The current debate over hate speech, although vigorous, is ultimately unsatisfactory. Both opponents and supporters of hate speech regulation fail to truly engage with the contending point of view. The debate appears to have reached a stalemate, resulting in commentators on both sides simply repeating formulaic versions of their preferred arguments. Despite all the talk, there is little conversation about the problem of hate speech. This Article analyzes the unsatisfactory nature of the current debate about hate speech and suggests that comparative jurisprudence may provide a way out of the impasse.

A rhetorical analysis of the American jurisprudence on hate speech provides a starting point for understanding the current impasse. By analyzing how the problem of hate speech is contextualized, how the participants in the hate speech conflict are characterized, and how the judge constructs the judicial role, it is possible to uncover the deepest unarticulated commitments of the hate speech discourse. When these discursive practices and their underlying commitments are contrasted with the body of academic literature designed to challenge this "official narrative" of hate speech, the reason for the stalemate becomes apparent. The "unofficial narrative," which focuses on the impact of hate speech on the targets, relies on commitments that are profoundly at odds with those of the official narrative, although they are similarly unarticulated. The result is that the two sides in the hate speech debate appear to talk past each other. The arguments arising from the unofficial narrative also appear to be simply beside the point, interesting perhaps, but ultimately outside the bounds of legal debate. However, whatever one thinks of the result, the official narrative's failure to seriously engage with the alternative point of view is unsatisfactory as a means of doing justice. Refusing to listen to the voices of the excluded may be effective for preserving the status quo, but it renders the hate speech opinions vulnerable, not only because it raises equality concerns but also because of the way that it constructs the role of judging.

If the unofficial narrative is unlikely to make itself heard, comparative jurisprudence may prove a more fruitful means of revivifying the hate speech debate. By comparing the American jurisprudence on hate speech with the rhetoric of the recent Canadian Supreme Court jurisprudence on hate speech, the working assumptions of each discourse become apparent. Comparison reveals the deeply contested and yet unstated choices that shape each body of law—the facts that are "relevant," the privileged perspective on those facts, the framing of the legal question, and the appropriate context.
in which to situate both the facts and the law. Uncovering the contentious nature of these choices ultimately does more than just reveal the very different working assumptions underlying the two discourses of hate speech. It also illuminates the extent to which even the most fundamental assumptions about the appropriate role for the state, the meaning of freedom, and the nature of democracy itself, are contested. This in turn helps to make apparent some of the underlying differences at issue in the American debate between the official and the unofficial narratives. By revealing these contested and contestable choices, comparative jurisprudence can help to uncover the complexities that the reductionist pressures of legal language work to suppress—complexities which form the unacknowledged substratum of the hate speech debate. Shifting the discussion to that terrain may therefore make it possible to engage in meaningful conversation about what is most fundamentally at issue in the debate over the regulation of hate speech.

I. INTRODUCTION

For weeks on end we were reduced to starting the same letter over and over again, recopying the same scraps of news and the same personal appeals, with the result that after a certain time the living words, into which we had as it were transfused our hearts’ blood, were drained of any meaning. Thereafter we went on copying them mechanically, trying, through the dead phrases, to convey some notion of our ordeal.

From Albert Camus, The Plague

In Camus’ The Plague, the inhabitants of a plague-ridden town find the linguistic resources of ordinary life inadequate to their horrifyingly altered circumstances. But they mechanically go on using the old language, perhaps preferring its empty conventions to the terrifying gulf of silence. Camus’ tale of the struggle to bridge that gulf and to make meaning possible in a world where old vocabularies fail is a parable of the human imperative to give new life to our inherited languages.

Our linguistic resources are rich partly because they have been reshaped by each generation, each individual who struggles as do Camus’ townspeople to make sense of the constantly changing world we inhabit. Wittgenstein describes language as an old city, “a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of modern sections with straight regular streets and uniform houses.” But language not only

2. Id.
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makes it possible to speak about our world, it also helps to determine what we see in our world. If our linguistic inheritance enriches our lives, it also obscures our understanding of the ways in which our world has changed from the world our fore-mothers inhabited. So each of us must struggle to revivify our language, to adapt it to the changing nuances of our communal life. In so doing, we not only come to better understand our world, we also help to remake it.

It is necessary to challenge and reshape our common inheritance within the legal context as well. The genius of judicial decisionmaking may be its flexibility. But while judges do distinguish previous cases by pointing to subtle differences in facts or even context, the weight of history remains heavy. Even apart from the strict doctrine of precedent, received language and analyses give credence to certain understandings and undermine others. Within a legal community, certain ideas are more inviolable than others. The First Amendment is such an idea—a norm as powerful culturally as it is legally. But those in the academic world and beyond it have witnessed an increasingly divisive debate on hate speech. Despite powerful indications that the inherited language of the First Amendment obscures some essential features of the problem, judicial opinions continue to reiterate the traditional responses as if they remained unproblematic. As the hate speech debate illustrates, reshaping a powerful inherited language is difficult—its perspective appears neutral, its assumptions simply statements of the natural and unchallengeable.

Comparing the dominant discourse of hate speech with the alternative understandings that attempt to reshape that discourse suggests why the alternative understandings have been so ignored. But if justice requires coming to terms with the alternative point of view, then it remains necessary to ensure that the language of hate speech truly takes the alternative perspectives into account.

Contrasting the American approach to hate speech with the Canadian approach may prove a more fruitful means of beginning to rethink the dominant language of hate speech. If comparative jurisprudence cannot encourage compromise, it may nevertheless encourage the minimum that civility requires—conversation. Ultimately, even the differences in American and Canadian political culture that would make straightforward transposition unfeasible may be sources of illumination. Examining another’s culture often casts a new light onto our own, making us suddenly aware that the world we have constructed is neither natural nor

necessary. Though sometimes disconcerting, in such awareness lies the beginning of moral ambition.

II. THE AMERICAN NARRATIVE OF HATE SPEECH

A. The Definition of Hate Speech

An analysis typically begins with a description of the problem. But no pre-theoretical description exists for anything, much less for complex social and cultural phenomena. So, describing the problem already involves choices and commitments that favor a certain way of seeing the world, that make some arguments more persuasive than others, some cases more relevant, and some facts easier to "find." These may be the very choices we need to question most of all, yet their invisibility makes this difficult. For this reason, the task of viewing something through lenses other than the "natural" ones can be a valuable way to illuminate aspects of the problem that the received analysis renders invisible.5

According to the traditional First Amendment understanding, racist and other similar speech is treated as part of the problem of subversive advocacy.6 However, I will not adopt this "natural" classification and will instead focus on a narrower class of speech typically referred to as hate speech. Of course, this choice of a non-traditional classification also reflects certain value commitments.7


6. This term refers to that class of extremist speech which is aimed at undermining the prevailing political order. An example is found in the speech of the anarchists and communists who were so often the unsuccessful defendants in the early free speech cases. See Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919). An engaging social and political history of these early subversive advocacy cases, particularly Abrams, is found in RICHARD POLENBERG, FIGHTING FAITHS (1987).

Treating hate speech as a subset of subversive advocacy may be done consciously to point out the ways in which relevant similarities run throughout the broader class. See LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986). More commonly, however, discussions, including the judicial discourse addressed below, simply imply the continuities by focusing on the impossibility of finding any principled ground on which to distinguish hate speech from the rhetoric of the bona fide reformer. Ironically, even this approach concedes a relevant moral difference between hate speech and subversive advocacy, but then insists that this difference cannot be the basis of a legal distinction because it is too elusive.

7. Any classification has normative implications. The fact that a particular classification appears natural does not mean that it is a value-free choice. The fact that
Despite the fact that the traditional understanding treats racist and similar speech as a subset of the problem of extremist political speech or subversive advocacy, one can also find definitions of a narrower class of speech generally described as hate speech. Hate speech, as described in the discussions of freedom of expression, typically includes certain elements. Mari Matsuda’s definition of racist hate speech as a persecutorial hateful or degrading message of racial inferiority directed against a historically oppressed group contains the central elements typically found in definitions of hate speech. For example, the key elements of Professor Matsuda’s race-based definition are also present in that category of speech selected for prohibition in the international human rights instruments. Similarly, the German Criminal Code has a provision which makes punishable the dissemination of materials “which incite to racial hatred.” Professor Matsuda’s definition also contains the central elements of the anti-hate propaganda provisions of the Canadian Criminal Code which the Supreme Court of Canada recently reviewed in order to determine whether the provisions violate the constitutional guarantee of freedom of expression. Like Professor it seems so natural is simply testimony to its power. As Michel Foucault notes, “[P]ower is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide in its own mechanisms.” The History of Sexuality (Robert Hurley trans., 1978). An illustration is found in contemporary discussions of the so-called “politically correct” movement. In an intriguing twist of political history noted in Lee C. Bollinger, The Open-Minded Soldier and the University 1 (1992) (unpublished manuscript, on file at the University of Michigan), this “movement” is charged with McCarthyism because it attempts to impose “orthodoxy.” But there is a further irony in such a charge—the truly orthodox elements of this debate appear value-neutral precisely because they are so orthodox that they seem not to be choices or positions, but simply to be true. Indeed, it is only the very unorthodoxy of the so-called “P.C.” positions that render them sufficiently visible to earn the label “orthodox.” As Martha Minow points out, this invisibility is one of the prerogatives of power. Minow, supra note 5, at 73.

11. R. v. Andrews, [1990] 3 S.C.R. 870 (Can.); R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.). The companion case to these cases considered the constitutionality of federal human rights legislation which prohibited telephonic messages likely to expose a person...
Matsuda’s definition, the Canadian prohibition, upheld by the Supreme Court, focuses on hate speech directed against those members of society who have been disadvantaged in the sense that they are the targets of historical and social prejudice.

I will adopt similar terminology, using hate speech to refer to speech that is intended to promote hatred against traditionally disadvantaged groups. For that reason, I will also treat pornography as falling within the class of speech plausibly encompassed by the term hate speech. Although the international instruments do not prohibit the dissemination of materials which incite hatred against women, the most forceful recent critiques of pornography link it to hate speech.

B. The Official Narrative of Hate Speech

In the way that we speak about things, individually and socially, one can trace the shape of our deepest convictions. Examining the American jurisprudence on the regulation of hate speech reveals profound commitments. The rendering of the hate speech plot has its own distinctive habit. There is also regularity in the treatment of the “characters”—who is the “good guy,” who is the “bad guy,” and who is not a “guy” at all. And there are continuities in judicial language and in the way judges position themselves in relation to the hate speech problem.

or a group to hatred or contempt. See Canada Human Rights Comm’n v. Taylor, [1990] 3 S.C.R. 892 (Can.).

12. Not all aspects of the following discussion apply with equal ease to the problem of pornography. For instance, as a matter of constitutional doctrine, pornography is not viewed as an extension of the subversive advocacy cases. The different constitutional treatment arises, at least in part, because pornography is seen as commercial speech, while racist and similar speech are classified as political. However, as discussed below, many of the assumptions that are the legacy of the subversive advocacy cases also operate in the treatment of pornography; therefore, one finds significant continuities in how the issues are discussed.

1. THE PLOTS

The first modern hate speech case is Brandenburg v. Ohio.\textsuperscript{14} Brandenburg, a leader of the Ku Klux Klan, had been convicted under Ohio's Criminal Syndicalism statute of advocating the use of violence and assembling for such purposes. The conviction was based on a televised film of a Klan rally. The film showed hooded figures, some of whom carried firearms. In his speech, Brandenburg suggested that "revengeance" might occur if the white race continued to be suppressed. Participants at the rally also used very pejorative terms to refer to both blacks and Jews, advocating their return to Africa and to Israel. In a brief per curiam opinion, the United States Supreme Court reversed Brandenburg's convictions on the ground that the Ohio statute was unconstitutional. The Court held that a state could not proscribe advocating the use of force, except where it was intended to and likely to produce imminent lawless action. Consequently, Ohio's criminalization of "mere advocacy" and of assembly with others "merely to advocate" the use of force violated the First Amendment.

A more celebrated hate speech plot unfolds in the series of judgments surrounding the Skokie controversy.\textsuperscript{15} Frank Collin, the leader of the National Socialist Party of America, requested a permit for a march in front of the village hall of Skokie, a predominantly Jewish suburb of Chicago. Collin stated that he planned to have the marchers parade in Nazi-style uniforms which displayed the swastika. Marchers would also carry banners displaying the swastika and messages such as "White Free Speech."

\textsuperscript{14} 395 U.S. 444 (1969). I am not treating Beauharnais v. Illinois, 343 U.S. 250 (1952), as a modern hate speech case. Although the facts of the case fall within the definition of hate speech, the legal analysis differs. This is in part because Beauharnais pre-dated New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and in part because its validity has been directly questioned. See Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978).

\textsuperscript{15} This Article will refer collectively to the different court decisions arising from the Skokie controversy as the "Skokie cases." The plot of the Skokie cases illustrates the complex factual geography of a case. Even the apparently simple task of laying out the "facts" as "found" is a more constructive task than the notion of found facts suggests. As Nelson Goodman remarks, the case against "perception without conceptualization, the pure given, absolute immediacy, the innocent eye, substance as substratum, has been so fully and frequently set forth ... as to need no restatement here." NELSON GOODMAN, WAYS OF WORLDMAKING 6 (1978). In the context of the Skokie cases, Lee Bollinger notes that the "facts" of Skokie resemble a "hall of mirrors." BOLLINGER, supra note 6, at 26-27. Most perplexing of the facts "lost" in Skokie is the identity of the Nazi leader Collin, whose father was a Jewish survivor of Dachau. Id. at 27 (citing ARYEH NEIER, DEFENDING MY ENEMY 40 (1979)).
The Village of Skokie attempted to prevent this march in a number of ways. It sought an injunction. It also enacted three ordinances. The first ordinance required insurance and assurances that, among other things, the group would not incite hatred or hostility against persons because of their religious, racial or ethnic affiliation. The second and third ordinances criminalized dissemination of material intended to incite racial or religious hatred and prohibited the wearing of military-style uniforms. Ultimately, all of Skokie's regulatory efforts failed. The Illinois Supreme Court held that Skokie could not even enjoin the wearing of the swastika.\textsuperscript{16} The ordinances were also invalidated on First Amendment grounds in the Seventh Circuit.\textsuperscript{17} The United States Supreme Court refused to review these decisions.\textsuperscript{18} Although the courts left the Nazis free to march in Skokie, the Nazis never did so, marching instead in downtown Chicago.

Somewhat surprisingly, until 1992, the U.S. Supreme Court had not considered a hate speech case on the merits. Over twenty years of silence ended when, on June 22, 1992, the Supreme Court handed down its much-anticipated decision in \textit{R.A.V. v. City of St. Paul.}\textsuperscript{19} R.A.V. was one of several youths who had burned a cross on the lawn of a black family's home. One of the ordinances under which R.A.V. was charged prohibited the display of a symbol which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.\textsuperscript{20} The state supreme court had upheld

\begin{itemize}
\item\textsuperscript{16} Skokie v. National Socialist Party of America, 373 N.E.2d 21 (Ill. 1978).
\item\textsuperscript{17} Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978).
\item\textsuperscript{18} 439 U.S. 916 (1978) (Blackmun & White, JJ., dissenting).
\item\textsuperscript{19} 112 S. Ct. 2538 (1992).
\item\textsuperscript{20} R.A.V. was also charged, in Count I of the delinquency petition, with violating MINN. STAT. § 609.2231(4) (Supp. 1990), which proscribes racially motivated assaults. R.A.V. did not challenge this count. \textit{R.A.V.}, 112 S. Ct. at 2541 n.2. However, it is worth noting that the majority decision by Justice Scalia in \textit{R.A.V.} may in fact cast some doubt on the constitutionality of even the proscription of such crimes. This is because, like the criminalization of racially motivated harassment found unconstitutional in \textit{R.A.V.}, outlawing racially motivated assaults could also be deemed to select out certain proscribable conduct on the basis of nonproscribable content.
\end{itemize}

Relying on this kind of reasoning and on the majority decision in \textit{R.A.V.}, the Supreme Court of Wisconsin found a violation of the First Amendment where a hate crimes statute provided for an enhanced sentence if a defendant intentionally selected the victim because of the victim's race. \textit{State v. Mitchell}, 485 N.W.2d 807 (Wis. 1992). However, the Supreme Court of the United States recently reversed this decision. 113 S. Ct. 2194 (1993). In an opinion by Chief Justice Rehnquist, the Court distinguished motive from mere abstract beliefs and emphasized the traditional discretion given judges to consider motive in the process of sentencing. The Court also distinguished the ordinance at issue in \textit{R.A.V.} on the ground that while that ordinance was aimed explicitly at speech, the statute at issue in \textit{Mitchell} was aimed at "conduct unprotected by the First
the ordinance by construing it to extend only to "fighting words" within the meaning of Chaplinsky v. New Hampshire. The United States Supreme Court unanimously reversed, holding that the ordinance was "facially invalid." There were four separate opinions. Justice Scalia, speaking for the majority, held that even within the constitutionally proscribable category of fighting words, speech could not be selectively regulated on the basis of a "nonproscribable" message. Because the ordinance punished only a subset of abusive speakers—those speakers who were expressing views on "specified disfavored topics" such as race, color, creed, religion or gender—it violated the First Amendment. Justices White, Blackmun and Stevens each delivered separate opinions, but all concurred that the ordinance was overbroad, and therefore unconstitutional.

Other recent chapters of the hate speech story have focused on attempts to regulate racist and similar speech on university campuses. At the University of Michigan, racist incidents prompted the adoption of a policy prohibiting discrimination and discriminatory harassment. The policy sanctioned, in academic buildings, any expression that stigmatized or victimized an individual on the basis of certain enumerated characteristics, and that either threatened or foreseeably interfered with a student's education or other campus-related pursuits. The ACLU challenged the policy in the name of John Doe, a graduate student in biopsychology, on the ground that it prohibited expression protected by the First Amendment. District Court Judge Cohn held that the policy did violate the First Amendment because it was both overbroad and unconstitutionally vague. He noted that the obligation to ensure equal educational opportunities, while important, could not be purchased "at the expense of free speech."
More recently, Senior District Court Judge Warren held the regulation of hate speech at the University of Wisconsin to be unconstitutional. The university rule prohibited students from directing discriminatory epithets at particular individuals with intent to demean them and create a hostile educational environment. Like Judge Cohn, Judge Warren found that the rule was overbroad because it was not confined to speech within the fighting words exception to the First Amendment. He further found that the rule was vague and therefore could not withstand First Amendment scrutiny.

The impact of the First Amendment on the regulation of pornography was addressed in *American Booksellers Ass'n v. Hudnut*. In that case, Judge Easterbrook considered an Indianapolis pornography ordinance that defined pornography as the graphic sexually explicit subordination of women. Judge Easterbrook found that this definition did not come within the obscenity exception to the First Amendment since it did not meet the test set out in *Miller v. California*. In particular, he noted that the definition did not explicitly refer to prurient interests, to offensiveness or to community standards as required under *Miller*. Nor did the ordinance provide an exception if the challenged work, judged as a whole, had literary, artistic or scientific merit. Since the ordinance's definition of pornography was unconstitutional, the court also found unconstitutional its other provisions which contained various prohibitions and granted certain civil rights of action to persons injured as a result of pornography consumption.

2. THE CONTEXT

Of course, in recounting the plots of these cases, judges necessarily make decisions about how to tell the story, about which elements warrant attention and which do not. This process of constructing a story about particular facts inevitably involves choosing, from the universe of ways to understand any event, the appropriate context in which to situate it.

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26. Presumably, however, after *R.A.V.*, even if the ordinance falls within the fighting words exception, this will not be sufficient to ensure that it survives First Amendment scrutiny. According to the reasoning of Justice Scalia's majority opinion in *R.A.V.*, the ordinance would still be constitutionally suspect because of its underinclusiveness.
27. 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).
29. In this sense, critics who call on courts to contextualize their decisions seem to miss the essential point. Of necessity, any facts related by a court—or by anyone else—are put into a particular context, without which they could not be understood. What critics really seem to be asking of courts is not simply to pay attention to context but
The context which is chosen will largely determine what features of the event will be relevant. Thus, there is an important sense in which one determines the meaning of an event, and then makes one's account conform to it. This is not to imply manipulation or bad faith—it is simply the necessary process of creating some order out of the multifariousness of reality.

The choice of context is significant in the hate speech cases as well, for once the issue is situated in a particular way, certain understandings appear far more plausible than others. Certain facts immediately become relevant and thus susceptible to being found, while others appear irrelevant, and thus are more easily lost.

In the American hate speech cases, courts situate the problem in the context of subversive advocacy. Out of the complex factual geography of a hate speech case, this context highlights the conflict between the dissident individual speaker and the state. This contextualization was established in Brandenburg, which involved a criminal syndicalism statute similar to the statutes applied to anarchists and communists in the subversive advocacy cases. By emphasizing the origin of the statute, the Brandenburg Court made plausible its chosen contextualization of the problem. Thus, the Court subtly reinforced the link with the subversive advocacy cases by pointing out that the Criminal Syndicalism Statute was enacted in 1919 and was part of the coterie of wartime legislation enacted throughout the country. The Court implicitly justified its understanding of the problem by highlighting the dangerous nature of the legislation under which Brandenburg was charged. It accomplished this by reference to the use of such legislation in "thoroughly discredited" subversive advocacy decisions such as Whitney v. California\(^\text{30}\) and Dennis v. United States.\(^\text{31}\) Thus, in Brandenburg, the issue of hate speech was placed in the context of a history in which the government had systematically

\(^{30}\) 274 U.S. 357 (1927).

\(^{31}\) 341 U.S. 494 (1951).
silenced radical dissenters, dissenters that the more reliable light of history revealed as “puny.”

Brandenburg’s approach to situating the problem of hate speech has prevailed ever since, primarily through the invocation of precedent. So, throughout the hate speech decisions, courts simply cite as relevant those cases where the state regulated speech in an attempt to insulate itself from the criticisms of radical dissenters. As is all too common in legal opinions, courts do not find it necessary to explain why this particular jurisprudence is controlling, nor why other jurisprudence that is potentially relevant is not accorded similar weight. Cases in which the state sought to punish flag burners and civil rights advocates are thus treated as precedent directly applicable to the problem of hate speech.  

32. This is not to suggest that later courts did not also exercise some choice as to how they would understand the problem. But the weight of history is heavy, especially in the law, and it requires considerable imagination to see an old problem in an unorthodox light.

33. It could be argued that even apart from the similar regulatory underpinnings, situating the problem in this way would also have appeared natural for other reasons, among them the very structure of the Constitution and of the resultant litigation. However, one should be hesitant to overemphasize the extent to which either the Constitution itself or the First Amendment determines the way the problem will be characterized by a court. Such characterizations may, ex post facto, appear to be the only—the “natural”—way to understand a problem. However, a court always chooses how to depict a problem, even in the context of the First Amendment. For much of its history, the First Amendment’s guarantee of freedom of speech was thought to apply primarily to systems of prior restraint. In fact, the Supreme Court did not directly consider the First Amendment’s guarantee of freedom of speech until Congress enacted the Espionage Act of 1917 at the outset of World War I. Similarly, for much of this century the Supreme Court has tended to treat as “nearly frivolous” claims that content-based regulation of broadcasting infringe the First Amendment. LEE C. BOLLINGER, IMAGES OF A FREE PRESS 66-73 (1991). However, as Bollinger points out, that approach may be undergoing a change.

A similar trend may also be underway in the regulation of sexual harassment. Typically such regulation has not been thought to raise any First Amendment concerns. However, Judge Warren’s opinion in UWM Post could be read as obliquely casting some doubt on the constitutionality of Title VII’s regulation of harassment. Further, in R.A.V., the non-majority opinions evidence concern about the implications of the majority decision for the constitutionality of Title VII.

In the context of political speech as well, courts clearly do choose whether to characterize the speech as worthy of First Amendment concern or, for example, as a violent conspiracy. The power of rhetoric to make these characterizations appear natural is nicely illustrated in the language of the Court in Dennis v. United States, 341 U.S. 494 (1951). In a telling passage, Chief Justice Vinson upheld convictions for conspiring to advocate the overthrow of government:

The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action, coupled with the inflammable nature of world
The consequences of treating hate speech as an aspect of the problem of subversive advocacy are far-reaching. In particular, this characterization determines the facts that a court is most likely to find. Taking their cue from the subversive advocacy cases—not as judged at the time, but rather as seen from the more comfortable distance of history—courts deciding American hate speech cases focus on the conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.

In addition to its plausibly being characterized as a threat to the democratic order, some recent commentators have also suggested that hate speech is more appropriately described as racial harassment than as political speech. An illustration of this treatment of hate speech can be found in the overruled Minnesota Supreme Court decision in R.A.V. The Minnesota court upheld an ordinance which prohibited "bias-motivated disorderly conduct." In re R.A.V., 464 N.W.2d 507 (Minn. 1991), rev'd sub nom. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). After describing the "deplorable conduct" of R.A.V. and noting that "the burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy," id. at 508, the court held that the regulation was a permissible means of accomplishing the "compelling governmental interest in protecting the community against bias-motivated threats to public safety and disorder." Indeed, the court went so far as to state that it was "the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear." Id.

Another choice that is particularly important in cases involving the First Amendment is the crucial characterization of an activity as either "speech" or "conduct." For example, the characterization of the activity proscribed by the statute at issue in Mitchell as "unprotected" conduct, 113 S. Ct. at 2201, was vital to the holding that the First Amendment, and in particular the decision in R.A.V., did not make the sentence enhancement statute unconstitutional. The point seems to be that the legislature can punish motive (which is not, therefore, a constitutionally protected idea) if—and only if—it is related to conduct. But this fails to explain why something is or is not conduct. It is not entirely self-evident, for instance, why burning a cross on someone's lawn is "speech" rather than conduct. Nor for that matter is it clear that the reason someone commits a crime is a motive rather than an idea. Similarly, little guidance is found in the Court's quote from Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984), quoted in Mitchell, 113 S. Ct. at 2199, to the effect that special harms distinct from communicative impact deserve no constitutional protection. This assertion does little more than restate the Court's conclusion that some harms, some forms of violence, and some kinds of conduct are protected by the First Amendment, while others are not. The apparently neutral speech/conduct distinction provides little real insight into the constitutional issue.

The majority judgments in the subversive advocacy cases depicted the conflict as between dangerous revolutionaries and the free and democratic social order. See Dennis, 341 U.S. at 498. The anarchists and communists were therefore characterized not simply as enemies of the state, but rather as the enemies of a whole way of life. Unsurprisingly, suppression of their speech was found constitutional.
conflict between the oppressive state and the zealous dissident. As discussed below, both the emphasis on the continuities with subversive advocacy and the related focus on the state-individual conflict predispose courts to adopt particular characterizations of the actors involved. Even beyond this, assumptions about official psychology, imported from the contemporary reading of subversive advocacy cases, largely account for the preoccupation with line-drawing in the hate speech debate. Thus, the choice of a context in which to situate particular events is not only one of the least articulated choices in judicial deliberations about hate speech, it is also one of the most important.

3. THE CHARACTERS

The analogy to subversive advocacy implies that the Klansman and the reform-minded socialist, the Nazi and the draft resister, and the student sending computerized hate mail and the campus radical, are normatively equivalent. The bigot appears as the modern counterpart to the early revolutionary, whom the foolish nervous state once again attempts to brutally silence. Judges in the modern hate speech cases point out how puny the communists and anarchists look in retrospect, as if trying to assure the reader that the perspicuity of distance will reveal the Klan as similarly innocuous. By emphasizing the continuities with earlier cases, courts give credence to their depictions of both characters. The state appears dangerous and the speaker beleaguered. This time, however, courts insist that they will not lend their imprimatur to the silencing state.

a. The State

Much of the power of First Amendment rhetoric derives from the ominous language used to talk about the state. Throughout the judicial discussions, particular images recur. The “meddlesome” state is one such image. This state is commonly depicted as overreacting to a problem that is less egregious than it perceives, perhaps because it is bowing to

The construction of the anarchist and communist speakers as idealistic radicals is thus a recent reworking of legal history. This understanding is—as Justice Douglas emphasizes in Brandenburg—familiar from the famous dissents in the subversive advocacy cases (particularly those of Oliver Wendell Holmes), dissents which have since been embraced by a generation of courts and commentators.

35. Lee Bollinger nicely captures this premise about official psychology in his statement that “every government bears within its personality an atavistic longing to recapture the autocratic powers of its ancestors.” BOLLINGER, supra note 6, at 77.

36. See discussion infra note 68.
partisan political pressure to silence undesirable minorities, a central concern of the First Amendment. But courts also conjure up a second image—the "nightmare" state. This state is fueled by totalitarian ambitions which make a menace of even the most apparently benevolent official action.

(1) The Meddlesome State

Throughout the discussions of hate speech, one often has the sense that government is an overly zealous housekeeper. The implication is that, if given free rein, she will subordinate everything, including meaningful debate, to the exigencies of tidiness and order. In Brandenburg, for instance, the state "sweeps within its condemnation" speech which is "immunized" from governmental control (apparently a contagious disease). The implication that the state is busy cleansing public debate of the distasteful things that may upset the squeamish is also apparent in discussions in the Skokie cases. For instance, in the language of the Collin decision, Skokie's ambition to prevent the march is described as an attempt to create a "privacy zone that may be sanitized from the offensiveness of Nazi ideology and symbols." The Meddlesome State

Heightening the sense of the inappropriateness of government action—as if analogizing government to a woman obsessed with dirt were not enough!—is the depiction of the problem. In keeping with the housekeeping metaphor, judges intimate that hate speech is insignificant by treating it as a problem of sensibilities, and therefore actually quite trivial. If the government is an over-zealous housekeeper, the targets of hate speech are squeamish, finicky participants in the public world. For instance, the lengthy quotation from Cohen v. California, which the Illinois Supreme Court found "applicable" to the facts of Skokie, implies that the real problem is the fastidiousness of the audience. The speech is an "individual distasteful abuse of privilege"; the result of prohibiting it would be to cleanse public debate "to the point where it is grammatically palatable to the most squeamish"; and the real issue is simply individual

37. See, e.g., R.A.V., 112 S. Ct. at 2548 ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.").
38. Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978).
39. 403 U.S. 15 (1971). Cohen involved a war protester who was prosecuted for wearing a jacket displaying "Fuck the Draft" in the corridors of a court house. The Supreme Court found this prosecution an unconstitutional abridgement of Cohen's First Amendment rights.
"matters of taste and style." While the expression may be "distasteful," that is "simply" a matter of "personal predilections," and hence not appropriately a matter of legislative concern. When it frames the issue by asking when the speaker can "justify the initial intrusion into the citizen's sensibilities," the Illinois Supreme Court intimates that Skokie involves a version—albeit extreme—of the same problem as Cohen. Similarly, in Doe v. University of Michigan, the federal district court suggests that the reason that particular speech is regulated by the University policy is that it is "offensive to good taste."

Courts further the image of the meddlesome state by implying that if only hate speech could be seen from the more dispassionate judicial vantage point, its trivial nature would be apparent. Often, courts seem to be attempting to convince their audience to see the speech from that more "objective" point of view. The nature of this judicial point of view is apparent in the frequent use of the term "mere" and similar qualifiers—language which indicates that courts do not imagine hate speech from the perspective of the target, since a target would not describe it as "merely offensive." So, for instance, in Brandenburg the Court intimates that the legislature has overreacted by emphasizing that the statute punishes "merely advocacy" and assembly with others "merely to advocate the described type of action." Similarly, in Doe v. University of Michigan, the speech at issue is described as "the mere dissemination of ideas." In R.A.V., Justice Scalia indicates that part

41. Id. (quoting Cohen, 403 U.S. at 21). In the Seventh Circuit decision, the same passage from Cohen is cited with emphasis added to the sentence referring to personal predilections. Collin, 578 F.2d at 1206.
42. Skokie, 373 N.E.2d at 26.
44. This is not to imply bad faith, for the well-intentioned judge who feels that there is no alternative but to strike down the regulation may be attempting to console the targets of hate speech by pointing out to them how trivial that speech really is. And to the judge, Nazis and Klansmen may indeed appear a band of hapless ne'er-do-wells. However, as Martha Minow points out, an unnuanced assertion of "real" meaning may be dangerous and even oppressive because it conceals the fact of point of view and makes it difficult to challenge the absence of objectivity. Minow, supra note 5, at 46.
45. There is an interesting parallel in Fourteenth Amendment language. In discussing discriminatory impact, courts frequently modify descriptions of adverse impact with minimizing qualifiers like "mere" and "merely." See, e.g., McCleskey v. Kemp, 481 U.S. 279, 298 (1987); Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979). Once again, a moment's reflection indicates that a person who has lived with the particular discriminatory effects would never use such language.
46. 721 F. Supp. at 864 (emphasis added).
of the difficulty with St. Paul's regulation was that it prohibited not only fighting words that communicated certain ideas in a threatening manner, but also those that communicated in "a merely obnoxious" manner. Justice White also complains that while St. Paul's ordinance regulated some unprotected speech, it also "ma[de] criminal expressive conduct that causes only hurt feelings, offense or resentment." The image of the meddlesome state is also conveyed through descriptions of the speech which emphasize its triviality. Like the use of qualifiers, such descriptions also implicitly adopt a perspective at odds with that of the target. Thus, for example, Justice Douglas's concurrence in Brandenburg describes the proscribed activity in the subversive advocacy cases in the following terms: "[T]he threats were often loud, but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous." In Skokie, the Illinois Supreme Court invites a similar understanding of the speech which it describes as "trifling and annoying." Through the use of qualifiers, the court in Doe v. University of Michigan also intimates that the racial incidents that inspired the policy were overblown: "According to the University, in the last three years incidents of racism and racial harassment appeared to become increasingly frequent." But the court found no evidence to suggest that the incidents of racial harassment "were anything other than isolated and purposeless acts." Nor was the court convinced that such incidents "occur more frequently at the University than at other comparable institutions." Similarly, in UWM Post, the court mitigates the sense that the speech is harmful by insisting that the speech will not "necessarily" provoke a violent reaction. And in Hudnut, the court complains about the prospect of restricting speech that subordinates and "even simply presents women in 'positions of servility or submission or display.'" The above-noted reference in R.A.V. to conduct that causes "only hurt feelings" also adopts a vantage point that

47. 112 S. Ct. at 2549 (emphasis added).
48. Id. at 2560 (White, J., concurring) (emphasis added).
50. 373 N.E.2d at 24 (quoting Cohen, 403 U.S. at 25).
51. 721 F. Supp. at 854 (emphasis added).
52. Id.
53. Id. at 854-55. This comment once again suggests a vantage point far removed from that of the person experiencing the "incidents." To such a person it would be cold comfort indeed to point out that the incidents were no more common than at other institutions.
55. 771 F.2d 323, 328 (7th Cir. 1985) (emphasis added), aff'd, 475 U.S. 1001 (1986).
makes the regulation seem ridiculous.\textsuperscript{56} By assuming a perspective that makes the speech appear trivial, the courts imply that the actions of the regulatory state are unjustified, furthering the idea that the state is simply meddling where it does not belong.

Courts convey a similar impression of the state by describing the impetus behind hate speech regulation as favoritism or the creation of approved points of view. There is an echo of the language of faction\textsuperscript{57} in the suggestion that the only real distinction between the regulated speech and any other speech is the illegitimate preference of government for one private view over another. For instance, in \textit{R.A.V.} Justice Scalia insists, "The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."\textsuperscript{58} Similarly, the "bias-motivated" speech which the ordinance prohibits is routinely referred to as a "disfavored topic," a preference.\textsuperscript{59} The court in \textit{Hudnut} also characterizes the anti-pornography ordinance as the creation of an "approved" point of view.\textsuperscript{60} In this way, courts imply that the motivation behind the regulation of hate speech is flimsy, and that the state is simply being meddlesome or perhaps has been captured by a faction and is therefore acting to further narrow partisan purposes.\textsuperscript{61}

\textbf{(2) The Nightmare State}

If the state is often seen as zealously overreacting to a trivial problem, it is just as often shown in a more threatening guise. Thus, one also finds the image of a menacing and dangerous state. This state seems a blunt and clumsy—but deadly—weapon, an ambitious ideological tyrant insistent on dominating all aspects of individual life.

Courts create the sense that the state is menacing partly by employing language suggesting clumsy aggressiveness. Thus, for instance, in \textit{Brandenburg}, Ohio is censured for its statute's "bald definition of the

\textsuperscript{56.} 112 S. Ct. at 2560 (White, J., concurring).
\textsuperscript{57.} This suspicious view of politics seems to rest at least in part on a concern addressed in \textit{The Federalist} No. 10 (James Madison).
\textsuperscript{58.} \textit{R.A.V.}, 112 S. Ct. at 2545.
\textsuperscript{59.} \textit{Id}. at 2547-48.
\textsuperscript{60.} 771 F.2d at 328.
\textsuperscript{61.} Thus, for instance, in \textit{R.A.V.} Justice Scalia argues, "[T]he existence of adequate content-neutral alternatives [has the effect of] casting considerable doubt on the government's protestations that 'the asserted justification is in fact an accurate description of the purpose and effect of the law.'" 112 S. Ct. at 2550 (quoting Burson v. Freeman, 504 U.S. 8 (1992) (Kennedy, J., concurring)). Earlier in the opinion, Justice Scalia also worries that \textit{Chaplinsky}'s categorical exclusions from First Amendment protection may be used by the government as "vehicles for content discrimination." 112 S. Ct. at 2543.
crime. That punishing a leader of the Ku Klux Klan is an unlikely and heavy-handed exercise of the state's criminal law powers is apparent in the Court's description of a statute which "purports to punish" and "to forbid, on pain of criminal punishment." Justice Douglas also implies the state's aggressiveness in his insistence that the statute that here "confront[s]" the Court "falls within the condemnation" of the First and Fourteenth Amendments. Similarly the court in Doe v. University of Michigan creates the sense of a dangerously befuddled bureaucracy, simply "making up the rules as it [goes] along," oblivious to the hapless individuals whose lives it affects. And in R.A.V., Justice Scalia describes the regulation of speech as a "weapon."

This clumsy state is also dangerous, perhaps using the pretense of housekeeping as a convenient guise for more invidious ambitions. In the rhetoric of the courts, the state is portrayed as the real tyrant. The discriminatory actors are not the Nazis or the Klansmen, but rather the regulatory state. So, while the role of the court is to guard against "harassment and intimidation," the focus of judicial concern is not the Nazi harassment of the inhabitants of Skokie, but instead the government harassment of Nazis. Thus, the "ideological tyranny" against which the Seventh Circuit warns in Collin refers to the actions, not of the Nazis, but of the government. Because of this ideological tyrant's dangerous ambitions, allowing any distinctions based on the subject matter of the speech "launches the government on a slippery and precarious path" that inevitably poses a threat to the vitality of First Amendment rights. The
menacing nature of official action is also apparent in Doe v. University of Michigan, where the court emphasizes that the state’s bumbling exterior belies the machinery of officialdom that backs the state action, no matter how ill-advised.69 Thus the court contrasts the University’s ineffectual development and imperfect comprehension of the policy with its enforcement mechanisms, which seem a well-oiled machine “constitutionally indistinguishable from a full blown prosecution.”70

The state depicted in UWM Post is even more threatening, partly because the court invokes George Orwell’s 1984 image of the nightmare totalitarian state. The suppression of violent speech71 is transformed into “government thought control.”72 The image of a crassly utilitarian state coolly computing the “social utility,” the “value” and the “costs” of the


69. 721 F. Supp. at 868.
70. Id. at 866.
71. The University of Wisconsin rule was enforced, for example, against “John Doe,” a male student who screamed at a woman for approximately ten minutes, calling her a “fucking bitch” and a “fucking cunt” in response to comments the woman made in a school newspaper about the school’s athletic department. The court in UWM Post required the Board of Regents to vacate the disciplinary action taken against John Doe on the ground that it infringed his freedom of speech. Another student was disciplined for sending a message to an Iranian faculty member on the university computer system that stated “Death to all Arabs! Die Islamic scumbags!” See 774 F. Supp. at 1167-68.
72. 774 F. Supp. at 1174 n.9 (emphasis added). It seems ironic that when the courts are assessing the suppression of speech, they are willing to acknowledge the power of speech and the relationship between speech and thought, and even the relationship between speech and identity. According to this view, speech is not simply an isolated and insignificant event: it is constitutive of what individuals can do and even of what they can think. However, when it comes to considering the possibility that hate speech may affect the self-image of the targets and their ability to participate in the public world, courts seem to revert to the sense that language is of little consequence, and to the linguistic theory captured in the schoolyard aphorism “Sticks and stones may break my bones but words will never hurt me.” Perhaps this apparent inconsistency could be defended on the view that the only speech significant to one’s participation and sense of self is the speech that one is allowed to utter. Therefore, it might be said that the speech that is addressed to individuals has no effect on their development of a sense of self. However, this seems to require a strange and counterintuitive view of human nature. Undoubtedly, as discussed below, there is also at work a certain notion of power and freedom that regards the state as the only dangerous actor.
speech is also invoked to more fully detail the totalitarian spectre.73 A
like image of totalitarian menace is apparent in Hudnut's equation of the
regulation of pornographic speech with "thought control."74 Similarly,
in R.A.V., the truly discriminatory action is attributed to the regulator.
Particularly in Justice Scalia's majority opinion, the language sets up an
opposition between the person being discriminated against (the speaker)
and the person who is merely denied a preference or favoritism (the
family upon whose lawn the cross was burned).75 Not only does the
state play favorites; in so doing it also engages in "content" and
"viewpoint" discrimination, which give rise to the possibility of official
suppression, not only of speech, but also of ideas.76 It is the city
regulating the cross-burning that is accused of "hostility" and of
attempting to "handicap" the expression of particular ideas.77 Thus, the
Court warns the city that it cannot "license one side of a debate to fight
freestyle, while requiring the other to follow Marquis of Queensbury
Rules."78 Justice Scalia metaphorically places in governmental hands the
very weapons wielded by racist speakers when he insists in the last words
of his opinion that the government must not add "the First Amendment
to the fire."79 Implicitly, this imagined fire, ignited by state
discrimination and favoritism and fueled by individual liberties, would be

73. See id. at 1165-67. This maximizing language invokes the claim, familiar
from liberal political theory, that communal action is inherently suspect because of its
carelessness toward individual persons. See Ronald Dworkin, Law's Empire 208-19
(1986); Robert Nozick, Anarchy, State and Utopia 190 (1975); John Rawls, A
Theory of Justice 228-34 (1971). There is also an important linguistic dimension to
this debate. For example, once one describes the conflict as a contest between an
individual's "rights" and "mere" social "utility," the outcome seems virtually inevitable.
However, other plausible descriptions yield a far less certain outcome.
74. 771 F.2d 323, 328 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).
75. Justice Scalia implies that if the regulation is struck down, the African-
American family is simply being treated equally, since the regulation plays favorites by
creating "disfavored subjects." 112 S. Ct. at 2547. To some degree, the majority's
insistent description of the regulation in terms of favored and disfavored points of view
is explained by Justice Blackmun, who argues that the Court erroneously based its
decision on the issue of "politically correct speech." Id. at 2561 (Blackmun, J.,
dissenting). A milder form of the language of favoritism is also found in Justice Stevens'
general discussion of First Amendment principles. Id. at 2561-66 (Stevens, J.,
concurring).
76. Id. at 2545 (emphasis added).
77. Id. at 2549.
78. Id. at 2548. See also Justice Stevens' concurrence in which he contends that
particular scrutiny is required when "the legislature's suppression of speech suggests an
attempt to give one side of a debatable public question an advantage in expressing its
views to the people." Id. at 2568 (Stevens, J., concurring) (quoting First Nat'l Bank v.
Bellotti, 435 U.S. 765, 785-86 (1978)).
79. Id. at 2550.
vastly more destructive than a "mere" burning cross on someone's lawn.

(3) The Balance of Evils

Ultimately, by invoking the image of a state whose actions are bound to be menacing and dangerous, no matter how apparently innocent its motives, the courts rely on their own balance of evils. They suggest that no matter how dangerous the speech—and seen in an objective light it really is not very dangerous—the nature of state power means that any regulation is inevitably the more hazardous option. The Seventh Circuit's sense of the balance of dangers in Collin is eloquently captured in Judge Harlington Wood Jr.'s concurrence. He quotes Alexander Solzhenitsyn's Nobel Lecture of 1972—again implying subversive advocacy is the appropriate analogy—to make the point that while "words die away, and flow off like water—leaving no taste, no color, no smell, not a trace," censorship of speech does not "die away" but remains "a dangerous and unmanageable precedent in our free and open society." Similarly, in Doe v. University of Michigan, the court suggests that we cannot afford to forget that "the evil[s] likely to spring from violent discussion" are, irrespective of their superficial aspect, far less ominous than "the terrors of law." And, in UWM Post, the court invites us to see the lurking

80. Ironically, this reveals the consequentialist reasoning that underlies the apparently "liberal" principle of free speech. Under classical liberalism, individual liberty is normatively justified only within the confines of the harm principle. JOHN STUART MILL, ON LIBERTY 10-11 (Norton & Co. 1975) (1859). However, most commentators on contemporary American freedom of expression recognize that the current position cannot be justified on the ground that it conforms to the harm principle, because in fact some constitutionally protected forms of speech do inflict harm on individuals. It is largely for this reason that the slippery slope argument and its various relations assume such a dominant position in discussions of freedom of expression. These arguments are essentially consequentialist in nature since they amount to the claim that even if hate speech does harm particular targeted individuals, it cannot be regulated because to do so would fatally undermine vital community values—democracy in particular. The result, in political theory terms, is to impose costs on particular individuals and groups in order to secure ends valued by the community. But this is exactly the kind of utilitarian calculus that the courts appear to think they are rejecting. Undoubtedly, this calculation is made more acceptable because the harms of hate speech tend to be minimized. Nonetheless, the implication is that individuals must bear those injuries, because society cannot afford to regulate them. This seems to be just the kind of carelessness toward persons for which liberals attack utilitarians. Yet the courts here invoke these claims in liberalism's name.

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spectre of state power behind superficially unproblematic individual situations. While such individual instances of "thought control" may not seem dangerous, together they "will work to dissolve the great benefits which free speech affords." The Court also insists in R.A.V. that the "danger of censorship" is so great that any content-based regulation will be viewed with great suspicion. Similarly, Justice White justifies the exceptional nature of the overbreadth doctrine by arguing that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." 

That the courts rely on their own utilitarian calculus is also apparent in their paradoxical insistence that it is precisely the fact that government cannot officially suppress ideas that separates the United States from the Nazi and totalitarian regimes advocated by the proponents of hate speech. Courts accomplish this displacement of the more obvious link between fascist regimes and hate speech by arguing that racist and fascist speech—no matter how odious to individuals—must be tolerated in the interests of democracy. Thus, in Hudnut the court insists:

Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

In a similarly intriguing move, the Seventh Circuit in Collin upheld the right of Nazis to propagate their racist ideas by saying that it is the American constitutional system which "protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life in the Third Reich." In R.A.V., the majority also evokes the "specter" of totalitarianism through

84. 112 S. Ct. at 2549.
85. Id. at 2558 (White, J., concurring) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)). It is worth noting what the subversive advocacy analogy obscures here—the possibility that racist speakers may mute the legitimate speech of their targets.
86. So, for example, one might plausibly think that those who propagate opinions based on ideas such as racial supremacy and limited civil and political rights would have obvious connections to fascism and Nazism. According to this view, it could be argued that a liberal democracy differs from Nazi Germany and other racist regimes precisely because in such a democracy no one needs to fear being harassed, intimidated, or threatened with the removal of civil and political rights because of their race or religion.
87. 771 F.2d at 328.
88. 578 F.2d 1197, 1201 (7th Cir. 1978).
its concern that "the Government may effectively drive certain ideas or viewpoints from the marketplace." In this way, courts imply that the long-range view of things—a view which they are uniquely well-situated to adopt—will reveal that the true source of danger is not individual speech, no matter how odious, but rather the suppression of ideas by the ambitious, self-serving state.

b. The Speaker

The depiction of the speaker in the American hate speech cases contrasts sharply with the characterization of the state. While the state appears menacing, powerful and intrusive, the speaker seems idealistic, earnest and harmless. This characterization of the speaker is facilitated because, as noted, the courts minimize the dangers of the speech. The use of minimizing adverbs, together with the fact that the problem is characterized as one of sensibility, points to the target, not the speaker, as the real difficulty. The language of favoritism also helps to lend credence to the notion that the speaker is essentially innocuous. The effect is not only to imply that official action is unwarranted, but also to cast the speaker in a more positive light.

The language used to describe the speakers also tends to inspire compassion for them. Courts achieve this partly by describing the speech and the speaker in very general rather than specific terms during the course of the analysis. The general terms chosen by courts typically have positive connotations, evoking respect and compassion for the speakers. For instance, in Skokie, the swastika makes its appearance as "symbolic political speech intended to convey to the public the beliefs of those who display it." The use of this "symbol" is justified because "the wearing of distinctive clothing" is "symbolic expression." Nazism is described as a "thought or philosophy." Similarly, the Seventh Circuit describes the activity of the Nazis in very general and approbatory terms: "a silent march, attended only by symbols and not by extrinsic

89. 112 S. Ct. at 2545 (citations omitted).
90. I refer specifically to the course of the analysis because, as Lee Bollinger discusses in the context of the Skokie cases, hate speech opinions tend to have a distinctive structure. BOLLINGER, supra note 6; see also infra note 113. Thus, it is necessary to distinguish the analysis itself from the "personal" statements which often bracket the legal analysis. In the text, the term "analysis" refers only to those parts of the opinions where the courts actually undertook the constitutional analysis of the speech and not to the bracketed statements of personal opinion.
91. 373 N.E.2d 21, 24 (Ill. 1978).
92. Id. at 23.
conduct offensive in itself." The swastika is transformed into the exercise of a “cognate” right, akin to “pure speech”; “a party flag.” Similarly, the court states in UWM Post that the epithets must be protected because they express “the speaker’s feelings regarding persons of a different race, sex, religion, etc.” and thus have emotive value. And, as noted, in R.A.V. the majority consistently refers to the hate speech regulated by the ordinance as a “specific disfavoured topic” and as a “particular idea.”

Interestingly, these general descriptions also frequently invoke religious imagery. In Brandenburg v. Ohio, Mr. Justice Douglas’s concurrence invokes religious language to generate a feeling of profound respect for the speaker: “The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of

93. Collin, 578 F.2d at 1206.
94. Id. at 1201.
95. 774 F. Supp. at 1175.
96. 112 S. Ct. at 2549.
97. Although it is obviously beyond the scope of this paper, the parallels between the role of religion in traditional societies and the role of freedom of expression in American political culture merit further discussion. As this Article points out, courts often use religious language when discussing the events of the hate speech cases.

But beyond this, freedom of expression sometimes seems to have quasi-religious status in the sense that it is a matter of faith, the unquestionable first premise, valuable in and of itself regardless of its consequences. (Although judges do also discuss the consequences of abridging speech, many of the consequentialist claims which form the heart of the slippery slope argument seem somewhat untenable. BOLLINGER, supra note 6.) In Hudnut—as well as in other cases—the commands of the First Amendment sometimes seem as rigid and unfathomable as those of the Old Testament God of Job:

Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail.

Hudnut, 771 F.2d at 323. Viewed in this light, it does not seem accidental that the ringing rhetoric of courts in hate speech cases venerates freedom of expression, for this is how the followers learn to find the lessons of a sometimes incomprehensible faith in the mundane events of political life.

Like religion, the First Amendment seems to play a crucial role in political culture and in the identification of the national identity. The court in UWM Post identifies free speech as foremost among the “God-given” rights that the “infant nation rallied to.” 774 F. Supp. at 1181. Similarly, as noted above, courts describe freedom of expression as the essential feature that separates the United States from totalitarian regimes. Thus, to the extent that Americans view themselves as more committed to freedom and more willing to risk the consequences of freedom than other Western democracies, BOLLINGER, supra note 6, at 8, 23, the First Amendment seems a powerful touchstone of contemporary national identity.
belief and conscience." 98 A similarly religious image of purity and conviction is found in the Seventh Circuit decision in *Collin*, which characterizes the proposed Nazi march as the “most pristine and classic form” of the exercise of First Amendment rights. 99 Religious language makes other appearances in the hate speech opinions. For instance, Justice Douglas argues that the Court has never been “faithful” to Justice Holmes’s dissent in *Gitlow v. New York*. 100 And judges who experience anti-free-speech impulses feel the urge to “confess” their illiberal sins. 101 Interestingly, in *UWM Post* the court identifies the speaker with religion by describing the right of free speech as a “God-given ‘unalienable right.’” 102

Courts also create a sense of sympathy for speakers by using the language of rationality. A somewhat astonishing illustration of this is found in the *UWM Post* decision. The students punished under the university’s rule—students who screamed racist and sexist epithets, often while intoxicated or fighting—were described as probably trying “to inform their listeners of their racist or discriminatory views.” 103 A student who described an Asian-American as “the reason that the country is screwed up” and who said that “some day the Whites will take over” probably “wished to convince his listener that he did not belong in America.” 104 A similar theme is found in *Doe v. University of Michigan*, where the court links the speakers with rational debate by describing hate speech as “dissemination of ideas,” and by insisting that the meddlesome state has no business policing the university setting, because “the free and unfettered interplay of competing views is essential to the institution’s educational mission.” 105 By using verbs such as “inform” and “convince,” and descriptions which equate hate speech with rational debate, courts underscore their positive depiction of the speaker.

The overbreadth and vagueness arguments so often relied upon in hate speech cases also enable courts to depict the proponents of hate speech in a more positive light. By imagining the “chilling effect” that could inhibit future speakers from voicing their thoughts, the courts transform Nazis and Klansmen into the constitutional representatives for all individuals who may want to engage in legitimate, but potentially

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100. 268 U.S. 652 (1925), cited in *Brandenburg*, 395 U.S. at 452.
101. 578 F.2d at 1200.
102. 774 F. Supp. at 1181.
103. Id. at 1175 (emphasis added).
104. Id. at 1167, 1175 n.10 (emphasis added).
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controversial, speech. Thus, the Seventh Circuit in Collin raises the possibility that the ordinance could "criminalize dissemination of The Merchant of Venice or a vigorous discussion on the merits of reverse racial discrimination."106 Similarly, in Doe v. University of Michigan, the court identifies the speaker's interests with the interests of future "[s]tudents of common understanding," who will be forced to guess at whether comments about controversial issues will be sanctionable.107 And the court in Hudnut imagines a myriad of unsuspecting individuals—from Homer to Brian dePalma—who could be silenced by the ordinance. In his speculations, Judge Easterbrook places rhetorical emphasis not on hard core pornographers, but rather on a more meritorious group, when he suggests that the ordinance could extend "from hard core films to W.B. Yeats' poem ‘Leda and the Swan’, . . . to the collected works of James Joyce, D.H. Lawrence and John Cleland."108 In this way, courts do more than just direct attention away from the relatively unsympathetic racists, pornographers and drunken students who tend to be the actual speakers, and toward a more worthy class of potential speakers.109 By making the proponent of hate speech the indicator of society's commitment to the airing of all ideas, courts also transform him into the touchstone of democracy.

4. JUDICIAL VOICE

Although the message of hate speech is deeply disturbing, the judicial voice that dominates the hate speech decisions—recent ones in particular—is a surprisingly untroubled one. The effect of this is to distance both the judge and the reader from the facts and results of the cases.110 Perhaps unsurprisingly, the vision of the judicial task that

106. 578 F.2d at 1207.
107. 721 F. Supp. at 867.
108. 771 F.2d at 327.
109. It is interesting to note here that the dissents in the Canadian hate speech cases also rely to a large degree on the danger that legitimate speech will be caught by an imprecise line. R. v. Keegstra, [1990] 3 S.C.R. 697, 797 (Can.) (McLachlin, J., dissenting). The dissents in these cases also make use of many other techniques from American case law, including the closely related slippery slope argument and the description of the impugned speech in very general terms.
110. Professor Joan Shaughnessy's observations on judging seem apposite here. She notes that judges and lawyers are often required to inflict pain, and comments, "It is difficult to inflict pain, and the more intimately we know another person, the more difficult it becomes." Professor Shaughnessy also suggests that this results in the use of certain professional distancing mechanisms. Joan Shaughnessy, Gilligan's Travels, 7 J. L. & INEQ. 1, 23-24 (1988). Similarly, in his new novel, BRIGHTNESS FALLS (1992), Jay McInerney observes that beginning with the individual leads to compassion, while
emerges from these cases is a mechanistic one, as judges rhetorically imagine their unambiguous tasks: finding the facts, applying the law, conforming to the Constitution's demands.

To the extent that judges do betray any emotion about the nature of hate speech, they do so not in the analysis itself, but rather at the margins of the analysis, opening and perhaps closing with statements of their personal responses to the speech. The strongest judicial statements about the disturbing nature of hate speech are found in the Skokie decisions. For example, the Seventh Circuit in Collin begins with a statement of its "personal" views that Nazi "beliefs and goals are repugnant to the core values held generally by residents of this country, and, indeed, to much of what we cherish in civilization." The note of personal anguish is even more audible in Judge Pell's final words. The language conveys a real sense of pain and perhaps even resignation:

It is a source of extreme regret that after several thousand years of attempting to strengthen the often thin coating of civilization with which humankind has attempted to hide brutal animal-like instincts, there would still be those who would resort to hatred and vilification of fellow human beings because of their racial background or their religious beliefs . . . .

However, on this point, the decisions arising from the Skokie controversy seem the exception rather than the rule. In most of the other hate speech cases, the "confession" is either non-existent or much more pro forma. Commonly, courts refer only very briefly to the starting with the group leads to violence.

Throughout the hate speech cases—both American and Canadian—a similar distancing mechanism seems at work. Judges respond to the concerns of the losers by minimizing the adverse results of their decisions, and by refusing to grant them personhood. To some extent this helps to explain why, as noted below, the American and Canadian hate speech cases are similar in that they both seem to have room for only one individual. Although the individual granted personhood is of course different in the Canadian and the American cases, in both cases that individual is the person who is not injured by the cases' results. Calabresi makes a related point concerning how the rhetoric of Roe v. Wade placed the losers outside the legal community. GUIDO CALABRESI, IDEAS, BELIEFS, ATTITUDES, AND THE LAW (1985).

111. 578 F.2d at 1200.
112. Id. at 1210.
113. Lee Bollinger notes how the Skokie cases were characterized by "the designated 'legal' analysis . . . bracketed by . . . clear uncomplicated 'personal' resolutions." BOLLINGER, supra note 6, at 28. He also suggests that the very presence of such words is a "form of official censure and thus a kind of coercion and punishment." Id. at 29. This aspect of the Skokie decisions (especially the Collin decision in the Seventh Circuit) is crucial to Bollinger's persuasive argument that the then-current
American treatment of extremist speech can be understood as a means of collective development of a much-needed capacity for tolerance. BOLLINGER, supra note 6. However, he notes that while the results and some of the rhetoric can be understood in these terms, many elements of the discourse are unequal to the task of promoting tolerance. He also points out the inadequacy of traditional freedom of speech language for realizing this aim. See id. at 218.

There may be reasons for doubting whether the discourse, as it has developed since 1986, can be adequately understood in terms of Bollinger’s tolerance thesis. It is noteworthy that the Skokie cases form the basis of Bollinger’s discussion. However, those cases differ significantly in several respects from the way that the problem of hate speech arose and was dealt with by the courts during the 1980s and early 1990s.

One obvious and important difference is the group that is being targeted and the relationship of public sympathy to that group. The Nazis in Skokie targeted the Jewish community—an act properly seen as horrific by the population at large in light of the Second World War and the fate of the Jewish people at the hands of the Nazis. So perhaps in those cases, deciding in favor of free expression was a vote for tolerance, because it required all individuals to challenge the intolerant impulses which they undoubtedly harbored towards the Nazis. Indeed, Bollinger identifies as significant to the tolerance-promoting function of the ruling in Skokie the fact that Anti-Semitism in American society is not “of such magnitude, or so pervasive, as to transform toleration into an act of implicit condonation.” Id. at 199. He further notes that the situation might be different, for example, in Germany.

But what are the implications for this understanding given that the majority of the later hate speech cases involved situations in which the targeted groups mainly consisted of people of color, particularly African-Americans? Indeed, what of Brandenburg, which involved the Klan? Given the history of discrimination and segregation, and given that many proponents of hate speech use it as a privatized means of segregation, trying to remove people of color from university campuses and particular neighborhoods, it seems at least plausible that allowing such speech does not promote any meaningful form of tolerance. This is not to say, of course, that everyone who defends the right of the Klan to propagate its message supports its vision of society. But the fact that the lives of many African-Americans are distorted by the horror of hate speech seems relatively untroubling to many people, and for this reason it is unclear whether refusing to allow the regulation of the modern manifestations of hate speech can in fact be understood in terms of the promotion of tolerance.

The rhetoric of the later hate speech opinions also raises other questions about how effectively the opinions promote any kind of tolerance. Unlike the Skokie opinions, where the courts seem genuinely troubled by the speech and by the effects of their ruling, the later opinions seem much more blasé about the issue, typically devoting only a cursory sentence or two to the pernicious nature of such speech. Indeed, the sense one gets from these later opinions is not that the result is troubling in any significant way, but rather that the result is simply obvious and inevitable. In this sense, the later hate speech opinions seem to exhibit more of the rhetoric that Bollinger identifies as subversive of the potential tolerance function of the cases. This, combined with very limited reliance on the personal statements of concern that Bollinger identifies as crucial to increasing the social capacity for tolerance, id. at 232, suggests that the later hate speech opinions may be less effective as means of promoting tolerance than are the Skokie cases, and therefore, are harder to justify on that ground.
recognition by using the disjunctive to juxtapose their condemnation of the speech with the virtues or demands of the First Amendment, creating the sense that the problems arising from the speech are not matters of serious concern. In *Doe v. University of Michigan*, for instance, Judge Cohn devotes two cursory sentences to the “unfortunate fact” of conflict between liberty and equality and the “sometimes painful” task of judges who must mediate.114 Similarly, in *UWM Post* the court states, “The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. *But* freedom of speech is almost an absolute in our land . . . .”115 And while the court in *Hudnut* explicitly accepts that pornography harms women, in an accompanying footnote it sounds much more equivocal, questioning the evidence and noting that judges are required to “accept the legislative resolution of such disputed empirical questions.”116 Similarly, in *R.A.V.*, Justice Scalia’s majority opinion betrays little in the way of personal reaction to the cross burning. The most extended reference appears in the last sentences of his opinion, and it contains the standard disjunctive trailer: “Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. *But* St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”117 However, perhaps the most striking failure to address the troubling nature of hate speech is found in *Brandenburg*. Particularly in light of *Skokie*, it seems surprising given the facts of *Brandenburg* that none of the opinions in *Brandenburg* even refer to the aspects of hate speech which the courts found so troubling in the *Skokie* ordeal.

116. 771 F.2d 323, 329 n.2 (7th Cir. 1985), aff’d, 475 U.S. 1001 (1986).
117. 112 S. Ct. 2538, 2550 (1992) (emphasis added). The other opinions in *R.A.V.* mention the Justices’ views of hate speech somewhat more frequently and in slightly more detail. However, the disturbing nature of this speech, and the implications of upholding it in general (as opposed to simply on the majority’s rationale) are not topics of serious discussion in any of the opinions, with the exception of the opinion of Justice Stevens. Unfortunately, because Justice Stevens simply relies on Justice White’s opinion with regard to the overbreadth argument, one has little sense of how his view of the speech interacts with his rationale for striking down the ordinance. *Id.* at 540. So, for instance, while Justice Stevens finds that it was “eminently reasonable and realistic” for St. Paul to conclude that the harms caused by racial, religious, and gender-based invective justify a particular form of regulatory response, he makes no attempt to reconcile this with his somewhat surprising single clause conclusion that “were the ordinance not overbroad,” he would vote to uphold it. *Id.* at 340, 345. And unlike the *Skokie* courts, neither he nor any of his fellow Justices express any particular regret or concern over the result of striking down the ordinance (although they do express concern at how the majority achieves this result).
When judges deciding hate speech cases do engage in more substantive personal confessions, they distinguish sharply between what they personally feel, and what they may constitutionally act upon. So, for instance, after confessing to personal hostility to the Nazis' speech, the Seventh Circuit in Collin insists on the limits of what can be addressed in the judicial role: "As judges sworn to defend the Constitution, however, we cannot decide this or any other case on that basis . . . . But our task here is to decide whether the First Amendment protects the activity in which the appellants wish to engage, not to render moral judgment on their views or tactics." On this point, the subversive advocacy cases seem to have special relevance for judges. It is illuminating, for instance, that the court states that "[i]deological tyranny, no matter how worthy its motivation, is forbidden as much to appointed judges as to elected legislators." Viewed in retrospect, the subversive advocacy cases tell the sad tale of judges too caught up in the fervor of the times to see the situation for what it really was. The legacy of this history resonates throughout the hate speech cases. While the predominant justifications for judicial review suggest that the rights of beleaguered minorities are more appropriately entrusted to the courts than to political institutions, the subversive advocacy cases counsel otherwise. The premises about official psychology that inform judicial review are normally taken to apply primarily to legislators. However, the subversive advocacy cases suggest that, with regard to political speech at least, judges are as susceptible as legislators to getting caught up in the tenor of the times and acting on the irrational fears of the majority.

The substantive lesson that judges glean from the subversive advocacy cases is that they should always uphold the right to speak, no matter how odious the speech may appear, for once a line is drawn, judges are as likely as legislators to abuse it. The somewhat ironic result of this view is that judges use very passivist arguments (that they are

118. 578 F.2d 1197, 1200-01 (7th Cir. 1978) (emphasis added).
119. Id. at 1200. Here again the characterization is critical. By calling the attempts to prevent the Nazi march through Skokie "ideological tyranny," the court chooses a description that seals the constitutional fate of the ordinances. Interestingly, the court also invokes the anti-consequentialist notion that the ends never justify the means. However, as noted above, there is an irony in this, for ultimately the conclusion that even harmful speech must be left unregulated has to find its justification in precisely the kind of consequentialist reasoning that the courts seem to believe they are rejecting.
prohibited from doing anything no matter how odious the speech may appear\(^\text{121}\) to achieve what are essentially very activist results (striking down the legislation of what are typically democratically enacted bodies). Thus, it is as if Judge Cohn is cautioning himself when he opens the opinion in \textit{Doe v. University of Michigan} by quoting from Lee C. Bollinger to the effect that, since judges are equally as likely as legislatures to want to suppress speech,\(^\text{122}\) “[w]e must give judges as little room to manoeuvre as possible and, again, extend the boundaries of the realm of protected speech . . . in order to minimize the potential harm from judicial miscalculation.”\(^\text{123}\) Courts imply that future institutional embarrassments like the “discredited” history of the subversive advocacy cases can be avoided only by refusing to allow any proscription of speech on the basis of its message. This theory seems to provide the underpinnings of the judicial refusal to be moved by moral outrage.\(^\text{124}\)

\(^{121}\) The implication is that the judicial record can remain unblemished only by striking down all regulation of speech. However, the suggestion that striking down legislation avoids institutional entanglement seems untenable. For instance, the fate of the “activist” \textit{Lochner}-era decisions illustrates that history may come to be as critical of striking down legislation as of upholding it. And, as the Supreme Court noted in a different context in \textit{Miller v. Schoene}, 276 U.S. 272 (1928), refusing to regulate and thereby assigning matters to private ordering is as much a public choice as is regulation. In the context of speech as well, the court that strikes down regulation is choosing to favor the determinations of private ordering. This choice may be defensible, but it cannot be defended on the ground that it is not a judicial choice.

\(^{122}\) An early statement to this effect is found in Justice Holmes’ famous dissent in \textit{Abrams v. United States}, which describes the impulse to intolerance as a “logical” one. 250 U.S. 616, 630 (1919).

\(^{123}\) 721 F. Supp. at 853 (quoting \textit{Bollinger, supra} note 6, at 78). It is worth noting, however, that Judge Cohn’s quotation seems to overlook the fact that Bollinger is simply describing one dominant First Amendment model. In fact, on the very next page, Bollinger says of this model that it is “seriously overplayed in twentieth-century life” and “out of proportion to its reality as an actual problem.” \textit{Bollinger, supra} note 6, at 79.

\(^{124}\) Lurking behind much of the rhetoric in the hate speech cases is the discredited history of the \textit{McCarthy}-era. An interesting parallel can be found in the ACLU’s own discredited history during this era. During the 1950s, the ACLU attempted to keep Communist influences out of the organization and even informed the FBI of the left-wing activities of members of state affiliates of the ACLU. \textit{Bollinger, supra} note 6, at 94 (quoting \textit{Nee, supra} note 15). It has been argued that “the context of that inner history and recent revelations about this rather sordid period in ACLU history during the \textit{McCarthy}-era can help place the fanaticism of its present leadership on the Skokie affair in proper perspective. The ACLU leadership does not want to make the same mistakes . . . .” Irving L. Horowitz & Victoria C. Bramson, \textit{Skokie, the ACLU and the Endurance of Democratic Theory}, 43 \textit{Law \& Contemp. Probs.} 328, 344 (1979). A similar desire to avoid repeating the errors of history also seems at work in the hate speech cases.

The institutional history of the Fourteenth Amendment provides another interesting parallel. In the context of substantive due process, it has been noted that the
“intransigence” of a majority on the *Lochner* era Court “tended to discredit the whole concept of judicial supervision”—that “extremism had bred extremism.” Robert L. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 *SUP. CT. REV.* 34, 42-43. And, in regard to the First as well as the Fourteenth Amendments, judicial fear of repeating the mistakes of a previous era has perhaps given rise to its own brand of extremism.

But part of what is troubling, at least in the case of the First Amendment, stems from another potential lesson of the subversive advocacy cases. In those cases, as the rhetoric of the courts makes terrifyingly clear, the judges themselves felt very threatened by the Communist menace. But the very nature of hate speech and the demographics of judicial power means that a judge will rarely feel personally threatened by hate speech. Thus, it is all too easy for those who will never be their targets to find the Nazis and the KKK puny and ridiculous, although it seems plausible that these groups are in fact more dangerous than the American communists and anarchists ever were.

This problem arises, at least in part, because the comfort of distance inevitably affects the estimation of the dangers of speech. BOLLINGER, *supra* note 6. If the structural nature of hate speech means that it will be directed against those who are typically excluded from positions of power, Matsuda, *supra* note 8, and if those in positions of power will find speech sufficiently dangerous to suppress only when they feel personally threatened, then the contemporary approach to the regulation of hate speech may give us the worst of all possible worlds. It may be that when speech attacks or threatens those in positions of power, it will be seen as more than “merely offensive” and thus sufficiently dangerous to be suppressed. And when speech attacks those without social or institutional power, it will be constitutionally protected because it will not appear dangerous to the decisionmakers.

Indeed, this is one way to read the recent Supreme Court decision in *State v. Mitchell*, 113 S. Ct. 2194 (1993). It does not seem entirely beside the point that the facts of *Mitchell* involved an attack on a fourteen-year-old white boy by a group of young black boys and men. It is in this context that the Supreme Court finds itself able to sufficiently imagine the perspective of the victim to find that bias-motivated crimes “inflict distinct emotional harms on their victims.” *Id.* at 4578. And here as well the Court finally seems able to identify the point at which the chilling and overbreadth arguments become too speculative to remain within the bounds of rational concern. *Id.* One could argue perhaps that the decision is simply a reflection of the racist nature of the Court. However, a subtler—though not unrelated—analysis is also available. Perhaps what makes the Court willing to consider the perspective of the victim is not just who the victim is, but rather that, as the racial dynamics in this particular crime indicate, judges do not enjoy the same comfort of distance in hate crimes cases as they do in hate speech cases. For if they could never imagine hate speech being directed against them or those they most care about, as the facts of *Mitchell* indicate, there is no such immunity from hate crimes (so one might argue that the very speech/conduct characterization privileges the interests of the powerful). It is not surprising then that in the case of *Mitchell*, the activity was seen as dangerous, labelled as “conduct,” and deemed susceptible to regulation in a way that cross burning was not. This is not, of course, in any way to condone what Mitchell and his companions did. However, it does not seem accidental that the Court is somewhat incredulous about the claim of harm when it is the kind of harm that could never happen to them, and sympathetic when it is the kind of harm that could befall them and those they care about.
Perhaps because judges deciding hate speech cases feel that they must set aside their "personal" views in order to do their institutional duty, the judicial voice in these cases has its own distinctive timbre. It is a voice that tends to create psychic distance between judges—who must override their merely personal responses—and the results of the case. Several of the already noted aspects of the official narrative contribute to this. Partly because they insist on a distant, apparently objective point of view, judges deciding hate speech cases seem removed from the events they recount. The judicial descriptions of both the speakers and the victims also create a sense of detachment. This arises because the effect on the target is typically discounted by judicial rhetoric and because the speech and the speaker are described in general, even philosophical, terms. Even the overbreadth and vagueness arguments suggest that judges inhabit a remote vantage point from which future cases and potential litigants may be seen, and the attendant dangers accurately assessed.

Courts find other ways to achieve psychic distance from results about which they may feel very ambivalent. In doing so, they imply that the role of the judge is simply to find and apply the law, not to make substantive value judgments. Courts suggest that the responsibility for the result lies elsewhere by removing themselves from the role of actor (either by placing others in the grammatical position of subject or by means of the passive construction) and by using the language of compulsion. In the Skokie case, the Supreme Court of Illinois describes itself as "bound" by decisions of the Supreme Court which "compel" them to permit display of the swastika; they are "precluded" from extending Chaplinsky. The Supreme Court precedents are "controlling" and so the court here is "constrained,"

But this suggests that contemporary First Amendment analysis may not provide much protection for speech that threatens decisionmakers in the way that the communist and anarchist speech of the subversive advocacy cases threatened them. This at least should be cause for discomfort. One might feel that this unsavory possibility would be less likely to occur if judges showed a greater awareness of the extent to which their own estimation of the speech is just as situated as the estimation of the targets, and then struggled to resolve the resulting tension.

125. The tendency of the Skokie courts to describe the result as predetermined is discussed in BOLLINGER, supra note 6, at 29-35. Bollinger suggests that this may spring partly from the "individual needs of the judges to dissociate themselves from the beliefs they are in the name of the First Amendment about to protect." Id. at 29. The rhetoric of the hate speech cases in general seems to derive at least in part from a similar impulse. As noted above, Professor Shaughnessy also discusses the professional distancing mechanisms which may be used when it is necessary to inflict pain. Shaughnessy, supra note 110.

126. 373 N.E.2d 21, 23 (Ill. 1978).
127. Id.
although reluctantly, to allow display of the swastika.\textsuperscript{128} The Illinois court also insists that it is the United States Supreme Court that has "permitted speakers to justify the initial intrusion into the citizen's sensibilities," intimating that the Illinois court has no control over or responsibility for the result.\textsuperscript{129} Similarly, the Seventh Circuit in \emph{Collin} describes its result as "dictated" by the need to protect dissident minorities.\textsuperscript{130} In \emph{UWM Post}, the court discusses the screening of content-based restrictions, which the Constitution "demands."\textsuperscript{131} And in \emph{R.A.V.}, particularly in Justice Scalia's opinion, the First Amendment itself frequently occupies the subject position in the sentence: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."\textsuperscript{132}

In addition to employing the language of compulsion, courts in hate speech cases also dissociate themselves from their decisions by the somewhat mechanical invocation of precedent. As is so often the case, the courts fail to address the substantive question of what makes a particular precedent applicable and normatively persuasive.\textsuperscript{133} Instead, judicial rhetoric implies that either precedent or the Constitution demands a particular resolution of the issue. Courts also import some of the more contentious language directly from other cases, rather than taking responsibility for the troubling phrases themselves. This is most apparent in the Illinois Supreme Court decision in \emph{Skokie}, which is composed primarily of quotations, largely from \emph{Cohen}, interspersed with a few sentences by the court.\textsuperscript{134} The court largely leaves it to the reader to assess what about \emph{Cohen} makes it so dispositive. Similarly, in the Seventh Circuit's decision in \emph{Collin}, the references to "mere public intolerance," silencing "simply as a matter of personal predilections," the "cognate," "pristine and classic" rights of the Nazis, are all direct quotations from former cases.\textsuperscript{135} The court in \emph{Doe v. University of Michigan} cites from \emph{Papish v. University of Missouri}\textsuperscript{136} to make the point that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name

\begin{thebibliography}{99}
\bibitem{128} \textit{Id.} at 25, 26.
\bibitem{129} \textit{Id.}
\bibitem{130} 578 F.2d at 1210.
\bibitem{131} 774 F. Supp. at 1181.
\bibitem{132} 112 S. Ct. at 2547.
\bibitem{133} Bolinger notes this difficulty in the \emph{Skokie} cases. \textit{Bollinger, supra} note 6, at 31.
\bibitem{134} 373 N.E.2d at 23-24.
\bibitem{135} 578 F.2d at 1201, 1206.
\bibitem{136} 410 U.S. 667, 670 (1973).
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alone of conventions of decency." As noted above, in *R.A. V.* Justice Scalia quotes from *Burson v. Freeman* to cast doubt on the good faith of St. Paul’s motivation.

Legalistic interpretations are another means by which courts detach themselves from their decisions in hate speech cases. Thus, the decisions often seem surprisingly devoid of any discussion of the normative issues. The *UWM Post* case is an occasionally shocking illustration of this legalistic approach. This is partly because the court undertakes its analysis in a completely bland way, creating a curious disjunction between the tone and the content of the analysis. The court argues that “it is ambiguous as to whether the regulated speech must actually demean the listener and create an intimidating, hostile or demeaning environment ... or whether the speaker must merely intend to demean the listener ...” Similarly, the court states that “The comment ‘you’re just a dumb black, woman or homosexual’ and the epithets ‘nigger,’ ‘bitch’ and ‘fag’ all express a speaker’s opinions regarding a characteristic of his or her addressee.” Perhaps the most dramatic illustration of this is the discussion of the fighting words doctrine. After looking to the dictionary to discover that to intimidate means to “discourage or threaten” and to demean is to “debase in dignity or stature,” the court apparently concludes that, by definition, an intimidated or demeaned individual is unlikely to retain enough self-esteem to start a fight. The court then reasons that if such speech “is unlikely to incite violent reaction,” prevention of an “intimidating” or “demeaning” environment cannot come within the fighting words exception to the First Amendment.

138. 112 S. Ct. at 2550; see discussion supra note 61.
139. Indeed, partly for this reason, hate speech decisions sometimes seem disappointing. The long-anticipated decision in *R.A. V.* is a case in point, for apart from the concurrence of Justice Stevens, the Court really seems to avoid rather than address the difficult issues. In this sense, one sometimes finds in the hate speech cases a strange echo of the rhetoric of the fugitive slave and related cases. For example, despite the oft-quoted passage from *Dred Scott v. Sanford*, 60 U.S. 393, 404-07 (1857) (insisting that slaves cannot claim any of the rights and privileges of citizenship), in those cases courts more often relied on technical and formalistic analyses to arrive at their decisions, blandly referring to human beings as “property of this description.” *Scott v. Negro Ben*, 10 U.S. (6 Cranch) 3 (1810). I remember reading with shock the first such cases I encountered. Instead of the obviously vicious rhetoric I expected, I found something vastly more chilling: dry, formalistic “applications” of the rules of evidence and the principles of statutory interpretation.
140. 774 F. Supp. at 1180.
141. *Id.* at 1177 n.11.
142. *Id.* at 1172 (quoting *The American Heritage Dictionary* (2d ed. 1976)).
The court in Hudnut occasionally relies on a similarly formalistic analysis. So, for instance, the court complains that the ordinance cannot come within the obscenity exception to the First Amendment since it does not explicitly refer to the “prurient interest” or to “offensiveness.” This is in spite of the fact that the ordinance defined pornography as “the graphic sexually explicit subordination of women,” including mutilation, degradation, and humiliation.

Formalistic and detached analysis is also a dominant feature of the recent decision in R.A.V. Aside from Justice Stevens’ concurrence, the opinion reads like a narrow academic squabble of little interest or concern to ordinary citizens. The footnotes exchanged between Justices Scalia and White are particularly striking for their petty and petulant tone. And the opinion of Justice Scalia is especially dominated by technical—even labyrinthine—reasoning. His response to the important argument that the selectivity of the ordinance was justified because it was designed to protect the particularly vulnerable targets of historical discrimination is but one illustration:

Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to the secondary effects within the meaning of Renton.

143. See supra text accompanying note 28 (discussing Miller v. California, 413 U.S. 15 (1973)).

144. 771 F.2d 323, 324 (7th Cir. 1985), aff’d, 475 U.S. 1001 (1986).

145. 112 S. Ct. at 2549. This provides an interesting contrast to the warm reception given in Mitchell to a similar argument that bias-motivated conduct results in greater social harm. See 113 S. Ct. 2194, 2201 (1993); see also supra note 124.

Another particularly impenetrable piece of reasoning is the following argument by Justice Scalia:

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of protection within the class.

112 S. Ct. 2545-46. Similarly dense prose is present elsewhere. “Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the speech.’” Id. at 2546 (citing Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986)). It is therefore not surprising that Justice White refers to the Court’s “arid, doctrinaire interpretation.” Id. at 2560. However, Justice White’s own opinion is not
As in *UWM Post*, the tone of this response seems at odds with the nature of the argument raised by the city of St. Paul. But the rhetoric is so successful at putting the facts of the case at a distance that it costs the reader some effort to keep in mind what exactly is at issue.

To the extent that the hate speech cases betray any judicial emotion, that emotion focuses on the glories of freedom of expression, not on the troubling effects of hate speech. For instance, hate speech opinions frequently close with reminders of the great principles that lie behind the protection of the repugnant and apparently worthless speech at issue in such cases. The Seventh Circuit’s decision in *Collin* ends with two such statements, one by Judge Pell, and a separate statement by Judge Harlington Wood quoting Alexander Solzhenitsyn.\(^{146}\) Similarly, *Doe v. University of Michigan* closes with a quote from Thomas Cooley,\(^{147}\) and *UWM Post* ends with a reference to the “founding fathers” and the “God-given inalienable rights” of free speech.\(^{148}\) In these and similar comments scattered throughout the other decisions, the precedents are venerable and the language lofty. The references to, and quotations from, the founding fathers invest the superficially none-too-noble events of the hate speech case with a sense of circumstance and tradition. The ringing rhetoric also imbues apparently trivial events with an air of significance. These statements are not only the justifications courts give for their decisions, but also the lesson courts hope to convey—that great principles like freedom of expression are forged in mundane and even ignoble moments of history. And in reciting this, courts are not simply instructing their readers, they are also relearning the elusive lessons of the First Amendment themselves.

**C. The Unofficial Narrative**

Heavenly hurt it gives us;
We can find no scar,
But internal difference
Where the meanings are.\(^{149}\)

Reading the official narrative of hate speech, particularly its most recent chapters, one would think that the issue of hate speech was uncontentious—a straightforward working out of legal doctrine. But the

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147. 721 F. Supp. at 869.
148. 774 F. Supp. at 1189.
untroubled language of the official narrative belies the fractious debate that has occupied the academic world. Particularly noteworthy are the accounts of the self-titled "outgroups" or "outsiders," which strenuously posit themselves as preferable versions of constitutionally relevant reality. They focus on the plight of the targets of hate speech—a plight that they claim is all but ignored in the official narrative. Yet these alternative accounts are largely absent from judicial deliberations. To begin to understand this, it is necessary to examine what these ignored perspectives try to convey, and how they attempt to do so.

The heart of this unofficial narrative is the plight of the target. As with all attempts to elaborate a non-dominant point of view, the unofficial narrative must work hard simply to make its world view understood. By describing the effect of hate speech in detail, the unofficial narrative hopes to portray the world as the targets of hate speech experience it. The unofficial narrative, therefore, chronicles the pain of hate speech by

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150. In his thoughtful 1991 article on the regulation of racist speech, Robert Post lists no less than 25 recent articles on the issue of the constitutionality of the regulation of racist speech. Even this is by no means a complete record of the recent literature on the subject. Post, supra note 68, at 267-68.

151. Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2412 (1989). Delgado defines an outgroup as "any group whose consciousness is other than that of the dominant one." Id. at 2412 n.8.


153. See, e.g., Delgamuukw v. The Queen, 79 D.L.R. 4th 185 (Can. 1991). This controversial British Columbia Supreme Court decision, dealing with aboriginal land claims, provides an excellent illustration of the difficulties of the "unofficial" narrative. At a conference held on this case, the Hereditary Chiefs and elders of the Gitskan people discussed having to prove that their culture existed. As they watched their culture on trial, trying to prove that it existed according to the common law, they described the experience as painful, insulting and at times even comical. They noted how they had to commission evidence and draw genealogies. The difficulty they faced is apparent in this comment by Miluulak, a Gitskan Hereditary Chief:

Our people have been asked over and over: "How can you substantiate who you are? Who are you to say you have ownership of the territories?" The answer is clear. We have ownership by what we call Ayook Niiye'e. It is the law of our grandfathers and the first law that our people have is called, Ayook'm Simoquit Gimlahax, which we call our relationship with the almighty, who is the grandfather of the heavens.

INSTITUTE FOR RESEARCH ON PUBLIC POLICY, ABORIGINAL TITLE IN BRITISH COLUMBIA: DELGAMUUKW V. THE QUEEN 58 (Frank Cassidy ed., 1992). Disappointingly but perhaps unsurprisingly, the Chief Justice of the British Columbia Supreme Court found that the Gitskan people had not made out a land claim according to the principles of English common law, which he believed clearly governed the case. 79 D.L.R. 4th at 185. This aspect of Delgamuukw was recently overturned by the British Columbia Court of Appeal. Delganuukw v. The Queen, 104 D.L.R. 4th 470 (Can. Ct. App. 1993), leave to appeal granted, 109 D.L.R. 4th, at vii (1994).
situating the isolated racist acts in a different context—the context of the experiences of a hate speech target. As the unofficial narrative describes it, this context includes not only widespread discrimination against the targets of hate speech, but also violence—violence which is often intimately linked to the words and symbols of hate. The hope of the unofficial narrative is that, once so situated, the nature of the injuries inflicted on the victims of hate speech—and willed by the perpetrators—will be more apparent.

The unofficial narrative describes, as one of the most distinctive and profound harms of hate speech, the denial of the target's humanity. It stresses that this attack on the person is fundamental: "To be hated, despised and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel most pain."\(^\text{154}\) This injury is not the fleeting harm of offensive words. Rather, it inflicts psychological wounds that create "lifelong feelings of inadequacy and inability to experience inner joy at one's achievements and abilities."\(^\text{155}\) And perhaps, partly in an effort to encourage a more sympathetic response, this account often emphasizes the especially devastating effects of hate speech on children.\(^\text{156}\)

The unofficial narrative also chronicles how hate speech constricts victims' lives and silences them. Authors point out that hate speech is often a punishment for targets presuming to go where they do not belong.\(^\text{157}\) These accounts describe the diminished personal liberty, as well as the feelings of isolation, that targets of hate speech suffer as a result of such speech. The damage is lasting and even material. In the

\(^{154}\) Matsuda, supra note 8, at 2338. Richard Delgado similarly notes that a racial insult is "always a dignitary affront." Delgado, supra note 68, at 143.

\(^{155}\) Delgado, supra note 68, at 146.

\(^{156}\) Delgado explains that children who are the targets of discrimination tend to suffer from self-rejection and all of the difficulties that accompany such feelings. Id. at 146-47. Charles Lawrence also points out that the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954), recognized the impact of this harm on the lives of innocent children when it repudiated the message of segregation, a "message that black children are an untouchable caste, unfit to be educated with white children." Lawrence, supra note 68, at 439. Perhaps most disturbing of all, Mari Matsuda describes how a group of Southeast-Asian-American children were routinely spat upon and taunted as they walked home from school in Boston. Matsuda, supra note 8, at 2330. And, when writers recount their own experiences of hate speech, they often describe childhood events. See, e.g., Lawrence, supra note 68.

\(^{157}\) See, e.g., Delgado, supra note 68; Lawrence, supra note 68; Teresa Scassa, Violence Against Women in Law Schools, 30 ALTA. L. REV. 809, 819 (1992). These authors suggest that the fact that the university—long the bastion of white male power—is one of the current loci of hate crime activity is no accident. Nor is it circumstantial that hate speech is so often directed against an employee in a newly integrated—race and/or gender—workplace, or against a minority family moving into a predominantly white area.
unofficial narrative, victims do not merely feel bad or offended—they quit or lose jobs, drop out of school, avoid certain public places and otherwise attempt to organize their lives to avoid being targeted with hate speech.

In the unofficial narrative, the prevalence of hate speech not only excludes individuals but also forces them to minimize the extent to which they are noticed and targeted in a world where they are considered outsiders. For example, Mari Matsuda describes the silencing effects of hate speech on targets, pointing out that the targets often curtail their own exercise of speech rights in an effort to avoid receiving hate messages. Charles Lawrence also notes that “[w]hen racial insults are hurled at minorities, the response may be silence or flight rather than a fight, but the preemptive effect on further speech is just as complete as with fighting words.” Similarly, Richard Delgado comments that children who are the targets of racial insults tend to “withdraw into moroseness, fantasy, and fear.” In the context of pornography, Catherine MacKinnon argues that pornography silences the voices of women, but notes the difficulty of demonstrating this given that “silence is not eloquent.” By linking violence and silence, the unofficial

158. Matsuda, supra note 8, at 2337.
159. Lawrence, supra note 68, at 452. It is somewhat ironic that the very same argument that was used by the court in UWM Post to justify refusing to treat fighting words and hate speech as co-extensive categories is used by Lawrence to try to convince the courts that the fighting words doctrine is underinclusive and should be extended. As noted above, the court in UWM Post concluded that since people who were demeaned and degraded would not be likely to fight back, the regulation of harassment could not be justified on the basis of the fighting words exception. 774 F. Supp. 1163, 1172 (E.D. Wis. 1991). However, Lawrence’s underinclusiveness argument, while morally compelling, fails to account for the fact that the fighting words argument purports not to protect the dignity or humanity of particular individuals nor to encourage speech, but rather simply to preserve the public interest in social order. Lawrence does, however, try to identify a public interest in repressing racist speech in his later discussion of the implications of Brown v. Board of Education, 347 U.S. 483, for regulation of racist hate speech on campuses. Lawrence, supra note 68.
160. Delgado, supra note 68, at 147 (citing KENNETH B. CLARK, DARK GHETTO 65 (1965); MARTIN DEUTSCH, THE DISADVANTAGED CHILD 106 (1968)).
161. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, supra note 13, at 206. In a similar vein, Teresa Scassa’s analysis of violence against women in law schools recounts Sheila McIntyre’s discussion of how women students reacted to attacks by male students on feminist professors. In McIntyre’s words, “[t]he women [in the class] felt attacked, shocked and silenced . . . . They no longer felt it safe to speak, and they feared that even if they did raise feminist concerns and I validated their viewpoint, I would be targeted for more male student abuse.” Scassa, supra note 157, at 826 n.46 (quoting Shelia McIntyre, Gender Bias Within the Law School: “The Memo” and Its Impact, 2 CAN. J. WOMEN & L. 362, 376 (1987)). McIntyre also notes that this incident prompted some women students to contemplate leaving law school. Id.
narrative tries to make visible these significant absences, and to stress that, as Adrienne Rich says, "[I]n a world where language and naming are power, silence is oppression, is violence."\textsuperscript{162}

The speaker is also cast in a very different light in the unofficial narrative. He is not an idealistic dissident, but a violent hate-monger. The alternative accounts give credence to this depiction of the speaker by adopting a very different rhetorical technique. While the official narrative describes the speech in very general terms, the unofficial narrative focuses on very specific hate speech incidents, and on the effect of hate speech on the targets. For instance, Mari Matsuda begins her article on racist speech with descriptions of three incidents of racist hate speech.\textsuperscript{163} Similarly, Charles Lawrence opens his article with a "Newsreel" that describes a number of hate speech incidents, interspersed with the traditional First Amendment justifications for holding that such speech cannot be constitutionally prohibited.\textsuperscript{164}

The unofficial narrative also attempts to undermine the official characterization of the speakers as idealistic radicals by linking hate speech with a now-discredited system of official discrimination, thus exposing the speakers' explicitly racist motives. For example, Mari Matsuda describes a series of "pranks" that are clearly inspired by segregationist motives, and which include the use of swastikas, burning crosses and other KKK symbols to terrify individuals and to inhibit integration in employment settings and in housing.\textsuperscript{165} Similarly, Delgado and Lawrence note how the effect of hate speech replicates official segregation and yields the same benefits for the powerful.\textsuperscript{166} Lawrence makes the most explicit connection on this point, arguing that \textit{Brown v. Board of Education}\textsuperscript{167} mandates some regulation of racist

\textsuperscript{163} Matsuda, supra note 8, at 2320.
\textsuperscript{164} Lawrence, supra note 68, at 431-34.
\textsuperscript{165} Matsuda, supra note 8, at 2327-29.
\textsuperscript{166} Lawrence, supra note 68, at 475-76 (citing Richard Delgado, Address at the State Historical Society, Madison, Wisconsin (Apr. 24, 1989)).
\textsuperscript{167} 347 U.S. 483 (1954).
speech. By associating the effect of hate speech with the continued prevalence of racism and sexism, the unofficial narrative seeks to show that, as Catherine MacKinnon puts it, hate speech is "not at all divergent or unorthodox. It is the ruling ideology."

The unofficial narrative also draws attention to the close connection between hate speech and acts of discrimination-motivated violence. In this way, it hopes to shed doubt on the official narrative’s easy dichotomy between violence and "merely offensive" hate speech. Thus, Mari Matsuda describes the connection between violent speech and violent acts by telling of the brutal murders of Chinese-Americans, of the harassment of Southeast-Asian-American school children, of KKK vigilante patrols harassing Japanese shrimpers, and of the firebombing of houses and the vandalizing of synagogues. Patricia Williams explicitly challenges the comfortable liberal distinction between discrimination and violence, arguing that "[t]he attempt to split bias from violence has been this society’s most enduring and fatal rationalization." And Derrick Bell insists there is a link between racism and a history "gory, brutal, filled with more murder, mutilation, rape, and brutality than most of us can imagine or easily comprehend."

The unofficial narrative stresses the continuity between violent racist practices and hate speech by drawing attention to the symbolic connotations of hate speech. It chronicles how speakers use symbols to evoke the larger social and historical practices of hatred and exclusion. How else can the persistence of cross-burning be explained? As a symbol, its power derives from its ability to summarize a history of violence, and it is used by the Klan for exactly that reason. The Nazis showed similar attentiveness to the potent message of a historical symbol when they indicated they wanted to march through Skokie in uniforms festooned with swastikas—this was not a fashion imperative, but a statement with historically potent meaning. And, as feminists point out, it is no accident that hate speech about women is dominated by images of

168. MacKinnon, Feminism Unmodified, supra note 13, at 205.
169. Matsuda, supra note 8, at 2330.
172. See, e.g., United States v. Lee, 935 F.2d 952, 956 (8th Cir. 1991) (Lonetta Miller, a 71-year-old Black woman testified that a burning cross was used as a "promise" of violence. She further stated that "[f]rom what I [understood] a lot of the cross burnings in the south . . . preceded hangings and that sort of thing."), quoted in Supreme Court Brief Amicus Curiae of the National Black Women’s Health Project in Support of Respondent at 7, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675).
sexual violence. By linking hate speech to a context of pervasive and often life-threatening violence against the targets and to a history in which the targets were brutalized as well as excluded from the privileged ranks of legal personality, the unofficial narrative challenges the official construction of the perpetrator as a misguided but harmless eccentric who ought to be shielded from the coercive power of the state.

In addition to these differences in content, there is also a striking contrast between the voice that dominates the official narrative, and the one that dominates the alternative accounts. While the voice of the official narrative is notable for its detachment, the dominant voice in the alternative accounts is passionate and personal. While the official narrative describes the speech in very general terms, the alternative understandings rely on very specific descriptions of hate speech. The acts, the symbols, the group affiliations and the motivations of the perpetrators of hate speech are all described in detail. Similarly, in contrast with judicial attempts to set aside personal responses and adopt a more “objective” point of view, the alternative accounts place great emphasis on the personal stories of the targets of hate speech. Because sharing these painful and humiliating experiences exposes the writers’ vulnerability, the unofficial narrative speaks primarily in an anguished personal voice.

This focus on personal experiences is not accidental.

173. Dworkin, supra note 13; MacKinnon, Feminism Unmodified, supra note 13, at 171-72; Scassa, supra note 157. Those who object to Brett Easton Ellis’ recent novel, American Psycho (1991), argue that the graphic and pervasive violence against women which forms the central plot of that work amounts to hate speech against women.

174. Charles Lawrence, for instance, shares a personal story of the power of a children’s rhyme to undo all of his careful work to construct himself as “belonging.” The rhyme begins “enie, menie, minie, mo,” apparently innocent words that instantly transform him from a popular schoolyard athlete to an “other, non-human, prey to be captured.” Lawrence, supra note 68, at 482. Lawrence recounts other personal experiences and speaks candidly of the injury inflicted by words that remind the world—and himself—that he is fair game for attack, words that “evoke the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.” Id. at 461. Similarly, Mari Matsuda describes both the childhood experience of being labelled with a racial slur and using her “best, educated inflection” to try to emphasize her humanity when confronted with anti-Asian pests. Matsuda, supra note 8, at 2320; Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation-The James M. Mitchell Lecture, 37 Buff. L. Rev. 337, 360 (1988-1989). And Patricia Williams tells of her rage and humiliation at being turned away from a New York City boutique despite the fact that it was obviously open and contained several white shoppers: “I was enraged. At that moment I literally wanted to break all of the windows in the store and take lots of sweaters for my mother. In the flicker of his judgmental grey eyes, that salechild had reduced my brightly sentimental, joy-to-the-world, pre-Christmas spree to a shambles.” Williams, supra note 170, at 128.
Critics of existing understandings view sympathetic recountings of an alternative, submerged point of view as powerful tools for change.\textsuperscript{175}

### III. CHALLENGING ESTABLISHED LANGUAGES

The plea of the unofficial narrative is passionate and often eloquent, the story it tells moving and painful. Yet it seems to have gone unheard. It is not simply that the results of recent American hate speech decisions are not in accord with the narrative’s recommendations. Despite the unofficial narrative, recent decisions seem even less attentive than their predecessors to the difficulties of using the inherited language of subversive advocacy to address the hate speech problem.\textsuperscript{176} But this is puzzling. Why do the courts fail to even acknowledge the plea of the targets? Examination of the alternative accounts of hate speech in light of the official discourse suggests a number of reasons why the alternative accounts are unlikely to bring about a successful challenge to the official understanding of the problem.

\textsuperscript{175} Delgado, supra note 151, at 2413-16; Mari J. Matsuda, \textit{When the First Quail Calls: Multiple Consciousness as Jurisprudential Method}, 11 \textit{WOMEN'S RTS. L. REP.} 7 (1989); Matsuda, supra note 8; Minow, supra note 5, at 68; Kim L. Scheppele, \textit{Foreword: Telling Stories}, 87 \textit{MICH. L. REV.} 2073 (1989). As noted above, Toni Massaro discusses some of the difficulties with the emphasis that “storytellers” such as Delgado tend to place on awakening empathy. Massaro, supra note 29.

In the literature on women’s issues, one often finds this kind of anecdotal argument, often in the first person, and often in a similar attempt to make the world viewed as it is lived by those who are not in positions of power. For instance, Kim Scheppele describes how women try to challenge law’s institutional denial of the female point of view in rape law by recounting their own experiences of rape. She notes that Susan Estrich begins her book \textit{REAL RAPE} (1987) with an account of her own rape. In the course of this reference, Kim Scheppele describes her two experiences as the victim of sexual assaults. Kim L. Scheppole, \textit{The Re-Vision of Rape Law}, 54 U. CHI. L. REV. 1095, 1113 n.63 (1987). Martha Mahoney’s article is a particularly interesting use of narrative to illustrate how the pressures of the legal system and the categories and labels it utilizes make it difficult for battered women to convey their experiences without having them fundamentally distorted. Martha R. Mahoney, \textit{Legal Images of Battered Women: Redefining the Issue of Separation}, 90 MICH. L. REV. 1 (1991). Weaving together personal accounts and critical examinations of scholarly materials, Mahoney carefully reconstructs the way that women’s lives look. In doing so, she aims to make the rationality of women’s actions and the complexity of their motivations more apparent than they appear when women are pressed into the position of explaining themselves primarily by responding to the apparently simple question, “Why does she stay?”

\textsuperscript{176} As noted above, the courts in the \textit{Skokie} cases seemed more aware of the difficulties with the position they ultimately took, and more attentive to injuries that such a decision could inflict.
A. The Unofficial Narrative's Challenge

Like any other language, the established language of hate speech tends to make certain dimensions of the problem apparent and to obscure others. Partly because hate speech is seen in the context of subversive advocacy, the sympathetic imagination of the official narrative is captured by the plight of the fervent speaker silenced by the oppressive state. The pain of the target of hate speech is invisible—as if the judicial imagination only has room for one individual capable of experiencing human suffering. So, no matter how compelling the version of the target's experience, the official discourse reacts as if it is simply beside the point. The official narrative's other characteristic response to the possibility that hate speech inflicts real pain is to suggest that the locus of the difficulty is in fact the hypersensitivity of the target. But if the suffering of the target is not seen as worthy of serious judicial attention, then the alternative accounts—which build their strategies for change on empathy for the plight of the target—seem likely to go largely unheeded.

There are other structural impediments to hearing the targets' stories. In the official narrative, judges feel they must set aside their personal responses to the plight of the targets of hate speech in order to fulfill what they see as the imperatives of their institutional role. But this suggests another serious problem with the unofficial narrative's strategy of gaining

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177. The way in which the official and unofficial narratives treat the chilling argument provides an interesting illustration of the kind of claims that a discourse renders plausible and implausible. The claim that imprecise regulation will chill the speech of those who may want to engage in legitimate debate is treated as an uncontestable tenet of First Amendment discourse. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2550 (1992) (White, J., concurring). In contrast, the notion that hate speech may “chill” the target's exercise of speech or other political rights tends to be greeted with incredulity by the same people who find the former argument sufficiently compelling to justify striking down regulation. Ultimately, as discussed below, the difference between these responses rests on a deeper constitutional theory which is generally left unarticulated.

178. The official narrative's treatment of the target of hate speech frequently exhibits the twin interpretive dangers that so often bedevil cultural anthropology. Clifford Geertz warns of these dangers when he insists that we must keep in mind that we are surrounded “neither by Martians nor by less well got-up editions of ourselves.” CLIFFORD GEERTZ, LOCAL KNOWLEDGE 16 (1983). Within the official discourse of hate speech, the suggestion that targets of hate speech experience real injury and pain as a result of the speech is often received with frank incredulity—an experience that seems improbable and unreal precisely because the judge cannot imagine having it. But just as often, courts insist that the targets of hate speech are no different than “the rest of us,” since we all have to live in a world where we are confronted by things we don’t like. Something akin to the epistemological smugness that Geertz warns against appears to be behind the courts' untroubled determination that the real problem of hate speech is "mere offensiveness."
critical leverage by empathetic renditions of the experiences of the targets. Even if the unofficial narrative is able to awaken the empathy of the judges, and even if there were room in the official narrative's world view for such feelings, the suspiciousness of personal responses would still pose an obstacle. In fact, the lesson of subversive advocacy teaches judges that the last thing they should do is to act on their feelings of sympathy or empathy. Thus, the official narrative's insistence that setting aside personal feeling is crucial to institutional integrity also works to preclude the alternative accounts from achieving any sizeable success.

There are more subtle reasons why alternative accounts of hate speech will find it difficult to be heard. Like other established ways of speaking about the world, the official narrative presents itself as the neutral, objective understanding of the facts. It also establishes certain authoritative criteria for what will and what will not be considered a good argument, criteria which enshrine prevailing understandings along with the world view that those understandings privilege. So, for example, the "objective" point of view enshrined in the official narrative imports from subversive advocacy the understanding that the state is dangerous, and private words harmless. Thus, it constructs both the public interest and the Constitution as requiring empathy and concern for the speaker. But this means that asking for attention to the target's point of view seems to require that judges depart from their normal standards of objectivity and neutrality, and prefer the interest of private individuals over the public interest. And, as the official narrative's critical references make clear, a legal claim which requires a judge to be partial or play favorites and to override the public interest will inevitably be found unconvincing.

But this means that the alternative approaches to hate speech cannot say what they want to say, and make arguments that are considered legitimate within the system. The result is that the alternative accounts

179. Interestingly, the obviously sympathetic judicial characterization of the speaker does not seem to fall within the ambit of suspicious responses. As discussed below, this indicates just how thoroughly the official narrative identifies the interests of the speaker with objective public interests.

180. Minow, supra note 5, at 65-68. Foucault's comments on the relationship between power and truth seem particularly apposite here.

Truth is a thing of this world . . . . Each society has its regime of truth, its "general politics" of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish false and true statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.

are forced either to make extra-legal arguments, or to moderate their position in an attempt to gain the ear of the official narrative. One can find traces of both of these approaches in the unofficial narrative. Most obviously, the unofficial narrative is largely characterized by reliance on extra-legal techniques, such as story-telling and the creation of empathy. But partly because the language of personal response, emotion and storytelling is not considered legal argument, the unofficial narrative speaks in an institutionally inadequate language—trying to give voice to a “subjugated knowledge.” “[B]y subjugated knowledges one should understand . . . a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity.” The result is that because it can be dismissed as outside the realm of recognizable legal arguments—particularly when it is appealed to in order to overturn precedent—the unofficial narrative’s understanding of hate speech is excluded from the realm of serious legal discourse.

But the unofficial narrative also attempts to deal with the limits of the inherited language by moderating its claims so that they appear more in keeping with the prevailing institutional understanding. So while the alternative accounts of hate speech take implicit aim at many of the most fundamental assumptions of the official narrative, they do not 181. A good argument could be made that there is a sense in which these arguments are not completely extra-legal. However, the fact that proponents of alternative understandings are forced to rely almost exclusively on techniques that the legal system itself does not typically consider persuasive makes their claims less plausible—and even less recognizable legal—than other claims. There is, of course, a troubling dimension to this, for it means that arguments which radically challenge an established language are structurally unlikely to achieve much success. In this sense, exclusion seems to be self-perpetuating. There is, perhaps, a solution to this, but it requires critical distance that may be very difficult for those immersed in a dominant way of speaking. As discussed below, one useful approach may be to uncover the way that established languages, far from being neutral and objective, actually enshrine and privilege certain points of view, and with them certain power relations.

182. FOUCAULT, supra note 180, at 82.

183. For instance, all of the unofficial accounts of hate speech ultimately pose an implicit challenge to the dominant understanding of the nature of both public and private power. Thus, their arguments require radical departures from the official narrative in two senses. Not only must one accept that private power can be more coercive than public power, one must also believe that it is appropriate for the state to silence or restrain some individuals in order to redress imbalances in private power. Thus, the private sphere is not necessarily free, and public regulation may actually be conceived to further, rather than suppress, freedom. However, most of the alternative accounts of hate speech do not specifically address this radical challenge to the official narrative’s world view. Indeed, as is perhaps understandable given the dominance of the established way of speaking about
explicitly say they do so. The result is that the alternative accounts characteristically accept the general premises of the discourse, and simply argue for one narrow exception. No doubt, critics adopt this approach partly because they hope to make their arguments more acceptable, and partly because of the dominance and power of the First Amendment language that is their inheritance. But since the dominant understanding enshrines a fundamentally different world view, the effect of this approach is to make the alternative accounts appear irrational because they seem to unwittingly clash with the official narrative's "regime" of truth. While directly addressing the larger question of the composition of this "regime of truth" would undoubtedly make the critique more radical, it might also make it more compelling. Such a direct challenge might make it more difficult for the proponents of the First Amendment orthodoxy on hate speech to ignore these critics.

hate speech, proponents of an alternative approach to hate speech typically spend much of their energy explaining how their delineation of the problem meets the ever-present line-drawing objection. Charles Lawrence's discussion of Brown v. Board of Educ., 347 U.S. 483 (1954), is one of the few accounts of hate speech that attempts to address the implications of what is, at bottom, a radically different constitutional vision. In particular, he attacks the state action doctrine, arguing, "To invoke the state action doctrine is to circumvent our value judgment as to how these competing interests should be balanced." Lawrence, supra note 68, at 447. Mari Matsuda also addresses the possibility of some kind of accommodation within existing First Amendment doctrine by means of a narrow exception drafted to prohibit certain forms of hate speech. However, she does not discuss the very different constitutional visions at work in the exception she drafts, and the civil libertarian's position with which she tries to reconcile it. Matsuda, supra note 8. It is only in the context of pornography that one finds a full-fledged critique of the theory of private power that underlies the dominant interpretation of the First Amendment. MACKINNON, FEMINISM UNMODIFIED, supra note 13; MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, supra note 13. It is partly this frank acknowledgement of the fundamental nature of her critique that earns Professor MacKinnon the label "radical." It is also what gives her critique its power.

184. This is an enduring difficulty faced by radical critics. As Jane Flax puts it, "We cannot re-vision the world with the tools we have been given." Jane Flax, Mother-Daughter Relationships: Psychodynamics, Politics and Philosophy, in THE FUTURE OF DIFFERENCE 20, 38 (Hester Eisenstein & Alice Jardine eds., 1980), cited in Minow, supra note 5, at 66 n.259. Professor Minow also goes on to comment on the dangers inherent in criticism: "We risk becoming embroiled in what we critique, entranced by what we would demystify. This is, of course, the general problem of any criticism: preoccupation with the subject of criticism." Minow, supra note 5, at 66.

185. This is not in any sense meant to imply that the alternative accounts of hate speech do not serve a very valuable function even apart from the question of whether they can single-handedly achieve the change that they hope to effect in the dominant discourse. The alternative perspectives on hate speech articulate an understanding of the problem that is undeniably relevant to the kind of richer discussion of the issue that one would ultimately hope to see. In this sense, their efforts are crucial to crafting a more adequate judicial discourse (and also to a fuller understanding of the issue). Further, the very act
Since the unofficial narrative cannot make arguments that are considered legitimate within the system, its arguments will per se sound somewhat irrational. But this impression is exacerbated by the effects of exclusion. The anger, passion, and pain of the unofficial narrative derives only in part from the hate speech experiences themselves. The fact that the official narrative has itself ignored and silenced the targets, especially when they have made themselves vulnerable by offering personal experiences of pain and humiliation, also helps to explain what sometimes seems to be the hostile tone of the unofficial narrative.\footnote{Unfortunately, this may reinforce the marginalization of the unofficial narrative by the First Amendment establishment, and, like many other effects of exclusion, may help to perpetuate it.}

B. The Official Narrative and the Demands of Justice

So there may be reasons why the alternative accounts of hate speech are unlikely to have their desired impact on the established discourse. But complacency about our inherited languages is no more open to us than it was to Camus' townspeople. Even if one thinks that there are of story-telling is beneficial to those who engage in it, enabling the story-teller to begin to articulate a perspective that has been suppressed, not only on an institutional, but also on a personal level. Delgado, supra note 151. Consciousness-raising for women performs a similar function. See MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, supra note 13. Story-telling can, in this sense, build on and nourish the very personhood of those whose understanding of the world has been subjugated. Adrienne Rich expresses this beautifully. "[T]here is something else: the faith of those despised and endangered that they are not merely the sum of damages done to them." ADRIENNE RICH, SOURCES (1983), quoted in MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, supra note 13, at 83.

186. Often the outsider does, in fact, speak in extreme terms. Once again, however, one can discern a structural reason for this. Richard Delgado's story about "Al-Hammar X," a radical black student leader, is an illustration of the problem. Upset by the faculty's refusal to hire a minority candidate, the speech he delivers is an outburst of anger and denunciation. He is not listened to, but is instead dismissed as an extremist, a demagogue, a hothead—not someone to be taken seriously. Delgado, supra note 151, at 2429. However, as this story illustrates, this response to exclusion is self-perpetuating. Individuals who have been silenced tend to speak up only when they can no longer contain themselves. But this very fact means that they often speak up in ways that ensure that they will not be heard; they explode, thus exacerbating the effects of exclusion. I know a woman who never spoke in her criminal law class. Then one day when rape was discussed, she—who had personal experience—could no longer keep quiet. Naturally, when she spoke, she was emotional. Not only was she unable to make her point in a way that was considered persuasive within the law school setting, but from that day forward, she also felt that she was branded a "rad-fem" and dismissed. In this sense, the tools of "rational" debate seem much more accessible to those who talk about others than to those who are talked about.
reasons to support the official narrative’s result, it is still inadequate for several reasons.

The official narrative’s failure to seriously engage with the alternative point of view undermines the ideal of justice. Since justice is forged through a difficult process of mediation and strife, a process that takes shape partly in how we speak about the world, the imperatives of justice require truly coming to terms with the contending points of view. But the hate speech opinions are deficient in this regard. The act of committing an argument to written form may reveal its flaws, sometimes forcing reconsideration. This means it is not even possible to assert with confidence that the results of the hate speech cases would be the same if the target’s point of view were given serious attention in the text of the judicial opinions. Another difficulty with the hate speech opinions is their heavy reliance on traditional formulations and almost mechanical use of precedent. Although such formulations come, in a certain sense, ready-made, this reliance may nonetheless be undesirable. The downside of this “advantage” is that invocation of these formulas also circumvents the process of grappling with the difficulties for oneself, in one’s own language—a process that seems essential both to personal understanding and to doing justice to any issue. As noted above, the hate speech opinions often literally repeat the words of prior cases at the most difficult points in the decisions. In such a case it is not possible to feel confident that the judges have really engaged the issue in the manner essential to achieving justice.

However, even beyond its function of meting out justice, a judicial opinion is an important cultural document. It does more than resolve the problem in a particular case; it gives voice to, and even helps to create

187. As Martha Nussbaum notes, “[J]ustice really is strife; that is, that the tensions that permit this sort of strife to arise are also, at the same time, partly constitutive of the values themselves. Without the possibility of strife it would all fall apart, be itself no longer.” MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK PHILOSOPHY 81 (1986). Similarly, Alasdair Maclntyre notes the necessary place of conflict in deliberations about justice and rationality. MACINTYRE, supra note 4, at 10.

188. For this reason, among others, excellence in judging requires the judge to expose her reader to “the grounds upon which her judgment actually rests, with as full and fair a statement of her doubts and uncertainties as she can manage.” WHITE, supra note 4, at 224.

189. The crucial importance of formulating ideas in one’s own language is nicely captured in David Winnicott’s comment on the tendency of the adherents of Ann Freud to repeat her formulas: “I personally think it is very important that your work should be restated by people discovering in their own way and presenting what they discover in their own language. It is only in this way that the language will be kept alive.” WHITE, supra note 4, at 268 (quoting D.W. WINNICOTT, THE SPONTANEOUS GESTURE: SELECTED LETTERS OF D.W. WINNICOTT 34 (F. Robert Rodmon ed., 1987)).
the kinds of relations that shape our everyday lives. The ideal of justice requires a court to approach the stories of all interested parties with equal respect and concern. But the hate speech opinions do not do this. Instead, they tend to discount or ignore the perspective of the targets, suggesting that it is unnecessary to consider either the dissenting voices or the perspective of the injured in their deliberations. And justice seems to be even more compromised when one looks at who are rendered the losers in the hate speech opinions. As the alternative understandings emphasize, hate speech is not indiscriminately showered on all members of our communities. Instead, hate speech targets those who are most vulnerable, usually those who have had to struggle even to attain membership in our legal communities.

190. White, supra note 4, at 269. Professor Minow frames the legal issue in this way: “The plea for judges to engage with perspectives that challenge their own is not a call for sympathy or empathy, nor a hope that judges will be ‘good’ people. Sympathy, the human emotion, must be distinguished from equal respect, the legal command.” She also draws attention to the distinction between respecting individuals and sympathizing with them, noting that the former does not necessarily entail the latter. Minow, supra note 5, at 77. This is an important distinction for the issue of hate speech. As discussed below, it often seems that courts (Canadian and American alike) are unwilling to accord respect to the loser, perhaps because of concern that allowing the loser to appear as a human being will generate sympathy and call the result into question. But while this simplification of the moral equation may seem to make matters easier, ultimately it is both unsatisfactory, for the reasons discussed in the text, and somewhat patronizing to the audience. This simplification seems problematic in another way. Because hate speech opinions generally take the perspective of the winner so completely, they speak with a voice that one might think of as more “lawyerly” than judicial.

191. The rhetoric of the courts, however, tends to suppress this dimension of the hate speech problem by describing the problem as one of offensiveness or of sensibilities, implying that we are all equally susceptible to the injuries of hate speech. In contrast, proponents of alternative understandings of hate speech emphasize the selective nature of hate speech and its relationship to denials of citizenship rights by suggesting that hate speech could plausibly be seen as privatized enforcement of segregation. For example, Charles Lawrence implies this concern in his argument that Brown v. Board of Education, 347 U.S. 483 (1954), mandates some regulation of racist speech. The underpinning of his position is that we ought to adhere to the ambition of Brown—a principle of equal citizenship which holds that “every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member.” Lawrence, supra note 68, at 438-39 (quoting Kenneth L. Karst, Citizenship, Race and Marginality, 30 WM. & MARY L. REV. 1, 1 (1988)). Other commentators, such as Richard Delgado and Teresa Scassa, also allude to this relationship between segregationist ambitions and hate speech. See Delgado, supra note 151; Scassa, supra note 157.

However, as Lawrence notes in the context of American constitutional jurisprudence, this argument may run afoul of the state action doctrine. Lawrence, supra note 68, at 444-45. In this regard, decisions like those in Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949), are of some interest. In Baskin, the Court of Appeals for the Fourth Circuit refused to uphold “private” party primary rules, which excluded Negroes as
Americans, other people of color, women, gays and lesbians are the primary targets of hate speech should move the judiciary to exercise some epistemological humility. This should warn us that subversive advocacy is not the only relevant lesson of institutional history in hate speech cases, since our legal system has had serious difficulty extending the full benefits of equal citizenship to these individuals. And too often, the judiciary itself has proven unwilling or unable to take their interests into account in a meaningful way. Indeed, the issue of who benefits from legal norms betrays much about the relative value of human lives. As effectively as the former state laws forbidding them to vote in the primaries. Unlike the courts deciding hate speech cases, the Baskin court looked to the effect of the system rather than who was involved in it. It responded to the obvious state action issue by characterizing the evil addressed by the Fifteenth Amendment in terms of effect rather than in terms of the actor:

When the organization of the party and the primary which it conducts are so used in connection with the general election that the latter merely registers and gives effect to the discrimination which they have sanctioned, such discrimination must be enjoined to safeguard the election itself from giving effect to that which the Constitution forbids.

Id. at 394. The court also attempted to “find” some state action by emphasizing that primaries are a vital part of the electoral machinery of the state. Id. at 393-94. Admittedly, Baskin is a voting case, perhaps subject to special treatment. However, one must still question why state action was not seen as a problem here. The difference in treatment between voting and speech cases does suggest that something other than the state action requirement is really at work in judicial determinations.

It should also give the judiciary cause for some concern that this history was so often justified by the supposedly objective appeal to a “natural” and therefore neutral social order. The court in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), denied a woman the right to practice law on the ground that “[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.” Id. at 141 (Bradley, J., concurring) (emphasis added). Similar reasoning prevailed in Plessy v. Ferguson, 163 U.S. 537 (1896), where the majority refuted the argument that the Fourteenth Amendment could preclude legislating separate railway cars for whites and blacks, noting that “[t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based on color . . . .” Id. at 544 (emphasis added).

Part of the reason that these assertions seem so disturbing is precisely that law—and in particular, constitutional guarantees of minority rights—should “provide a place where unheard voices can be heard and responded to.” White, supra note 4, at 267. Yet the hate speech decisions seem to refuse to attend to the voices that are truly unheard. Indeed, they make these voices unheard.

Matsuda notes this fact, commenting that the “absence of law is itself another story with a message, perhaps unintended, about the relative value of different human lives.” Matsuda, supra note 8, at 2322. Similarly, the sociologist Dorothy Smith has written of the exclusion of women from the authoritative creation of cultural norms. She notes:
decisionmakers occasionally recognize, protecting hate speech does benefit racist and sexist speakers at the expense of the disadvantaged who are their targets. While perhaps this alone should not be determinative, when combined with a recognition of the more complex lessons of history, it should inspire some uneasiness about systematically discounting the target's point of view. It seems legitimate to worry about the judiciary's ability to fairly assess the effect of hate speech on the target, when the judge is not only unlikely to ever have a comparable experience, but is also unwilling to listen to the voices of those who have had such experiences. In this sense, the hate speech decisions are vulnerable because they fail to treat the accounts of the losers in the hate speech debate with equal concern and respect. The targets are thus excluded from the ranks of full membership in our legal community.194 This is exacerbated when one considers that the losers are members of the very

We have learned to live inside a discourse which is not ours and which expresses and describes a landscape in which we are alienated and which preserves that alienation as integral to its practice. In a short story Doris Lessing describes a girl growing up in Africa whose consciousness has been wholly formed within traditional British literary culture. Her landscape, her cosmology, her moral relations, her botany, are those of English novels and fairy tales. Her own landscape, its forms of life, her immediate everyday world do not fully penetrate and occupy her consciousness. They are not named. Lessing's story is a paradigm of the situation of women in our society. Its general culture is not ours.

Dorothy E. Smith, A Peculiar Eclipsing: Woman's Exclusion from Man's Culture, WOMEN'S STUD. INT'L Q. 281, 283 (1978) (citation omitted).

W.E.B. DuBois describes a similar double-consciousness, a sense of two-ness, that comes from being judged according to norms that are not of your making: "[T]his sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity." W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 3 (Kraus-Thomson Org. Ltd. 1973) (1953).

194. Guido Calabresi relies on a similar argument to critique the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973). CALABRESI, supra note 110. According to Calabresi, while Roe attempts to avoid the difficult conflict of beliefs, it ultimately fails as a constitutional argument because it tells the losers that their beliefs are irrelevant to our Constitution. Id. at 92. While Calabresi does not suggest what the best result would have been, he does elaborate on rhetorical superiority:

A decision which recognizes the values on the losing side as real and significant tends to keep us from becoming callous with respect to the moralisms and beliefs that lose out . . . . It tells the losers that, though they lost, they and their values do carry weight and are recognized in our society, even when they don't win out. In other words, it treats the believers as citizens of the polity, and not as emarginated bigots or unassimilated immigrants.

Id. at 109. In this sense, the rhetoric of the hate speech opinions implicates the principle of equal citizenship. Karst, supra note 191, at 1.
groups whose inequality the legal system has too often been complicit in sanctioning.

The hate speech opinions are deficient in other ways. Their exclusionary rhetoric implies that citizens can neither participate in nor evaluate the conversation about hate speech. Instead, questions of justice seem to involve esoteric issues of legal interpretation which the ordinary person cannot understand. The opinions also appear undemocratic because they seek to persuade the reader by presenting the winning perspective in its strongest form and the losing perspective in its weakest form, if at all. It is as if the judiciary is unwilling to trust the citizenry with a more nuanced, balanced view of the problem for fear that the court's solution might become vulnerable. The opinions also suggest that questions of constitutional interpretation are not only not the concern

195. In this sense, the judicial voice in the hate speech decisions tends to be authoritarian, rather than democratic, in nature. J.B. White has said that this kind of rhetoric results "in a conversation that is not the beginning but the end of democracy." WHITE, supra note 4, at 160. There is a particular irony in structuring judicial discussions of free speech in this way, since one of the major justifications for according special treatment to speech is that it is essential to the principles of self-government. As Alexander Meiklejohn describes it, "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good." Alexander Meiklejohn, Free Speech and Its Relation to Self-Government, in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1965). This democratic view, which relies so strongly on the sovereignty of the individual and faith in the individual's deliberative process, seems strangely at odds with a First Amendment doctrine which implicitly insists that free speech issues are the province of judges and not of the citizenry. Lee Bollinger also notes the tendency of free speech talk to fall victim to the very impulses it seeks to discourage. BOLLINGER, supra note 6, at 213-36; Bollinger, supra note 7, at 27-28.

Another rather striking illustration of the tendency of free speech proponents to fail to apply their critical premises to their own assumptions is found in Kent Greenawalt's discussion of the justifications for the contemporary contours of the principle of freedom of expression. Kent Greenawalt, Free Speech Justifications, 89 COLUM. L. REV. 119 (1981). Greenawalt places great emphasis on the truth-discovery justification for freedom of speech. In response to the skeptic's argument about the elusiveness of the very concept of truth, Greenawalt offers an answer that is rather astonishing given the context. The claim that freedom of speech is essential to the pursuit of truth turns to a large degree on the notion that "truth will out" only if all—even the most apparently infallible—premises are open to challenge. Yet Greenawalt justifies continued adherence to the truth-seeking justification for freedom of speech even in the face of the relativist challenge on the following grounds: "If a justification that remains coherent in its premises has long been assumed to support a settled social practice, the justification is entitled to continued weight until the case against it becomes very strong." Id. at 14. It seems ironic indeed to support a principle of freedom of speech by relying on an almost Burkean faith in traditional practices. It is as if everything must survive critical scrutiny except the principle that everything must survive critical scrutiny.
of individual citizens, they are not the responsibility of the adjudicating judges either. Instead, the questions were authoritatively resolved long ago either by the framers of the Constitution or by judges in generations past. But neither the original agreement itself nor the reflections of judges in times past can fully answer the question or take away the responsibility—heavy as it is in cases such as those involving hate speech—of the judge to resolve the issue for herself. Established languages, especially when they are technical or formal, pose a special danger here. It may be tempting to invoke the language of the past, rather than to face the difficult task of fashioning a new vocabulary more adequate to our times. And it may also appear that this is a more neutral position for the judge to assume. But not only is this not true, it also undermines what we value most in the art of judging.

Legal deliberations, especially but by no means solely those which involve constitutional issues such as freedom of speech, are matters of great concern and relevance to the ordinary citizen as well as to the constitutional scholar. True democracy ultimately requires a constitutional jurisprudence that speaks to and respects the layperson as well as the expert. Thus, a committed judge must make an effort—valuable in itself—to speak about issues in a language that makes sense to the ordinary person, and to highlight the tensions and difficulties that were weighed in arriving at a solution. A constitution is, at bottom, an agreement about how to shape our common life, and true democracy requires the judge to engage the citizenry in the shared struggle to give life to that agreement in light of the changing problems we face in living together. So there are reasons to seek some reformulation of how courts speak about hate speech, even if the alternative accounts of hate speech are not likely to achieve this.

One way of gaining some critical leverage is to look beyond the confines of one's national legal system. Comparative jurisprudence may be a valuable way of showing an old problem in a new light, partly because it has the advantage of being entitled to some form of institutional respect. The language spoken in the decisions of other relatively similar legal regimes is also forged within similar institutional constraints,

196. Thus, it is crucial to the democratic nature of law that it make sense to the ordinary citizen. WHITE, supra note 4, at 262.

197. It is of course necessary to add this qualifier since the decisions of a legal regime committed to entirely different and unacceptable premises would not, for that very reason, be a useful or persuasive point of comparison. Thus, one could not imagine using an explicitly racist or totalitarian legal regime for this kind of a comparative purpose. Of course, the study of such regimes may be useful in certain other ways. However, it seems unlikely that their treatment of freedom of speech would have any persuasive authority in a liberal democracy.
and thus may not seem extra-legal in the same sense as the alternative perspectives on hate speech.

Canada, which has a constitutional guarantee of freedom of expression similar to that of the United States, recently found its regulation of hate speech challenged on the ground that it infringed freedom of expression. The Supreme Court of Canada’s approach to the problem of hate speech may thus provide a helpful point of comparison with the American approach.

IV. THE CANADIAN HATE SPEECH CASES

A. Background

Like many other liberal democracies, Canada became concerned about the potential effects of hate propaganda following the revelation of the horrors of the Second World War. Although the 1953 revisions to the Criminal Code of Canada\textsuperscript{198} attempted some regulation of hate propaganda, the true genesis of the criminalization of hate propaganda in Canada was the Special Committee on Hate Propaganda, usually referred to as the Cohen Committee. This highly respected committee released its unanimous report in 1966. The preface of the report noted that civilized democratic societies have a heavy bias in favor of freedom of expression. However, according to the Committee, the bias “stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.”\textsuperscript{199} In an attempt to delineate the point beyond which expression should no longer be protected, the Committee proposed amendments to the Criminal Code which criminalized the advocacy of genocide,\textsuperscript{200} the public incitement of hatred likely to lead to a breach of the peace,\textsuperscript{201} and the wilful promotion of hatred.\textsuperscript{202} These proposals ultimately formed the basis of the provisions in Canada’s Criminal Code which regulate hate speech. Significantly, the consent of the Attorney

\begin{itemize}
\item \textsuperscript{198} In Canada, unlike in the United States, criminal law is exclusively a matter of federal jurisdiction. Constitution Act, 1867, § 91.
\item \textsuperscript{199} REPORT OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA (Ottawa, Queen’s Printer 1966), quoted with approval in R. v. Keegstra, [1990] 3 S.C.R. 697, 725 (Can.).
\item \textsuperscript{200} Criminal Code, R.S.C. 1985, ch. C46, § 318.
\item \textsuperscript{201} Id. § 319(1).
\item \textsuperscript{202} Id. § 319(2).
\end{itemize}
General is a prerequisite for proceedings under most of these subsections, including a proceeding for wilful promotion of hatred.203

Until recently, Canada’s tradition of parliamentary sovereignty precluded any direct freedom of expression challenges to this regulation of hate speech. However, in 1982 Canada repatriated its constitution and incorporated into it the Canadian Charter of Rights and Freedoms.204 Section 2(b) of the Charter guarantees among its fundamental freedoms the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Importantly, section 1 of the Charter states that the all of the rights and freedoms contained within the Charter are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

In 1989, the first cases challenging the regulation of hate propaganda on freedom of expression grounds reached the Supreme Court of Canada. R. v. Keegstra205 and R. v. Andrews206 challenged the provision of the Criminal Code that criminalizes the wilful promotion of hatred (section 319(2)),207 while Canada (Human Rights Commission) v. Taylor208 challenged a section of the Canadian Human Rights Act which restricts the communication of telephone messages likely to expose people to hatred or contempt because of, among other things, their race, national or ethnic origin, color or religion.209 Shortly after these cases, R. v. Butler210 challenged the obscenity provisions of the Criminal Code. There was lively public and academic debate about how these cases should be resolved.211 One of the major topics of that debate was

203. Id. §§ 318(3), 319(6), 320(7). Only § 319(1), which criminalizes public incitement of hatred "against any identifiable group where such incitement is likely to lead to a breach of the peace," does not require the consent of the Attorney General.


205. [1990] 3 S.C.R. 697 (Can.).

206. [1990] 3 S.C.R. 870 (Can.).


208. [1990] 3 S.C.R. 892 (Can.).


whether Canada should adopt the American position and hold that the regulation of such speech was an unconstitutional abridgement of the right to freedom of expression.

In early December 1990, the Supreme Court of Canada released its judgments on the three hate speech cases. A closely divided court upheld the regulation of hate speech in every case. A majority of four members of the Court held that while the prohibitions did violate section 2(b) of the Charter, they were justifiable under section 1. And early in 1992, the Supreme Court released its decision in Butler; a unanimous Court upheld the regulation of obscenity under the Criminal Code.  

Keegstra is considered the leading case, not only because it addresses the issues in the most detail, but also because its reasoning forms the foundation for its companion cases. For this reason, Keegstra will be


212. Since Butler, the Supreme Court of Canada has decided another case dealing with hate speech. R. v. Zundel, [1992] 2 S.C.R. 737 (Can.), concerned Ernst Zundel’s distribution of white supremacist literature. Because Ontario’s Attorney General would not consent to Zundel’s prosecution under the wilful promotion of hatred provisions, a private prosecution was commenced, charging Mr. Zundel with publishing a knowingly false statement likely to cause injury or mischief to the public interest, contrary to what is now § 177 of the Criminal Code. After a complex litigation history, including two trials, each of which resulted in a conviction, the case reached the Supreme Court of Canada.

On August 27, 1992, a sharply divided Supreme Court issued its decision striking down the false news provision as contrary to the guarantee of freedom of expression. A majority of four members of the Court distinguished the provision at issue in Keegstra on the grounds that that provision was carefully tailored to address the specific evil of hate propaganda while also attempting to preserve freedom of expression. The Court argued that Zundel should have been prosecuted under that provision.

Although the Court in Zundel is clearly at pains to make clear that it is not attacking Keegstra, both the alignment of the Court and the rhetoric in Zundel cast some doubt on this. All but one of the Zundel majority dissented in Keegstra, and the Zundel dissenters represent the Keegstra majority. Therefore, with the exception of Madam Justice l’Heureux-Dube, all of the members of the Court who sat on both cases saw the two provisions as constitutionally identical. Perhaps unsurprisingly, given how the majorities and dissents line up, the rhetoric of the majority in Zundel is remarkably similar to the dissents in Keegstra and its companion cases, which essentially adopt an American approach—both in rhetoric and in result—to the problem of hate speech. For example, the Zundel majority relies heavily on vagueness and line-drawing arguments, places little emphasis on the specific facts of the case, and articulates the fear that the state will use such provisions in order to become the arbiters of truth, thereby skewing the marketplace of ideas and ultimately democracy itself.

213. The reasoning in Keegstra was directly applied in Andrews, and simply restated in Taylor. Therefore, although Keegstra involved a captive audience situation, its rationale is not confined to such cases. In Andrews, the reasoning of Keegstra was directly applied to uphold the prohibition of the Nationalist Reporter, a white supremacist
used as the primary point of comparison with the American hate speech cases.

**B. The Canadian Narrative of Hate Speech**

1. THE PLOT

Jim Keegstra was a high school teacher in the small town of Eckville, Alberta, from the early 1970s until his dismissal in 1982. Mr. Keegstra taught his pupils that Jews were "treacherous," "subversive," "sadistic," "money-loving," "power hungry" and "child killers." He also instructed them that the Jews were responsible for the major calamities of human history, including depressions, anarchy, wars, and revolutions. The Holocaust, he claimed, was manufactured by the Jews "to gain sympathy." Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they did not, their marks suffered.

In 1984, Mr. Keegstra's teachings formed the basis of a charge of wilful promotion of hatred against an identifiable group. The charge was laid under what is currently section 319(2) of the Criminal Code. He was convicted at trial after unsuccessfully arguing that section 319(2) unjustifiably infringed his freedom of expression under section 2(b) of the Charter. On appeal to the Alberta Court of Appeal, Mr. Keegstra's freedom of expression argument was unanimously accepted and his conviction overturned.

A majority of the Supreme Court of Canada disagreed with the Alberta Court of Appeal and ordered that Mr. Keegstra be granted a new trial on the issue. The first major question they addressed was whether the freedom of expression guarantee of section 2(b) of the Charter even encompassed speech such as hate propaganda. Several of the intervenors in the case argued that section 2(b)’s guarantee should not cover hate propaganda because of its violent content and because of its conflict both with other sections of the Charter (including the equality and

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newspaper, under the wilful promotion of hatred provisions of the Criminal Code. [1990] 3 S.C.R. 870 (Can.) It is instructive, however, that the majority chose *Keegstra* as the case in which to deliver its most detailed reasons. Quite possibly, if the dissent’s point of view had prevailed, the primary reasons would have been delivered in *Andrews* and then simply applied to *Keegstra*.

214. Mr. Keegstra's very lengthy second trial on this issue recently concluded. He was fined $3,000. Mr. Keegstra appealed this second conviction. The Alberta Court of Appeal overturned Mr. Keegstra’s conviction for a second time, this time on a technical issue concerning the trial judge’s response to a request for information by the jury. R. v. Keegstra, No. 13537 (Can. Ct. App. Sept. 7, 1994). Therefore a second appeal to the Supreme Court on the subject of Mr. Keegstra’s conviction for wilful promotion of hatred is possible.
the multiculturalism provisions) and with Canada's international human rights obligations. Both the majority and the dissent rejected this argument. Instead, they held that section 2(b) itself should be interpreted broadly to include any expression proscribed because of its content. Any content-based restrictions, the Court held, were better addressed under section 1.

Thus, the central issue that divided the majority and the dissent was whether the criminalization of hate propaganda was justifiable in "a free and democratic society" and therefore sustainable under section 1. Unsurprisingly, section 1 of the Charter is the subject of a complex and expanding body of case law and commentary. Under section 1, the government (which bears the onus of proof once an infringement of a Charter right has been made out) must first establish that the objective of the law addresses a matter of pressing and substantial concern to a free and democratic society. Second, the government must show that the measures adopted to achieve that objective are proportional. This "proportionality" test requires that the means be rationally connected to the objective, that the right be impaired as little as possible, and that the effects of the measure be proportionate to the objective. The majority found that the provision at issue in Keegstra was constitutional because it satisfied all of these requirements of section 1.

2. THE CONTEXT

As is apparent in American cases, much depends upon the context in which the court chooses to situate the problem of hate speech. The Keegstra majority selected a very different context in which to analyze the problem of hate speech than that chosen in the American cases. It is telling that Chief Justice Dickson, speaking for the majority, begins his analysis of the constitutionality of the legislation by focusing on why the legislature thought regulation of this speech was important. Since the legislation was developed following the Second World War and the discovery of the horrors of Nazi Germany, the historical analysis naturally leads into a discussion of discrimination, racial and religious relations, and the violent activities of hate groups, including the Ku Klux Klan. This in turn leads to a discussion of the harms of hate speech.

Several things are accomplished by situating hate speech in this context. Linking hate speech to a history of genocide and discrimination makes the speech appear violent and dangerous, rather than innocuous. However, it does more than this. The conflict made visible by situating

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hate speech in the context of racial and religious discrimination is not the conflict between the individual and the state, but rather between private individuals within society. The relevant source of danger is not the coercive state but violent individuals. Describing civil society in this way also allows for the possibility of casting the state in the benevolent role of attempting to ensure a society in which the vulnerable as well as the powerful can be free.

3. CHARACTERS

As with the American cases, the choice of context has an important bearing not merely on how the characters are depicted but even more fundamentally on what characters are depicted. Given the significantly different context chosen by the Canadian majority, it is unsurprising that these characterizations are very different from those found in the American cases.

The most significant and far-reaching difference is the treatment of the state. The American discourse characterizes the state as the ominous police power, acting arbitrarily and clumsily overreaching its constitutional confines. In sharp contrast to this is the Canadian majority's vision of the state. This state appears calm and deliberative rather than unwieldy and threatening. It is conscientiously pursuing public good, not placating narrow factional interests. And far from overreaching its constitutional limits, the state here appears to be acting upon prudent legal considerations.

The majority in Keegstra and the other decisions conveys the image of a restrained and prudent state in part by carefully chronicling the legal sources that both inspire and constrain official action. By emphasizing that the Holocaust was the impetus for the legislation, the Court casts the state in the role of protector rather than destroyer of individual freedom. However, the Court does not rely simply on a sympathetic rendering of history to support this characterization of the state. It also finds justifications for state action in what might be termed persuasive legal authority.

The Court finds one such legal source in international law. For example, the Court outlines the development of the internationally based obligation to prohibit the dissemination of hate propaganda. The codification of the obligation to prevent the dissemination of hate propaganda is found in the International Convention on the Elimination of All Forms of Racial Discrimination,\(^{216}\) International Covenant on

Civil and Political Rights, and in documents such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. These documents are used to emphasize that, in legislating against the dissemination of hate propaganda, the Canadian government was not acting rashly or out of narrow self-interest. Rather, it was proceeding on the basis of a broad consensus borne of both historical experience and of the efforts of human rights scholars over the last several decades.

The Court finds another legal argument in support of the regulation of hate speech. In the section 1 inquiry, the Court insists that a particular right or freedom should not be viewed in isolation, but rather should be seen in the context of the broader obligations which the Charter as a whole imposes on the state. The Court finds the equality guarantee in section 15 and the obligation to respect and enhance the multicultural heritage of Canada in section 27 particularly relevant to hate speech:

The message of [hate speech] is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.

By emphasizing these legal obligations, the Court advances a justification for official action that goes beyond an empathic response to the plight of the targets. The use of historical and legal precedents does more than draw attention to the moral and other-directed impetus behind the regulation of hate speech. It also makes the crucial point that in regulating hate speech the state is not unconstrained, nor is it acting arbitrarily and merely protecting its own self-interest or playing favorites. Instead, the state is seeking, within the confines of an extensive system of legal obligations, to further public good by securing the most fundamental of constitutional values.

219. Charles Lawrence argues for a similar equality-based defense of the regulation of hate speech on campuses in the United States. There are significant differences between Lawrence's argument and what the majority of the Canadian Supreme Court is doing in considering the equality provisions of the Charter.
220. [1990] 3 S.C.R. 697, 756 (Can.).
In addition to identifying various legal motivations behind the regulation of hate speech, the Court depicts the state in a positive light in other related ways. The Court broadens the inquiry by focusing on the dialogical situation, thus recasting the question that confronted the legislature. So the issue is not simply the narrow question of how to ensure that the speaker is as free as possible, but rather the broader question of how to ensure that public debate is as free as possible. And of necessity, this broader inquiry must take into consideration the effect of hate speech on the ability of the targets to speak, act, and participate in the world.\textsuperscript{221}

This dialogical focus is crucial to the Court’s analysis of the extent to which the traditional rationales for protecting freedom of expression justify protecting hate speech. Once the inquiry is broadened to include the target’s interests as well as the speaker’s, justifying tolerance of hate speech on traditional freedom of expression rationales becomes problematic.\textsuperscript{222} So, for instance, the Court finds that hate speech cannot be upheld on the self-actualization rationale because its “extreme opposition” to the “process of individual self-development and human flourishing among all members of society” inhibits the targets of the speech from being self-actualized.\textsuperscript{223}

This broader focus also makes the hate speech’s effect on the target relevant to the analysis of the justifiability of regulation. By describing hate speech from the target’s point of view, the Court is able to identify the distinctive harms that justify the regulation of such speech, even according to the liberal harm principle. Thus, the Court’s language associates the harms of hate speech with the most elemental aspects of

\textsuperscript{221} In this sense the Supreme Court of Canada would concur with Wittgenstein that “[t]o imagine a language means to imagine a form of life.” \textit{WITTGENSTEIN, supra} note 3. This linguistic theory relies on the view that “our acts of language are actions in the world, not just in our minds.” \textit{WHITE, supra} note 4, at ix. For the Supreme Court of Canada majority, speech partly creates the world we live in, and the world created by hate speech is not the kind of world we want anyone to have to endure. A different linguistic theory is apparent in the American cases involving hate speech. While these cases do venerate speech, they justify doing so partly by minimizing the power and impact of language—thus the references to “mere” offensiveness and “mere” advocacy, which sharply delineate the world of words from the world of actions, and the quote from Solzhenitsyn in the \textit{Collin} decision, which argues that while words may evaporate, censorship persists. \textit{See BOLLINGER, supra} note 6, at 58-61. Carl Schmitt, the Nazi political theorist, expresses his contempt for this assumption of liberalism. In his description of liberal society as a society of conversants, Schmitt mocks—and indeed, makes use of—what he sees as the constitutive and naive belief of liberalism that speech alone can never be dangerous. \textit{Carl SCHMITT, POLITICAL THEOLOGY} (MIT Press 1985) (1922).

\textsuperscript{222} Lee Bollinger makes a similar point. \textit{See BOLLINGER, supra} note 6, at 51-58.

\textsuperscript{223} [1990] 3 S.C.R. at 763.
Talking About Hate Speech

personhood. Hate speech does not simply offend sensibilities, it also attacks "human dignity" and "an individual's sense of self-worth," values which resonate with liberalism's emphasis on human equality and autonomy. Including the vantage point of the target supports the harm principle justification in another way, for it undermines the pure speech argument by illuminating the link between racist speech and exclusion, racial violence and even genocide.

While the Court does discuss how the liberal harm principle can justify the regulation of hate speech, the plight of the target is not the exclusive, or even the primary, focus of the analysis. Rather, the Court carefully explains that in legislating against hate speech, the legislature is not merely protecting a private party, no matter how deserving of protection that person might be. By identifying the link between individual and collective identity, the Court illustrates how protecting particular individuals can also further constitutional interests. The Court notes that the hate speech attack is not simply an individual affront—it also undermines social and even constitutional values, such as the "relations between the various cultural and religious groups in Canadian society." In this way, the Court uncovers how the legislation not only protects the dignity of individual targets, but also supports vital public interests.

The Court finds another public interest behind the regulation by describing the regulation itself as a form of "expression" inspired by constitutional ambitions: "[T]he reaction to various types of expression by a democratic government may be perceived as meaningful expression on behalf of the vast majority of citizens." Such regulation provides society with an opportunity to "illustrate" and to publicize "the values beneficial to a free and democratic society." Similarly, the Court insists that the regulation encourages "the values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by the hate-mongers." In this way, the Court identifies expressive rights of constitutional dimension on both sides of the hate speech equation.

Throughout this discussion, the Court invokes the image of an even more important public good ensured by the regulation of hate speech. The point of hate speech regulation is not simply to fulfill various legal

224. Id. at 746.
225. Id. at 757.
226. Id. at 764-65. Lee Bollinger also discusses law as a communicative tool by means of which we reflect and embody "the aspirations and values of the community." BOLLINGER, supra note 6, at 78.
228. Id. at 764.
obligations, nor just to protect the target. Behind these aims the Court discerns and gives voice to a deeper ambition, an ambition that is at the heart of who we are as a community. It is, at bottom, an image of a certain kind of public world, a conception of democracy. This public world is not a rough and tumble place where only the loudest survive. If it is a "marketplace of ideas," it is the regulated marketplace of the late twentieth century, not the Darwinian marketplace of nineteenth-century capitalism.

However, the public world that the Supreme Court of Canada both describes and helps to create seems more aptly described in conversational or deliberative terms. For while the marketplace metaphor imagines ideal public discourse at which the Supreme Court of Canada seems to be aiming has much in common with the ambitions underlying the fairness doctrine in American broadcast regulation as discussed by Lee Bollinger, supra note 33. Although the Canadian jurisprudence on freedom of expression goes somewhat further in its willingness to countenance not only regulation but also prohibition of certain expression, the animating idea is similar. That idea is that "quality public debate and decision making need the buoyant support of some form of collective action by citizens, involving public institutions." Id. at 139.

Of course, Canada has the direct analog of the Canadian Broadcasting Corporation, but the belief that the absence of regulation does not automatically ensure the most vibrant public debate also seems at work in the Canadian hate speech cases. It is interesting to note that, like the Canadian decisions on hate speech, the American jurisprudence on the fairness doctrine evinces a broader concern not merely with the First Amendment rights of the speakers, but also with those of the listeners. A similar image of a dialogical situation is apparent, for example, in Red Lion Broadcasting Co. v. F.C.C., where the U.S. Supreme Court identifies as paramount not the right of the broadcaster to speak, but rather the "right" of the "viewers and listeners." 395 U.S. 367, 390 (1969). Interestingly, in Red Lion the state appears not as a threat to public interest, but rather the benevolent agent of the public which, according to Lee Bollinger, "executes the will of the people to ensure that broadcasters provide adequate service to the realm of public debate." BOLLINGER, supra note 6, at 73. There is a further similarity between the American jurisprudence on fairness and the Canadian hate speech cases. Lee Bollinger notes that "one of the more interesting features of the broadcast regulation experience has been the absence of egregious abuses by the FCC." Id. at 115. Similarly, the history of the hate speech provisions of the Canadian Criminal Code reveals relatively few misapplications during its more than 20-year history and no evidence that it was used as a guise for suppressing radical critiques of government policy. This seems to give some credence to the anti-federalist (and essentially Aristotelian) view that the citizen is as much the creation as the creator of politics. So we are led to wonder to what extent we create, in our hopes and fears, the very conditions we anticipate. If we are suspicious of officials and expect them to be selfish and therefore devise policy to restrain them, to what extent do we create a public culture of suspicion and egoism? Conversely, if we believe that people in public life will act for the common good, do we foster a more generous and altruistic public culture? Obviously this would be, on its own, too simple an explanation, yet one cannot help but speculate to what extent our presuppositions are self-fulfilling prophecies.
(efficient) results emerging from the wholly separate actions of self-interested individuals, the rhetoric of the Canadian Supreme Court rests on a fundamentally different notion. In this more Aristotelian public world it is the "open participation" of all persons in the processes of collective deliberation that forms the heart of the democratic ideal.\(^{230}\) This can only be achieved, the Court suggests, through observance of the fundamental tenet, the animating idea, of democracy: the notion that "all persons are equally deserving of respect and dignity."\(^{231}\) Because the regulation of hate speech bolsters these democratic values, the Court is able to identify such regulation with a fundamental public interest—the protection of democracy. Thus, our treatment of the target is the barometer of the strength of our democratic convictions.\(^{222}\) According to this view, democracy requires more than simply the absence of official obstacles to participation; it must also enshrine the fundamental commitment to equal respect and dignity that is the substantive heart of the democratic ideal.\(^{233}\)

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230. This ideal seems to share much with the public meeting that Alexander Meiklejohn envisages. See Meiklejohn, supra note 195. Although Meiklejohn's model appears purely procedural in nature, the procedural legitimacy, and even the viability, of the model relies heavily on the fact that Meiklejohn's imagined citizens meet as "political equals." Arguably, this substantive prerequisite makes possible the deliberation about collective welfare that is at the heart of Meiklejohn's model. Insofar as the notion of dialogue implies a fundamental commitment to respect and equality, Meiklejohn's dialogical focus, apparent in his insistence on the importance not only of the speaker but more crucially of the listener, also rests on certain substantive value commitments. In this sense, the regulation of hate speech could plausibly be seen as consistent with Meiklejohn's model, because the whole point of hate speech is to repudiate the fundamental equality and respect that makes dialogue (as opposed to merely speech) possible.


232. Interestingly, the Court implies here that part of what makes Canada different from South Africa or Nazi Germany is the fact that the state not only does not itself engage in violent discrimination, but it also does not tolerate others doing so. The distinction that the Canadian Supreme Court implicitly makes between states such as Nazi Germany and Apartheid South Africa on one hand, and Canada on the other, is that in Canada, individuals should never have to live under the shadow of racial hatred. In contrast, as noted above, several of the American cases suggest that what separates the U.S. from Nazi Germany is the fact that in the U.S. one can say what one thinks, while in Nazi Germany, one could not.

233. Canada's Federal Court of Appeal recently handed down a freedom of expression decision that is a particularly interesting illustration of a related point. The Native Women's Association challenged the federal government's funding of the recent constitutional deliberations. Native Women's Ass'n v. Canada, [1992] 3 F.C. 192 (Can.). The federal government had provided funding for and seats at the table to four aboriginal groups, none of which were aboriginal women's organizations. Based on evidence forwarded by NWAC, the Federal Court of Appeal found that the four aboriginal organizations that were funded were "male-dominated." The native women were
The sharp contrast between how the Canadian and American states are depicted derives at least in part from the language used to describe the state. For the courts do not merely analyze, but actually recreate, the deliberations of the state. It is not coincidental that American courts convey the state’s unwieldy ambitions partly through dramatic and even feverish rhetoric in which the judges imagine an apparently endless array of potentially silenced speakers and threats to democracy. Part of the sense that the state is dangerous comes precisely from this anxious language. Conversely, the deliberative and careful terms in which the Keegstra majority recreates legislative motivation and traces out the sources and justifications for the regulation of hate speech help to create a very different image of the state. The language is not sensational or dramatic, but calm and reasoned. It is less overtly metaphorical and less figurative than the language in the American cases. The state is depicted as careful and responsible, and the measured rhetoric of the Court subtly reinforces this image.

But for all of this restraint, there is also rhetorical power in the Canadian Supreme Court’s discussion of the state. The organic connection between the government and the people is conveyed partly through language that emphasizes the unity of the government and the governed. Both the Court’s vision and its language refute the notion of

particularly concerned that aboriginal self-government would jeopardize the equality rights of native women on the reserves. Since the women’s organizations had neither a seat at the table, nor the resources to make their concerns known, they challenged the federal government’s funding on several grounds. The Federal Court, Trial Division ruled against NWAC, but the Federal Court of Appeal overturned this ruling. The Federal Court of Appeal noted that while the federal government could choose whether to provide funding, if it did decide to provide funding, it had to conform to the requirements of the Charter, and the equality provisions in particular. (This contrasts with the American case law on related issues. See Rust v. Sullivan, 500 U.S. 173 (1991); DeShaney v. Winnebago County Dep’t of Social Serv., 489 U.S. 189 (1989). As the DeShaney Court notes, equal protection arguments were not made in that case.)

Since the effect of the government’s decision was to fund men’s speech but not the speech of the relatively more disadvantaged women, the Federal Court of Appeal held that the funding violated the Charter by not ensuring equal freedom of expression to both men and women. This decision is interesting in a number of ways. For the purposes of the analysis here, it is particularly significant that the guarantee of freedom of expression was not satisfied by the absence of governmental obstacles to participation. Indeed, the decision recognizes that positive government action may be required to ensure freedom of expression. The Supreme Court of Canada recently overturned the Federal Court of Appeal decision on factual grounds. Native Women’s Ass’n v. Canada, No. 23253 (Can. Oct. 27, 1994).

234. When the Supreme Court refers to state action, it uses the term “Parliament,” bringing to mind venerable traditions of parliamentary democracy in which elected bodies bear the sole responsibility not only for ensuring public good, but also for protecting individual rights.
a state-society dichotomy, of an opposition between the people and their government. Over and over again, the term “community” and references to “collective” values and ambitions are used to describe the unified collectivity of state and society. Additionally, the language of shared moral ambition is used to describe the aspirations of the legislation: the purpose of the legislation is to foster “harmonious social relations in a community dedicated to equality and multiculturalism”;235 our “aspirations” include “fostering a vibrant democracy where the participation of all individuals is accepted and encouraged”;236 the ambition of Parliament is to “bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.”237 References to the fundamental democratic values of equality and human dignity that we all share also reinforce the sense of a unified and morally engaged communal life.

The Court’s extensive and laudatory discussion of the state stands in sharp contrast to its characterization of the speaker. The speaker appears as the violent enemy of the target, partly because the Court brings the target much more into view in discussing the speaker. When the effect on the target is treated as a structural part of assessing the claim that the speech deserves protection, the speaker appears less like a free-thinking zealot and more like a threatening hate-monger. However, the Court depicts the speaker not only as inflicting injury on the target, but also as striving to undermine our worthy communal aspirations. Thus, the language used to describe the proponents of hate speech draws attention to the impact of their speech both on the targets and on the fundamental values which define our legal and political community.

Unlike the calm and deliberative language used to describe the state, the language used to describe the speaker is strong, negative and extreme. Those who promote hate speech are routinely described as “hate-mongers” who advocate their views with “inordinate vitriol.”238 The whole aim of their speech is to “subvert” and “repudiate” and “undermine” democracy, which they do with “unparalleled vigour.”239 Since their ideas are “anathemic” and “inimical” to our fundamental values, we view them with “severe reprobation.”240 In this way, the Court characterizes the speaker as the enemy of democracy, not its litmus test, a hypocrite using democracy’s most cherished ideal of free speech to undermine the freedom and democracy of others.

236. Id. at 766.
237. Id. at 756.
238. Id. at 763.
239. Id. at 764-65.
240. Id. at 769.
4. JUDICIAL VOICE

The judicial voice that dominates the Canadian hate speech cases provides an interesting contrast with the American jurisprudence. The majority in the Canadian hate speech decisions conceives of constitutional adjudication and of the role of judges in a very different way. According to this view, good judging is a matter of defensible value choices, rather than of steering a neutral course among (or perhaps above) particular value choices. And since there is no elevated position above all value choices, the judge cannot avoid making choices. Thus, the Court must come to terms with the value conflict in all of its particularity. Only in this way, the Court insists, can the normative issues inherent in the conflict properly come into view. It is partly this close scrutiny that accounts for the concerned and engaged tone of the Canadian Supreme Court.

Thus, the Canadian cases discuss the speech in great detail, focusing on its specific content. Indeed, the majority's focus on the specific message of hate speech is crucial to its conclusion that such speech is appropriately regulated. By characterizing hate speech as "deeply offensive, hurtful and damaging to target group members, misleading to . . . listeners, and antithetical to the furtherance of tolerance and understanding in society," the Court helps to settle the question of the normative value of the speech. Indeed, in the companion case of Canada

241. So, for example, the Supreme Court has insisted that section 1 requires a contextual approach in order to "[b]ring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it." Keegstra, [1990] 3 S.C.R. at 737 (quoting Edmonton Journal v. Alberta, [1989] 2 S.C.R. 1326, 1355-56 (Can.)).

242. Indeed, analysis of the hate speech cases provides an interesting vantage point on the fact-law distinction, since the level of specificity in the descriptions of the speech is crucial to the legal analysis. It is noteworthy, for instance, that in the Canadian hate speech cases, the dissents describe the speech in very general terms and the majority describes it in very specific terms. In this way, among others, the difference in the level of generality of the description turns out to be crucial to the persuasiveness of the particular legal determination. This means that it is not possible to simply question the legal determinations. Rather, one must go back to the facts to assess how they are characterized. Yet, as noted, despite the vast material written on legal interpretation, there is little discussion of the interpretation of facts, confidence in the stability of which is nicely captured in the notion of "found facts." However, Mary Eberts' excellent discussion of the role of facts in constitutional adjudication of equality issues is an exception to this general silence on the theoretical significance of facts. Mary Eberts, New Facts for Old: Observations on the Judicial Process, in CANADIAN PERSPECTIVES ON LEGAL THEORY (Richard F. Devlin ed., 1991).

Chief Justice Dickson expresses a certain frustration with the dissent's abstract characterization of the speech. After noting that he "cannot ignore the setting" in which freedom of expression is raised, he continues:

It is not enough to simply balance or reconcile those interests promoted by a government objective with abstract panegyrics to the value of open expression. Rather, a contextual approach to s.1 demands an appreciation of the extent to which a restriction of the activity at issue on the facts of the particular case debilitates or compromises the principles underlying the broad guarantee of freedom of expression.245

This careful inquiry into the particulars of the speech at issue is crucial to the Court's resolution of the problem. It also helps to account for the less detached tone of the *Keegstra* majority's legal analysis.

The Court's admission that it too must engage in a process of mediating different values also helps to create a more egalitarian relationship with the reader. Although the Court must try to fairly assess the conflict and understand both perspectives, it does not and indeed cannot view the conflict from a privileged, neutral position above the particular sides in the debate. So, while the American hate speech cases suggest that it is incumbent upon judges to set aside their personal assessments of the speech in favor of a more objective point of view, the rhetoric of the Canadian Supreme Court clearly illustrates that the Court's considered response to the speech is a relevant factor in determining whether the speech should be protected. Since the Court does not claim that it has a privileged perspective from which it can see what hate speech really is (although it does have an institutional tradition of fairness and even-handedness to respect), it must justify its decision on normative grounds. And this justification inevitably implicates the Court's own determinations of value, determinations which must themselves be assessed and either justified or rejected.

The Court strengthens this egalitarian relationship with the reader by exposing her to some of the difficulties inherent in the position it ultimately defends. Throughout the opinion one has a sense of intellectual struggle, of what John Rawls refers to as "reflective equilibrium."246

So, in considering the appropriate course of action, the Chief Justice admits that the state "cannot act to hinder or condemn a political view

244. [1990] 3 S.C.R. 892 (Can.).
245. *Id.* at 922.
246. RAWLS, supra note 73, at 48-51.
without to some extent harming the openness of Canadian democracy.” Similar, after illustrating that no course of action can completely protect the values underlying freedom of expression, he wonders how to deal with the possibility that his ruling weakens our communal commitment to freedom of expression, albeit in a different way than does the toleration of hate speech. By thus exposing the weaknesses of the position ultimately adopted, the Court encourages the reader to participate in the process of thinking through the best approach to this difficult problem. And the Court refuses to allow easy equivalences to obscure the difficulty of the choices we all, judges and citizens, face:

While we must guard carefully against judging expression according to its popularity, it is equally destructive of free

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248. Id. at 766.
249. This is not to suggest, however, that the judgments are in all respects ideal. They particularly seem to fall short in their treatment of the hate speech proponent. While the Court allows the target a certain kind of personhood not granted in the American case law, it does not seem willing to go the final step and also grant the proponent of hate speech the status of personhood. Instead, he is routinely described as a violent hate-monger. There may be a fair middle ground available between the American approach, which minimizes the harm and venerates open expression, and the Canadian approach, which reduces the speaker to a violent-hate monger. Of course, these speakers may be violent hate-mongers, but they are also individuals even if they are profoundly misguided and dangerous. Watching a film like Blood in the Face or the trial of someone like Jim Keegstra should make anyone but the ideologue feel some sense of sorrow for people who are so racked by hatred, and some sense of concern about how we have failed them (for instance, the class dynamics of this kind of racial hatred are often troubling). Thus, I think the Canadian hate speech opinions would be strengthened by recognizing that judgments upholding the regulation of hate speech do inflict a certain amount of real suffering on the proponent of hate speech. Surely we do not have to deny this in order to say that the regulation is nonetheless justified. There is something elitist, and even authoritarian, about the fact that courts do not seem to trust their audiences to feel some sympathy for the proponents of hate speech, and yet to feel that legislation is justified. This all too common technique of simplifying the moral equation by allowing personhood to only one party does not do us justice. A related difficulty is found in the Canadian Supreme Court’s decision to uphold pornography legislation. R. v. Butler, [1992] 1 S.C.R. 452 (Can.). In Butler, a unanimous Court simply dismissed far more serious problems of vagueness, and did not even address indications that the legislation had been disproportionately applied to gay bookstores. Since Butler, there have been continuing complaints about the unfair enforcement of pornography laws against gay and lesbian bookstores, as well as discontent about the failure to enforce the legislation against “mainstream” pornography. A lesbian bookstore in Vancouver B.C. called “The Little Sister Cooperative” has just commenced litigation in which it alleges that the practices of customs officials in enforcing the pornography provisions discriminate against lesbians. Arguments in the case concluded in the late fall of 1994.
expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial [to the values of freedom of expression].

Even the language of the Canadian Supreme Court’s hate speech opinions creates the sense that the Court hopes to forge a different relationship with its audience, for the Court chooses language that reaches beyond the legal community to the citizen. These opinions, although dauntingly long, are generally written in language which makes sense to the ordinary person. There is little technical language, and when legal doctrines are discussed, they are discussed in accessible rather than esoteric language. Reading these cases, one feels that the Court was aware that it was crafting an important cultural document, creating our most basic cultural values, even as it expressed them. In its eloquent statements about Canadians’ traditional beliefs in equality and tolerance, the Court not only expresses but also encourages us to strengthen those beliefs, to become more fully who we like to think we are.

V. COMPARATIVE JURISPRUDENCE AND THE PROBLEM OF TRANSLATION

The history of thought and culture is, as Hegel showed with great brilliance, a changing pattern of great liberating ideas which inevitably turn into suffocating straitjackets, and so stimulate their own destruction by new, emancipating, and at the same time, enslaving conceptions.

Naturally, we all speak languages that are largely inherited. Particularly—but by no means solely—in the field of law, the established language is powerful, ordering our existence and our relations with others, but also obscuring certain aspects of our world. Power has a way of concealing point of view and making a particular understanding of reality look simply neutral and true. And the realities our languages obscure remain invisible; the possibility of change, however necessary, seems elusive. But power cannot be exercised responsibly, nor perhaps even impartially, until this is recognized. The American discourse of hate speech that has developed in the past few decades is so powerful, so formulaic, that it indeed becomes difficult to conceive of alternative

252. Minow, supra note 5, at 74.
understandings. Much of it seems to insiders, even critical ones, to be so natural and inevitable as to be unquestionable. For this reason, comparing the American discourse of hate speech with the recent hate speech decisions of the Canadian Supreme Court may be a useful way of revivifying the American hate speech debate and enabling it to move forward.

Part of the potency of encountering another’s way of speaking about the world is that it makes apparent the conditions on which our own language operates; it renders visible what our own languages make invisible. Clifford Geertz suggests that to grasp concepts that, for another people are “experience-near” (in the sense that they are so foundational, so un-self-conscious that they do not appear as concepts at all), may enable us to move towards a more nuanced understanding of both ourselves and others. In this comparative activity we may begin to discover not only the value of other languages, but also the strictures of our own. Our own rhetorical choices, which inevitably privilege certain points of view and make others implausible, become matters to be discussed and justified rather than simply assumed. In this process

253. To some degree my position as an outsider to American political culture brought this home to me with regard to both my own view and the dominant American view. This occurred partly because of the ways in which the American discourse challenged my inherited understandings. Suddenly I had to explain and justify, if only to myself, those aspects of my understanding of the world which had previously seemed natural and not in need of justification. As I studied the American approach to hate speech, I began to see a pattern, the slippery slope. No doubt it was apparent as a pattern to me precisely because it did not coincide with my way of thinking about the problem. Indeed, initially I found that in discussions, I too was quickly pulled into talking about the problem in those terms. But I felt dissatisfied, as if I was not saying what I felt was relevant. It was partly this need to say something for which the official discourse left no room that led me to begin to compare what I wanted to say and what the discourse allowed. In attempting to uncover the underlying views of the world, I learned as much about the implications of my own language as about the foreign tradition which it was my original aim to understand.

254. Geertz, supra note 178, at 57.

255. White, supra note 4, at 257. Alasdair MacIntyre makes a similar point in Whose Justice? Which Rationality?, where he notes that individuals encountering an “alien” tradition may, despite the fact of some “untranslatability,” discover that it provides a standpoint from which “the limitations, incoherences, and poverty of resources of their own beliefs can be identified, characterized, and explained in a way not possible from within their own tradition.” MacIntyre, supra note 4, at 387-88.

256. J.B. White notes that it is necessary to challenge “the formulations by which the power of one person (or group) over the lives of another in the private sphere is justified or made to seem natural, by languages that assert their own unquestioned validity.” White, supra note 4, at 267. Similarly, Martha Minow recommends two methods to help those who judge to “glimpse the perspectives of others and to avoid a false impartiality.” Minow, supra note 5, at 79. She suggests that to achieve this, it is
of normative justification, we engage in the ongoing human task of fashioning a language adequate to our changing world.

There is a pragmatic reason why it can be valuable to compare the way different legal systems approach a similar problem. As discussed above, the dominant American discourse on the issue of hate speech makes a persuasive rendering of the alternative perspective within the system all but impossible. For this reason, it can be helpful to those seeking to articulate a subjugated perspective to look to comparative jurisprudence. The decisions of the Canadian Supreme Court provide a useful illustration of how one might go about making a persuasive case for the constitutionality of the regulation of hate speech.

In particular, the Canadian hate speech decisions are helpful because they illustrate the kinds of sources that might be called upon to make a case for the regulation of hate speech. For example, as noted above, the Canadian Supreme Court finds several legal sources, including international human rights instruments and the equality guarantee of the Charter, which foster respect for the legislature's decision to prohibit hate speech. On the critical issue of how the facts of a hate speech case necessary to "explore our own stereotypes, our own attitudes toward people we treat as different and, indeed, our own categories for organizing the world." Id.

257. The sources identified by the Canadian Supreme Court are not all equally applicable in the United States. For example, unlike Canada, the United States is not a party to any of the international instruments mentioned by the Supreme Court of Canada. However, this need not be determinative. It is worth noting, for instance, that the Canadian Court referred to documents such as the European Charter, which clearly do not bind Canada. The Court used these documents as sources of persuasive authority for the proposition that there is an international consensus among human rights scholars working within the liberal democratic tradition that hate speech ought to be regulated in the interests of racial and religious minorities. This approach characterizes hate speech as an issue best addressed in terms of discrimination rather than freedom of speech.

Similarly, while the constitutional guarantees of equality differ in Canada and the United States (not only because Canadian courts recognize effects-based discrimination, but also because they view the Charter as capable of imposing positive obligations on the state, especially under the rubric of the equality guarantee, see Schachter v. Canada, 93 D.L.R. 4th 1 (Can. 1992)), it presumably would be open to American judges to consider the presence of a constitutional imperative like the Fourteenth Amendment in their deliberations on hate speech. Once again, the Canadian jurisprudence suggests the form that such an argument might take. It is noteworthy, for instance, that the Canadian Supreme Court did not hold that failure to legislate would constitute a violation of the equality guarantee. Rather, the Court suggests that when considering the constitutionality of legislation, it may be relevant that the enacting legislature was attempting to secure protection of other constitutional rights. Thus, to the extent that a government regulating speech is doing so in an attempt to secure other Charter rights which may be in jeopardy, this constitutes some reason for approaching the legislation with respect rather than suspicion. According to this view, a constitution is not seen as a series of unrelated guarantees. Rather, the implicit understanding of the Canadian Supreme Court is that,
are constructed, it may also be helpful that the majority of the Canadian Supreme Court implicitly and explicitly challenges the use of the vagueness and overbreadth arguments to shift the focus from actual litigants to more attractive constitutional stand-ins. The decisions of the Canadian Supreme Court also provide some guidance for how the regulation of hate speech might be understood to further a public interest. The American approach to hate speech classifies the target's interest in protection as purely private. The predominant technique of critics, which relies on story-telling and the creation of empathy, implicitly accepts that classification and hopes to generate enough sympathy to make the private plight a matter of public concern. But the failure to challenge the implicit classification of that interest as purely private allows the official discourse to characterize regulation as illegitimate favoritism and to ignore the alternative perspectives. In contrast, the Canadian hate speech cases find that the regulation of hate speech protects not just the targets, but also important public interests, including equal participation in public life, democracy and respect for human dignity and equality. These arguments may further a richer discussion of the potential public—as opposed to merely private—issues in the regulation of hate speech.

However, comparative jurisprudence offers more than practical benefits. In the context of hate speech, for instance, comparing the while a document like the Charter is a series of distinct guarantees, it is much more. Together these guarantees have meaning because they form the foundation of what we believe is necessary to compose a good society. Thus, a right cannot be considered in complete isolation from the other elements of the Charter. Courts and commentators have pointed to section 1's "free and democratic society" as the expression of the fundamental values that both give content to, and limit, the rights contained in the Charter. R. v. Keegstra, [1990] 3 S.C.R. 697, 735-36 (Can.); R. v. Oakes, [1986] 1 S.C.R. 103, 133-34 (Can.). This understanding may be easier under the Canadian Charter, not only because of section 1, but also because the Charter was enacted as a single document. However, this does not seem to provide a complete answer to why it is necessary to view constitutional rights in isolation from each other.

258. On this point, however, I think the hate speech decisions of the Canadian Supreme Court could be more helpful. In particular, it would have been useful for them to address more directly the question of the level of specificity with which facts are to be described. While, as noted above, Chief Justice Dickson expresses frustration with the dissent's "abstract panegyrics," his opinion would have been stronger if he had directly addressed the merits of his fact characterization. Canada (H.R.C.) v. Taylor, [1990] 3 S.C.R. 892, 922 (Can.). The dissents, which rely on very abstract fact characterizations, as well as the vagueness and overbreadth arguments, do not defend their chosen fact characterizations either. However, since the dissents rely explicitly on American precedents which have made this approach familiar in Canada, their position may need less justification. Given that the majority departs entirely from this dominant approach to the problem, it would have been helpful if they had explicitly discussed why they had done so.
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Canadian and American approaches can reveal the crucial yet unstated assumptions which underlie each discussion. 259

Judicial construction of the facts is one of the most decisive elements of a legal opinion. In a sense, the war over hate speech is largely fought on the battleground of what will be considered the relevant facts. Paradoxically, justification for any particular construction of the facts is one of the most neglected issues in both judicial opinions and theoretical writings. 260 But this poverty of discussion means that the war is largely a guerilla war—the opinions state only the bare result of any particular battle. Judges do not tell us why they situate facts in a particular way, nor why certain facts are relevant but others are not. Yet, comparing the American and the Canadian descriptions of the very similar facts of a hate speech case uncovers the vital choices judges nonetheless make in finding the facts. 261

Perhaps most importantly, the Canadian and the American cases come to very different conclusions on the crucial determination of how to situate the hate speech problem. While the American courts treat hate speech as an unproblematic extension of the subversive advocacy cases, the Canadian Supreme Court instead situates it in the context of racial and religious discrimination. This demonstrates that although the choice of context is indeed crucial to the resolution of the issue, hate speech can plausibly be understood in the context of either subversive advocacy or of racial discrimination. Comparison of the Canadian and the American discussions also uncovers a whole range of choices about how to

259. The assumptions exist on both sides. However, I will focus on the assumptions of the American debate. The American jurisprudence is so much older, so much more literally the product of an inherited language, and in some sense more in need of revivification than the Canadian jurisprudence, which is the constitutional equivalent of a newborn in matters of freedom of expression. Also, Canada, with its historical links to Britain and its geographical situation beside such a powerful neighbor, has always defined itself in terms of some more powerful other, a fact which has the inevitable side effect of making it more aware of its own point of view.

260. Kim Scheppele discusses this in Foreword: Telling Stories, supra note 175, at 2077-84 (1989). She also comments on the surprising absence of discussions of factual interpretation in works like Ronald Dworkin's LAW'S EMPIRE (1986), which focus on the enterprise of legal interpretation. Scheppele, supra note 175, at 1105. An exception to the general absence of discussion about factual construction can be found in Eberts, supra note 242, and Michael Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277 (1985).

261. This is not to suggest that this is a conscious choice. Indeed, part of the invisible power of an established language is its ability to make choices not seem like choices, even to those who make them. Further, as noted above, there also seems to be at work a desire to minimize the sense that the decision inflicts harm, and this is achieved partly by creating sympathy for the speaker and avoiding serious discussion of the plight of the target.
characterize hate speech. The American cases characterize the speech in very general terms and dwell very little on its specific content. In contrast, the Canadian cases focus closely on the specific content of the speech. There is an important link between how the speech is described and the resolution of the case. Focusing on its specific content makes hate speech seem like violent harassment, so that protecting it in freedom’s name seems dubious. Conversely, describing the speech in general terms as political or even philosophical speech makes any regulation of it appear unjustifiable. But there does not seem to be any objective or neutral way to choose between the various levels of specificity at which speech can be described. Nor can it plausibly be said that general descriptions are more objective, particularly when it is necessary to select among general descriptions like “racial harassment” or “political speech.”

Similar choices become apparent when one compares the points of view adopted by the courts. The American hate speech cases talk about the vantage point of the judge as if it were above the messy events of history, where the judge can see what hate speech really is. When one compares this vantage point with the Canadian cases, however, the particularity of this apparently neutral perspective becomes apparent. It is point of view that seems to distinguish the context and the description of the facts adopted by the American courts from those adopted by the Canadian courts. Seeing the problem as one of subversive advocacy and political speech casts the speaker as an idealistic dissident and thus tracks his or her self-understanding. In contrast, describing the issue as racial harassment and focusing on the impact of the hate message on the target implicitly identifies the target’s perspective as the normatively relevant point of view. The different treatments of democracy in the Canadian and American cases also privilege different perspectives. If, as the American cases suggest, democracy requires the unfettered airing of all ideas, then the speaker’s interest in participation in the “marketplace of ideas” is privileged. In contrast, a view of democracy that protects each member’s equality and dignity gives greater priority to the interests of the targets. But in what meaningful sense can one of these perspectives be said to be more neutral than the other?

262. In the context of factual descriptions in tort law, Morris notes a similar issue. If the facts of a case are described in very general terms, then they are more likely to be seen as reasonably foreseeable. Conversely, if they are described in very specific terms, then they are less likely to seem reasonably foreseeable. Since both (or all) descriptions are generally true, the choice between (or among) them cannot rely on an appeal to reality or truth in some unproblematic sense. Clarence Morris, Duty, Negligence and Causation, 101 U. PA. L. REV. 189, 196-98 (1952).
The way a court describes the facts of a case always has an intimate relationship to the legal conclusion. It is partly by adopting apt descriptions of the facts that courts so often are able to plausibly invoke precedent without any discussion. So, for example, in the American cases on hate speech, the fact that the speech is described as symbolic and political speech involving philosophical ideas helps to determine whether the law of subversive advocacy or the law concerning racial harassment and civil rights will be relevant. If the speaker is described as an idealistic radical, cases about war protesters and civil rights activists naturally seem applicable. In contrast, as the Canadian cases illustrate, if the speech and the speaker are characterized in terms of discrimination and harassment, then it is precisely the precedents on discrimination and human rights that seem applicable.

This comparison also reveals an absence that is at least as relevant as the fact of these choices. Courts make crucial choices in their descriptions of the facts and invocation of precedent, but they do not justify those choices. Instead, they rely on rhetoric that makes their understanding appear natural and even inevitable—rhetoric that obscures the fact of choice and thus avoids responsibility. Comparison illustrates that these questions cannot be adjudicated simply by resort to truth claims. The issue is not whether a particular description or classification is true, but whether it is illuminating. This requires a substantive discussion of the merits of viewing hate speech in one context or another. How does it further understanding, for instance, to treat hate speech as morally and legally equivalent to the speech of idealistic anarchists like Jacob Abrams? There are at least as many discontinuities as continuities in the analogy, so the argument cannot simply be that it is the same. So why exactly do courts think that the continuities are more deserving of judicial attention? There may be good reasons why, but the hate speech cases do not divulge them. And if justification is crucial to judicial decisionmaking, then this cannot be adequate. It is also necessary to justify why any one particular perspective is a better way of viewing the problem than another, or perhaps more optimistically, whether it isn’t possible to take multiple perspectives into consideration.

263. Here, again, it is interesting to note how the alternative narrative tends to operate within the assumptions of the dominant discourse. In response to the implicit claim of the dominant discourse that hate speech really is dissident political speech, proponents of an alternative approach often seem to claim in response that hate speech really is racial or sexual harassment.

264. For a formulation of a moral point which evaluates convictions from the common, rather than the particular or personal standpoint, see the discussion of objectivity in John Rawls, Justice as Fairness: A Briefer Restatement 72-77, 96-98 (1990) (unpublished manuscript, on file with author).
body of law cannot simply be assumed to apply, courts must explain what makes one body of law more applicable than another. Such a discussion would most certainly not only enrich decisions but might also inspire more meaningful conversations by enabling the participants to concur on what truly divides them.

Comparing the Canadian and the American discussions of hate speech is also illuminating because the rhetoric provides a window to the deepest commitments of the two discourses. The two sides in the American hate speech debate often fail to engage at all on the deepest issues that divide them. However, uncovering the fundamental assumptions that underlie the official American discourse on hate speech by contrasting that discourse with the Canadian approach may at least make discussion possible. Comparison reveals that the two discourses rest on very different understandings of the nature of the state, the concept of freedom, and even the concept of democracy itself. These understandings are "experience-near"—so fundamental that they are not mentioned, so constitutive of our ways of speaking about and living in the world that they do not seem to be assumptions at all.

The notion of the state is the most fundamental concept underlying the competing discussions of hate speech. While neither the American nor the Canadian cases explicitly discuss their views of the state, these unarticulated views profoundly inform the way the problem of hate speech is discussed. Indeed, the very unselfconsciousness of the concept is testimony to its power. Unifying much of the discussion of hate speech in the American cases is the premise that the state is profoundly dangerous. A belief that no private actor, however threatening, could ever be as dangerous as the state underlies much of both the rhetoric and

265. Indeed, this question of what qualifies as a relevant similarity is at the normative core of many legal judgments, yet rarely does a judge explicitly address it. The judge's analysis is, in one sense, a justification. However, judges rarely acknowledge that they are often choosing among varying precedents. As noted, the fact of choice is also somewhat obscured since the notion of the relevant law seems to flow naturally out of the court's chosen characterization of the facts. In addition, the predominance of the established language of hate speech combines with institutional mechanisms such as precedent to make the element of choice particularly obscure.

266. On the whole, Canadian political culture is probably somewhat more aware that its view of the state is a view simply because we have always identified ourselves in terms of an other, more powerful point of view. The resultant tenuousness of Canadian identity has been much discussed. MARGARET ATWOOD, SURVIVAL (1972). In the legal domain as well, Canadian courts draw relatively freely on the jurisprudence of other jurisdictions, including the United States, England, France, Australia, and New Zealand. Indeed, the hate speech cases themselves, which discuss not only American but also European and international approaches to the problem, are an illustration of this broad view of what sources may be considered persuasive authority.
the results in the American hate speech cases. The very language used to describe the state invokes this image—it is the menacing police power, exercising thought control, playing favorites, and likely to use even the most apparently innocuous regulation for its own selfish purposes. This state is characterized by pluralist politics and dominated by factions. It is this vision of the state, and of official psychology, that underlies the all too prevalent slippery slope argument, for the assumption that the state is a dangerous megalomaniac is what gives force to the concern with the precision and clarity of the legal line. This is also what makes plausible the depiction of the speaker as beleaguered. In a political culture dominated by this conception of the state, the threat one private individual poses to another inevitably appears insignificant. For this reason, courts characterize the state as the dangerous discriminator. In this sense too, the language of “mere offensiveness” and other attempts to minimize the harm of the speech can be seen as an attempt on the part of the judiciary to convince the audience that abuses of private power pale in comparison with abuses of state power. As Justice Scalia’s warning against adding the First Amendment to the fire so aptly illustrates, in this discourse the state is a kind of super-individual, like other individuals in

267. Carl Becker nicely summarizes this view when he paraphrases Thomas Paine to the effect that “whereas society springs from men’s virtues, government springs from their vices, and is therefore a necessary evil.” This illustrates the predominance of the eighteenth-century version of liberal political philosophy, which holds that the best form of government is the one that governs least. CARL BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 7-8 (1945). Similarly, Alan Westin observes that “Americans are inordinately distrustful of government, and are, for the most part, suspicious of all authority, religious, economic or otherwise.” ALAN F. WESTIN, The United States Bill of Rights and the Canadian Charter: A Socio-Political Analysis, in THE U.S. BILL OF RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 31 (1983). Charles Taylor notes a similar predisposition in American political culture. See Charles Taylor, Can Canada Survive the Charter?, 30 ALTA. L. REV. 427 (1992).

268. This is an interesting echo, undoubtedly unintentional, of The Civil Rights Cases, 109 U.S. 3 (1883). The Court struck down the Civil Rights Act of 1875 on the ground that the legislation was not authorized by any substantive grant of power to the federal government. In particular, the Court rejected the argument that the Fourteenth Amendment authorized such legislation by finding that the Fourteenth Amendment was directed only to state action and not to individual invasions of individual rights (which were “simply” private wrongs). In the course of its discussion, the Court made a statement that seems curiously in keeping with the rhetoric of particularly the later hate speech cases: “When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.” Id. at 25 (emphasis added).

269. THE FEDERALIST NO. 10, supra note 57.
its pursuit of its own selfish ambitions, but profoundly more dangerous because of its relative power.\footnote{270} In contrast, the Canadian hate speech cases rest on a much more positive understanding of the state.\footnote{271} The descriptions of the state and of official motivation in the Canadian cases convey an image of the orderly and rational pursuit of public interest. According to this view, given constitutional expression in section 1 of the Charter, the state is not a super-individual necessarily concerned with selfish motives. Instead, the state can be public-spirited,\footnote{272} and, as the Court describes it, the state does indeed seem to be pursuing a conception of the public good. This conception emphasizes both the centrality of equal citizenship as well as the responsibility of the state to ensure that this kind of equality can be realized. It is to make this point that the opinions emphasize the equality-seeking and the freedom-enhancing nature of official action. And it is in part this possibility of benevolent state action that makes the dissent's slippery slope arguments ring hollow. Culturally, even if Canadians do

\footnote{270} This concept of the state as an essentially illegitimate faction underlies much liberal discourse. A classic example is Robert Nozick's \textit{Anarchy, State, and Utopia}, where the state is routinely analogized to a group of individuals trying to impose their will on everyone else. Nozick, supra note 73. Anything beyond the minimal state is characterized by the triumph of some essentially individual, private interests over those less powerful. Thus, Nozick concludes, the state must be confined to the nightwatchman role accorded it in nineteenth-century liberal political theory.

\footnote{271} Westin notes this difference: "Most Canadians see government as more positive, and more often acting in the interests of the citizenry, than is the case in the United States." Westin, supra note 267, at 38. Some of the possible reasons for these differences in political culture have been explored by Gad Horowitz in \textit{Conservatism, Liberalism, and Socialism in Canada: An Interpretation}, in \textit{Canadian Labour in Politics} (1968). Building on the work of Louis Hartz in \textit{The Founding of New Societies} (1964), Horowitz suggests that the difference between the "Lockean individualism" that dominates American political culture and the English-Canadian version of liberalism which is "less individualistic, less ardently populistic-democratic, more inclined to state intervention in the economy" derives primarily from the nature of the fragments of European societies that immigrated to the two new countries. \textit{Id.} at 29. Seymour Lipset also discusses the source of these differences in political culture. \textit{SEYMOUR LIPSET, CONTINENTAL DIVIDE} (1990). He traces the divide back to the varying impacts of revolutionary birth of the United States and the much less dramatic Canadian genesis. \textit{Id.}

\footnote{272} Charles Taylor also identifies this notion as part of what makes Canadian political culture distinctive. He describes this element as involving a greater commitment to "collective provision." Taylor, supra note 267, at 429. Professor Taylor notes that while appeals for a reduced government may also be heard in Canada, the actual content of those appeals still distinguishes Canadians who consider themselves minimal state adherents from their American counterparts. He notes that, in general, Canadians are proud of and happy with their social programs, especially health insurance, and find the relative absence of these programs in the U.S. disturbing. \textit{Id.}
not particularly like the government, we do not tend to see it as dangerous—foolish and bumbling, yes, but rarely dangerous.273

This difference in the understanding of the state also has important implications for the concept of freedom at work in the two narratives.274 If the state is the fundamental threat to freedom, then freedom is secured by restraining the state and giving full play to forces in the private sphere. This classic "negative liberty"275 view of freedom and of the state forms the conceptual underpinning of the way that hate speech is discussed in the American cases. Its implicit distinction between the freedom of civil society and the coerciveness of public authority makes plausible the notion that the courts are preserving freedom, even as they uphold the rights of groups like the Nazis and the Ku Klux Klan, for what the courts are preserving is a sphere in which individuals may act free of government interference. This view of the freedom of the private sphere is also apparent in the judicial rhetoric that identifies the speaker with the cause...

273. The language used to describe the state is also illuminating. For example, Canadians would not describe the sphere of political action as the exercise of the "police power." Interestingly, even our police officers (the picturesque Royal Canadian Mounted Police) don't appear dangerous—they look more like museum pieces than dangerous storm troopers. Of course, this is not to say that the political arm of the Canadian government is not potentially dangerous. This is simply not the image we have of our state. Charles Taylor notes how this predisposition to trust authority can equally lead Canadians to excesses. In particular, he notes our remarkable reluctance to condemn the R.C.M.P. despite serious reasons to do so. Taylor, supra note 267, at 429. In this sense, more flexible views seem desirable on both sides of the 49th parallel.

274. Westin notes that the negative rights orientation of Americans toward government "deeply affects notions of rights and liberties and how Americans expect such rights to be protected." Westin, supra note 267, at 31. "This . . . illustrates the kind of political ideology that is fundamental to understanding the American civil liberties experience." Id. This political ideology is naturally apparent elsewhere in American constitutional law. For instance, both Rust v. Sullivan, 500 U.S. 173 (1991) and DeShaney v. Winnebago Cty. Dep't of Social Services, 489 U.S. 189 (1989) insist that the Constitution is concerned with negative rights only. While both decisions seem explicable on narrower and less contentious bases, it is nonetheless revealing that a negative rights interpretation of the Constitution is considered such a strong ground of justification.

275. Sir Isaiah Berlin describes negative liberty in the following terms: "By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom." ISAIAH BERLIN, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 123 (1979). Berlin notes that since, as Hobbes argued, "Law is always a 'fetter,' even if it protects you from being bound in chains that are heavier than those of law," there must be a frontier "drawn between the area of private life and that of public authority." Otherwise, there will be no personal freedom. Id. at 124. Charles Taylor describes—and critically discusses—this "opportunity concept" of negative liberty in What's Wrong with Negative Liberty, in PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 2, 213 (1985).
of freedom and the state with oppressive constraint.\textsuperscript{276} If government intervention is seen as an inevitable threat to liberty, then keeping government out will be seen as freedom. Preserving freedom of speech thus requires the courts to keep the meddlesome and dangerous state at a safe distance from the free interplay of ideas.

Underlying the Canadian discourse is a profoundly different vision of freedom. Indeed, it is perhaps unsurprising given the long tradition of public involvement in medical care, higher education, public broadcasting and many other areas of life, that Canadians generally embrace not only negative but also positive liberty. Since the state is not seen as necessarily threatening, freedom is not automatically equated with the state staying out. This conception of freedom has more in common with the “exercise-concept” of positive liberty, according to which freedom is not merely the absence of external constraint, but is instead the effective exercise of control over one’s life.\textsuperscript{277} Even the structure of the Charter is illustrative of this. If many of the guarantees of the Charter protect the classic negative liberties, section 1 gives expression to Canada’s belief in positive liberty. This is because section 1 embodies the recognition that the state may well be acting, and even limiting, some Charter rights and freedoms, in an attempt to secure a more positive form of freedom not sufficiently safeguarded in private ordering.\textsuperscript{278} When seen in light of this more positive conception of liberty, section 1’s reference to those limits on rights which are justified by a free and democratic society is not

\textsuperscript{276} It is primarily because of this understanding of the configurations of public and private power that the official American approach to hate speech finds it plausible that potential speakers will be chilled into silence by regulation, but unbelievable that the targets of hate speech would be chilled into silence simply because of being targeted with racist hate speech. Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). This understanding of freedom is also apparent in the confidence that minimum regulation yields maximum speech. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

\textsuperscript{277} Taylor, supra note 275, at 213.

\textsuperscript{278} Interestingly, Professor Westin notes that the Canadian tradition of parliamentary supremacy has historically put “in the hands of the legislature, the responsibility, in law and in politics, of holding the society’s balance true between liberty claims on the one hand, and competing claims of order and community on the other. There is in Canada a broad public sense, not shared in the United States, that legislatures and cabinets are appropriate bodies to conduct those kinds of weighing processes wisely and well.” Westin, supra note 267, at 38-39. While this seems correct, it also misses another fundamental point, perhaps because Professor Westin equates liberty with negative liberty. This is because different kinds of liberty claims may compete with one another, as they do in the hate speech cases, and thus the legislature may act to further certain kinds of liberty claims (positive) by limiting other kinds of liberty claims (negative). The legislature is not simply engaged in weighing collective interests against the liberty claims of individuals; it also acts to further liberty interests, and in doing so finds justification for its actions under section 1.
incoherent. Instead, it expresses the "uniquely Canadian" vision of a free society—a society in which members have not merely the opportunity to be free, but also the means of exercising that freedom. This accounts for the necessity of looking at the effects of speech and of legislation in order to determine how much effective self-determination people can actually exercise in the private realm, under conditions not only of state intervention, but also of non-intervention. The Canadian Supreme Court does exactly this in the hate speech cases by describing the speaker as destructive of freedom and the regulation as supportive of it.

Perhaps most interesting of the underlying assumptions at work in the two discussions of hate speech is the vision of democracy. In both the American and Canadian cases, identification of the overwhelming public interest is crucial. Interestingly, both approaches accomplish this identification primarily through their notions of democracy. However, the visions of democracy invoked by the two courts are strikingly different.

An important part of the rationale at work in the American cases is the view that if the state is allowed to silence anyone, it will inevitably distort the processes of democracy. This embodies a certain ideal of

279. R. v. Keegstra, [1990] 3 S.C.R. 697, 743 (Can.). The Court seems to be referring to the uniqueness of section 1 as compared with the American view of rights and liberty. As the Court notes, international rights-protecting documents do envisage limits such as those found in section 1. Id. at 750-55. Of course, the Canadian Court does not adopt the view that there are no limitations on the rights guaranteed in the American Constitution simply because there is no equivalent of section 1. But what the Court does suggest is that beginning the Charter with a strong affirmation of the role of elected bodies in ensuring freedom and democracy suggests a conceptual departure from the American approach. It is also worth noting that there is room in American political theory for a more positive conception of liberty akin to that expressed in section 1. For instance, John Rawls emphasizes that liberalism aims not merely at liberty, but at equal liberty, a view which gives room for liberty-enhancing action on the part of the state. RAWLS, supra note 73, at 201-05.

280. Perhaps this difference in the concept of freedom helps to account for why Canadians find it so difficult to understand the American rhetoric surrounding the issue of public health care, which tends to be discussed largely as an issue of freedom of choice. Ronald Dworkin, What Is Equality? Part 3: The Place of Liberty, 73 IOWA L. REV. 1 (1987). It is difficult to square this description with the understanding of freedom that prevails in Canadian political culture, for poor individuals cannot obtain adequate medical coverage in a system where access to health care depends on resources. Thus, they cannot exercise effective control over their health. However, the freedom of choice description does make sense if one assumes the dominant American view of freedom, for so long as the state is exercising its authority, the individuals by definition cannot be free.

281. This suggests there is something compelling about the connection Alexander Meiklejohn makes between freedom of speech and democracy. Meiklejohn, supra note 195.
democracy as a process by which all ideas are presented so that the populace can select among them. Like the market metaphor on which this view is based, democracy itself is a mechanism neutral as among the contending ideas. In this sense, the prevalence of the "marketplace of ideas" metaphor is anything but accidental. According to this Schumpeterian model, democracy consists purely of the unfettered process by which the people choose among contending views: "The main stipulations of this model are, first, that democracy is simply a mechanism for choosing and authorizing governments, not a kind of society nor a set of moral ends; and second, that the mechanism consists of a competition between two or more self-chosen sets of politicians..." 

Under this model, the purpose of democracy is not to assess but simply to register preferences, and therefore any restriction of the market options inevitably undermines democracy. Thus, judges indicate that only the protection of hate speech can safeguard democracy, for such protection ensures that the market will proffer the widest possible array of options. This model also underlies the claim that the refusal to regulate hate speech distinguishes the American way of life from totalitarian societies—that is, from societies where the state dictates what options can and cannot enter the democratic marketplace. It is this view of democracy that gives force to the normative identification of anarchists with members of the Klan and Nazis. They are equally legitimate representatives of democracy, for they bring ideas to the marketplace. Indeed, they are even plausibly the litmus test for the extent of a society's commitment to democracy, since they test its devotion to the unfettered airing of ideas and thus to democracy itself. Politics is conceived as a competition among interest groups and whoever wins rules legitimately, for the touchstone of legitimacy is the unfettered process which guarantees the citizens' ability to replace one government with another of their choice.

The Canadian view of democracy sharply contrasts with this vision. The democratic ideal that animates the Canadian hate speech decisions is at its core concerned with the substantive value commitments democracy entails, including most prominently an overriding belief in the dignity and equal worth of each human being. This model of democracy, which


283. The underpinning of this model, like that of the market, is an invisible hand theory, which privileges an individualistic model of choice and is inherently suspicious of the collective deliberation that characterizes the political sphere. A contemporary illustration of this perspective can be found in Dworkin, supra note 280.

284. R. v. Keegstra, [1990] 3 S.C.R. 697, 764 (Can.). Therefore, while the American approach suggests that restrictions of hate speech may be particularly problematic because of the political content of the speech, Chief Justice Dickson argues
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has John Stuart Mill and the ethical-liberal democrats of the late nineteenth and early twentieth centuries as its philosophical ancestors, aims toward a society where all people are equally free to realize their capabilities. Therefore, the democratic process must be measured against the substantive commitments to human dignity and equality which infuse the democratic ideal. For example, the Canadian Chief Justice argues that the open participation so crucial to democracy is not simply procedural, but instead relies on the substantive belief that "all persons are equally deserving of respect and dignity." It is this understanding of democracy which enables the Supreme Court of Canada to find that hate speech subverts and repudiates the democratic ideal. This focus on substantive results also underlies the distinction that the Canadian Supreme Court draws between Canada and totalitarian or undemocratic regimes. The Court points out that hate speech aims to undermine not only the democratic processes but also the substantive belief in equal humanity and dignity that underlies that ideal, thus suggesting that restricting hate speech supports rather than undermines the democratic ideal.

that "given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s.2(b) rationale." Id. at 765.

285. See MACPHERSON, supra note 282.
287. Id.
288. Id. Interestingly, in its focus on the possibility that hate speech will inhibit free participation in democratic processes, the Court also draws attention to possible procedural difficulties with such speech. But this takes us back to the differing views of freedom, since only a more positive conception of liberty could conceive of such an argument.

289. Id. Another, subtler difference underlies the American and the Canadian approaches to the regulation of hate speech—a difference which provides an interesting analogue to the different views of democracy. At work in the American and the Canadian hate speech cases are very different pictures of the ideal judge. These pictures seem to parallel the understandings of democracy. In the American cases, like the ideal of neutrality in democracy, the ideal of neutrality in judging seems to require the judge to assume a position above—and independent of—all value choices. The legitimacy of the process of judging, like the legitimacy of the democratic process, depends upon this value-neutral stance. The rhetoric also suggests that the judiciary is simply a mechanism, neutral as between the values it adjudicates, by which the demands of the Constitution are applied to a particular case. In contrast, the Canadian hate speech cases embody a somewhat different notion of judging. According to this view, judging necessarily entails making and defending substantive value choices within the framework of values set out by the Constitution. According to this view, the legitimacy of judging ultimately depends upon the validity of those value choices.
So, there are very fundamental differences underlying the rhetoric of the American and the Canadian hate speech cases. But this may call into question whether the two discourses are in fact so divergent that the Canadian approach cannot serve as a useful means of revivifying the American debate on hate speech and suggesting some new directions. Are the differences simply too great to make comparison useful?

Canadian legal and political institutions have developed in a political culture that has imbued them with certain ideals well suited to their allotted role. And the same is true of the American institutions. Moreover, the histories of the two countries are very different despite many obvious similarities. In particular, Canada has no true equivalent of the McCarthy-era and the subversive advocacy cases which seem to be the impetus for the judicial concern with the regulation of speech.²⁹⁰ It may be the case that when it comes to political freedoms, the American state is more dangerous than the Canadian state.²⁹¹ There may be other significant differences between the two countries that are important for the issue of hate speech regulation. For instance, it is possible that Canadians are more tolerant of certain kinds of differences. It is noteworthy, for example, that the Canadian political culture is typically described in terms of a cultural mosaic while the American political culture is described as a melting pot.²⁹² While these characterizations are obviously simplistic, and probably overplay the real differences, it may nonetheless be true that there is in Canada greater tolerance for a wide range of political opinions, as well as for various cultural differences.²⁹³ Thus, promoting tolerance through non-regulation of hate speech may not seem as crucial to Canadians. To the extent that Canadian and American political culture differ on this point, then, the approach of the Canadian hate speech cases may not be persuasive in the American situation.

It is also important to note the very different institutional histories that inform the two judicial approaches. The rhetoric of the Canadian

²⁹⁰. This is not to suggest that Canadian history reveals no abuses of civil and political rights in the interests of prevailing political power. While Canada has witnessed nothing as sustained and official as the McCarthy-era institutions, it does have its own history of political repression. THOMAS BERGER, FRAGILE FREEDOMS: HUMAN RIGHTS AND DISSERT IN CANADA (1981).

²⁹¹. Although, as noted above, while it is possible that the American hate speech cases overplay the dangers of the state, it is also possible that Canadians underplay any such dangers. It seems most likely that no simple view of the state is adequate in either country. Rather, one must look more carefully at the precise issue and the risks involved in any particular form of regulation (both risks derived from state power if regulation is pursued, and risks involved in allowing private power to be determinative if regulation is not pursued).

²⁹². See Taylor, supra note 267, at 431.

²⁹³. Horowitz, supra note 271.
Talking About Hate Speech

Supreme Court betrays some of the zeal of the newcomer to the exhilarating language which the Charter puts at the disposal of the courts. Until 1982, discussions of individual rights by the Canadian judiciary were lodged in the oblique language of federalism and the division of powers. Perhaps for this reason, Canadian courts, and the Supreme Court in particular, have enthusiastically embraced the more appropriate language of the Charter. Conversely, it is certainly of some relevance that American judicial history is much more extensive and naturally contains episodes that make contemporary courts aware of the dangers of wholeheartedly embracing an interpretive position that acknowledges that constitutional interpretation ultimately requires judges to make substantive value choices. Though Canadian courts will no doubt at some point have their own equivalent of the Lochner-era or the subversive advocacy era, they have no such troubling judicial history under the Charter at this point, and this is reflected in their understanding of the judicial role.

No doubt these are but a few of the reasons why, even if one were so inclined, it would not be possible to simply transpose the Canadian approach to the regulation of hate speech to the United States. Nonetheless, comparative jurisprudence can be illuminating, perhaps most of all because it makes us aware of the most fundamental commitments we make when we invoke—as we inevitably do—an inherited way of speaking about the world. Ironically, in studying the approach that another country takes to a problem we all face, the most valuable knowledge we gain may be self-knowledge. What always seemed simple and natural becomes, through force of comparison, complex and problematic: “You open a chamber of the mind that before was closed and bring under scrutiny that which had theretofore seemed invisible, natural, beyond any imagined contemplation . . . .”

Certainly we cannot simply import wholesale the approach of one country’s jurisprudence into that of our own. Indeed, this would undermine the whole point of trying to shape a language adequate to one’s own world. There is, in fact, no easy way around this enduring human struggle. It is no more adequate to simply transpose the approach of another country than it is to hold blindly onto inherited understandings. Like the growth and development of the old city that Wittgenstein describes, revivifying our languages proceeds by means more piecemeal, more uncertain. Difficult as it is, even as we work within our own languages, we must struggle against them and question what they enable us to see of our world. In this arduous task, comparative jurisprudence

294. As noted above, Alasdair MacIntyre discusses this function of comparative understandings. MACINTYRE, supra note 4, at 387-88.
295. WHITE, supra note 4, at 255.
can be useful. It makes visible possibilities obscured by our way of speaking about the world, makes problematic what had always seemed simple, and thus helps us to become aware of the straightjackets of our once liberating ideas. But this rediscovery of complexity and ambiguity is only the beginning. Ultimately we must ask what makes sense now, in our time. No matter what the outcome, this is a crucial part of each citizen's moral education.

Comparing the American and Canadian approaches to the regulation of hate speech can therefore be instructive. Uncovering some of the differences also illustrates that the construction of the state, of the private realm, and of democracy are choices about how to understand and speak about the world, not unassailable truths. This process helps to uncover—and thus enables discussion about—the complexities that the reductionist pressures of legal language work to suppress. This comparison may also be helpful in another way. The energetic American debate on freedom of speech is frustrating for several reasons, among them the fact that the contending perspectives do not seem to address each other at all. Examining another way of approaching the problem may help to uncover the invisible assumptions and therefore make it possible to identify some of the fundamental points of contention. In this way, the two sides may, at least, begin to really speak about what divides them. Such a discussion cannot help but enrich the debate, even if the result remains the same.

This process of questioning is also crucial to the democratic ideal, for, as John Dewey said, "democracy begins in conversation." Our constitutional provisions themselves can never be considered completely defined by history, for we are responsible for interpreting that history and its import for our time. Our forbearers inhabited a certain world and fashioned their ideals accordingly. Our world is in some respects the same and in some different. It is our responsibility to reexamine that world and struggle with how we can best live together. And in that process, in reexamining the way we understand and speak about the world, we begin the conversation that begins democracy.