that group harm ought not to justify legal regulation is reflected in technical First Amendment doctrine in the fact that virtually all communications likely to provoke a claim of group harm will be privileged as assertions of evaluative opinion.¹⁶² The following language, for example, gave rise to legal liability in *Beauharnais*: "If persuasion

and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL."¹⁶³ Justice Frankfurter interpreted this language as false factual assertion: "No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana."¹⁶⁴ This interpretation, however, seems plainly incorrect. To accuse an individual of using marijuana is to assert that she has committed certain specific acts. To accuse the group "African Americans" of using marijuana, however, is not to make an analogous assertion. Some African Americans will have used marijuana, and most will not have. The question is thus not the existence of certain specific acts, but rather whether those acts can appropriately be used to characterize the group. The fundamental issue is the nature of the group's identity, an issue that almost certainly ought to be characterized as one of evaluative opinion.

Because the social meaning of race is inherently controversial, most statements likely to give rise to actions for group harm will be negative assessments of the identity of racial groups, and hence statements of evaluative opinion. No serious commentator would advocate a trial to determine the truth or falsity of such statements; the point is rather that such statements should not be made at all because of the deep injury they cause. But in a context where group identity is a matter for determination through political struggle and disagreement, the hypostatized injury of a group cannot, consistent with the processes that instantiate the principle of self-determination, be grounds to legally silence characterizations of group identity within public discourse.

Commentators who stress the theme of group harm vigorously emphasize the fact that racist speech does not injure random groups; it damages precisely those groups who have historically suffered egregious oppression and subordination.¹⁶⁵ But although the tragedy of this fact is obvious, its constitutional implications are not. Our history certainly warrants the assumption that racist speech will inflict terrible injuries on victim groups. But the question is whether these injuries are so unspeakable as to justify suspending the democratic constitution of group identities. One approach might be to avoid this tension by characterizing the injuries of racist speech in such a way that their legal redress would actually be required by the principles of public discourse. Thus it can be argued that the stigmatizing and disabling effects of racist speech effec-

tively exclude its victims from participation in public discourse. This approach suggests an important line of analysis, but I will defer consideration of it until part 3(D), where it can be placed in the context of other justifications for restraints on racist speech that turn on harms to the marketplace of ideas.

Another method of avoiding the tension between group harm and democratic principles would be to claim that racist speech ought to be characterized as a "mechanism of subordination" within a larger system of suppression, rather than as a form of communication.¹⁶⁶ This claim requires us to determine the criteria by which speech can be designated as action and hence excluded from public discourse. The standard implicitly advanced by the claim is that if communication is intimately connected to larger social relationships that are deeply undesirable, the communication can for that reason be characterized as action.

The difficulty with this standard is that all communication grows out of and embodies social relationships; for this reason all communication is both speech and action. The function of public discourse is to create a protected space within which communication, even if embodying social relationships, can be protected as speech if formulated and disseminated in ways relevant for democratic self-governance. Such a space opens up the possibility of subjecting social relationships to rational reflection, dialogue, and *self-control*. It thus enables "self-rule" to be reconciled with rule "by laws."¹⁶⁷ If communication could be excluded from this space because it embodies social relations of which we disapprove, public discourse could no longer perform this function. There is no difference between excluding speech from public discourse because we condemn the social relationships it embodies, and excluding speech from public discourse because we condemn the ideas by which those social relationships are embodied. In the end, therefore, the argument that racist speech is a form of action reduces to the claim, which we have already considered, that racist speech ought to be restrained because of its inconsistency with the egalitarian ideals of the Fourteenth Amendment.

C. Public Discourse and Harm to Individuals

There appear at first blush to be important differences between claims of group harm and claims of individual harm. To the extent group identity

is understood to be a matter of political struggle (and hence dialogic interaction), speech containing negative ascriptions of that identity cannot be censored without undermining the democratic nature of that struggle. But individual identity does not seem to rest on political struggle and dialogue in this way. Indeed, one's spontaneous image is of fully formed individuals entering the realm of public discourse to reach agreement on issues that concern their collective, rather than personal life. Speech damaging personal life can thus be restricted without undercutting the very purposes of public discourse.

This perspective, however, rests on a rather sharp distinction between individual and collective identity, a distinction that simply cannot be maintained. The very reason that racist speech harms individual persons is because it so violently ruptures the forms of social respect that are necessary for the maintenance of individual personality. These forms of respect, when taken together, constitute a collective, community identity. Hence the state can prevent the individual harm caused by racist speech only by enforcing pertinent standards of community identity. The interdependence of individual and collective identity is thus presupposed in the very concept of individual harm.

This interdependence lies behind the well-established constitutional prohibition on restricting public discourse because it is "offensive"¹⁶⁸ or "outrageous,"¹⁶⁹ or because it affronts "dignity" or is "insulting" or causes "public odium" or "public disrepute."¹⁷⁰ Such speech causes intense individual suffering because it violates community norms, yet the Court has required its toleration in order to prevent the state from using the authority of law to enforce particular conceptions of collective life.¹⁷¹

Questions of personal identity are in fact always at stake in discussions of collective self-definition. For this reason effective political dialogue requires that participants be constantly willing to be transformed. As Frank Michelman points out, public discourse is impossible so long as "the participants' pre-political self-understandings and social perspectives must axiomatically be regarded as completely impervious to the persuasion of the process itself."¹⁷² As our collective aspirations change, so will our respective personal identities. Thus restrictions on public discourse designed to protect those identities from harm will necessarily also restrict self-determination as to our collective life. If group harm is an inevitable price of the political constitution of group identity, individ-

ual injury is an unavoidable cost of the political constitution of community identity.

It is important to emphasize the narrowness of this conclusion. In recent years an important theme of our national life has been the opposition to racism. We have enacted that opposition by legally regulating racist behavior such as discrimination. Because action both creates and manifests identity, this regulation inhibits the formation and expression of racist identities. So also does regulation prohibiting certain kinds of racist communication in nonpublic speech, as for example in the workplace.¹⁷³ In effect we have determined to use government force to reshape community institutions in order to combat racism. This is an appropriate and laudable use of democratic power.¹⁷⁴ But it is legitimate precisely because we have adopted it in a manner consistent with the principle of self-determination; it reflects a national identity that we have freely chosen.

This legitimacy is made possible by public discourse, which serves the value of self-determination because it is so structured that every call for national identity has the opportunity to make its case. There is a significant difference, therefore, between proscribing racial insults directed toward individuals in the workplace¹⁷⁵ and proscribing them in a political discussion or debate.¹⁷⁶ The harm to the individual victim may be the same, but for public discourse to enable self-government, racist speech within that discourse must be repudiated on the merits, rather than be silenced by force of law.

D. Public Discourse and Harm to the Marketplace of Ideas

The most effective arguments for regulating racist speech are those that double back on the concept of public discourse itself and contend that such regulation is necessary for public discourse truly to instantiate the principle of self-determination. On the surface there appear to be two distinct lines of analysis. The first stresses the irrational and coercive qualities of racist speech, the second the untoward effects of racist speech in silencing victim groups. In the end these lines of argumentation cross and depend upon each other.

Racist Speech as Irrational and Coercive. Public discourse must be more than simply a register of private preferences in order to serve as a

medium for the enactment of collective autonomy. If persons communicated in public discourse merely through polling organizations to make known their "votes" on public issues, democracy would degenerate into the heteronomous system of majoritarian rule described by Schauer. The purposes of collective self-determination require instead that public action be founded upon a public opinion formed through open and interactive processes of rational deliberation. The argument that racist speech is irrational and coercive, that it is nothing more than a kind of "linguistic abuse (verbal abuse on an unwilling target),"¹⁷⁷ thus cuts to the very root of public discourse.

The argument, however, points to a more general problem, for all communication that violates civility rules is perceived as both irrational and coercive.¹⁷⁸ Because civility rules embody the norms of respect and reason we are accustomed to receive from members of our community, communication inconsistent with those rules is experienced as an instrument "of aggression and personal assault."¹⁷⁹ The argument from coercion and irrationality thus poses a generic dilemma for First Amendment doctrine. If the state were to be permitted to enforce civility rules, it would in effect exclude from public discourse those whose speech advocated and exemplified unfamiliar and marginalized forms of life. But if the state were to suspend the enforcement of civility rules, it would endanger the possibility of rational deliberation by permitting the dissemination of abusive and coercive speech. This tension between the requirement that self-government respect all of its citizens "as free and equal persons," and the requirement that self-government proceed through processes of rational deliberation, creates the paradox of public discourse.¹⁸⁰

It might be thought that the specific case of racist speech dissolves this paradox, for such speech by hypothesis violates norms of both equality and civility and hence appears to be suppressible without harm to public discourse. But this conclusion is not accurate. The principle of equality at issue in the paradox of public discourse is formal; its extension to all persons is the fundamental precondition of the possibility of self-government. To the extent that the principle is circumscribed, so also is the reach of self-determination. The norm of equality violated by racist speech, on the other hand, is substantive; it reflects a particular understanding of how we ought to live. It is the kind of norm that ought to emerge from processes of public deliberation. Although the censorship

of racist speech is consistent with this substantive norm of equality, it is inconsistent with the formal principle of equality, because such censorship would exclude from the medium of public discourse those who disagree with a particular substantive norm of equality. Such persons would thus be cut off from participation in the processes of collective self-determination.

First Amendment doctrine has tended to resolve the paradox of public discourse in favor of the principle of formal equality, largely because violations of that principle limit *pro tanto* the domain of self-government, whereas protecting uncivil speech does not automatically destroy the possibility of rational deliberation. The visceral shock of uncivil speech can sometimes actually serve constructive purposes, as when it causes individuals to question the community standards into which they have been socialized, and hence enables them, perhaps for the first time, to acknowledge the claims of others from radically different cultural backgrounds.¹⁸⁷ There is in fact a long tradition of oppressed and marginalized groups using uncivil speech to force recognition of the intensity and urgency of their needs.¹⁸²

Tolerating uncivil speech, moreover, does not necessarily undermine the process of rational deliberation, so long as the extent of such speech is confined and does not infect the process as a whole. The judgment that rational deliberation can continue in spite of the presence of uncivil speech is exactly the point of Harlan's opinion in *Cohen v. California*,¹⁸³ in which the Court refused to permit the state to use the force of law "to maintain . . . a suitable level of discourse within the body politic".¹⁸⁴

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . .

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.¹⁸⁵

It is of course a matter of judgment whether "open debate" within "the arena of public discussion" is indeed achieving "broader enduring values." How one makes that judgment will depend very much on one's circumstances. The call in recent literature to attend more carefully to "the victim's perspective"¹⁸⁶ is well taken in this regard. Members of dominant groups may be satisfied with the overall quality of public deliberation, but members of victim groups, at whom racist speech is systematically targeted, may feel quite otherwise.

It is at this point that the line of analysis stressing the irrational, coercive quality of racist speech crosses and depends upon the line of analysis stressing the silencing of victim groups. For when pressed the point is not that public discourse is pervasively disabled by racist speech, but rather that the concentrated effect of such speech on members of victim groups is to foreclose public discourse as an effective avenue of collective self-determination. In the contemporary debate this effect has been addressed under the rubric of "silencing."

Racist Speech as Silencing Minority Groups. The literature on "silencing" has burgeoned. So far as I can make out, the literature presents three distinct arguments to support the claim of silencing:¹⁸⁷ (1) Victim groups are silenced because their perspectives are systematically excluded from the dominant discourse;¹⁸⁸ (2) victim groups are silenced because the pervasive stigma of racism systematically undermines and devalues their speech; and (3) victim groups are silenced because the visceral "fear, rage, [and] shock" of racist speech systematically pre-empt response.¹⁸⁹ This section analyzes each of these arguments separately; the next section weaves them together into a more complex indictment of racist speech.

The first argument is that the language of public discourse, although seemingly neutral and objective, has a built-in bias that prevents the articulation of minority positions.¹⁹⁰ Thus racism in the dominant discourse is compressed into "the neutralized word 'discrimination,'" in which "the role of power, domination, and oppression as the source of the evil" is effaced, and "[m]uch of the political, historical, and moral content of 'equality' has been dropped."¹⁹¹ Similarly, the understanding of whites that racism is an "intentional belief in white supremacy"—the perpetrators' perspective—has been folded into the very language of

public debate, while the understanding of minorities that racism "refers solely to minority subordination"—the victims' perspective—is banished from the language.¹⁹²

Although the premise of this argument seems to me true, it does not by itself support the conclusion that racist speech ought to be regulated. All communication rests on foundations of unarticulated assumptions. The very function of dialogue is often to move toward enlightenment by uncovering and exposing these assumptions. Enlightenment can be gradual and progressive, or it can result from the shock of intense political struggle. That our language always encompasses both more and less than our intentions is thus not an argument for the suppression of racist speech, but rather for the encouragement of further public debate.

The point might be made, however, that public debate fails to achieve such enlightenment because the pervasive racism of American society devalues and stigmatizes minority contributions to this debate. The voice of the victims goes unheard. There is thus a call for an "outsider jurisprudence"¹⁹³ which will legitimate that voice and enable "legal insiders . . . [to] imagine a life disabled in a significant way by hate propaganda."¹⁹⁴

Once again, the premise of this argument appears sound, but its conclusion does not. Audiences always evaluate communication on the basis of their understanding of its social context.¹⁹⁵ This is not a deformity of public discourse, but one of its generic characteristics.¹⁹⁶ It poses the question of how an audience's prepolitical understanding of social context may be altered, a question that confronts all participants in public dialogue. The urgency of the question does not justify restricting public discourse; it is rather a call for more articulate and persuasive speech, for more intense and effective political engagement.

Taken together, the argument from the inherent bias of accepted discourse and the argument from the stigmatic devaluation of minority speech fuse into a single indictment of public discourse as irrational. The systematic derogation of the specific perspectives of victim groups is said to be caused by the nation's particular history of racial oppression, rather than by concerns that should properly affect a legitimately rational public dialogue. Both arguments thus ultimately appeal to the concept of false consciousness,¹⁹⁷ to the notion that there is an ideal vantage from which the rationality of discourse can be "objectively" assessed.

It is one thing, however, to use the idea of false consciousness as a

weapon *within* public discourse to convince others of the need to break with the prejudices of the past, and it is quite another to use the idea as a justification to limit public discourse itself. The first is a familiar rhetorical strategy. It is consistent with the processes of public discourse because its effectiveness ultimately depends on its persuasive power. But the second presupposes an intimacy with truth so vital as to foreclose opposing positions. The very point of using the idea of false consciousness to limit public discourse is to justify legally disregarding certain perspectives, on the grounds that they could not possibly be respected as true expressions of autonomous individuality. Circumscribing public discourse to ameliorate false consciousness thus does not protect public discourse from harm, but rather contradicts its very purpose of providing a medium for the reconciliation of autonomous wills.

The third argument for restraining racist speech does not turn on the characterization of public discourse as irrational, but rather as coercive. Recent literature contains searing documentation of the profound personal injury of racist speech, and this injury may in particular circumstances be so shocking as to literally preempt responsive speech. Although the analogous harm of uncivil speech is randomly scattered throughout the population, the disabilities attendant upon racist speech are concentrated upon members of victim groups. Hence where members of dominant groups perceive "isolated incidents,"¹⁹⁸ members of victim groups perceive instead a suffocating and inescapable "racism that is a persistent and constituent part of the social order, woven into the fabric of society and everyday life."¹⁹⁹

Under such conditions it is to be expected that members of dominant and victim groups may well come to conflicting judgments about whether racist speech shocks significant segments of victim group populations into silence. The recent literature proposing restraints on racist speech is eloquent on the need to "listen [] to the real victims" of such speech, and to display "empathy or understanding for their injury."²⁰⁰ And of course any fair and just determination about the regulation of public discourse would require exactly this kind of social sensitivity. But there is also a tendency in this literature to move from the proposition that a fair determination cannot be made unless "the victims of racist speech are heard,"²⁰¹ to the very different proposition that such a determination ought to use "the experience of victim-group members [as] a guide."²⁰² The latter proposition seems to me plainly false.

The issue on the table is whether irrationality and coercion have so tainted the medium of public discourse as to require shrinking the scope of self-government. That issue significantly affects every citizen, and its resolution therefore cannot be ceded to the control of any particular group. In fact I do not see how the issue can be adequately resolved at all unless some notion of civic membership is invoked that transcends mere group identification. If we cannot strive to deliberate together as citizens, distancing ourselves from (but not abandoning) our specific cultural backgrounds, the issue can be resolved only through the exercise of naked group power, a solution not at all advantageous to the marginalized and oppressed.²⁰³

Paradoxically, therefore, the question of whether public discourse is irretrievably damaged by racist speech must itself ultimately be addressed through the medium of public discourse. Because those participating in public discourse will not themselves have been silenced (almost by definition), a heavy, frustrating burden is de facto placed on those who would truncate public discourse in order to save it. They must represent themselves as "speaking for" those who have been deprived of their voice. But the negative space of that silence reigns inscrutable, neither confirming nor denying this claim. And the more eloquent the appeal, the less compelling the claim, for the more accessible public discourse will then appear to exactly the perspectives racist speech is said to repress.

Even if this burden is lifted, however, and it is simply accepted that members of victim groups are intimidated into silence, it would still not allow that restraints on racist speech within public discourse are justified. One might believe, for example, that such silencing occurs chiefly through the structural conditions of racism, rather than specifically through the shock of racist speech. "The problem," as the controversial hair of the black studies department of New York's City College once remarked in response to the racist comments of an academic colleague, does not lie with specific communicative acts, but rather with "racism" itself, "insidious in our society and built into our culture."²⁰⁴ If the hair's diagnosis were true, restraints on racist speech would impair public discourse without at the same time repairing the silence of victim groups.

Alternatively, one might believe that racist speech silences victim groups primarily because of its "ideas," because of its messages of

racial inferiority, rather than because of its incivility. The distinction is important for the following reason: although it is consistent with the internal logic of public discourse to excise in extreme circumstances certain kinds of uncivil speech that are experienced as coercive,²⁰⁵ it is fundamentally incompatible with public discourse to excise specific ideas because they are "analogously" deemed to be coercive. Public discourse is the medium within which our society assesses the democratic acceptability of ideas; to exclude certain ideas as *prima facie* "coercive" and hence destructive of public discourse is to contradict precisely this function. Therefore "harm" to public discourse cannot justify restraints on racist ideas on the grounds that such ideas are perceived to be threatening or coercive.²⁰⁶

There are also other possibilities. One might believe, for example, that because it is difficult to distinguish ideas from incivility, and because it is essential to collective self-determination to protect all ideas, the law will as a practical matter be able to restrain only a small category of blatant racist epithets, which, although deeply offensive and lacking in ideational content, have relatively little to do with the more widespread phenomenon of silencing. Or one might believe that racist speech silences primarily when shocking racist epithets are used in the face-to-face confrontations characteristic of the "fighting words" doctrine of *Chaplinsky*,²⁰⁷ so that the essential insight of the argument from silencing is already reflected within First Amendment doctrine.

My own conclusion, in light of these alternative considerations, is that the case has not yet been made for circumscribing public discourse to prevent the kind of preemptive silencing that occurs when members of victim groups experience "fear, rage, [and] shock." I say this with some hesitation, and with considerable diffidence. But even if the empirical claim of systematic preemptive silencing were accepted (and I am not sure that I do accept it), it is in my view most directly the result of the social and structural conditions of racism, rather than specifically of racist speech. Because the logic of the argument from preemptive silencing does not impeach the necessity of preserving the free expression of ideas,²⁰⁸ public discourse could at most be regulated in a largely symbolic manner so as to purge it of outrageous racist epithets and names. It seems to me highly implausible to claim that such symbolic regulation will eliminate the preemptive silencing that is said to justify restraints on public discourse.

Racist Speech as Symbolic Cultural Oppression. When distinguished and parsed in this analytic manner, therefore, the various arguments for restraining racist speech in order to preserve the integrity of public discourse do not in my judgment support their desired conclusion. But the arguments can be braided together to fund an accusation more powerful than its separate strands.

In ordinary life members of victim groups do not experience a string of distinct disadvantages. Rather, if representations in the current literature are accepted as true, they confront in public discourse an undifferentiated complex of circumstances in which they are systematically demeaned, stigmatized, ignored; in which the very language of debate resists the articulation of their claims; in which they are harassed, abused, intimidated, and systematically and egregiously injured both individually and collectively. The question is not whether these liabilities, when taken individually and singly, justify restraining racist speech within public discourse, but rather whether, when taken together as a complex whole, they render public discourse unfit as an instrument of collective self-determination for members of victim groups, and whether this unacceptable situation would be cured by restraints on racist speech.

What makes this question so very formidable is that it turns on the nexus between public discourse and the value of collective self-determination. Although the formal preconditions of that nexus can be described, its actual substantive realization must remain contingent upon conditions of history, culture, and social structure. Thus when members of victim groups claim that public discourse no longer serves for them the value of self-government, it is no answer to reply that they have been embraced within its formal preconditions. If members of victim groups in fact perceive themselves to be systematically excluded from public dialogue, that dialogue can scarcely achieve for them those "broader enduring values" that are its democratic justification. The very legitimacy of democratic self-governance is thus called into question.

The dependence of the value of public discourse upon matters of social perception poses complex and delicate questions, but the difficulty of these questions is profoundly magnified in the context of the controversy over racist speech. First, the truth of the claim that members of victim groups are cut off from meaningful participation within public discourse cannot be directly experienced and hence evaluated by members of dominant groups. Its resolution must therefore depend, to one

degree or another, upon the acceptance of representations by members of victim groups. As a practical political matter, therefore, what is called into question is not merely the truth of these representations, but also the trust and respect with which they are received by members of dominant groups.²⁰⁹ Second, the focus on trust and respect is reinforced by the remedial claim that racist speech ought to be censored so as to open up public discourse to victim groups. Essentially this claim requires self-determination to be denied to some so that it may be made available to others. Society's willingness to circumscribe public discourse is thus transformed into a touchstone of the esteem with which it regards victim groups.

In fact it is this transformation that most precisely supports the argument. The argument turns on the interpretive meaning which members of victim groups ascribe to their place in American life; the contention is that this meaning is one of exclusion. Such an interpretation cannot be reduced to any specific empirical claims or conditions. Instead the need of those who feel alienated is most exactly met by a gesture of social esteem. By conveying in the strongest possible terms messages of respect and welcome, the censorship of racist speech might go a long way toward allowing members of victim groups to reinterpret their experience as one of inclusion within the dialogue of public discourse. The objections we noted earlier, that the regulation of racist speech within public discourse could at most restrict the publication of highly offensive racist epithets and names and that such regulation could only serve symbolic purposes, is thus no longer to the point. For the argument now turns squarely on the politics of cultural symbolism.

The most salient characteristic of such politics is that the particular content of government regulation is less important than its perceived meaning. We have already noted how claims like those of individual injury or preemptive silencing define concrete classes of communications that are said empirically to cause a particular harm. But the claim of cultural exclusion is fundamentally different, for it implies no such specific referent. The claim, when pressed, is not that any specific class of communications actually causes members of victim groups to feel excluded, but rather that a particular regulatory gesture will be the occasion for members of victim groups to feel included.²¹⁰

This suggests, however, that restraints on public discourse are only one of a wide variety of strategies that government can pursue to ameliorate

rate the sense of cultural exclusion experienced by victim groups. Alternatives might include antidiscrimination laws, affirmative action programs, redistribution of economic resources, restraints on racist forms of nonpublic speech, and so forth. All these modifications of community life could be interpreted as significant gestures of respect and inclusion. It is a matter of political choice and characterization to reject these alternatives as insufficient and to deem the limitation of public discourse as necessary to overcome the alienation of victim groups.

At root, therefore, the argument from cultural exclusion seeks to subordinate public discourse, whose very purpose is to serve as the framework for all possible forms of politics, to a particular political perspective. The argument begins with the sound premise that a cultural sense of participation is necessary for public discourse to serve the value of collective self-determination. But instead of conceiving public discourse as a means of rousing the nation's political will to actions designed to facilitate that sense of participation, the argument instead turns on public discourse itself, and, as a matter of political perception and assertion, deems the limitation of that discourse to be prerequisite for the elimination of disabling alienation. The argument therefore does not ultimately rest on the importance of protecting public discourse from harm, but rather on the need to sacrifice public discourse in order to recuperate profound social dislocations.

Bluntly expressed, the argument requires us to balance the integrity of public discourse as a general structure of communication against the importance of enhancing the experience of political participation by members of victim groups. The argument thus reiterates the position that public discourse ought to be subordinated to the egalitarian ideals of the Fourteenth Amendment. It adopts a sophisticated version of that position, however, for it is able to contend that public discourse need be impaired in only slight and symbolic ways. Even so minimal a gesture as purging outrageous and shocking racist epithets could be sufficient to make members of victim groups feel welcome within the arena of public discourse, and thus to enable public discourse to serve for them the value of self-determination.²¹¹ In this form, the argument is analogous to that advanced in the controversy over prohibiting flag burning, in which it is also urged that public discourse ought to be minimally impaired for highly important symbolic reasons.²¹² Just as it has been contended that any idea can be expressed without burning a flag,²¹³ so it can be asserted

that any idea can be expressed without recourse to vile racist epithets.²¹⁴ In both cases, therefore, it can be argued that the de minimis effects on public discourse are outweighed by the significance of the interests at stake.²¹⁵

I believe, however, that this invitation to balance ought to be declined. This is not because balancing can be ruled out in advance by some "absolutist" algorithm; the attraction of a purely formal democracy may itself in certain circumstances no longer command limitless conviction. It is rather because, in the American context, the temptation to balance rests on what might be termed the fallacy of immaculate isolation.²¹⁶ The effect on public discourse is acceptable only if it is de minimis, and it is arguably de minimis only when a specific claim is evaluated in isolation from other, similar claims. But no claim is in practice immaculately isolated in this manner. As the flag-burning example suggests, there is no shortage of powerful groups contending that uncivil speech within public discourse ought to be "minimally" regulated for highly pressing symbolic reasons.²¹⁷

This is evident even if the focus of analysis is narrowly limited to the structure of the claim at issue in the debate over racist speech. In a large heterogeneous country populated by assertive and conflicting groups, the logic of circumscribing public discourse to reduce political estrangement is virtually unstopppable. The nation is filled with those who feel displaced and who would feel less so if given the chance symbolically to truncate public discourse. This is already plain in the regulations that have proliferated on college campuses, which commonly proscribe not merely speech that degrades persons on the basis of their race, but also, to pick a typical list, speech that demeans persons on the basis of their "color, national origin, religion, sex, sexual orientation, age, handicap, or veteran's status."²¹⁸ The claim of de minimis impact loses credibility as the list of claimants to special protection grows longer.

The point I want to press does not depend on the intellectual difficulty of drawing lines to separate similar claims. It is rather that the remedial and political logic of equal participation applies with analogous force to a broad and growing spectrum of group claims. One might, of course, devise arguments, perhaps based on the specific history of the Fourteenth Amendment, to distinguish racial epithets from blasphemous imprecations, or from degrading and pornographic characterizations of women, or from vicious antigay slurs, or from gross ethnic insults. But the

question is whether such arguments can withstand the compelling egalitarian logic that unites these various situations. My strong intuition is that they cannot, and hence that the claim of de minimis impact on public discourse is implausible.²¹⁹

In the specific context of the argument from cultural exclusion, moreover, a refusal to balance is far less harsh than it might superficially appear. The fundamental challenge is to enable members of victim groups to reinterpret their experience within the American political and cultural order as one of genuine participation. There are a host of ways to address this challenge short of truncating public discourse. The most obvious and potentially effective strategy would be to dismantle systematically and forcefully the structural conditions of racism. If we were so blessed as to be able to accomplish that feat—if we were truly able to eliminate such conditions as chronic unemployment, inadequate health care, segregated housing, or disproportionately low incomes—then we would no doubt also have succeeded in ameliorating the experience of cultural exclusion.

4. THE FIRST AMENDMENT AND HARM TO THE EDUCATIONAL ENVIRONMENT

If public discourse is bounded on one side by the necessary structures of community life, it is bounded on the other by the need of the state to create organizations to achieve explicit public objectives. These organizations, which are nonpublic forums, regulate speech in ways that are fundamentally incompatible with the requirements of public discourse.²²⁰ Public discourse is the medium through which our democracy determines its purposes, and for this reason the legal structure of public discourse requires that all such purposes be kept open to question and reevaluation. Within nonpublic forums, on the other hand, government objectives are taken as established, and communication is regulated as necessary to achieve those objectives.

Although the Supreme Court has often held that “the First Amendment rights of speech and association extend to the campuses of state universities,” and even that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum,”²²¹ in fact state institutions of higher learning are public organizations established for the express purpose of education. The Court has

always held that “a university’s mission is education,” and it has never construed the First Amendment to deny a university’s “authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.”²²² The Court has explicitly recognized “a university’s right to exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of other students to obtain an education.”²²³ Thus student speech incompatible with classroom processes may be censored; faculty publications inconsistent with academic standards may be evaluated and judged; and so forth.

The regulation of racist speech within public institutions of higher learning, therefore, does not turn on the value of democratic self-governance and its realization in public discourse. Instead the constitutionality of such regulation depends on the logic of instrumental rationality, and specifically on three factors: (1) the nature of the educational mission of the university; (2) the instrumental connection of the regulation to the attainment of that mission; and (3) the deference that courts ought to display toward the instrumental judgment of institutional authorities.²²⁴ The current controversy regarding the constitutionality of regulating racist speech on university and college campuses may most helpfully be interpreted as a debate about the first of these factors, the constitutionally permissible educational objectives of public institutions of higher learning.²²⁵

Courts have advanced at least three different concepts of those objectives. The most traditional concept, which I refer to as “civic education,” views public education as an instrument of community life, and holds “that respect for constituted authority and obedience thereto is an essential lesson to qualify one for the duties of citizenship, and that the schoolroom is an appropriate place to teach that lesson.”²²⁶ Civic education conceptualizes instruction as a process of cultural reproduction, in which community values are authoritatively handed down to the young. The validity of those values is largely taken for granted, and there is a strong tendency to use them as a basis for the regulation of speech in the manner of the traditional common law.

The concept of civic education held sway in the years before the Warren Court and has recently been forcefully resurrected with regard to the regulation of speech within high schools. Thus in *Bethel School District No. 403 v. Fraser*²²⁷ the Court upheld the punishment of a high school student for having delivered an “offensive” and “indecent”

student-government speech.²²⁸ The Court reasoned that "the objectives of public education" included "the 'inculcation of] fundamental values necessary to the maintenance of a democratic political system.'" ²²⁹ Among these values were "the habits and manners of civility as . . . indispensable to the practice of self-government."²³⁰

The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. . . .

. . . [S]chools must teach by example the shared values of a civilized social order. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.²³¹

That the concept of civic education would lead to similar conclusions if applied to institutions of higher learning is evidenced by Chief Justice Burger's 1973 dissent in *Papish v. University of Missouri Curators*.²³²

In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.²³³

Because racist speech is both deeply uncivil and contrary to "the shared values of [our] civilized social order,"²³⁴ its restraint would be relatively unproblematic if civic education were understood to constitute a constitutionally acceptable purpose of public institutions of higher learning.²³⁵ A number of public universities have fashioned their regulations on exactly this understanding. For example, the Policy Against Racism of the Board of Regents of Higher Education of the Commonwealth of Massachusetts argues that "institutions must vigorously strive to achieve diversity in race, ethnicity, and culture sufficiently reflective of our society. However, diversity alone will not suffice".

There must be a unity and cohesion in the diversity which we seek to achieve, thereby creating an environment of pluralism. Racism in any form, expressed or implied, intentional or inadvertent, individual or institutional, constitutes an egregious offense to the tenets of human dignity and to the accords of civility

guaranteed by law. Consequently, racism undermines the establishment of a social and academic environment of genuine racial pluralism.²³⁶

The policy clearly postulates the fundamental task of the university to be the inculcation of the value of "genuine racial pluralism," and it proscribes racist speech because of its incompatibility with that value.

A second concept of the mission of public education, which I refer to as "democratic education," begins with the very different premise that the "public school" is "in most respects the cradle of our democracy,"²³⁷ and it therefore understands the purpose of public education to be the creation of autonomous citizens, capable of fully participating in the rough and tumble world of public discourse.²³⁸ Democratic education strives to introduce that world into the generically more sheltered environment of the school.

The concept of democratic education was most fully expressed during the era of the Warren Court in *Tinker v. Des Moines School District*,²³⁹ in which the Court held that the purpose of public education is to prepare students for the "sort of hazardous freedom . . . 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."²⁴⁰ The majority in *Tinker* explicitly rejected the premise of civic education that the purpose of public schooling is the transmission of canonical values. It concluded instead that "[i]n our system, state-operated schools may not be enclaves of totalitarianism. . . . [S]tudents may not be regarded as closed-circuit recipients of only that which the [s]tate chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."²⁴¹ According to *Tinker* the objective of public education is to lead students to think for themselves.

The chief characteristic of democratic education is its tendency to assimilate speech within public educational institutions to a model of public discourse. Recognizing that this ambition is "not without its costs in terms of the risk to the maintenance of civility and an ordered society," the Court nevertheless strongly advanced the concept of democratic education during the late 1960s and early 1970s, in part because it believed the concept essential to the maintenance of "our vigorous and free society."²⁴² If, as I have argued, racist speech is and ought to be

immune from regulation within public discourse, we can expect courts guided by the concept of democratic education to be quite hostile to the regulation of racist speech within universities, preferring instead to see students realistically prepared for participation in the harsh but inevitable world of public discourse.

There is yet a third concept of public education, one most often specifically associated with institutions of higher learning. This concept, which I refer to as "critical education," views the university as an institution whose distinctive "primary function" is "to discover and disseminate knowledge by means of research and teaching."²⁴³ Critical education locates the principal prerequisite for university life in "the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable."²⁴⁴

[I]f a university is a place for knowledge, it is also a special kind of small society. Yet it is not primarily a fellowship, a club, a circle of friends, a replica of the civil society outside it. Without sacrificing its central purpose, it cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect. To be sure, these are important values; other institutions may properly assign them the highest, and not merely a subordinate priority; and a good university will seek and in some significant measure attain these ends. But it will never let these values, important as they are, override its central purpose. We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is a barrier to the tyranny of authoritarian or even majority opinion as to the rightness or wrongness of particular doctrines or thoughts.²⁴⁵

The university as the purveyor of critical education serves important social purposes. These include not only the disciplined pursuit of truth, but also the exemplary enactment of a "model of expression that is meaningful as well as free, coherent yet diverse, critical and inspirational."²⁴⁶ The concept of critical education has strong affinities to the traditional "marketplace of ideas" theory of the First Amendment, and it is not uncommon for courts who use the concept to speak of the "classroom" as "peculiarly the 'marketplace of ideas,' " deserving of protection because the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "²⁴⁷

The concept of critical education differs significantly from both civic and democratic education. In contrast to civic education, it rejects the notion of canonical values that are to be reproduced in the young. Public universities committed to critical education are not free to posit certain values (apart from the value of critical education itself) and to punish those who disagree. The logic of critical education would constitutionally require that a public university "not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent."²⁴⁸ This stands in stark contrast to the educational project of institutions like the University of Massachusetts, Mount Holyoke, Marquette, or Mary Washington,²⁴⁹ which are committed to the mission of civic education.

The concept of critical education would also sharply limit the ability of universities to censor uncivil speech. Speech can be uncivil for many reasons, including the assertion of ideas that are perceived to be offensive, revolting, demeaning, or stigmatizing. Critical education, however, would require the toleration of all ideas, however uncivil.²⁵⁰ This toleration would be consistent with the Court's 1973 holding that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' "²⁵¹

Critical education also differs in important respects from democratic education. The telos of critical education lies in pursuit of truth, rather than in the instantiation of the responsible autonomy of the citizen. The pursuit of truth requires not only an unfettered freedom of ideas, but also honesty, fidelity to reason, and respect for method and procedures. Reason, as we have seen, carries its own special requirements of civility, which preclude coercion and abuse.²⁵² Although enforcement of these requirements and values would be inconsistent with democratic education, it may well be required by critical education. Moreover, critical education requires freedom of ideas only with respect to that speech which forms part of the truth-seeking dialogue of the university. Thus, for example, nothing in the concept of critical education would prevent a university from penalizing malicious racist speech communicated solely for the purpose of harassing, humiliating, or degrading a victim.²⁵³ The trick, of course, would be to distinguish such speech in a manner that does not chill communication intended to form part of a

truth-seeking exchange.²⁵⁴ This represents a formidable technical challenge, for it is all too easy to permit revulsion with the content of speech to infect regulation ostensibly justified by other reasons.²⁵⁵

Although there is insufficient space in this short essay to engage in a full-scale exploration of the purposes of higher education, some conclusions are clear enough. The Constitution would not permit a public university, in the name of civic education, to prohibit the teaching of communism because of its conflict with community values. Nor would the Constitution, in the name of democratic education, preclude a public university from enforcing regulations against highly offensive racial epithets within a classroom.

Examples like these incline me toward the concept of critical education, yet the extent to which state universities ought constitutionally to be *required* to pursue one or the other of these educational missions does not seem to me without difficulties.²⁵⁶ The analysis is further complicated by the possibility that public universities may have various educational functions with constitutionally distinct characteristics. Thus it is conceivable that public universities may be permitted to pursue the mission of civic education within their dormitories, but be required to follow the requirements of democratic education with regard to their open spaces.²⁵⁷ These are matters that require extended and careful consideration.

I conclude, therefore, by stressing two brief points. First, the constitutionality of restraints on racist speech within public universities does not depend on the constitutionality of such regulation within public discourse. Second, the constitutionality of restraints on racist speech within public universities will depend to a very great extent on the educational purposes that we constitutionally attribute to public institutions of higher learning, and on the various modalities through which such institutions are understood to pursue those purposes. We ought to see debate turn toward the achievement of a fuller and more reflective comprehension of these questions.

5. CONCLUSION: THE QUESTION OF FORMAL DEMOCRACY

This account of the constitutionality of university restrictions on racist speech suggests that a principal flaw of the contemporary debate has been its pervasive assumption that the relationship of racist speech to

the First Amendment can be assessed independently of social context. Communication, however, does not form a constitutionally undifferentiated terrain. The standards of First Amendment protection afforded to public discourse will not be the same as those applied to nonpublic speech, and these in turn will differ from those that govern the regulation of speech within governmental institutions like universities. The concrete circumstances of racist speech thus figure prominently in the constitutional equation.

Public discourse is the realm of communication we deem necessary to facilitate the process of self-determination. As that process is open-ended, reflecting the boundless possibility of social self-constitution, so we fashion public discourse to be as free from legal constraint as is feasible to sustain. But as self-determination requires the antecedent formation of a "self" through socialization into the particularity of a given community life, so public discourse must at some point be bounded by nonpublic speech, in which community values are embodied and enforced. And as the decisions of a self-determining democracy require actual implementation, so public discourse must at some other point be bounded by the instrumentally regulated speech of the nonpublic forum.

I have attempted to explain the unique protections that American First Amendment jurisprudence affords to public discourse through a self-consciously formal analysis; that is, I have attempted to uncover the formal prerequisites for the instantiation of the value of democracy as self-determination. Although this kind of formal analysis has the advantage of forcing us to clearly articulate the values in whose name we purport to act, it has the disadvantage of obscuring the messy complications of the world. Formal analysis is always subject to the critique that actual, substantive conditions have undermined its very point and meaning.

From a formal perspective, democracy fulfills the purposes of autonomous self-government because we accept an image of independent citizens deliberating together to form public opinion. We therefore structure constitutional policy according to the requirements of that image. But it is an image blatantly vulnerable to the most forceful empirical attack.²⁵⁸ Citizens are not autonomous; they are manipulated by the media, coerced by private corporations, immured in the toils of racism. Citizens do not communicate together; they are passive, irrational, and voiceless.

Deliberation is impossible because of the technical and economic structure of the mass media; public opinion is therefore imposed upon citizens rather than spontaneously arising from them. The very aspiration to self-determination reinforces preexisting inequalities by empowering those with the resources and competence to take advantage of democratic processes; it systematically handicaps socially marginalized groups who lack this easy and familiar access to the media of democratic deliberation. And so forth: the litany is by now depressingly familiar.

Of course these criticisms, and others like them, contain important elements of truth. They therefore force us to choose: either we decide to retain the ideal of democracy as deliberative self-determination and work to minimize the debilitating consequences of these criticisms, or we decide that these criticisms have so undermined the ideal of deliberative self-determination that it must be abandoned and a different value for democracy embraced. If we choose the second alternative, we have the responsibility of articulating and defending a new vision of democracy. But if we choose the first, we have the responsibility of working to foster the constitutional values upon which we rely. We have the obligation of doing so, however, in ways that do not themselves contravene the necessary preconditions of the ideal of deliberative self-determination.²⁵⁹ The function of formal analysis is to make clear the content of that obligation.

The strict implication of this essay, then, is not that racist speech ought not to be regulated in public discourse, but rather that those who advocate its regulations in ways incompatible with the value of deliberative self-governance carry the burden of moving us to a different and more attractive vision of democracy. Or, in the alternative, they carry the burden of justifying suspensions of our fundamental democratic commitments. Neither burden is light.

Notes

I am deeply indebted to the many friends and colleagues who read the manuscript of this essay: Alexander Aleinikoff, Richard Delgado, Melvin Eisenberg, Cynthia Fuchs Epstein, Bryan Ford, Angela Harris, Sanford Kadish, Kenneth Karst, Mari Matsuda, Frank Michelman, Martha Minow, Paul Mishkin, Rachel Moran, John Powell, Terrance Sandalow, Joseph Sax,

1. Philip Selznick, Reva Siegel, Jerome Skolnick, Jan Vetter, James Weinstein, and Franklin Zimring.
2. D. Dumond, *Antislavery: The Crusade for Freedom in America*, 273 (1961) (quoting William Lloyd Garrison).
3. 346 U.S. 483 (1954).
4. For a representative discussion, see Fiss, "Foreword: The Forms of Justice," 93 *Harr. L. Rev.* 1 (1979).
5. Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 *Harr. C.R.-C.L. L. Rev.* 133 (1982) (hereafter Delgado, "Words That Wound"); see Heins, "Banning Words: A Comment on 'Words That Wound,'" 18 *Harr. C.R.-C.L. L. Rev.* 583 (1983); Delgado, "Professor Delgado Replies," 18 *Harr. C.R.-C.L. L. Rev.* 593 (1983).
6. Delgado, "Campus Antiracism Rules: Constitutional Narratives in Collision," 85 *Nw. U. L. Rev.* 343 (1990); Gale, "On Curbing Racial Speech," *Responsive Community*, Winter 1990-91, at 47; Glass, "Anti-Racism and Unlimited Freedom of Speech: An Untenable Dualism," 8 *Can. J. Phil.* 559 (1978); Grano, "Free Speech v. the University of Michigan," *Academic Questions*, Spring 1990, at 7; Greenawald, "Insults and Epithets: Are They Protected Speech?," 42 *Rut. L. Rev.* 287 (1991); Grey, "Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment," *Soc. Phil. & Policy*, Spring 1991, at 81; Hughes, "Prohibiting Incitement to Racial Discrimination," 16 *U. Tor. L. J.* 361 (1966); Jones, "Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment," 23 *How. L. J.* 429 (1980); Kretzmer, "Freedom of Speech and Racism," 8 *Cardozo L. Rev.* 445 (1987); "Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation," 37 *Buffalo L. Rev.* 337 (1989) (hereafter "Language as Violence"); Lason, "Racial Defamation as Free Speech: Abusing the First Amendment," 17 *Colum. Hum. Rts. L. Rev.* 11 (1985) (hereafter Lason, "Racial Defamation"); Lason, "Group Libel Versus Free Speech: When Big Brother Should Butt In," 23 *Duq. L. Rev.* 77 (1984) (hereafter Lason, "Group Libel"); Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke L.J.* 431; Love, "Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress," 47 *Wash. & Lee L. Rev.* 123 (1990); Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Mich. L. Rev.* 2320 (1989); Minow, "On Neutrality, Equality, & Tolerance: New Norms for a Decade of Distinction," *Change*, Jan.-Feb. 1990, at 17; Partlett, "From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech," 22 *Vand. J. Trans. L.* 431 (1989); Richardson, "Racism: A Tort of Outrage," 61 *Ore. L. Rev.* 267 (1982); Smolla, "Rethinking First Amendment Assumptions about Racist and Sexist Speech," 46 *Wash. & Lee L. Rev.* 171 (1990); Strossen, "Regulating Racist Speech on Campus: A Modest Proposal," 1990 *Duke L.J.* 484; Wedgwood, "Freedom of Expression and Racial Speech," 8 *Tel Aviv U. Stud. L.* 325 (1988); Wright,

- "Racist Speech and the First Amendment," 9 *Miss. C. L. Rev.* 1 (1988); Note, "A Communitarian Defense of Group Libel Laws," 101 *Harv. L. Rev.* 682 (1988); Note, "The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb," 12 *J. Comm. & Ent. L.* 593 (1990); Comment, "Freedom from Fear," 15 *Lincoln L. Rev.* 45 (1984) (authored by Kammy Au); Edelman, "Punishing Perpetrators of Racist Speech," *Legal Times*, May 15, 1989, at 20.
6. See, e.g., H. Ehrlich, *Campus Ethnviolence and the Policy Options*, 41-72 (1990); Gibbs, "Bigots in the Ivory Tower: An Alarming Rise in Hatred Roils U.S. Campuses," *Time*, May 7, 1990, at 104.
7. David Rieff writes that 137 American universities "have in the past two years passed proscriptions on hate speech." Rieff, "The Case Against Sensitivity," 114 *Esquire* 120, 124 (1990). See "Lessons from Bigotry 101," *Newsweek*, Sept. 25, 1989, at 48; Wilson, "Colleges' Anti-Harassment Polices Bring Controversy over Free Speech Issues," *Chronicle of Higher Education*, Oct. 4, 1989, at A1; Fields, "Colleges Advised to Develop Strong Procedures to Deal with Incidents of Racial Harassment," *Chronicle of Higher Education*, July 20, 1988, at A11.
8. For a chronicle of the effect of this controversy on the American Civil Liberties Union (ACLU), see Hentoff, "The Colleges: Fear, Loathing, and Suppression," *Village Voice*, May 8, 1990, at 20; Hentoff, "What's Happening to the ACLU?," *Village Voice*, May 15, 1990, at 20; Hentoff, "Putting the First Amendment on Trial," *Village Voice*, May 22, 1990, at 24; Hentoff, "A Dissonant First Amendment Fugue," *Village Voice*, June 5, 1990, at 16; Hentoff, "An Endangered Species: A First Amendment Absolutist," *Village Voice*, June 12, 1990, at 24; Hentoff, "The Civil Liberties Shootout," *Village Voice*, June 19, 1990, at 26; "Policy Concerning Racist and Other Group-Based Harassment on College Campuses," *ACLU Newsletter*, Aug.-Sept. 1990, at 2.
9. J. Kovel, *White Racism: A Psycho-History*, 34 (1970). See Lawrence, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 *Stan. L. Rev.* 317, 321-26 (1987).
10. Department of Student Affairs, University of Connecticut, "Protect Campus Pluralism" (available from the Dean of Students Office, University of Connecticut). The regulations provide that "[e]very member of the University is obligated to refrain from actions that intimidate, humiliate, or demean persons or groups or that undermine their security or self-esteem." They define "harassment" as "abusive behavior directed toward an individual or group because of race, ethnicity, ancestry, national origin, religion, gender, sexual preference, age, physical or mental disabilities," and they prohibit "harassment that has the effect of interfering with an individual's performance or creating an intimidating, hostile or offensive environment." *Id.*
11. *Id.* The regulations continue: "All members of the University community are responsible for the maintenance of a positive environment in which everyone feels comfortable working and learning." *Id.*

12. *Id.* The regulations instruct a student to inform the Discrimination and Intolerance Response Network if "[y]ou have experienced or witnessed any of the signs" and to "[k]now that the University will not tolerate such behavior." *Id.*
13. Lawrence, *supra* note 9, at 322.
14. One is reminded of the escalating efforts of the Inquisition in sixteenth-century Spain to discover and punish all external signs of inward backsliding on the part of Moors and Jews who had outwardly converted to Catholicism in order to avoid expulsion. These efforts eventually led the Inquisition to conclude that eating couscous or disliking pork were themselves punishable as heresy. See Root, "Speaking Christian: Orthodoxy and Difference in Sixteenth-Century Spain," *Representations*, no. 23 (Summer 1988), at 118, 126, 129.
15. Ravo, "Campus Slur Alters a Code against Bias," *New York Times*, Dec. 11, 1989, at B1, B3.
16. Modest aspirations, however, will not be easy in the highly charged atmosphere of many universities. See Detlefsen, "White Like Me," *New Republic*, Apr. 10, 1989, at 18. The University of Connecticut is hardly unique in its use of punitive legal regulation to block all manifestations of racism. The Board of Regents of Higher Education of the Commonwealth of Massachusetts, for example, adopted on June 13, 1989, a "Policy against Racism" that "prohibits all forms of racism." Board of Regents of Higher Education, Commonwealth of Massachusetts, "Policy against Racism and Guidelines for Campus Policies against Racism" 1 (June 13, 1989). This prohibition includes:
- [A]ll conditions and all actions or omissions including all acts or verbal harassment or abuse which deny or have the effect of denying to anyone his or her rights to equality, dignity, and security on the basis of his or her race, color, ethnicity, culture, or religion. . . . Racism in any form, expressed or implied, intentional or inadvertent, individual or institutional, constitutes an egregious offense to the tenets of human dignity and to the accords of civility guaranteed by law.
- Id.* at 2.
17. These categories by no means exhaust the field. In the European literature, for example, there is a well-developed jurisprudence of regulating racist speech based on the harm of potential violence. See Cotterrell, "Prosecuting Incitement to Racial Hatred," 1982 *Pub. L.* 378; Kretzmer, *supra* note 5, at 456; Leopold, "Incitement to Hatred—The History of a Controversial Criminal Offense," 1977 *Pub. L.* 389, 391-93. I do not discuss this category of harm because it is relatively unimportant in the American setting. I suspect that this is largely because of the accepted dominion of the *Brandenburg* version of the clear and present danger test. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).
18. Wright, *supra* note 5, at 14-22.
19. *Id.* at 10.

20. *Id.* at 9.
21. Hughes, *supra* note 5, at 364.
22. Lawrence, *supra* note 5, at 438-49.
23. Kretzmer, *supra* note 5, at 456.
24. *Id.* at 454.
25. Matsuda, *supra* note 5, at 2357.
26. Riesman, "Democracy and Defamation: Control of Group Libel," 42 *Col. L. Rev.* 727 (1942).
27. 343 U.S. 250 (1952). For work in this vein, see Lasson, *supra* note 5; Note, "Group Vilification Reconsidered," 89 *Yale L.J.* 308 (1979).
28. Matsuda, *supra* note 5, at 2358.
29. *Id.*
30. See, e.g., Lasson, "Racial Defamation," *supra* note 5, at 48.
31. Matsuda, *supra* note 5, at 2357.
32. Delgado, "Words That Wound," *supra* note 4, at 137.
33. *Id.* at 143.
34. *Id.* at 157.
35. Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism," 42 *U. Miami L. Rev.* 127, 151 (1987).
36. Love, *supra* note 5, at 158.
37. Richard Delgado, for example, proposes that courts create a tort for racial insult whenever a plaintiff can prove that "[l]anguage was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult." Delgado, "Words That Wound," *supra* note 4, at 179.
38. See, for example, the proposed regulation of the University of Texas at Austin, which prohibits racial harassment and which defines racial harassment as "extreme or outrageous acts or communications that are intended to harass, intimidate or humiliate a student or students on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress." President's Ad Hoc Committee on Racial Harassment, the University of Texas at Austin, "Report of President's Ad Hoc Committee on Racial Harassment" 4-5 (Nov. 27, 1989). The drafters of the proposed regulation state that it is "much preferable for a racial harassment policy to focus on the real injury of severe emotional distress." *Id.* at 20.
39. Compare, for example, the former regulations of the University of Wisconsin, which reach "racist or discriminatory comments, epithets or other expressive behavior directed at an individual," Board of Regents of the University of Wisconsin System, Wis. Admin. Code UWS § 17.06(2)(a) (Aug. 1989) (struck down as a violation of the First Amendment in *UWM Post, Inc. v. Board of the Univ. of Wis. Sys.*, 774 F.Supp. 1163 [E.D. Wis. 1991]), with those of Stanford University, which reach only racist speech that is "addressed directly to the individual or individuals whom it insults

- or stigmatizes" and that consists of "insulting or 'fighting' words." Stanford University, "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" 2 (draft, Mar. 15, 1990).
40. Lasson, "Group Libel," *supra* note 5, at 123. "The speech clause protects the marketplace of ideas, not the battleground." *Id.*
41. Lawrence, *supra* note 5, at 468.
42. *Id.* at 447 n.66 (quoting MacKinnon, "Not a Moral Issue," 2 *Yale L. & Pol. Rev.* 321, 340 [1984]).
43. *Id.* at 452.
44. *Id.* at 470.
45. Office of Student Life Policy and Service, Rutgers University at New Brunswick, "University Student Life Policy Against Insult, Defamation, and Harassment" 1 (May 31, 1989) (revised); see also *Doe v. University of Mich.*, 721 F.Supp. 852, 856 (E.D. Mich. 1989); Oberlin College, "Policy on Race Relations and Informal Procedures for Racial Grievances"; Office of the Dean for Student Affairs and the Special Assistants to the President, Massachusetts Institute of Technology, "Information on Harassment," Sept. 1989; State University of New York College at Brockport, "Discriminatory Harassment," § 285.02; University of Pennsylvania, "Harassment Policy" (*Almanac Supp.*, Sept. 29, 1987) (as published originally in the *Almanac* of June 2, 1987).
46. University of California, "Universitywide Student Conduct: Harassment Policy" (Sept. 21, 1989) (available from the Office of the President). For an example of a regulation based on group harm, see Clark University's Code of General Conduct: "Harassment includes any verbal or physical conduct which has the intent or effect of unreasonably interfering with any individual's or group's work or study, or creating an intimidating, hostile, or offensive environment." Clark University, "Code of General Conduct and University Judicial Procedures" 1 (Fall Semester, 1988). For other examples of similar kinds of regulations, see Emory University, "Policy Statement on Discriminatory Harassment"; Marquette University, "Racial Abuse and Harassment Policy" (May 5, 1989); Office of University News and Information of Kent State University, "Policy to Combat Harassment," *For the Record* (Feb. 6, 1989).
47. Mount Holyoke College, "The Honor Code: Academic and Community Responsibility § III, Community Responsibility, Introduction" (reprinted from the *Student Handbook*).
48. Marquette University, "Racial Abuse and Harassment Policy" 1 (May 5, 1989).
49. *Id.*
50. Mary Washington College, *Mary Washington College Student Handbook* 20 (1990-91) (available from Office of the Dean of Students).
51. *Id.*
52. "If the university stands for anything, it stands for freedom in the search for truth. . . . [But] can truth have its day in court when the courtroom is made

- into a mud-wrestling pit where vicious epithets are flung?" Laney, "Why Tolerate Campus Bigots?," *New York Times*, Apr. 6, 1990, at A35.
53. Thus James T. Laney, the president of Emory University: "Educators are by definition professors of value. Through education we pass on to the next generation not merely information but the habits and manners of our civil society. The university differs from society at large in its insistence on not only free expression but also an environment conducive to mutual engagement." *Id.*
54. See, e.g., Delgado, "Words That Wound," *supra* note 4, at 175-79; Note, "A First Amendment Justification for Regulating Racist Speech on Campus," 40 *Case W. Res.* 733 (1989-90).
55. 496 U.S. 310 (1990).
56. *Id.* at 318.
57. *Id.* at 319 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 [1989]). See Brennan's remark in *Texas v. Johnson* to the same effect: "The First Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas." 491 U.S. 397, 418 (1989). In *Johnson* Brennan cites *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in support of his conclusion. In *Brandenburg*, First Amendment protection was extended to a Ku Klux Klan rally, which featured such revolting comments as: "Bury the n____s." "A dirty n____r." "Send the Jews back to Israel." *Id.* at 446 n.1
58. Charles Lawrence, for example, writes that the University of Michigan regulations invalidated by a federal court (see *supra* note 45) were so patently unconstitutional that "it is difficult to believe that anyone at the University of Michigan Law School was consulted" in their drafting. Lawrence, *supra* note 5, at 477 n.161. "It is almost as if the university purposefully wrote an unconstitutional regulation so that they could say to the black students, 'We tried to help but the courts just won't let us do it.'" *Id.* A great many contemporary university regulations are similar to those of the University of Michigan.
59. *Hustler Magazine v. Falwell*, 485 U.S. 46, 54 (1988).
60. F. Schauer, *Free Speech: A Philosophical Enquiry*, 40 (1982). On the equation of democracy with majoritarianism, see A. De Tocqueville, *Democracy in America*, vol. 1, 264 (F. Bowen, trans., 1945): "The very essence of democratic government consists in the absolute sovereignty of the majority."
61. Schauer writes: "The more we accept the premise of the argument from democracy, the less can we impinge on the right of self-government by restricting the power of the majority. If the argument from democracy would allow to be said things that the 'people' do not want to hear, it is not so much an argument based on popular will as it is an argument against it." Schauer, *supra* note 60, at 41.
62. The equation is nevertheless quite commonplace. See, e.g., Partlett, *supra*

- note 5, at 458 (footnote omitted) ("I take it that a central tenet of democracy is majority rule. If the majority decides to suppress free speech, how can it be defended upon democratic lines?").
63. N. Bobbio, *Democracy and Dictatorship*, 137 (P. Kennealy, trans., 1989).
64. H. Kelsen, *General Theory of Law and State*, 284-86 (A. Wedberg, trans., 1961).
65. 376 U.S. 254 (1964).
66. *Id.* at 274 (quoting 4 *Elliot's Debates* 569 [1876]) (citation omitted in original).
67. *Id.* at 275 (quoting 4 *Annals of Congress* [1794]).
68. This is the central problematic of Alexander Meiklejohn's work. A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, 11 (1948). Meiklejohn was concerned to analyze "the difference between a political system in which men do govern themselves and a political system in which men, without their consent, are governed by others."
69. J. Rousseau, *The Social Contract* (C. Frankel, trans., 1947).
70. H. Kelsen, *supra* note 64, at 285.
71. *Id.* at 287-88.
72. For a good discussion of this point, see Freeman, "Reason and Agreement in Social Contract Views," 19 *Phil. & Pub. Aff.* 122, 154-57 (1990).
73. B. Barber, *Strong Democracy: Participatory Politics for a New Age*, 136 (1984). See Pitkin and Shumer, "On Participation," *Democracy* (Fall 1982), 43-54.
74. *Dialogue on John Dewey*, 58 (C. Lamont, ed., 1959).
75. E. Durkheim, *Professional Ethics and Civic Morals*, 89 (C. Brookfield, trans., 1958).
76. C. Lefort, *Democracy and Political Theory*, 39 (D. Macey, trans., 1988).
77. J. Habermas, *The Theory of Communicative Action*, vol. 2, 81 (T. McCarthy, trans., 1987).
78. Rawls, "Justice as Fairness: Political not Metaphysical," 14 *Phil. & Pub. Aff.* 223, 230 (1985).
79. Michelman, "Law's Republic," 97 *Yale L. J.* 1493, 1526-27 (1988).
80. Rawls, *supra* note 78, at 229-30; see J. Habermas, *The Theory of Communicative Action*, vol. 1, 25-26 (T. McCarthy, trans., 1984); Michelman, *supra* note 79, at 1526-27.
81. Fiss, *supra* note 3, at 38.
82. I do not mean to foreclose the possibility that, under special conditions of charismatic leadership or identification with traditional authority, the value of self-determination can be achieved in the absence of a communicative structure of public discourse. I mean only to imply that such conditions will not ordinarily obtain in the modern rational and bureaucratic state.
83. Rawls, *supra* note 78, at 230.
84. J. Piaget, *The Moral Judgment of the Child*, 366 (M. Gabain, trans., 1948).
85. See Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment," 76 *Calif. L. Rev.* 297, 314-24 (1988).

86. See, for example, Kateb, "Democratic Individuality and the Claims of Politics," 12 *Pol. Theory* 331, 332 (1984): "To speak, therefore, of individualism is to speak of the most characteristically democratic political and moral commitment. It would be a sign of defection from modern democracy to posit some other entity as the necessary or desirable center of life. There is therefore nothing special (much less, arbitrary) in assuming that the doctrine of the individual has the preeminent place in the theory of democracy."
87. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 203-6 (1986) (Blackmun, J., dissenting). Such a public/private distinction must, of course, be understood as inherently unstable and problematic, for all government regulation influences, to one degree or another, the formation of individual identity. See, e.g., Sunstein, "Legal Interference with Private Preferences," 53 *U. Chi. L. Rev.* 1129, 1138-39 (1986). For this reason the distinction should be regarded as a pragmatic instrument for distinguishing those aspects of the self considered indispensable for the exercise of political and moral autonomy, and hence as beyond the coercive formation of the state.
88. G. Mead, *Mind, Self and Society*, 162 (C. Morris, ed., 1937).
89. A. Meiklejohn, *supra* note 68, at 14.
90. L. Wittgenstein, *Culture and Value*, 46e (P. Winch, trans., 1980).
91. See, generally, Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell," 103 *Harv. L. Rev.* 601 (1990) (hereafter Post, "The Constitutional Concept"); Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," 74 *Calif. L. Rev.* 691 (1986) (hereafter Post, "Defamation Law"); Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," 77 *Calif. L. Rev.* 957 (1989) (hereafter Post, "Privacy").
92. See M. Sandel, *Liberalism and the Limits of Justice* (1982).
93. See Post, "Defamation Law," *supra* note 91, at 699-719.
94. See Post, "Privacy," *supra* note 91, at 959-87.
95. See Post, "The Constitutional Concept," *supra* note 91, at 616-46.
96. See, e.g., *id.* at 627-33.
97. 310 U.S. 296 (1940).
98. 376 U.S. 254 (1964).
99. 403 U.S. 15 (1971).
100. 485 U.S. 46 (1988). The American First Amendment is unique in thus separating democracy from community. I suspect that the origins of this separation lie both in our tradition of individualism and in the fact of our cultural diversity. For instructive contrasts, see Jacobson, "Alternative Pluralisms: Israeli and American Constitutionalism in Comparative Perspective," *The Review of Politics*, Spring 1989, 159-89; Kommers, "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany," 53 *S. Calif. L. Rev.* 657 (1980).
101. J. Habermas, *supra* note 77, at 38.

102. Rawls, *supra* note 78, at 230.
103. Post, "The Constitutional Concept," *supra* note 91, at 641-44.
104. *Id.*
105. 315 U.S. 568 (1942).
106. Rawls, *supra* note 78, at 230.
107. Pitkin, "Justice: On Relating Private and Public," 9 *Pol. Theory* 327, 346 (1981).
108. See Post, "The Constitutional Concept," *supra* note 91, at 667-84.
109. *Id.* at 667.
110. *Id.*
111. *Id.* at 680.
112. See, e.g., *Rogers v. EEOC*, 454 F.2d 234, 237-38 (5th Cir. 1971); *cert. denied*, 406 U.S. 957 (1972); *EEOC v. Murphy Motor Freight*, 488 F.Supp. 381, 385 (D. Minn. 1980); cf. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986) (holding that speech that constitutes sexual harassment may be regulated). I do not mean to imply, however, that all speech within the workplace is excluded from public discourse. See, e.g., *Connick v. Myers*, 461 U.S. 138, 149 (1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979).
113. It should be emphasized that I am in text using the adjective "public" in a discrete and stipulative sense to refer to that speech necessary for democratic self-governance. Thus I do not mean to imply that speech within the workplace is "nonpublic" in the sense that it is unimportant, or that it is "private" in the sense of being intrinsically insulated from governmental control or regulation. See Karst, "Private Discrimination and Public Responsibility: Patterson in Context," 1989 *Sup. Ct. Rev.* 1, 10-11; *supra* text accompanying notes 106-11. My point is instead that if the regulation of such speech is in fact protected by the First Amendment, it will be on the basis of constitutional values other than democratic self-governance.
114. 343 U.S. 250 (1952). The leaflet is reproduced in Justice Black's dissenting opinion. *Id.* at 276 (Black, J., dissenting).
115. *Id.* at 267 (Black, J., dissenting).
116. See *Collin v. Smith*, 447 F.Supp. 676 (N.D., Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).
117. To exclude from public discourse the category of racist speech as such would be equivalent to establishing a per se exclusion of racist ideas from public discourse, a form of regulation whose constitutionality is assessed in section 3(A) *infra*.
118. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 [1978]).
119. Rawls, *supra* note 78, at 230.
120. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).
121. J. Piaget, *supra* note 84, at 57. See *id.* at 63.
122. Wright, *supra* note 5, at 10.

123. Matsuda, *supra* note 5, at 2359. See Kretzmer, *supra* note 5, at 458.
124. Matsuda, *supra* note 5, at 2332-34. "Racist hate messages are rapidly increasing and are widely distributed in this country using a variety of low and high technologies." *Id.* at 2336. Kretzmer is also concerned with the potential spread of racist ideas. See Kretzmer, *supra* note 5, at 464-65.
125. See *supra* note 123 and accompanying text.
126. I thus do not reach the theoretically more fundamental question of why it should make a constitutional difference that racist ideas are "universally condemned." See, for example, the Court's rejection in *United States v. Eichman*, 496 U.S. 310 (1990), of the Solicitor General's invitation to overrule *Texas v. Johnson*, 491 U.S. 397 (1989), on the grounds of "Congress' recent recognition of a purported 'national consensus' favoring a prohibition on flag-burning. . . . Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *Eichman*, 496 U.S. at 318.
127. Kretzmer, *supra* note 5, at 456. See Matsuda, *supra* note 5, at 2338:

However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, . . . the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.

128. Matsuda, *supra* note 5, at 2378.
129. See Greenawalt, *supra* note 5, at 304-5.
130. Karst, "Citizenship, Race, and Marginality," 30 *Wm. & Mary L. Rev.* 1, 1 (1988).
131. See, e.g., N. Bobbio, *supra* note 63, at 157-58; C. Gould, *Rethinking Democracy: Freedom and Cooperation in Politics, Economy, and Society*, 90 (1988); J. Pennock, *Democratic Political Theory*, 3-161 (1979).
132. Michelman, *supra* note 79, at 1500-1501. Michelman notes that "no earnest, non-disruptive participant in American constitutional debate is quite free to reject" this "belief." *Id.* at 1500.
133. Rawls, *supra* note 78, at 230.
134. See, for example, "Language as Violence," *supra* note 5, at 360 (remarks of Mari Matsuda): "I use the principle of equality as a starting point. . . . [I]f I were to give primacy to any one right, and if I were to create a hierarchy, I would put equality first, because the right of speech is meaningless to people who do not have equality. I mean substantive as well as procedural equality."
135. That members of minority groups are now embraced within the circle of the people and afforded the formal equality required by First Amendment processes of self-determination is not, of course, due to any principle of

- the First Amendment, but rather to the principle of equal citizenship embodied in the Fourteenth. In this fundamental sense, therefore, no hierarchical relationship between the First and Fourteenth Amendments can exist.
136. For a fuller consideration of a sophisticated form of "balancing" the values of the Fourteenth Amendment against those of the First, see *infra* text accompanying notes 210-19.
137. *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952) (citing Ill. Rev. Stat. ch. 38 ¶ 471 [1949]). Anti-blasphemy regulations are a common example of such laws. See Post, *supra* 85, at 305-17; *The Law Commission, Offenses against Religion and Public Worship*, 39-53 (Working Paper No. 79, 1981). Many countries also have laws prohibiting group defamation. See, e.g., E. Barendt, *Freedom of Speech*, 161-67 (1985); Lasson, "Group Libel," *supra* note 5, at 88-89; Matsuda, *supra* note 5, at 2341-48.
138. Jacobson, *supra* note 100, at 175.
139. *Id.* at 170.
140. *Id.* at 175.
141. See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. (1989).
142. 310 U.S. 296 (1940).
143. *Id.* at 309.
144. *Id.* at 310.
145. For an excellent study of the efforts of contemporary Americans to forge new communities, like the Castro district in San Francisco, and hence to "reinvent themselves" by constructing "new lives, new families, even new societies," see F. Fitzgerald, *Cities on a Hill: A Journal through Contemporary American Cultures*, 23 (1986). Fitzgerald views such efforts as "quintessentially American"; try to imagine, she suggests, "Parisians creating a gay colony or a town for grandparents." *Id.* If in Europe or Canada group identity precedes the attempt to ask "the essential questions of who we . . . are, and how we ought to live" (*id.* at 20, 389-90), Fitzgerald's work illustrates the extent to which group identity in America tends to follow on that attempt, and hence ultimately to rest on individualist premises.
146. For a more detailed discussion, see Post, *supra* note 85, at 319-35.
147. See P. Miller, *The Life of the Mind in America*, 40-43 (1965).
148. R. Bellah, M. Madsen, W. Sullivan, A. Swidler, and S. Tipton, *Habits of the Heart: Individualism and Commitment in American Life*, 225 (1985).
149. See, e.g., D. Rhode, *Justice and Gender*, 5 (1989); Marcus, "Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York," 42 *U. Miami L. Rev.* 55, 55-63 (1987).
150. Marcus, *supra* note 149, at 61. See Harris, "Race and Essentialism in Feminist Legal Theory," 42 *Stan. L. Rev.* 581 (1990).
151. See Harris, *supra* note 150, at 615-16.
152. Fraser, "Toward a Discourse Ethic of Solidarity," 5 *Praxis Int'l* 425, 429 (1986).
153. *Id.*

154. M. Omi and H. Winant, *Racial Formation in the United States: From the 1960s to the 1980s*, 59 (1986). For an example of the persistence of a biological model of race, see, e.g., Herrnstein, "Still an American Dilemma," *The Public Interest*, no. 98 (Winter 1990), 3-17.
155. M. Omi and H. Winant, *supra* note 154, at 60, 68. Omi and Winant write of the "continuous temptation to think of race as an essence, as something fixed, concrete and objective." *Id.* at 68. See Appiah, "The Uncompleted Argument: Du Bois and the Illusion of Race," in H. L. Gates, "Race," *Writing, and Difference*, 36 (1986): "Talk of 'race' is particularly distressing for those of us who take culture seriously. . . . What exists 'out there' in the world—communities of meaning, shading variously into each other in the rich structure of the social world—is the province not of biology but of hermeneutic understanding."
156. For a good example, see Scales-Trent, "Black Women and the Constitution: Finding Our Place, Asserting Our Rights," 24 *Harv. C.R.-C.L. L. Rev.* 9 (1989).
157. For a brief history of the interdependence of understandings of national identity and understandings of race, see Gleason, "American Identity and Americanization," in W. Petersen, M. Novak, and P. Gleason, *Concepts of Ethnicity*, 57-143 (1982). A small but I suspect paradigmatic example of this interdependence may be found in the following passage from a student letter to *The Daily Californian*:
- Advertising, television, schools and government are areas of society where racism is largely promoted. Its existence is not easily eradicated. Phrases like "blackmail," "black ball" and "black mood" are common ways "blackness" is communicated in negative terms. . . . One of my professors frequently employs terms like "black lie" to mean the worst of all lies. It takes a conscious effort to disregard these statements and prevent such negative influence on one's psyche. But we must understand that daily use of this terminology reinforces the attack on African-American identity and value.
- Broughton, "Promote Afro-American Culture," *The Daily Californian*, Tuesday, Sept. 12, 1989, at 4. The writer's point is relevant to the perspectives of members of both minority and majority groups; in fact, the point effectively demonstrates the essential reciprocity of these perspectives.
158. Wilson, "Social Research and the Underclass Debate," *Bulletin of the American Academy of Arts and Sciences*, vol. 43, no. 2 (Nov. 1989), 30-44.
159. S. Steele, *The Content of Our Character: A New Vision of Race in America* (1990).
160. See "Black Power, Foul and Fragrant," *Economist*, Oct. 12, 1985, at 25, for a summary of Farrakhan's critical assessment of the condition of many African Americans.
161. Note, in this regard, Nadine Strossen's evidence that regulations of racist speech have historically proved to be "particularly threatening to the speech of racial and political minorities." Strossen, *supra* note 5, at 556-59.
162. Or, in the language that the Court proposed in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), claims of group harm will most likely be privileged as nonfactual assertions of "ideas." For a discussion of the First Amendment distinction between fact and ideas, see Post, "The Constitutional Concept," *supra* note 91, at 649-61. For a discussion of the close relationship between group defamation and nonfactual ideas, see D. Richards, *Toleration and the Constitution*, 190-93 (1986); Greenawalt, *supra* note 5, at 305-6.
163. *Beauharnais v. Illinois*, 343 U.S. 250, 276 (1952) (ellipses in the original).
164. *Id.* at 257-58.
165. See, e.g., Matsuda, *supra* note 5, at 2358.
166. *Id.*
167. Michelman, *supra* note 79, at 1501.
168. *Cohen v. California*, 403 U.S. 15, 16 (1971).
169. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).
170. *Boos v. Barry*, 485 U.S. 312, 316, 322 (1988). "[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Id.* at 322 (quoting *Hustler* magazine, 485 U.S. at 56); see *Texas v. Johnson*, 491 U.S. 397 413-18 (1989).
171. I elaborate on this argument in Post, "The Constitutional Concept," *supra* note 91, at 626-46. The cases cited in notes 168-70 *supra* thus stand foursquare against the application to public discourse of the tort of racial insult as proposed by Delgado, *supra* note 4, Love, *supra* note 5, and Wright, *supra* note 5.
172. Michelman, *supra* note 79, at 1526. See F. Cunningham, *Democratic Theory and Socialism*, 188-91 (1987).
173. See *supra* notes 112-13 and accompanying text.
174. It should be noted, however, that the public/private distinction necessary for democratic governance will require that at some point limitations be placed on the ability of the state coercively to form citizens with nonracist identities. See note 87, *supra*.
175. See, e.g., *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977); *Alcorn v. Ambro Engineering, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Love, *supra* note 5, at 128-33.
176. Cf. *Dominguez v. Stone*, 97 N.M. 211, 638 P.2d 423 (1981) (penalizing racist insults in political speech).
177. Lasson, "Group Libel," *supra* note 5, at 122.
178. Thus "fighting words" are understood to be those which "by their very utterance inflict injury." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Outrageous words intentionally inflicting emotional distress are "nothing more than a surrogate" for a "punch or kick." Wright, "Hustler Magazine v. Falwell and the Role of the First Amendment," 19

- Cumb. L. Rev.* 19, 23 (1988). "Ridicule" is experienced as a form of "intimidation." Dewey, "Creative Democracy—The Task before Us," in *Classic American Philosophers*, 389, 393 (M. Fisch, ed., 1951). Pornography is received not as "expression depicting the subordination of women, but [as] the practice of subordination itself." Brest and Vandenberg, "Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis," 39 *Stan. L. Rev.* 607, 659 (1987). And blasphemous communications are nothing more than a form of "brawls." F. Holt, *The Law of Libel*, 70-71 (1816).
179. *Time, Inc. v. Hill*, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting). Alexander Bickel once remarked that such communication "amounts to almost physical aggression." A. Bickel, *The Morality of Consent*, 72 (1975); see also *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).
180. See *supra* text and accompanying notes 91-105.
181. *Thus Terminiello v. Chicago*:
 [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.
 337 U.S. 1, 4-5 (1949) (citations omitted).
182. For an excellent discussion, see Karst, "Boundaries and Reasons: Freedom of Expression and the Subordination of Groups," 1990 *U. Ill. L. Rev.* 95.
183. 403 U.S. 15.
184. *Id.* at 23.
185. *Id.* at 24-25.
186. Matsuda, *supra* note 5, at 2340; Lawrence, *supra* note 5, at 436.
187. I omit discussion of speech that silences through outright intimidation and threats. The regulation of such speech is not problematic under any theory.
188. For a good introduction to the concept of "discourse," see Bove, "Discourse," in *Critical Terms for Literary Study*, 50 (F. Lentricchia and T. McLaughlin, eds., 1990).
189. Lawrence, *supra* note 5, at 452.
190. *Id.* at 474-75. See Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," 101 *Harv. L. Rev.* 1331, 1370-81 (1988).
191. Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning," 64 *Notre Dame L. Rev.* 886, 889 (1989).

192. Note, "Racism and Race Relations in the University," 76 *Va. L. Rev.* 295, 304 N.32 (1990) (quoting Brooks, "Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets," 5 *J.L. & INEQUALITY* 1, 8-11 [1987]).
193. Matsuda, *supra* note 5, at 2323-26.
194. *Id.* at 2375. See Lawrence, *supra* note 5, at 458-61.
195. Riesman, "Democracy and Defamation: Fair Game and Fair Comment II," 42 *Colum. L. Rev.* 1282, 1306-7 (1942).
196. See P. Chevigny, *More Speech: Dialogue Rights and Modern Liberty*, 53-72 (1988); Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," 56 *Tenn. L. Rev.* 291, 313 (1989).
197. For a general discussion of the concept of false consciousness, see R. Geuss, *The Ideal of a Critical Theory: Habermas and the Frankfurt School* (1981).
198. Matsuda, *supra* note 5, at 2331.
199. Note, *supra* note 192, at 295.
200. Lawrence, *supra* note 5, at 436.
201. *Id.* at 481.
202. Matsuda, *supra* note 5, at 2369. This tendency is explicitly thematized in Iris Marion Young's artless proposal that "a democratic public" will necessarily cede to "constituent groups that are oppressed or disadvantaged" a "veto power regarding specific policies that affect a group directly." Young, "Polity and Group Difference," 99 *Ethics* 250, 261-62 (1989).
203. The "grand tradition" of republican participation, the notion that "we can lift our public realm above the fallen and compromised realm of factional politics," thus does not appear to me so easily abandoned as would appear from recent literature stressing fidelity to the particular cultural "tradition" of minority groups. See Lopez, "The Idea of a Constitution in the Chicano Tradition," 37 *J. Leg. Educ.* 162, 164-65 (1987). Even Young notes that a "heterogeneous public . . . is a public, where participants discuss together the issues before them and are supposed to come to a decision that they determine as best or most just." Young, *supra* note 202, at 267.
- It is possible for persons to maintain their group identity and to be influenced by their perceptions of social events derived from their group-specific experience, and at the same time to be public spirited, in the sense of being open to listening to the claims of others and not being concerned for their own gain alone. It is possible and necessary for people to take a critical distance from their own immediate desires and gut reactions in order to discuss public proposals. Doing so, however, cannot require that citizens abandon their particular affiliations, experiences, and social location.
- Id.* at 257-58.
204. Berger, "Professors' Race Ideas Stir Turmoil at College," *New York Times*, Apr. 20, 1990, at B1, col. 2.

205. See *supra* text accompanying notes 178–80.
206. Note that the argument in text does not hold against the contention that certain ideas should be excluded from public discourse because they cause extensive harm to individuals or victim groups. Such harm is extrinsic to the function of public discourse. To evaluate the contention that public discourse ought to be limited because of harm to individuals or groups, therefore, we must assess the importance of democratic self-governance in light of our commitment to protecting stable personal and group identities. See *supra*, part 3(B)&(C).
- The argument that certain ideas ought to be excluded from public discourse because they are intrinsically “coercive,” on the other hand, turns upon harm to the function of public discourse itself. The argument is unsatisfactory because the concept of “coercion” must itself be defined by reference to a “moral baseline” determined by the practice in question. See A. Wertheimer, *Coercion* (1987). Within the practice of public discourse no idea can be deemed intrinsically “coercive” because the very function of public discourse presupposes a formal equality of persons and hence of ideas.
207. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
208. See *supra* note 206.
209. See Lawrence, *supra* note 5, at 474–75. That this is a general characteristic of group claims can be seen by the development of an analogous dynamic among those who support the regulation of pornography. See, e.g., C. MacKinnon, “On Collaboration,” in *Feminism Unmodified: Discourses of Life and Law*, 198 (1987).
210. The success or failure of the gesture will depend entirely on the perception of members of victim groups. There is thus no guarantee that any particular regulatory scheme will in fact actually cause members of victim groups to reinterpret their position within public discourse. This inherent gap between regulatory design and the achievement of regulatory purpose, coupled with the fact that only members of victim groups can experience and evaluate the claim of cultural exclusion, creates disturbing possibilities for strategic manipulation.
211. Of course so minimal a gesture might not be sufficient to achieve this purpose. The intrinsically speculative quality of the argument must be taken into account in its evaluation.
212. According to the solicitor general, the state’s interest in prohibiting flag burning turns on the importance of “safeguard[ing] the flag’s identity ‘as the unique and unalloyed symbol of the Nation.’” *United States v. Eichman*, 496 U.S. 310, 315 (1990) (quoting Brief for United States at 28, 29).
213. *Texas v. Johnson*, 491 U.S. 397, 430–32 (1989) (Rehnquist, C.J., dissenting).
214. I should be plain that I myself reject the premise of this argument and do not believe that the meaning of speech can be disentangled from the manner of its presentation. Style and substance are always interdependent,

- for, in the words of Georg Lukacs, “[c]ontent determines form.” G. Lukacs, *Realism in Our Time: Literature and the Class Struggle*, 19 (J. and N. Mander, trans., 1962). For a discussion, see Post, “The Constitutional Concept,” *supra* note 91, at 663 n.314. I therefore do not think that the impact on public discourse of prohibiting certain kinds of words can ever properly be said to be *de minimis*. I nevertheless want to evaluate the case for balancing on the strong assumption of this kind of *de minimis* impact.
215. For a discussion of this argument in the context of flag burning, see *Eichman*, 496 U.S. at 320–23 (Stevens, J., dissenting).
216. In evaluating this balance, I do not mean to call into question the holding of *Chaplinsky*, which in my view attempts to distinguish private fracasas from political debate. See Post, “The Constitutional Concept,” *supra* note 91, at 679–81. It is clear enough that racial epithets, when uttered in certain face-to-face situations, would constitute “fighting words” and hence not form part of public discourse. See Greenawalt, *supra* note 5, at 306. The point of the argument in text, however, is to evaluate restraints on racist epithets in what would otherwise clearly be deemed public discourse, as for example in political debates, newspapers, pamphlets, magazines, novels, movies, records, and so forth.
217. Anyone inclined to doubt this proposition should review again the controversy over funding for the National Endowment for the Arts, or the prosecutions occasioned by the Mapplethorpe exhibition or the recordings of 2 Live Crew. See “Rap Band Members Found Not Guilty in Obscenity Trial,” *New York Times*, Oct. 21, 1990, § 1, at 1, col. 1; “Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case,” *New York Times*, Oct. 6, 1990, § 1, at 1, col. 1; “Reverend Wildman’s War on the Arts,” *New York Times*, Sept. 2, 1990, § 6 (Magazine), at 22, col. 1.
218. Emory University, “Policy Statement on Discriminatory Harassment” (1988); see *Doe v. University of Mich.*, 721 F.Supp. 852, 856 (E.D. Mich. 1989) (concerning sanctions for speech victimizing an individual “on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, martial status, handicap, or Vietnam-era veteran status”). The regulations of Michigan State University include the prohibited category of “political persuasion.” Michigan State University, *Your Ticket to an Adventure in Understanding* (1988) (available from University Housing Program). The regulations of West Chester University include the category of “lifestyle.” West Chester University, *Ram’s Eye View: Every Student’s Guide to West Chester University*, 61 (1990) (available from Student Development Office). The regulations of Hampshire College include that of “socioeconomic class.” Hampshire College, *College Policies: Updates and Revisions* (1988–89).
219. This claim is also implausible, as I noted earlier, because of its vulnerable assumption that style can be sharply distinguished from substance. See *supra* note 214.
220. The argument in this and the following two paragraphs is developed in

- detail in Post, "Between Governance and Management: The History and Theory of the Public Forum," 34 *UCLA L. Rev.* 1713 (1987) (hereafter Post, "Between Governance"). See also Post, "The Constitutional Concept," *supra* note 91, at 684-85.
21. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 268-69 (1981).
 22. *Id.* at 268 n.5.
 23. *Id.* at 277 (citing *Healy v. James*, 408 U.S. 169, 189 [1972]).
 24. Judicial application of these factors in nonpublic forums like universities is discussed in greater detail in Post, "Between Governance," *supra* note 220, at 1765-1824.
 25. This short discussion considers only issues pertaining to the *constitutional* of the regulation of racist speech. It does not consider the *educational* issues raised by such regulation. These issues are, however, profound and revolve around the question of whether legal restraint is the heuristically most effective response to racist speech.
 26. *Pugsley v. Sellmeyer*, 158 Ark. 247, 253, 250 S.W. 538, 539 (1923).
 27. 478 U.S. 675 (1986).
 28. *Id.* at 678.
 29. *Id.* at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 [1979]).
 30. *Id.* (quoting C. Beard and M. Beard, *New Basic History of the United States*, 228 [1968]).
 31. *Id.* at 681, 683. For another example of the same kind of reasoning, see *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).
 32. 410 U.S. 667 (1973).
 33. *Id.* at 672 (Burger, C.J., dissenting).
 34. *Bethel v. School Dist. No. 403 v. Frazer*, 478 U.S. 675, 681 (1986).
 35. For the development of this logic at the pre-university level, see, for example, *Clarke v. Board of Educ.*, 215 Neb. 250, 338 N.W. 2d 272 (1983).
 36. Commonwealth of Massachusetts Board of Regents of Higher Education, "Policy against Racism and Guidelines for Campus Policies against Racism," 2 (June 13, 1989).
 37. *Alder v. Board of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). For a fully developed statement of this position, see *Abington School Dist. v. Schempp*, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring).
 38. The tension between the concepts of democratic and civic education closely recapitulates the informative debate between Piaget and Durkheim over the question of how to teach moral values. Durkheim stressed the importance of discipline, authority, and constraint, whereas Piaget emphasized cooperation, agreement, and autonomy. See J. Piaget, *supra* note 84, at 341-71.
 39. 393 U.S. 503 (1969).
 40. *Id.* at 508-9.
 41. *Id.* at 511.
 42. *Healy v. James*, 408 U.S. 169, 194 (1972).

243. "Report of the Committee on Freedom of Expression at Yale," 4 *Hum. Rts.* 357, 357 (1975) (hereafter "Report of the Committee"). This function is not one that we ordinarily attribute to high schools, much less elementary schools.
244. *Id.*
245. *Id.* at 357-58; see Schmidt, "Freedom of Thought: A Principle in Peril?," *Yale Alumni Mag.*, Oct. 1989, at 65, 65-66.
246. Byrne, "Academic Freedom: A 'Special Concern of the First Amendment,'" 99 *Yale L.J.* 251, 261 (1989). The presence of such a model "contributes profoundly to society at large. We employ the expositors of academic speech to train nearly everyone who exercises leadership within our society. Beyond whatever specialized learning our graduates assimilate, they ought to be persuaded that careful, honest expression demands an answer in kind. The experience of academic freedom helps secure broader, positive liberties of expression." *Id.*
247. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 [S.D.N.Y. 1943]); see *Healy v. James*, 408 U.S. 169, 180-81 (1972).
248. *Healy*, 408 U.S. at 186-88.
249. See *supra* notes 47-51 and accompanying text.
250. "If the university's overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument." "Report of the Committee," *supra* note 243, at 360.
251. *Papish v. University of Mo. Curators*, 410 U.S. 667, 670 (1973).
252. See *supra* part 3(D).
253. As a matter of policy, however, it is always dangerous to make the legality of speech depend primarily upon an assessment of a speaker's intent, for there is a powerful tendency to attribute bad motives to those with whom we fundamentally disagree.
254. The inability to make this distinction contributed to a court's decision to strike down as unconstitutional the regulations of the University of Michigan. See *Doe v. University of Mich.*, 721 F.Supp. 852 (E.D. Mich. 1989); Grano, *supra* note 5, at 7.
255. For an admirable attempt to meet this challenge, see Grey, *supra* note 5, and the regulations that Professor Grey drafted for Stanford University.
256. Cases like *Tinker* and *Healy* make clear, however, that the Supreme Court's First Amendment jurisprudence has rested on the assumption that there are constitutional limits to the freedom of public educational institutions to define their own educational mission.
257. Some universities have regulated racist speech in ways that turn on such functional and geographic considerations. See *Doe*, 721 F.Supp. at 856; "Tufts Restores Free Speech after T-Shirt Confrontation," *San Francisco Chronicle*, Dec. 9, 1989, at B6, col. 1; Wilson, "Colleges Take 2 Basic Approaches in Adopting Anti-Harassment Plans," *Chronicle of Higher*

Education, Oct. 4, 1989, at A38, col. 1; Russo, "Free Speech at Tufts: Zoned Out," *New York Times*, Sept. 27, 1989, at A29.

58. See, e.g., E. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973).
59. For a striking illustration of the untoward (and in retrospect horrifying) consequences of repudiating that obligation, see Marcuse, "Repressive Tolerance," in R. Wolff, B. Moore, and H. Marcuse, *A Critique of Pure Tolerance*, 81 (1965).

4. Regulating Racist Speech on Campus: A Modest Proposal?

Nadine Strossen

Freedom of speech is indivisible; unless we protect it for all, we will have it for none.

—Harry Kalven, Jr.

If there be minority groups who hail this holding [rejecting a First Amendment challenge to a group libel statute] as their victory, they might consider the possible relevancy of this ancient remark: "Another such victory and I am undone."

—Hugo Black, Jr.

The civil rights movement would have been vastly different without the shield and spear of the First Amendment. The Bill of Rights . . . is of particular importance to those who have been the victims of oppression.

—Benjamin L. Hooks

It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried.

—Eleanor Holmes Norton

The basic problem with all these regimes to protect various people is that the protection incapacitates. . . . To think that I [as a black man] will . . . be told that white folks have the moral character to shrug off insults, and I do not. . . . That is the most insidious, the most insulting, the most racist statement of all!

—Alan Keyes

Whom will we trust to censor communications and decide which ones are "too offensive" or "too inflammatory" or too devoid of intellectual content? . . . As a former president of the University of California once said: "The University is not engaged in making ideas safe for students. It is engaged in making students safe for ideas."

—Derek Bok