

4-1-1998

## Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech

Kenneth D. Ward

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [First Amendment Commons](#)

---

### Recommended Citation

Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. Miami L. Rev. 733 (1998)

Available at: <https://repository.law.miami.edu/umlr/vol52/iss3/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech

KENNETH D. WARD\*

I. INTRODUCTION .....	733
II. FREE SPEECH AND LEGITIMATE DEMOCRATIC GOVERNMENT .....	736
A. <i>Formulations of Free Speech Principles</i> .....	736
B. <i>Collective and Particular Interests Advanced by Free Speech</i> .....	738
C. <i>Free Speech and the Development of a Liberal Character</i> .....	743
III. LIBERAL VIRTUES AND POLITICAL PARTICIPATION: FRANKFURTER'S RESPONSE TO BRANDEIS .....	747
IV. CONFUSION WROUGHT BY BRANDEIS' DEFENSE OF FREE SPEECH .....	753
V. JUDICIAL RESTRAINT AS A RESPONSE TO LEGISLATION RESTRICTING FLAG-BURNING AND HATE SPEECH .....	756
A. <i>Flag-Burning</i> .....	758
1. CITIZENS' ATTITUDES ABOUT FREE SPEECH AND THE POLITICAL COMMUNITY .....	758
2. JUDICIAL RESTRAINT AS A RESPONSE TO RESTRICTIONS ON FLAG-BURNING .....	760
a. Flag-Burning and Political Legitimacy .....	760
b. Judicial Restraint as a Means to Strengthen Citizens' Commitment to Free Speech .....	762
B. <i>Hate Speech</i> .....	765
1. CITIZENS' ATTITUDES ABOUT FREE SPEECH AND A LIBERAL CHARACTER .....	766
2. JUDICIAL RESTRAINT AS A RESPONSE TO RESTRICTIONS ON HATE SPEECH .....	772
a. Hate Speech and Political Legitimacy .....	772
b. Judicial Restraint as a Means to Strengthen Citizens' Commitment to the Political Community .....	785

## I. INTRODUCTION

This essay defends a seemingly implausible thesis: that judges sometimes promote interests that freedom of speech advances when they decide *not* to invalidate legislation that limits free speech. This thesis assumes a certain relationship between free speech and democratic government, one that informs Felix Frankfurter's defense of judicial restraint. While people are quick to cite Frankfurter to support the idea

---

\* Instructor, Columbia University. B.A., Drew University, 1985; J.D., Yale University, 1988; Ph.D., Columbia University, 1998. I would like to thank Robert Amdur, Kent Greenawalt, Louis Henkin, Eric Mitchko, and Steven Wall for helpful comments.

that judges should defer to political authority<sup>1</sup> or to claim that judicial restraint endangers important interests,<sup>2</sup> they do not adequately explore the basis of his reservations about judicial authority. Frankfurter's conception of free speech in a democracy explains his restraint when confronted by legislation—such as in *Minersville School District v. Gobitis*,<sup>3</sup> *West Virginia v. Barnette*,<sup>4</sup> and *Dennis v. United States*<sup>5</sup>—that advances interests at odds with his presuppositions concerning good government.<sup>6</sup> His opinions in these cases suggest a sophisticated argument about the place of constitutional rights in a democracy.

The relationship between rights and democracy must influence one's thinking about political legitimacy. Most people assume that legitimate governments are democratic *and* must respect rights—such as guarantees of free speech—that protect citizens' vital interests. People disagree about the extent of these rights and the best way to guarantee their inviolability.<sup>7</sup> Frankfurter's defense of judicial restraint suggests a symbiotic relationship between rights and democracy that has implications for determining the best means to secure rights and to promote legitimate democratic government. According to Frankfurter, a healthy democracy must guarantee certain rights.<sup>8</sup> Frankfurter emphasizes, however, that legitimate governments gain strength as citizens learn to respect rights. When citizens participate in democratic government, they develop a character—virtues, such as courage, tolerance, empathy, liberality, and open-mindedness—that enables them to respect rights. This essay uses the term *liberal character* to describe people who possess these virtues. The term is intended to reflect the readiness with which people who possess this character depend on their reason to assess the challenge posed by unusual and unfamiliar ideas.<sup>9</sup>

---

1. See, e.g., Steven S. Neff, *The United States Military vs. The Media: Constitutional Friction*, 46 MERCER L. REV. 977, 999 (1995).

2. See, e.g., H.N. HIRSCH, A THEORY OF LIBERTY 4 (1992); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 81, 172-74 (1990); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 124 (1993); Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COM. 277, 293 (1995); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1464 (1990).

3. 310 U.S. 586 (1940) (holding that forcing school children to salute the flag does not violate the First Amendment).

4. 319 U.S. 624, 646 (1943) (Frankfurter dissenting to the Court's decision to overrule *Gobitis*).

5. 341 U.S. 494, 517 (1951) (Frankfurter concurring in affirmance of the lower court judgment upholding the constitutionality of the Smith Act of 1940).

6. See *infra* text accompanying notes 76-78.

7. Obviously, there are great disputes about the substance of these rights.

8. See *infra* text accompanying notes 57-59.

9. I will claim that this type of character informs the arguments of both Brandeis and Frankfurter. See *infra* text accompanying notes 42-44, 60-81.

Resuscitating Frankfurter is not the primary concern of this essay; rather, it focuses on whether Frankfurter's conception of democracy has implications for how judges should approach contemporary issues of free speech. In particular, it argues that controversies involving flag-burning and hate speech expose differences in how citizens value free speech. Some people consider guarantees of free speech as means for promoting important interests that must be secured by a legitimate government. Others recognize how free speech contributes to the development of their character. They believe that by endorsing these guarantees, citizens express the value of a liberal character.

It is easy to mistake people's passion for free speech bred from a concern for individual ends<sup>10</sup> for an affirmation of the value of a liberal character. Consequently, it is easy to overestimate the quality of people's character and their commitment to free speech. Moreover, Frankfurter does not specify how political participation induces a change in citizens' character. This essay argues that controversies involving flag-burning and hate speech provide opportunities to test Frankfurter's conception of democracy. By looking at these controversies, one can determine whether the Court might have strengthened citizens' characters and their commitment to free speech, if it had refused to invalidate legislation that restricted speech.

Part II of this essay examines different arguments claiming that free speech is a precondition for legitimate democratic government, and how Louis Brandeis applies these arguments in *Whitney v. California*.<sup>11</sup> Part III interprets Frankfurter's opinion in *Dennis* to be an extension of Brandeis' opinion. Frankfurter acknowledges the importance of free speech in a democracy, and contends that citizens who participate in democratic politics are more likely to develop the type of character that is the foundation for Brandeis' arguments. Thus, Frankfurter concludes that judicial restraint helps citizens to develop this character. Part IV illustrates how the power of Brandeis' rhetoric leads people to conflate his different arguments linking guarantees of free speech to legitimate democratic government. Finally, Part V examines whether Frankfurter's defense of judicial restraint should be applied to contemporary free speech conflicts that involve flag-burning and hate speech. These conflicts reveal people's tendency to exaggerate citizens' commitment to free speech, but also suggest that judicial restraint might encourage political participation that will strengthen their commitment.

---

10. I refer to these ends as particular interests. See *infra* text accompanying note 22.

11. 274 U.S. 357, 375 (1927) (Brandeis concurring in the Court's decision upholding a conviction under California's Criminal Syndicalism Act of 1919).

## II. FREE SPEECH AND LEGITIMATE DEMOCRATIC GOVERNMENT

### A. *Formulations of Free Speech Principles*

Before proceeding, it will be helpful to distinguish different claims people make about the relationship between political legitimacy and rights that guarantee free speech. The first claim assumes that guarantees of free speech are a condition of political legitimacy, because they ensure that the government treats citizens with the respect that human beings deserve.

A second claim conditions political legitimacy on benefits citizens receive when the government guarantees free speech. It contends that these benefits compensate for any coercion suffered through the exercise of governmental authority.<sup>12</sup> Guarantees of free speech allow citizens to accept political authority. They ensure that citizens have a tighter rein on their representatives, and they contribute to a political environment that enhances citizens' deliberations about particular interests.

A third claim bases legitimacy on citizens' desire to strengthen their character, a desire that citizens express when they endorse principles of free speech. A government whose citizens affirm a liberal character has a stronger claim of legitimacy. This conception of free speech encompasses a more concrete—but still fairly abstract—assertion: Guarantees of free speech reveal that citizens recognize that a liberal character has value independent of its contribution to individual and collective interests.

The first and second claims derive governmental legitimacy from the government's treatment of its citizens, while the third derives it from evidence of citizens' attitudes about free speech. The first two claims overlap with the third. How the government treats its citizens will influence how those citizens think about free speech. In addition, one would challenge the legitimacy of a government whose treatment of its citizens fell below the threshold of respect that is due people, even if its citizens remained committed to free speech or to the government itself. The distinction also helps to avoid mistakes made by commentators who conflate the argument that appeals to citizens' character as evidence of governmental legitimacy with the argument that the government is legitimate because it helps citizens to attain such a character.

Moreover, this essay will argue that most citizens lack a liberal

---

12. Together these claims define the collective interest—citizens' interest in enforcing collective values—that I will discuss *infra*: (1) Free speech contributes to citizens' interest in enforcing community values by ensuring that these values express the will of each individual, and thus, ensuring that citizens receive the treatment that they are due; or (2) Free speech leads to better government policies, and thus, each citizen benefits even if they occasionally disagree with a policy.

character and do not view guarantees of free speech as means for strengthening their character. This indicates that citizens will not readily accede to the exercise of judicial review when it impedes their pursuit of individual interests. Contemporary free speech controversies involving flag-burning and hate speech illustrate the limits of citizens' character. In situations such as these, judges should refuse to invalidate illiberal legislation. Judicial restraint would encourage political responses to such legislation, and thereby promote democratic participation that would teach citizens to value free speech and a liberal character. This argument is not a claim of the first or second type, but it is contingent on such claims. We will see that free speech principles guarantee interests that judges must secure before they seek to strengthen citizens' character.

It is also important to distinguish claims people make about free speech principles when they evaluate judicial action. People expect judges to decide free speech cases based on interpretations of these principles, and therefore, appeal to these principles to support criticisms of judicial decisions; they criticize judges who stray from these principles without sufficient warrant—from a superseding principle or from circumstances unique to the context in which the case arises—or who misinterpret them. More generally, people expect that judges will base their actions on principle and not on individual interests.<sup>13</sup> For example, critics may disagree with how a judge applies a free speech principle or with a judge's decision to rely on a superseding principle, and still believe that the judge acted in a principled manner. They would need additional evidence to support the contrary contention.

We must distinguish claims that link free speech principles to governmental legitimacy from those that use free speech principles to assess judicial action. It conflates two paths of analysis when people confuse a criticism of judicial action with a judgment that a government is illegitimate. We have already seen that the claim, that free speech principles root political legitimacy in citizens' affirmation of the value of a liberal character, is independent of claims about governmental actions. Although government actions will obviously affect citizens' sentiments about free speech and a liberal character,<sup>14</sup> these actions do not necessarily determine people's sentiments.

Given that some people consider the benefits secured when judges enforce free speech principles a foundation of political legitimacy, how-

---

13. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

14. My thesis depends on this fact. I argue that judges can promote conditions likely to strengthen citizens' character.

ever, it would appear that a judge who misinterprets free speech principles would undermine a government's claim of legitimacy. A litigant who loses a case—and is denied such benefits—because a judge misapplied applicable free speech principles could support a claim that the government's action was coercive, and possibly the abstract claim that the action is illegitimate. Nonetheless, although an ideal government would never violate rights that are conditions of its legitimacy, experience teaches us to reduce our expectations; governments are not ideal. People will lose cases that they should win. When judges—or any governmental officer—upset interests that condition governmental legitimacy, people have a basis to criticize their action and, assuming that their error is not an isolated occurrence, a reason to remove them from office. However, this analysis is only peripherally related to questions of political legitimacy. We assess the legitimacy of government to determine its general operation: how well a system of governmental institutions respects interests that we believe must be guaranteed by a legitimate government.<sup>15</sup> Thus, although we remain concerned about competent judging, our focus on legitimacy makes us more concerned about whether the government has mechanisms to correct judicial errors and prevent their reoccurrence.

### B. *Collective and Particular Interests Advanced by Free Speech*

The ideas that free speech advances the search for truth and, less ambitiously, the quest for successful democratic government are basic tenets of American democracy. They have roots in the writings of John Milton<sup>16</sup> and John Stuart Mill,<sup>17</sup> and enter Supreme Court jurisprudence when Justice Holmes employs the market place of ideas metaphor in his dissent to *Abrams v. New York*.<sup>18</sup> Alexander Meiklejohn develops this metaphor in his treatise on free speech,<sup>19</sup> and it becomes orthodoxy in

---

15. Thus, although we remain concerned about competent judging, our focus on legitimacy makes us more concerned about whether the government has mechanisms to correct judicial errors and prevent their reoccurrence.

16. See generally JOHN MILTON, *AREOPAGITICA* (Bandanna, 1991).

17. See generally JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., 1978).

18. 250 U.S. 616:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

*Id.* at 630-31 (Holmes, J., dissenting).

19. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1st ed. 1948).

*New York Times v. Sullivan*.<sup>20</sup>

Few would deny that democracy fails without some guarantees of free speech. But, people disagree about why protecting free speech is a condition of legitimate democratic government. To settle this disagreement, it must be determined how limits on political discussion corrupt democratic ends.

People can agree that legislatures perform better than they otherwise would, if citizens and representatives are free to discuss issues and these discussions yield factual information and normative argument that shapes legislation. Restrictions on speech often limit the scope and resources of political discussion and, consequently, throttle effective democracy.<sup>21</sup> Free speech creates an environment that facilitates citizens' deliberations about collective and particular interests; it leads citizens to make better choices about these interests. This essay uses the term collective interests to refer to interests shared by most members of the political community. Particular interests refer to any interest a citizen might wish to pursue.<sup>22</sup>

Free speech allows citizens and their representatives to resolve conflicts among competing ideas. Moreover, it allows citizens to control their representatives. When elected officials control the information made available to the public, they have leeway to pursue their own interests to the detriment of democratic ends. Free speech checks governmental power.<sup>23</sup> It ensures that representatives direct their energy toward advancing the public good rather than particular interests. It also forces representatives to consider their constituents' particular interests as well as their own.

Thus, free speech is a precondition for legitimate democratic government. It advances a collective interest in promoting good legislation. Representatives will perform better if they must strive to satisfy the expectations of informed constituents. Free speech also advances people's particular interests: (1) it limits government's ability to manipulate citizens' judgments about particular interests; (2) it increases the likelihood that citizens will make better choices about their particular inter-

---

20. 376 U.S. 254 (1964) (upholding the right to publish libelous statements about public officials).

21. See, e.g., MEIKLEJOHN, *supra* note 19; Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. REV.* 1 (1971).

22. I will argue that political legitimacy depends on respect for certain particular interests or providing benefits—such as those that arise from guarantees of free speech—that advance citizens' particular interests. Moreover, these benefits can themselves be considered particular interests. Therefore, citizens' interest in the environment in which they define and pursue particular interests is itself a particular interest.

23. See Vincent Blasi, *The Checking Value in First Amendment Theory*, *WEAVER CONST. L. SERIES* no. 3 (1977).



ests; and (3) it helps citizens combat legislation that impedes their pursuit of these interests.

Arguments that defend speech based on citizens' interest in promoting good legislation tend to protect less speech than those based on citizens' interest in advancing individual ends. People who emphasize this interest in good legislation link political legitimacy to authoritative norms that they assume will be identified by a well-ordered political process.<sup>24</sup> This essay refers to these norms as community values to indicate their special status. Community values are not simply norms that a majority or super-majority of the community endorse at a given point in time. The term community values connotes a stronger meaning: that government institutions derive authority when they enforce these norms.

Community values gain their authority from the process that identifies them. Government institutions will define good values if there is open discussion, or if such discussion encourages citizens to reach consensus about the public good so that legislation will then express a common will. These arguments suggest that people should measure political discourse against an ideal, and that they can use this ideal to justify limitations on speech. For example, limitations would be justified if they improved the quality of political discourse.<sup>25</sup> In addition, an ideal of political discourse allows people to compare different species of speech. They can deem speech that does not enhance political deliberation less valuable, and thereby, expose it to regulation.<sup>26</sup>

Rather than assume that a well-ordered political process identifies community values that rational citizens can acknowledge as consistent with the common good or as an expression of a common will, other theorists claim that political institutions derive authority when they represent citizens' particular interests. Guarantees of free speech facilitate citizens' deliberations about particular interests.<sup>27</sup> Theorists who defend broad guarantees of free speech claim that wide-ranging and uninhibited speech ensures that citizens have adequate information to determine

---

24. See, e.g., CASS. R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xvi-xvii, 241-43 (1993); Bork, *supra* note 21, at 26.

25. See generally Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986); SUNSTEIN, *supra* note 24; J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375.

26. This idea supports the Supreme Court's categorical approach to free speech that deems certain categories of speech—such as libel, fighting words, and obscenity—without value and therefore subject to regulation. Robert Bork interprets the First Amendment as extending protection only to political speech. See Bork, *supra* note 21, at 20. He defends significant restrictions on free speech by establishing that certain types of expression are outside the range of speech necessary for adequate political deliberation.

27. See, e.g., MILL, *supra* note 17, at 31-33, 53-55.

their choice of particular interests and the means for pursuing them.<sup>28</sup> Furthermore, guarantees of free speech ensure that once citizens have adequate information with which to make their choices, the government does not interfere in the process of selection.<sup>29</sup> Thus, these theorists provide two bases for the claim that citizens' deliberations are advanced by free speech: (1) citizens will make more informed choices if they receive increased information; and (2) citizens are in a better position than the government to gauge how this information affects their interests, and thus, their choices may be considered autonomous.<sup>30</sup> On the other hand, to defend limitations on free speech these theorists must demonstrate that regulation will improve the environment in which citizens choose and pursue their ends. For example, a regulation that limits the hours of sports programming on television would seem to interfere with citizens' choice of amusement. People could justify such legislation, however, if they thought that the regulation would lead citizens to make better viewing choices.<sup>31</sup> Many theorists recognize the merits of both types of claims: Free speech promotes the identification of community values, and it provides citizens an appropriate sanctuary<sup>32</sup> in which to define and pursue their particular interests. Clearly, people should challenge the legitimacy of a government that restricts speech which would advance legislative decision-making or citizens' abilities to define and pursue particular interests. But this essay does not seek to adjudicate conflicts between the arguments linking free speech to legitimate government, or to establish the scope of free speech necessary to ensure political legitimacy; it is not concerned with restrictions on speech that could render a government illegitimate. Instead, it explores a third connection between free speech and legitimate democratic government. A legitimate government strengthens its authority when it develops citi-

---

28. See, e.g., MILL, *supra* note 17, at 31-33, 53-55; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion Autonomy and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

29. See *id.*

30. We have also seen that guarantees of free speech limit the government's ability to interfere with citizens' pursuit of these interests. In addition, there is a tension between these bases for the claim that free speech advances citizens' deliberations. It is possible that by ensuring that citizens make their own choices, certain choices they make will be worse than a choice that could be imposed on them by the government.

31. See also T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

32. I use the term appropriate sanctuary to capture the different aspects of claims about individual interests. Although people disagree about the extent that government can interfere with people's choices in order to enhance the likelihood that they will make better choices, every theorist who defends free speech based on particular interests would believe that there remains some space in which the government cannot interfere with citizens' choice of particular interests.

zens who endorse guarantees of free speech, in order to manifest and affirm the value of a liberal character.

This claim about free speech is closely related to—and therefore easily confused with—the claims that free speech contributes to collective and particular interests. The earlier claims emphasize how free speech contributes to citizens' interests by leading people—individually and collectively—to make better choices, or by limiting the government's ability to interfere with citizens' choice and pursuit of particular interests. In contrast, the third claim links free speech to citizens' concern for their character. Because this claim examines political legitimacy in light of citizens' sentiments, it invites a different form of analysis than the other claims. A primary concern is whether citizens have the requisite attitude toward free speech and a liberal character, not whether the government maintains conditions that establish its legitimacy.<sup>33</sup>

This essay argues that many citizens lack this attitude, and that commentators are slow to recognize this deficiency, because they conflate a claim of the third type with claims of the first two types. Furthermore, it argues that judges can strengthen people's character and their commitment to free speech by encouraging political responses to illiberal legislation, and that these benefits outweigh the slight harms to collective and particular interests inflicted by such legislation. Citizens tend to become more involved in political controversies than they do in legal controversies.<sup>34</sup> Political participation shapes citizens' character and leads them to recognize how guarantees of free speech contribute to the development of their character. Therefore, in certain contexts, people should rely on democratic participation—rather than judicial review—to challenge legislation that would offend liberal citizens.

The issue of political legitimacy, however, becomes confused, because people expect that liberal citizens will make better choices about collective and particular interests. Because it is contended that judges should tolerate illiberal legislation in order to encourage citizens

---

33. Although this essay focuses on the connection between liberal virtues and citizens' commitment to free speech, it also assumes the validity of the earlier claims about free speech and democratic legitimacy; a legitimate government must guarantee free speech in order to promote citizens' particular and collective interests. I do not intend to establish the scope of these guarantees, but when I argue that judges should tolerate restrictions on free speech I indicate why I do not believe that these interests are implicated by the restrictions anticipated.

34. There are obvious counter examples. *Roe v. Wade*, 410 U.S. 113 (1973), is a recent and notable one. Nonetheless, the case can be made that the legal fight generated by *Roe* has impeded public discussion of the issue. It has caused people to focus on whether they have won the legal battle over abortion rather than on how to find common ground on the issue. A political fight might have given participants an incentive to find such ground. See also MARY ANN GLENDON, RIGHTS TALK 58-60 (1991).

to develop a liberal character, it is easy to confuse this contention with claims made by those who argue that certain restrictions on speech could promote citizens' deliberations about collective and particular interests. These people claim that limitations of speech advance free speech principles. This essay's concern, in contrast, is whether judges should tolerate certain *violations* of free speech principles—in the short run—in order to promote a political environment that teaches citizens to recognize how guarantees of free speech contribute to the development of their character. These violations must be consistent with the assumption that guarantees of free speech secure interests protected by a legitimate government. Thus, this essay argues that the reasons for guaranteeing free speech extend to interests beyond those that condition political legitimacy.<sup>35</sup>

### C. *Free Speech and the Development of a Liberal Character*

In his concurring opinion in *Whitney*, Justice Brandeis examines the relationship between free speech and legitimate democratic government. Brandeis assumes that free speech enables political institutions to identify community values and advances each citizen's deliberations about particular interests, but he also deepens the connection between free speech and legitimate democratic government. He suggests that free speech can serve as a foundation for political authority, because citizens recognize that free speech is integral to their liberal character. In order to grasp this argument, one must see how Brandeis' claims about citizens' character informs different connections he draws between free speech and legitimate democratic government.

Brandeis believes that a successful political community nurtures virtuous citizens—the virtue that he emphasizes is courage—who can overcome the irrational fears that inspire censorship. Free speech is a precondition for democratic government because it teaches citizens to confront—with arguments—unfamiliar ideas that inspire these fears, and trust their use of reason to combat bad or dangerous proposals.<sup>36</sup>

Courageous citizens will enjoy substantial benefits. They will remain open-minded when confronted by unfamiliar ideas, and will work to escape the biases that flow from their own position and to better understand the positions of others. They will moderate any claims founded on their beliefs, at least that which is necessary to secure a

---

35. For example, one might endorse Lee Bollinger's argument that guarantees of free speech promote tolerance without believing that the promotion of tolerance is a condition of legitimate government. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 237-48 (1986).

36. See *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." *Id.*

critical perspective from which to evaluate the truths they affirm. Courageous citizens will strive to be empathetic, which will lead them to make better choices about community values and particular interests.

Brandeis' analysis suggests three different connections between free speech and legitimate democratic government. Two of these connections extend our earlier discussion of how free speech promotes collective and particular interests that are conditions of legitimate democratic government. Because people make better choices after they tame irrational fears that warp their thinking, one would expect that citizens who escape the tyranny of irrational fears are more likely to identify community values. When citizens recognize common interests, they can overcome distrust of others that prevents the identification of community values. Brandeis makes this point when he contends that "freedom to think what you will and to speak what you think are means indispensable to the discovery and spread of political truth."<sup>37</sup>

Furthermore, free speech promotes individual ends because courage advances each citizen's deliberations about competing particular interests. Empathy renders citizens more willing—and able—to exploit a diverse environment. As citizens learn to adjust their preferences to respect the perspectives of others, they also grow to appreciate those perspectives and are more likely to give them serious consideration.<sup>38</sup> For example, Frank Michelman discusses the impact of the civil rights movement on the American political conscience.<sup>39</sup> He claims that people experience this impact individually and collectively. It is easy to see that Michelman's claim has wider applicability; political toleration has led to greater acceptance and appreciation of African-American culture. African-American culture has increasingly become an important component of the wider culture; it shapes people's understanding of art, music, literature, and many other pursuits. While the McCarthy hearings provide an eloquent reminder of Brandeis' warning concerning the bondage wrought by irrational fears—and the danger of witch trials<sup>40</sup>—the same era also teaches that men fear music by African-American artists and buy Pat Boone records.<sup>41</sup>

---

37. *Id.* at 375.

38. See Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 29 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555, 1567, 1570 (1988).

39. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1530 (1988).

40. See *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

41. Pat Boone's fame is at least partly attributable to his recordings of songs that were originally performed by African-American artists but denied radio exposure. Although no official censorship banned access to African-American artists, the sale of their records was limited by a form of censorship within the society. Record companies and radio stations did not market these artists for a wider audience, and the mores and customs in many parts of the country provided

Brandeis also draws a third connection between free speech and democratic legitimacy. Brandeis contends that guarantees of free speech manifest citizens' courageous character. They reveal that people have confidence in their rational faculties. Citizens trust that free speech will enable the political community to identify and shield itself from dangerous ideas. They have confidence in the political institutions—including free speech—that underwrite their courage. Brandeis introduces the founding generation as a paragon of courage, to appeal to citizens' confidence that reason exercised through democratic government can combat dangerous ideas.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion.<sup>42</sup>

The first two connections Brandeis draws between free speech and legitimate democratic government focus on the benefits people derive from free speech; free speech leads citizens to identify community values and to make better choices about particular interests.<sup>43</sup> In contrast, Brandeis' appeal to the founding generation is effective to the extent that people believe that being courageous has value independent of its contribution to other ends. People should aspire to be like the founding generation *because* of its character; the founding generation was "courageous, and self-reliant . . . [and had]. . . confidence in the power of free and fearless reasoning applied through the process of popular government. . . ."<sup>44</sup>

Brandeis does not contend that citizens actually seek to develop a liberal character, and there is evidence to challenge such an argument. Nonetheless, Brandeis' appeal to emulate the founding generation suggests that he believes political legitimacy is connected to citizens' development of a liberal character. By appealing to the character of the founding generation, Brandeis indicates that people should relish a liberal character, and thus, a government would strengthen its claim of

---

foundation for this market strategy. In addition, widespread prejudice against African-Americans must have influenced many people's response to artists of each race. One would expect that even when given the opportunity to listen to Little Richard's version of *Good Golly Miss Molly* alongside Pat Boone's remake, the prejudices of some of Pat Boone's fans would taint their response to the music. Rock and Roll's reputation for exciting the sex drive of teenagers is at least partly associated with its association as race music.

42. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

43. *See supra* text accompanying notes 37-41.

44. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

legitimacy if it developed such citizens. Consequently, Brandeis defends free speech because it contributes to a political process that encourages citizens to affirm the value of a liberal character.

John Stuart Mill makes a similar claim about the connection between individual and collective well-being. He celebrates rare ages—such as classical Greece, the Renaissance, and enlightenment Germany—in which there is a symbiotic relationship between individual and societal greatness. He contrasts conformity in Victorian England, which he believes breeds mediocrity by extinguishing individuality:

Where not the person's own character but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.<sup>45</sup>

Mill believes individual and social progress become entwined. People contribute to the evolution of their society, which in turn fuels their own development:

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore, capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them.<sup>46</sup>

While Mill speaks broadly of the relationship between individual achievement and the greatness of human-kind, he suggests that individual autonomy<sup>47</sup> becomes valuable in its own right. People flourish when they draw forth their individuality and make choices about their lives in an environment conducive to deliberation. Furthermore, the process of human development feeds itself as the life each person defines becomes a model for others. Thus, self-definition becomes an on-going process

---

45. MILL, *supra* note 17, at 54.

46. *Id.* at 60.

47. Mill, who focuses on autonomy, in contrast to Brandeis' concern for citizens' development of virtues that will lead them to make better choices about their lives, concentrates on a different aspect of people's character. But, the broader point is the same: People consider themselves bound to a social context that contributes to their formation of a favorable character.

that binds people to the social context that supports and manifests human achievement.

We must not be precipitous, however, in concluding that guarantees of free speech are integral to a political process that advances the development of citizens' character. Mill's immediate concern was the attitudes of Victorian society; he was less concerned with the institutions of the political community.<sup>48</sup> According to Mill, people do not become autonomous through political association, but through engagements with human-kind. If political association is peripheral to the development of citizens' character, it would not lead citizens to consider the enforcement of guarantees of free speech an affirmation of the value of a liberal character.<sup>49</sup>

### III. LIBERAL VIRTUES AND POLITICAL PARTICIPATION: FRANKFURTER'S RESPONSE TO BRANDEIS

Felix Frankfurter draws a closer connection between political association and the development of liberal citizens. But unlike Brandeis, he emphasizes that citizens develop their character when they participate in democratic politics. Therefore, although a liberal person would value free speech, free speech gains its value because it is a precondition for the operation of democratic politics. Frankfurter tolerates limits on free speech that do not impede democracy.<sup>50</sup>

Frankfurter contends that through democratic participation, people attain the liberal character described by Brandeis' ideal of civic courage. His opinion in *Dennis* acts as a counterpoise to Brandeis' argument in *Whitney*. He concurs in the Court's judgment upholding the constitutionality of a provision of the Smith Act of 1940, which made it a felony to advocate the violent overthrow of the United States government or to conspire to organize a group that advocates such violence.<sup>51</sup> Frankfurter upholds the limitations on free speech, but still embraces the virtues that Brandeis believes are instilled and manifest by guarantees of free speech. More significantly, he questions whether citizens attain these virtues when the Court invalidates legislation that limits free speech. Frankfurter suggests that if citizens are forced to challenge legislation through the democratic process, they will develop the virtues that Brandeis rhapsodizes.

---

48. See MILL, *supra* note 17, at 3-8.

49. Mill believes that people should endorse free speech to secure the benefits of social interactions, and that they have an obligation to respect political institutions from which they derive benefits. See MILL, *supra* note 17, at 73.

50. See *infra* text accompanying notes 57-59.

51. See *Dennis v. United States*, 341 U.S. 494, 517 (1951).



On the surface, Frankfurter's opinion fails to treat free speech seriously. He believes that free speech derives its value from its role in a democracy, but leaves it to the legislature to balance "[t]he demands of free speech *in a democratic society*" and "the interest in national security."<sup>52</sup> Frankfurter contends that the balance between free speech and security touches on broader political questions, and the Court's involvement with the issue might bring its independence into question.<sup>53</sup> The Court lacks the competence to resolve such issues, and therefore, should respect the legislature's judgment.<sup>54</sup> Frankfurter concludes that Congress made a reasonable judgment concerning the best way to combat communism.<sup>55</sup>

Because Frankfurter allows the legislature to determine the role of free speech in a democracy, he seems to contradict the conclusion that guarantees of free speech are a precondition for legitimate democratic government. However, Frankfurter can defend this position by distinguishing among the different claims about the relationship between free speech and legitimate democratic government. While the legislation in question is illiberal, it does not necessarily restrict speech that a legitimate government must protect. The Smith Act restricted speech that sought to circumvent and destroy democratic institutions.<sup>56</sup> It did not limit speech that helped people control their elected representatives or that significantly contributed to their deliberations about collective or particular interests. People still could pursue communist ends through democratic means, and the debate about the merits of communism might even enhance citizens' deliberations about their ends.

Although the Smith Act did not necessarily undermine legitimate democratic government, Frankfurter's opinion allows the government too much leeway to regulate speech that democratic governments must protect. Nonetheless, Frankfurter recognizes that a legitimate government must guarantee certain rights. Frankfurter's faith in democracy<sup>57</sup> did not prevent him from finding unreasonable legislative or administrative actions that denied rights that he believed to be a foundation for

---

52. *Id.* at 524 (Frankfurter, J., concurring) (emphasis added).

53. *See id.* at 525 (Frankfurter, J., concurring).

54. Justice Frankfurter remarked that: "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Id.* at 525 (Frankfurter, J., concurring). He continues: "To make validity of legislation depend on judicial reading of events still in the womb of time . . . is to charge the judiciary with duties beyond its equipment." *Id.* at 551 (Frankfurter, J., concurring).

55. *See id.* at 525 (Frankfurter, J., concurring).

56. *See id.* at 551 (Frankfurter, J., concurring).

57. *See generally* Sanford Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973).

legitimate government.<sup>58</sup> These rights would certainly include guarantees of speech that allow people to challenge governmental policies.<sup>59</sup>

Moreover, Frankfurter's opinion in *Dennis* also responds to Brandeis' contention that free speech both promotes and manifests citizens' possession of a liberal character. Curiously, Frankfurter defends the reasonability of the Smith Act by noting that the volume of legislation combatting communism illustrates the seriousness of Congress' purpose. This legislation, however, also indicates Congress' ability to fuel, and then ease, the fears of constituents, casting further doubt on whether one can trust Frankfurter's reasonability analysis to protect speech that is a precondition of legitimate democratic government. Yet, it is not clear that Frankfurter's faith in American democracy is naive. Confidence in an electorate must not be confused with trust in the democratic process. Frankfurter would agree that liberal citizens are courageous, and had reason to believe that the American electorate lacked this character.<sup>60</sup> But, he questions whether people should, or even can, supplement the absent virtue by having judges invalidate legislation that restricts free speech.

Instead, Frankfurter believes that citizens can develop a liberal character through democratic participation. From James Bradley Thayer, he derives the belief that democracy instructs citizens in virtue. Though he was never Frankfurter's teacher, Thayer had a tremendous influence on Frankfurter.<sup>61</sup> Thayer challenges trends in constitutional law by which courts check legislative power by enforcing state constitutional restrictions.<sup>62</sup> He introduces two ideas that inform Frankfurter's

58. See William T. Coleman, Jr., *Mr. Justice Felix Frankfurter: Civil Libertarian as Lawyer and as Justice: Extent to Which Judicial Responsibility Affected His Pre-Court Convictions*, reprinted in *SIX JUSTICES ON CIVIL RIGHTS* 91 (Ronald D. Rotunda ed., 1983).

59. See *id.* In a letter to Justice Stone concerning the *Gobitis* decision, Frankfurter's defense of judicial restraint presupposes that the *Gobitis* possess First Amendment rights that enable them to challenge the legislation that burdens their religious pursuits. See ALPHEUS THOMAS MASON, *SECURITY THROUGH FREEDOM* app., at 217-20 (1955).

60. See *infra* notes 76-78.

61. See Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 *TUL. L. REV.* 15, 46 (1990); Felix Frankfurter, *John Marshall and the Judicial Function*, in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 149 (Philip B. Kurland ed., 1967). Frankfurter describes himself as "[O]ne brought up in the traditions of James Bradley Thayer, echoes of whom were still resounding in this very building in my student days, is committed to Thayer's statesmanlike conception of the limits within which the Supreme Court should move. . . ." See also H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 128-29 (1981). Hirsch claims that Thayer's defense of judicial restraint appealed to Frankfurter's patriotism and his preconceptions about the possibility of social change through democratic participation by an educated citizenry.

62. See JAMES BRADLEY THAYER, *LEGAL ESSAYS* 37-39 (1929); James Bradley Thayer, *John Marshall*, in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 83 (Philip B. Kurland ed., 1967).

narrow interpretation of the First Amendment: (1) that judicial review impedes the health of a democracy by forestalling the development of citizens' character; and (2) that this impediment arises because people conflate ideas of constitutionality and wisdom.<sup>63</sup> Thayer believes that judicial review weakens democratic processes by encouraging legislators and their constituents to shift the responsibility of governance to the judiciary.<sup>64</sup> Representatives, thus, have an incentive to acquiesce to unconstitutional demands of their constituents and trust courts to correct their mistakes.<sup>65</sup> Legislators who depend on the Court are prone to forget that honesty, fairness, honor, and—by implication—wisdom are not synonymous with constitutionality.<sup>66</sup> This dependency also diminishes the capacities of citizens:

the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out. . . and correcting their own errors. The tendency of a common and easy resort to this great function . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.<sup>67</sup>

In *Dennis*, Frankfurter uses Thayer's theory of judicial restraint to counter Brandeis' argument that judges should promote courage among citizens by invalidating laws that limit free speech. Frankfurter seems to acknowledge that the legislation at issue in *Dennis* is dangerous because it quenches the free spirit. Frankfurter, however, applies Thayer's distinction between wisdom and constitutionality to justify judicial restraint: "When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional."<sup>68</sup> Frankfurter's concern to instill liberal virtues parallels the notion of courage expounded in Brandeis' *Whitney* concurrence.<sup>69</sup> He links the well-being of civilization to the character of its people, people whose confidence in their ability to reason frees them from irrational fears. But, following Thayer, Frankfurter denies that the salvation of the free spirit rests on the judiciary's enforcement of the First Amendment:

---

63. See THAYER, *supra* note 62, at 38-39.

64. See Thayer, *supra* note 62, at 83-84.

65. See *id.*

66. See *id.*; THAYER, *supra* note 62, at 38-39.

67. Thayer, *supra* note 62, at 85-86.

68. *Dennis*, 341 U.S. at 556 (Frankfurter, J., concurring).

69. See *supra* text accompanying notes 42-44; see also PHILLIPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 102-06 (1993); Levinson, *supra* note 57, at 431. Brandeis' discussion—in contrast to Frankfurter's—is more immediately concerned with the democratic character, but it is important to note that the book that so influenced Brandeis, Alfred Zimmern's *The Greek Commonwealth*, was also a favorite of Frankfurter.

The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; apart from all else, judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling. A persistent, positive translation of the liberating faith into feelings and thoughts and actions of men and women is the real protection against attempts to strait-jacket the human mind. Such temptations will have their way, if fear and hatred are not exorcised. The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind. We may be grateful for such honest comforts as it supports, but we must be unafraid of its uncertainties. Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved.<sup>70</sup>

Although Frankfurter acknowledges that courage is the means to a civilized society, Thayer's influence compels his conclusion that citizens will be less likely to develop these virtues when judges enforce guarantees of free speech. Frankfurter claims that "apart from all else," judges—as well as legislators—are influenced by public opinion, and therefore, might not be able to counter "illiberal" and "envenoming" legislation.<sup>71</sup> His point is stronger. He adapts Thayer's claim that the problems of a closed society are too deep to be corrected through judicial enforcement of First Amendment values.<sup>72</sup>

Thayer's influence is also apparent in Frankfurter's early opinions in *Gobitis*<sup>73</sup> and *Barnette*.<sup>74</sup> Frankfurter's opinion in *Gobitis*, which upheld a school board regulation that compelled students to salute the American flag, was overruled three years later in *Barnette*. Frankfurter dissented from the reversal. These opinions outline the argument for judicial restraint that Frankfurter subsequently employs in *Dennis*. He concludes that the Court lacks the competence to overrule the judgment of the legislatures and school boards that have addressed the issue.<sup>75</sup>

Yet, Frankfurter expresses skepticism about the legislation, and introduces the distinction between wise and constitutional legislation to

70. *Dennis*, 341 U.S. at 556 (Frankfurter, J., concurring). Frankfurter's concern for civilization is obviously broader than Brandeis' concern for democracy, but his description of the people of a civilized society clearly suggests Brandeis' discussion in *Whitney*.

71. See *Dennis*, 341 U.S. at 556 (Frankfurter, J., concurring).

72. See THAYER, *supra* note 62, at 39.

73. See *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

74. See *West Virginia v. Barnette*, 319 U.S. 624 (1943).

75. See *Gobitis*, 310 U.S. at 597. "To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence." *Id.*

explain his refusal to invalidate it.<sup>76</sup> When Frankfurter returns to the question of judicial review, he combines Thayer and Brandeis to illustrate how legislatures promote liberty:

But to the legislature no less than to courts is committed the guardianship of deeply cherished liberties. . . . Where all the effective means of inducing political change are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.<sup>77</sup>

As guardians of deeply cherished liberties, both the legislature and the Court work to enforce rights that ensure the operation of the political process, rights we have previously identified as preconditions for legitimate political authority. Frankfurter, however, also claims that “legislation is itself a training in liberty,” one that “serves to vindicate the self-confidence of a free people.”<sup>78</sup> These statements again parallel Brandeis’ claims about free speech promoting courage. They define the character of a free person and the means to gain such a character.

In a later essay, Frankfurter’s discussion of law extends the connection to Brandeis. We have seen that Brandeis believed that guarantees of free speech are both the foundation for, and an expression of, the courage citizens have after they gain confidence in the democratic institutions through which they exercise their rational faculties. Frankfurter makes a similar point about law. He speaks of law as “presuppositions on which government is conducted. . . .”<sup>79</sup> Law is more than a codification of contemporary community values. It is also the means people use

---

76. See *id.* at 598. When Frankfurter shifts his analysis to the best means the government has for promoting unity—what he believes to be the end sought by the legislature—he introduces the possibility that exposure to diverse ideas—diversity that could be wrought by the Court’s enforcement of First Amendment values of free speech and free exercise of religion—might be a better source for unity than mandatory flag salutes.

Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crotchety beliefs. Perhaps, it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue.

*Id.* See also MASON, *supra* note 59. Frankfurter’s skepticism about the legislation is also apparent in a letter he wrote to Justice Stone: “I cannot rid myself of the notion that it is not fantastic, although I think foolish and perhaps, worse, for school authorities to believe—as the record in this case explicitly shows the school authorities to have believed—that to allow exemption to some of the children goes far towards disrupting the whole patriotic exercise.” *Id.* at 218-19.

77. *Gobitis*, 310 U.S. at 600.

78. *Id.*

79. Frankfurter, *supra* note 61, at 169.

to infuse government with a spirit that allows the political community to evolve. Law shapes citizens' character, and the relevant question for Frankfurter becomes how to strengthen the character of citizens and their representatives: "[W]hat matters most is whether the standards of reason and fair dealing are bred in the bones of people."<sup>80</sup>

Frankfurter breaks with Brandeis—in favor of Thayer—when he identifies the legislative, rather than the judicial power as the means to strengthen citizens' character. Democratic participation—not the judiciary's enforcement of the First Amendment—promotes a society in which citizens have the character to rid themselves of foolish or paranoid legislation.<sup>81</sup>

#### IV. CONFUSION WROUGHT BY BRANDEIS' DEFENSE OF FREE SPEECH

It is puzzling that commentators dismiss or venerate Frankfurter's defense of judicial restraint without recognizing that he adopts Brandeis' goal of enforcing a conception of the First Amendment that promotes a liberal citizenry. This response might be attributable to the influence of Brandeis' opinion,<sup>82</sup> as well as to Frankfurter's failure to specify how increased political participation leads citizens to develop a liberal character.<sup>83</sup> The power of Brandeis' rhetoric might distract people who would otherwise examine his individual arguments: Guarantees of free speech promote collective and particular interests that condition political legitimacy; and guarantees of free speech manifest citizens' desire to strengthen their character.<sup>84</sup> Although these guarantees might contribute to citizens' deliberations about collective and particular interests, citizens do not necessarily affirm the value of a liberal character when they endorse the actions of judges who enforce these guarantees.

People who conflate these arguments have difficulties when they must respond to restrictions of speech that indicate citizens' lack of lib-

80. *Id.* at 168-69.

81. See MASON, *supra* note 59, at app. In his letter to Stone, Frankfurter states that his intention

. . . was to use this opinion as a vehicle for preaching the true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature, self-protecting and tolerant democracy by bringing the responsibility for a combination of firmness and toleration directly home where it belongs—to the people and their representatives themselves.

*Id.* at 220. See also Frankfurter, *supra* note 61, at 157. Frankfurter cites his concurring opinion in *AFL v. American Sash & Door Co.*, 335 U.S. 538, 555-57 (1949), to express skepticism about democracy through judicial regents as a way to "foster disciplined responsibility in a people."

82. See Bork, *supra* note 21, at 24.

83. I will try to establish the connection between political participation and liberal virtues through an analysis of controversies regarding flag-burning and hate speech. See *infra* text accompanying notes 90-249.

84. See *supra* text accompanying notes 42-44.

eral virtues. Guarantees of free speech might promote important collective and particular interests, but people will not necessarily become liberal when judges enforce these guarantees. When we assume that broad guarantees of free speech express citizens' regard for a liberal character, we beg the question that concerns Frankfurter: Do courts better promote the development of liberal citizens by enforcing the First Amendment or by giving elected institutions responsibility to combat repressive legislation?

After providing an example of how Brandeis' defense of free speech can lead commentators to confuse his different arguments, this essay turns to recent controversies involving legislation restricting flag-burning and hate speech. These controversies illustrate how easy it is to overestimate citizens' passion for free speech. They also suggest that judicial restraint in response to such legislation would have created political conditions that would lead many citizens to recognize how guarantees of free speech contribute to the development of their character.

Consider Lee Bollinger's thesis that free speech contributes to democratic government by teaching citizens the virtue of tolerance. Bollinger follows the path blazed by Brandeis in *Whitney*, and does not seem to recognize the need to question the motivations that underlie people's commitment to free speech. Therefore, he does not give adequate consideration to whether protecting certain forms of speech might prevent citizens from developing the virtue he commends.

According to Bollinger, democracy fails if citizens cannot control the impulse to censor ideas that challenge personal beliefs or undermine particular interests.<sup>85</sup> He defends protection for extremist speech—such as the right of neo-Nazis to march in Skokie, Illinois—because he believes that exposure to such speech is particularly effective in imparting lessons in tolerance, and thereby, fosters greater rationality in democratic legislation.<sup>86</sup>

---

85. See BOLLINGER, *supra* note 35, at 92-93, 105-08.

86. See *id.* at 112, 125, 133, 173-75. First, public toleration of extremist speech has symbolic power. Extending tolerance to extremist speech sharpens the pedagogical facility of the message of tolerance. "By pursuing the 'principle' to its logical end, well beyond what the particulars of individual cases call for . . . , the society impresses on itself the importance of the lesson . . . . 'To straighten a bent stick you bend it back the other way.'" *Id.* at 125. Second, extremist expression provides examples of the quality of mind people should avoid. As the expression at issue in *Skokie* demonstrates, extremist speech reflects people's tendency to suppress ideas that challenge their own understandings. Bollinger believes that exposure to extremist speech actually sensitizes people to the basic human impulse that is manifest by censorship, racism, anti-semitism, and other forms of prejudice. Finally, not only does extremist speech reflect the mental weakness of speakers, it forces listeners to confront the complexity of their own character. Censorship of extremist speech allows people to deny their own impulses toward prejudice. It creates a

Bollinger thinks that tolerant citizens are more likely to: (1) recognize valuable arguments, even those that threaten particular interests; and (2) subordinate their particular interests when ideas they reject achieve democratic success. In a stable democracy, people must learn to confront unfamiliar or threatening ideas with an open mind. Citizens must be willing to assess the value of these ideas. Yet, Bollinger's argument, that we should tolerate extremist speech to teach ourselves tolerance, depends on people's willingness to tolerate ideas that they can readily dismiss.<sup>87</sup> It reinforces people's tendency to be tolerant when they have confidence in their own opinions. But it is not likely that people, who tolerate ideas because they are confident that these ideas are wrong, will develop the quality of mind Bollinger seeks.

Bollinger does not examine the basis for people's toleration; he seems to assume that people tolerate because of a liberal character. If anything, Bollinger's idea of tolerance teaches citizens to accommodate ideas so reprehensible that people learn to tolerate based on the arrogance that arises from certainty. His discussion of statements—made by participants in the *Skokie* case—that convey the need for tolerance despite the repugnance of Nazism are illustrative:

The federal court of appeals, after making its opening declaration of sympathy with the beliefs of the Skokie community, then changed ground rapidly and pronounced its own personal views as irrelevant to its assigned task. . . . "As judges sworn to defend the Constitution . . . we cannot decide this case or any case on that basis. Ideological tyranny, no matter how worthy its motivation, is forbidden as much to judges as to elected legislators."<sup>88</sup>

and:

It is there, in the prologue, that Neier speaks not only as the director of the ACLU but also as an individual, as a Jew, and he speaks with a stirring voice. He recites his "credentials" for despising Nazis, recounting his last minute escape from Hitler Germany as a young boy. "I recite my own background . . . to suggest why I am unwilling to put anything, even love of free speech, ahead of detestation of

---

scapegoat to assume responsibility for people's innate capacity for intolerance, which becomes uncomfortably apparent upon exposure to extremist speech.

87. See HARRY KALVEN, JR., *A WORTHY TRADITION* 142-43 (Jamie Kalven ed., 1988). Kalven criticizes Holmes' dissent in *Abrams v. United States*, 250 U.S. 616 (1919), for only protecting trivial speech. Holmes' idea is eloquently stated by the epigram "sticks and stones may break my bones, but names will never hurt me." We teach children to ignore speech rather than take it seriously. As advice, it is effective at avoiding violence, but it denies children an opportunity of self-reflection, the ability to see themselves from another's perspective and respond to that perspective. It is also not accurate. See generally Frederick Schauer, *Uncoupling Free Speech*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* (Laura J. Lederer & Richard Delgado eds., 1995).

88. BOLLINGER, *supra* note 35, at 30.



Nazis.”<sup>89</sup>

In both statements, the importance of tolerance is conveyed by the writer’s powerful motivation for suppression. They are effective because they appeal to people’s confidence that extremist speech is false, and people’s recognition that there is good reason to despise its substance. However, they do not teach the quality of toleration that Bollinger seeks. People who learn to tolerate extremely offensive ideas that are obviously false might also learn to tolerate other ideas they consider offensive. It would be surprising, however, if tolerating Nazi speech teaches people to suspend presuppositions about their own beliefs and confront the challenge posed by offensive ideas that deserve their attention.

Bollinger’s mistakes indicate how readily we assume that people who endorse guarantees of free speech have a liberal character, and the importance of determining whether judges promote such a character when they enforce guarantees of free speech. Brandeis’ *Whitney* opinion masks the need to address these questions; it obscures differences in how people view guarantees of free speech.

These differences inform contemporary free speech controversies involving flag-burning and racist speech. These controversies indicate that people value free speech because it contributes to their definition and pursuit of particular interests. They also suggest that people who view free speech in this manner lack the virtues that Brandeis and Frankfurter celebrate, and do not affirm the value of a liberal character when they endorse the actions of judges who enforce guarantees of free speech. Therefore, these controversies provide an opportunity to test the thesis that by refusing to invalidate illiberal legislation, judges can promote a political environment that will strengthen citizens’ character.

#### V. JUDICIAL RESTRAINT AS A RESPONSE TO LEGISLATION RESTRICTING FLAG-BURNING AND HATE SPEECH

Many have noted that people tend to tolerate speech they like, but not speech they despise.<sup>90</sup> Although people sometimes reveal this tendency, the point is exaggerated. Most people have some commitment to free speech and readily tolerate expression they reject as offensive, or even as dangerous.<sup>91</sup> Nonetheless, there is an interesting tension under-

---

89. *Id.* at 98. Although this statement precedes the speaker’s justification of a model of free speech that Bollinger criticizes, it is an example of a message in which the value of tolerance is manifest by the depth of the speaker’s hatred for the tolerated speech.

90. See, e.g., NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT THEE* (1992).

91. I am not interested in the small minority who do not have any commitment to free speech: those who would regulate offensive speech without consideration of any First Amendment interest. My concern is why people make exceptions to the free speech principles they endorse.

lying contemporary debates about free speech. People celebrate free speech passionately, but without reflection. It is not unusual for people to endorse guarantees of free speech in grand terms that suggest that they value a liberal character. For example, people often link free speech to the pursuit of truth or express concern that a limitation on speech is the first step toward totalitarianism. But, the breadth of these claims suggests that the speakers have not thought about the value of free speech and its relationship to a liberal character.

Recent controversies concerning legislation restricting flag-burning and hate speech illustrate that we should not assume that people manifest or affirm their liberal character when they praise free speech. Yet, it is not clear that we should endorse Frankfurter's view: that judges should exercise restraint, and thereby, encourage democratic participation that will strengthen citizens' character.

Citizens have incentive to develop liberal virtues that facilitate their pursuit of particular interests. Liberal citizens gain political advantage to the extent that they become more adept at considering the interests of others and identifying potential allies with whom they can combine to pursue an agenda that encompasses their favored policies. Citizens advance their interests by adapting their ends in response to the political pressures that necessitate compromise and reward those who can forge alliances.

The transformation Frankfurter anticipates, however, is not likely to result from a single political controversy. One would expect people to develop liberal virtues from political experience over time and across a range of issues. It would be surprising if judges significantly influenced the extent of this experience by invalidating restrictions on flag-burning and hate speech. In addition, the issues of flag-burning and hate speech do not provide a strong incentive to develop liberal virtues. Citizens respond to these issues emotionally, and therefore, will have greater difficulty identifying the interests of others from which a compromise can be forged. The problem of identification is further exacerbated by the abstractness of the interests at stake in the flag-burning controversy—a commitment to free speech on one side and a much greater commitment to the freedoms represented by the flag on the other side. While it is easier to identify the interests involved in the controversy about hate speech, the controversy itself has garnered much less attention except in the communities where restrictions have been debated.<sup>92</sup>

Nonetheless, the controversies involving flag-burning and hate

---

92. The flag-burning controversy has gained much more attention and generated a much greater political response. The issue of hate speech has produced a significant academic debate, as well as debate at university campuses that have struggled with the issue of speech codes.

speech suggest that judges would have transformed the political environment if they had refused to invalidate restrictions on speech. In both cases, judicial restraint would encourage substantive debate that could lead citizens to appreciate the value of free speech. In the case of hate speech, judicial restraint would also engender conflicts between people's interests, and these conflicts would promote greater empathy among citizens.

### A. *Flag-Burning*

#### 1. CITIZENS' ATTITUDES ABOUT FREE SPEECH AND THE POLITICAL COMMUNITY

Most people recognize that the government undermines interests advanced by guarantees of free speech when it censors critical messages, such as those that are sometimes expressed by burning an American flag. Americans are taught to fear governmental tyranny: They tend to view the exercise of governmental power suspiciously, and consider guarantees of free speech a means to control that power. People often express their readiness to combat restrictions on public discussion through a variant of the grandest of free speech clichés: "I reject what you say, but I'll defend with my life your right to say it."

Moreover, many have put this thought into action. Citizens have fought wars in the name of freedom; it informs their conception of the political community, and, curiously enough, veterans seek to protect the flag as an embodiment of this ideal.<sup>93</sup> Yet, few people would risk their lives to save flag-burners from prosecution, even though such prosecutions seem to violate the ideal.<sup>94</sup> Many people's concern for free speech is overwhelmed by a desire to punish flag burners—or worse, if we believe many of the bumper stickers that appeared in the aftermath of *Texas v. Johnson*.<sup>95</sup>

Those who seek to punish flag-burners reveal their tenuous commitment to free speech. Although people who attack flag-burners wish to protect the flag as a symbol of America and its promise of freedom—including freedom of speech—their disgust at flag-burners prevents them from considering whether their actions undercut guarantees of free speech that advance their own interests. They clearly have little concern for how free speech contributes to the development of their character. To support these assertions, two related distinctions must be made.

---

93. See *Texas v. Johnson*, 491 U.S. 397, 425 (1989) (Rehnquist, C. J., dissenting); see also *id.* at 436, 439 (Stevens, J., dissenting) (opposing a decision striking down a state law proscribing the burning of the American flag).

94. See *Johnson*, 491 U.S. at 418.

95. See *id.* at 425, 436, 439 (Stevens, J., dissenting).

First, a message that criticizes the government of the United States must be distinguished from a message that criticizes America. Flag-burners have desecrated a symbol of America to draw attention to their criticism of governmental policies.<sup>96</sup> Second, people's commitment to the government must be distinguished from their commitment to country. Those who wish to censor flag-burners respond to the insult against their country. Love of country, however, does not necessarily translate into love of government. Many people who attack flag-burners readily tolerate extreme attacks on the government.

Consider the public response to the Freemen and other groups that reject the authority of the United States government. These groups, like flag-burners, challenge governmental authority.<sup>97</sup> Yet, public outcry against flag-burners is much more severe. People who attack flag-burners often share the Freemen's concern for limited government.<sup>98</sup> But, a love of freedom does not necessarily translate into a strong commitment to the political community; many people tolerate a political community that leaves them alone.

We would expect people whose commitment to the political community rests on benefits they derive from avoiding the burdens of political association to view guarantees of free speech as means for preventing the government from interfering with particular interests. Not surprisingly, people who hold such views show little concern about government restrictions on speech that do not implicate their particular interests. Some might consider the prosecution of flag-burners an early but significant threat to particular interests. But for most people, such prosecutions do not threaten the freedom they enjoy. To the contrary, many people protect the flag from defilement, in order to reaffirm this freedom by honoring the symbol that most closely embodies it.

---

96. See *id.* at 399. See also *United States v. Eichman*, 496 U.S. 310 (1990) (striking down a federal law proscribing the burning of the American flag). The defendant in *Texas v. Johnson* sought to enhance a protest of policies of the Reagan administration and certain Dallas-based corporations. In *United States v. Eichman*, the defendants burned the flag as a vehicle for political protest and to challenge legislation proscribing flag-burning. Of course, the message that is critical of country tends to overwhelm the substantive message to which it is intended to draw attention.

97. See James Brooke, *Judge Displays His Patience as the Freemen Display Their Contentiousness*, N.Y. TIMES, July 27, 1996, at B6. At a preliminary hearing, one Freeman refused to acknowledge the authority of the flag.

98. See Eric Felten, *The Movies, the Enemy and the Government*, WASH. TIMES, July 4, 1996, at A15. People's attitudes toward the Freemen changed as the extent of their anti-government radicalism became clearer. See David Johnstone, *Isolation Led to End for Freemen*, ROCKY MTN. NEWS, June 16, 1996, at B2; Carey Goldberg, *Mediator in Freemen Deal Tells How It Nearly Failed*, N.Y. TIMES, June 15, 1996, at A10; *Freemen Surrender Ending 81 Day Standoff*, L.A. TIMES, June 14, 1996, at A1.

## 2. JUDICIAL RESTRAINT AS A RESPONSE TO RESTRICTIONS ON FLAG-BURNING

The controversy concerning flag-burning illustrates how people's strong commitment to particular interests can mask a weaker commitment to free speech. It is illuminating to examine this controversy in light of Frankfurter's defense of judicial restraint; would judicial restraint in response to restrictions on flag-burning promote a political environment in which citizens recognize the value of free speech? On the one hand, flag-burning might be such an emotional issue that it is not reasonable to believe that democratic debate will lead people to overcome their zeal and recognize how free speech contributes to the development of their character. Moreover, the issue might not have garnered any attention but for the possibility of the Court striking down anti-flag-burning statutes. On the other hand, restrictions on flag-burning only have a slight influence on the collective and particular interests that are conditions of political legitimacy. In addition, while there is no doubt that *Texas v. Johnson* ignited a national debate on flag-burning, this debate has not encouraged discussion about the value of free speech.<sup>99</sup> Our experience after *Johnson* suggests that if the Court had let stand the restriction on flag-burning, debate about free speech would have been conducted at a higher level. Such a debate would lead some citizens to a better understanding of how they advance their pursuit of particular interests by honoring guarantees of free speech. This benefit would outweigh the negative affects of the restriction.

### a. Flag-Burning and Political Legitimacy

Legislation that proscribes flag-burning has little impact on interests that a legitimate government must protect. Neither the ability to define community values nor the ability to define and pursue particular interests is undermined by proscriptions against flag-burning. Very few

---

99. It is possible, however, that an expectation of judicial restraint would foreclose the possibility of any public discussion of flag-burning; defendants prosecuted for flag-burning would not challenge the constitutionality of their prosecution. Once the Court limits the occasions in which it exercises judicial review, some restrictions on speech will be assumed constitutional and will not garner the attention that free speech cases currently gain. Thus, these restrictions might never come to the public's attention. In addition, one would expect that these restrictions would be like flag-burning restrictions—and not like restrictions on hate speech—in that without a Court case, they would generate little political controversy, because they do not involve important interests. It would be unfortunate if judicial restraint led to a political community in which no one noticed the prosecution of flag-burners. On the other hand, I believe that, overall, restraint would enhance discussion about the value of free speech and would make the prosecution of flag-burners less likely. Moreover, it seems likely that prosecution of flag-burners would continue to draw local attention—and perhaps some national attention—even if the possibility of judicial review was remote.

people wish to indulge in this freedom, and those who do have efficacious alternatives for communicating their messages critical of both government and country. People denied the opportunity to deliver their message in the form they choose would be harmed to the extent that their messages reach a smaller audience once stripped from the inflammatory attack against country. But, democracies do not gain legitimacy by guaranteeing citizens a wide or attentive audience for their speech.<sup>100</sup> Moreover, although a speaker might attract a broader audience by burning a flag, the incendiary means for delivering the message draws attention from its substance. It does not behoove a politician to disturb a quiet street with a soundtruck at three in the morning.<sup>101</sup> Similarly, burning a flag is likely to generate such contempt for the speaker that people would be less willing to consider the message.

Kent Greenawalt recognizes that restrictions on flag-burning do not undermine political legitimacy. He identifies the controversy's silver lining: Our fixation on an issue as trivial as flag-burning suggests general contentment with our political institutions.<sup>102</sup> He believes that people's focus on the issue of flag-burning indicates consensus about "broadly liberal premises" defining the limits of free speech; "[t]hat people worry so much about this narrow form of political expression, rather than the substance of political dissent, suggests a firm understanding supporting broad latitude for dissent."<sup>103</sup>

Our analysis of flag-burning, however, suggests the breadth of people's commitment to free speech masks its shallowness. Greenawalt too, fears that people's faith in the flag is not rooted in any deeper belief, and that the government can exploit the vacuity of their faith by wrapping its policies in the good will generated by the flag.<sup>104</sup> Thus, although Greenawalt notes the risk in undercutting the values the flag symbolizes when we tolerate its defilement, he concludes that concern for the shallowness of people's faith in the flag counter-balances this risk. His analysis confirms that, while we should be thankful for a government that sustains its legitimacy through sufficient guarantees of free speech, we must be wary that people tend to be unreflective about the concepts of freedom that give meaning to the symbol of the flag.

---

100. Moreover, there are alternative means for making a spectacle of oneself. These means serve the purpose of luring an audience just as well.

101. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 110 (1980).

102. See KENT GREENAWALT, *FIGHTING WORDS* 28-29 (1995).

103. *Id.* at 29.

104. See *id.* at 42-44.

b. Judicial Restraint as a Means to Strengthen Citizens' Commitment to Free Speech

The question remains whether judges should let stand restrictions on flag-burning. Will the effort to repeal these restrictions strengthen citizens' commitment to free speech, as they discover how guarantees of free speech facilitate their pursuit of particular interests? Some people might respond that high profile cases, such as *Johnson*, provide the Court with an opportunity to teach citizens the value of their rights.<sup>105</sup> Greenawalt notes that the *Johnson* opinions, in contrast to more ordinary Court opinions, employ non-legalistic arguments in order to convince a wider audience.<sup>106</sup> Others have criticized the *Johnson* opinions for being more legalistic than those in *Barnette*.<sup>107</sup> These critics claim that the justices scuttled an opportunity to inform a wider audience about the importance of free speech.<sup>108</sup> But, most citizens do not pay attention to the workings of the Supreme Court, and often misunderstand rulings when they do.<sup>109</sup> In addition, citizens have less incentive to consider the Court's arguments as this impact grows. *Johnson* presents particular difficulties because the Court's opinion had to convince citizens whose interest in the case was emotional and intense. These considerations reduce the efficacy of judicial pedagogy.<sup>110</sup>

Experience since *Johnson* confirms this conclusion. Politicians immediately sought to exploit citizens' emotional response to the decision, and thereby, undercut any chance that citizens would consider the Court's arguments.<sup>111</sup> Moreover, this experience provides evidence to

---

105. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

106. See *id.* at 41.

107. See, e.g., Lackland H. Bloom, Jr., *Barnette and Johnson: A Tale of Two Opinions*, 75 IOWA L. REV. 417 (1990).

108. See *id.* at 430-31.

109. See THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 135-36, 142-45 (1989); EDWARD J. CLEARY, BEYOND THE BURNING CROSS 180 (1994). Cleary describes the inability of both the public and the press to grasp the issues involved in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The abortion controversy provides another example of people's difficulties following the Court's work, and in understanding it. The abortion debate has dominated American politics more than any other recent issue the Court has addressed. Yet, few people realize that the Court significantly narrowed *Roe v. Wade*, 410 U.S. 113 (1973), in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Moreover, I find that most people I ask, including many people who pay attention to politics, believe that the Court will outlaw abortion if it reverses *Roe*. See also BENJAMIN PAGE & ROBERT SHAPIRO, THE RATIONAL PUBLIC 76-80, 107 (1992). Page and Shapiro note that the Court seems to have little influence on the public's attitude concerning civil rights and abortion.

110. In contrast, legislative battles usually require people to be less concerned with winning fights. Citizens respond to political conflicts by finding common ground with people whose interests oppose their own.

111. Immediately after the Court issued its ruling, lawmakers and President Bush lined up to

support Thayer's contention that judicial review encourages legislators and citizens to shift responsibility to the Supreme Court—rather than fight themselves—to combat legislation they consider unjust and unwise.<sup>112</sup> Most politicians recognize that their electoral well-being dictates a negative response to *Johnson*.<sup>113</sup> Their constituents showed little inclination to address the arguments of the majority opinion.<sup>114</sup>

Congress responded to *Johnson* with The Flag Protection Act of 1989,<sup>115</sup> a statute designed to circumvent *Johnson* by exploiting divisions on the Court. Instead of addressing the *Johnson* majority's concern about limits on free speech, the federal statute sought to assuage the Court by emphasizing concern for the physical integrity of the flag, rather than for any message associated with it.<sup>116</sup> Representatives, senators, and the President all had strong incentives to support this legislation.<sup>117</sup> Given that elected officials are more educated than the average citizen, and considering that many officials are lawyers whose training includes indoctrination concerning the value of free speech, it is likely that at least some who supported this legislation found it unwise, if not unconstitutional.<sup>118</sup> Yet, few would sacrifice a political career to a defense of free speech, especially when one considers that similarities between the Texas and federal statutes provided reason to believe that the Court would invalidate the legislation.<sup>119</sup>

The Court's opinion in *United States v. Eichman* proved such beliefs to be well-founded. The continuing effort to pass a constitutional amendment to overturn both *Eichman* and *Johnson* indicates that politi-

---

denounce the decision. See Robin Toner, *Bush and Many in Congress Denounce Flag Ruling*, N.Y. TIMES, June 23, 1989, at A8.

112. See *supra* text accompanying notes 61-67.

113. See GREENAWALT, *supra* note 102, at 36-37.

114. See *id.*

115. The Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (Oct. 28, 1989) (amending 18 U.S.C. § 700 (1988)).

116. See GREENAWALT, *supra* note 102, at 37.

117. See Robin Toner, *Senate Attempts to Reinstate Law on Desecration of Flags*, N.Y. TIMES, June 24, 1989, at A8; Robin Toner, *Washington Talk; Politics*, N.Y. TIMES, June 26, 1989, at B6. Within two days of the ruling, the Senate addressed legislation designed to overturn the ruling. Democrats denounced the decision. Michael Dukakis' response to the previous year's flag-salute controversy had illustrated the consequences of appearing unpatriotic. President Bush quickly asked his Attorney General to submit a plan to respond to the Court's ruling. See Bernard Weinraub, *Bush Seeking Way to Circumvent Court's Decision on Flag Burning*, N.Y. TIMES, June 27, 1989, at A1.

118. See Robin Toner, *Amendment on the Flag Raises Fears in Congress*, N.Y. TIMES, June 13, 1990, at A22. In approaching a proposed constitutional amendment to protect the flag, lawmakers feared that a negative vote would be perceived as a vote against the flag. See Robin Toner, *Politicians Forced to Confront Issue of Defacing Flag*, N.Y. TIMES, June 17, 1990, at A1.

119. Even if the Court had endorsed the charade, that too would ease the burden of legislative responsibility.



cians expect benefits from inciting their constituents on this issue.<sup>120</sup> It suggests that we should be skeptical about claims that judges can overcome strong prejudices and employ powerful justifications of free speech to teach citizens the value of their rights.

Politicians, of course, continue to have an incentive to exploit citizens' anger about flag-burning. This incentive continues to fuel the movement to amend the Constitution, and indicates that politicians will be ready to sacrifice constitutional principle to their electoral interest, whether or not a court has the power to correct their mistakes. Thus, even if the *Johnson* Court had upheld the proscription against flag-burning, Texas legislators would have had little reason to advance the arguments of those seeking to repeal the proscription. A legislator who tried to present these arguments in a public forum would invite defeat at the next election.

Nonetheless, given the likelihood that public discourse about free speech would have been conducted at a higher level had the *Johnson* Court let stand the proscription against flag-burning, it is possible that judicial restraint would encourage citizens to recognize the benefits derived from robust guarantees of free speech. We have already seen how opponents of the *Johnson* opinion excited and galvanized existing opinion so as to pressure politicians. They activated this opinion without any significant discussion of free speech. The opponents of *Johnson* attacked the character of flag-burners and implicitly—sometimes explicitly—the patriotism of those who defended free speech.<sup>121</sup> Had the situation been reversed, defenders of free speech would have had to change public sentiment about the treatment of flag-burners. To do so, they would have had to demonstrate the value of free speech, and convince people of their interest in tolerating extremely offensive expression.

More significantly, the *Johnson* opinion ensured that defenders of free speech would face a hostile audience. People would have been more tolerant and receptive of arguments defending free speech if they had thought that those arguments would not harm their interests; friends of the flag would respond better to an argument about why a decision they favor is wrong than they would to an argument about why they should be thankful their defense of the flag failed.<sup>122</sup> It is not surprising that in the aftermath of *Johnson*, defenders of free speech outside of the

---

120. President Bush called for a constitutional amendment to protect the flag on the same day that the *Eichman* decision was handed down. See Robin Toner, *Patriotism and Politics Mix in Reaction to Flag Ruling*, N.Y. TIMES, June 12, 1990, at B6.

121. See HENTOFF, *supra* note 90, at 233-35.

122. See *Johnson*, 491 U.S. at 434 (Rehnquist, C.J., concurring). Rehnquist describes the majority opinion as a "regrettably patronizing civics lecture."

government seem almost as muted as the politicians who refuse to defend the *Johnson* holding.

One could argue that the *Johnson* opinion will lead to a higher level of discourse about the value of free speech, once opponents of the opinion pursue their attacks through a constitutional amendment. Leaving aside the problems associated with amending the Constitution over such a trivial issue,<sup>123</sup> the claim that the debate about the proposed amendment will enhance discourse about free speech advances<sup>124</sup> Frankfurter's position. Defenders of free speech would have a greater incentive to present their case, because they could no longer trust the Court to combat legislation they find unwise or silly. In addition, proponents of a constitutional amendment would give more consideration to their opponents' arguments. Amending the Constitution is a more serious step than legislation, because of the difficulty of overturning the decision. The same reasoning supports Frankfurter's claim that citizens and legislators will take legislative processes more seriously as the likelihood of judicial review decreases.<sup>125</sup>

### B. *Hate Speech*

The debate concerning hate speech also illustrates how passion for free speech is not girded by citizens' desire to develop a liberal character. Many participants on both sides of this debate are primarily concerned with advancing particular interests. Their response to restrictions on hate speech suggests that they do not affirm the value of a liberal character.

More significantly, restrictions on hate speech do not necessarily burden the collective and particular interests that condition political legitimacy. This essay defines hate speech as any form of expression through which speakers primarily intend to vilify, humiliate, or incite hatred against their targets. The concept of primary intention invites an observer to gauge whether the speakers' desire to communicate ideas—ideas other than hate towards their targets—outweighed their desire to injure their victims. It is possible that someone might consider a

---

123. See GREENAWALT, *supra* note 102, at 45.

124. One caveat arises from the complexity of the amendment process. Proposed amendments usually arise from a two-thirds vote in each House of Congress. In addition to the difficulty of overcoming the super-majoritarian requirement—even given the power of public sentiment against flag-burning, and especially when we consider that two-thirds of the Senate will not face an immediate reelection campaign—opponents of the amendment can exploit the rules of Congress that would allow a proposal to die without forcing legislators to vote, or even publicly debate, the proposal.

125. Of course, the finality of a constitutional amendment and the reverence with which we view the Constitution would continue to make people consider the amendment process a more serious business than the legislative process.

speaker's criticisms or comments humiliating or hateful, even though the speaker did not intend his speech as an attack. Speakers will sometimes wish to communicate ideas that others find hurtful, and might even try to justify the suffering they cause others based on the importance of the ideas they communicate. In contrast, one should conclude that speakers employ hate speech if their attacks are so virulent that an observer would have great difficulty separating the message delivered from the attack against the victim. For example, one can distinguish speech that condemns homosexuality from speech that attacks homosexuals. A speaker might consider homosexuality a grave sin and believe that a person will suffer grievously if he or she engages in homosexual acts. This speaker might use incendiary language to convince homosexuals of the mistakes he believes they make. While there is certainly a grey area in which it will be difficult to determine the intent of the speaker, at some point, the enmity of the message will overwhelm its substance, and the personal attack will predominate. At this point, the speaker has used hate speech.

Restrictions on hate speech do not impose significant costs, especially when one considers that a democratic response to such restrictions could strengthen citizens' character. The controversy concerning hate speech would be transformed if the political community could nurture liberal citizens who recognize how free speech contributes to the development of their character. Liberal citizens would empathize with the victims of hate speech; they would not employ hate speech and would condemn those who do in terms that would discourage its use. The victims of hate speech would join the political community in condemning their assailants as immature and vicious; they would view hate speech as an anomalous artifact of a more repressive society rather than a manifestation of the injustice of the contemporary social-order. Therefore, one must determine whether judges can strengthen citizens' character by refusing to invalidate legislation that restricts hate speech.

#### 1. CITIZENS' ATTITUDES ABOUT FREE SPEECH AND A LIBERAL CHARACTER

The controversy concerning hate speech is more complex and significant than the flag-burning controversy. Therefore, this controversy will be examined more closely. In particular, I will outline a legislative response to hate speech that will not impede the ends advanced by guarantees of free speech.

Although the effort to restrict flag-burning has taken greater hold of the public's attention, the debate about hate speech has been more substantive. The defenders of free speech are much more animated than those in the flag-burning debate, and the harms that hate speech inflicts

are more serious. Thus, efforts to restrict hate speech, most notably restrictions implemented on university campuses, have generated discussions that articulate the interests on each side of the controversy and—in contrast to those in the flag-burning controversy—transcend the emotional core of the debate. These discussions force people to justify the value they place on free speech.

While the flag-burning controversy clearly marked a limit to people's commitment to free speech, the debate about restrictions on hate speech blurs the boundary. Because the debate has focused on university speech codes,<sup>126</sup> participants have included many<sup>127</sup> who commit themselves to the pursuit of knowledge and revere the liberal virtues that advance it. These discussions reveal a strong respect for free speech, and often employ the language of First Amendment jurisprudence.<sup>128</sup> Participants worry that the restrictions are too vague or are overbroad so as to have a "chilling effect" on students.<sup>129</sup> They are sensitive to abuses of government power that could result if officials slide down the slippery slope of restricting offensive communication.<sup>130</sup> Some participants seek to balance free speech against the evils of harassment or fighting words.<sup>131</sup> Yet, their statements tend to border on cliché; they seldom explain the value of free speech, except for making excessively general statements linking free speech to the quest for truth.<sup>132</sup> Consequently, these discussions make it difficult to identify why the disputants value free speech. Moreover, in gauging the public's commitment to free speech, one must remember that most people did not participate in the debates about university speech codes; the few people who are aware of

---

126. The public debate on hate speech centered on campus controversies concerning speech codes. Interestingly, public awareness of legislative debate about statutes restricting hate speech was comparatively non-existent. The Supreme Court decision in *R.A.V. v. City of St. Paul* gained some attention, but I do not think that the public has the same awareness of this case as it does of the campus debates. More significantly, it seems as if the Court's opinion in that case has dampened public debate on the topic. An examination of the *New York Times*' coverage of the fight concerning university speech codes supports this conclusion. The *Times*' coverage of the issue crests in 1991, the year before *R.A.V.* It is also interesting to note that in 1991, President Bush addressed the issue in a commencement speech, a good indicator that the issue had attracted the public's attention. See Maureen Dowd, *Bush Sees Threat to Flow of Ideas on U.S. Campuses*, N.Y. TIMES, May 5, 1991, at A1.

127. The incidents on campus that lead to the adoption and enforcement of speech codes make clear that all members do not share these commitments, and the debate about these incidents suggests a difference between revering and possessing liberal virtues. See *infra* notes 234-40.

128. The debates have also been shaped by the participation of constitutional law scholars.

129. See Warren George Sandmann, Jr., *Freedom of Expression and/or Freedom from Racial and Sexual Harassment: College Campuses and Hate-Speech Codes* 88, 105, 124, 129, 131, 163-70 (May, 1992) (unpublished doctoral thesis, University of Iowa) (on file with author).

130. See *id.* at 117-19, 124, 131.

131. See *id.* at 82, 87, 126-27, 129, 131, 137, 160-62.

132. See *id.* at 89, 91, 105, 120-21, 127, 137.

them probably gained their information through the filter of authors, commentators, and journalists, who situate the debate in the context of larger controversies about political correctness and culture wars.

Statements made by participants in the campus discussions about restrictions on hate speech, as well as the broader public debate, illustrate how particular interests guide people on both sides of the controversy. Of course, people can focus on particular interests and still affirm the value of a liberal character when they endorse guarantees of free speech. Brandeis' argument presupposes it; citizens who value free speech recognize that it contributes to the process by which they review, revise, and select their ends.<sup>133</sup> It would be strange if people sought to develop a liberal character because it led them to make better choices about their ends, but did not value the particular interests they chose.

Those who oppose restrictions, however, tend to concentrate on how laws that limit hate speech affect their particular interests. In contrast, it is unusual to hear people defend free speech in terms analogous to Brandeis' *Whitney* concurrence. This suggests that people do not link free speech to the development of a liberal character, and would be slow to subordinate particular interests in order to extend the benefits of free speech to those with competing interests.

People who wish to employ hate speech view guarantees of free speech as a shield against government interference with their pursuit of particular interests. They have no interest in participating in discussion that could influence their deliberations about collective or particular interests.<sup>134</sup> People who use hate speech discourage response. Hate speech affords them no opportunity to engage the ideas of their victims, or of others who might challenge the substance of their message. Hate speech does not seek a response and is often used to intimidate its victims: Racist speech invites silence, resentment, and violence rather than discussion.<sup>135</sup>

Many people who oppose government restrictions on hate speech, however, also condemn racism and take great offense at such expression. Some might condemn regulations on hate speech from fear that their latent prejudices or controversial opinions will expose them to

---

133. See *supra* text accompanying notes 42-44.

134. See CLEARY, *supra* note 109, at 88-90. Cleary, the attorney for R.A.V., discusses the different *amici* briefs filed with the Supreme Court. These include a brief filed by the Patriot Defense Foundation, a group that often represents the Ku Klux Klan. Their brief states that their interest in the case was to "protect the vital First Amendment rights of political activists . . . who advocate that the United States should remain a predominantly Christian, Anglo-Saxon, and European derived nation. . . ." *Id.*

135. See GREENAWALT, *supra* note 102, at 49-64; ROBERT POST, *CONSTITUTIONAL DOMAINS* 293-99 (1995).

prosecution.<sup>136</sup> Many people, though loath to burn crosses or engage in direct verbal attacks, harbor prejudices about the virtue, intelligence or character of those different from themselves and sometimes express these prejudices.

Citizens who genuinely oppose discrimination and the repugnant expression that fuels the movement to restrict hate speech,<sup>137</sup> can also imagine circumstances in which their own expression could be susceptible to criticism. People recognize that they are not in perfect control of what they say. It is not unusual for people under emotional strain or the influence of alcohol to express hateful thoughts that they do not believe or that are not indicative of their better feelings.<sup>138</sup>

In addition, people are afraid that things they say will be taken out of context or misinterpreted.<sup>139</sup> Perhaps one can justify regulations of hate speech because they force people to be more sensitive to their audience and exercise restraint before spewing venom or drivel. However, imposing such discipline on people reduces their control over their own lives. People do not like having every utterance subject to government assessment, or having to fear that their words might cost them jobs, friends and social standing. Thus, it is likely that some people reject restrictions on hate speech because such restrictions make it difficult to engage in activities that contribute to the pursuit of particular interests.<sup>140</sup>

People also reject restrictions on hate speech for fear that their pursuit of particular interests will suffer, because these restrictions favor interests that oppose their own. People criticize campus regulations attacking hate speech, because they consider these regulations an aspect of a larger movement to stifle speech critical of an agenda favored by

---

136. See HENTOFF, *supra* note 90, at 154.

137. See generally THE PRICE WE PAY, *supra* note 87, at 3-112.

138. I think it is possible to express—and have—prejudicial thoughts, yet know they are wrong. It is unfortunate, but a well-developed vocabulary of hatred exists to assist people in conceptualizing the anger they feel toward others. While this anger is a primary characteristic of bigoted people, for many others, it is an anomaly. Nonetheless, when pushed to anger in rare—or, depending on the person, comparatively rare—situations that do not lend themselves to ready deliberation, people will employ this vocabulary, even those who are repulsed by it.

139. See HENTOFF, *supra* note 90, at 154-58.

140. The consequences of having one's words misinterpreted can be severe. For example, consider the recent controversy at Rutgers University. The President of the University, Francis Lawrence, found himself in trouble concerning remarks he made about school admissions. President Lawrence was arguing against admissions criteria that tended to harm minority candidates—he also had a strong record on minority admissions—but the record of the minutes of the meeting were garbled. They indicated that President Lawrence believed that minorities were genetically ill equipped to do well on the exams. The controversy led to calls for his resignation. See Jon Nordheimer, *Rutgers Leader Disavows Linking Race and Ability*, N.Y. TIMES, Feb. 1, 1985, at B5.

the left. These critics believe that restrictions on hate speech shield an ideal—of a society characterized by diversity and equality—that minorities, feminists, and homosexuals seek to advance.<sup>141</sup> They fear that limits on speech will prevent those who reject leftist ideology from examining and exposing differences among people.<sup>142</sup> For example, certain restrictions against hate speech could be interpreted to proscribe statements by people criticizing or condemning homosexuality, gender equality or distinguishing characteristics of different races. This potential censorship would deny the affected speakers an opportunity to explore controversial ideas about how they might live their lives, or it would facilitate public acceptance—and consequently the pursuit by others—of ideas that conflict with their particular interests.<sup>143</sup>

A fear of government unduly burdening citizens' definition and pursuit of particular interests informs the majority opinion in *R.A.V. v. City of St. Paul*.<sup>144</sup> Justice Scalia assumed that the government has authority to proscribe all speech encompassed by the category fighting words.<sup>145</sup> But, he held that the government cannot ban some fighting words without banning all fighting words.<sup>146</sup> Scalia contends that the government could skew people's assessments of societal conflicts if it allowed one side to employ fighting words but not the other; "St. Paul has no such authority to license one side to fight freestyle, while requiring the other to follow the Marquis of Queensbury rules."<sup>147</sup> Scalia's response assumes that, although fighting words may be without value, government restrictions could bias public discourse.<sup>148</sup> He suggests that the Minneapolis statute would favor religious groups, given that it bans attacks that express religious bigotry but allows people to use fighting words to attack religious bigots.<sup>149</sup> When the political community allows only certain groups to employ fighting words to gain public support for their particular interests, it burdens groups with conflicting interests.

Justice Stevens challenges Scalia's claim that the Minnesota statute favors certain viewpoints over others.<sup>150</sup> He contends that, even assum-

---

141. See, e.g., ROBERT BORK, *SLOUCHING TO GOMORRAH* 262-63 (1996); DINESH D'SOUZA, *ILLIBERAL EDUCATION* 144-52 (1991); SANDMANN, *supra* note 129, at 150, 168.

142. See HENTOFF, *supra* note 90, at 178-79.

143. See *id.* at 152-53.

144. 505 U.S. 377 (holding that a law banning specific forms of hate speech—such as cross-burning—was a content-based restriction, and therefore was unconstitutional).

145. See *id.* at 383.

146. See *id.* at 391.

147. *Id.* at 392.

148. See *id.* at 391-92.

149. See *id.*

150. See *id.* at 433-35 (Stevens, J., concurring).

ing the speech in Scalia's example constituted fighting words, there is a difference between speech debating the need for tolerance and speech debating the merits of competing religions.<sup>151</sup> Regardless of their viewpoints, people remain free to employ fighting words in their discussions of tolerance, but must refrain from using them in their discussions of religions.<sup>152</sup>

Stevens also claims that the government has an interest in protecting the victims of hate speech.<sup>153</sup> By examining powerful arguments that support his claim, one discovers that proponents of restrictions on hate speech also seek to secure particular interests. Critical race theorists defend the constitutionality of various restrictions on hate speech.<sup>154</sup> They believe that victims of hate speech curtail their participation within the political community, and are thereby denied interests that a legitimate government must protect.

These theorists believe that hate speech inflicts substantial injuries on its immediate victims. It also reinforces a climate that harms members of the subordinate social groups that are its target;<sup>155</sup> it impedes their ability to define and pursue particular interests. Hate speech is hurtful. Critical race theorists contend that victims of hate speech have suffered physical symptoms, psychological disorders and have even become suicidal.<sup>156</sup> They note that the immediate response to hate

---

151. *See id.* at 434-35 (Stevens, J., concurring).

152. *See id.* at 435 (Stevens, J., concurring). It should be noted that Stevens' rebuttal does not respond to Scalia's contention that the regulation will bias public discussion. Although the regulation may be neutral among people within the protected categories—it is neutral concerning hate speech directed at men and women or Catholics and Protestants—it does limit our vocabulary for making criticisms based on race, creed, religion, and gender. In contrast, it does not encumber the expression of those who attack bigots.

153. *See id.* at 424-36 (Stevens, J., concurring).

154. *See, e.g.,* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C. L. L. REV. 133 (1982); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

155. *See* Delgado, *supra* note 154, at 135; Lawrence, *supra* note 154, at 453-56. Notwithstanding the documentation offered in support of these claims of harm, the discussion that supports them—in the various articles—is somewhat anecdotal and speculative. Although it is easy to recognize that harms are suffered, it is more difficult to quantify and, at times, qualify them. Yet, it is important to appreciate the comments of Matsuda, *supra* note 154, at 2326-27, and Lawrence, *supra* note 154, at 475-76, that minorities are much more likely to recognize the harms and to be receptive to arguments in favor of regulation. I believe that the critical race theorists make a case that supports narrow restrictions on hate speech. *See infra* text accompanying notes 162-70. However, instead of debating the weight of competing ideals of freedom and equality, our response to hate speech should focus on how to promote a community in which citizens recognize and condemn the viciousness of those who employ it.

156. *See* Delgado, *supra* note 154, at 136-38, 143, 146; Lawrence, *supra* note 154, at 463; Matsuda, *supra* note 154, at 2336.



speech is often paralysis. Paralysis results both from the aggressive nature of the expressed sentiment, and the fact that people tend to employ hate speech when the victim's minority status is both clear and relevant.<sup>157</sup>

Critical race theorists claim that hate speech not only causes the emotional distress of an ordinary insult, but also assaults its victim's dignity by reinforcing social stigma.<sup>158</sup> The reinforcement of social stigma leads members of subordinate social groups that are the victims of hate speech—as well as the greater community—to question their moral worth and place in society, and ultimately to curb their participation within the political community.<sup>159</sup> According to this view, the statements themselves emphasize victims' lesser status to a point in which it influences all of their interactions with superordinate groups.<sup>160</sup> Not only do they curb their participation within the political community, they accept the majorities' assertions of superiority. Critical race theorists argue that victims respond to this subordinate status by curtailing their ambitions, and by failing to develop capabilities that would expand their opportunities to pursue particular interests.<sup>161</sup>

## 2. JUDICIAL RESTRAINT AS A RESPONSE TO RESTRICTIONS ON HATE SPEECH

### a. Hate Speech and Political Legitimacy

It remains to be determined whether judges would have strengthened citizens' character if they had refused to invalidate legislation restricting hate speech. But first, one must establish that properly drawn restrictions on hate speech do not unduly burden collective and particular interests that a legitimate democratic government must protect. This essay does not intend to offer a legislative proposal or defend an existing statute. Yet, one must recognize that a vague or overbroad provision will provide an incentive for self-censorship, and would allow too much discretion to government officials charged with its enforcement. Officials with such discretion could skew public debate by targeting speech they reject or that is critical of their performance. These problems undermine collective and particular interests that a legitimate government must secure.

A sufficiently narrow restriction on hate speech will address these problems. It should describe the nature of the restricted speech and

---

157. See Lawrence, *supra* note 154, at 452.

158. See *id.* at 453-57.

159. See *id.*

160. See *id.*

161. See Delgado, *supra* note 154, at 136-38; Matsuda, *supra* note 154, at 2338-41.

identify the specific harms it means to counteract. For example, a statute could restrict speech that is directed at certain groups,<sup>162</sup> and by which the speaker primarily intends to vilify, humiliate, subordinate or incite hatred against members of such groups.<sup>163</sup> The restriction should account for the perspectives of both the speaker and audience members whom it seeks to protect: In order to restrict hate speech, a judge must believe that the speaker intended the message as an attack on some members of his audience, and those members must interpret the speech as an attack. The restriction should not encompass attacks that arise in situations so heated that an average person would not consider the use of hate speech premeditated.<sup>164</sup> In addition, speakers should not be liable for hate speech when they are not aware of their victims' presence or when their victims are present but the speaker addresses the audience as a whole, not the victims directly.<sup>165</sup> But, once a judge determines that an attack was intended, she should assess its ferocity—whether the speaker employed hate speech—from the perspective of the victim.<sup>166</sup>

Although a speaker will not be subject to prosecution unless he directs hate speech at his victims, the proscription can encompass more

---

162. Statutes that restrict hate speech tend to define these groups based on race, ethnicity, religion, gender, and sexual orientation. I recognize, however, that hate speech might not cause the same harms to each group or might harm other groups in a manner that suggests the utility of a broader definition. I do not address these questions in this essay.

163. Statutes that restrict hate speech should provide specific examples of the type of speech contemplated, to provide guidance to officials who must decide whether a form of expression is *meant* to promote these harms. Speaker intent is an important means for limiting the breadth of the restriction. Without this limitation, it is likely that enforcing restrictions on hate speech would unduly burden particular and collective interests that a legitimate government must protect. However, we must also note that this claim becomes weaker as the evidence of the harms inflicted by hate speech becomes stronger. See *supra* note 155. The critical race theorists allege serious harms from which a legitimate government would have to shield its citizens. Not only would the interest in protecting citizens from these harms override the costs of the restriction on speech, we would also have better means to control the officials who enforce the restriction. The evidence that would support the claims of the critical race theorists would, by its nature, provide information about the types of speech that should fall within the restriction.

164. See GREENAWALT, *supra* note 102, at 49. Greenawalt notes that spontaneous speech of this type might have expressive value. I do not think, however, that a government would undermine its legitimacy if it demanded greater responsibility from all speakers by punishing such utterances. But, I believe that broadening the restriction would provide officials too much discretion to prosecute.

165. According to this view, we would consider a speaker at a Ku Klux Klan rally subject to prosecution if he directs hate speech at African-Americans who protest the gathering. We would not consider the same speech sanctionable if it was a commentary about African-Americans aimed at the participants at the rally, even if the speaker knew that the protesters were present. I do not, however, find any significant difference between the two situations. I draw the distinction only to further limit the chances that prosecutors will abuse their discretion.

166. See GREENAWALT, *supra* note 102, at 51-52. Given that the restriction is intended to limit harm to victims, it is how they experience the attack that is relevant.

than face-to-face attacks.<sup>167</sup> If the political community intends to limit the harms of hate speech, it has reason to extend protection to victims who are not in the speaker's presence. The harms it seeks to prevent would also arise from a speaker sending a letter to someone or burning a cross in front of their home when they are not immediately in the speaker's presence or when they happen to be away. Similarly, the political community might protect people from direct attacks that disparage groups to which they belong; speakers can attack members of their audience without singling them out.<sup>168</sup>

When the political community enforces broader restrictions on hate speech, however, it gives prosecutors the discretion to determine whether an attack is direct, and risks the possibility of people censoring themselves. This should give us reason to pause, especially considering the likelihood that attacks against victims will be combined with speech that can contribute to citizens' deliberations about collective and particular interests.

We can defend this discretion. The discretion to determine whether someone was attacked directly is analogous to the discretion to determine whether an attack was face-to-face—discretion that those who defend restrictions on fighting words tolerate.<sup>169</sup> The different proximities of the attacks might make it harder for an official to decide that an attack was direct—and thus, make an abuse of discretion harder to detect. But, one addresses this problem by significantly narrowing the type of speech that is subject to prosecution. Prosecutions will remain rare, and those that do occur will garner enough attention to clarify the standard of actionable speech. Furthermore, the defenders of free speech will provide valuable support to those who wish to flaunt the restriction. If anything, they might have an incentive to overcome the impulse to self-censorship, knowing that their trial will expand their audience and that their legal defense will be subsidized.

More significantly, the problems of discretion and self-censorship involve questions of how to administer restrictions on speech that can be justified in theory. If experience suggests that narrow restrictions do not sufficiently control discretion and provide too great an incentive for self-censorship, we can adjust our response to hate speech in order to secure the goals underlying our conception of how free speech contributes to

---

167. *But cf.* GREENAWALT, *supra* note 102, at 62-64.

168. I do not mean to take a position on the concept of group libel, except to not reject it categorically. I suspect that group libels cause many of the harms as hate speech, but they are not necessarily aimed at individuals. Here, I only seek to protect individuals when a speaker intends to harm them through a group libel.

169. *See R.A.V.*, 392 U.S. at 399-403 (White, J., concurring); 424-26 (Stevens, J., concurring). *See also* GREENAWALT, *supra* note 102, at 53.

political legitimacy.<sup>170</sup>

It is possible, however, that even a narrow restriction limiting hate speech will harm citizens' collective and particular interests. Therefore, one must strengthen the theoretical case by examining four arguments challenging the legitimacy of a government that enforces even narrow restrictions on hate speech: (1) Protecting hate speech benefits speakers whose definition and pursuit of a particular interest requires the use of hate speech; (2) Protecting hate speech will lead those who employ it to reformulate their ends and make, what they consider to be, better choices concerning particular interests; (3) Protecting hate speech will advance citizens' deliberations concerning the definition and pursuit of particular interests;<sup>171</sup> and (4) Protecting hate speech advances a collective interest in defining community values.

The first two claims involve benefits to speakers who employ hate speech; hate speech contributes to their definition and pursuit of particular ends, and it invites discussion that could help them to reformulate their ends. One can reject the first claim, because restrictions on hate speech will not have a significant impact on the ends people can pursue. People can continue to define and pursue most ends, even when denied the privilege of employing hate speech. Some might respond that hate speech is essential to the pursuit of certain ends, and they are probably correct. For example, it is easy to imagine forms of white supremacy that people could not pursue without the ability to employ racist and anti-semitic epithets.<sup>172</sup>

One can defend the legitimacy of a government that restricts such speech. A legitimate government must give citizens considerable rein to pursue particular interests and especially to engage in discourse that facilitates their pursuits. But, political legitimacy should be assessed based on the general environment that results from the government's exercise of power. The government can restrict speech when it establishes a close correspondence between a form of speech and a substantial harm.<sup>173</sup> One tolerates such restrictions because these harms

---

170. See *infra* text accompanying notes 232-42.

171. This claim of course has two bases: (1) citizens will make better choices; and (2) citizens' choices will be more autonomous. See *supra* text accompanying note 30.

172. It is important to emphasize that the government does not interfere with citizens' choice of these ends, except to the extent that people will be less likely to choose ends that are difficult to pursue. This might be a violation of their autonomy, and an instance of governmental coercion. Nonetheless, even if hate speech is restricted, people can continue to believe in any form of white supremacy and will continue to be exposed to such ideas as well as people who pursue analogous ideas. More importantly, it is obvious that political legitimacy does not depend on the government treating people as autonomous beings by allowing them to pursue any end they happen to choose. We tolerate government coercion so long as it has sufficient reasons to support its actions.

173. See *R.A.V.*, 392 U.S. at 416-26 (Stevens, J., concurring).

threaten particular interests that a legitimate government must protect. Thus, the government can draw on the critical race theorists' argument that hate speech limits citizens' ability to define and pursue particular interests to justify restrictions on hate speech.

It is possible that the government might have alternative means for securing these interests. But, given the narrowness of the restriction on the speaker,<sup>174</sup> the government's action would still not scuttle its legitimacy. Although certain speakers might rightfully consider themselves coerced by a government that forecloses the pursuit of certain ends,<sup>175</sup> the government should be considered legitimate, so long as it continues to maintain an environment that provides sufficient conditions for citizens to define and pursue particular interests.<sup>176</sup>

One can reject the second claim for many of the same reasons: The particular interests of the victims of hate speech provide a basis for governmental action that outweighs speakers' interest in how hate speech contributes to their choice of particular interests,<sup>177</sup> and one should not determine political legitimacy based on how the government's exercise of authority affects a small number of people. In addition, given the nature of hate speech, one would not expect that it would advance speakers' deliberations about particular interests by inviting discussion that could help them to reformulate their ends. People who use hate speech indicate that they do not expect and will not engage any response. In most contexts, their expectations will be satisfied; hate speech precludes rational reply.<sup>178</sup>

---

174. It is possible that it would affect the wider population to such an extent that government legitimacy would be undermined. I address this claim *infra*.

175. Similarly, the speaker would rightfully consider himself coerced even if the government had to restrict his speech in order to ensure other citizens sufficient opportunity to define and pursue their particular interests. In each case, the question of the scope of freedom guaranteed by a legitimate government and how individual citizens experience the exercise of that authority are distinct—though obviously related—questions.

176. This suggests that the argument of legitimacy turns on the third claim that will be examined.

177. I do consider this interest more important than the benefit citizens derive because guarantees of free speech facilitate their pursuit of particular interests that undermine important interests of others. But, I do not believe that a government derives its legitimacy by promoting an environment in which some citizens' deliberations about particular interests are advanced at the expense of other citizens' deliberations.

178. *See supra* note 157 and accompanying text. One could argue that hate speech promotes discussions with other bigots, and this would contribute to the speaker's formulation of his ends. However, this possibility is addressed by our response to the first claim. It is also possible that through hateful expression, the speaker might attract the efforts of people who could help him to moderate his prejudice. We can reject this argument—as a claim of the second type—because of my response to such claims. However, it also seems relevant to an analysis of claims of the third type; we can improve the conditions in which citizens define and pursue particular interests if we could significantly reduce the number of people prone to employ hate speech. I do not examine this claim, however, because the contingency on which it is premised appears remote as does the

The disutility of hate speech in generating discussion also undermines the third claim, that protecting hate speech would advance citizens' deliberations concerning particular interests. Some people argue that exposure to hate speech might lead some citizens to reexamine their own prejudices and might promote discussion within the political community that would lead citizens to make better and more autonomous choices about their particular interests. For example, Bollinger argues that when forced to confront hate speech, citizens would also have to confront their own sublimated prejudices.<sup>179</sup> It is likely that such a self-examination would lead people to reevaluate their particular interests. We have already seen, however, that the extremity of hate speech is not likely to force people to confront their prejudices; it is more likely to give citizens reason to confirm the presuppositions that govern their lives.<sup>180</sup> Joseph Raz also contends that by protecting speech of little value—what he calls bad speech<sup>181</sup>—the political community advances citizens' definition and pursuit of particular interests. Rather than find value with extreme forms of speech, he claims that such speech is an aspect of worthy—though imperfect—forms of life.<sup>182</sup> Raz believes that when the government restricts speech, it condemns forms of life associated with that speech, and it becomes more difficult for those lives to “gain public recognition and acceptability.”<sup>183</sup> Thus, the government's actions limit citizens' ability to identify and pursue worthwhile forms of life.

Raz does not address important questions relevant to this essay, including whether one can justify restrictions on hate speech;<sup>184</sup> he only seeks to support the claim that free speech is a public good.<sup>185</sup> But Raz's argument seems to confound the criticism that hate speech is ill-suited to advance citizens' deliberations about particular interests.<sup>186</sup> The political community would have reason to protect even worthless

---

possibility that the cumulative effect of such transformations will lead to significant benefits for the general citizenry. Moreover, if these assumptions are incorrect, my response to claim three would apply to this argument as well.

179. See BOLLINGER, *supra* note 35, at 92-92, 105-08.

180. See *supra* text accompanying notes 88-90.

181. See Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEG. ST. 303, 316 (1991).

182. See *id.*

183. See *id.* at 318.

184. Raz does not address the application of other arguments defending free speech or the types of harms that would justify limitations on free speech. Moreover, his essay does not distinguish among varieties of “bad speech.” As I will argue, the problem of separating speech from associated life-styles becomes less pressing as the speech in question becomes more extreme—such as the speech contemplated by the restrictions I examine.

185. See Raz, *supra* note 181, at 305.

186. See *supra* text accompanying note 178.

speech, if its restriction would impede people's ability to identify and pursue valuable forms of life.<sup>187</sup>

Raz's argument can be surmounted. He justifies protection for speech that is "an expression or portrayal of something which is a part of a valuable way of life."<sup>188</sup> The challenge Raz presents is whether one can separate hate speech from valuable forms of life with which it can be associated. If successful, the restriction on hate speech will not deter people from pursuing valuable forms of life, and it might increase the appeal of such lives. Consider three examples: (1) a black nationalist employing anti-semitic hate speech; (2) a Catholic employing hate speech to condemn homosexuality; and (3) members of a fraternity directing abusive language at a female student in a public space. Even assuming that in each case the speech contributes to a worthwhile form of life,<sup>189</sup> it seems likely that the separability problem will diminish as the speech at issue becomes more extreme; even though hate speech might be related to expression associated with a valuable form of life, the speaker attenuates the association by employing hate speech.<sup>190</sup>

One can, therefore, condemn individuals who employ hate speech to attack Jews, gays, and women, and *not* condemn the groups to which they belong, even if those groups espouse anti-semitic, homophobic or sexist ideas. People derive the association between speech and a form of life from either the substantive message of the speech or the act of expression itself: On the one hand, a Catholic communicates a tenet of theology by condemning the sinfulness of homosexual acts; on the other hand, fraternity members flirt obnoxiously with women as part of a ritual designed to strengthen group bonds. But, each use of speech is only a single component in a complex form of life. One would expect that such speech would affect how people comprehend these lives, but that the use of hate speech would draw attention to the speaker and away from any message concerning the form of life he espouses.

In the case of the Catholic condemning homosexual acts, the bitterness of the hate speech would overwhelm and undermine its substantive message. The speech loses any connection to Catholic theology or what one would consider a Catholic form of life. People distinguish between a homophobe who happens to be Catholic from a Catholic who con-

---

187. Raz's concern that the government not condemn forms of life extends to people whose lives are censored. They might suffer injuries that could undermine a government's claim of legitimacy. My earlier arguments address this claim. See *supra* text accompanying notes 172-78.

188. Raz, *supra* note 181, at 319.

189. See *id.* Raz does not resolve the question of what makes a form of life unacceptable.

190. The problem of extreme speech will also bear on the harm that we can counterbalance against citizens' interest in free speech. But, my only concern is whether the separability problem diminishes as speech becomes less rational.

demns homosexuality based on religious grounds.<sup>191</sup> Similarly, the fraternity members' expression loses its significance when it takes the form of hate speech. Although many fraternities engage in—what outsiders might consider—extreme forms of behavior in order to solidify bonds among members, they do not consider hurting women an aspect of their life.<sup>192</sup> In each case, one would expect that proponents of these lives would endorse action to prevent misrepresentation of how they experience or understand their lives.

Raz might respond that our greater concern should be how outsiders perceive those lives, and that when the government condemns proponents of those lives who employ hate speech, it condemns the lives themselves. Yet, if the goal is to avoid government actions that render these lives less attractive, one should take seriously the concerns of proponents who do not want people's perception of these lives to be clouded by a false association with hate speech. In the absence of governmental restrictions, people who associate a form of life with hate speech, perceive a stereotype of that life; they see Catholicism as homophobia or fraternity life as sexism. By preventing such false associations, restrictions on hate speech could advance Raz's goal of enhancing people's opportunity to experience valuable forms of life, as well as the aims of people who pursue lives that people falsely associate with hate speech.<sup>193</sup>

This response to Raz does not address his concern for the close association between bad speech and valuable forms of life. Instead, it severs hate speech from these forms of life by denying the association that is a presupposition of Raz's argument. Yet, significant problems remain concerning (1) how to draw the line between hate speech and bad speech that many proponents of a form of life would consider an aspect of their life, and (2) how to treat bad speech that is not hate speech. For example, black nationalists have an interest in severing their move-

191. Even people who condemn the Catholic Church as homophobic should accept this distinction. Gay rights activists direct energy toward the Catholic Church because it poses a greater threat than ordinary homophobes who do not root their opposition to homosexuality in a conception of a well-lived life.

192. They certainly do not present themselves as misogynist associations. It may be possible that there are fraternities in which each member has misogynistic attitudes, and views the fraternity as a means to advance these attitudes. But, this seems unlikely. However, it is certainly true that some fraternities harm women, and some members of fraternities seek to harm women.

193. It is possible that those who employ hate speech are defining a life that differs from the life proponents defend, i.e., certain fraternity members define their life in terms of its misogyny. But, one would expect that as hate speech becomes integral to someone's understanding of their form of life, we can class that life as a bad one. Raz does not specify what makes a life a bad one, but suggests that it is tied closely to actions that can be regulated by law. I do not plan to make the argument, but I would expect that hate speech would be integral to lives that can be condemned under this criterion.



ment's association with anti-semitism. One often hears the complaint that accusations of anti-semitism have prevented people from grasping their project. However, many black nationalists continue to affirm the ideas that underlie expression they consider unnecessarily extreme. Many Jews, on the other hand, believe that these ideas are anti-semitic and amount to hate speech. Our response to Raz only supports restrictions which encompass the comparatively insignificant area in which most black nationalists acknowledge that the restricted expression is hate speech.<sup>194</sup> Therefore, one must determine whether there are reasons to override Raz's argument, and to extend the concept of hate speech to include expression that is more closely associated with valuable forms of life.<sup>195</sup>

The political community can restrict hate speech and still provide citizens significant opportunities to explore various worthwhile forms of life. A legitimate government must respect citizens' autonomy by allowing citizens to gauge their own interests. In addition, it must also provide an environment in which citizens have adequate information for defining particular interests and choosing the means to pursue them.<sup>196</sup>

If the government can sustain such an environment without protecting hate speech, it has no obligation to pursue a superior environment. Assuming that people have adequate information relevant to the choices they have to make and opportunity to deliberate about those choices, it would be strange to insist that a government must continue to advance people's interest in the conditions in which they select their ends without regard for other interests, especially their interest in pursuing the ends they choose. For example, citizens' interest in the conditions in which they deliberate about particular interests justifies a law that prevents a

---

194. We would also expect that people who engage in a common form of life would be slow to consider the speech of a fellow member—espousing ideas that they look upon favorably—a form of hate speech.

195. Again, these considerations do not refute Raz's argument. Raz does not argue that governments derive legitimacy through free speech guarantees that advance citizens' deliberations about particular interests. In addition, he did not examine other interests, including free speech interests, that would override the considerations that lead us to treat free speech as a public good. *See supra* note 184.

196. *See supra* text accompanying notes 27-30. I need not get into what an appropriate limit is, given that I do not believe the interference is at all significant. For the vast majority of people, narrow restrictions on hate speech have little influence on this process. Clearly, at one level, the government does not respect the autonomy of speakers whose use of hate speech is proscribed. This is why we can say that the government acts coercively against such speakers whether or not we can justify the action. *See supra* note 175. But we have also seen that governmental legitimacy depends on the general environment created by the government's exercise of authority, not on how its exercise affects particular people. Although I believe that citizens have a greater interest in being treated autonomously than they have in pursuing interests that require the use of hate speech, I do not think that narrow regulations of hate speech impact this interest in a manner that would threaten government legitimacy.

religion from taking actions that permanently foreclose its members opportunity to reassess their commitment to that religion.<sup>197</sup> One would still challenge a supplementary law that forces people to consider an array of religious literature before they are free to practice any religion.

Therefore, even if restrictions on hate speech reduce the diversity of lives that citizens have reasonable opportunity to choose, it is not clear that a concern to advance citizens' deliberations about particular interests should override a concern for the particular interests of the victims of hate speech.<sup>198</sup> People who defend restrictions on hate speech illustrate how these victims have less opportunity to define and pursue particular interests.<sup>199</sup> Given an environment in which citizens have significant opportunity to define and pursue diverse forms of life, it would be odd to sacrifice important interests of some citizens in order to foster conditions that enhance these same interests for other citizens.

Furthermore, restrictions on hate speech might improve the environment in which citizens define and pursue particular interests.<sup>200</sup> Although people would be less likely to pursue valuable forms of life that are tainted by their association with hate speech, the restriction against hate speech might assist proponents of those lives who seek to sever the association. Black nationalists who reject anti-semitism will have an incentive to forego incendiary speech and address their concern that such speech impedes the growth of their movement.<sup>201</sup> These actions might make it easier for people to consider that life.

Finally, one must consider whether the political community can restrict hate speech without undermining its interest in identifying community values. Robert Post, for example, rejects critical race scholars' arguments for restricting hate speech, because he believes that guarantees of free speech promote self-government;<sup>202</sup> "[D]emocracy serves the value of self-determination by establishing a communicative structure within which the varying perspectives of individuals can be reconciled through reason."<sup>203</sup> In a well-ordered democracy, political

---

197. See Kenneth Ward, *The Allure and Danger of Community Values: A Criticism of Liberal Republican Constitutional Theory*, 24 HASTINGS CONST. L.Q. 171, 209-14 (1996).

198. Moreover, I will argue that judges promote citizens' ability to define and pursue particular interests by refusing to invalidate restrictions on hate speech.

199. See *supra* text accompanying notes 154-61.

200. See also *infra* text accompanying notes 227-48. I will argue that judges can strengthen citizens' character by tolerating restrictions on hate speech. This argument, in contrast, contends that tolerating the restriction will lead citizens to choose better ends and make better choices concerning how to pursue them.

201. See *supra* text accompanying notes 194-95.

202. See POST, *supra* note 135, at 299; Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 302 (1991).

203. POST, *supra* note 135, at 303-04.

discourse helps citizens synthesize collective and particular interests. It leads citizens to freely reassess their public and private commitments.<sup>204</sup>

Post contends that restrictions on hate speech impede legitimate democratic government. He makes both types of claims<sup>205</sup> that root political legitimacy in a collective interest in identifying community values. Restrictions on hate speech make it impossible for some citizens to consider the exercise of government authority as consistent with their will. The government must protect hate speech, according to Post, in order to ensure that citizens are treated as free and equal;<sup>206</sup> citizens must remain free to challenge exercises of public authority from which they dissent.<sup>207</sup> As public discussion continues, citizens have opportunity to reassess any policy the government implements. They can, therefore, acknowledge their participation in democratic government, even when they dissent from any particular policy defined by elected institutions. This view suggests that people can consider the exercise of government authority as consistent with their will.<sup>208</sup>

Restrictions on hate speech also interfere with the conditions of open discussion that allow us to treat a democratically defined norm as a community value. Post believes that concepts such as race and gender are inherently controversial, and that it is better to settle these meanings through discourse rather than allow a dominant majority to impose them.<sup>209</sup>

Post, however, also recognizes that the process by which the political community identifies its values is in tension with citizens' particular interests. He identifies a conflict among the requirements of effective political discourse. The norms of the diverse communities that constitute the political community shape the identities, and thus, particular interests of citizens who participate in public discourse.<sup>210</sup> Public discourse depends on these communities to articulate the competing interests that it integrates.<sup>211</sup> Yet, public discourse must also remain unfettered. This requirement creates conflicts with the norms of constituent communities.

These conflicts form what Post calls the paradox of public discourse.<sup>212</sup> In the absence of regulation, political discussion stalls,

---

204. *See id.* at 299.

205. *See supra* text accompanying notes 24-26.

206. *See* Post, *supra* note 135, at 304.

207. *See id.* at 184-87.

208. *See id.*

209. *See id.* at 307-08.

210. *See id.* at 193-94.

211. *See id.* at 192.

212. *See id.* at 147-48, 192-94.

because citizens must tolerate and comprehend speech that they find offensive, irrational, or coercive. But, a legitimate government cannot enforce the civility norms of particular communities. First, it must allow people who reject these norms to continue to challenge them. Second, a government that enforces the civility norms of particular communities impedes the identification of community values, by excluding from public discourse competing perspectives advocating unfamiliar and marginalized forms of life.<sup>213</sup>

However, the paradox of public discourse makes it impossible to support Post's argument for tolerating hate speech. He assumes that open discussion gives citizens a sense that their particular interests are being represented, which allows them to consider the exercise of political authority consistent with their will. Ideally, open discussion allows people to assess diverse views and identify those norms that every citizen can integrate within his or her conception of particular interests.

One could, however, defend restrictions on hate speech as necessary to ensure that citizens can freely integrate these interests. Post identifies inevitable connections between public and private identity. He cites Michelman's argument that political discourse transforms participants' identities.<sup>214</sup> Yet, Michelman defends a process in which the transformation in participants' identities results from *non-coercive* political discourse among equals.<sup>215</sup> If one accepts the views of critical race scholars, a political community that tolerates hate speech subjects its victims to an environment that they experience as systematically degrading, demeaning, and oppressive.<sup>216</sup> Such an environment would impede their definition and pursuit of particular interests. According to this view, Post's conception of public discourse sacrifices the particular interests of victims of hate speech to the end of identifying community values.<sup>217</sup> Thus, they could not consider the exercise of political authority as consistent with their will.

Moreover, public discourse becomes less efficacious when the political community tolerates hate speech that prevents particular communities from shaping the perspectives of their members. Post believes that public discourse integrates interests defined by particular communities, but he rejects restrictions on hate speech, because public discourse also defines the identities of these groups. Yet, this idea—that the public participates in the definition of particular communities—seems to

---

213. See *id.* at 188-89, 313.

214. See *id.* at 186.

215. See *id.* at 119. See also Michelman, *supra* note 39, at 15-27.

216. See *supra* text accompanying notes 155-61.

217. See Post, *supra* note 135, at 309-11.

contradict what Post says about the requirements of political discourse. He discusses the role particular communities play in constituting individuals' identities. He states that democratic government "... presupposes important (not to say foundational) aspects of the social world organized along non-democratic lines."<sup>218</sup>

Post describes how families and educational institutions socialize individuals.<sup>219</sup> Yet, he fails to adequately discuss how ethnic or racial communities shape people's identities. Because public discourse is in tension with, as well as dependent upon, the civility norms of communities, Post must establish the point at which community values are enforced, to ensure that particular communities can continue to develop the individuals who introduce diverse perspectives that fuel political discourse.<sup>220</sup> Post shifts questions of the identity of these groups to the public sphere, and does not address the burden that political discourse imposes on the development of members of particular communities.<sup>221</sup>

Post believes that public discourse itself is the best means to determine whether hate speech impedes public discourse. Otherwise, restrictions on hate speech will limit the scope of discussion, and thus, prevent discourse from being transformative.<sup>222</sup> However, Post's alternative of enforcing civility norms only when dialogical breakdown is likely, begs the question he seeks to address: What is the proper scope of discussion in light of the paradox of public discourse?<sup>223</sup>

Post fails to answer this question because he doubts whether the diverse communities that constitute the larger political community can resolve their disagreements. He does not think that there is a perspective that allows one to objectively evaluate the operation of public discourse.<sup>224</sup> Even assuming that there is no objective point from which to gauge public discourse, it seems strange to trust a potentially defective process to correct itself, and then reject regulations of hate speech that emerge as ameliorants.

---

218. *Id.* at 299.

219. *See id.* at 301.

220. *See id.*

221. One consequence of public discussion altering people's understanding of the communities that participate in the constitution of citizens' identities is the danger of community members being coerced into conforming with perceived public norms. Of course, this is a problem associated with all public discussion of communities and not simply discussion that employs hate speech. In addition, although it is more difficult for citizens to deny their racial origin than their religious, ethnic or familial connections, it is possible to reject norms one has absorbed from a community of race. Certainly, the evidence of black children internalizing their inferior public status is disturbing—at least in part—because it indicates their rejection of their heritage. *See Delgado, supra* note 154, at 147.

222. *See Post, supra* note 135, at 317.

223. *See id.* at 302.

224. *See id.* at 305-06, 317.

Post, nonetheless, recognizes that the victims of hate speech bear the weight of the requirement of unfettered public discourse.<sup>225</sup> He suggests affirmative action and anti-discrimination programs as possible means to secure the position of victims of hate speech in the political community.<sup>226</sup> Our experience with these programs indicates, at best, limited success in integrating people who feel excluded from the political community. In addition, one would expect great difficulties in passing programs to combat the social and economic conditions that alienate citizens from the political community. These difficulties are further exacerbated by a political environment tolerant of hate speech. It would be surprising if people who withdraw from political engagements were to enjoy great success at protecting particular interests. Post cannot employ a collective interest in identifying community values to support his argument against restricting hate speech, if the harms from hate speech undermine that interest.

b. Judicial Restraint as a Means to Strengthen Citizens' Commitment to the Political Community

Frankfurter's defense of judicial restraint suggests an alternative means to transcend the paradox of public discourse; by refusing to invalidate restrictions on hate speech, judges might promote conditions in which citizens will recognize how free speech contributes to the development of their character. The conflicts generated by legislation restricting hate speech will not render racists open-minded, homophobes tolerant, or sexists liberated. But, there is reason to believe that the Court's defense of free speech in *R.A.V. v. City of St. Paul* has preempted a debate that could have strengthened the character of some citizens, and could have led them to this recognition. It is interesting to note the passing of the debate about speech codes on campus. These debates, which had forced people to respond to arguments that challenged the value of free speech, have been muted in the aftermath of the Court's decision.<sup>227</sup> One can also make a Thayerite observation concerning how the Court influenced the debate: Many participants employed the language of the Court's First Amendment jurisprudence,<sup>228</sup> and some suggested that university officials—facing political pressure to respond to racist incidents on campus—could rely on the Court to correct unconstitutional aspects of their policies.<sup>229</sup>

---

225. See *id.* at 293.

226. See *id.* at 321.

227. See *supra* note 126.

228. See *supra* notes 129-32.

229. See Sandmann, *supra* note 129, at 88, 123, 158-59, 163.

How would extending political debates about speech codes and hate speech influence people's perceptions about free speech and the value of a liberal character? Judicial restraint in response to restrictions on hate speech would encourage defenders of free speech to identify arguments that establish the value of unrestricted expression, and would promote empathy among citizens that would lead some people to comprehend how free speech contributes to the development of their character.

The defenders of free speech will have an incentive to employ arguments appealing to interests that transcend citizens' particular interests. They face two problems. To repeal recently enacted legislation, they must force some legislators to concede a mistake, something that legislators are loath to do.<sup>230</sup> In addition, people who supported the original restriction will defend their success. They would express anger at a system of free speech that continues to impose great harms on the victims of hate speech. It would be difficult for legislators seeking repeal to explain why some citizens should endure harms that limit their definition and pursuit of particular interests so that other citizens can enjoy these same interests.

More significantly, considering the sacrifice the political community demands of the victims of hate speech, the defenders of free speech would have to advance arguments that appeal beyond citizens' concern for particular interests. They would have to convince these victims to tolerate vicious attacks—knowing that the system of free speech will counter the hate speech—and persevere in their own efforts to define and pursue particular interests. The defenders of free speech would have an incentive to follow a model such as Brandeis' *Whitney* concurrence, and convince citizens that the development of their character depends on a system of unimpeded public discourse.

In addition, by tolerating restrictions on hate speech, judges afford people an opportunity to observe how officials exercise their discretion to enforce these restrictions. Such information is highly relevant to an understanding of free speech. People routinely defend broad guarantees of free speech by invoking the specter of a government abusing its dis-

---

230. This argument presupposes that there has not been a significant alteration in the composition of the legislature—of course, depending on the original vote, a significant alteration could be a change of one new legislator. It also depends on a related presupposition: that citizens' positions have not changed significantly. For example, people whose support of free speech is tied to its effect on particular interests might have made organizational strides that would allow them to place great pressure on legislators. However, I believe that it is unlikely that such a shift would be significant, considering that particular interests are at stake on both sides of the issue. Given the original success of the proponents for restricting hate speech, we would expect the other side to be well organized.

cretion to define and punish harmful speech. Although this suspicion might be supported by historical examples of governmental restrictions on speech,<sup>231</sup> a historical understanding cannot substitute for the actual experience of seeing a government exercise its authority. Given that narrow restrictions on hate speech do not undermine political legitimacy,<sup>232</sup> the political community can afford the risks required to attain this valuable experience.

This experience might lead people to curtail the government's authority to restrict speech. The experience of the campus speech codes illustrates the difficulty of narrowing the application of a restriction on hate speech. The language of a speech code will often lend itself to circumstances different from the most serious incidents—usually of racism, sexism or homophobia—that led to its adoption.<sup>233</sup> As public officials enforce the restriction, one can compare different incidents in which they have to respond to the complaints of people offended by the speech of others. After adoption of the University of Wisconsin speech code, a student filed a complaint against an editorial cartoon considered to be anti-Christian expression.<sup>234</sup> At the University of Michigan, a student brought a charge against another student for reciting a limerick that the complainant considered demeaning to homosexuals.<sup>235</sup> We should compare the expression in these cases, and also compare these cases to others such as: (1) fraternities conducting slave auctions and dressing in blackface;<sup>236</sup> (2) people hounding and abusing students with racist and sexist epithets;<sup>237</sup> (3) fliers left on or under students' doors that attack them based on their race;<sup>238</sup> (4) students being told that Asians—like themselves—are ruining America;<sup>239</sup> and (5) a physical attack on members of a Jewish fraternity accompanied by anti-semitic and racist statements.<sup>240</sup>

These cases can be distinguished based on the intensity of the hate speech employed in each incident, as well as by the directness of the attack on individuals. Yet, even assuming that the restriction of speech is limited to cases of direct and intense harassment, administrators will have considerable discretion to gauge directness and intensity. People

---

231. McCarthy era prosecutions of communists present obvious examples.

232. I am also assuming that people will apply a democratic tether to officials who abuse their discretion.

233. See Sandmann, *supra* note 129, at 68-92, 107-38, 148-79.

234. See *id.* at 91.

235. See *id.* at 132.

236. See *id.* at 80-81.

237. See *id.* at 91.

238. See *id.* at 109.

239. See *id.* at 91.

240. See *id.* at 73-74.



favoring and people opposing, restrictions on hate speech can assess the exercise of discretion. This should influence their understandings of free speech.<sup>241</sup>

In addition, the enforcement of restrictions on hate speech provide people an opportunity to gain insight into the experiences of others. One often hears about how free speech provides information that allows people to recognize danger in their midst.<sup>242</sup> One also hears that free speech expands people's access to different forms of life that can influence their deliberations concerning collective and particular interests.<sup>243</sup> But as government institutions implement restrictions on offensive speech, people will gain important information concerning their associates. Conflicts between the offensive and the offended confront speakers with the costs of their words, and would encourage greater empathy among citizens. Initially, these conflicts would allow some citizens to identify vital particular interests that they share. Thus, they will be more likely to subordinate other particular interests when they impede important interests of others. Moreover, these conflicts also place pressure on people to adapt their behavior in response to negative reactions of others. Most people will initially consider this pressure coercive. They might rethink their own perspective, however, as they attain greater understanding of perspectives that they have tended to neglect. Consequently, they would also reassess their commitment to free speech, as they recognize how it influences the development of their character.

Consider a prosecution of a black nationalist who spices a speech with anti-semitic comments that violate a restriction on hate speech. The prosecution could spawn curious political alliances among people who consider government restrictions on speech as a threat to their definition and pursuit of particular interests. Many people will condemn the prosecution, even though they reject the speaker's message—including some victims of the attack—because of their concern that the government threatens particular interests when it restricts speech. Moreover, people who endorse the views of the speaker would attack the prosecution, because it poses a direct threat to particular interests.

---

241. It is difficult to believe that the biases of officials and the pressures created by the campus environment will not influence their decisions. In Michigan, the officials conducted a hearing and placed on probation the student who uttered the homophobic limerick. In Wisconsin, they did not pursue the charge of anti-Christian speech. The two cases were different: people respond differently to an editorial in a newspaper—where they expect to find controversial or offensive statements—than they do to offensive statements made in their presence, especially if they have reason to suspect that the offensive statement was directed at them. Nonetheless, we would expect that officials would be slower to sanction speech against Christians compared to speech against the people the speech codes were designed to protect.

242. See, e.g., Sandmann, *supra* note 129, at 164.

243. See *supra* text accompanying notes 37-41.

But, many of the people who support the speaker's views can also empathize with victims of hate speech. The government would have to justify its prosecution in a forum subject to unusually intense publicity. Therefore, critics of the prosecution would have to confront the claims of Jews who have been harmed by anti-semitic speech. They will claim that hate speech impedes their pursuit of particular interests by reinforcing a hostile social environment and a history of subordination. Black nationalists might reject the analogy between the discrimination suffered by Jews and African-Americans, but the experience of such a trial would be unnerving. The claims of prejudice advanced by Jews would correspond to their own experience.<sup>244</sup>

A limited form of empathy also guides the actions of Jews who, notwithstanding the injury they suffer from anti-semitic speech and their concerns about black nationalism, oppose the prosecution. They understand the peril faced by the defendant; particular interests are threatened when governments prosecute people because of ideas they espouse. We have already seen this form of empathy in the statements made by people defending the right of Nazis to march in Skokie.<sup>245</sup> As in that case, however, it would be surprising if the recognition of a common interest effectuated a greater change in character. Their predisposition against black nationalism indicates that they will not seek an understanding of the perspective of black nationalists. Consequently, they will not experience a shift in their own perspective, as free speech facilitates an exchange of ideas with their opponents.<sup>246</sup>

The hypothetical prosecution might have an even greater influence on Jews who favor guarantees of free speech, but are willing to tolerate restrictions on hate speech that do not negatively impact their particular interests. Although this group endorses the arrest of the black nationalist, it is likely that some members will remain wary of government discrimination against the defendant. The immediacy of the anti-semitic attack could lead these members to conclude that black nationalists pose a greater threat to their interests than a government that abuses its

---

244. In the four years that I worked in the City University of New York, I have noticed a shift in response to how African-American students respond to allegations of anti-semitism. Although they often remain skeptical of the claims of Jews, whom they regularly encounter in a position of authority, they also seem more cautious in their dealings with Jews. They are sensitive to the possibility that their comments could be construed as anti-semitic, and I believe this sensitivity is partially attributable to a greater recognition of the similarity between anti-semitism and racial prejudice. This recognition may have been induced by the debates that have occurred in the aftermath of controversies involving Leonard Jeffries as well as supporters of Louis Farrakan.

245. See *supra* text accompanying notes 88-89.

246. But their capacity for empathy suggests that they will be more receptive to the positions of other citizens—including more moderate African-Americans who sympathize with the black nationalist position—and that contact with these citizens might lead to greater empathy.

power. Yet, their fear of majority tyranny will make them view the prosecution with suspicion. As a trial unfolds, they will have reason to empathize with the defendant's claim of majority persecution, and might even conclude that the government has abused its authority. Once removed from the tensions wrought by the incident of anti-semitic hate speech, they would be in a position to rethink—and possibly regret—their original response. They would move toward the position of those who despise anti-semitic speech, but recognize a collective interest in harnessing government power.

Although one would expect the prosecution of a black nationalist to generate empathy between Jews and African-Americans, it would be naive to think that this controversy would lead these groups to transcend the prejudices that motivate the antipathies between their members. It could have only a limited impact on the process by which members of these groups define and pursue particular interests. Their mutual empathy arises from each group's experience of majoritarian tyranny. It is not a form of empathy that will cause either Jews or African-Americans to seek an understanding of the particular interests of the other. Some Jews might join black nationalists in combatting the prosecution or challenging the restriction on hate speech, and some African-Americans will condemn the anti-semitic attack. It would be surprising, however, if such alliances had a greater effect on the character of members of either group. They would not fully recognize the value of a liberal character.

Nonetheless, changes in the political environment introduced by restrictions on hate speech would also have repercussions that influence the character of those not immediately involved in the conflict. Such transformations could emerge gradually, as people are confronted by the perspectives of others. The movement towards political correctness provides a useful analogy. Advocates of political correctness try to create social pressure, so that speakers will have incentive to be vigilant in anticipating the response to their speech.<sup>247</sup> Opponents of political correctness respond angrily to what they consider a form of censorship that promotes an agenda they oppose. It is not unusual for opponents—or even wary supporters of political correctness—to acknowledge the claims of political correctness before flaunting one of its precepts. Others undermine their conformity with a precept by apologizing for their political correctness. When combatting another person's use of a stereotype, they say things such as “I hate to be politically correct,” or

---

247. This definition of political correctness is meant to identify common ground among diverse and competing actions. I emphasize social pressure to distinguish legal mechanisms that are the subject of this Section. But, the concept of social pressure is meant to convey responses such as hissing, shunning, or ostracization.

they employ ironic facial expressions to undercut their use of the feminine pronoun in a context in which people expect the masculine.

Even though they express qualms about the coercive aspects of political correctness, these people respond to its underlying claims. They are more aware that people have sensitivities concerning language and know that there are consequences when they ignore these sensitivities. Therefore, whether they like it or not, opponents of political correctness think harder about how others interpret their expression. One would expect that their anger towards political correctness will correlate with the extent that the demand for greater deliberation intrudes into their thought processes.

The opponents of political correctness, however, derive benefits from the intrusion and they can recognize these benefits. Political correctness forces speakers to be empathetic; they must take greater account of how other people experience the world. Although many continue to reject the claims of those promoting these interests, they still have to confront unexpected interpretations of their speech and reconsider their own political perspectives. They have become more cognizant of the views of others. The businessman who restrains from telling an ethnic joke in a public context may do so from fear of consequences, out of respect to his audience or both. But, in each of these circumstances, his restraint reveals an understanding of how others comprehend his statements, and indicates that people adapt their pursuit of interests—if not their definition of them—when confronted by the views of others. Obviously, people who experience political correctness as coercive might question the value of being sensitive to different perspectives. Further consideration, however, will allow some people to distinguish between how political correctness affects their pursuit of particular interests and how it affects their identification of these interests. In time, it is probable that some people will internalize the requirements of political correctness as they realize that their—and other people's—sensitivity to these requirements have not curtailed their own pursuits. Moreover, when they recognize the gap between the intended meaning of their statements and the responses of their students, colleagues or friends, they might come to appreciate the influence of political correctness.

This essay does not offer the analogy to political correctness either as a defense of hate speech legislation or as a defense of political correctness. In both instances, restrictions on speech undercut the utility of free expression as a means by which people define and pursue their particular interests. It seems likely that political correctness and restrictions on hate speech lead people to engage in self-censorship and refrain from introducing ideas that other people might find valuable. It would be

preferable if we could trust that our responses to controversial opinions and offensive statements would ensure that people would speak more deliberately.<sup>248</sup>

The analogy, however, suggests that political engagements influence how we think about our particular interests. Controversies involving both hate speech and political correctness might lead some people to discover a deeper interest in free speech and reformulate their opposition to such restrictions. They provide an incentive for the defenders of free speech to present arguments linking robust guarantees of free speech to the advancement of particular interests. The controversy involving hate speech suggests that political engagements will generate empathy among some citizens, enabling them to recognize the importance of extending the application of free speech protection. Instead of viewing the restrictions on speech as an attack against particular interests, they may come to view them as a threat to the system of open communication that is integral to their formulation of these interests.

---

248. I do not reject all restrictions on hate speech. I believe that narrow restrictions can be supported, based on an interest in protecting the victims of hate speech from some of the harms they experience—harms that impede their ability to define and pursue particular interests. In addition, when speech such as hate speech is so offensive that one cannot respond rationally, I believe that actions such as shunning are appropriate.