CHAPTER 8

Speech in the Welfare State: The Primacy of Political Deliberation

A New Deal for speech would renovate the free speech tradition. Whether or not we attempt such a New Deal, the Madisonian conception insists that the First Amendment is principally about political deliberation. A renewal of this view, asserted most vigorously in the work of the philosopher Alexander Meiklejohn,[1] would help to resolve many current controversies. It would do so while maintaining the focus on deliberative democracy, and without sacrificing the basic features of free speech law as it now stands. It would be compatible with the New Deal for speech; but it could be accepted even if the New Deal were rejected.

On the Madisonian view, ours is a two-tier First Amendment.[2] Political speech lies at the core of the amendment, and it may be regulated only on the basis of the strongest showing of harm. But the presence of words or pictures is not, standing by itself, a sufficient reason for full constitutional protection. Bribery, criminal solicitation, threats, unlicensed medical advice, conspiracies, perjury—all these are words, to be sure, but they are not by virtue of that fact entitled to the highest level of constitutional protection. They may be regulated on the basis of a lesser showing of harm than is required for political speech. They are not entirely without constitutional protection; they count as "speech." But they do not lie within the core of the free speech guarantee.

Theory

THE TWO-TIER FIRST AMENDMENT

In order to defend this proposal, I begin by exploring whether there should indeed be a two-tier First Amendment, for the view that some forms of speech are less protected than others is frequently met with alarm. Notwithstanding the controversy, a view of this sort receives strong support from existing law. Indeed every justice has expressed some such view within the last generation. For example, the Supreme Court gives less than complete protection to commercial speech. It excludes obscenity from the First Amendment altogether. It treats libel of private persons quite differently from libel of people who are public figures.[3] The absence of protection for conspiracies, purely verbal workplace harassment of individuals on the basis of race and sex, unlicensed medical and legal advice, bribery, and threats appears to owe something to a distinction between the political and nonpolitical use of speech.

The Court has yet to offer a clear principle to unify the categories of speech that it treats as "low value." The apparent absence of a unifying principle is a source of continuing frustration to people who try to make sense of free speech law. It is tempting to think that some speech is unprotected because it is "really" not speech at all, but merely "action." But this notion is unhelpful. Conspiracies, unlicensed medical advice, and bribes are speech, not action; literally, they consist only of words, not of nonverbal behavior. If they are to be treated as action—that is, if they are not to be protected—it is because of their distinctive features. This is what we must discuss. The word *action* is simply a placeholder for that unprovided discussion.

Thus far, then, we see that the Supreme Court understands the First Amendment to have two tiers, and that the speech/action distinction is inadequate. But is a two-tier First Amendment either inevitable or desirable? It does seem that any well-functioning system of free expression must ultimately distinguish among different kinds of speech by reference to their centrality to the First Amendment guarantee.[4] It would not be plausible to say that all speech stands on the same footing, and that regulation of (for example) campaign speeches must be tested under the same standards applied to misleading commercial speech, child pornography, conspiracies, libel of private persons, and threats. If the same standards were applied, one of two results would follow; and both are unacceptable.

The first would be that the burden of justification imposed on government would have to be lowered as a whole, so as to allow for regulation of misleading commercial speech, private libel, and so forth. The effect would be an unacceptably high threat to political expression. A system in which political speech received the same (partial) protection given to commercial speech would produce serious risks to democratic self-governance. Government can regulate misleading or false commercial speech. If the standards were the same, government would also be allowed to regulate political speech when it is misleading or false, and this would provide too little breathing space for crucial speech. A system in which libel of government officials received no less protection than libel of ordinary citizens would produce the same risks. Such a system would deter criticism of government.

The second possibility would be that the properly stringent standards applied to efforts to regulate political speech would also be applied to commercial speech, private libel, and child pornography. The central problem with this approach is that it would ensure that government controls could not be applied to speech that in all probability should be regulated. We would make it difficult or impossible for government to regulate (among other things) criminal solicitation, child pornography, unlicensed medical advice, private libel, and false or misleading commercial speech. The harms that justify such regulation are of course real, but they are simply not grave enough to permit government controls under the extremely high standards applied to regulation of political speech. Under those high standards, the Constitution would require child pornography to be regulated not through controls on speech, but through controls on the production itself; criminal solicitation would be constitutionally permitted (it is often harmless because ineffectual), and only criminal conduct restricted.

These would in fact be the right conclusions if we impose, in these cases, the severe burden applied to government restrictions of "core" speech. If courts are to be honest about the matter, an insistence that "all speech is speech" would require the elimination of many currently unobjectionable and even necessary controls; or, more likely, judgments about value, because unavoidable, would continue to be made, but covertly.

If a distinction must be drawn between low- and high-value expression, the many efforts to understand the First Amendment only as a protection of "autonomy" may well be doomed to failure.[5] It has been suggested, for example, that the free speech principle protects the autonomy of speakers or of listeners, first by safeguarding their speech, and second by forbidding government to regulate speech because listeners might be influenced by it.

These suggestions are extremely valuable. They help explain why government interference with speech is especially troublesome. They also help account for the Court's protection of speech that is wholly nonpolitical. Government should not intrude on the individual's decision about what to believe; at least as a general rule, it should respect each person's capacity to make that choice for himself. This principle rules out certain commonly offered reasons for regulation of speech. It also helps explain why art, literature, and even commercial speech are entitled to constitutional protection.

But an autonomy principle is unlikely to provide a complete basis for understanding the free speech guarantee. I must be tentative about the point here, but it seems likely that any autonomy-based approach will make it difficult or impossible to make the necessary distinctions between different categories of speech. If we protect speech because and when people want to talk or listen, it is not easy to come up with standards by which to distinguish among different kinds of speech. Perhaps we will be able to say that the interest in autonomy calls for protection of art and literature but allows restrictions on bribery, threats, and even false commercial speech. Perhaps we can elaborate an autonomy principle in such a way as to make the appropriate distinctions. Perhaps we can even use such a principle to generate a two-tier First Amendment. I cannot fully discuss this possibility here. But it seems plausible that the adjustments of the autonomy principle will have a disturbingly ad hoc quality, and that something other than autonomy will really be at work. It seems hard, for example, to think that an autonomy principle can entirely explain the division between specially protected speech on the one hand and purely verbal sexual harassment, unlicensed medical or legal advice, child pornography, and misleading commercial speech on the other.

Moreover, an approach rooted only in a norm of autonomy may make it difficult to understand what is special about speech at all. Almost all voluntary acts, like almost all speech, seem to serve the goal of autonomy as this idea is usually understood by advocates of an autonomy-based conception of the First Amendment.[6] If autonomy in the abstract is the principle, there may be nothing distinctive about speech to explain why it has been singled out for constitutional protection. An approach to the First Amendment that does not account

for the distinctiveness of speech would be untrue to constitutional text and structure. And if we do not account for the distinctiveness of speech, it will be very hard to decide hard free speech cases.

It is surely plausible to say that autonomy is a free speech value, and the interest in autonomy helps explain why all words are entitled to at least a degree of constitutional protection. But unless it can account for a two-tier system, autonomy is inadequate as a full account of the First Amendment.

THE CASE FOR THE PRIMACY OF POLITICS

It remains, however, to explain by what standard courts might accomplish the task of distinguishing between low-value and high-value speech. Of all the possible standards for distinguishing between forms of speech, an emphasis on democracy and politics seems likely to be best. To support this argument, it is of course necessary to define the category of political speech.

For present purposes I mean to treat speech as political *when it is both intended and received as a contribution to public deliberation about some issue.* It seems implausible to think that words warrant the highest form of protection if the speaker does not even intend to communicate a message. The First Amendment does not put jibberish at the core even if it is taken, by some in the audience, to mean something. An act of arson does not belong at the core simply because some people think that the act is a political protest; it is necessary that the speaker be trying to contribute to political deliberation.[7] By requiring intent, however, I do not mean to require a trial on the question of subjective motivation, and certainly I do not suggest that juries should make ad hoc decisions on that matter. Generally this issue can be resolved by making reasonable inferences from the speech at issue. We can think of some borderline cases, but it is probably not worth worrying much over them. In the real world, almost all cases will be easy on this score.

By requiring that the speech be received as political, I do not mean that all listeners or readers must see the political content. It is sufficient if some people do. Many people of course miss the political message in some forms of speech that should unquestionably qualify as political—especially art or literature. But if no one at all can see the political content, it is hard to understand why the speech should so qualify.

Finally, both requirements must be met, although in almost all cases speech that is intended as political will be seen by some people as such.

The requirements do belong in the conjunctive: The mere fact that some speech is seen by some as political is insufficient if we assume that it is not so intended. Consider, for example, an act of arson, commercial speech, obscenity, or private libel. If some people understand the speech in question to be political, it cannot follow that the speech qualifies as such for constitutional purposes, without treating almost all speech as political and therefore destroying the whole point of the two-tier model. Of course the definition I have offered leaves many questions unanswered, and there will be hard intermediate cases. I offer it as a starting point for analysis.

An approach that affords special protection to political speech, thus defined, is justified on numerous grounds. Such an approach receives firm support from history—not only from the framers' own theory of free expression, but also from the development of that principle through the long history of American law. There can be little doubt that suppression by the government of political ideas that it disapproved of or found threatening was the central motivation for the clause.[8] There can be little doubt that the main examples of unacceptable censorship in America and elsewhere involve efforts by government to insulate itself from criticism. A political conception of the First Amendment is also supported by the bulk of judicial interpretations over time.

Such an approach has the further advantage of corresponding to our initial or considered judgments about particular free speech problems. Any approach to the First Amendment will have to take substantial account of those particular judgments and adjust itself accordingly.[9] It seems clear that political protests cannot be regulated without a powerful demonstration of harm. It also seems clear, on reflection, that such forms of speech as perjury, bribery, unlicensed medical advice, threats, misleading or false commercial advertising, criminal solicitation, and libel of private persons—or at least most of these—are not entitled to the highest degree of constitutional protection. The political approach accounts well for our considered judgments about all or most of these cases. It may not do so perfectly, and some people will differ about some cases; but no other general approach seems nearly as well suited to this task.

In addition, an insistence that government's burden is greatest when political speech is at issue responds well to the fact that it is in the political setting that government is most likely to be biased or to be acting on the basis of illegitimate considerations.[10] Government is

rightly distrusted when it is regulating speech that might harm its own interests. The premise of distrust is strongest when politics is at issue. It is far weaker when government is regulating (say) commercial speech, bribery, private libel, unlicensed medical advice, or obscenity. In such cases there is less reason to suppose that it is likely to be biased or to be insulating itself from criticism.

Finally, a political approach protects speech not only when regulation is most likely to be biased, but also when it is most likely to be harmful. Restrictions on political speech have the distinctive feature of impairing the ordinary channels for political change. Because they make democratic corrections less effective, such restrictions are especially dangerous.[11] If there are controls on commercial advertising, for example, it always remains possible to argue that such controls should be lifted. Any damage to democratic processes is minimal; democracy can correct the situation. If the government bans violent pornography, citizens can continue to argue against the ban. But if some political argument is foreclosed, the democratic corrective is severely impaired. A ban on speech critical of a war, or a prohibition on libel of public officials, will undermine an ordinary political response to possible government failure. Controls on speech that is not political do not have this uniquely damaging feature.

Taken in concert, these considerations suggest that government should be under a special burden of justification when it seeks to control speech that is intended and received as a contribution to democratic deliberation. To be sure, there are some powerful alternative approaches. Perhaps we should hold speech to be entitled to special protection whenever it involves rational thought. An idea of this sort would extend well beyond the political to include not merely literary and artistic work, but commercial and scientific expression as well. Perhaps such an approach can ultimately be defended. But the "rational thought" approach will produce major anomalies. It seems unlikely that (for example) technological data with potential military applications should be given the same protection as political speech, or that misleading commercial speech deserves the same protection as misleading political speech. A conclusion of this sort would make it difficult or impossible to justify the regulation of misleading advertising or of the export of such data to unfriendly foreign countries. These results, apparently required by the "rational thought" idea, seem to be jarring.

Alternatively, it might be thought that the core of the free speech

principle includes any representation through words or pictures that reflects deliberation or imagination in a way that is relevant to the development of individual human capacities.[12] An approach of this sort has yet to be elaborated fully, and it might carry considerable promise. But at first glance such an approach would also produce anomalies. It would, for example, make it hard to distinguish between scientific and political speech, and it might also include within the top tier such materials as child pornography.

Much work remains to be done to elaborate and evaluate alternatives of this sort. But a conception of free speech that is centered on democratic governance appears, at the present time, to hold out the best promise for organizing our considered judgments about the range of cases likely to raise hard First Amendment questions.

If the First Amendment offers special protection to political speech, it would of course be necessary to reject the proposition that all forms of speech stand on the same ground—that distinctions cannot be drawn between obscenity and political protest, between misleading commercial speech and misleading campaign statements, or between proxy statements and party platforms. It would also be necessary to resort far less readily to the view that a restriction on one form of speech will necessarily lead to another.

COUNTERARGUMENTS

The problems with a political conception of the First Amendment are not unfamiliar; they raise all the questions that produced the current First Amendment preoccupation with line-drawing. How, for example, are we to treat the work of Robert Mapplethorpe, the music of a rock group, or nude dancing? Both commercial speech and pornography are political in the crucial sense that they reflect and promote a point of view, broadly speaking ideological in character, about how important things in the world should be structured. The recent attack on pornography has drawn close attention to its political character, and in this sense might be thought to invalidate efforts to regulate it. (See Chapter 9.)

Or, more generally: Is it so clear that speech that has nothing to do with politics is not entitled to First Amendment protection? Must we exclude music or art or science?[13] Surely it is philistine or worse to say that the First Amendment protects only political platforms. Often the deepest political challenges to the existing order can be found in art, literature, music, or (perhaps especially) sexual expression; sex is fa-

miliarly a metaphor for social rebellion. Sometimes government attempts to regulate these things for precisely this reason. And even when politics are not involved, art and literature involve matters central to human life and individual development. Is the First Amendment indifferent to this fact?

These are hard questions without simple solutions. I can venture only some brief remarks in response. The first is that the existence of real line-drawing problems should not be taken, by itself, to foreclose an attempt to distinguish between political and nonpolitical speech. Surely the problem counts against the attempt, but it cannot be decisive in light of the enormous problems produced by refusing to make that distinction. If the distinction is otherwise plausible, and if systems that fail to make it have severe problems, the difficulty of drawing lines is acceptable.

Even more fundamental, there is no way to operate a system of free expression without drawing lines. Not everything that counts as words or pictures is entitled to full constitutional protection. No one really believes that the First Amendment is an absolute, that all words and pictures belong on the same tier. The question is not whether to draw lines, but how to draw the right ones. For this we need some kind of theory.

The second point is that the category of the political should be broadly understood. The definition I have offered would encompass not simply political tracts, but all art and literature that have the characteristics of social commentary, which is to say most art and literature. Such a broad conception seems right, first, because much of this speech is in fact political in the relevant sense despite initial appearances, and, second, because it is important to create a large breathing space for political speech by protecting expression even if it does not explicitly fall within that category. This second point is crucial, since our institutions are inevitably both fallible and biased, and we should therefore build into free speech law protective principles to counteract problems of application. Both Joyce's *Ulysses* and Dickens' *Bleak House* are therefore political for First Amendment purposes. The same is true of Robert Mapplethorpe's work, which attempts to draw into question current sexual norms and practices. We might even conclude that art and literature generally belong in the top tier because often these are indeed relevantly political, and because courts are not capable of drawing in an unbiased way the line between political and nonpolitical art and literature.

But to say this is emphatically not to say that all speech that has political consequences is by virtue of that fact "political" in the constitutional sense. Obscenity is surely political in the sense that it has political wellsprings and effects; the same is true of commercial speech, which affects the world in important ways, and even of bribery—certainly bribery of public officials. An employer's purely verbal sexual or racial harassment of an employee surely has political consequences, including the creation of a deterrent for women and blacks to go to that workplace at all; this is unquestionably a political effect.

All these forms of speech are not by virtue of this fact entitled to the highest form of constitutional protection. If we concluded that speech is political because it has political causes and effects, we would be saying that nearly everything that counts as words or pictures is immunized from legal regulation. For reasons suggested above, that cannot be right. For purposes of the Constitution, the question is whether the speech is intended and received as a contribution to political deliberation, not whether it has political effects or sources. Thus, for example, there is a distinction between a misogynist tract, which is entitled to full protection, and many pornographic movies, which are not, but which are in essence masturbatory aids. There is a difference between face-to-face racial harassment by an employer of an employee, which is not entitled to full protection, and a racist speech to a crowd, which is so entitled. There is a difference between a racial epithet and a tract in favor of white supremacy. And there is a difference between an essay about the value of unregulated markets in oil production and an advertisement for Texaco—even if both are written and published by an oil company.

The definition I have offered would exclude much speech from the high-value category, and for this reason it might pose an unacceptable danger of censorship. A more general response is that the definition would offer exceptionally fragile safeguards for art, music, literature, and perhaps much of commercial entertainment. A First Amendment offering so little protection to so much might be embarrassingly weak and thin. If the exclusion of such materials results from a theory that is not compelled by the Constitution's text, surely that theory should be repudiated.

A possible elaboration of this view would build on a point made above. Free speech law should be devised to "overprotect" speech, and for good institutional reasons. That is, we might include materials that would not, in a world with perfect prosecutors and judges, re-

ceive protection—simply because without such protection, people in positions of authority will, in our world, draw lines in a way too threatening to the system of free expression.

In fact, however, the framework I propose would allow much room for powerful First Amendment challenges to most government regulation of speech. No speech can be regulated on the basis of whim or caprice. Something stronger than rationality review, though weaker than "strict scrutiny," should be applied to low-value expression. Even under a two-tier First Amendment, speech that falls within the second tier cannot be censored without a substantial showing of harm. This is in fact current law. Thus, for example, commercial speech receives a good deal of protection. It is regulable when government can show both a solid reason and a solid connection between the means of regulation and the reason in question. This system ensures that commercial speech is generally allowed if truthful and not misleading.[14]

In addition, the government may not regulate speech on the basis of constitutionally disfavored justifications. The Constitution generally disfavors regulation of speech if the government fears that people will be persuaded or influenced by what is said, or if it seeks to protect against ideas that offend people. Frequently the real reason for regulating speech will be disfavored in this sense, even if the speech is low value. For example, regulation of pornography could not be permitted if the purpose of regulation is to repress a message rather than to redress genuine harms. The First Amendment makes certain reasons for regulation illegitimate even if those reasons are invoked against low-value speech. The most important principle here is that government may not regulate speech of any kind if the reason is that it disapproves of the message or disagrees with the idea that the speech expresses. An effort to regulate music because it is "offensive" or because it stirs up passionate feeling would run afoul of the free speech clause. The approach I suggest will therefore give a good deal of protection to nonpolitical speech.

Of course there will be hard cases, in which it has to be decided whether a legitimate justification is at work. The resolution of these cases will require judgment, and cannot be purely mechanical. But even if the First Amendment is especially concerned with political speech, there is little reason to fear a large increase in official censorship.

Practice

An approach of this sort would not require major substantial changes in the law. Its advantage is that it would help us deal with new controversies, not that it would unsettle resolution of the old ones. The Court has already created categories of speech that are less protected or not protected at all. What the Court has not done is to give a clear sense of the unifying factors that justify the creation of these categories. But it is highly revealing that political speech never falls within them, and that all speech that does so is not political in the sense that I understand the term here. The principal difference between the approach I suggest and current law is the explicit statement that nonpolitical speech occupies a lower tier—a statement that the Court has yet to make. For reasons suggested below, however, it is unclear that even this distinction would make much of a difference.

There would, however, be several new developments in current law. My suggested approach would mean that so-called public figures not involved in governmental affairs—famous movie stars and other celebrities, for example—could bring libel suits more easily. Under contemporary law, celebrities are constrained in libel actions in the same way as public officials. They must show "actual malice"—knowledge of falsehood or reckless indifference to the matter of truth or falsehood.[15] But there is no special constitutional reason to protect the breathing space of the press insofar as it is discussing athletes or movie stars. On what possible principle must a legal system provide special breathing space to libelous falsehoods about famous people?[16] The test for special protection should be whether the matter bears on democratic governance, not whether the plaintiff is famous.

Another possible change relates to sexually explicit speech. Under current law, such speech usually receives protection, certainly if it has significant social value, even when that value is scientific or literary rather than political. An emphasis on the political foundations of the First Amendment appears to threaten this basic idea. But under the approach I suggest, regulation of sexually explicit speech would also be invalid in most cases. Such regulation would usually be unsupportable by reference to a legitimate justification. A narrow category of materials combining sex with violence would, however, be regulable (see Chapter 9).

The securities laws would, however, raise no serious question. In-

deed, many of the controversies with which I began would be resolved fairly automatically. Disclosure of the names of rape victims could certainly be prevented. In most cases, the disclosure has no real political content. The government can easily justify a ban on the ground that disclosure of such names is both a deterrent and a penalty to those who attempt to redress rape, an especially underenforced crime.

The hardest case here is hate speech. Such speech quite plausibly has political content in the sense that it is a self-conscious statement about how current political controversies should be resolved. The analysis here would depend on the extent to which something labeled as hate speech is actually intended and received as a contribution to thought about some public matter. Most of the regulations of "hate speech," on the campus and elsewhere, do in fact apply to political speech in this sense. Those regulations are unconstitutional.

By contrast, speech that amounts to simple epithets, showing visceral contempt, would be deprived of protection. By analogy with the obscene telephone call, a university can prevent students and teachers from using words in a way that is not plausibly part of democratic deliberation about an issue. But racist, homophobic, or sexist speech, even if offensive and harmful, would not be regulable so long as it was plausibly part of the exchange of ideas. The general conclusion is that the "speech codes" of public universities are generally unconstitutional, except insofar as they are limited to the narrow category of epithets.

The approach suggested here would also mean that some forms of scientific speech should be regulable. This conclusion bears on an important current issue: It would allow the government to regulate the export of technology with military applications. This is so even though the showing of harm is too speculative to suffice under the stringent standards properly applied to regulation of political speech. Technological information is not entitled to the same high level of protection. The possibly serious risks posed by improvements in the military capability of other nations do provide an adequate justification for such restrictions.

What of art and literature? In the many instances in which these are highly political, they belong in the core of constitutional protection. Indeed, the fact that they are frequently political—combined with the severe difficulty of deciding on their political quality on an ad hoc basis—argues powerfully in favor of the view that art and literature should generally be taken as core speech. When government seeks to censor art or literature, it almost always does so because of the political content. Any such efforts are impermissible. And even when art or literature stands outside the core, government can never regulate speech because it disagrees with the message. A legitimate justification is always required, and a legitimate justification is what is almost always lacking. "Offensiveness" or fear of persuasion and influence is per se illegitimate.

An approach of this general sort would solve most of the current First Amendment problems without making it necessary to enter into complex debates about power and powerlessness, or about neutrality in constitutional law. Such an approach would also have the considerable advantage of drawing on history, on the best theories about the function of the free speech guarantee, and on a sensible understanding about when government is least likely to be trustworthy. There is much to be said in favor of a movement in this direction.

AN EXAMPLE: CROSS-BURNING

It will be useful to explore an issue of great current controversy, that raised by community efforts to regulate cross-burning and similar forms of "hate speech." I build the example from the important recent Supreme Court decision of *R.A.V. v. St. Paul*,[17] involving a ban on cross-burning that produced certain audience reactions. We can use this as a case study. It tests and helps give content to many of the principles discussed above.

We might be tempted to begin with the suggestion that cross-burning is action, not speech, and therefore outside the First Amendment altogether. We might suggest a proposition:

I. *Action is unprotected by the First Amendment. To claim constitutional protection, a person must be saying or writing words.*

Is proposition I true? As a matter of basic principle, it seems hard to disqualify "expressive conduct" from constitutional protection. If speech is entitled to special protection because and when it expresses a point of view about some public issue, the line between "words" and "expressive conduct" seems extremely artificial. Some forms of conduct, such as flag-burning, are clearly expressive in character; in this way they qualify as "speech." If the flag-burning example seems controversial, we might think about sign language, or wearing black armbands, or demonstrating. All of these are in a way "action," but they nonetheless deserve constitutional protection. In any case we

know that flag-burning qualifies as speech.[18] Given this fact, it seems hard to claim that cross-burning does not.

Thus far, then, we know that cross-burning counts as speech. Suppose that a criminal prosecutor invokes the law of criminal trespass to proceed against someone who has burned a cross on a private lawn. (I put to one side possible issues of selective prosecution.) Here we have a content-neutral law—the law of trespass—invoked to suppress an expressive act. Hence it might be suggested:

II. *Content-neutral restrictions on acts that qualify as speech are generally permissible.*

How shall we evaluate proposition II? At least in general, the use of the trespass law does seem constitutionally acceptable, even after the analysis in Chapter 7. Surely the law of criminal trespass could be used to prevent someone from drawing pictures on my house or from using my property as a place for a pro- or antiwar demonstration. At least in general, the law of property can be invoked to protect, in a content-neutral way, private lands and dwellings from invasion, whether through expression or otherwise. The Court has so held on several occasions, and this conclusion is the clear implication of the *R.A.V.* case.[19] The law of trespass might well be unconstitutional if it forecloses a crucial arena for expression—an arena to which there are no good alternatives—and if the state has no good reason to protect property rights in this way. But the state has extremely good reasons to protect ordinary homes from expressive invasion, and the grant of such protection does not seriously compromise the system of free expression.

Suppose, however, that a locality believes that the law of trespass is inadequate. Suppose it believes that it is important to enact a special statute explicitly forbidding expressive conduct of a certain sort. The resulting law might make it a crime to "place on public or private property a symbol, including but not limited to a burning cross or a Nazi swastika, which one knows or has reason to know arouses anger or resentment in others on the basis of race, color, or creed." (This is a minor variation on the law at issue in the *R.A.V.* case.) Such a law might be invoked to forbid a public demonstration of cross-burning. This leads to another proposition, quite different from II:

III. *Acts that qualify as speech can be regulated if they produce anger or resentment.*

From basic principle, as from the flag-burning cases, we know that III is false. The mere fact that an expressive act produces anger or resentment cannot be a sufficient reason for regulation. An expressive act cannot, consistently with the First Amendment, be prohibited simply because it upsets the audience.[20] To defend the law, it would therefore be necessary to show the particular properties of a burning cross (and other banned symbolic speech) that take it out of the realm of constitutional protection. That is, it would be necessary to show that there is a relevant difference between the ordinary anger or resentment produced by many expressive acts and "anger or resentment on the basis of race, color, or creed." That is, we have a new proposition:

IIIa. *Acts that qualify as speech can be regulated if they produce anger or resentment on the basis of race, color, or creed.*

On one view, IIIa is really just a subcategory of III. The anger or resentment produced by this kind of speech may be more intense than other forms; but there is at most a quantitative difference between the two. On another view, the anger or resentment produced by symbolic acts such as cross-burning and based on race, color, or creed is qualitatively different from other forms. It is properly treated differently.

If we were starting fresh, there might be room for some disagreement here. But the legal analogies seem to foreclose the claim that there is such a qualitative difference, at least in the context of an attempt to ban otherwise protected racist speech that produces anger or resentment. Speech that causes racial hatred has not been treated differently from other speech that causes ordinary offense or anger.

Suppose that there is no such difference, as the cases conclude. Defenders of the ban on cross-burning must therefore concede that the hypothetical law is unconstitutional. It is just like any other law that regulates speech that upsets people. We might, then, imagine that the locality proceeds to narrow the reach of its ordinance, as did the state supreme court in the *R.A.V.* case. Suppose that the locality prohibits cross-burning that produces anger or resentment if and only if the speech in question is regulable under existing standards as "incitement" or "fighting words." That is, the prohibition will not be trig-

gered unless the circumstances of the expressive conduct fit within an already-established exception to First Amendment protection.

How does this affect the analysis? At first glance it seems to dispose of the issue.[21] The law now covers only speech unprotected by the First Amendment. Surely such a law is acceptable. This appears to be the conclusion of Justices White, Blackmun, and O'Connor in the *R.A.V.* case.[22] Thus we have a new, highly attractive proposition:

IV. *Unprotected acts of expression may be regulated by the state as and however it wishes.*

But the first glance is misleading. We can prove that IV is wrong by an analogy. Imagine that the state attempted to regulate only those "fighting words" directed at Republicans or at whites. Or imagine that the state made it a felony to engage in "incitement" if and only if the incitement was directed against people of a certain political view. It seems clear that such regulations would be impermissible. The reason is that laws discriminating on the basis of viewpoint are generally impermissible, because they are unacceptably motivated by government favoritism, and because they have skewing effects on the system of free expression.

This is a principal argument by the Supreme Court in the *R.A.V.* case: "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."[23] The principle apparently emerging from these analogies is that the state may not regulate unprotected speech if it selects, from the class of unprotected speech, material chosen on the basis of point of view. Viewpoint discrimination is unacceptable even in the context of otherwise unprotected speech. Hence it seems clear that:

V. *Unprotected acts of expression may not be regulated on the basis of viewpoint.*

The next question then becomes whether our hypothetical law violates the prohibition on viewpoint discrimination. In a critical sense, the ordinance is different from those in the clear cases of viewpoint discrimination. The locality has not drawn a line between prohibited and permitted points of view. It has not said that one view on an issue—race relations, for example—is permitted, and another proscribed. If cross-burning were all that it banned, we might well have a case of viewpoint discrimination, since cross-burning has a particular

viewpoint. But here the class of prohibited speech ("symbols that arouse anger or resentment on the basis of race, color, or creed") is far broader. Antiwhite and antiblack statements are both allowed. The locality allows speech opposed to men and speech opposed to women; it does not distinguish between the two. In this respect, the law is viewpoint-neutral.

The locality has thus built on existing public reactions to certain kinds of speech, within a subset of the categories of "incitement" and "fighting words." It has not singled out a particular message for prohibition. It has regulated on the basis of subjects for discussion, not on the basis of viewpoint.[24] The final proposition to be evaluated is this:

VI. *If government singles out unprotected acts of expression for regulation when they cause "anger or resentment on the basis of race, color, or creed," it does not discriminate on the basis of viewpoint or otherwise on any impermissible ground.*

Is VI true? In the end, this was the central issue that divided the justices in the *R.A.V.* case. It is indeed a difficult question.

The analogous cases, involving "fighting words," are a helpful start here, for they show that regulation of "fighting words" is not by itself impermissibly viewpoint-based or otherwise objectionable. The "fighting words" doctrine is acceptable even though the listeners' reaction is indeed caused by an idea. The doctrine is deemed permissibly neutral because any regulation of fighting words fails to single out for legal control a preferred point of view. It depends instead on whether the average addressee would fight.[25] The viewpoint of the speaker is relevant in the sense that addressees will be reacting in part to the speaker's viewpoint; but the government has not endorsed a particular idea or a point of view. So long as the "fighting words" doctrine has any viability, this is a crucial difference.

As the *R.A.V.* majority emphasized, however, the hypothetical ordinance is not a broad or general proscription of fighting words. It reflects a decision to single out a certain category of "fighting words," defined in terms of audience reactions *to speech about certain topics.* Is this decision constitutionally illegitimate? The category of regulated speech—involving race, color, and creed—is based on subject matter, not on viewpoint. The question is then whether a subject matter restriction of this kind is acceptable. In *R.A.V.*, the Court, by a five-to-four vote, concluded that it is not. As we will soon see, the disagreement had everything to do with status quo neutrality.

Subject matter restrictions are not all the same. We can imagine subject matter restrictions that are questionable ("no one may discuss homosexuality on the subway") and subject matter restrictions that seem legitimate. As a class, they appear to occupy a point somewhere between viewpoint-based restrictions and content-neutral ones. Here too the analogies are revealing. Frequently subject matter restrictions are indeed upheld as a form of permissible content regulation. The Court has, for example, permitted a prohibition on political advertising on buses.[26] It has permitted a ban on partisan political speech at army bases.[27]

These cases show that there is no per se ban on subject matter restrictions. When the Court upholds subject matter restrictions, it does so either because the line drawn by government gives no real reason for fear about viewpoint discrimination, or (what is close to the same thing) because government is able to invoke neutral, harm-based justifications for treating certain subjects differently from others. Thus, for example, the restriction in the buses was justified as a means of preventing what would inevitably be a kind of governmental selectivity in choosing among political advertisements. The restriction in the army base was said to be a plausibly neutral effort to prevent political partisanship in the military.

If the subject matter restriction is acceptable in the cross-burning case, it must be so because the specified catalogue is sufficiently neutral and does not alert the judge to lurking concerns about viewpoint discrimination; or because (again a closely overlapping point) it is plausible to argue that the harms, in the specific covered cases, are sufficiently severe and distinctive to justify special treatment. This was the issue that in the end divided the Supreme Court.

In his dissenting opinion, Justice Stevens argued that the harms were indeed sufficiently distinctive. He wrote that "race based threats may cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race based threats is justifiable because of the place of race in our social and political order." In his view, "Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot . . . ; such threats may be punished more severely than threats against someone based on, for example, his support of a particular athletic team."[28] Thus there were "legitimate, reasonable, and neutral justifications" for the special rule.

In its response, the Court said that this argument "is word-play." The reason that a race-based threat is different "is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive method. The First Amendment cannot be evaded that easily."[29] Who is right?

An initial response to the Court is that the "fighting words" doctrine itself shows that the state can ban speech even if the relevant harms are "caused by a distinctive idea, conveyed by a distinctive method." At first glance, moreover, it seems that a legislature could reasonably decide that the harms produced by this narrow category of speech are sufficiently severe to deserve separate treatment. Surely it seems plausible to say that cross-burning, displaying swastikas, and the like are an especially distinctive kind of "fighting word"—distinctive because of the objective and subjective harm they inflict on their victims and on society in general. An incident of cross-burning can have large and corrosive social consequences; a government could plausibly decide that the same is not true for a hateful attack on someone's parents or political convictions. A harm-based argument of this kind suggests that the legislature is responding not to an ideological message but to real-world consequences.

It turns out that the key issue here is the appropriate conception of neutrality. The debate over a version of status quo neutrality accounts for the disagreement within the Court. According to Justice Stevens, a state is indeed acting neutrally if it singles out cross-burning for special punishment, because this kind of "fighting word" has especially severe social consequences. According to the Court, a state cannot legitimately decide that cross-burning is worse than (for example) a vicious attack on your political convictions or your parents. A decision to this effect violates neutrality. But the Court's conception of neutrality, appearing here in a powerfully argued contemporary opinion, is highly reminiscent of (though of course not nearly as bad as) that in *Plessy v. Ferguson* itself. In *Plessy*, the Court upheld racial segregation in part on the ground that the view that segregation was distinctly stigmatizing had been created by black people, and was not really to be credited. In *R.A.V.*, the judgment that racial hate speech is distinctly stigmatizing was similarly thought to violate neutrality.

This is not an argument for broad bans on hate speech. As discussed above, such bans would indeed violate the First Amendment because they would forbid a good deal of speech that is intended and received as a contribution to public deliberation. But here we are dealing with hate speech that is limited to the exceedingly narrow category of ad-

mittedly unprotected "fighting words." The argument on behalf of the restriction is helped by an analogy, Justice Stevens' reference to the especially severe legal penalties directed toward threats against the President. Everyone seems to agree that this restriction is permissible because threats against the President cause distinctive harms. But if the government can single out one category of threats for special sanction because of the harm that those threats cause, why is not the same true for fighting words of the sort at issue here?

Justice Scalia's response is perhaps the best that can be offered: "[T]he reasons why threats of violence are outside the First Amendment (protecting individuals from fear of violence, from the disruption that fear engenders, and from the possibility that threatened violence will occur) have special force when applied to the President."[30] But very much the same thing could be said of the hate speech ordinance under discussion. Here, as in cases involving threats against the President, we are dealing with a subcategory of unprotected speech challenged as involving impermissible selectivity, and we have a justification for the selectivity made out in terms of the particular harms of the unprotected speech at issue.

The argument to this effect depends critically on the fact that the subject matter classification occurs on the context of speech that is, we are supposing, without First Amendment protection. A subject matter restriction on unprotected speech should probably be upheld if the legislature can plausibly argue that it is counteracting harms rather than ideas. An analogy is helpful here as well. Supplemental criminal penalties for racially motivated "hate crimes" seem to be a well-established part of current law, and it seems clear that those penalties do not violate the First Amendment (although the outcome in *R.A.V.* might draw this conclusion into doubt). The governmental motivation for the additional penalty—the distinctive subjective and objective harm produced by these crimes, in part because of their symbolic or expressive nature—is the same as in the cross-burning case. So long as we are dealing with otherwise unprotected speech, that motivation should not be fatal to the cross-burning enactment if it is not fatal to the "hate crimes" measures.

I conclude that, contrary to the outcome in *R.A.V.*, proposition VI is true. A restriction on cross-burning and other symbolic speech is, in this context, a permissible subject matter classification, so long as the restriction is narrowed in the way described. In any event, the *R.A.V.* case helps show the interactions among the two-tier First Amendment,

status quo neutrality, and the categories of viewpoint-based, content-based, and content-neutral restrictions.

Notes on Foundations: Deliberative Democracy and the Free Speech Principle

At this point a few remarks are in order about the functions of the free speech guarantee and the conception of democracy that it should be taken to embody.

We have seen that the American constitutional system is emphatically not designed only to protect private interests and private rights. Even more emphatically, its purpose is not to furnish the basis for struggle among self-interested private groups. That notion is anathema to American constitutionalism.

Instead a large point of the system is to ensure discussion and debate among people who are differently situated, in a process through which reflection will encourage the emergence of general truths. A distinctive feature of American republicanism is hospitality toward heterogeneity rather than fear of it. Recall here the words of the prominent antifederalist Brutus, speaking for those who lost the debate over the ratification of the Constitution: "In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other."[31] Recall too Alexander Hamilton's response that in a heterogeneous republic, discussion will be improved; "the jarring of parties . . . will promote deliberation."[32] The Federalists did not believe that heterogeneity would be an obstacle to political discussion and debate. On the contrary, they thought that it was indispensable to it.

In the American tradition, politics is not a process in which desires and interests remain frozen, before or during politics. The protection given to free speech should be understood accordingly. Its overriding goal is to allow public judgments to emerge through general public discussion and debate. This view does not depend on a sharp distinction between public interest and private interest, or on an insistence that private interest is not and should not be a motivation for political action. It is necessary only to claim that the provision of new information or alternative perspectives can lead to new understandings of what interests are and where they lie.

It is in this sense that conceptions of politics as an aggregation of

interests or as a kind of "marketplace" inadequately capture the American system of free expression. Aggregative or marketplace notions disregard the extent to which political outcomes were supposed to depend on discussion and debate, and on the reasons offered for or against the various alternatives. The First Amendment is the central constitutional reflection of these ideas. It is part and parcel of the constitutional commitment to citizenship. And this commitment must be understood in light of the American conception of sovereignty, placing governing authority in the people themselves.

The proposals set out here flow directly from this conception of the First Amendment. The belief that politics lies at the core of the amendment is of course an outgrowth of the more general commitment to deliberative democracy. The concern for ensuring the preconditions for deliberation among the citizenry is closely associated with this commitment. It is in this respect that the proposals suggested here fit with the highest aspirations of the constitutional principles of which the First Amendment is the most tangible expression.

We have come far from the basic ideas that characterize current thinking about free speech. The familiar aversion to line-drawing with respect to speech seems to lead to insoluble problems. It is far better to be candid about the matter and to recognize that as far as the First Amendment is concerned, all speech is not the same. Threats to free speech do indeed come from government, but the general understanding of what this means is far off the mark. Such threats take the form not only of conventional, highly visible censorship but also of what is in some respects the same thing, that is, the allocation by government of rights of property, ownership, and exclusion that determine who can speak and who cannot, and that involve the use of civil and criminal law to carry out the rights of exclusion.

Government neutrality is the right aspiration, but, properly understood, neutrality does not require respect for rights of speech as these can be vindicated in light of the existing distributions of rights and entitlements. It is thus necessary to reform all the commitments that have, with respect to speech, come to represent the conventional wisdom.

Over the last forty years, the American law of freedom of speech has experienced nothing short of a revolution. The revolution has accomplished enormous good. It would be hard to argue that a return to the pre-1950 law of free speech would provide a better understanding of

the free speech principle. In the aftermath of the bicentennial of the American Bill of Rights—a period in which an appreciation for freedom of speech seems to be exploding throughout the world—we should indeed celebrate our tradition of liberty and recognize the extent to which it is an extraordinary and precious achievement.

At the same time, a crucial part of that achievement involves the dynamic and self-revising character of the free speech tradition. Our existing liberty of expression owes its origins to the capacity of each generation to rethink and to revise the understandings that have been left to it. To the economists' plea that "the perfect is the enemy of the good," we might oppose John Dewey's suggestion that "the better is the enemy of the still better."[33] The conception of free speech in any decade of American history is often quite different from the conception twenty years before or after.

Moreover, it is increasingly clear that current understandings are inadequate to resolve current controversies, and that they threaten to protect both more and less free speech than they should. They are inadequate for current controversies because they are poorly adapted to the problems raised by campaign finance regulation, scientific speech, regulation of broadcasting, content-neutral restrictions on speech, hate speech, commercial advertising, and pornography. They protect more than they should because they include, within the category of protected expression, speech that serves few or none of the goals for which speech is protected, and that promises to cause serious social harms. They protect less than they should because current law does not adequately serve the central goal of producing a deliberative democracy among political equals.

Ironically, the existing system owes many of its failures to the supposed mandates of contemporary conceptions of the First Amendment. These failures often stem from status quo neutrality. They apply pre–New Deal understandings about existing distributions to contemporary problems of free expression. They do not see "regulation" when it actually exists; they disfavor as "regulation" governmental efforts to promote the system of free expression.

I have suggested two changes in existing understandings. Both of them derive from the American contribution to the theory of sovereignty. First, some forms of apparent government intervention into free speech processes can actually improve those processes, and should not be understood as an objectionable intrusion into an otherwise law-free social sphere. Such intervention should not always be

taken as an impermissible abridgment of the free speech right. Efforts of this sort do not represent "positive" government action intruding on constitutionally protected "negative" liberty. They should not be taken to argue for a "positive" understanding of free speech in lieu of the heretofore dominant belief in "negative" liberty.

Instead these efforts would entail a democratic recognition of the dangers to free speech posed by market-constructing, content-neutral restrictions that limit access to arenas in which expression should be allowed to occur and might make a difference. The risks posed by content-neutral restrictions are generally recognized in the law. The gap lies in the unwillingness to see that the speech "market" is a product of law subject to legislative improvements and in any event to First Amendment constraints.

A healthy recognition that decentralized markets generally are indispensable to promote liberty—for both products and for speech—is not inconsistent with the basic claim. Nor is that recognition inconsistent with the view that the creation of markets might, on some occasions and in some settings, itself amount to an abridgment of free speech.

Second, the free speech principle should be understood to be centered above all on political thought. In this way the free speech principle should always be seen through the lens of democracy. Other forms of speech may be regulated not on a whim, and not for illegitimate reasons, but on the basis of a showing of lesser harm.

Taken together, these principles would bring about significant changes in the legal treatment currently given to electoral campaigns, electronic broadcasting, and the assertion of ownership rights in order to exclude political speech. In their most modest form, the principles would provide a major step toward resolving current free speech controversies without making serious changes in existing law. Rightly understood, these principles might well counteract the novel, sometimes invisible, and often serious obstacles that now lie in the path of free speech in America, and that threaten to do so in an increasingly severe way in the twenty-first century.