

The Harm in Hate Speech: A Critique of the Empirical and Legal Bases of Hate Speech Regulation

by JOHN T. BENNETT*

Introduction

Proposals to regulate hate speech are often premised on the societal consequences of racist or sexist speech: mainly, the psychological toll of bigotry on minorities and widespread gender or racial inequalities in American life.¹ Specifically, proposals for hate speech regulation rest on two largely unexamined premises: that hate speech causes social harm and that the degree of speech-based harm is so severe that speech regulations are warranted. The first premise is empirical. The second premise densely interweaves empirical and constitutional analysis. This article explores each premise in order to critique proposals for hate speech regulation.²

Unsupported claims about the cause and effect relationship between speech and social harm are common in the literature on hate speech regulation. For instance, then-professor Elena Kagan once asserted, “I take it as a given that we live in a society marred by racial and gender

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1. See, e.g., Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136–49 (1982) [hereinafter Delgado, *Words That Wound*] (indicating that victims of hate speech often suffer behavioral and psychological problems); N. Douglas Wells, *Whose Community? Whose Rights?—Response to Professor Fiss*, 24 CAP. U. L. REV. 319, 320 (1995) (“The harm caused by hate speech is greater than the psychological harm to the victims of hate speech; it also includes harm to society at large.”).

2. This article will generally use the description “speech regulation” instead of “censorship.” “Censorship” can be a descriptive or pejorative term, or both. “Speech regulation” is more value neutral and less conclusory. While this article does not eschew normative considerations, the term “censorship” will be reserved for historical policies that are widely agreed to have constituted censorship.

inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation.”³ Justice Kagan took it “as a given that we live in a society marred by racial and gender inequality,” yet she failed to explain how “certain forms of speech perpetuate and promote this inequality.” Kagan did not support that key premise—that hate speech promotes inequality—with a single reference to empirical data. Kagan is not alone in such presumptions. The evocatively titled *Words That Wound* is widely regarded as “the leading piece of reference in the field” of “free speech critical race theory.”⁴ Speech regulation advocates also point to the “psycho-emotional harms”⁵ of hate speech, including “feelings of humiliation, isolation, and self-hatred,” as well as “dignitary affront.”⁶ These individual-level harms are said to aggregate into broader structures of racial injustice that warrant legal remedy, which is the second key premise of hate speech regulation.

The second key premise of hate speech regulation is that speech-based harm is widespread and severe enough to warrant speech regulation. “[A]ll whites enjoy certain power, privilege, and prestige by virtue of their race,” Victor Romero claims, and “the white majority has created a society in which its power is institutionally ensconced,” thus “minorities are entitled to greater protection against hate speech.”⁷ “Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship,” according to Mari Matsuda.⁸ Proponents of hate speech regulation often frankly describe the empirical premises of their sought-after speech regulation regimes. As Richard Delgado succinctly put

3. Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 873 (1993). Prior to her nomination to the Supreme Court, Justice Kagan was once vaguely sympathetic to the goal of regulating hate speech, with qualifications, as a “low-value speech.” Kagan believed that hate speech ordinances “should be limited to racist epithets and other harassment: speech that may not count as ‘speech’ because it does not contribute to deliberation and discussion.” *Id.* at 900.

4. Uladzislau Belavusau, *Instrumentalisation of Freedom of Expression in Postmodern Legal Discourses*, 3(1) EUR. J. OF LEGAL STUD. 145, 148 (2010). The harms postulated by Delgado and other scholars, are taken for granted by later generations of hate speech regulation advocates. See, e.g., Victor C. Romero, *Restricting Hate Speech against Private Figures: Lessons in Power-Based Censorship from Defamation Law*, 33 COLUM. HUM. RIGHTS. L. REV. 1, 6 (2001) (citing *Words That Wound* for proposition that “insult and humiliation [are] suffered by many people of color on a daily basis.”).

5. Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 229 (1991).

6. Delgado, *supra* note 1, at 138, 143.

7. Romero, *supra* note 4, at 24–25, 31.

8. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2358 (1989).

the matter, “[t]he psychological, sociological, and political repercussions of the racial insult demonstrate the need for judicial relief.”⁹ Connecting the empirical to the constitutional, Charles Lawrence points to the “discriminatory impact” of hate speech as “a compelling governmental interest” in regulating hate speech.¹⁰ Speech regulation advocates take for granted that the “message of hatred” bombards minorities in American life, creating severe social harm.¹¹ To what extent is that presumption factually correct? Does countering speech-based harm plausibly constitute a compelling governmental interest? The answers to these questions have great bearing on the constitutionality of hate speech regulation, and on our very character as a nation.

This article will critique the empirical basis of hate speech regulation proposals. In particular, those proposals that rely for their rationale on the supposed harm of hate speech. With a remarkable degree of uniformity, calls for hate speech regulation rest on supposed social harms or inequalities, and presume that severe and widespread speech-based harm is a frequent aspect of life with a constitutionally significant impact on minorities.¹² Yet, these key premises of hate speech regulation have gone largely unexamined.¹³ To remedy that gap in the literature, this article will explore the place of social harm in First Amendment jurisprudence and offer a critique of the unique empirical premises of speech regulation proposals. Part I provides a brief outline of the existing constitutional barriers to hate speech regulation under current First Amendment jurisprudence. This article highlights four barriers with critical relevance to the hate speech debate. First, and chief among the barriers, *Snyder v. Phelps* explicitly rejected emotional pain as a justification for speech regulation on matters of public concern, even when it is established that the

9. Delgado, *supra* note 1, at 149.

10. Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 797 (1992).

11. Matsuda, *supra* note 8, at 2332 (“The spoken message of hatred and inferiority is conveyed on the street, in schoolyards, in popular culture and in the propaganda of hate widely distributed in this country.”); *see also* Delgado, *supra* note 1, at 135 (“The idea that color is a badge of inferiority and a justification for the denial of opportunity and equal treatment is deeply ingrained.”).

12. This theme is developed in Part II.

13. Kagan briefly but sharply acknowledges the existence of a factual dispute over the harms of subordination. “Are not the harms caused by pornography and hate speech—characterized most generally as racial and sexual subordination—also very much contested?” Kagan, *supra* note 3, at 898. Early in her article, Kagan evidently did not believe that the harm of “subordination” is “very much contested.” To the contrary, she asserted, “I take it as a *given* that we live in a society marred by racial and gender inequality [and] that certain forms of speech perpetuate and promote this inequality.” *Id.* at 873 (emphasis added).

speech is “particularly hurtful,” and even when the speech-based harm goes far beyond “emotional distress.”¹⁴ Second, content-based speech regulation must meet strict scrutiny. Third, because of governments’ sordid habits of censorship and official orthodoxy, courts will not defer to legislative wisdom concerning matters of free speech. Fourth, the harm caused by speech must be imminent in order to justify speech regulation; existing First Amendment jurisprudence does not permit speech regulation based on theoretical, indirect, or speculative harms. To reveal the conceptual and empirical flaws of hate speech regulation, Part I is interspersed with examples of influential proposals for hate speech regulation, premised on the supposed social harms caused by hate speech. Part II explores the empirical basis of the alleged social harms often cited to justify speech regulation. Part II introduces two competing perspectives, referred to here as the “structural” and “cultural” perspectives. Using these two perspectives, this article reviews contested empirical findings in the social science literature. These contested empirical findings severely complicate the arguments advanced by speech regulation advocates. The speech-based social harms posited in the literature are, as empirical matters, hotly debated and very poorly understood. Norms and cultural factors may produce racial and gender inequalities. Proposals for hate speech regulation are potentially misguided insofar as those proposals rely on a structural perspective of inequality and social harm. Part III asserts that American law should not regulate the speech-based harms posited by advocates of hate speech regulation. Part III analyzes proposals for hate speech regulation, in light of the four barriers against speech regulation described in Part I. Part III then considers the implications of the debate between structural and cultural perspectives, discussed in Part II, particularly the constitutional significance of that debate for hate speech regulation within existing First Amendment jurisprudence. Lastly, Part IV discusses hate speech regulation as public policy. In exploring the prospects for the enactment of public policy, Edward Banfield formulated a helpful pair of questions, asking: Is the policy feasible and is the policy acceptable?¹⁵ In exploring the feasibility and acceptability of hate speech

14. *Snyder v. Phelps*, 562 U.S. 443, 456 (2011). The Court presumed that there was real emotional harm that “exacerbated preexisting health conditions,” that the Phelps’ views were “particularly hurtful to many, especially to Matthew’s father,” and that “emotional distress . . . fails to capture fully the anguish” that Phelps’ expressions “added to Mr. Snyder’s already incalculable grief.” *Id.* at 451, 456. While the holding was purportedly “narrow,” the Court also found it “unacceptable” to risk letting juries impose liability on the basis of their beliefs about an expression. *Id.* at 458, 460.

15. EDWARD C. BANFIELD, *THE UNHEAVENLY CITY REVISITED* 260 (1974) (“A measure is *feasible* if (and only if) government (local, state, or national) could constitutionally implement it

regulation, the real contours of speech-based harm—and the ways in which courts would address that harm—are matters of fundamental importance. By exploring the empirical work on social harm in the context of the First Amendment, this article sheds new light on the empirical, normative, and constitutional implications of hate speech regulation.

Empirically, scholars continue to puzzle over the extent of harm caused by hate speech, which is one part of the harm of societal racism.¹⁶ The harm of societal racism and inequality are contested within social science literature.¹⁷ For instance, there are opposing perspectives on the origins of group inequalities, and on the validity of using subjective emotional states as a metric for social harm.¹⁸ There are radically different perspectives on the riddle of which factors lead to the various social harms and inequalities posited by speech regulation advocates. However, liberal hegemony within the social sciences ensures that an empirically grounded critique of hate speech regulation is absent from the discussion about hate speech.¹⁹ This article asserts that social science data does not justify hate speech regulation under current First Amendment doctrine, particularly in the wake of *Snyder v. Phelps*, which rejected emotional pain as a justification for speech restriction—at least when the speech addresses matters of public concern. Furthermore, social science data cannot support a compelling governmental interest in regulating hate speech, or warrant a new unprotected speech category.

From a normative standpoint, hate speech regulation poses a challenge to the social sciences—and to civil society—as the hate speech debate asks

and if its implementation would result in the achievement of some specified goal or level of output at a cost that is not obviously prohibitive [A] measure is *acceptable* if those who have authority in government (elected or appointed officials or sometimes voters) are willing to try to carry it into effect.”). Professor Banfield was a University of Chicago and Harvard political scientist, described by philosopher Leo Strauss as “a very good scholar and teacher and colleague,” known for his “complete freedom from pretense,” as “a man of unusual charity” who “conceal[ed] . . . charity under a shell of bluntness and gruffness.” Professor Leo Strauss, Remarks at Farewell to Edward C. Banfield on Departure from Chicago (1959).

16. Part II below discusses a relevant sample of this literature.

17. Compare JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA (2001) (asserting that victimology, separatism, and anti-intellectualism undermine minority achievement) with DERRICK BELL, SILENT COVENANT: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004), and EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS (2d ed. 2006).

18. Gerald E. Zuriff, *Inventing Racism*, 146 PUB. INT. 114 (2002).

19. Leftist hegemony within the social sciences and the impact of this hegemony on the hate speech debate is discussed further at Part II below. The hegemony has grown so obvious that even the *New York Times* took notice. See Patricia Cohen, ‘Culture of Poverty’ Makes a Comeback, N.Y. TIMES, Oct. 17, 2010, at A1 (reporting that, for the last several decades, “in the overwhelmingly liberal ranks of academic sociology and anthropology the word ‘culture’ became a live grenade, and the idea that attitudes and behavior patterns kept people poor was shunned”).

incredibly difficult sociological questions about the troubled fate of some communities, isolated from the promise of American life. The purpose of this article is not to provide an independent test of any particular premise of hate speech regulation. This article neither doubts the individual harm of hateful speech, nor denies the true benefit of societal condemnation of hateful speech.²⁰ Rather, this article seeks to promote a balanced public discussion about the racial and gender issues raised by hate speech regulation. Exploration of social issues should be uncompromisingly empirical and committed to confronting the varieties of human conduct and culture, whether flattering or not.

Finally, as a matter of constitutional significance, the use and misuse of empirical data in hate speech literature deserves serious scrutiny. The premises of hate speech regulation should be subjected to rigorous analysis, given the vital freedom at stake. The push to regulate hate speech has been gaining ground within academic circles for decades.²¹ If unsound interpretations of empirical evidence are used to rationalize speech regulation, then unreason will be compounded with injustice. In response to that danger, this article critiques the use of empirical data in the literature on hate speech regulation, and maps that critique onto First Amendment doctrine. The First Amendment is certainly not absolute.²² Nonetheless, hate speech regulation is and should remain unconstitutional. This article explains why by scrutinizing the largely overlooked empirical premises of hate speech regulation.

I. Speech-Based Harm and the First Amendment

Hate speech regulation targets speech-based harms that are not covered under current First Amendment jurisprudence. This section sketches four pillars of First Amendment free speech doctrine relating to social harm, including emotional harm. First, and most decisively, *Phelps* foreclosed the use of emotional harm as a basis for tort liability when speech on matters of public concern is involved. Additionally, content-

20. See, e.g., Frederick Schauer, *The Sociology of the Hate Speech Debate*, 37 VILL. L. REV. 805, 817–19 (1992) (discussing the social benefit of increased sensitivity among college students to the consequences of speech).

21. *Id.* at 806 (remarking on “the enormous number of law review articles on the subject [of hate speech regulation], as well as many articles in other disciplines” as of 1992); Stephen L. Carter, *Does the First Amendment Protect More than Free Speech*, 33 WM. & MARY L. REV. 871, 874, 893 (1991) (“I suspect that First Amendment jurisprudence is moving in the direction of community control of speech,” driven by public “desire to return to relatively homogenous communities”).

22. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”).

based speech regulation must meet strict scrutiny, courts will not defer to legislative wisdom, and harm must be imminent in order to justify speech regulation. These four barriers against regulation deserve special attention in any analysis of the constitutionality or desirability of hate speech regulation.

Hate is an emotion and form of thought with a rich history.²³ As Robert Post writes, hate is at times “an extreme and troublesome human emotion,” but also one “that can serve constructive social purposes.”²⁴ One person’s hate is another person’s sense of justice, or even truth. Yet, “hate” is quite often used as the slanderous epithet for any idea or statement that does not conform to the reigning politically correct dogmas. Before turning to the barriers against regulation, it is vitally instructive to first appreciate how “hate” and “racism” are defined, according to the worldview of speech regulation advocates. There are an indefinite number of ideas and expressions labeled “derogatory,” “racist,” or “xenophobic,” including the following:

- Advocating school vouchers for public school students.²⁵
- Advocating voter ID laws.²⁶
- Use of the term “Obamacare.”²⁷
- Criticism of President Barack Obama.²⁸
- Any reference to “food stamps” that liberals object to.²⁹

23. Robert Post, *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 123, 123–25 (Ivan Hare & James Weinstein eds., 2009).

24. *Id.* at 124.

25. *Report Charges School Vouchers Are Racist*, RACE FORWARD: THE CENTER FOR RACIAL JUSTICE INNOVATION (Apr. 13, 2006), <https://www.raceforward.org/research/reports/report-charges-school-vouchers-are-racist> (pointing to “the racist history of vouchers in this country” and claiming that a “current voucher proposal has no safeguards to prevent new variations on this racist history, allowing de facto discriminatory practices.”).

26. See, e.g., Michael Hiltzik, *How Racism Underlies Voter ID Laws: the Academics Weigh In*, L.A. TIMES (Oct. 20, 2014, 1:53 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-the-racism-underlying-voter-id-20141020-column.html>.

27. Eric Garland, *MSNBC host: O-Care a Derogatory Term*, THE HILL (Dec. 9, 2013, 10:41 AM), <http://thehill.com/video/in-the-news/192464-msnbc-host-obamacare-is-a-racist-term> (quoting MSNBC host Melissa Harris Perry claiming that the word “Obamacare” “was originally intended as a derogatory term, meant to shame and divide and demean”).

28. Jelani Cobb, *Talking Openly About Obama and Race*, NEW YORKER (July 15, 2014), <http://www.newyorker.com/news/daily-comment/talking-openly-about-obama-and-race> (“I think an overwhelming portion of the intensely demonstrated animosity toward President Barack Obama is based on the fact that he is a black man, that he’s African-American.”).

29. See, e.g., Walter Mosley, *‘Food Stamp President’: Gingrich’s Poetry of Hate*, CNN (Jan. 26, 2012, 11:22 AM), <http://www.cnn.com/2012/01/26/opinion/mosley-gingrich-food-stamp-president/> (writer claims that “calling someone a ‘food stamp president’ brings up the working person’s fear, looming reality, and in some cases the actual experience, of

- Any reference to “welfare” that liberals object to.³⁰
- Advocacy of a functioning legal immigration system.³¹
- Cautioning that the inordinate number of young black men raised without fathers will not have a stable relationship to authority (just as whites would under similar familial conditions).³²
- Televising the mug shot of a convicted murderer who was released on weekend furlough, then raped a woman and stabbed her fiancé while furloughed.³³

Then there are terms that are believed to “activate racist concepts”:

[T]he concepts “welfare queen,” “states’ rights,” “Islamic terrorist,” “thug,” “tough on crime,” and “illegal alien” all

unemployment—while making a shout-out to racism and affixing a stigma to poverty.”); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (arguing that negative portrayals of black women cause the public to dislike welfare programs).

30. KENNETH NEUBECK & NOEL CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR* (2001).

31. Mitch Dudek & Esther Castillejo, *GOP will Pay Political Price for Immigration Stance, Gutierrez Says*, CHI. SUN-TIMES (Feb. 17, 2015, 1:48 PM), <http://chicago.suntimes.com/news/7/71/374756/gop-will-pay-political-price-immigration-stance-gutierrez-says> (Democrat Congressman claims, “It speaks volumes of just how mean and xenophobic you can be” for federal judge to issue an injunction against presidential executive action on immigration policy); Josephine McKenna, *Pope Francis: End the ‘Racist and Xenophobic’ Approach to Migrants along U.S.-Mexico Border*, WASH. POST (July 15, 2015), <http://www.washingtonpost.com/nation/religion/pope-francis-end-the-racist-and-xenophobic-approach-to-migrants-along-us-mexico-border/2014/07/15/fccc87d0-0c50-11e4-bc42-59a59e5f9e42story.html> (Pope Francis states that “Many of their [migrants on southern border] rights are violated, they are obliged to separate from their families and, unfortunately, continue to be the subject of racist and xenophobic attitudes.”).

32. John Corry, *TV: ‘CBS Reports’ Examines Black Families*, N.Y. TIMES (Jan. 25, 1986), <http://www.nytimes.com/1986/01/25/arts/tv-cbs-reports-examines-black-families.html> (“The Moynihan Report, criticized at the time [of its release] as racist, found little favor,” when first released). See U.S. DEP’T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), reprinted in *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 41, 93 (Lee Rainwater & William L. Yancey eds., 1967) [hereinafter *MOYNIHAN REPORT*] (pointing to the pathologies of “the wild Irish slums of the 19th Century Northeast”: “Drunkenness, crime, corruption, discrimination, family disorganization, juvenile delinquency were the routine of that era. In our own time, the same sudden transition has produced the Negro slum—different from, but hardly better than its predecessors, and fundamentally the result of the same process.”).

33. Schauer, *supra* note 20, at 810 (listing Willie Horton ad as example of “public statements” that “have helped to make racial animosity . . . more socially acceptable”); TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 3 (2001) (following the Horton ad, “Bush and his campaign officials vehemently denied the charge of racism; [Jesse] Jackson and [Lloyd] Bentsen (though not [Michael] Dukakis repeated it”).

activate racist concepts that have already been planted in the public consciousness, and can be purposefully or accidentally activated by political elites, campaign activities, or media coverage.³⁴

Even complaining about “reverse discrimination” can be interpreted as a racist deed; according to Matsuda, “righteous indignation against diversity and reverse discrimination” is one of the “implements of racism” for upper-class whites.³⁵

Public discourse is saturated with frivolous accusations of “racism.”³⁶ If accusations of “racism” alone do not satisfy the speech regulator’s impulses, more robust categories can always be drawn: Waldron insists that “laws restricting hate speech should aim to protect people’s dignity against

34. Lilian Jiménez, *America’s Legacy of Xenophobia: The Curious Origins of Arizona Senate Bill 1070*, 48 CAL. W. L. REV. 279, 287 (2011) (citing MENDELBERG, *supra* note 33, at 97).

35. Matsuda, *supra* note 8, at 2357.

36. Veronica Rocha, *Actress Taraji Henson Apologizes to Glendale Police for Racial Profile Claims*, L.A. TIMES (March 27, 2015, 3:29 PM), <http://www.latimes.com/local/lanow/la-me-ln-actress-taraji-p-henson-son-racial-profile-20150327-story.html> (actress publicly apologized to Glendale police for accusing police of racially profiling her son during traffic stop after video of traffic stop was released, showing that the officer was very lenient and professional. “I would like to publicly apologize to the officer and the Glendale Police Department,” the actress posted online. “A mother’s job is not easy and neither is a police officer’s. Sometimes as humans we overreact without gathering all the facts. As a mother in this case, I overreacted and for that I apologize. Thank you to that officer for being kind to my son”); Lindsey Bever, *‘Django Unchained’ Actress Daniele Watts Ordered to Apologize to LAPD Cops she Accused of Racism*, WASH. POST (May 5, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/05/05/django-unchained-actress-daniele-watts-ordered-to-apologize-to-lapd-cops-she-accused-of-racism/> (after police were called about a report of a couple having sex in public, while being detained, black actress Daniele Watts told police, “I bet you you’re a little bit racist.”); STUART TAYLOR & K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2008) (chronicling false allegation of rape against members of Duke’s lacrosse team, and ensuing campaign of baseless vilification by liberal faculty as well as severe prosecutorial misconduct); Robert D. McFadden, *Brawley Made Up Story Of Assault, Grand Jury Finds*, N.Y. TIMES (Oct. 7, 1988), <http://www.nytimes.com/1988/10/07/nyregion/brawley-made-up-story-of-assault-grand-jury-finds.html?pagewanted=all&src=pm> (black teenager claimed she was abducted and raped by a group of six white men including a prosecutor and state trooper, and that they wrote racial slurs on her body and smeared her with feces, but grand jury investigation determined that her story was fabricated and that she inflicted the various markings on herself); Mark Memmot, *15 Years Later, Tawana Brawley Has Paid 1 Percent Of Penalty*, NPR (Aug. 5, 2013), <http://www.npr.org/sections/thetwo-way/2013/08/05/209194252/15-years-later-tawana-brawley-has-paid-1-percent-of-penalty> (prosecutor falsely accused by Brawley successfully sued Brawley and Al Sharpton for defamation). See also Alec Torres, *Eleven Hate Crime Hoaxes*, NAT’L REV. ONLINE (Mar. 24, 2014), <http://www.nationalreview.com/article/374096/eleven-hate-crime-hoaxes-alec-torres> (describing numerous confirmed fraudulent accusations occurring within the last several years).

assault.”³⁷ Heyman defines hate speech as “expression that abuses or degrades others on account of their racial . . . identity.”³⁸ Smolla would outlaw speech in certain “restricted zones” when that speech is “highly offensive to an ordinary reasonable person,” meaning speech that “espouses views of racial superiority or inferiority by using stereotypes to ascribe negative characteristics to members of certain groups.”³⁹ Tsesis indicates that hate speech laws should target the communication of certain “stereotypes.”⁴⁰

Frankly, it appears that many of the scholars and interest groups promoting speech regulation will reflexively label any form of opposition “hate.” “Hate,” “racism,” and “stereotypes” are defined in a manipulative and recklessly ideological manner. Because “hate,” “racism,” and “stereotypes” are defined politically, it is entirely predictable that hate speech restrictions will target a broad range of speech dealing with “matters of public concern.”⁴¹ True to that prediction, mainstream proposals for hate speech regulation reveal the alarmingly overbroad and vague scope of desired speech limits.⁴² Advocates of hate speech regulation target an erratically expanding range of speech, sometimes even within the same author’s work.⁴³ As the following four barriers against speech regulation

37. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 105 (2012).

38. STEVEN J. HEYMAN, *HATE SPEECH AND THE CONSTITUTION* ix (1996).

39. Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 211 (1990).

40. Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 780–81 (2000) (advocating that “legislative proposals should be advanced against stereotypes that in the past have led their adherents to violate outgroups’ human rights”). As Tsesis confidently writes, “Hate speech laws’ potential to safeguard human rights outweighs the interest of bigots in spreading their false stereotypes about outgroups.” *Id.* at 764.

41. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

42. See further discussion of various proposals in Part III.

43. In his article, Tsesis continually expands and contracts his own vague and overbroad criteria for speech regulation. “Restrictions should be enacted against hate speech that is intended to elicit persecution or oppression when such results are significantly probable.” Tsesis, *supra* note 40, at 731; “Several dangerous trends in the contemporary United States indicate the need for restricting the type of hate speech that is intended to elicit violent and inhumane acts against outgroups.” *Id.* at 755; Laws should prohibit “hate speech aimed at violating outgroups’ civil rights.” *Id.* at 763; “Hate speech legislation should prohibit utterances intended to stir individuals or groups to oppress.” *Id.* at 764; “[E]xpressions with a reasonable potential to lead dominant groups to maltreat outgroups should be prohibited.” *Id.* at 772; “[H]ate speech aimed at harming persons with immutable characteristics should be prohibited if, based on historic patterns, such speech has a realistic or actual potential of inciting oppression or persecution.” *Id.* at 779; “[L]egislative proposals should be advanced against stereotypes that in the past have led their adherents to violate outgroups’ human rights.” *Id.* at 780–81. Tsesis ambiguously refers to additional criteria: “The dissemination of fallacies about the history and characteristics of

illustrate, self-serving ideological labeling must inevitably produce constitutionally infirm speech regulations.

A. *Snyder* Foreclosed the Use of Emotional Harm as a Basis for Hate Speech Regulation

In *Snyder v. Phelps*, the Supreme Court was confronted by a grief-stricken father forced to suffer the indignity of witnessing vulgar protesters gloat over his son's death, directly outside of his son's funeral. Lance Corporal Matthew Snyder, a Marine, was killed in action in Iraq. Matthew's father had to endure protesters from the Westboro Baptist Church. The protesters used the occasion of Matthew's funeral to express the following messages: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."⁴⁴

The *Snyder* Court acknowledged "[e]xpert witnesses testified that Snyder's emotional anguish had resulted in severe depression and had exacerbated preexisting health conditions."⁴⁵ According to the Court, Mr. Snyder "testified that he is unable to separate the thought of his dead son from his thoughts of Westboro's picketing."⁴⁶ The Court continued:

Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term—"emotional distress"—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief.⁴⁷

In *Snyder*, the Court specifically stated that the protestors' speech was "particularly hurtful," and had an impact that went far beyond "emotional

identifiable outgroups has contributed to the rise of hate crimes in the United States." *Id.* at 759. It appears that disseminating ideas thought to be fallacies about "the history and characteristics" of favored groups would be punishable under the regime proposed by Tsesis. Most far seeing, Tsesis divines "the seeds of hate speech often lie dormant until conditions permit them to sprout into social cancers that pray on outgroups." *Id.* at 770. Not content to prosecute hate speech itself, a benevolent regime will seek out "the seeds" as well.

44. *Snyder*, 562 U.S. at 447–48.

45. *Id.* at 450.

46. *Id.*

47. *Id.* at 456.

distress.”⁴⁸ The Court found that “Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible.”⁴⁹ Despite these extraordinarily compelling facts, the Court ruled that the First Amendment serves as a defense to tort claims when the speech at issue involves “matters of public concern.”⁵⁰ Under that principle, the Court ordered that a tort jury verdict against Westboro be set aside. After *Snyder*, even vile, emotionally harmful speech “cannot be restricted simply because it is upsetting or arouses contempt.”⁵¹ *Snyder* provides a dramatic benchmark by insisting that “the point of all speech protection” is to protect “misguided, or even hurtful” expressions.⁵² The speech at issue in *Snyder* caused emotional devastation and serves as a vivid metric for analyzing whether the alleged harms of hate speech should justify speech restriction.

B. Strict Scrutiny Demands that Speech Regulation Be Narrowly Tailored to Serve a Compelling State Interest

Content-based speech restriction must satisfy strict scrutiny.⁵³ Content-based speech restrictions are only constitutional where those restrictions are “narrowly tailored to serve a compelling state interest.”⁵⁴ Importantly, strict scrutiny is strict in fact toward underinclusive speech regulation.⁵⁵ When a content-based speech restriction is challenged under the First Amendment, courts will look to see whether there are less restrictive alternatives to speech restriction available.⁵⁶ Moreover, the government then has the burden to “prove that the alternative will be ineffective to achieve its goals.”⁵⁷ The burden is directly on the government to prove that a proposed alternative would not be as effective as the challenged statute. The Court, in *Ashcroft v. American Civil Liberties Union*, plainly stated that the government must establish that

48. *Id.*

49. *Id.* at 460.

50. *Snyder*, 562 U.S. at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

51. *Id.* at 458.

52. *Id.* (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)).

53. *Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1989).

54. *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990) (“[W]e hold that application of [the statute at issue] is constitutional because the provision is narrowly tailored to serve a compelling state interest.”).

55. This point is developed in Part III.

56. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest . . . If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”).

57. *Id.* at 815.

“proposed less restrictive alternatives are less effective than” the government’s speech regulation.⁵⁸ Thus, the demands of strict scrutiny compel governments to search for less restrictive means of achieving desired policy goals. For instance, in *Reno v. ACLU*, the potential availability of a less restrictive means was relevant to a finding of unconstitutionality under strict scrutiny.⁵⁹ What is the governmental goal of hate speech regulation? To address racism, sexism, inequality, and systems of subordination generally. One should not need to ponder very long to think of alternative means of addressing those problems. The entire modern welfare state presents a plethora of such means.⁶⁰

Preventing speech-based harm must also constitute a compelling government interest. Speech may be restricted when there is a compelling governmental interest in restricting the speech in question.⁶¹ The Supreme Court has only found a compelling governmental interest in restricting a few very narrow types of speech.⁶² Importantly, even where there is a compelling interest in addressing speech-based harm, if there are less-restrictive or content-neutral means of advancing the state interest in preventing speech-based harm, then speech regulations are invalid.⁶³ Any content-based regulation of hate speech would face the demands of strict scrutiny.

58. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

59. *Reno v. ACLU*, 521 U.S. 844, 876–77 (1997) (concluding that Communications Decency Act of 1996 is not narrowly tailored, finding relevant that “currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available”).

60. In no particular order: Head Start, Section 8 housing, Pell grants, Medicaid, Medicare, Earned Income Tax Credits, affirmative action, food stamps, rent supplements, student loans, legal services, and various welfare and other antipoverty programs. See, e.g., Paul C. Light, *Government’s Greatest Achievements of the Past Half Century*, Reform Watch, No. 2, Brookings Institution, Washington, D.C. (Nov. 2000).

61. *NAACP v. Button*, 371 U.S. 415, 438 (1963) (asserting that “[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling”) (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

62. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2419 (1996) (citing examples including the interest in maintaining a stable political system, preventing criminals from profiting from crime, and protecting groups targeted by discrimination so that they may live in safety).

63. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1991) (“The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul’s compelling interests; it plainly is not An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council’s special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.”).

C. No Deference to Legislatures Is Warranted by Law, Logic, or Experience

Speech regulation advocates assume that only “bigots” will have their speech penalized by hate speech regulation.⁶⁴ That assumption reflects unwarranted optimism about the competence or virtue of government officials to fairly or rationally regulate speech. Did we learn nothing from the sordid modern history of political persecution,⁶⁵ indoctrination,⁶⁶ scapegoating,⁶⁷ blame shifting,⁶⁸ and general misattribution and misunderstanding?⁶⁹ Have we forgotten how government imposed “equality” produced “the highest body counts in history”?⁷⁰ Did we not

64. Tsesis, *supra* note 40, at 764 (“Hate speech laws’ potential to safeguard human rights outweighs the interest of bigots in spreading their false stereotypes about outgroups.”).

65. SIMON LEYS, *CHINESE SHADOWS* 47 (1977) (describing how, during the Cultural Revolution, the government enforced “the obligation to be present at, if not to take an active part in, the public denunciation of neighbors, friends, fellow workers, and parents” and that “all this must have put its mark on the society as a whole”).

66. Aaron Wildavsky, *Politically Correct Hiring Will Destroy Higher Education*, 7 *ACADEMIC QUESTIONS* 78–79 (Winter, 1993/94) (“If there is no truth outside of group identification, and if truth is only the servant of power, those who have power in society will feel possessed of the right to remake universities in their own image. Hence American universities will follow the processes by which many Latin American universities have become so politicized that their character changes with alterations in regime.”).

67. NIEN CHENG, *LIFE AND DEATH IN SHANGHAI* 285 (1988) (“One of the most ugly aspects of life in Communist China during the Mao Zedong era was the Party’s demand that people inform on each other routinely and denounce each other during political campaigns. This practice had a profoundly destructive effect on human relationships.”).

68. MARK GRAUBARD, *WITCHCRAFT AND THE NATURE OF MAN* 286 (1984) (“The purge trials of the Soviet Union under Stalin’s dictatorship, which were interrupted by World War II but which resumed their intensified ruthlessness at its termination until the tyrant’s death in 1953, show the basic identity of human conduct under the influence of the blame complex in our times as in the past.”).

69. DAVID O. SEARS ET AL., *Cultural Diversity and Multicultural Politics: Is Ethnic Balkanization Psychologically Inevitable?* in *CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT* (ed. Deborah Prentice & Dale Miller) 35, 73 (1999) (“symbolic racism” supposedly detected in affirmative answers to survey questions such as, “[D]o blacks get more attention from the government than they deserve?”, “[S]hould [blacks] work their ways up without special favors?”, and “[A]re [blacks] too demanding in their push for equal rights.”). Zuriff notes that, if affirmative answers to these questions are interpreted as “racist,” then leftist academics “have ensured that racism will endure as long as Americans disagree on racial politics, because one side of the debate will be declared racist.” Zuriff, *supra* note 18, at 128.

70. Roy F. Baumeister & W. Keith Campbell, *The Intrinsic Appeal of Evil: Sadism, Sensational Thrills, and Threatened Egotism*, 3 *PERSONALITY & SOC. PSYCHOL. REV.* 210, 210 (1999) (“[T]he highest body counts in history were achieved in the Stalinist and Maoist purges, each of which is currently estimated at having caused more than 20 million deaths” in the effort to create “a utopian society based on equality, shared wealth, and dignity for all”). Regimes based on fixed orthodoxy are tempted to wield force to maintain that orthodoxy. EDWARD PETERS, *INQUISITION* 163 (1989) (“Portugal, Spain, and Rome were unique in seventeenth-century Europe in terms of their religious unity and their mechanisms of persecution. In European

even learn the most obvious lessons from ideologically motivated censorship in the 20th century?⁷¹ Even the Soviet constitution of 1936 “guaranteed” the “[f]reedom of speech,” along with freedom of the press and assembly.⁷² Article 125 of the Soviet constitution reads: “In conformity with the interests of the toilers, and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed by law: (a) Freedom of speech . . .”⁷³ Historians point out that “[n]ot one of these freedoms existed in reality, and admirers of Stalin’s constitution and the supposed bestowal of such freedoms missed the qualification in the introduction to the article.”⁷⁴ That qualification was simply that freedom of speech must be interpreted “[i]n conformity with the interests of the toilers” and “to strengthen the socialist system.” Freedom of speech must yield to Soviet doctrine. In other words, the qualification obliterated the freedom. Brown points out the Orwellian futility of free speech circumscribed by ideological qualifications:

Should anyone wish to assert those freedoms, who would decide whether they were in conformity with “the interests of the toilers” or whether their actions were designed to “strengthen the socialist system”? The answer, of course,

eyes, such unity of religious belief and practice necessarily had to depend upon force or social enervation, for it could no longer be viewed as voluntary.”); *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (“Governments that want stasis start by restricting speech.”).

71. Brown describes the West’s willful blindness, in the immediate postwar era, towards the horrors of Communism: “Stalin, in his own country, was responsible for the imprisonment and execution of political opponents, real and imagined, on an even larger scale than Hitler in Germany, but all this was, for the time being, overlooked. Soviet secrecy and censorship, combined with the suspension of critical faculties on the part of many Westerners who provided rosy accounts of Stalin’s USSR, meant that such facts were not nearly as widely known as they should have been.” ARCHIE BROWN, *THE RISE AND FALL OF COMMUNISM* 149 (2009). *See also*, Kagan, *supra* note 3, at 881–82 (giving examples of World War I-era attempts in the U.S. to “stifle criticism of military activities,” and “suppress support of Communism,” and pointing to “government favored anti-abortion speech”); Catherine A. MacKinnon & Ronald Dworkin, *Pornography: An Exchange*, N.Y. REV. BOOKS, March 3, 1994, at 47 (noting that a Canadian censorship law “has been used by conservative moralists to ban gay and lesbian literature by well-known authors, a book on racial injustice by the black feminist scholar bell hooks, and, for a time, Andrea Dworkin’s own feminist writing as well”).

72. Art. 125, Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, Dec. 1936.

73. *Id.*

74. BROWN, *supra* note 71, at 74. *See also* Eugene D. Genovese, *The Question*, *DISSENT*, 371, 371 (Summer, 1994) (historian and former communist noting that communists “broke all records for mass slaughter”).

was the Communist Party leadership and the political police who did Stalin's bidding.⁷⁵

Some of the most degrading censorship was self-imposed.⁷⁶ The censorious instinct represents a constant menace to free societies, and the state is a coveted tool for imposing the censorious instinct.⁷⁷

Governments quite predictably insist that censorship policy will be implemented responsibly, and the censors proclaim their noble "humanitarian" goals.⁷⁸ Such guarantees count for nothing under existing law. *U.S. v. Stevens* enunciated that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."⁷⁹ Advocates of speech regulation have a different approach. Smolla, with evident approval, describes the "Aristotelian impulse" driving speech regulation: "Only through communal living and through the state may men achieve virtue; only through the state may they find true peace, happiness, and fulfillment."⁸⁰

Existing law treats the individual adult in a free society as generally capable of avoiding offensive messages. As the Court held in *Erznoznik v. Jacksonville*, harmful speech can be dealt with by allowing the unwilling

75. BROWN, *supra* note 71, at 74.

76. Victor Serge observed of Stalin's Russia:

I have seen intellectuals of the left responsible for editing reputable reviews and journals refuse to publish the truth, even though it was absolutely certain, even though they did not contest it; but they found it painful, they preferred to ignore it, it was in contradiction with their moral and material interests (the two generally go together).

VICTOR SERGE, *MEMOIRS OF A REVOLUTIONARY* 376 (trans. Peter Sedgwick) (Oxford, 1963).

77. See, e.g., NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* (1993) (condemning the increase in censorship by educational and governmental bodies); Erwin Chemerinsky, *Students Do Leave Their First Amendments Rights at Schoolhouse Gates*, 48 *DRAKE L. REV.* 527, 546 ("School officials—like all government officials—often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it."); Kagan, *supra* note 3, at 881–82 (acknowledging "the tendency of governmental actors (of all kinds) to see speech regulation through the lens of their own orthodoxies, as well as the ease with which such orthodoxies can thereby become entrenched").

78. JONATHAN RAUCH, *KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT* 123 (1993) (describing the "humanitarian threat" to free thought and expression, arguing, "The Inquisition was a policing action. But by its own lights it was a humanitarian action, too.")

79. *United States v. Stevens*, 559 U.S. 460, 480 (2010).

80. Smolla, *supra* note 39, at 173.

listener to disagree or turn away.⁸¹ The ordinary citizen's capability to disagree or turn away minimizes the need for state regulation. Even for unwilling listeners, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."⁸² Existing law is appropriately dismissive of government speech regulation whose purported goal is to "serve the people"—a goal trumpeted by many governments, including the most tyrannical regimes in modern history.⁸³

D. Harm Must Be Imminent In Order to Justify Speech Regulation.

In his landmark work, Anthony Lewis described Justice Louis Brandeis's concurrence in 1927 in *Whitney v. California* as quite possibly the finest tribute to freedom of speech.⁸⁴ In his concurrence, Brandeis wrote, "It is hazardous to discourage thought, hope, and imagination . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."⁸⁵ Justice Brandeis then insisted that violence must be imminent before speech restriction is allowed. "Only an emergency can justify repression."⁸⁶ Brandeis's concurrence, in its essence, was later adopted in *Brandenburg v. Ohio*.⁸⁷ *Brandenburg* held that speech could be restricted as incitement only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁸⁸ Furthermore, *Hess v. Indiana* made clear that speech doesn't satisfy the "imminence" requirement if it is merely "advocacy of illegal action at some indefinite future time."⁸⁹ The imminence standard does not allow restrictions on free speech based only on the potential for violence.

81. *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11.

82. *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 (1975)).

83. *See, e.g.*, MAO TSE-TUNG, *SERVE THE PEOPLE* (1966). *See also* CHENG, *supra* note 67, at 498 ("'To serve the people' was perhaps the most publicized slogan of the Chinese Communist Party Whenever the Party wanted a man to do something he did not want to do, the official would ask, 'Don't you want to serve the people?'").

84. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 85 (1991).

85. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

86. *Id.* at 376.

87. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

88. *Id.*

89. *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

Similarly, *Watts v. United States* ruled that the states are permitted to ban expressions that are a “true threat.”⁹⁰ As the Court asserted in *Virginia v. Black*, “True threats encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁹¹ Proposals for hate speech regulation by their nature target a far broader range of speech than the advocacy or threat of imminent lawless action. The imminence standard does not allow restrictions on free speech based on the potential for violence or possible violence, much less nebulous notions of harm or inequality. If advocacy of illegal action in the future may not be proscribed, neither can speech advocating or expressing “hate.”

The four barriers described above stand in the way of hate speech regulation to the extent that such regulation is based on supposedly speech-based social harms. These four barriers have tremendous constitutional implications for hate speech regulation. Those constitutional implications will be discussed in Part III below. Before discussing the constitutional implications, it is first necessary to appreciate the empirical evidence linking harm to speech. The causal connection between speech and social harm, as portrayed by advocates of hate speech regulation, is discussed in Part II next.

II. Sociological Perspectives on the Harm of Hate Speech

The central empirical premises of speech regulation proposals are that hate speech causes specific social harms, and that these speech-based harms are so severe they warrant speech restriction. As it happens, the questions surrounding social harm have been widely discussed within the social sciences, and within the larger society. In fact, the extent of racism within American society has remained one of the key issues of American public life and social science research for generations.⁹² Most scholars view racial and gender inequality as a direct result of racism, or as lingering vestiges of past racism, and this paper will refer to this collection of views as the “structural” perspective, as shorthand. Other scholars, certainly in the minority in academic ranks, believe that inequalities are either unavoidable, unsurprising, or unrelated in any significant way to

90. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (internal quotation marks omitted).

91. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Watts*, 394 U.S. at 708) (internal quotation marks omitted).

92. GUNNAR MYRDAL, AN AMERICAN DILEMMA 20 (1944) (asserting that the racial attitudes of white Americans “typically follow rather than precede actual institutional . . . alteration”).

racism or sexism. I refer to this latter perspective as “cultural.” “Structural” and “cultural” are simply shorthand for an array of perspectives. The intent of this section is not to elucidate the entire array of perspectives encapsulated by these two terms, but to concisely distill the most salient characteristics of each. These competing perspectives have far-reaching constitutional significance for the hate speech debate. If the cultural perspective adequately accounts for inequalities and other social problems, then the legal rationale for hate speech regulation is severely undermined.

A. The Structural Perspective

Mary Matsuda and Richard Delgado offer the structural argument that the impact of racist speech is direct, pervasive, and devastating to the life chances of many minorities.⁹³ For Matsuda and Delgado, racism refers to discriminatory action and hurtful speech. Delgado writes that “racial insult” and “mere words, whether racial or otherwise, can cause mental, emotional, or even physical harm to their target.”⁹⁴ This concern applies with greater force for the younger members of society. Delgado writes that “[b]ecause they constantly hear racist messages, minority children, not surprisingly, come to question their competence, intelligence, and worth.”⁹⁵ Claims of this nature are the foundation of many speech regulation proposals. Hateful speech is thought to create or contribute to various social problems. Hate speech regulation, in turn, is urgently advocated as a remedy for these various social problems.⁹⁶

There are variations of the structural perspective, some viewing modern society as benign, others portraying a malign social order with respect to racial and gender issues. The former view is represented by William Julius Wilson, who asserts that past racial barriers have gradually eroded over time, but that those past barriers eventually became institutionalized in the form of substandard employment, housing, schools, and transportation.⁹⁷ Institutionalized disadvantages result in a defective opportunity structure, which Orlando Patterson views as an acute social problem even though overt racism no longer represents the primary barrier

93. See, e.g., Matsuda, *supra* note 8; Delgado, *supra* note 1.

94. Delgado, *supra* note 1, at 143.

95. *Id.* at 146.

96. Tsesis, *supra* note 40, at 779 (“Legislatures cannot be absolutely certain that enacted laws will eradicate the blight of racism, but the preservation of democracy and human rights requires the adoption of laws prohibiting violent forms of hate speech.”).

97. William Julius Wilson, *Why Both Social Structure and Culture Matter in a Holistic Analysis of Inner-City Poverty*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 200 (2010).

to opportunity.⁹⁸ Viewed through this more moderate perspective, social problems and inequalities are unintended remainders of past racism. In this moderate structural perspective, the evidently antisocial or self-destructive behaviors that disproportionately appear in some communities are behavioral reactions against—or adaptations to—societal and structural factors. Structural factors themselves shape the culture and attitudes, then the culture and attitudes foster additional inequalities, and an intergenerational cycle ensues. This moderate structural perspective does not typically influence hate speech regulation proposals. Hate speech regulation is the product of a more strident variant of structural orthodoxy.

1. *The Conscious Physical “Structure” Metaphor*

According to Matsuda, “[r]acist speech is . . . a mechanism of subordination, reinforcing a historical vertical relationship.”⁹⁹ Similarly, Johnson claims that “[p]oor education and employment opportunities for racial minorities result in economic inequality, with many whites materially benefiting,” constituting a structure of “racial subordination.”¹⁰⁰ Because of “white privilege” Romero claims, “the white majority has created a society in which its power is institutionally ensconced,” and thus “minorities are entitled to greater protection against hate speech.”¹⁰¹ The concept of a racist American social “structure” is a fixture of leftist discourse.¹⁰² Naturally, the critical race theorists promoting speech regulation feature the concept of “structure” prominently in their work.¹⁰³ Charles Lawrence, a leading critical race theorist, assumes that there are “structures of subordination” existing in society.¹⁰⁴ Even mainstream liberals like Cass Sunstein describe the “systemic disadvantage” of “caste”

98. Orlando Patterson, *The Socio-Political Question*, 21 HOW. L.J. 519, 525–26 (1978).

99. Matsuda, *supra* note 8, at 2358.

100. Kevin Johnson, *Roll Over Beethoven: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 717, 720 (2003–2004).

101. Romero, *supra* note 4, at 25–26, 31.

102. Ruth D. Peterson & Lauren J. Krivo, *Race, Residence, and Violent Crime: A Structure of Inequality*, 57 KAN. L. REV. 903, 903 (2009) (promoting notion that “the social organization of U.S. society is structured to produce and reinforce a racial order where whites are privileged over other groups”); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 79 (2d ed. 1994) (“The major institutions and social relationships of U.S. society . . . have been structured from the beginning by the racial order.”); JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 137–74 (2000) (“White prerogatives stem from the fact that society has, from the beginning, been structured in terms of white gains and white-group interests.”).

103. Matsuda, *supra* note 8, at 2335 (presuming “the structure of racism” in American society).

104. Lawrence, *supra* note 10, at 792.

that occurs when “[a] social or biological difference systematically subordinates the relevant group . . . because of social and legal practices.”¹⁰⁵ There are profound conceptual and normative problems inherent to the physical metaphor of “structure.”¹⁰⁶ Walter B. Miller best summarizes those problems:

The conversion of complex processes and relational systems into concrete objects like power structures and opportunity structures and ghettos and prisons creates an illusion of manipulability that is bound to produce disillusionment. Building blocks can be carted around, walls can be raised or lowered, structures can be built, renovated, demolished with relative ease. Modes of exercising authority or relations between sectors of a society cannot. The pervasive and often unconscious influence of the solid-structure conceptualization creates an unrealistic impression of the ease with which fundamental forms of social change can be effected.¹⁰⁷

Common invocations of the structure metaphor fail to acknowledge the ways in which individuals and groups have agency to shape their own structures, or adapt to existing structures. As respected sociologist David Bordua posited, “members of highly sophisticated delinquent gangs often find themselves blocked from whatever occupational opportunities there are, but this seems, often, the end product of a long history of their progressively cutting off opportunity and destroying their own capacities.”¹⁰⁸ As for gender issues, the notion that structural barriers are responsible for gender inequality was rejected in the noteworthy discrimination case *E.E.O.C. v. Sears, Roebuck & Co.*¹⁰⁹ The habits,

105. Cass Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 801(1993).

106. Walter B. Miller, *The Elimination of the American Lower Class as National Policy: A Critique of the Ideology of the Poverty Movement of the 1960s*, in ON UNDERSTANDING POVERTY 263 (Daniel P. Moynihan, ed., 1969).

107. *Id.* at 293.

108. David J. Bordua, *Delinquent Subcultures: Sociological Interpretations of Gang Delinquency*, 338 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 134 (1961).

109. *E.E.O.C. v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1315 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). Expert witness testimony from a social scientist that “women’s preferences and choices were more important than discrimination in explaining the statistical disparities” was given “considerable weight” by the court in rejecting claims of discrimination. “EEOC’s assumption of equal interest [on the part of both men and women] is unfounded [with regard to commissioned sales jobs] and fatally undermines its entire statistical analysis.” *Id.*; Steven Greenhouse, *Federal Judge Rules for Sears in Sex Bias Case*, N.Y. TIMES, Feb. 4, 1986,

attitudes, and interactions involved in the everyday navigation of social structures are not going to be altered by slipshod speech regulation.

“Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right,” according to MacKinnon.¹¹⁰ The notion that “people are placed in hierarchies” implies passive objects with little, if any, human agency. Aside from being morally impoverished, this notion fails to grasp the reality that people also situate themselves within hierarchies. In fact, when taken in the aggregate, individual decisions based on shared norms combine to position individuals, families, and communities at various locations within hierarchies. The concepts of structure, hierarchy, and “subordination” are subject to criticism for being unduly literal, deterministic and denying human agency.

Speech regulation advocates take for granted that “some members of our community are less powerful than others and that those persons continue to be systematically silenced by those who are more powerful.”¹¹¹ Romero explicitly states that, because of the “silencing” of minorities by whites, that minorities should “be afforded more protection when they speak.”¹¹² The grammatical formulation “systematically silenced” implies that there is a discernable entity actively silencing the “less powerful.” This is a paranoid notion with no basis in fact. Even assuming that the structural view has some empirical support, there are practical legal problems with defining a government interest in the context of structure, hierarchy, and subordination. Any effort to connect speech to social inequality ends up creating a causal knot that the legal system is incapable of untying. As Moon notes, “[t]he causation requirement seems to lead to the conclusion that either no hate speech is caught by the ban (since no statement alone causes hatred) or that all racist or bigoted expression is caught (as part of the system of racist speech that supports the spread of racism).”¹¹³

at A21. Use of women’s studies work in the argument that disparities are “due not to discrimination but to women’s own preferences” has been discussed. See Ruth Milkman, *Women’s History and the Sears Case*, 12 FEMINIST STUD. 375, 385 (1986).

110. CATHARINE MACKINNON, ONLY WORDS 31 (1993).

111. Lawrence, *supra* note 10, at 804.

112. Romero, *supra* note 4, at 25 (claiming that all whites “benefit from the privileges their whiteness secures. In contrast, minority voices have been almost completely silenced by the overwhelming power (whether intentionally or unintentionally) of the white voice, and should therefore . . . be afforded more protection when they speak”).

113. Richard Moon, *Hate Speech Regulation in Canada*, 36 FLA. ST. U. L. REV. 79, 83 (2008-2009).

The notions of “structure” and “subordination” entail an agent actively subordinating an object. This notion is in some cases a misnomer and in other cases a total fabrication. Similarly, the language of “marginalization” should be modified to reflect the possibility of “self-created marginalization,” as Daphne Patai suggests.¹¹⁴ For instance, the social problems found in some white British communities are remarkably similar to the social problems found in urban communities in the United States.¹¹⁵ In England and in the United States, a segment of the white population, together with a segment of minority groups, occupy the bottom range of various measurements of opportunity and success. Racism presumably does not account for the class position of the lower-class white British. Whites can find themselves—and even place themselves—at the bottom of the class scale without the help of racism. It is not difficult to imagine that members of other racial groups may find themselves at the bottom of the class scale without the help of racism.

For Matsuda, “[p]art of the special harm of racist speech is that it works in concert with other racist tools to keep victim groups in an inferior position.”¹¹⁶ This very notion of imposed group inferiority is disputed, and should be. While sociologists disagree over the criteria for true “victim groups,” hate speech regulation would require courts to enshrine “disadvantaged group” status, as well as divine the “social standing” of listeners.¹¹⁷ This is only after a legislature, in its wisdom, designates which favored groups should be protected. Courts would then run the risk of viewpoint favoritism, identity group favoritism, entrenchment of orthodoxy, and chilling effects. In short, hate speech regulation would require that courts do everything the First Amendment was intended to prevent courts from doing.

B. The Cultural Perspective

“Cultural perspective” is the shorthand term used here to describe an alternative explanation for important social outcomes like inequality. The cultural perspective is characterized by appreciation for the role of norms in processes of socialization, identity formation, and acculturation. Under this view, racism and sexism no longer present significant obstacles to the

114. Daphne Patai, *Will the Real Feminists in Academe Please Stand Up?*, CHRON. HIGHER EDUC., Oct. 6, 2000.

115. See, e.g., THE LOSS OF VIRTUE: MORAL CONFUSION AND SOCIAL DISORDER IN BRITAIN AND AMERICA (Digby Anderson ed., 1995); THIS WILL HURT: THE RESTORATION OF VIRTUE AND CIVIC ORDER (Digby Anderson ed., 1995).

116. Matsuda, *supra* note 8, at 2362.

117. Owen Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 290 (1995).

educational and occupational advancement of the vast majority of women and non-whites. The cultural perspective finds that, based on copious evidence, various inequalities are caused in large part by the distinct norms, habits, and lifestyles of different people within different communities. This perspective has no prior ideological commitments to a rigid social science status quo.¹¹⁸ In particular, the cultural perspective emphasizes the vital relationship between norms and conduct. The social system, in this perspective, is not the primary barrier to individual or group advancement. Instead, the cultural perspective emphasizes the agency that people have to make their own life choices. Individual choices are often bracketed or constrained by circumstance. However, the brackets and constraints around choice are themselves shaped by community norms as well as personal commitments to various subcultures. Life's circumstances are navigated by individuals possessing personal attributes and group norms that powerfully shape the individuals' response to life's circumstances. From the structural standpoint, the cultural perspective is easily dismissed as "blaming the victim,"¹¹⁹ or simply "racist."¹²⁰ "Cultural" views might be confused with "conservatism." To the contrary, the cultural perspective is agnostic towards free markets, and skeptical of the supposedly positive results of untrammelled individual impulse. The cultural perspective offers a theoretically valid diagnosis of several major social ills facing modern

118. See, e.g., John Tierney, *Social Scientist Sees Bias Within*, N.Y. TIMES, Feb. 7, 2011 (reporting on research that finds a "hostile climate" created by social scientists towards non-liberals).

119. The very phrase "blaming the victim" was coined by a left wing psychologist writing in response to the Moynihan Report. WILLIAM RYAN, *BLAMING THE VICTIM* (1971). Upon the release of his report, Moynihan was initially vilified by the social science community, with few exceptions. "The Moynihan Report, criticized at the time [of its release] as racist, found little favor," as *The New York Times* reports. John Corry, *TV: 'CBS Reports' Examines Black Families*, N.Y. TIMES (Jan. 25, 1986), <http://www.nytimes.com/1986/01/25/arts/tv-cbs-reports-examines-black-families.html>. Liberal journalist Bill Moyers produced a startling TV documentary called "The Vanishing Family—Crisis in Black America," which affirmed Moynihan's central argument, and dramatized the self-destructive cycle of single parenthood and welfare dependence. By 1985, Moynihan's 1965 Report had been vindicated many times over. A *New York Times* review of Moyers's documentary astonishingly acknowledged, "A matriarchal society in urban America does not work. The absence of two parents encourages rootlessness . . . the social structure erected by the state can be counterproductive . . . Men who take no responsibility for their children are not edifying." Corry, *Id.* In 1985, Harvard selected Moynihan to deliver the Godkin Lecture, in which he described the social problems stemming from female-headed families and out-of-wedlock birth. See Sen. Daniel Patrick Moynihan, *The Godkin Lectures at Harvard University: Family and Nation* (Apr. 8–9, 1985).

120. Douglas Foley, *Ogbu's Theory of Academic Disengagement: Its Evolution and its Critics*, 15 *INTERCULTURAL EDUC.* 385, 389–90 (2004) (arguing that Ogbu saw "African-Americans through African eyes and laments and moralizes about what they have lost and have failed to achieve. This makes him sound like a conservative, assimilationist thinker. Why Ogbu never distanced himself from such racist appropriations of his work remains a mystery.").

society. This perspective is, unsurprisingly, the dissenting sociological perspective within academic social sciences.¹²¹

From the cultural perspective, racial and gender inequality are understood to be primarily the aggregate result of varying norms, habits, preferences, and conscious decisions. Inequalities are therefore not surprising at all; inequality is neither cause for alarm nor political response. The cultural view does not interpret inequality as an indictment of society, but rather as the largely predictable consequence of cultural, behavioral, and attitudinal patterns that are deeply rooted and resistant to change.¹²² This is not the same thing as saying that group inequality is biologically fixed, which would be tantamount to rank Social Darwinism.¹²³ Inequalities are simply the unremarkable product of widely varying cultures and subcultures present within different social groups, as well as between members of any given social group. Various class cultures are distinguished by their prominent “focal concerns,” defined as those “areas and issues which command widespread and persistent attention and a high degree of emotional involvement.”¹²⁴ Recall Laurence Thomas’s observation that “taking cultural diversity seriously entails acknowledging that interests may differ across ethnic and racial groups.”¹²⁵ Appreciating culture means having no expectation of identical results across various, different cultures.

The cultural perspective has important corollaries as a critique of structural explanations. From a structural perspective, observed group

121. Wilson notes that the “cultural arguments,” or what this article refers to as “cultural perspective,” are more consistent with the opinions of lay people: “Any attempt to integrate structural and cultural factors in developing a comprehensive explanation will be faced with the problem that the cultural arguments will invariably resonate more with the general public so much so that they won’t be paying attention to the structural arguments. And so I think that a scholar has an obligation to make sure that the structural explanations do not recede into the background.” William Julius Wilson, Speech at Ohio State University (Oct. 15, 2009), <http://youtu.be/mwkb7cNRr0s>.

122. Brigitte Berger, *The Culture of Modern Entrepreneurship*, 11 POL’Y 5 (1995) (emphasizing the role of culture in economic development “encompasses all the shared ways of thinking, believing, understanding and feeling as well as work practices, consumption, and social interaction in general. Slowly and incrementally the elements that constitute a new manner of life become habituated, routinized, and eventually institutionalized, provided political realities permit them to unfold.”).

123. RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT, 1860-1915* 204 (1967, Beacon Press ed.) (concluding “that the life of man in society, while it is incidentally a biological fact, has characteristics that are not reducible to biology and must be explained in the distinctive terms of cultural analysis” as well as the “social organization” of the society).

124. Walter B. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES 5, 6 (1958).

125. Laurence Thomas, *Equality and the Mantra of Diversity*, 27 U. CIN. L. REV. 931, 934 (2004).

inequalities are taken as proof that a given group is treated unfairly. However, that conclusion rests on the “fallacy of inferred discrimination,” which is “the assumption that the extent to which a group is or has been subject to discrimination can be measured by the disparity between its percentage in the population and its percentage” in whichever measure of ostensible discrimination one observes.¹²⁶ Delgado implicitly repeats this fallacy, as do other speech regulation advocates.¹²⁷ Cass Sunstein postulates the “systemic disadvantage” of “caste,” and claims that “[t]he resulting inequality occurs in multiple spheres and along multiple indices of social welfare: poverty, education, health, political power, employment, susceptibility to violence and crime, and so forth.”¹²⁸ In the structural worldview, inequality is a symptom of caste, discrimination, subordination, or some other social defect independent of individual lifestyles or broader culture. In discussions of male-female earnings differences, the fallacy of inferred discrimination is reflexive.

Hate speech regulation applies the fallacy of inferred discrimination to speech. For instance, Wells asserts “racist hate speech is a painful reminder to its victims of the inequality and second class citizenship status to which they are assigned.”¹²⁹ This inexact description of status as an “assigned” position is misleading. Who or what “assigned” any individual to their status? Which conscious part of the structure “assigned” an individual to their status? If the structure unconsciously “assigned” an individual to their status, did the individual have any agency or discretion in accepting or declining this “assigned” role? Not only is there a structure, but that structure evidently has some form of conscious power to create behaviors and socioeconomic outcomes.

Speech regulation proposals emerge from conceptually misleading and socially incendiary solid structure metaphors. Structural explanations are

126. William R. Beer, *Resolute Ignorance: Social Science and Affirmative Action*, 24 *SOC'Y* 63, 64 (May/June, 1987).

127. Delgado, *supra* note 1, at 140 (“[C]areer options for the victims of racism are closed off by institutional racism—the subtle and unconscious racism in schools, hiring decisions, and the other practices which determine the distribution of social benefits and responsibilities.”); Edelmira P. Garcia & Tarnjeet Kang, *Perpetuating Racism Through the Freedom of Speech, in IMPLEMENTING DIVERSITY: CONTEMPORARY CHALLENGES AND BEST PRACTICES AT PREDOMINANTLY WHITE UNIVERSITIES* 84 (Helen Neville, et al. eds., 2010) (arguing that school performance is impeded by internalized stereotyped messages). Cf. John H. McWhorter, *Explaining the Black Education Gap*, 24 *WILSON Q.* 73, 74 (2000) (“[B]lack students often continue to perform below standards even in affluent, enlightened settings where all efforts are made to help them” chiefly because of “a variety of anti-intellectualism that plagues the black community.”), http://archive.wilsonquarterly.com/sites/default/files/articles/WQ_VOL24_SU_2000_Article_05.pdf.

128. Sunstein, *supra* note 105, at 801.

129. Wells, *supra* note 1, at 320.

flawed by a generally myopic refusal to consider multiple causation at the origin of complex human behavior. Observed disparities have many potential causes. The racism and inequality that speech regulators complain of may not exist to the extent they claim, and—to the extent that it does exist—inequality may be predominantly caused by a host of cultural and behavioral factors that have nothing to do with racism or discrimination. The premise of discrimination-based inequality deserves rigorous scrutiny. The competing perspectives laid out here have tremendous implications for the hate speech debate. It would be logically unsound to accept biased social science as an adequate explanation for human behavior, social outcomes, or as a basis for social policy. For the very same reasons, it would also be constitutionally unsound to accept biased social science as a basis for restricting speech.

1. *Academic Bias and the Question of Social Harm*

Hate speech advocates rely on empirical data for their claims about the social harm of hate speech. This empirical data emerges from the ranks of academic social scientists. Academic social science, however, suffers from deeply rooted and longstanding ideological bias.¹³⁰ The overwhelming liberal bias within the social sciences has become so evident that even the *New York Times* has taken notice.¹³¹ This ideological bias is equally ingrained in the viewpoints of law school faculty, taken as a whole.¹³² To a surprising degree, the public sees political bias within academia as a cause

130. REINHOLD NIEBUHR, REINHOLD NIEBUHR ON POLITICS 44 (Harry R. Davis & Robert C. Good, eds., 1960) (“While the ideological taint upon all social judgments is most apparent in the practical conflicts of politics, it is equally discernible, upon close scrutiny, in even the most scientific observations of social scientists.”); Seymour Martin Lipsett & Everett Carl Ladd, *The Politics of American Sociologists*, 78 AM. J. SOC. 86–87 (1972) (concluding that “the evidence definitely suggests that there is a much higher proportion of radicals among sociologists than among any other occupation group.”).

131. Cohen, *supra* note 19 (reporting that for the last several decades “in the overwhelmingly liberal ranks of academic sociology and anthropology the word ‘culture’ became a live grenade, and the idea that attitudes and behavior patterns kept people poor was shunned.”); John Tierney, *Social Scientist Sees Bias Within*, N.Y. TIMES (Feb. 7, 2011), <http://www.nytimes.com/2011/02/08/science/08tier.html> (reporting on research finding a “hostile climate” created by social scientists towards non-liberals).

132. See, e.g., John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculties*, 93 GEO. L.J. 1167, 1177 (2005) (discussing overwhelmingly liberal political campaign contributions of law professors); Jennifer Pohlman, *Law Schools Hiring Liberal Educators*, NAT’L JURIST, Nov. 2010, at 14–15 (noting the large imbalance between liberal and conservative faculty hires); Adam Liptak, *If the Law is an Ass, the Law Professor is a Donkey*, N.Y. TIMES (Aug. 28, 2005), <http://www.nytimes.com/2005/08/28/weekinreview/28liptak.html> (quoting liberal law professors acknowledging the prevalence of liberalism among faculty).

of concern.¹³³ Students appear to share the general public's concerns.¹³⁴ Concerns about academic bias are justified, because this bias has distorted academic inquiry,¹³⁵ and restricted the range of policy options permitted in public debate.¹³⁶ Within the academic community, "sociopolitical biases influence the questions asked, the research methods selected, the interpretation of research results, the peer review process, judgments about research quality, and decisions about whether to use research in policy advocacy."¹³⁷ Worst of all, some academics are evidently willing to engage in outright discrimination in order to maintain the preeminence of their liberal doctrines. Based on a sample of 800 social psychologists, Inbar and Lammers found that academics in that field openly admitted they would discriminate against conservatives in hiring, distributing grants, and reviewing papers.¹³⁸ Academic discourse about social problems can ultimately influence public behavior, especially that of impressionable individuals who are inclined to justify their misconduct.¹³⁹ Ideological bias

133. Neil Gross & Solon Simmons, *Americans' Views of Political Bias in the Academy and Academic Freedom*, Working Paper (Harvard University and George Mason University) 11, 19, 24 (May 22, 2006), <http://www.aaup.org/NR/rdonlyres/DCF3EBD7-509E-47AB-9AB3-FBCFFF5CA9C3/0/2006Gross.pdf> (finding that "37.5% of respondents claim that political bias is a very serious problem" in the classroom and "68.2% agree that colleges and universities tend to favor professors who hold liberal social and political views; 61.8% agree that too many professors are distracted by disputes over issues like sexual harassment and the politics of ethnic groups." The authors conclude that "a significant minority believe that colleges and universities are havens for liberals and 'radicals,' that conservative professors do not get a fair shake, and that professors are too distracted by identity politics.").

134. See American Council of Trustees and Alumni and University of Connecticut Center for Survey Research & Analysis, *POLITICS IN THE CLASSROOM: A SURVEY OF STUDENTS AT THE TOP 50 COLLEGES & UNIVERSITIES 2* (Oct., 2004) (finding that forty-six percent of students at *U.S. News* top 20 colleges and universities report that professors propound their own ideologies in the classroom, and forty-two percent of students complain that course materials present only one side of controversial public issues).

135. See, e.g., HEATHER MAC DONALD, *THE BURDEN OF BAD IDEAS: HOW MODERN INTELLECTUALS MISSHAPE OUR SOCIETY* 74 (2000) (observing that among law school faculty "race and feminist theory have achieved their position of dominance with little argument: their practitioners wear the impregnable mantle of victimhood").

136. Richard E. Redding, *Sociopolitical Diversity in Psychology*, 56 *AM. PSYCHOL.* 205, 205 (2001) (citing numerous studies finding that ideological bias affects research and undermines independent intellectual inquiry).

137. *Id.* at 206.

138. Yoel Inbar & Joris Lammers, *Political Diversity in Social and Personality Psychology*, 7 *PERSP. ON PSYCHOL. SCI.* 496, 500–01 (2012).

139. NATHAN GLAZER, *THE LIMITS OF SOCIAL POLICY* 15 (1988) (remarking that young delinquents internalize and repeat the explanations and excuses propounded by sociologists and social workers to rationalize their harmful behavior); THEODORE DALRYMPLE, *LIFE AT THE BOTTOM: THE WORLDVIEW THAT MAKES THE UNDERCLASS* x, xi-xii (2001) ("[M]ost of the social pathology exhibited by the underclass has its origin in ideas that have filtered down from the intelligentsia The climate of moral, cultural, and intellectual relativism- a relativism that

fundamentally threatens the First Amendment when calls for hate speech are premised on one-sided research concerning speech-based harm.

A few social scientists have bravely criticized the regnant structural ideology. Allan Bloom memorably wrote, “Any research, however dispassionate, which might tend to reveal differences among nations, races, or sexes which are counter to the prevailing dogma is risky indeed to the scholar.”¹⁴⁰ A small number of academics have publicly warned that liberal orthodoxy stifles intellectual inquiry and constricts policy research.¹⁴¹ The structure metaphor itself is a doctrinaire product of 1960s era left-liberal academic ideology.¹⁴² Walter B. Miller, writing in 1969, warned, “[T]his ideology has assumed the quality of the sacred dogma of a cult movement and has become so deeply and unconsciously ingrained as to critically restrict consideration of policy options.”¹⁴³ Patterson directly blames the structural dogma for the explanatory weakness of contemporary social science:

The main cause for this shortcoming is a deep-seated dogma that has prevailed in social science and policy circles since the mid-1960’s: the rejection of any explanation that invokes a group’s cultural attributes—its distinctive attitudes, values and predispositions, and the resulting behavior of its members—and the relentless preference for relying on structural factors like low incomes, joblessness, poor schools and bad housing.¹⁴⁴

Academic bias directly influences the empirical questions at the heart of the hate speech debate, namely the prevalence of racism and sexism in American life. Quite naturally, politically biased academics will

began as a mere fashionable plaything for intellectuals- has been successfully communicated to those least able to resist its devastating practical effects.”).

140. Allan Bloom, *The Failure of the University*, 103 DAEDALUS 58, 64 (1974).

141. See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 7 (1981) (noting that, among criminologists, “[r]esearch into such fundamental problems as the deterrent efficacy of penal sanctions was avoided and even scorned . . . strikingly illustrat[ing] how an ideology ensconced in an academic discipline may dictate what questions are to be investigated”); Genovese, *supra* note 74, at 371, 373 (historian and former communist noting that communists “broke all records for mass slaughter” yet “[s]cholars in our own ranks have shown precious little interest in reflecting seriously on the collapse of the socialist countries we supported to the bitter end”).

142. See, e.g., Miller, *supra* note 106, at 260–315.

143. *Id.* at 263.

144. Orlando Patterson, *A Poverty of the Mind*, N.Y. TIMES (Mar. 26, 2006), <http://www.nytimes.com/2006/03/26/opinion/26patterson.html?pagewanted=all>.

exaggerate the prevalence of racism and sexism in American life. “The paradox of a constant appeal to racism in the context of a precipitous decline in racism is in part a consequence of a dilution of the meaning of racism for which social scientists are largely responsible,” as Zuriff concludes.¹⁴⁵

Because of liberal hegemony in the academy, the hate speech debate suffers from a fixation on the defects of “white society”¹⁴⁶ and a corresponding blindness towards minority and women’s progress. Women and minorities’ progress stands as a counterfactual that calls into question the premises of hate speech regulation. Yet, the ideological uniformity of university researchers creates a climate where key assumptions about race and gender are rarely challenged. Due to the lack of ideological diversity in universities, speech restriction advances without the intellectual challenge and critique essential for any open dialogue. The following section explores the empirical data concerning social harm, as social harm relates to speech regulation.

C. The Central Empirical Premises of Hate Speech Regulation Proposals

In the scholarship on hate speech regulation, two central empirical premises often emerge: First, that hateful speech causes certain social harms to minorities and women by engendering psychological stresses, self-defeating attitudes, antisocial behaviors, or by perpetuating inequalities. Second, this harm is supposedly so severe as to warrant government imposed speech regulation. Justice Kagan postulates the first premise by asserting, “I take it as a given that we live in a society marred by racial and gender inequality,” and “that certain forms of speech perpetuate and promote this inequality.”¹⁴⁷ Likewise, claims Charles Lawrence, “[w]hen hate speech is employed with the purpose and effect of

145. Zuriff, *supra* note 18, at 115.

146. Robin West, *Murdering the Spirit: Racism, Rights, and Commerce*, 90 MICH. L. REV. 1771, 1773 (1992) (reviewing PATRICIA L. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR* 73, 61–63 (1991)) (declaring that it is “eloquent, profoundly original,” and even “brilliant” to attribute “spirit-murder” to “white society”). See also Derrick Bell, *Who’s Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 907 (1995) ([B]lack Harvard law professor asserting that “the American social order is maintained and perpetuated by racial subordination”). Explicitly race-based criticism of whites as a group is evidently acceptable. See JOAN WALSH, *WHAT’S THE MATTER WITH WHITE PEOPLE?: FINDING OUR WAY IN THE NEXT AMERICA* (2013).

147. Kagan, *supra* note 3, at 873. Prior to her nomination to the Supreme Court, Justice Kagan was once vaguely sympathetic to the goal of regulating hate speech, with qualifications, as a “low-value speech.” Kagan believed that hate speech ordinances “should be limited to racist epithets and other harassment: speech that may not count as ‘speech’ because it does not contribute to deliberation and discussion.” *Id.* at 900.

maintaining established systems of caste and subordination, it violates” the value of “full and equal citizenship” under the Fourteenth Amendment.¹⁴⁸ Advocates of speech regulation perceive American society in a particularly ominous manner. “[T]he pervasiveness of racially marginalizing communication in society at large and also on college and university campuses” is taken as a given.¹⁴⁹ For Waldron, hate speech causes harm to “the dignitary order of society.”¹⁵⁰ “Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship,” according to Matsuda.¹⁵¹ Proponents of regulation point to the “psycho-emotional harms” of hateful speech.¹⁵² These speech-based harms are thought to include “feelings of humiliation, isolation, and self-hatred,” as well as “dignitary affront.”¹⁵³ Those individual-level harms are then said to aggregate into broader structures of racial injustice, which is the second key premise of hate speech regulation.

As to the second key premise of hate speech regulation, in Delgado’s influential article *Words That Wound*, he describes the link between social harms and First Amendment jurisprudence: “The psychological, sociological, and political repercussions of the racial insult demonstrate the need for judicial relief.”¹⁵⁴ Delgado names among those repercussions everything from the internalization of stereotypes to “aggressive” behavior in schools.¹⁵⁵ The pivotal role that social harm plays in justifying proposals for speech regulation is widely acknowledged:

[F]ree speech critical race theory is based on the assumption that particular types of speech can be harmful to minorities. The emotional distress provoked by hate speech includes offence, uncertainty, discomfort and loss of dignity. If the state fails to protect a vulnerable minority from hate speech, it is in fact failing to provide proper security to its citizens. Free speech critical race theory targets the severe psychological trauma suffered by members of identifiable groups.¹⁵⁶

148. Lawrence, *supra* note 10, at 792.

149. Schauer, *supra* note 20, at 817.

150. Waldron, *supra* note 37, at 92.

151. Matsuda, *supra* note 8, at 2358.

152. Massaro, *supra* note 5, at 229.

153. Delgado, *supra* note 1, at 137, 143.

154. *Id.* at 149.

155. *Id.* at 146–47.

156. Belavusau, *supra* note 4, at 148.

Lawrence clearly spells out what he presumed to be a logical connection between social harm and regulation, by claiming that the presence of “discriminatory impact . . . is a compelling governmental interest unrelated to the suppression of the speaker’s political message, that requires a balancing of interests rather than a presumption against constitutionality.”¹⁵⁷

To speech regulation advocates, inferior social standing and inequality of access to resources are often deemed to be the products of racism, and racism flows from speech. Those inequalities in access are a symptom of racism, indicating the need for hate speech regulation. This line of reasoning, however, could be empirically unsound. What if the “psychological, sociological, and political repercussions of the racial insult”¹⁵⁸ are exaggerated? What if those repercussions would not be ameliorated by speech regulation? Indeed, what if the inequalities attributed to racial insult are in fact properly attributed to a different cause or causes unrelated to racial insult? Similarly, men who consume pornography may or may not be led to engage in violence against women, so we might acknowledge uncertainty about the cause and effect relationship between pornography and harm. Unequal incomes between men and women may be due to informed choices and genuine preferences. In short, if social inequalities or other social harms arise from distinct cultural characteristics, value preferences, lifestyle patterns, or any other causal factor independent of hate speech, then it is inaccurate to attribute social harms to hate speech, as the literature so often does. To the extent that social harms have any cause aside from hate speech, then hate speech regulation would be misguided.

The two premises of “hate” speech regulation—that hate speech causes social problems and that the harm of racism is so prominent in American society that it warrants speech regulation—are fundamentally empirical questions. Evidence that undermines any of these premises will correspondingly weaken the case for speech regulation. One of the more grievous flaws in the hate speech literature is the absence of any rigorous empirical critique of these core premises. How do we know whether hate speech causes social problems? How much racism and sexism does exist in American society? What is the degree of that racism and sexism? Only when we answer these questions can we determine whether the harm of hate speech warrants regulation. Any call for regulation must provide

157. Lawrence, *supra* note 10, at 797.

158. Delgado, *supra* note 1, at 149.

unequivocal answers to persuade a free people that their First Amendment rights should be abridged.

1. *Does Hate Speech Cause Particular Social Harms?*

How do we know that hate speech causes the social problems cited by speech regulation advocates? Is there any reason to believe that the problems cited by regulation advocates actually have a different cause or causes? If the structural view does not explain the social problems adequately, what are some competing explanations? Here, it is illuminating to consider three specific examples of speech-based harm posited by regulation advocates: inequality, hostility, and psycho-emotional harms.

a. Inequality

“Social inequality is substantially created and enforced—that is, *done*—through words and images,” writes MacKinnon.¹⁵⁹ Even though he struck down MacKinnon’s ordinance, Judge Frank Easterbrook conceded MacKinnon’s point that “[d]epictions of subordination tend to perpetuate subordination.”¹⁶⁰ Hate speech regulators complain of “systems of caste and subordination” in American society, systems that are revealed in the form of various inequalities.¹⁶¹ This explanation is essentially doctrinaire leftist thinking, with an extrapolation to the remedy of speech regulation. The glaring logical flaw in this thinking is that racial and gender inequalities may very well be caused by other factors. Racial inequalities in outcomes such as educational performance,¹⁶² and family structure¹⁶³

159. MACKINNON, *supra* note 110, at 99 (“Social hierarchy cannot and does not exist without being embodied in meanings and expressed in communications.”).

160. American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

161. Lawrence, *supra* note 10, at 792.

162. See MCWHORTER, LOSING THE RACE, *supra* note 17 (arguing that cultural attitudes and habits undermine minority educational achievement); Cf. JAMES COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 192, 320 (1966) (finding that school quality had only minor effect on educational outcome, while family background was the most important factor); see also JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT (2003) (noting that black children of upper-middle class, professional families had poor study habits and unhealthy role models which explained their unequal outcomes when compared with whites of similar socioeconomic status); but see Foley, *supra* note 120, at 391 (asserting that the families Ogbu studied did not have the economic and cultural capital needed to “compete” with white families).

163. See SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994) (surveying the challenges in social and personal development faced by children of all races within single-parent families); Steven Ruggles, *The Origins of African-American Family Structure*, 59 AM. SOC. REV. 136, 148 (1994) (“What, then,

could merely represent the unsurprising outcomes of different individual preferences and cultural traits.¹⁶⁴ These preferences and traits may account for the troubling social inequalities. We have no clear idea whether or to what degree speech fosters society's vexing inequalities. The cultural perspective offers a fundamentally different explanation. For Walter Williams, an economist, the "erosion of spontaneously evolved traditional values lies at the heart of our most intractable socioeconomic problems."¹⁶⁵ From Williams' standpoint, "[w]idespread family breakdown—or, what is more descriptive, families not forming in the first place—has produced the pathology that is an integral part of today's urban landscape."¹⁶⁶

Inequality of outcomes could result from an array of causes, such as distinctive cultural norms, that are unrelated to racism. Laurence Thomas concisely dissects the erroneous presumption that flawless equality should be the norm:

[W]ithout there ever having been racism, it does not follow that a group would be sufficiently visible in all segments of society, certainly not if sufficient visibility is to be assessed by the criterion of proportionality. Complete liberty and equality in a society is compatible with there being cultural traditions, say, that incline members of a group to pursue one walk of life rather than another.¹⁶⁷

The presence of "discriminatory impact" is nonetheless seen by regulation advocates as "a compelling governmental interest" that actually "requires a balancing of interests rather than a presumption against [the]

are the origins of the current pattern of African-American family structure? Economic explanations cannot be ruled out, but they have to be more subtle than the simple thesis that single parenthood resulted from economic stress All things considered, the cultural explanations appear just as persuasive as the economic ones.").

164. Ronald F. Ferguson, *Test-Score Trends Along Racial Lines, 1971 to 1996: Popular Culture and Community Academic Standards*, in 1 *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* 348, 373 (Neil J. Smelser, William J. Wilson & Faith Mitchell eds., 2001) (suggesting that the decline in reading scores amongst blacks, which began in the late 1980s, was caused by the ascendance of rap music; when young minority men "embraced the expressions and began to mimic the styles and behaviors of gangsta rap and other hip-hop personalities," this role modeling was "almost surely" harmful to their education).

165. Walter E. Williams, *The Welfare Debate*, 33 *SOC'Y* 13, 13 (1996).

166. *Id.* at 14.

167. Thomas, *supra* note 125, at 934 (pointing out that "[a]ll the liberty and equality in the world is not likely to change the fact that far more blacks are apt to take a liking to gospel music than are Muslim Arabs or Jews. More generally, taking cultural diversity seriously entails acknowledging that interests may differ across ethnic and racial groups").

constitutionality” of hate speech regulation.¹⁶⁸ To the contrary, there are a host of reasons for concluding that inequalities are the product of distinctive cultural norms rather than the result of discrimination.

Sowell, among others, concluded that there is no reason based in history or logic to expect different ethnic groups to have identical career outcomes: never, in any country or any historical period, has there been equal income or occupational outcomes among racial or ethnic groups.¹⁶⁹ As early as 1965, sociologist and future Democratic Senator Daniel Patrick Moynihan concluded that slavery and racism had historically caused black poverty, but that those causal factors no longer account for the social problems burgeoning during the era of the 1960s. “At this point,” he concluded in 1965, “the present tangle of pathology is capable of perpetuating itself without assistance from the white world.”¹⁷⁰ Glenn Loury once noted that “[g]ross statistical disparities are inadequate to identify the presence of discrimination, because individuals differ in many ways likely to effect their earning capacities that are usually not measured and controlled for when group outcomes are compared.”¹⁷¹ For instance, a Northwestern University study found that young minorities (between the ages of 8 and 18) consume 13 hours of media content per day; four and a half hours per day more than whites.¹⁷² Indeed, children describe cultural differences with more clarity than most adults.¹⁷³

168. Lawrence, *supra* note 10, at 797.

169. THOMAS SOWELL, RACE AND ECONOMICS (1974) (surveying the differences among American ethnic groups); THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW (1994) (cataloguing the enormous international evidence reflecting complex human cultural and economic behaviors); THOMAS SOWELL, MARKETS AND MINORITIES (1981); THOMAS SOWELL, PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE (1990); THOMAS SOWELL, CONQUESTS AND CULTURES: AN INTERNATIONAL HISTORY (1998).

170. MOYNIHAN REPORT, *supra* note 32, at 93.

171. Compare GLENN LOURY, ONE BY ONE, FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA 133–34 (1995), with GLENN LOURY, THE ANATOMY OF RACIAL INEQUALITY (2003). Loury’s change of ideological direction is vivid proof of the uncertainty inherent in strong claims based on social science.

172. Victoria Rideout, MA, Alexis Lauricella, Ph.D., & Ellen Wartella, Ph.D., *Children, Media, and Race Media Use Among White, Black, Hispanic, and Asian American Children*, NW. UNIV. SCH. OF COMM’N 1, 7 (June 2011), <http://web5.soc.northwestern.edu/cmhd/wp-content/uploads/2011/06/SOCconfReportSingleFinal-1.pdf> (“One big difference in young people’s home media environments is that Black and Hispanic youth are much more likely to have TVs, DVD players, and video game consoles in their bedrooms than . . . others in their age group.”).

173. See, e.g., Hector Becerra, *Trying to Bridge the Grade Divide*, L.A. TIMES (July 16, 2008), <http://articles.latimes.com/print/2008/jul/16/local/me-lincoln16> (noting that in a public meeting of Asian and Hispanic students from the same school, “the students agreed” that “Asian parents are more likely to pressure their children to excel academically”).

Distinctive cultural norms produce inequalities of every imaginable variety.¹⁷⁴ Amy Wax contends that patterns of attitudes and voluntary conduct are the primary causes of inequality.¹⁷⁵ Again, Laurence Thomas quite sensibly reasons through the implications of cultural differences: “[T]aking cultural diversity seriously entails acknowledging that interests may differ across ethnic and racial groups. Hence, the absence of a minority group in one sphere of life rather than another may be benign, as opposed to reflecting social opposition (subtle or explicit) to the [minority group’s] participation in that activity.”¹⁷⁶ Gender-based inequalities may similarly be a product of varying preferences for certain types of jobs and career paths.¹⁷⁷ Simply put, the tastes and preferences of diverse groups can vary, and these variations may have consequences for educational, familial, and occupational life outcomes.

The tragic inequality that has proven most consequential—and controversial—is the family structure. Why did black and white family structures converge then diverge so significantly throughout American history? The structural theory is most lacking as an explanation of the family structure that developed within the black community following Emancipation. If racism or structural variables truly account for social problems like the family structure, then the family structure would have been weakest when racism was most intense; during slavery, Jim Crow, and segregation. As racism weakened in the post-Civil Rights era, the family structure should have strengthened, if structural variables truly accounted for the weaker family structure. Yet, the overwhelming body of

174. See JAMES Q. WILSON AND RICHARD HERRNSTEIN, *CRIME AND HUMAN NATURE* 438 (1985) (concluding that rates of suicide, divorce, illegitimacy, alcoholism, drug abuse, and crime were mostly affected by cultural rather than economic factors); Christopher Jencks, *Deadly Neighborhoods*, *NEW REPUBLIC*, June 13, 1988 (suggesting that the erosion of social stigmas and norms within disadvantaged communities did great harm to those communities); *but cf.* W.J. Wilson, *Social Research and the Underclass Debate*, 43 *BULL. AM. ACAD. ARTS & SCI.* 30, 32 (1989) (noting “chronic, self-perpetuating pathology . . . of the ghetto” while also acknowledging structural barriers).

175. See AMY WAX, *RACE, WRONGS, AND REMEDIES: GROUP JUSTICE IN THE 21ST CENTURY* 95–101 (2009) (asserting “most black-white disparities can be traced to blacks’ lower qualifications on neutral criteria or to simple differences in behavior On-going race-based discrimination—whether conscious or unconscious, rational or irrational—explains a very small part of existing differences in educational attainment, jobs, wages, family structure, consumer credit rates, and involvement with the criminal justice system.”).

176. Thomas, *supra* note 125, at 934.

177. This point will be elaborated upon in Subsection 2 below. Remarkably, as long ago as 1971, women who remained unmarried into their thirties and worked continuously following high school earned higher incomes than men with identical lifestyles. WASHINGTON, D.C.: U.S. GOVERNMENT PRINTING OFFICE, *THE ECONOMIC REPORT OF THE PRESIDENT, THE ECONOMIC ROLE OF WOMEN* 103 (1973).

historical, economic, and sociological research on this question shows that the exact opposite occurred: The black family structure was remarkably resilient during the periods of slavery, Jim Crow and segregation, while racism was rampant, as Eugene Genovese and Herbert Gutman established.¹⁷⁸ Based on his detailed review of one representative slave community, Gutman wrote that “the slaves themselves—denied the security of legal marriages and subjected to the severe external pressures associated with ownership—sustained lasting marriages and the slave social beliefs and practices associated with them.”¹⁷⁹ As Gutman concluded, “between 1800 and 1857 most Good Hope [slave community] adults settled into permanent unions and most children grew up in such families.”¹⁸⁰ In their heralded work, Robert Fogel and Stanley Engerman assert that “[t]he belief that slave-breeding, sexual exploitation, and promiscuity destroyed the black family is a myth. The family was the basic unit of social organization under slavery.”¹⁸¹ In fact, Gutman’s research led him to a remarkable conclusion:

At all moments in time between 1880 and 1925—that is, from an adult generation born in slavery to an adult generation about to be devastated by the Great Depression of the 1930s and the modernization of southern agriculture afterward—the typical Afro-American family was lower-class in status and headed by two parents.¹⁸²

178. EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 450–58 (Vintage Books, 1st ed. 1976) (1972). Genovese rejected the “conventional wisdom” that “slavery had emasculated black men, created a matriarchy, and prevented the emergence of a strong sense of family.” *Id.* at 450. “I suggest only that the slaves created impressive norms of family life, including as much of a nuclear family norm as conditions permitted, and that they entered the postwar social system with a remarkably stable base.” *Id.* at 451–52; HERBERT GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925* at 448–56 (1976) (population data show that between 1880 and 1925, the ordinary lower to middle-class black family was headed by both parents).

179. GUTMAN, *supra* note 178, at 52.

180. *Id.* at 58.

181. ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 5 (1995). *See also* CARL N. DEGLER, *OUT OF OUR PAST* 476 (3d ed. 1984) (1959) (Union Army chaplains who went South during the Civil War to formally officiate marriages between slaves found that over forty percent of marriages officiated in Mississippi and Louisiana were actually slave marriages that had been intact for between five to fourteen years).

182. GUTMAN, *supra* note 178, at 455–56. In 1925, in New York City, “Three percent of all households and subfamilies were male-absent and headed by women under thirty.” *Id.* at 455.

W.E.B. Du Bois observed in 1899 that post-slavery family bonds actually strengthened during a period of severe *de jure* segregation and rampant structural racism, noting, “The home was destroyed by slavery, struggled up after emancipation, and is again not exactly threatened, but neglected in the life of city Negroes. Herein lies food for thought.”¹⁸³ Gutman’s detailed review of population data resulted in the singularly impressive conclusion that “either a husband or father” was present in eighty-five percent of all black homes in New York City in 1925.¹⁸⁴ Because the black family remained intact and resilient throughout the worst periods of American racism, the structural perspective fails to account for the outcomes measured by Genovese, Gutman, Fogel, and Engerman.

A similar critique of the structural perspective carries through to the post-Civil Rights era. The black family unit fractured throughout the 1960s, ‘70s, and ‘80s, which is precisely the period when racism was declining.¹⁸⁵ As the Urban Institute notes, “[t]he percentage of black children born to unmarried mothers . . . tripled between the early 1960s and 2009.”¹⁸⁶ In 1940, ten percent of white families were female-headed with no husband present, and eighteen percent of black families were female-headed with no husband present, but by 1983, that figure was twelve percent for whites and forty-two percent for blacks.¹⁸⁷ Because the plight of the black family worsened even as racism diminished throughout the 1960s, ‘70s, and ‘80s, it is nearly impossible to adequately explain the contemporary black family structure by pointing to discrimination or prejudice. Structural perspectives cannot account for today’s family outcomes. There is an urgent need to reevaluate the causes of observed disparities in family structure. Instead of contributing to such an evaluation, speech regulation proposals proceed from the assumption that inequality is caused by structural factors. This assumption concerns the

183. W.E.B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* 196 (1899).

184. GUTMAN, *supra* note 178, at 454, 515 tbl.A-44 (“either a husband or father” were present in “six of seven 1925 households and subfamilies”). In New York City in 1905, that number was 83 percent. *Id.* at 515 tbl.A-44.

185. The 1940 census provides the oldest national-level data on family structure. In 1940, “even in urban areas, [seventy-two] percent of black families with children under eighteen were male headed The two-parent nuclear family remained the predominant type for both blacks and whites up to World War II.” WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 65 (2d ed. 2012). *See also* STEPHEN THERNSTROM AND ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 237–41 (1999) (concluding based on census and other government data that “as recently as 1960, two-thirds of all black children lived in intact, two-parent families”).

186. *The Moynihan Report Revisited*, URBAN INSTITUTE 3 (June, 2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412839-The-Moynihan-Report-Revisited.PDF>.

187. WILSON, *TRULY DISADVANTAGED*, *supra* note 185, at 65–66 (citing census and other government statistics).

hate speech debate because hate speech regulation is justified by “the speech’s detrimental effect upon equality.”¹⁸⁸ Recognizing that the “amelioration of offense” is an inadequate basis to restrict speech, some advocates urge that “restrictions upon hate speech need to have the promotion of equality as their goal rather than the amelioration of offense.”¹⁸⁹ “[I]t is not the offensiveness that justifies [speech] regulation. Instead, it is the speech’s detrimental effect upon equality that supports such regulation.”¹⁹⁰ Where will we turn for proof of “speech’s detrimental effect upon equality”? To proof of inequality, thus to the fallacy of inferred discrimination. If “the promotion of equality” is the goal of hate speech regulation, then the continued existence of inequality will be taken to demonstrate a perpetual need for hate speech regulation. The cycle of racial (or gender) guilt and speech restriction would never end. If, however, the origins of inequality emerge through the culture, then speech regulation would be a vain effort to address an incorrectly diagnosed root cause.

b. Hostility

Delgado portrays a world where not only are young minorities the constant victims of degradation, but those young people are also equipped with just two psychological responses:

The child who is the victim of belittlement can react with only two unsuccessful strategies, hostility or passivity. Aggressive reactions can lead to consequences which reinforce the harm caused by the insults; children who behave aggressively in school are marked by their teachers as troublemakers, adding to the children’s alienation and sense of rejection.¹⁹¹

How common is it that minority students are belittled on the basis of their race? The question is worth posing, considering that speech restriction is premised on minority children being belittled to a degree that warrants new restrictions on speech. Can we identify a source of the belittling remarks or treatment? The odds that a contemporary teacher or administrator would treat a student with racist belittlement are infinitesimally small. The odds

188. Robin Edger, *Are Hate Speech Provisions Anti-Democratic: An International Perspective*, 26 AM. U. INT’L L. REV. 119, 128 (2010).

189. *Id.* at 129.

190. *Id.* at 128.

191. Delgado, *supra* note 1, at 147.

are much higher than a minority student might treat a fellow minority student in a belittling manner for “acting white.”¹⁹² Moreover, there are already administrative penalties and remedies available for belittling conduct or speech within the school setting. As the Court declared in *Fraser*, “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”¹⁹³ Particularly in the educational environment, existing First Amendment jurisprudence gives school administrators the power to limit student speech, and schools have not been afraid to use that power.¹⁹⁴ Because there are available administrative penalties and remedies for belittling conduct or speech within the school setting, new hate speech laws are unnecessary to address harmful speech in the school setting.

More importantly, are there in fact “only two” responses available to children who are belittled? Groups of people who have suffered oppression have historically accomplished remarkable feats when their culture inclines them to excel rather than wallow in victim status.¹⁹⁵ Of all of those children who “behave aggressively in school,” what percentage does so because they are the “victim of belittlement”? Children who behave aggressively in school or disengage academically could be motivated by any number of personal, psychological, cultural or peer-related factors. Delgado is pointing to one explanation, suggesting that young people defensively form identities or personas in opposition to those institutions that they are alienated from or excluded from. On the subject of academic

192. See Roslyn A. Mickelson & Anne E. Velasco, Bring It On! Diverse Responses to ‘Acting White’ Among Academically Able Black Adolescents, in BEYOND ACTING WHITE: REFRAMING THE DEBATE ON BLACK STUDENT ACHIEVEMENT 27, 53 (Erin McNamara Horvat & Carla O’Connor eds., 2006) (“Because of the power of acting white to shame them as traitors to the race, some portion of black adolescents do decline to behave in ways that lead to academic success.”); Henry Louis Gates, Jr., *Breaking the Silence*, N.Y. TIMES, August 1, 2004 (arguing that “in too many black neighborhoods today, academic achievement has actually come to be stigmatized”).

193. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

194. See Chemerinsky, *Students Do Leave*, *supra* note 77, at 546 (concluding, disapprovingly, that “thirty years after *Tinker*, students do leave most of their First Amendment rights at the schoolhouse gate”); Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 B.Y.U. EDUC. & L.J. 123, 162 (2000) (“Public schools across the country have recently begun to discipline students for a range of student Internet uses that the schools believe are damaging to their educational environments.”). See also NATHAN L. ESSEX, *SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS* (6th ed. 2015).

195. See, e.g., THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* (1983) (citing numerous instances internationally—such as the Chinese in Southeast Asian countries, Indians in East Africa, and Jews in Western Europe—where group differences in economic status do not correlate with oppression and those subject to oppression have outperformed those in the role of oppressor).

disengagement on the part of minority students, there has been a fruitful debate about the role played by racism in creating “oppositional” identities among minority youth. Hostile or stereotyped ideas, expressed through language towards minority youth, could theoretically shape negative attitudes among those groups and contribute to undesired outcomes, academically and otherwise. However, the oppositional identity theory—that racist power structures or bigoted attitudes shape minority attitudes—posits an extremely attenuated causal link.¹⁹⁶ McWhorter provides a compelling reason for rejecting the oppositional identity theory; namely, that the theory “implies that the culprit [for academic disengagement] is alienation from racist behavior on the part of whites, when in fact today it thrives and is passed on even in the absence of significant experiences with racism.”¹⁹⁷ This is precisely what President Obama was pointing to in his 2004 keynote address at the Democratic National Convention, when then-Senator Obama said, “children can’t achieve unless we raise their expectations and eradicate the slander that says a black youth with a book is acting white.”¹⁹⁸ The oppositional identity theory essentially infantilizes certain groups by positing that their innermost character is to a great degree determined by other people’s attitudes about the victim group. We should expect that minorities have enough will power or moral resources to withstand the infrequent hateful speech directed towards them by hostile outside groups. Besides, white guilt ensures that any individual or group that uses “hate speech” will likely be ostracized and socially censured upon the slightest hint of racial insensitivity.¹⁹⁹

Aside from being the “victim of belittlement,” do aggressive or academically withdrawn children have any other impetus for their behavior? Violence or disrespect for authority within schools and the larger society have several intriguing modern roots. Refusal to cooperate with law enforcement is one striking example. Geoffrey Canada, an antiviolence activist and children’s education advocate in Harlem, points to the dangers of the “stop snitchin’” campaign. Canada states that, historically, “no snitchin’” as a cultural norm never had broad appeal, until

196. Even sympathetic liberal scholars note that assigning “total definitional power to language (and therefore to anyone who employs that language)” tends to deny the power of “insurrectionary speech,” or the possibility of resisting the injurious expression. CHRIS HUTTON, *LANGUAGE, MEANING AND THE LAW* 111–12 (2009) (internal quotation omitted).

197. MCWHORTER, *LOSING THE RACE*, *supra* note 17, at 126.

198. *Quoted in* Henry Louis Gates, Jr., *Breaking the Silence*, N.Y. TIMES, Aug. 1, 2004.

199. See Shelby Steele, *The Age of White Guilt*, 35 HARPER’S MAG. 33 (2002) (“Under this stigma [of white guilt] white individuals and American institutions must perpetually prove a negative—that they are not racist—to gain enough authority to function in matters of race, equality, and opportunity. If they fail to prove the negative, they will be seen as racists.”).

very recently. “When I was growing up, kids used to talk about snitching” but this talk “never extended as a cultural norm outside of the gangsters.”²⁰⁰ “It was not for regular citizens. It is now a cultural norm that is being preached in poor communities.”²⁰¹ What was once a fringe subculture has spilled over into a broader part of society. Speaking about middle-class blacks, Canada warns there are “kids who have never been hungry, who’ve always had clothes, and what do they want to do? They want to go out and get involved in selling drugs,” and engaging in related crimes because they pattern their behavior after rap artists.²⁰² Canada insisted of the “stop snitchin’” message, “I have no doubt in my mind that it is setting the cultural context for murder.”²⁰³

What causes the aggression that Delgado mentioned? There are ample reasons, none connected to hate speech, which may explain why a young person might be aggressive. Quite simply, crime may offer the criminal a sense of enjoyment. Renowned criminologist David Bordua once lamented, “It seems peculiar that modern analysts have stopped assuming that ‘evil’ can be fun and see gang delinquency as arising only when boys are driven away from ‘good.’”²⁰⁴ In the past, when the social sciences produced a broader range of social critique, there was a fruitful debate over the causes of crime and aggressive behavior. James Q. Wilson and Richard Herrnstein’s exhaustive *Crime and Human Nature* concluded that rates of crime were strongly affected by cultural and familial influences.²⁰⁵ Similarly, McWhorter has linked hip-hop music to antisocial behavior, rejecting the notion that racism or structural barriers are the root cause.²⁰⁶ It could very well be that social scientists and speech regulation advocates have generally misdiagnosed many of society’s ills. For instance, we don’t know how often belittlement impacts students’ behavior. Therefore, it would be rash to enact speech restriction in order to remedy behavior that is

200. Interview with Geoffrey Canada, *Stop Snitchin’*, CBS NEWS: 60 MINUTES INTERVIEW (Apr. 19, 2007), <http://www.cbsnews.com/news/stop-snitchin/>.

201. *Id.*

202. Interview with Geoffrey Canada, *Stop Snitchin’*, CNN NEWS: ANDERSON COOPER 360 DEGREES (Apr. 27, 2007), <http://www.cnn.com/TRANSCRIPTS/0704/27/acd.02.html>.

203. *Id.*

204. David J. Bordua, *Delinquent Subcultures: Sociological Interpretations of Gang Delinquency*, 338 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 136 (1961).

205. WILSON & HERRNSTEIN, *CRIME AND HUMAN NATURE*, *supra* note 174, at 438, 524–25 (1985) (describing the family as “the most important social achievement of mankind And it is the socialization of the male that we must chiefly explain if we are to understand why not everyone commits crimes whenever it is advantageous to do so”).

206. John McWhorter, *How Hip-Hop Holds Blacks Back*, CITY JOURNAL (Summer, 2003), http://www.city-journal.org/html/13_3_how_hip_hop.html.

not entirely understood, and is in many instances not attributable to hateful speech.

c. Psycho-emotional Harm

Proponents of hate speech regulation also cite the “psycho-emotional harms” of hateful speech.²⁰⁷ Using a psychological state as the metric for the impact of racist speech is deeply problematic. How do we gauge when an individual has suffered psycho-emotional harm? Simply consider the confusion ensuing from the two words “mental impairment” within the Americans with Disabilities Act.²⁰⁸ Such vague metrics are so prone to abuse that they are “threatening to undermine our culture’s already fragile sense of personal responsibility,” according to Zuriff.²⁰⁹ The vague standard of “psycho-emotional harm” would call for a highly subjective inquiry into personal feelings, creating intractable empirical questions, to go along with the constitutional problem of remedying speech-based harm by reference to the vague standard. As for the empirical question, there is reason to believe that American society rarely inflicts racist “psycho-emotional harm.” Specifically, if hate speech in American society is causing psycho-emotional harm, this has not led to a measurable impact on self-reported self-esteem. Based on a massive study incorporating decades’ worth of research from 1960 through 1998, Gray-Little and Hafdahl found that “despite substantial similarity, Black children, adolescents, and young adults have higher average self-esteem than their White counterparts. The Black self-esteem advantage is contrary to classical theorizing regarding the relationship between self-esteem and social status.”²¹⁰

Proponents of regulation typically point, not to the broader experience of racial minorities, but to aberrant or outdated instances of bigoted speech. Delgado asserts that “[s]ocial scientists who have studied the effects of racism have found that speech that communicates low regard for an individual because of race” has a tendency to create undesirable traits within the listener.²¹¹ Delgado’s citation for that claim was a study published in 1968. Surely the impact of racism in America has changed somewhat during the intervening years. The rapid change in racial

207. Massaro, *supra* note 5, at 229.

208. Gary E. Zuriff, *Medicalizing Character*, 123 PUB. INT. 94 (1996) (“What were in earlier times considered to be faults of mind and flaws of character are today regarded as ‘psychological disorders,’ which are, moreover, covered by the ADA.”) (quotation marks in original).

209. *Id.* at 94.

210. Bernadette Gray-Little & Adam R. Hafdahl, *Factors Influencing Racial Comparisons of Self-esteem: A Quantitative Review*, 126 PSYCHOL. BULL. 26, 31, 40 (2000).

211. Delgado, *supra* note 1, at 146 n.72 (quoting MARTIN DEUTSCH, IRWIN KATZ & ARTHUR R. JENSEN, *SOCIAL CLASS, RACE AND PSYCHOLOGICAL DEVELOPMENT* 175 (1968)).

attitudes, especially the erosion of bigoted attitudes, raises questions for the proponent of speech regulation. Which psycho-emotional harms are caused by hate speech, how do we know, and how severe is that harm? Those committed to the tradition of free speech may want answers to these questions before consenting to surrender their First Amendment rights.

For those who claim to suffer from racist psycho-emotional harm, could there actually be some other source for their perceived psychological state, aside from hate speech or societal racism? Human existence is arguably characterized by a sense of restlessness, perhaps even dissatisfaction.²¹² How do we trace any particular person's inner malaise, much less their social status, to hate speech? Could there be people who have not suffered the harm they claim to have suffered? Could there be people who have suffered harm but misperceive the intent behind the harm? Sometimes, what is perceived to be prejudicial treatment is in fact neutral treatment, even if in some cases that neutral treatment can be objectively classified as unfair or poor. There can be misperceptions on the part of minority group members with regard to the motives of whites. Relationships between police officers and black communities offer an illustration: Banfield describes lower class whites who were treated forcefully by arresting police officers, and compares their experience with similar treatment afforded to blacks. Blacks may tend to assume that forceful treatment is due to racism, while in fact a "white, Protestant, old-stock American" would have received similar treatment: "[T]o treat the lower-class Negro exactly like the lower-class white is not, on the face of it, to show racial prejudice."²¹³ Racism may at times be misperceived. Worse yet, there are—on occasion—people who concoct stories of "racism" out of thin air.²¹⁴ A subjective psychological state cannot provide a reliable metric for the impact of racism in American life. Ultimately, we may not know which purported psychological states are genuine. We may not know which factors gave rise to any given psychological state for any given person. Allowing a political, judicial, or other agency to unpack these mysteries would produce a raging farce, at best.

To give any official body the power to limit speech based on the perception of "hate" would be to guarantee a procession of show trials, jeopardizing the First Amendment. This diminution of rights would be especially unjust given that so much of the empirical basis for speech regulation is subject to critique and falsification. Many intervening

212. See, e.g., WILLIAM BARRETT, *IRRATIONAL MAN* 23 (1962) ("[M]odern man seems even further from understanding himself than when he first began to question his own identity.").

213. BANFIELD, *supra* note 15, at 89–90 (quotation marks omitted).

214. See sources cited *supra* note 36.

variables enter the equation between speech and psycho-emotional harm. There are so many intervening variables that it would require immense speculation and credulity for courts to find a valid causal link between speech and social harm. Even if a valid causal argument could be made, the harm does not necessarily occur on a wide enough scale or to a great enough degree to warrant speech regulation, given available alternatives.

2. *Is the Degree of Racism (or Sexism) Remaining in American Society So Severe That it Warrants Speech Regulation?*

Some scholars, such as Dr. John McWhorter, have declared that “[r]acism [i]n America is [o]ver.”²¹⁵ Nobel economist Gary Becker asserted fifty years ago that the theoretical antidiscriminatory impact of free markets has found some confirmation.²¹⁶ Political scientist Edward Banfield wrote in 1974 that “racial prejudice today is of a different order of magnitude than it was prior to the Second World War; the change of attitudes in the last two decades alone has been so widespread and profound as to make meaningless comparisons between the two periods.”²¹⁷ Against this view of dramatically improving race relations, modern social scientists generally, and critical race theorists in particular, see racism as a major factor in the lives of many minorities today.²¹⁸ “Because they constantly hear racist messages, minority children, not surprisingly, come to question their competence, intelligence, and worth. Much of the blame for the formation of these attitudes lies squarely on value-laden words, epithets, and racial names,” Delgado alleges.²¹⁹ From a more mainstream liberal perspective, Sunstein claims “unrestricted speech may contribute to the maintenance of a system with caste-like features” and that “narrow and well-defined legal controls on pornography and hate speech are simply a part of the attack on systems of racial and gender caste.”²²⁰

215. John McWhorter, *Racism In America is Over*, FORBES, Dec. 30, 2008, http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html.

216. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

217. BANFIELD, *supra* note 15, at 78.

218. See, e.g., Bell, *supra* note 146, at 907 (black Harvard law professor asserting that “the American social order is maintained and perpetuated by racial subordination.”); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 140 U. CHI. LEGAL F. 139, 162 (1989) (black UCLA law professor claiming that “the social experience of race creates both a primary group identity as well as a shared sense of being under collective assault”).

219. Delgado, *supra* note 1, at 146.

220. Sunstein, *supra* note 105, at 802, 844.

“The racist name caller is accompanied by a cultural chorus of equally demeaning speech and symbols,” Charles Lawrence writes.²²¹ For Lawrence, “[s]egregation and other forms of racist speech injure victims because of their dehumanizing and excluding message. But each individual message gains its power because of the cumulative and reinforcing effect of countless similar messages.”²²² This view of a society riven by racism is a common feature of proposals for hate speech regulation. Schauer asks, “Given the pervasiveness of racially marginalizing communication in society at large and also on college and university campuses, and given a historical willingness to accept it, how are its victims to call attention to the phenomenon?”²²³ Speech-based harm is supposedly so widespread that some see speech regulation as an appropriate response. This line of reasoning requires that regulation advocates offer rather strong claims about the pervasive degree of racism in American life. For example, minorities are supposedly inundated with hateful racist messages from the broader society. According to Matsuda, “The spoken message of hatred and inferiority is conveyed on the street, in schoolyards, in popular culture and in the propaganda of hate widely distributed in this country.”²²⁴ For Delgado, “American society remains deeply afflicted by racism.”²²⁵ The harm of words conveyed in individual messages has powerful force because “[r]acism is an epidemic infecting the marketplace of ideas and rendering it dysfunctional. Racism is ubiquitous. We are all racists,” according to Charles Lawrence.²²⁶

The degree to which racism affects the life chances of minority group members is one of the most contentious and perennial questions in the social sciences, and in politics. Yet, advocates of hate speech regulation are certain that they have revealed the only correct answer to this question. For regulation advocates, the overwhelming degree of racism and sexism in American society is an article of faith. However, mounting evidence concerning important life outcomes will not support the bleak picture suggested by some.

221. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 39 DUKE L.J. 431, 453 (1990).

222. *Id.* at 453 n.90.

223. Schauer, *supra* note 20, at 817.

224. Matsuda, *supra* note 8, at 2332.

225. Delgado, *supra* note 1, at 135.

226. Lawrence, *supra* note 221, at 468.

a. Positive Outcomes for Minorities

Expressions of overt racism in modern America have undeniably decreased following the Civil Rights era.²²⁷ The antidiscriminatory impact of free markets described by Gary Becker fifty years ago appears to have some confirmation.²²⁸ For instance, Census figures prove that blacks with doctorates have higher median incomes than whites with doctorates, and blacks with a college degree have incomes that are ninety-five percent of the incomes of whites with degrees.²²⁹

The overall attainments of black women have proven especially positive. Robert Slater uses Census figures to show that black women with four-year degrees earn more median income than white women with similar degrees.²³⁰ This refutes the notion that “black women have it worse” than any other social group, as Nash alleges.²³¹ Aggregate statistics do not square with assertions that there are “established systems of caste and subordination” present in America.²³² Stanford Law Professor Ralph Richard Banks notes that segregation, which was once a shared experience that bound blacks together, has been replaced by a new and different overarching question: “whether black women will continue to be held hostage to the failings of black men.”²³³ If there is some significant degree of discrimination remaining, it is evident that there are abundant pathways to avoid that discrimination, as well as strategies for thriving despite it—less restrictive alternatives to speech regulation, in First Amendment parlance. This positive change in American society impacts public opinion, with solid majorities believing that racial minorities are able to get

227. John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 318 (2000) (“In part because of changing norms and the Civil Rights Act and other legislative interventions that have made discrimination not simply immoral but also illegal, overt expressions of prejudice have declined significantly over the past [thirty-five] years,” but authors also warn “that the development of contemporary forms of prejudice, such as aversive racism, may account—at least in part—for the persistence of racial disparities in society despite significant decreases in expressed racial prejudice and stereotypes.”).

228. BECKER, *supra* note 216.

229. Robert B. Slater, *Holding a Four-Year College Degree Brings Blacks Close to Economic Parity With Whites*, 47 J. BLACKS HIGHER EDUC. 6 (2005), http://www.jbhe.com/news_views/47_four-year_collegedegrees.html.

230. *Id.* at 6 (blacks with doctorates have higher median incomes than whites with doctorates, and blacks overall with a college degree have incomes that are ninety-five percent of the incomes of whites with degrees).

231. Jennifer C. Nash, *Bearing Witness to Ghosts: Notes on Theorizing Pornography, Race, and Law*, 21 WISCONSIN WOMEN’S L.J. 47, 64 (2006).

232. Lawrence, *supra* note 10, at 792.

233. Lisa M. Krieger, *Stanford Law Professor Argues Black Women Should Cross Race Barrier for Marriage Partners*, SAN JOSE MERCURY (Sept. 10, 2011), http://www.mercurynews.com/bay-area-living/ci_18847167?source=most_viewed.

ahead on their own efforts. “By more than two-to-one ([sixty-three percent to twenty-seven percent]), the public says blacks who can’t get ahead are mostly responsible for their own condition,” according to the latest Pew Research polling.²³⁴ In a Pew Research/National Public Radio opinion survey, sixty-six percent of all adults, and fifty-three percent of blacks, agreed that “[b]lacks who can’t get ahead are mostly responsible for their own condition.”²³⁵ For a growing number of people, the injustices of the past are not the felt reality of today.²³⁶

b. Positive Outcomes for Women

In 2008, single women between the ages of twenty-two to thirty with no children were earning eight percent more than their male peers in most U.S. cities.²³⁷ In large American cities, young women who work full time have out-earned their male peers for several years.²³⁸ This extraordinarily important and historic breakthrough has only received scant publicity in the media, nowhere near the acclaim and emphasis given to the “gender gap.”²³⁹ Judge Easterbrook asserted that “[t]he bigotry and contempt [pornography] produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights.”²⁴⁰ Contrary to

234. *Beyond Red vs. Blue: The Political Typology*, Pew Research Center, 49, 139–40, June 2014 (the percentage of the population who agree that “Blacks who can’t get ahead in this country are mostly responsible for their own condition” has risen steadily from the mid-1990s when Pew first began recording responses to this question), <http://www.people-press.org/files/2014/06/6-26-14-Political-Typology-release1.pdf>.

235. *Optimism about Black Progress Declines*, Pew Research Center/National Public Radio 33 (survey released Nov. 13, 2007) (poll asked, “Which of these statements comes closer to your views: Racial discrimination is the main reason why many black people can’t get ahead OR Blacks who can’t get ahead are mostly responsible for their own condition.”), <http://pewsocialtrends.org/files/2010/10/Race-2007.pdf>.

236. Even decades ago, vast majorities of blacks did not claim to suffer rampant discrimination: In a 1986 poll, seventy-five percent of blacks said they have never suffered from discrimination in education; seventy-three percent said the same about discrimination in housing; and sixty percent said the same about getting a job. ABC News/*Washington Post* poll (Jan. 1986) cited in William Beer, *Whose Straw Man?*, 25 SOC’Y 70 (Jan/Feb. 1988).

237. Conor Dougherty, *Young Women’s Pay Exceeds Male Peers*, WALL ST. J., Sept. 1, 2010, at 6; see also Yuki Noguchi, *Women’s Salaries Back On Top For Younger Set*, NPR: All Things Considered (Sept. 1, 2010), <http://www.npr.org/templates/story/story.php?storyId=129584041> (“In most areas of the country now, unmarried women between the ages of twenty-two and thirty without kids are making 8 percent more than men in the same demographic.”).

238. Alex Williams, *Putting Money on the Table*, N.Y. TIMES, Sept. 23, 2007 (“For the first time, women in their [twenties] who work full time in several American cities—New York, Chicago, Boston and Minneapolis— are earning higher wages than men in the same age range.”).

239. See, e.g., Noguchi, *supra* note 237.

240. *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir 1985), *aff’d*, 475 U.S. 1001 (1986).

Easterbrook's assertion, the influence of pornography is evidently so weak that women are able to reach economic parity despite "bigotry and contempt." Or, perhaps women have generally avoided the influence of pornography and bigotry, and are free to reach economic parity. If pornography ever contributed to women's economic subordination, something has changed to mediate the impact of pornography and other hate speech. Pornography is certainly harmful to some people, at some times, under some circumstances, but it is manifestly untrue to claim that speech-based harm is preventing women from economic attainment. Again, young women without children are out-earning their male peers in most cities.²⁴¹ This profound social development calls into question the strength and even the continued existence of a causal connection between pornography (or hate speech) and gender inequality.

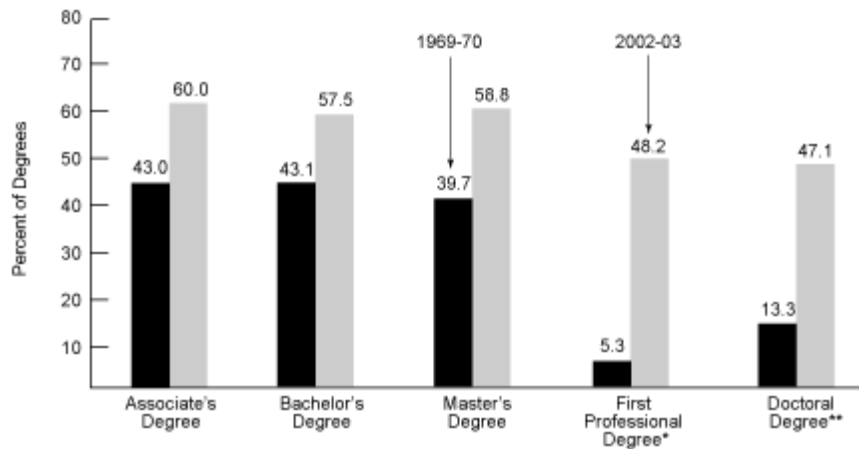
Single, childless women's median wages are at a peak of 121 percent of their male peers in Atlanta, "the jewel of the South," and 119 percent of their male peers in Memphis.²⁴² This breakthrough is unsurprising to those with the slightest awareness of educational trends. Women have been rapidly surpassing men in obtaining degrees, as Figure 1 below illustrates:

241. Dougherty, *supra* note 237; Noguchi, *supra* note 237.

242. Belinda Luscombe, *The Rise of the Sheconomy*, TIME, Nov. 22, 2010, at 61.

Figure 1.²⁴³**Degrees Awarded to Women, by Type, 1969-70 and 2002-03**

Source: U.S. Department of Education, Digest of Education Statistics



*Includes fields of dentistry (D.D.S. or D.M.D.), medicine (M.D.), optometry (O.D.), osteopathic medicine (D.O.), pharmacy (D.Pharm.), podiatry (D.P.M.), veterinary medicine (D.V.M.), chiropractic (D.C. or D.C.M.), law (LL.B. or J.D.), and theological professions (M.Div. or M.H.L.) **Includes Doctor of Philosophy degree (Ph.D.) as well as degrees awarded for fulfilling specialized requirements in professional fields such as education (Ed.D.), musical arts (D.M.A.), business administration (D.B.A.), and engineering (D.Eng. or D.E.S.) First-professional degrees, such as M.D. and D.D.S., are not included under this heading.

Recently, women made the historic leap of overtaking men in the obtainment of bachelor's *and* advanced degrees.²⁴⁴ By the 1990s, it was acknowledged that “female law students have achieved near parity with males in numerical terms.”²⁴⁵ Such advances belie the notion that discrimination is a major obstacle. In fact, when one controls for lifestyle choices, the gender gap is essentially nonexistent, and has been for decades. As long ago as 1971, women who remained unmarried into their thirties and worked continuously following high school earned higher incomes than men with identical characteristics.²⁴⁶ In 1984, Daymont and Andrisani concluded that job preferences and college major were crucial drivers of earnings differences, and that “elimination of labor market

243. Source: MATERNAL AND CHILD HEALTH BUREAU, DEP'T OF HEALTH & HUMAN SERVS., WOMEN'S HEALTH USA 2005 (2006), http://www.mchb.hrsa.gov/whusa_06/popchar/graphs/0205edisV.htm.

244. Hope Yen, *In a First, Women Surpass Men in Advanced Degrees*, Associated Press (Apr. 27, 2010), <http://apnews.myway.com/article/20110427/D9MRUQGO0.html>.

245. Valerie Fontaine, *Progress Report: Women and People of Color in Legal Education and the Legal Profession*, 6 HASTINGS WOMEN'S L.J. 27, 27 (1996).

246. *The Economic Role of Women*, in THE ECONOMIC REPORT OF THE PRESIDENT 103 (1973) (Washington, D.C.: U.S. Government Printing Office, 1973).

discrimination would not lead to equality in earnings . . . unless accompanied by greater similarities between men and women in their preferences and preparation for the labor market.”²⁴⁷ Sowell concluded in 1984 that when comparing unmarried men and women, there is “virtual parity” in income.²⁴⁸

The future promises an even greater gender gap, continuing in women’s favor. As of 2009, more women than men are earning doctorate degrees.²⁴⁹ Thirty-three percent of women between twenty-five and thirty-four have a bachelor’s degree, compared with twenty-six percent of men.²⁵⁰ In fact, the notion of female subordination increasingly resembles a fraud, when viewed against the current higher education realities as described by the *New York Times*:

What is beyond dispute is that the college landscape is changing. Women now make up [fifty-eight] percent of those enrolled in two- and four-year colleges and are, over all, the majority in graduate schools and professional schools too. Most institutions of higher learning, except engineering schools, now have a female edge, with many small liberal arts colleges and huge public universities alike hovering near the [sixty to forty] ratio.²⁵¹

Moreover, in the much-bemoaned realm of gender within science fields, Ceci and Williams concluded from a review of two decades’ worth of data that “the evidence shows women fare as well as men in hiring, funding, and publishing” in math-intensive fields.²⁵² The new gender gaps undermine broad claims, like MacKinnon’s, that women are “relegated to categories of jobs that pay nil.”²⁵³ Women have demolished the gender gap so thoroughly that their new social and economic standing introduces

247. Thomas N. Daymont & Paul J. Andrisani, *Job Preferences, College Major, and the Gender Gap in Earnings*, 19 J. HUM. RESOURCES 408, 426 (1984).

248. THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 91–108 (1984).

249. *More Women than Men Earn U.S. Doctoral Degrees*, CBS NEWS, Sept. 14, 2010, <http://www.cbsnews.com/stories/2010/09/14/national/main6864491.shtml>.

250. Dougherty, *supra* note 237, at 6.

251. Tamar Lewin, *At Colleges, Women are Leaving Men in the Dust*, N.Y. TIMES, July 9, 2006, at A1, <http://www.nytimes.com/2006/07/09/education/09college.html?pagewanted=all>.

252. Stephen J. Ceci & Wendy M. Williams, *Understanding Current Causes of Women’s Underrepresentation in Science*, 108 PROC. NAT’L ACAD. SCI. 3157, 3161 (2011), <http://www.pnas.org/content/108/8/3157.full.pdf+html?sid=8444714f-cf52-4f50-b1da-e90cc2f2e0e2>.

253. Catherine MacKinnon, *Difference and Dominance*, in FEMINISM UNMODIFIED 32–45 (1987).

unfamiliar challenges in many private lives. “Now, as more women match or overtake men in education and the labor market, they are also turning traditional gender roles on their head, with some profound consequences for relationship dynamics,” reports the *New York Times*.²⁵⁴ For instance, more and more women find it difficult to locate a male of comparable educational or income level.²⁵⁵ As women continue to outpace men in education and earnings, the notion of hierarchy will seem less and less tenable, while “countless women . . . are victims of a role reversal that is profoundly affecting the pool of potential marriage partners Women’s earnings have been increasing faster than men’s since the 1970s.”²⁵⁶

Women in large cities are surpassing their male peers in earnings, and women in the aggregate surpass their male peers in educational attainment, but what explains the simultaneous persistence of the gender gap? It has long been understood that a significant number of women will prioritize family and personal well being over occupational advancement. Felice Schwartz, in launching the “mommy track” debate, stated, “The career-and-family woman is willing to trade off the pressures and demands that go with promotion for the freedom to spend more time with her children.”²⁵⁷ Women and men often have varying career preferences and job expectations.²⁵⁸ Some women will choose to have a child, on occasion without reaching full maturity financially or personally. One British prison psychiatrist who served lower-class urban areas described in poignant terms the significance some young women place on having a child. “They want something upon which to confer their unexpressed capacity for love, and they want unconditional love in return.”²⁵⁹ This preference for

254. Katrin Bennhold, *Keeping Romance Alive in the Age of Female Empowerment*, N.Y. TIMES (Nov. 30, 2010), <http://www.nytimes.com/2010/12/01/world/europe/01iht-letter.html>.

255. It is commonplace to notice that “more women match or overtake men in education and the labor market.” Bennhold, *supra* note 254.

256. Sam Roberts, *More Men Marrying Wealthier Women*, N.Y. TIMES (Jan. 18, 2010), <http://www.nytimes.com/2010/01/19/us/19marriage.html>.

257. Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV. 65, 69 (Jan.-Feb. 1989).

258. See Lawrence H. Summers, President, Harvard Univ., Remarks at NBER Conference on Diversifying the Science and Engineering Workforce (Jan. 14, 2005), http://www.harvard.edu/principal/speeches/summers_2005/nber.php (“The most prestigious activities in our society expect of people who are going to rise to leadership positions in their forties near total commitments to their work And it is a fact about our society that that is a level of commitment that a much higher fraction of married men have been historically prepared to make than of married women.”)

259. This was the conclusion of Dr. Theodore Dalrymple, a doctor who worked for decades in low-income British hospitals as well as prisons. Theodore Dalrymple, *They Think Having a Baby will Bring Them Love*, THE TELEGRAPH (July 4, 2004), <http://www.telegraph.co.uk/news/uknews/1466125/They-think-having-a-baby-will-bring-them-love.html>.

motherhood is as deep and unfathomable as love itself, and the preference will invariably result in inequalities.

Data on educational attainment and salary demonstrate that gender discrimination does not have a significant, widespread impact. The lived experience of economic opportunity has produced changes in attitudes about the gender wage gap. In one recent survey, when asked what explains the wage gap, seventy percent of women cited factors such as: education and skills, women's priorities, and men's assertiveness in asking for raises, while only nineteen percent of women in that survey believed that discrimination explained the wage gap.²⁶⁰ Opinion surveys from the early 1980s reflect similar sentiments; the majority of women then did not feel that they had been discriminated against: Seventy-three percent said they had never suffered from discrimination in salary at any job, and eighty-three percent said they had never been turned down for a job in favor of a man.²⁶¹ In the realm of gender relations, calls for restrictions on speech to correct for past injustices will seem increasingly inapposite. As Kaiser and Miller, both psychologists, validly observe, "If society assumes that discrimination is no longer a major problem, this may justify abandoning policies to remedy discrimination."²⁶² It is possible that women are faring rather well in terms of opportunities, and may in fact benefit from a *de facto* preference. Decades ago, we learned from Corning CEO James Houghton "that no company can afford a predominantly white, male workforce."²⁶³

3. *Would Empirical Evidence Help Courts Measure Speech-based Harm?*

Racist and sexist speech undeniably causes harm to some individuals.²⁶⁴ The trouble with addressing speech-based harm through speech regulation is that it would be difficult if not impossible to trace the connection between hate speech and any given indicia of social or even individual harm. To prove that hate speech has a harmful impact,

260. Catherine Hill & Elena Silva, *Public Perceptions of the Pay Gap*, AM. ASS'N UNIV. WOMEN EDUC. FOUND., 16 (Apr. 19, 2005), <http://files.eric.ed.gov/fulltext/ED485717.pdf>.

261. *New York Times* Women's Survey (Sept. 1983), cited in William Beer, *Whose Straw Man?*, 25 SOC'Y 70 (Jan./Feb. 1988).

262. Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERS. SOC. PSYCHOL. BULL. 254, 262 (2001).

263. Stanley Fish, *Boutique Multiculturalism, or Why Liberals are Incapable of Thinking About Hate Speech*, 23 CRITICAL INQUIRY 378, 386 (1997).

264. Robert J. Boeckmann & Jeffrey Liew, *Hate Speech: Asian American Students' Justice Judgments and Psychological Responses*, 58 J. SOC. ISSUES 363, 377 (2002) (study "participants were emotionally affected by second-hand accounts of hate speech and suffered a (presumably) temporary reduction in collective self-esteem as a consequence of reading about their own group being disparaged").

regulation proponents must resolve one of two mysteries. In cases where an individual was targeted by “hateful” speech, the aggrieved party would have to show specific, individualized harm. The difficulty here would be in tracing the allegedly offending speech to whatever psychological disturbance the individual purports to suffer. In cases where “hateful” speech targeted a group, the plaintiff or state would have to show group-level harm. The difficulty here would be in pinpointing the specific social effects caused by speech. Courts would have an impossible task determining which specific social ill was caused by speech, rather than a myriad of other factors. The specific social effects caused by speech should be distinguished from the social effects caused by other factors. Furthermore, hate speech regulation relies on the existence of highly subjective and imprecise mental or emotional states. Hate crimes cause psychological harms and emotional scars.²⁶⁵ The harm caused by crime is easy to detect and define, statutorily. The harm caused by speech is not. The harm caused by words is nebulous, easily exaggerated, and readily contrived. This fact is absolutely critical to understanding just how dangerous speech regulation could be. Put simply, officials, judges, and ordinary citizens stand to gain politically by exaggerating the harm caused by speech. Hate speech laws should be expected to serve as political weapons, to be used against unpopular speech or speech that one faction disagrees with. With the disturbing history of ideologically motivated censorship in mind, we should resist that threat.

The harms of racism and sexism are somewhere between *de minimus* and overwhelmingly pervasive, depending on who you ask. From an empirical standpoint, evidence of inequalities is diminishing, and the critical mystery is to discover the causal mechanism producing remaining inequalities. Authorities who blame discrimination and racism are easily found. Social scientists predictably label cultural explanations of social disparities “racist appropriations” of legitimate scholarship.²⁶⁶ Vested financial, institutional, and ideological interests have reason to emphasize, if not exaggerate, the presence of discrimination in modern life. It could be that the current position of minority groups in America is due mainly to

265. See, e.g., Gregory M. Herek, J. Roy Gillis & Jeanine J. Cogan, *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. CONSULTING & CLINICAL PSYCHOL. 945 (1999) (questionnaire given to lesbian and gay victims of hate crimes finds that hate crime victims’ responses indicate higher levels of depression and post-traumatic stress as compared with victims of nonbias crimes).

266. Foley, *supra* note 120, at 389–90 (2004) (arguing that Ogbu saw “African-Americans through African eyes and laments and moralizes about what they have lost and have failed to achieve. This makes him sound like a conservative, assimilationist thinker. Why Ogbu never distanced himself from such racist appropriations of his work remains a mystery.”).

their own decisions, efforts, and norms. If that is the case, then the empirical premise of speech-based harm is fatally undermined. There is no reliable way to determine that hate speech gives rise directly to the harms of racism and sexism to a degree warranting abridgment of the First Amendment. Sociological research does not provide clear answers. Yet, speech regulation advocates presume that their preferred ideological interpretations are in fact the definitive answers. To adjudicate hate speech controversies, courts would be drawn into the morass of competing social explanations of perennial controversies. Because of the free speech interest at stake, courts should not apply unsound social science to speech regulation.²⁶⁷

There is massive disagreement about the severity of harm presented by racism and sexism in modern America, how speech causes that harm, and to what degree. Thus, there is a dispute over the very premises of hate speech regulation. If the academic consensus appears to support structural orthodoxy, it is because of rampant, reflexive bias. Academic bias bears directly on the hate speech debate because courts will turn to empirical research, and legislative findings about that research, in determining the constitutionality of speech regulation. Courts send mixed messages about the level of deference to be given social science research, and the level of deference to be given legislatures when policy relies on social science research.²⁶⁸ Critical treatment of structural accounts is almost non-existent in contemporary scholarship. Social scientists overwhelmingly lean towards structural accounts, and such accounts are the fixed cannon within the modern academy. The American Academy of Political and Social Science now proclaims that “[c]ulture is back on the poverty research agenda,” while “acknowledging that [culture] should never have been

267. The problem of social science being abused in courts is, in itself, a related perennial issue. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 93–162 (1993).

268. Judge Easterbrook appears to accept the premises of the anti-pornography ordinance, then goes on to question that empirical data, but ultimately avers that courts must defer to legislatures on the question of when and how speech causes harm: “The social science studies are very difficult to interpret, however, and they conflict In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences, we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions.” *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 329 n.2 (7th Cir 1985), *aff’d*, 475 U.S. 1001 (1986). Perhaps because of the courts’ mixed messages, commentators reach varying conclusions about the level of deference given to legislative consideration of empirical evidence. Dworkin, *Pornography: An Exchange*, *supra* note 71 (“When a court is asked to declare a statute unconstitutional, it defers to the findings of fact on which the legislature based the statute if the court thinks there is any evidence supporting those findings, even if in its view that evidence is inconclusive.”).

removed” from the research agenda to begin with.²⁶⁹ This appears to simply be a nod towards the inescapable reality that culture plays a role in human conduct and various life outcomes. The strong ideological commitments are very deeply imbedded, and ideology continues to influence research, as it has for decades.²⁷⁰ The public is left to choose from a narrow range of perspectives on the problems of inequality, academic disengagement, crime, and other vexing ills. Patterson, addressing the problem of young men’s alienation from the mainstream society, castigated “the failure of social scientists to adequately explain the problem, and their inability to come up with any effective strategy to deal with it.”²⁷¹ The ideological climate of modern social science must be considered when determining the credibility and weight to be given empirical findings. The field of social science research is rife with ideologically tainted research. For this reason, courts should be very leery about any claim made by social science on matters related to speech-based harm. Courts should not defer to ideologically tainted interpretations of tenuous empirical data as a justification for speech regulation.

In summary, there is no reason to believe that American minorities are facing harms of racism and discrimination *to the degree* posited by Matsuda, Delgado, and other speech regulation advocates. The core premises of hate speech regulation could be erroneous. First, we do not know, because there is no reliable metric, if or when utterances of hateful speech cause specific social harms. Second, there is no reason to believe that speech-based harm is so severe that it warrants regulation. Regulation advocates consistently draw misconceived inferences from various statistical data concerning sundry social problems. Yet, it is hard to see how vulnerable people are to be uplifted by curbing speech rights. Rather than advancing social justice, calls for regulation may actually entrench the status quo, which uplifts no one and is actually debilitating.²⁷² Any attempt to use structural notions of harm as a justification for speech regulation would conflict with the four First Amendment barriers described in Part I.

269. Cohen, *supra* note 19, at A1.

270. Walter B. Miller, *Subculture, Social Reform and the ‘Culture of Poverty’*, 30 HUM. ORG. 111, 120 (1971) (noting that left-leaning ideological “shifts in the climate of permissible intellectual choice have affected every serious student of human behavior”).

271. Patterson, *supra* note 144.

272. See GLAZER, LIMITS OF SOCIAL POLICY, *supra* note 139, at 15 (young delinquents use the explanations and excuses propounded by sociologists to rationalize their harmful behavior), and SHELBY STEELE, WHITE GUILT (2006) (arguing that liberal whites claim false moral authority for “helping” blacks while actually enabling self-destructive behavior). See also THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY (1996).

Next, Part III will consider the implications of the debate between structural and cultural perspectives, particularly the implications of that debate for hate speech regulation when confronted by the four First Amendment barriers.

III. The Law Should Prohibit Speech Regulation Premised on Speech-Based Social Harm

Part I described how four pillars of free speech doctrine treat speech-based social harm, and Part II explored the empirical weakness of the structural perspective underlying proposals for speech regulation. Building on Parts I and II, what follows is a framework for assessing hate speech regulation proposals, from both a constitutional and empirical standpoint.

A. *Snyder* Foreclosed the Use of Emotional Harm as a Basis for Hate Speech Regulation

The term “hate,” like “outrageousness,” is “highly malleable”²⁷³ and therefore inherently subjective, a troubling characteristic that usually proves fatal to speech regulation and also fatal to tort damages arising from protected speech.²⁷⁴ In *Snyder*, the Court did not question expert testimony that the plaintiff’s “emotional anguish had resulted in severe depression,” thereby worsening “preexisting health conditions.”²⁷⁵ The Court found that “Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible.”²⁷⁶ The Court specifically stated that the protestors’ speech was “particularly hurtful,” and had an impact that went far beyond “emotional distress.”²⁷⁷ Nonetheless, the Court ruled that such speech “cannot be restricted simply because it is upsetting or arouses contempt.”²⁷⁸ If the First Amendment serves as a barrier to liability for

273. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“‘Outrageousness,’ . . . is a highly malleable standard with ‘an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression,’” a risk the Court finds “unacceptable.”) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

274. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864, 859 (E.D. Mich. 1989) (“[T]he terms ‘stigmatize’ and ‘victimize’ are not self defining. These words can only be understood with reference to some exogenous value system. What one individual might find victimizing or stigmatizing, another individual might not.”). See also Anthony D’Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329 (1991) (discussing the extraordinarily wide-ranging room for error judges would have if given greater authority to decide speech-related cases).

275. *Snyder*, 562 U.S. at 450.

276. *Id.* at 460.

277. *Id.* at 456.

278. *Id.* at 458.

intentional infliction of emotional distress, even when there is a direct link between genuinely hateful speech and the victim's emotional state, then hate speech regulation would necessitate a significant reduction in speech protections, or a redefinition of which speech-related harms may be addressed.

The facts in *Snyder* presented a direct link between "hateful" speech and an individual's emotional state. By comparison, it would be nearly impossible to show a direct link between "hateful" speech and an entire ethnic group's aggregate emotional state. Individuals vary widely in their susceptibility to stressful events. It is true that a number of minority group members, as well as nonminorities, could prove that a "hateful" statement emotionally harmed them. Even so, a showing of emotional harm would not warrant speech regulation. So long as *Snyder* remains good law, emotional injury will not justify restriction on speech involving matters of public concern. Individuals vary in their susceptibility to hurtful comments, as well as their willingness to exaggerate personal feelings or even fabricate events. As our political discourse becomes increasingly shrill, identity-group centered, egocentric, and emotive, the censorious instinct will probably grow. The First Amendment must not bend to identity group pressures, sociological fads, or ideological dogma. Unfortunately, those very ills are reflected in the seminal speech regulation proposals.

For her part, Matsuda does not want to stretch existing doctrine, she instead wants "[r]acist speech" to be "treated as a *sui generis* category" to be placed "outside the realm of protected discourse."²⁷⁹ Matsuda explains that she does not aim "to stretch existing first amendment exceptions, such as the 'fighting words' doctrine and the 'content/conduct' distinction."²⁸⁰ She explains, "This stretching ultimately weakens the first amendment fabric, creating neutral holes that remove protection for many forms of speech."²⁸¹ Matsuda actually illustrates the danger that would arise if ideological notions of "[r]acist speech" were codified. For instance, consider how Matsuda operationalizes the term "racism." In Matsuda's worldview, "righteous indignation against diversity and reverse discrimination" is one of the "implements of racism" for upper-class whites.²⁸² However, *Snyder* demands that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and

279. Matsuda, *supra* note 8, at 2357.

280. *Id.*

281. *Id.*

282. *Id.* at 2334.

is entitled to special protection.”²⁸³ “Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community.’”²⁸⁴ Thus, “righteous indignation against diversity and reverse discrimination,” which Matsuda believes is an “implement of racism,” is actually at the “highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”²⁸⁵ Matsuda wants to create a whole new category of unprotected speech, rather than rely on existing First Amendment exceptions. This is easier said than done, because *Snyder* would protect the types of expressions that many find “racist” or “hateful.”

Long before the *Snyder* decision, Delgado argued that the tort of intentional infliction of emotional distress is inadequate to redress the harm of racist speech.²⁸⁶ He called for an “independent tort for racial insults” to match the “unique, powerfully evocative nature of racial insults.”²⁸⁷ Delgado presents three objections to a tort for racial insult, and addresses each. First is the difficulty of determining damages such as “emotional well-being” and “affront to dignity,” a difficulty that Delgado writes off by noting that “[j]uries always can assign a value to such interests and their infringement.”²⁸⁸ To the contrary, after the Supreme Court’s ruling in *Snyder*, it can not be taken for granted that the “psychological or emotional harm alleged in such [hate speech] cases can be proved in the same manner as in other torts that protect psychological well-being,” as Delgado avers.²⁸⁹ A pillar of First Amendment protections is that the government will refuse to involve itself in redressing hurt feelings because “outrage” is too subjective and malleable.²⁹⁰

The second objection Delgado mentions is the difficulty of monetarily apportioning damages. Delgado blithely notes that “juries should be free to set damages.”²⁹¹ Delgado’s normative statement runs contrary to established free speech doctrine. In cases involving hurtful, controversial

283. *Snyder*, 562 U.S. at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted)).

284. *Id.* at 452 (quoting *Connick*, 461 U.S. at 146).

285. *Id.* at 452.

286. Delgado, *supra* note 1, at 151–57.

287. *Id.* at 157.

288. *Id.* at 166.

289. *Id.* at 167.

290. *Snyder*, 562 U.S. at 458 (“‘Outrageousness,’ however, is a highly malleable standard with ‘an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’”) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

291. Delgado, *supra* note 1, at 168.

speech, “a jury is ‘unlikely to be neutral with respect to the content of [the] speech,’ posing ‘a real danger of becoming an instrument for the suppression of . . . vehement, caustic, and sometimes unpleasan[t]’ expression.”²⁹² By an eight to one margin, the Court in *Snyder* found this risk flatly “unacceptable.”²⁹³ As the Court held in *Snyder*, “[o]utrageousness,’ . . . is a highly malleable standard with ‘an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’”²⁹⁴ *Snyder* made abundantly clear that such a risk is “unacceptable.”²⁹⁵ Current free speech doctrine wisely does not often provide juries the chance to suppress unpopular speech.

Delgado’s third objection regards the fraudulent claims and flood of litigation that would immediately ensue if speech regulation were enacted. Delgado inadvertently sums up the potential chilling effect of hate speech laws with this alarming evasion: “[E]ven if occasional plaintiffs win recoveries based on nonexistent damages, there is no reason to assume that these results would be erroneous more often than is the case in other types of civil litigation.”²⁹⁶ In other words, hate speech lawsuits would be fraudulent or meritless as often as any other type of civil suit, so there is nothing to worry about. “At any rate,” Delgado continues, “both correct and erroneous results would deter future offenses.”²⁹⁷ Even a meritless suit could result in a victory for a plaintiff, and that would serve to “deter future offenses.” One only has to search briefly through the abysmal history of modern dictatorships to find similar, cynical ploys. Arbitrary punishment serves a powerful function within dictatorial regimes because arbitrary punishment frightens rational people.²⁹⁸ While critical race theorists may be perfectly glad to see “erroneous results” in a lawsuit against free expression, others may be troubled by such a cavalier approach to free expression.

Delgado’s speech regulation proposal faces other challenges after *Snyder*. Delgado insists that racial insult is intended to injure, “not to discover truth or advocate social action.”²⁹⁹ In some cases, Delgado is

292. *Snyder*, 562 U.S. at 458 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510) (1984).

293. *Id.* at 458.

294. *Id.* at 458 (citing *Hustler*, 485 U.S. at 55) (internal quotation marks omitted).

295. *Id.*

296. Delgado, *supra* note 1, at 171

297. *Id.*

298. *See, e.g.,* ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (abridged) (Harper 2007) (1973).

299. Delgado, *supra* note 1, at 175.

surely correct; as a general matter, blind hatred is not always meant to contribute to the marketplace of ideas. For example, recent cyber-bullying incidents show the deadly harm of some speech.³⁰⁰ However, *Snyder* asserts that the ostensibly “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”³⁰¹ There will continue to be an association between “racist” remarks and issues of public concern, if for no other reason than that liberals have a penchant for labeling those they disagree with “racist.” For now, “[t]he First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”³⁰² Above all, “speech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’”³⁰³

B. Strict Scrutiny Demands that Speech Regulation Be Narrowly Tailored to Serve a Compelling State Interest

Content-based speech restrictions will be subjected to strict scrutiny, meaning the restrictions must be “narrowly tailored to serve a compelling state interest.”³⁰⁴ How would hate speech regulations fare under narrow tailoring? The Supreme Court has unequivocally held that government speech regulation must come with the guarantee that “proposed less restrictive alternatives are less effective than” the government’s speech regulation.³⁰⁵ Similarly, in *Video Software Dealers Ass’n v. Schwarzenegger*, speech restriction was held invalid where there was a “possibility that an enhanced education campaign about the ESRB rating system directed at retailers and parents would help achieve government interests” as a less restrictive means to achieve the government’s interests.³⁰⁶ In scrutinizing any hate speech regulation, courts would

300. Thomas Wheeler, *Facebook Fatalities: Students, Social Networking, and the First Amendment*, 31 PACE L. REV. 182 (2011).

301. *Snyder*, 562 U.S. at 453 (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

302. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

303. *Id.* at 451 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (opinion of Powell, J.)).

304. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990) (“[W]e hold that application of [the statute at issue] is constitutional because the provision is narrowly tailored to serve a compelling state interest.”).

305. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004). *See also Reno v. American Civil Liberties Union*, 521 U.S. 844, 876–77 (1997) (pointing to the availability of technology that parents could use to prevent their children from viewing indecent material).

306. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009) (“Under strict scrutiny, the State has not produced substantial evidence that supports the Legislature’s conclusion that violent video games cause psychological or neurological harm to

thoroughly survey the existing or potential policies that could be used to address the issues of discrimination, inequality, and even “hate.” The available less restrictive alternatives to achieving the government’s interest are already numerous. Each day represents an opportunity for education and increased awareness regarding the need for mutual respect. Existing programs of every kind have been tried and continue to be utilized to address the larger social problems of discrimination, inequality, and racism.³⁰⁷ America has a well-developed, modern welfare state. Critical race theorists acknowledge that the welfare state does “mitigate the harms of hate speech” as part of an overarching antidiscrimination agenda.³⁰⁸ Welfare state and educational policies all represent less restrictive means of achieving speech regulators’ goals. There is no conceivable way the government could establish that this plethora of less restrictive alternatives would be less effective than speech regulation.³⁰⁹ In fact, one commentator sympathetic to speech regulation inadvertently pointed out how universities actually adopt effective means of addressing discrimination after courts *strike down* hate speech codes: “Stripped of the power to regulate hate-speech in any meaningful way, universities must focus on eliminating the root causes of discrimination.”³¹⁰ Speech regulation is certainly not the

minors. Even if it did, the Act is not narrowly tailored to prevent that harm and there remain less-restrictive means of forwarding the State’s purported interests, such as the improved ESRB rating system, enhanced educational campaigns, and parental controls.” *aff’d*, 131 S. Ct. 2729 (2011). *See also* United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 816 (“When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”).

307. In no particular order: Head Start, Section 8 housing, Pell grants, Medicaid, Medicare, Earned Income Tax Credits, affirmative action, food stamps, rent supplements, student loans, legal services, and various welfare and other antipoverty programs. *See, e.g.*, Paul C. Light, Government’s Greatest Achievements of the Past Half Century, Reform Watch, No. 2, Brookings Institution, Washington, D.C. (Nov. 2000).

308. Charles J. Ogletree, Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 502, 509 (1996) (“The state thus has an affirmative moral duty to mitigate the harms of hate speech, by enforcing affirmative action policies, providing affordable housing for minorities, or engaging in programs of education.”)

309. *See, e.g.*, *Playboy Entm’t Group*, 529 U.S. at 816 (“When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996) (plurality op.) (striking down ban on alcohol price ads because less restrictive alternatives were available, including publicized educational campaigns and speech opposing the ads). *See also Video Software Dealers Ass’n.*, 556 F.3d at 965 (“Instead of focusing its argument on the possibility of less restrictive means, the State obscures the analysis by focusing on the ‘most effective’ means [T]he State does not acknowledge the possibility that an enhanced education campaign about the ESRB rating system directed at retailers and parents would help achieve government interests.”).

310. Carol W. Napier, *Can Universities Regulate Hate-Speech After Doe v. University of Michigan?*, 69 WASH. U. L.Q. 991, 998 (1991).

“least restrictive means among available, effective alternatives” for addressing the government’s interests.³¹¹ No advocate of speech regulation can seriously claim otherwise.

As Volokh summarizes the narrow tailoring rule, “the court makes a primarily empirical judgment about the means: If the means do not actually further the interest, are too broad, are too narrow, or are unnecessarily burdensome, then the government can and should serve the end through a better-drafted law.”³¹² Hate speech regulation by its very nature is not narrowly tailored to fit the governmental objective. Matsuda claims “law is the means by which the state typically provides incentives for changes in behavior.”³¹³ If it is behavior—or even attitudes—that we want to change, there are ample less restrictive alternatives. The discrete problem of hate speech is partially dealt with through existing antiharassment and antidiscrimination laws, which have been broadly upheld as consistent with First Amendment doctrine. In order to regulate speech, the government would have to show that social stigma, education, ameliorative policies, or existing laws would not be effective alternatives to speech regulation. The fact is that education, cultural awareness, and sensitivity training could always be enhanced, if need be. Existing laws already deal with some of the most prominent and severe forms of harmful speech. For instance, as Delgado notes, public officials are punished for the use of racial slurs.³¹⁴ Less restrictive means than speech regulation have already led to demonstrably improved race relations, unless one presumes that there has been no progress in race relations during the nearly 100 years following the incorporation of the First Amendment.³¹⁵

American society has evolved over the years, moving from ubiquitous racist violence against minorities, to widespread discrimination against minorities, to subtle prejudice against minorities, to affirmative action on behalf of minorities, to the point where now death threats are issued against a hapless white student who made off-color generalizations about Asians using cell phones at the university library.³¹⁶ In 2010, Pew Research

311. *Ashcroft v. ACLU*, 542 U.S. at 666.

312. Volokh, *supra* note 62, at 2418–19.

313. Matsuda, *supra* note 8, at 2361.

314. Delgado, *supra* note 1, at 159–62.

315. *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that the Fourteenth Amendment incorporated the First Amendment).

316. Larry Gordon & Rick Rojas, *UCLA Won't Discipline Creator of Controversial Video, Who Later Withdraws from University*, L.A. TIMES (Mar. 19, 2011), <http://articles.latimes.com/2011/mar/19/local/la-me-ucla-speech-20110319> (student posted video online in which she imitated an Asian accent, then later withdrew from university citing death threats towards her in response to video, and claiming she had been “ostracized from an entire community.”).

Center data showed an “upbeat” picture of race relations between blacks and whites.³¹⁷ However, one recent poll claimed to show that race relations are the worst they’ve been in twenty years,³¹⁸ and when asked specifically about the Obama presidency, respondents in several polls now indicate that race relations have gotten worse under Obama.³¹⁹ Nonetheless, the recent trends in race relations have been positive; our collective national experience has been that education, fair-minded socialization, antidiscrimination laws, and moral suasion are effective. Even courts sympathetic to speech regulation will at least have to ask whether the government considered less restrictive means. When less restrictive policies are available, more restrictive means will fail strict scrutiny. If the less restrictive means consideration plays any role in a future court’s review of speech regulation, it will be difficult to prove how speech regulation is the least restrictive of all alternatives.

Narrow tailoring works together with the kindred doctrines of overbreadth and vagueness.³²⁰ Given that speech regulators aim at such

317. *Blacks Upbeat About Black Progress, Prospects*, Pew Research Center 1 (Jan. 12, 2010), <http://www.pewsocialtrends.org/files/2010/10/blacks-upbeat-about-black-progress-prospects.pdf> (“blacks’ assessments about the state of black progress in America have improved more dramatically during the past two years than at any time in the past quarter century, according to a comprehensive new nationwide Pew Research Center survey on race.”).

318. Sarah Dutton, Jennifer De Pinto, Anthony Salvanto & Fred Backus, *Views on Race Relations Hit Two-Decade Low, Poll Shows*, CBS NEWS (May 4, 2015, 6:30 PM), <http://www.cbsnews.com/news/cbs-news-new-york-times-poll-views-on-race-relations-hit-two-decade-low/>.

319. Economist/YouGov Poll, 4, Conducted May 2-4, 2015 (“Since Barack Obama has been President, do you think race relations in the United States have gotten better, gotten worse, or stayed about the same?” Eight percent of Americans answered “gotten better” while fifty-five percent answered “gotten worse”), http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/bjly8n5o7b/econToplines.pdf; CNN/ORC International Poll, 11, Conducted June 26–28, 2015 (“Do you think relations between blacks and whites in the U.S. have gotten better, gotten worse, or stayed the same since Barack Obama became president?” Twenty percent of Americans answered “gotten better” while forty-three percent answered “gotten worse”), <http://i2.cdn.turner.com/cnn/2015/images/06/29/obama.approval.pdf>.

320. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864, 867 (E.D. Mich. 1989) (overbreadth doctrine requires “that statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand.” University hate speech enactment was impermissibly vague where “it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct.”); Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 (2003) (overbreadth doctrine “can serve as a useful tool to test the legitimacy of lawmakers’ motives; the closer fit between the government’s chosen means and its valid objectives, the more likely it is that lawmakers truly sought to fulfill those objectives”). See also John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M.L. REV. 53, 61 (2004) (“[V]agueness pertains to a lack of clarity in the actual content of a statute. In contrast, overbreadth is present when a statute’s language is so far reaching that it applies to conduct the state is not entitled to regulate.”).

nebulous targets as “racial insult,”³²¹ the overbreadth problems with hate speech regulation would be significant. For instance, Delgado’s proposal contains broad language that potentially captures any speech that could be said to “demean” and constitute a “racial insult.”³²² Given his proposed statutory language, nearly any racially tinged expression could be actionable, depending on the sensitivity and litigiousness of the listener. Delgado more sensibly suggests that low-value words that are “highly insulting” and have a “racial component” in certain contexts, like “boy,” could be actionable under his proposed statute.³²³ Yet, the concept “insult” suffers from the same glaring defect as the term “pornography,” in that it “has no legal definition or significance.”³²⁴ The term “insult,” like “pornography,” can be employed “loosely and pejoratively, to tar *any* disfavored idea or expression.”³²⁵ The same Orwellian contortions occur with the word “hate.” “Hate” is as malleable, subjective, and nebulous a notion as the human imagination can conceive. “Hate” is a common pejorative in partisan bickering. The label “hate group” has been criticized as “character assassination” by the Republican Speaker of the U.S. House of Representatives.³²⁶ Courts are properly reluctant to wade into the ideological mire of “hate,” “insult,” or “outrageousness.” Each of these words has an “inherent subjectiveness”³²⁷ that could easily lead to suppression of unpopular speech.

Other prominent speech restriction proposals include excessively broad language. Matsuda posits “three identifying characteristics” of hate speech which she proposes to regulate: the “message is of racial inferiority,” it is “directed against a historically oppressed group,” and “is persecutorial, hateful, and degrading.”³²⁸ There is no realistic prospect of that type of language being applied with any sort of intelligible limit. The experience of university speech codes and political correctness is illustrative. It is now de rigueur for school administrators, academics and

321. Delgado, *supra* note 1, at 171.

322. *Id.* at 179 (Delgado’s proposed cause of action reads: “Language 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.”).

323. *Id.* at 180.

324. NADINE STROSSEN, *DEFENDING PORNOGRAPHY* 18 (1995).

325. *Id.* at 18.

326. Patrik Jonsson, *Annual Report Cites Rise in Hate Groups, but Some Ask: What is Hate?*, CHRISTIAN SCI. MONITOR (Feb. 23, 2011), <http://www.csmonitor.com/USA/Society/2011/0223/Annual-report-cites-rise-in-hate-groups-but-some-ask-What-is-hate/%28page%29/2>.

327. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

328. Matsuda, *supra* note 8, at 2357.

students to uncover examples of perceived “racism.” Some of their evidence: “[T]he former Chief Illiniwek mascot and recent racially themed parties on campus.”³²⁹ The fact that such circumstances are described as “racism” just goes to show that speech regulation could cover nearly any expression that offends a “historically oppressed group.”

Underinclusiveness is another target of narrow tailoring that deserves very careful attention in the hate speech debate. Underinclusiveness, as Eugene Volokh describes it, signifies that “a law is not narrowly tailored if it fails to restrict a significant amount of speech that harms the government interest to about the same degree as does the restricted speech.”³³⁰ In order to understand why underinclusiveness deserves careful attention, recall why strict scrutiny applies to race-based policy. Strict scrutiny is applied to root out “simple racial politics.”³³¹ There is more than a tinge of “simple racial politics” woven into hate speech restriction. Delgado frankly declares that his proposed speech restriction “is intended primarily to protect members of racial minority groups traditionally victimized.”³³² Matsuda’s proposed regulation aims at speech “directed against a historically oppressed group,” dramatically demonstrating that racial categorizations are an integral part of her plan.³³³ Similarly, Kagan recommends that various methods of speech restriction be “tested in a continuing and multi-faceted effort to enhance the rights of *minorities and women*, while also respecting core principles of the First Amendment.”³³⁴ MacKinnon, author of the anti-pornography civil rights ordinance at issue in *Hudnut*, wrote that her “feminist critique of pornography is a politics, specifically politics from women’s point of view, meaning the standpoint of the subordination of women to men.”³³⁵ Romero asserts that whites “deserve less protection than [nonwhites], who are less able to effective

329. See Edelmira P. Garcia and Tarnjeet Kang, *Perpetuating Racism Through the Freedom of Speech*, in IMPLEMENTING DIVERSITY: CONTEMPORARY CHALLENGES AND BEST PRACTICES AT PREDOMINANTLY WHITE UNIVERSITIES 79 (Helen Neville et al. eds., 2010) (adding that “an atmosphere infinitely open to freedom of speech, regardless of its content, cultivates racism on college campuses”).

330. Volokh, *supra* note 62, at 2423.

331. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting) (defining “simple racial politics” as a political setting where “ethnic, religious, or racial group[s] with political strength [are able to] negotiate ‘a piece of the action’ for its members”).

332. Delgado, *supra* note 1, at 180 n.275.

333. Matsuda, *supra* note 8, at 2357.

334. Kagan, *supra* note 3, at 902 (emphasis added).

335. Catherine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL. REV. 321, 322–23 (1984).

combat hurtful speech.”³³⁶ Romero openly promotes a speech regime that explicitly favors “nonwhite groups whose speech, even if equally offensive [as whites’], deserves to be heard because of the lesser power they have in society.”³³⁷ These and similar hate speech regulation proposals have an underinclusive character. Speech regulation enacted “to enhance the rights of minorities and women” presupposes government favoritism towards particular groups. This is a fatal defect of race and gender conscious speech regulation proposals. Volokh warns, “Underinclusiveness might suggest . . . that the government’s real interest wasn’t the stated one but was rather just a desire to favor one form of speech over another, or to suppress offensive or otherwise disfavored speech.”³³⁸ Hate speech proposals that leave nonminorities without protection from hate speech would, by definition, necessarily fail to regulate speech that harms the very government interest supposedly served by speech regulation. It should be alarming that so many proposals for hate speech regulation explicitly identify the racial groups intended to benefit from speech regulation. Unless one presumes that hate speech only affects minorities or women, one would have to concede that a government interest in protecting minorities from hate speech should also extend to protecting nonminorities from hate speech.

Additionally, the narrow tailoring requirement holds tremendous importance for one specific argument put forward by speech regulators: “Hate speech frequently silences its victims, who, more often than not, are those who are already heard from least,” Lawrence argues.³³⁹ Carter paraphrases this argument: “[I]f members of historically disadvantaged groups are subjected to namecalling and harassment, their own ability to speak—to participate in public debate within the community—will be compromised and perhaps destroyed.”³⁴⁰ This argument may, for ideological reasons, appear persuasive to some. However, under narrow tailoring, we must inquire whether other means are available to meet the government objective. Is regulating speech the least restrictive means of ensuring that minorities can participate in public debate? When was the

336. Romero, *supra* note 4, at 11. Romero believes that there is “a strong case for censoring anti-minority web speech by white supremacists but not anti-white web speech by black separatists [B]lack separatist websites that injure the white majority through equally harmful speech should be allowed to exist.” *Id.* at 23 (internal quotation marks omitted).

337. *Id.* at 11.

338. Volokh, *supra* note 62, at 2423.

339. Lawrence, *supra* note 10, at 792.

340. Carter, *supra* note 21, at 888. See also Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL’Y 273, 275 (2004) (arguing that hate speech regulation promotes equality by empowering subordinated groups to express their views).

last time hate speech actually interfered with public debate? When was the last time “namecalling and harassment” actually “compromised and perhaps destroyed” the ability of minorities “to speak” or “to participate in public debate”? These are empirical questions that must be posed. To answer these questions is to expose the perplexing factual basis of regulation proposals. Public debate in America in the last several decades is characterized by a dramatic restriction of the parameters of acceptable opinion, in favor of a rigid, politically correct status quo.³⁴¹ For expressing what are believed to be insensitive ideas, commentators and researchers are banished from the public sphere.³⁴² Some on the left acknowledge this basic reality of life in 21st century America:

For a politician or a journalist in a democratic country to be labeled racist is usually equivalent to the end of their public career. It is therefore of paramount importance for anyone working in the public sector to pay close attention to the language they use in order to make sure that it does not contain any potentially inflammatory or even slightly offensive elements.³⁴³

Today’s politically correct zeitgeist is so strict and predatory that “slightly offensive” language will “usually” end a “public career.” In the era of social media, what is true of public figures is true of most citizens, and “to be labeled racist is usually equivalent to the end of” private careers as well.

341. BILL MOYERS JOURNAL, PBS, Feb. 27, 2009, <http://www.pbs.org/moyers/journal/02272009/transcript5.html> (linguist John McWhorter critiques the phrase “conversation on race” and concludes that “conversation about race . . . means that black people have something to teach white people if white people would just sit and listen. And it is not a conversation in the strict sense. It’s not just an exchange.”).

342. Helen Nugent, *Black People ‘Less Intelligent’ Scientist Claims*, THE TIMES OF LONDON (Oct. 17, 2007, 12:26 PM), <http://www.thetimes.co.uk/tto/news/uk/article1916263.ece> (James Watson, the Nobel Prize-winning scientist who discovered DNA, was engulfed in controversy for stating that there are racial differences in intelligence and subsequently lost his job); Ana Marie Cox, *Jason Richwine is a Bigot who Shows the Pitfalls of Partisan ‘Analysis’*, THE GUARDIAN (May 14, 2013, 1:15 PM), <http://www.theguardian.com/commentisfree/2013/may/14/jason-richwine-heritage-foundation-racism> (think tank analyst resigned from Heritage Foundation after controversy erupted over his Harvard dissertation, which advocated the selection of high-IQ immigrants); David Folkenflik, *NPR Ends Williams’ Contract After Muslim Remarks*, NPR (Oct. 21, 2010, 12:43 AM), <http://www.npr.org/templates/story/story.php?storyId=130712737> (Juan Williams was fired for the following remarks: “Look, Bill, I’m not a bigot. You know the kind of books I’ve written about the civil rights movement in this country. But when I get on the plane, I got to tell you, if I see people who are in Muslim garb and I think, you know, they are identifying themselves first and foremost as Muslims, I get worried. I get nervous.”).

343. Magda Stroińska, *Discourse on Social Exclusion in the Era of Multiculturalism and Political Correctness*, 3 TEKST I DYSKURS/TEXT UND DISKURS 63, 64 (2010).

In fact, there is a website devoted to getting private citizens fired from their jobs for expressing unorthodox or dissenting views on racial matters.³⁴⁴ The speech rights of “favored groups” are very much protected by a reactionary intolerance for unorthodox or dissenting speech on matters of race. Given this status quo, it is dubious to claim that hate speech is causing minorities to withdraw from public debate. It would be difficult if not impossible to provide a single example where the state needs to restrict the range of expression in order to protect the speech rights of favored groups. Take the extreme case of a prohibition on cross burning, found in *R.A.V. v. City of St. Paul*. Fiss claims that, under a set of facts such as those found in *R.A.V.*, “the state is protecting the speech rights of the blacks, and it can do so only by restricting the range of speech acts in which racists are allowed to engage.”³⁴⁵ “The state is acting as a parliamentarian trying to end a pattern of behavior that silences one group and thus distorts or skews public debate,” Fiss claims.³⁴⁶ This portrayal does not hold up to scrutiny. In what exact sense are “the speech rights of the blacks” only secured by restricting hateful speech? The expression of cross burning is surely intimidating and discouraging to the targeted black family, and to the black community. Cross burning is wrong for many reasons, but that does not mean that speech restrictions are a required method of protecting the speech rights of blacks in that community. With cross burning, we have a group of bigots making a spectacle of themselves and their racist views. There is no reason to presume that this spectacle “distorts or skews public debate” in a manner warranting speech restriction. In fact, the spectacle of cross burning invariably turns public opinion *against* the bigots.

Moreover, at least one important space for “public debate” is largely devoted to promoting the overtly politicized, strictly left wing perspectives of minorities and other “marginalized” groups (but only when those groups are left wing). University life is undoubtedly a major component of public debate. In university settings, left wing and minority perspectives are featured prominently and with abject fealty, while conservatives are almost entirely excluded from faculty positions or fair representation in curricular

344. Soraya Nadia McDonald, ‘*Racists Getting Fired*’ Exposes Weaknesses of Internet Vigilantism, no Matter how Well-Intentioned, WASH. POST (Dec. 2, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/12/02/racists-getting-fired-exposes-weaknesses-of-internet-vigilantism-no-matter-how-well-intentioned/> (reporting on “a hitch that revealed a problem with Internet blood-lust: Sometimes the torch-wielding throngs get it wrong”).

345. Fiss, *supra* note 117, at 288.

346. *Id.* at 289.

offerings.³⁴⁷ The idea that speech or participation in “public debate” is hampered by hate speech is problematic because this scenario almost never transpires as described. In fact, the only recent examples of “public debate” being “compromised and perhaps destroyed” are cases where leftist student groups have literally shut down public debate about important social issues.³⁴⁸

In addition to narrow tailoring, preventing speech-based harm must constitute a compelling government interest. Content-based speech restrictions are only constitutional where those restrictions are “narrowly tailored to serve a compelling state interest.”³⁴⁹ Some speech regulation advocates argue that criminalization of “hate propaganda” constitutes a compelling government interest.³⁵⁰ In determining whether a compelling government interest exists, courts will consider underinclusiveness as a factor in that determination. Underinclusiveness, according to Volokh,

347. See *supra* notes 130–45 and accompanying text. A report by the National Association of Scholars (“NAS”) quantified the overrepresentation of left-liberal course offerings within the history department of Texas’s two premier universities. The NSA report examined the research subject interests of each of the forty-six history faculty at the University of Texas (“UT”) and Texas A&M University at College Station (“A&M”), together with the assigned readings for each of 85 history courses taught in the Fall 2010 semester. The report found that seventy-eight percent of UT faculty and sixty-four percent of A&M faculty had “special research interests in race, class, and gender” topics. History faculty members who received their Ph.Ds in the 1990s or later displayed even greater uniformity: Of UT history faculty who received their Ph.Ds in the 1990s or later, eighty-three percent had race, class or gender research interests. Of A&M history faculty who received their Ph.Ds in the 1990s or later, ninety percent had race, class or gender research interests. National Association of Scholars, *RECASTING HISTORY: ARE RACE, CLASS, AND GENDER DOMINATING AMERICAN HISTORY*, Jan. 2013, at 6–10, https://www.nas.org/images/documents/Recasting_History.pdf.

348. Jillian Lanney &Carolynn Cong, *Ray Kelly Lecture Canceled Amidst Student, Community Protest*, BROWN DAILY HERALD (Oct. 30, 2013), <http://www.browndailyherald.com/2013/10/30/ray-kelly-lecture-canceled-amidst-student-community-protest/> (Prior to a speech at Brown University by New York City Police Department Commissioner Ray Kelly, the director of the university venue stated that “protest is a necessary and acceptable means of demonstration at Brown University,” but asked protesters not to interrupt the lecture because interruptions would prevent the public from listening to and communicating with Kelly. “As soon as [Kelly] began to speak, many protesters stood with their fists in the air and began shouting in unison, after which neither Kelly nor Vice President for Campus Life and Student Services Margaret Klawunn and Vice President for Public Affairs and University Relations Marisa Quinn—two administrators present—could regain control of the auditorium.”).

349. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990) (“We hold that application of [the statute at issue] is constitutional because the provision is narrowly tailored to serve a compelling state interest.”). See also *NAACP v. Button*, 371 U.S. 415, 439 (1963) (“Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.”) (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

350. Eric Wolfman, *The Criminalization of Hate Propaganda: A Clash of Ideals Between Canada and the United States*, 2 ILSA J. INT’L & COMP. L. 543, 575 (1996).

“may be evidence that that an interest is not compelling, because it suggests that the government itself doesn’t see the interest as compelling enough to justify a broader statute.”³⁵¹ Race-conscious proposals for hate speech regulation are vulnerable to attack for their underinclusiveness. The underinclusiveness of race-conscious hate speech regulation strongly suggests “that the government’s real interest wasn’t the stated one,”³⁵² but was instead a ruse to advance racial favoritism or other partisan agendas. The Supreme Court has found a compelling government interest in restricting speech in only a few instances.³⁵³ The compelling government interest in hate speech regulation is an ill-defined amalgam of ideological goals and empty slogans backed by unreliable social science. Hate speech regulation can not meet strict scrutiny, as that standard currently exists.

C. No Deference to Legislatures is Warranted by Law, Logic, or Experience

Justice Douglas provided a morally urgent statement of the proper role of government in matters of free speech. “The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people.”³⁵⁴ Speech regulation advocate Mari Matsuda concedes that “a formal, legal-structural response to racist speech goes against the long-standing and healthy American distrust of government power.”³⁵⁵ Indeed, courts quite rightly refuse to accept official assurances about speech restrictions. “We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly,” the Court wryly noted in *Stevens*.³⁵⁶ Nonetheless, supporters of speech regulation express great faith in the state to serve the people by responsibly controlling speech. For example, Smolla maintains that an “Aristotelian impulse” should guide speech regulation. This “Aristotelian impulse” means “[o]nly through communal living and through the state may men achieve virtue; only through the state may they

351. Volokh, *supra* note 62, at 2420. An interest asserted by the government might itself be underinclusive, as Volokh notes. There is even support for the principle that the state “may not assert a compelling interest in fighting one particular ill, and then refuse to deal with other ills that seem almost indistinguishable.” *Id.*

352. *Id.* at 2423.

353. *Id.* at 2420–21 (providing examples where the Court has recognized compelling interests).

354. *Schneider v. Smith*, 390 U.S. 17, 25 (1967) (Douglas, J.). *Cf.* Smolla, *supra* note 39, at 173 (“Only through communal living and through the state may men achieve virtue; only through the state may they find true peace, happiness, and fulfillment.”).

355. Matsuda, *supra* note 8, at 2322.

356. *United States v. Stevens*, 559 U.S. 460, 480 (2010).

find true peace, happiness, and fulfillment.”³⁵⁷ Smolla wants this “impulse” to motivate public policy, claiming, “When this Aristotelian impulse becomes the dominant mode of thinking in a society, there will be an inexorable tendency for the state to think that it is reasonable to exercise control over speech.”³⁵⁸ This is an impulse that courts and citizens must resist. American courts have continually validated distrust towards the state in questions of speech regulation. “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”³⁵⁹ Courts have good reason to be suspicious of empty government promises. Consider this revealing vignette from *Doe v. University of Michigan*:

During the oral argument, the Court asked the University’s counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which “stigmatizes or victimizes” on the basis of an invidious factor. Counsel replied “very carefully.” The response, while refreshingly candid, illustrated the plain fact that the University never articulated any principled way to distinguish sanctionable from protected speech.³⁶⁰

In *Stevens*, the Court stated that the “[g]overnment’s assurance that it will apply [a statute] far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.”³⁶¹ Learned figures have disagreed

357. Smolla, *supra* note 39, at 173.

358. *Id.*

359. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). *See also* *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 641 (1994) (“[T]he First Amendment, subject only to narrow and well understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.”); *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (“The ordinance discriminates on the ground of the content of the speech The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.”).

360. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864, 867 (E.D. Mich. 1989). *See also* Robert M. O’Neil, 76 *Hate Speech, Fighting Words, and Beyond—Why American Law is Unique*, ALBANY L. REV. 467, 484 (2013) (“Every case that has been brought against a public university on the basis of such a code has been decided against the institution, on free speech or due process grounds or both.”).

361. *United States v. Stevens*, 559 U.S. 460, 480 (2010).

about what constitutes hate speech.³⁶² When the best and brightest legal scholars can not agree on the definition of hate speech, it would be foolhardy to expect that politicians or other bureaucrats would reach consistent or just conclusions about the matter. Even while acknowledging the harms of racist speech, courts should maintain deep distrust of government speech regulation, in light of the established record of state orthodoxy and thought control.³⁶³

To guard against the dangers of government, the Supreme Court has held that “[n]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”³⁶⁴ There is no limit to man’s desire to manipulate and control his fellow man; or to demonize others who disagree with cherished beliefs. Those most committed to a belief will view those who disagree as misguided, hurtful, or “hateful.” Indeed, hate speech regulation can be viewed as a policy of silencing speech by characterizing it as misguided, hurtful, or “hateful.” Yet, “the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”³⁶⁵ Because of the intensity of conflicting points of view, the government is quite naturally the censor’s preferred weapon. Justice Holmes, in his dissent in *Abrams v. United States*, observed that persecution for the expression of opinions is, in a sense, “perfectly logical.”³⁶⁶ “Persecution for the expression of opinions seems to me to be perfectly logical. If you have no doubt of your premises or your power and want a certain result you naturally express your wishes in law and sweep away all opposition.”³⁶⁷ The government is the preferred tool for this “perfectly logical” persecution, whether government is in the hands of a minority or majority.³⁶⁸ The First

362. Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL OF RTS. J. 765, 768–69 (2009) (discussing scholarly disagreement over the criteria for defining “anti-Semitic” and “anti-Jewish” speech); Massaro, *supra* note 5, at 215 (discussing “the formidable problems of defining an epithet or slur”).

363. See *supra* notes 65–77 and accompanying text.

364. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

365. *Snyder*, 562 U.S. at 458 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)).

366. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

367. *Id.*

368. One could reasonably surmise that persecution is especially logical for those who are losing in the marketplace of ideas—in other words, those whose preferred policies are out of favor with the public. Persecution makes equally good sense for those in the majority, or those who dominate the marketplace of ideas through sheer force; nothing ensures political victory as well as silencing opponents. Such is the view of free speech shared by despots and dictators of every stripe, including the proletarian variety. See CHENG, *supra* note 67, at 369 (recounting the

Amendment stands in the way of “perfectly logical” persecution. There will probably always be factions eager to restrict their political opponents’ speech, and those factions will often find politicians who believe that the First Amendment could be made more useful for their aggrandizement. Decisions like *Heller*, however, are future-oriented and anticipate the abuse of judicial power: “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”³⁶⁹ At least one critical race theorist, Judith Butler, recognizes that hate speech regulation could empower the state to suppress the speech of any unpopular or marginalized group.³⁷⁰ The impulse to impose orthodoxy should always raise alarms, because totalitarian regimes have a penchant for colonizing the provinces of thought and expression.³⁷¹

Justice Holmes’s *Abrams* dissent could have been written today in reference to the critical race theorists, and the legion of politicians and interest groups who would gladly crush dissent or even discussion, for that matter. As correct as they believe themselves to be, the censors may happen to be the people with the worst ideas. Throughout history, those most convinced of the rightness of their cause have been among the most violent and unreasoning. No ideology is correct or appropriate for all times, so we need a free trade in ideas. This is not because free trade in ideas guarantees truth. Free trade in ideas guarantees that the government does not enforce orthodoxy. Politicians are predisposed to seize upon intellectual fads that justify the accrual of greater power over citizens,

innocent Chinese people jailed, tortured and forced to “assume a correct attitude towards the Great Proletarian Cultural Revolution.”).

369. *District of Columbia v. Heller*, 545 U.S. 570, 634–35 (2008). The *Heller* majority provided an evocative comparison of the rights secured by the First and Second Amendments:

We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people.

Id. (internal citations omitted).

370. JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 130 (1997) (warning that hate speech regulations risk “potentially empowering the state to invoke such precedents against the very social movements that pushed for their acceptance as legal doctrine”).

371. LEYS, *supra* note 65, at 34–35 (“Those who harbor a certain nostalgia for totalitarianism and unconsciously regret the passing away of the Inquisition and the Pope’s Zouaves will find in Maoist China the incarnation of a medieval dream, where institutionalized Truth has again a strong secular arm to impose dogma, stifle heresy, and uproot immorality.”).

especially when done in the name of lofty goals like “equality.”³⁷² Today, ideologically biased social science serves as the basis for speech regulation. As we know from experience, social science research has long been plagued by bias, with tragic results for public debate and public policy.³⁷³ Hate speech regulation would be a confluence of academic orthodoxy with an awful form of government control.

The sordid record of censorship finds unmistakable modern echoes in hate speech regulation proposals. For instance, the “parliamentary figure” model proposed by Fiss illustrates the immense problems involved in trusting the government to responsibly implement speech regulation. Fiss is sanguine about the prospect that, for courts resolving conflicts between liberty and equality, a “certain measure of partiality [in favor of equality] may be acceptable, and indeed necessary.”³⁷⁴ Partiality is, of course, to be expected in any system that allows hate speech regulation. As proof of this obvious outcome, Delgado is frank about the racial favoritism of his content-based proposal, which “is intended primarily to protect members of racial minority groups traditionally victimized.”³⁷⁵ Romero advocates blatant differential treatment against whites: “[W]hites should bear the burden of hurtful speech because they are more likely to be protected by the First Amendment than similarly situated nonwhites.”³⁷⁶ However, the government is prohibited from codifying race-based paternalism. The Minnesota statute at issue in *R.A.V. v. City of St. Paul* violated the Constitution because it targeted forms of speech “that communicate messages of racial, gender, or religious intolerance.”³⁷⁷ As the Minnesota statute revealed, to target particular expressions is to favor the groups who are thought to suffer from those expressions. The modern American record of hate speech censorship gives no reason for faith in the beneficence of censors or enlightened bureaucrats.³⁷⁸

372. Genovese, *supra* note 74, at 373 (historian and former communist noting communism’s “grand liberation featured hideous political regimes under which no sane person would want to live”).

373. *See supra* notes 135–45 and accompanying text.

374. Fiss, *supra* note 117, at 291.

375. Delgado, *supra* note 1, at 180 n.275.

376. Romero, *supra* note 4, at 17.

377. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992) (“Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid.”).

378. *See, e.g., Doe v. Univ. of Mich.*, 721 F. Supp. 852, 868 (E.D. Mich. 1989) (“[T]here is no evidence in the record that anyone at the University ever seriously attempted to reconcile their efforts to combat discrimination with the requirements of the First Amendment.”).

The distinction between protecting a group from “hate” and protecting a group from criticism is probably impossible to make on a fair, consistent, or rational basis. The effort to distinguish “hate” from criticism, when attempted in other Western nations, is fraught with difficulty.³⁷⁹ For instance, in England, “the distinction between protecting religious groups from vilification and protecting their beliefs and practices from criticism” has proven to be impracticable.³⁸⁰ Strossen describes the unintended but predictable consequences of one form of speech regulation directed at pornography in Canada.³⁸¹ Observers of the European political scene are aware of the trial of Dutch politician Geert Wilders, and will not wish to replicate such blatant persecution here.³⁸² To avoid these predicaments, our constitutional order prefers open debate to the alternative.

First Amendment jurisprudence is riddled with distrust for governments, and this distrust is expressed in various rules of construction and interpretation. Courts rightly construe speech regulation in a manner that favors free speech over government regulation. As noted in *Snyder*, courts will “impose a limiting construction on a statute only if it is readily susceptible to such a construction.”³⁸³ Hate speech regulation is not susceptible to a limiting construction.

The current First Amendment posture of distrust towards government fosters a healthy civil society. Courts, among other institutions, foster the norm of self-reliance by refusing to act as the enforcer of government orthodoxy. Society’s major institutions should encourage adults to counter or avoid offensive messages rather than expect that the government will protect them from offense. As the Court held in *Erznoznik*, harmful speech can be dealt with by allowing the unwilling listener to disagree or turn away.³⁸⁴ Even for the unwilling listeners, “the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”³⁸⁵ Courts should not trust the government—or the public, through

379. Edger, *supra* note 188, at 124 n.35 (describing complaints, hearings, and investigations against conservative Canadian magazines alleging, in part, that an article exposed Muslims “to hatred and contempt, on the basis of their religion”) (internal citation omitted).

380. Eric Barendt, *Religious Hatred Laws: Protecting Groups or Belief?*, 17 RES PUBLICA, 41, 41 (2011).

381. STROSSEN, *supra* note 324, at 229–39.

382. *Dutch MP Geert Wilders ‘Can Challenge’ Islam Hate Trial*, BBC NEWS (Feb. 14, 2011), <http://www.bbc.co.uk/news/world-europe-12456693>.

383. *United States v. Stevens*, 559 U.S. 460, 480 (2010) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997)) (internal quotation marks omitted).

384. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975).

385. *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (citing *Erznoznik*, 422 U.S. at 210–11).

juries—to make decisions about what sort of speech is “hateful.” Crucially, the Court has decisively ruled that, in public debate, we will have to “tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”³⁸⁶ Free speech strives to avoid the chilling effect of regulation. The chilling effect is defined as “‘a reaction of self-censorship’ on matters of public import.”³⁸⁷ Hate speech regulation would have a severe chilling effect on those who are worried about public scorn, which includes just about every adult member of civil society. Ours is a society enervated by political correctness and poisoned by tribalism.³⁸⁸ In such a society, the destructive power of chilling effects is potentially quite significant. Some people will always be offended about one thing or another, and some politicians will always be inclined to amass power by taking freedoms away from “nonfavored”³⁸⁹ groups—to “serve the people” no doubt. In response to that perpetual threat to free speech, the Supreme Court in *Snyder* reaffirmed, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”³⁹⁰

The harms that flow from hate speech are said to include “feelings of humiliation, isolation, and self-hatred,” as well as “dignitary affront.”³⁹¹ It would take a fantastic level of faith in the judiciary to believe that a judicial or other official body could parse out such nebulous and subjective harms. Then again, perhaps faith in the judiciary is beside the point; hate speech advocates might just as well operate on the cynical understanding that the judicial system could present an ideal forum for show trials against

386. *Id.* at 458 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

387. *Id.* at 452 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985)).

388. The term “tribalism” accurately captures the dynamic of psychological intensity and politicized in-group favoritism. See ARTHUR SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 14 (1998) (warning that the “virus of tribalism” was spreading throughout the globe). See also Amitai Etzioni, *The Perils of American Tribalism*, WASH. POST BOOK WORLD, Sept. 8, 1991, at 4 (reviewing Arthur Schlesinger, Jr. *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1994)); *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (J. Scalia, dissenting) (J. Scalia noted that some schools practice “tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies”).

389. This is the Orwellian term the *Grutter* majority used to describe nonminorities and other groups who are not selected for official favoritism. *Grutter*, 539 U.S. at 320.

390. *Snyder*, 562 U.S. at 458 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

391. Delgado, *supra* note 1, at 137, 143.

unpopular speech. There are radically different perspectives on the question of the degree of racism in society, and the riddle of which factors lead to various social inequalities. Speech regulation proposals reduce these questions to one-sided condemnation of American society; a condemnation that screams of a wicked nation whose first freedom should be abridged in order to prevent words that supposedly wound.

Current free speech doctrine is pessimistic about the government's wisdom to regulate speech, and forbids the government to act as arbiter of orthodoxy. Hate speech regulation would empower lawmakers to barter away the right to free speech. Lawmakers would be tasked with defining which utterances should be prohibited and who to enforce the speech code against. Some official body would be required for that purpose. This official body would have the power to determine the specific terms that are punishable, or perhaps even determine when a forbidden belief is expressed. Hate speech regulation is an avenue for the timeless evils of ideological dogma and group favoritism to advance astride an overbearing state. Of course, the censors would proclaim their good intentions, as they always have. When free speech is at stake, the government's stated intention to remedy social problems or redress grievances should carry no legal weight.

D. Harm Must Be Imminent In Order to Justify Speech Regulation

The development of the First Amendment imminence standard must be appreciated within the full context of an unstable epoch in American history. The Supreme Court issued the *Watts* and *Brandenburg* decisions in 1969. If there were ever a time when the First Amendment was in need of limitation due to speech-based societal violence or social harm, the 1960s would have been that era.³⁹² Four of the most prominent political figures of the decade were slain violently.³⁹³ The crime rate was soaring.³⁹⁴

392. See TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965-68* (2006).

393. John F. Kennedy was assassinated in 1963; Malcolm X in 1965; and then Martin Luther King, Jr. and Bobby Kennedy in 1968.

394. WILSON & HERRNSTEIN, *CRIME AND HUMAN NATURE*, *supra* note 174, at 409 (modern pattern of American crime is characterized by a "flat or declining rate of serious crime during the 1930s and 1940s, followed by a sharp and lasting upturn starting in the early 1960s"); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 75-102 (2001) (analyzing the evolution of social constraints on conscience and conduct, as well as the changing family, neighborhood, and workplace environments, together with changing cultural norms that led to the postwar rise in crime); GARY LAFREE, *LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA* 96-113 (1998) (describing decline of trust in public institutions along with widespread weakening of family and other social institutions throughout 1960s and 1970s).

A full-scale war in Vietnam was truly “hell in a very small place,” and the war met fierce, outspoken resistance at home.³⁹⁵ Race relations grew volatile, and tense protests were ubiquitous.³⁹⁶ Levels of social strife were extraordinary, as the controversies of that era exacerbated generational differences.³⁹⁷ The political controversies of the day combined with generational differences and impacted familial and other relationships in a sometimes caustic and tragic manner.³⁹⁸ That era has long since passed; the threat of social strife today pales in comparison. As *Watts, Brandenburg, Cohen v. California*³⁹⁹ and *Gooding v. Wilson*⁴⁰⁰ proved, the nation underwent wrenching change and maintained the peace, all without the assistance of speech regulation. To the contrary, “[d]uring the 1960’s and 1970’s . . . the Supreme Court altered the fighting words doctrine to make it consistent with the emerging doctrine of content neutrality in order to protect the speech rights of protesters in the public forum.”⁴⁰¹ Smolla, a speech regulation advocate, observes, “By the late 1960s, our first amendment jurisprudence already had begun to evolve to a stringent reformulation of the clear and present danger test, requiring a tight causal connection between speech and illegal action before the government would criminalize the speech.”⁴⁰² At the pinnacle of an era of unrest, it was observed that “[t]he Supreme Court seems ready to subject public disorder laws to more exacting standards and to strike them down unless they are

395. BERNARD B. FALL, HELL IN A VERY SMALL PLACE: THE SIEGE OF DIEN BIEN PHU (masterful account of French defeat in 1954, marking an historic military success for the Viet Minh over a wealthier and more modern French military, which was a harbinger of the conflict to come with the United States); STANLEY KARNOW, VIETNAM: A HISTORY (1997) (providing detailed overview of the political decisions, domestic pressures, and strategic reasoning that led America into and out of war).

396. TERRY H. ANDERSON, THE MOVEMENT AND THE SIXTIES: PROTEST IN AMERICA FROM GREENSBORO TO WOUNDED KNEE (1995) (providing a hagiographic overview of protest movements).

397. MIDGE DECTER, LIBERAL PARENTS, RADICAL CHILDREN 37 (1975) (iconic reflection on permissive parenting during the 1960s and 1970s, directing criticism towards American youth: “[I]t was no small anomaly of your growing up that while you were the most indulged generation, you were also in many ways the most abandoned to your own meager devices.”).

398. See, e.g., WILLIAM L. O’NEILL, COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960’S (1971) (balanced description of societal dissolution).

399. *Cohen v. California*, 403 U.S. 15, 20–22 (1971) (nonverbal message “Fuck the Draft” in context used did not fall under a category of speech that government may prohibit).

400. *Gooding v. Wilson*, 405 U.S. 518, 520 n.1 (1972) (anti-war demonstrator convicted under public disorder law for telling arresting officers, “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces,” and “White son of a bitch, I’ll kill you,” but Supreme Court struck down state law).

401. Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 632 (1984).

402. Smolla, *supra* note 39, at 192.

precisely directed at specific harms which justify government intervention in the first amendment area.”⁴⁰³ Viewing the 20th century more broadly, we see that Communist, Nazi, and fascist speech were protected in order to preserve traditional free speech rights.⁴⁰⁴ Are minorities in the 21st century so besieged by racism that now we suddenly need to scale back the First Amendment? Have we found a violent group in modern America whose speech represents a threat greater than that of Communists, Nazis, or fascists? If so, is that threat imminent?

Speech regulation advocates such as Romero demonstrate the extremely attenuated link between hate speech and harm. Romero claims that one of two harms of hate speech is the “indirect” harm of the “white supremacist website . . . leading to the increased risk that hateful speech might turn into hateful acts.”⁴⁰⁵ This is not the harm of speech “leading to” the “hateful acts.” This is not even the harm of speech “leading to” the “increased risk” of “hateful acts.” This is only the theoretically possible harm of speech “leading to” the “increased risk” that hate speech “might turn into” some “hateful acts.” These vague possibilities are a stark contrast with the relatively well-defined immanence criteria.

There are well-defined criteria demarcating when violence justifies speech limits. *Brandenburg* stands for the proposition that the government may restrict advocacy of illegal conduct that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴⁰⁶ The imminence standard is widely accepted as an embedded pillar of First Amendment doctrine. Smolla writes that the clear and present danger test was enhanced to require “a tight causal connection between speech and illegal action before the government would criminalize the speech.”⁴⁰⁷ It is within that legal framework that the ostensible harm of

403. *Statutes and Ordinances: The Fighting Words Requirement*: Gooding v. Wilson, 405 U.S. 518 (1972), 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 492, 496 (1972).

404. *Schneider v. Smith*, 390 U.S. 17 (1968) (First Amendment protected former Communist who refused to answer questions about his political affiliation); *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977) (First Amendment protected American Nazi who was denied permit to march through a village where a sizable Jewish population lived); *Terminiello v. City of Chi.*, 337 U.S. 1 (1949) (First Amendment protected anti-Semitic and pro-fascist former priest’s speech even though it angered protesting mob).

405. Romero, *supra* note 4, at 8. The other harm posited by Romero is that “coming upon a white supremacist website contributes directly to the insult and humiliation suffered by many people of color on a daily basis.” *Id.* at 6.

I leave it to the reader to judge whether people, with any frequency that would justify speech regulation, actually “come upon” white supremacist websites, as one might “come upon” a coin on the ground.

406. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

407. Smolla, *supra* note 39, at 192.

racist speech must be analyzed. Only the most direct harm warrants abridgement of First Amendment freedom; the imminence standard does not allow restrictions on free speech based on the potential for violence. The imminence standard does not allow restrictions on the “mere advocacy” of illegal action,⁴⁰⁸ and “advocacy of illegal action at some indefinite future time” is protected.⁴⁰⁹ As Justice Brandeis noted in *Whitney*, violence must be imminent: “Only an emergency can justify repression.”⁴¹⁰ Speech regulation requires more than a loose connection or imaginary association between speech and social harm. Whether hate speech causes imminent harm is an empirical question with major constitutional ramifications. A theoretical “climate of hate”⁴¹¹ will not justify restrictions on speech because hate falls short of harm. In fact, hate falls short of being a threat as well. Throughout the analysis of imminence, it is critical to bear in mind that—as argued in Part II—the causal connection between hate speech and social harm is weak. Given the weak causal connection between hate speech and social harm, the imminence standard is unlikely to be satisfied by hate speech regulation.

Hate speech regulation must necessarily do violence to the imminence standard. Hate speech regulation, in order to be tenable, must weaken or abandon the requirement of a causal connection between speech and harm. For instance, in Smolla’s hate speech proposal, he is forced to argue that “[a] lower threshold of harm and a looser nexus of proof linking the speech to the harm should be permitted.”⁴¹² The conceptual and constitutional problem with lowering the threshold is straightforward: Any nebulous risk could be viewed as satisfying the lowered threshold. Would words that contribute to a “climate of hate” satisfy the lowered threshold? The hackneyed phrase “climate of hate” vividly demonstrates the conceptual and constitutional problems that would result from a relaxed imminence

408. *Brandenburg*, 395 U.S. at 448–49 (the “clear and present danger test” formerly encompassed “mere advocacy,” but *Brandenburg* narrowed the scope of the test so that mere advocacy is no longer actionable).

409. *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

410. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

411. This oft-used expression is illustrative of overbreadth. If its overuse in polemics is any indication, the phrase “climate of hate” is a conceptual husk waiting to be filled with partisan fervor. See, e.g., Paul Krugman, *Climate of Hate*, N.Y. TIMES, Jan. 10, 2011, at 21. See also U.S. Department of Commerce, National Telecommunications and Information Administration, *The Role of Telecommunications in Hate Crimes* 6 (Washington, DC: Government Printing Office, 1993) (defining hate speech as either “words that threaten to incite ‘imminent unlawful action,’ which may be criminalized without violating the First Amendment” or “speech that creates a climate of hate or prejudice, which may in turn foster the commission of hate crimes”).

412. Smolla, *supra* note 39, at 206. Smolla is careful to add that his proposal for speech regulation is limited to “restricted zones” such as university classrooms. *Id.* at 210–11.

standard. Two significant steps would have to be taken to show the link between speech and lawless action. Brown, from a philosophical perspective, elucidates these two steps: First, there must be “a connection between the existence of hate speech and the existence of a climate of hatred.”⁴¹³ Second, there must be “a connection between a climate of hatred and the increased incidence of hate-based discrimination, destruction of property, violence, and so forth.”⁴¹⁴ For some, a climate of hate exists whenever their political opponents are allowed to speak. Speech often elicits emotions and some type of emotion generally precedes action. When unpopular speech is uttered anywhere, there might be a faction willing to associate that speech with harm. If we seriously consider the range of expressions that have been labeled “hateful,” it becomes clear that the cause and effect relationship between hate speech and harm is too weak to meet the imminence standard. For instance, in innumerable cases there is no causal link between pornography and harm, while in other cases the targeted harm (inequality, subordination, etc.) is produced by some cause other than pornography.⁴¹⁵ Experience provides us with proof that the imminence requirement is necessary to protect public debate from those officials who would rush to judgment in a crisis. In response to the shooting of Congresswoman Gabrielle Giffords in 2011, one Congressman suggested that symbols such as target signs and crosshairs be banned when those symbols are depicted in speech about politicians or federal employees.⁴¹⁶ Once the facts about Giffords’ shooter became known, calls for such censorship seemed premature.⁴¹⁷ This episode is one of many

413. ALEX BROWN, HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION 69 (2015).

414. *Id.* at 69.

415. Geoffrey R. Stone, *American Booksellers Association v. Hudnut: The Government Must Leave to the People the Evaluation of Ideas*, 77 U. CHI. L. REV. 1219, 1223 (2010) (“Although pornography as defined by the ordinance might contribute to the harms the ordinance was designed to prevent, it does not cause those harms in a way that satisfies the clear and present danger test.”).

416. Democratic Representative Bob Brady of Pennsylvania told the *New York Times* that he wanted to criminalize target symbols. Without a shred of evidence linking target symbols to the shootings, the politician advocated censorship, remarking, “I don’t know what’s in that nut’s [Jared Loughner’s] head. I would rather be safe than sorry.” Michael Shear & Sarah Wheaton, *Live Blog: Latest Developments on Arizona Shooting*, N.Y. TIMES: THE CAUCUS BLOG (Jan. 9, 2011, 10:49 AM), <http://thecaucus.blogs.nytimes.com/2011/01/09/live-blog-latest-developments-on-arizona-shooting/?src=tw&tw=thecaucus#bill-to-ban-crosshairs>.

417. Initially, it was widely assumed that Giffords’ shooter was a right-wing extremist. The *N.Y. Times*’s public editor was forced to issue an apology for his organizations’ coverage of the shooting. Arthur Brisbane, *Time, The Enemy*, N.Y. TIMES (Jan. 15, 2011), http://www.nytimes.com/2011/01/16/opinion/16pubed.html?_r=2&partner=rss&emc=rss (“[O]pportunities were missed to pick up on evidence -quite apparent as early as that first day- that Jared Lee Loughner, who is charged with the shootings, had a mental disorder and might not have been motivated by politics at all.”). Once the evidence indicated that the shooter was an anti-Bush, anti-war atheist, the

examples when the link between speech and violence existed only within the ideologically confined imagination of the would-be censor. The partisan imagination produces connections between speech and harm, but when empirical research appears to establish a link between speech and harm, the link is not as easily dismissed.

There is a precedent of courts turning to empirical evidence to establish the link between racist speech and violence within the First Amendment context. In *Beauharnais v. Illinois*, the Court considered evidence of the level of racial strife in Chicago, and the historical connection between racism and violence as it related to hateful speech.⁴¹⁸ While some courts have accepted the research proffered by speech regulation advocates, others have been critical of empirical research. In *Brown v. Entertainment Merchants Association*, Justice Scalia scrutinized the psychological studies involving children and violent video games, judging that “nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology They show at best some correlation between exposure to violent entertainment and minuscule real-world effects.”⁴¹⁹ On the other hand, in *Hudnut*, Judge Easterbrook wrote, “[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.”⁴²⁰ The terms “tend to” and “lead to” are rather inexact terms if we are seeking to accurately describe a cause and effect relationship between an expression and a specific social harm. Subordinate status may lead to “affront” and “injury,” but many other causes also lead to “affront” and

political scapegoating and calls for speech restrictions seemed premature. See Dan Berry, *Looking Behind the Mug-Shot Grin*, N.Y. TIMES (Jan. 15, 2011), <http://www.nytimes.com/2011/01/16/us/16loughner.html?pagewanted=3> (reporting that the shooter’s “anger would well up at the sight of President George W. Bush.”); Jim Lindgren, *Jared Loughner’s Anti-War Views*, THE VOLOKH CONSPIRACY (Jan. 10, 2011, 5:28 PM), <http://volokh.com/2011/01/10/jared-loughners-anti-war-views/> (Loughner held left wing views about the wars in Iraq and Afghanistan, as well as harboring anti-Christian and anti-religious sentiments); Tim Steller, *Man Linked to Giffords Shooting Rampage Called ‘Very Disturbed’*, AZ DAILY STAR (Jan. 8, 2011), http://azstarnet.com/news/local/crime/article_91db5db4-1b74-11e0-ba23-001cc4c002e0.html (“He lists among his favorite books ‘Mein Kampf’ and ‘The Communist Manifesto’. But he also includes a broad variety of other titles, including: ‘Animal Farm,’ ‘Brave New World,’ ‘To Kill a Mockingbird,’ and ‘One Flew Over the Cuckoo’s Nest.’”).

418. See *Beauharnais v. Illinois*, 343 U.S. 250, 259–62 (1952) (citing the history of nativism, racial animosity, migration patterns, race riots, and bombings in Chicago).

419. *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2739 (2011) (internal citations omitted).

420. *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

“injury.” The causal connection between speech and harm will in many cases prove extremely elusive. As Stone observes, “the harms identified by Dworkin and MacKinnon, even if real and substantial, are remote, attenuated, and the consequence of many factors in addition to speech.”⁴²¹ At times it seems that speech regulation advocates engage in free association between hate speech and social harm, perhaps in an earnest desire to ameliorate various social ills. Tsesis, in his discussion of hate speech and the rise of the Nazis, argues that “the most dangerous form of bigotry takes years to develop, until it becomes culturally acceptable first to libel, then to discriminate, and finally to persecute outgroups.”⁴²² Many bad deeds start with bad words, but if that simple fact justifies speech regulation, then the First Amendment will need to be formally repealed or interpreted out of existence. Tsesis posits that the “widespread dissemination of bigotry has been the springboard for discrimination that has led to separation, persecution, oppression, enslavement, and genocide.”⁴²³ Regulating speech on this theory—that many bad deeds start with bad words—results in an absurdity. Any critical or unfavorable comment about an “outgroup” is reduced to the first stage of persecution or genocide.⁴²⁴

How else can hate speech regulators make use of the incitement exception, given that the harms caused by speech are so attenuated, uneven, infrequent, and ephemeral? Smolla suggests that incitement could encompass hate speech because hate speech induces stigma, and “[s]tigma is at the heart of modern equal protection analysis,” citing *Brown v. Board of Education*.⁴²⁵ This argument is unavailing because *Brown* dealt with government actors that explicitly enacted separate but equal educational policy, which inherently stigmatized minorities. Through government action, racial segregation was enforced in public schools. Hate speech, as

421. Stone, *supra* note 415, at 1223.

422. Tsesis, *supra* note 40, at 746.

423. *Id.* at 763.

424. *Cf.* KARL DIETRICH BRACHER, *THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE AND EFFECTS OF NATIONAL SOCIALISM* (1991) (trans., Jean Steinberg). Bracher asserted “the speaking ban imposed on Hitler until 1927 (in Prussia, until September 1928) did seriously impair his effectiveness. It just did not last long enough.” *Id.* at 180. But this assertion is belied by other facts. The prohibition on speaking “allowed Hitler to concentrate on closed party meetings. Furthermore, the vigilance called for to avoid further prohibitions stimulated and justified his championship of a policy of legality vis-à-vis rival policies within the party.” *Id.* at 180. Hitler consciously adopted a manipulative “policy of legality” in response to official repression of his speeches and party organization efforts. The “policy of legality” entailed “the tactic of winning power through unremitting exploitation of the legal and pseudo-legal opportunities offered by a tolerant democratic framework.” *Id.* at 155.

425. Smolla, *supra* note 39, at 200–01.

generally understood, does not involve government actors. Proving the existence of stigma requires fact specific inquiries into nebulous and subjective mental states, quite unlike identifying segregationist policy.

In an effort to work around *Brandenburg*, Matsuda conflates “the category of racist speech” with incitement, as well as other exceptions to the First Amendment, such as threats and fighting words.⁴²⁶ However, the category of racist speech, as a matter of fact, does not always overlay the categories of threat, fighting words, or incitement. Whether racial insult reflects an incitement will depend on the specific facts of any given social setting. In cases where racial insult does reflect immediate violent intent, existing law deals with that problem. While hate speech may contribute to a vaguely defined climate of hate and intolerance, such a result is far from being a “true threat” under *Watts*.⁴²⁷

Along with incitement, the “fighting words” doctrine is another potential avenue for limitations on free speech. *Chaplinsky v. New Hampshire* held that states may punish those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁴²⁸ Echoing *Chaplinsky*, Delgado argues that “[r]acial insults” do “inflict injury by their very utterance.”⁴²⁹ Delgado seems to define “racial insult” as “verbal racism”⁴³⁰ or “language [that] injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood.”⁴³¹ This is the type of blunderbuss language that has no regard for the imminence standard, even if a workable definition of harm could somehow be deciphered from the vague, overbroad, and ambiguous language. Furthermore, subsequent rulings narrowed *Chaplinsky*, reflecting the difficulty involved in enacting or enforcing speech regulation.⁴³²

Under the *Brandenburg* test, for speech to be regulated it must be “directed to inciting” and “likely to incite” an “imminent lawless action.”⁴³³

426. Matsuda, *supra* note 8, at 2355 (“Incitement to imminent violence is a related and acceptable point of intervention” when “the state feels threatened by certain ideas”). *Id.* at 2350.

427. *Watts v. United States*, 394 U.S. 705, 708 (1969).

428. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

429. Delgado, *supra* note 1, at 173–74.

430. *Id.* at 135 n.12.

431. *Id.* at 135–36.

432. See *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949) (overturning conviction for breach of peace where lower court “permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand”).

433. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

When the government posits harm as the justification for the abridgement of free speech rights, courts inquire into the imminence of the harm. Hate speech regulation proposals appear devoid of any consideration of imminent lawless action. As long as free speech doctrine maintains existing imminence principles, hate speech regulation will remain unconstitutional. When hate speech accusations are critically examined, the empirical data simply will not support a finding of imminence, in all but the most extreme cases.

IV. The Feasibility and Acceptability of Hate Speech Regulation

The preceding analysis focused on the relationship of free speech doctrine to sociological and empirical questions raised by hate speech regulation. The following section will focus on hate speech regulation from a policy standpoint. This assessment is guided by Edward Banfield's framework for considering whether a given policy can be implemented.⁴³⁴ Banfield presents two criteria: is the proposed measure feasible, and is it acceptable?⁴³⁵ As Banfield noted, for a policy to be feasible, it must be one that "government . . . could constitutionally implement" at bearable cost.⁴³⁶ Secondly, a policy would also need to be acceptable, meaning political leaders "are willing to carry it into effect."⁴³⁷

A. Feasibility

For Banfield, feasibility means "implementation would result in the achievement of some specified goal or level of output at a cost that is not obviously prohibitive."⁴³⁸ The concept of cost encompasses burdens of any kind, including, but not limited to, monetary costs. As this article has endeavored to demonstrate, there are four especially pertinent constitutional barriers to hate speech regulation. The constitutional barriers each present considerable costs. The constitutional barriers are rooted in deep moral intuitions about the parameters of freedom, the proper role of government, and the role of reason in shaping man's fate. There are also feasibility issues arising from the political and social costs of speech regulation. The political and social costs in turn stem from the racial favoritism and tribalism inherent in hate speech regulation, as well as the resultant backlash that would be sure to follow.

434. BANFIELD, *supra* note 15, at 260.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* Banfield also notes that feasibility requires that a policy must be one that "government . . . could constitutionally implement." *Id.* at 260.

If hate speech laws were enacted, reasonable people would perceive racial favoritism in their implementation. Suspicions of racial favoritism are largely validated by review of the literature advocating hate speech restrictions. “When evaluating which expressions to prohibit, lawmakers should empathize with the historical consciousness of outgroups,” urges Tsesis.⁴³⁹ What societal cost would hate speech regulation entail? The experience of affirmative action suggests possibilities. Hate speech regulation would be at least as unpopular as affirmative action. This is because speech regulation applies selective, race-conscious remedies based on empirically dubious notions of harm. Stephen Johnson offers experimental evidence that affirmative action increases racial hostility between groups.⁴⁴⁰ William Julius Wilson noted the “imminent potential for racial conflict” present in affirmative action within some job sectors.⁴⁴¹ As some scholars acknowledge, affirmative action places burdens on innocent third parties who bear no responsibility for the targeted harm.⁴⁴² If the right to free speech were subordinated to the same racial politics that characterize affirmative action, sensible people of all persuasions will probably disdain the outcome. The resentment engendered by government infringement upon freedom of speech would only compound the backlash against racial favoritism.

Hate speech regulation would further disrupt racial harmony. Before even considering the legality of hate speech regulation, we must consider the impact such regulation would have on race relations. Post concludes that when laws use “community norms to restrict participation in public discourse” such laws may be perceived as “hegemonic and unjustified.”⁴⁴³ In a heterogeneous society with diverse racial groups, when the law restricts speech in favor of certain favored minority groups, “nonfavored”⁴⁴⁴ groups will resent the favoritism inherent in such laws. In a multiracial society striving for unity, racial favoritism encoded in law can undermine social cohesion. Surely, carving out speech restrictions based on minority groups’ real or perceived grievances would not promote social cohesion. Indeed, hate speech regulation can be seen as part of a debilitating societal shift towards racial grievances, an inflammatory and

439. Tsesis, *supra* note 40, at 780.

440. Stephen Johnson, *Reverse Discrimination and Aggressive Behavior*, 104 J. PSYCHOL. 11–19 (1980).

441. Teodros Kiros, *Class, Race and Social Stratification: An Interview with William Julius Wilson*, 21 NEW POL. SCI. 405, 411 (1999).

442. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1238 (2002).

443. Post, *supra* note 23, at 136.

444. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

profoundly illiberal trend. After having persevered through the most horrendous periods of American racism with the First Amendment intact—surely not a coincidence—it would be a singular act of racial favoritism to begin regulating hate speech now.

As Matsuda admits, hate speech regulation would be a departure from current doctrine.⁴⁴⁵ Yet, courts obviously do, at times, recognize previously unrecognized “causes of action,” as Delgado points out.⁴⁴⁶ In the law of torts, Prosser notes, “the mere fact that the claim is novel will not of itself operate as a bar to the remedy.”⁴⁴⁷ When, however, novel restrictions on a cherished right carry tremendous costs, this will impact the feasibility of the remedy. Would hate speech regulation result in the achievement of any specified goal “at a cost that is not obviously prohibitive”?⁴⁴⁸ Any answer calls for supposition and inference, but we can make several sensible projections. Given the grim political and social consequences of racial favoritism, as well as the costs arising from constitutional infirmity, hate speech regulation should be expected to exact a heavy toll on American society. The costs are magnified when placed along the high value attached to First Amendment rights.

B. Acceptability

Banfield notes that in addition to feasibility, a policy would need to be acceptable, meaning political leaders “are willing to carry it into effect.”⁴⁴⁹ In the case of hate speech regulation, that would entail promoting and adopting the legislation and considering public opinion on the matter. Opinion research reflects public wariness of “hate speech” laws. In 2010, Rasmussen polled Americans on their views of hate speech laws. Sixty-nine percent of those polled “think it is better to allow free speech without government interference rather than let the government decide what types of so-called ‘hate speech’ should be banned.”⁴⁵⁰ Only seventeen percent

445. Matsuda, *supra* note 8, at 2347.

446. Delgado, *supra* note 1, at 165 (providing the examples of invasion of privacy and prenatal injury).

447. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 1, at 3–4 (4th ed. 1971).

448. BANFIELD, *supra* note 15, at 260.

449. *Id.*

450. *Most Americans Say Government Is Too Sensitive to Minority Concerns*, Rasmussen Reports, Survey conducted on Oct. 15 and 16, 2010, http://www.rasmussenreports.com/public_content/politics/general_politics/october_2010/most_americans_say_government_is_too_sensitive_to_minority_concerns. *But cf.* Nathaniel Persily & Stephen Ansolabehere, *Knowledge Networks: Field Report- Constitutional Attitudes Survey*, 58 (released July 14, 2010), <http://electionlawblog.org/archives/persily.pdf> (In response to survey question asking “In general, do you agree or disagree that people should be allowed to say things in public that might be

avored government bans on “hate speech.”⁴⁵¹ These polling results are surely attributable to the widespread consensus on free speech in America. Free societies are generally not comfortable regulating thoughts.⁴⁵² Calls for hate speech regulation maintain currency in academic circles, as well as on the political far left.⁴⁵³ The enactment of hate speech laws would require far broader support than that provided by insular academics and a narrow range of leftists.

As further proof that hate speech laws are unacceptable in the American political context, consider the policies analogous to hate speech regulation in their effect and goals, such as affirmative action, slavery reparations, and political correctness. These policies are deeply unpopular with the American public. According to the Pew Research Center, the majority of those polled oppose “preferential treatment” for “blacks and minorities” by a sixty-five percent to thirty-one percent margin.⁴⁵⁴ Quinnipiac polling finds similar results: by a fifty-five percent to thirty-six percent margin, the majority believes that affirmative action should be abolished.⁴⁵⁵ Speech regulation is analogous to affirmative action, in the sense that it is driven by racial favoritism and treats various groups differently based on racial identity, under the assumption that minorities today somehow deserve or require compensatory policy. This assumption is widely rejected. A *Wall Street Journal*/NBC News poll showed that just twenty-two percent of whites believe that affirmative action is needed to counteract discrimination.⁴⁵⁶ Members of “nonfavored groups”⁴⁵⁷ must, in

offensive to racial groups?” Forty-eight percent agreed “people should be allowed to say” offensive things, while fifty-two percent disagreed).

451. Rasmussen Reports, *supra* note 450.

452. See *United States v. Schwimmer*, 279 U.S. 644, 654–55 (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”).

453. See STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* (2008) (arguing for regulation from a rights-based standpoint); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 *WAKE FOREST L. REV.* 497 (2009) (promoting regulation of speech that incites discrimination); Demaske, *supra* note 340, at 275 (arguing that hate speech regulation promotes equality by empowering subordinated groups to express their views).

454. *Trends in Political Values and Core Attitudes: 1987–2009*, THE PEW RESEARCH CENTER, 56 (May 21, 2009), <http://www.people-press.org/files/legacy-pdf/517.pdf>.

455. Quinnipiac University National Poll. *June 3, 2009- U.S. Voters Disagree 3-1 With Sotomayor On Key Case* (taken from May 26- June 1, 2009), <https://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=1307>.

456. Gary Fields, *Racial Lines*, *WALL ST. J.*, Jan. 20, 2010, at R7 (citing *Wall St. Journal*/NBC News poll finding that twenty-two percent of whites believe affirmative action is needed to counteract discrimination, while seventy-three percent of blacks agree).

significant numbers, pay the costs of affirmative action. A chilling effect on legitimate speech is built in to hate speech regulation. Members of “nonfavored groups” would shoulder the chilling effect because speech regulation is plainly premised on racial group favoritism for specific minorities. There is a very high likelihood that speech on matters of public concern would be singled out for state disapproval, if the historical patterns of government overreach and racial favoritism are any indication.

Slavery reparations are another race-based scheme that can offer points of comparison with hate speech regulation. A CNN/USA Today/Gallup poll found that ninety percent of whites and thirty-seven percent of blacks are opposed to slavery reparations.⁴⁵⁸ This is another example of a public not eager for race-conscious government favoritism. Hate speech restrictions would probably fare no better in the public eye. There are additional reasons to expect that regulation is not acceptable. Hate speech regulation is, in essence, political correctness applied to the First Amendment. Seventy-five percent of Americans, in a recent Rasmussen poll, consider political correctness a problem.⁴⁵⁹ Hate speech regulation doesn’t arise from the classical liberal tradition, and it certainly doesn’t arise from conservatism. Rather, hate speech regulation shares the precepts of political correctness, rigid leftist doctrine, and totalitarianism.

The preceding evidence indicates that public willingness to use state power to redress the harm of racism is waning, while support for compensatory programs steadily erodes. According to Pew Research polling, by a sixty-three percent to twenty-seven percent margin, “the public says blacks who can’t get ahead are mostly responsible for their own condition.”⁴⁶⁰ Race-based compensatory policy remains unpopular, despite concerted efforts to inculcate white guilt.⁴⁶¹ Thus, hate speech regulation

457. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

458. Peter Viles, *Suit Seeks Billions in Slave Reparations*, CNN.COM (Mar. 27, 2002, 11:29 AM), <http://edition.cnn.com/2002/LAW/03/26/slavery.reparations/index.html>.

459. *Most Americans Say U.S. Is Too Politically Correct*, Rasmussen Reports (Oct. 19, 2009), http://www.rasmussenreports.com/public_content/politics/general_politics/october_2010/most_americans_say_u_s_is_too_politically_correct.

460. *Beyond Red vs. Blue: The Political Typology*, Pew Research Center, 49, 139–40 (June, 2014), <http://www.people-press.org/files/2014/06/6-26-14-Political-Typology-release1.pdf> (The percentage of the population who agree that “Blacks who can’t get ahead in this country are mostly responsible for their own condition” has risen steadily from the mid-1990s when Pew first began recording responses to this question).

461. Omaha, Nebraska’s public school system spent \$130,000 in federal stimulus funds to purchase “white privilege” training manuals, which were given to every employee in the entire school system. Joe DeJka, *Only in the World-Herald: Stimulus Money Buys for Every Staffer OPS Says it Won’t Go Totally by the Book Criticism of “White Privilege” is a Key*, OMAHA WORLD-HERALD, July 10, 2011, at 1. These manuals claimed that advantages in American

would be an unprecedented and race-based intrusion into cherished rights, at a time when support wanes for race-based compensatory policy. Within the current climate of public opinion, few political decision-makers will be willing to carry hate speech regulation into effect. There is very little basis to suppose that a majority of government representatives today would sacrifice speech rights in a dubious effort to address racial issues. Only time will tell whether the window of opportunity for speech regulation is opening or closing.

Hate speech regulation will be viewed as unfavorably as affirmative action, slavery reparations, and political correctness. Yet, for some reason, regulation proponents appear optimistic about the judiciary's competence to adjudicate correct thought and speech. Even worse, regulation proponents would place their trust in government bodies to codify speech restrictions. "We are a legalized culture. If law is where racism is, then law is where we must confront it," proclaims Matsuda.⁴⁶² Matsuda's assertion is counterintuitive. Lawyers are among the least popular of all professions, coming in near the bottom of the rankings, just ahead of senators, congressmen, and insurance salesmen.⁴⁶³ Our "legalized culture" is actually a culture wherein a substantial share of the public believes that lawyers contribute very little to society.⁴⁶⁴ Matsuda does not realistically account for that fact when she refers to our "legalized culture." The public will not accept hate speech regulation, in part, because the culture is overly litigious already. Hate speech regulation would sacralize the unholy union of politicians, ethnic pressure groups, and lawyers. The public will not eagerly trust an alliance of these professions to restrict free speech.

Hate speech regulation will not be feasible or acceptable within the foreseeable future. In assessing the prospects for speech regulation, we must consider the ramifications of two eight to one decisions rejecting the

society "channel wealth and power to white people," and urged that educators "take action for social justice." *Id.*

462. Matsuda, *supra* note 8, at 2381.

463. Lydia Saad, *Nurses Top List of Most Honest and Ethical Professions*, Gallup (poll conducted Dec. 8–10, 2006), <http://www.gallup.com/poll/25888/nurses-top-list-most-honest-ethical-professions.aspx>.

464. *Public Esteem for Military Still High*, Pew Forum on Religion and Public Life (July 11, 2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/#journalists-getting-less-respect-especially-among-women> ("Among the [ten] occupations the survey asked respondents to rate, lawyers are at the bottom of the list. About one-in-five Americans ([eighteen percent]) say lawyers contribute a lot to society, while [forty-three percent] say they make some contribution; fully a third ([thirty-four percent]) say lawyers contribute not very much or nothing at all."); *Honesty/Ethics in Professions*, Gallup (Dec. 8–11, 2014), <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (in rating the "honesty and ethical standards" of various professions, respondents rate lawyers ahead of business executives and behind bankers).

legal claims of two of the most sympathetic victims imaginable: defenseless animals in *United States v. Stevens*, and the grieving family of a fallen service member in *Snyder v. Phelps*.⁴⁶⁵ If defenseless animals and fallen service members' families cannot provide the political impetus for feasible and acceptable speech restrictions, then an unappealing mélange of left wing special interests probably will not either.

Conclusion

Hate speech laws combine one of the most dangerous government powers with the worst of ideological dogma. The debate over hate speech regulation should include perspectives that fundamentally challenge the premises of hate speech regulation. This article attempted to provide a perspective expressing the traditional American distrust of government, as well as offer an empirically grounded sociological critique of the doctrinaire leftist concepts underlying hate speech regulation proposals. There is apparently no limit to the perception of racial insult, no limit to the censorious instinct, and no limit to government's potential to abuse power. For these reasons, politicized and racialized hate speech regulation would be unsound policy, and should be prohibited by the First Amendment. To those who endeavor to learn from the collective experience of history, the prospect of government speech regulation in service of group resentment should appear as a recipe for disunity, censorship, and conflict.

465. *United States v. Stevens*, 559 U.S. 460 (2010); *Snyder v. Phelps*, 562 U.S. 443 (2011).