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Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms

VICKI C. JACKSON*

Owen Fiss is clearly one of our generation's most important scholars in constitutional law. My own scholarly work has been influenced by my having been his student at Yale Law School, and I want to begin by acknowledging my enormous intellectual debt to him. This Essay will consider the integration of older and newer constitutional commitments in the context of three central concerns in Owen Fiss's work — for racial equality, for freedom of expression, and for the distinctive role of courts in the constitutional system.

This Essay urges an approach to constitutional interpretation that is more holistic in taking account of constitutional change, giving greater weight to more recent amendments in construing the entire Constitution. The equality values embodied in the text of the Fourteenth Amendment should not be treated as constitutional latecomers, but as fundamental to our constitutional commitments in the same way that First Amendment freedom of expression values are. In understanding how to interpret a constitution that accords priority both to equality and to freedom of expression, I suggest comparative constitutional law can be helpful, because most Western liberal democracies have written constitutions that made commitments simultaneously to freedom of expression and equality values. The constitutional case law in other Western democracies can illuminate interpretive approaches grounded in simultaneous commitments to freedom of expression and human equality.

Often a source of civic pride, the age of the U.S. Constitution is also a source of great challenge both for workable governance and aspirational constitutionalism in the United States. With its basic power distributing structures established in 1789 and with an unusually difficult amending process, this is a constitution that must be subject to enough flexibility in interpretation in order to do the basic work of a

* Professor of Law, Georgetown University Law Center. With thanks for helpful comments and conversations to Alex Aleinikoff, Dennis Curtis, Neal Katyal, Nina Pillard, Bob Pitofsky, Judith Resnik, Roy Schotland, Mike Seidman, Bob Taylor, Mark Tushnet, and to participants in the University of Miami Law Review's conference in honor of Owen Fiss and to participants in the Georgetown University Law Center Summer Research Workshop. This Essay was written for a conference in honor of Owen Fiss in March 2003, before the Court's decisions in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), and *McConnell v. FEC*, 124 S. Ct. 619 (2003). Although references to these cases have been added, the Essay's basic critique and argument were written prior to these decisions.

national constitution — that is, to provide a good framework for governance (that is both effective and protective of human rights) and to express fundamental national commitments and self-understandings.¹ Our practice of adding amendments to the constitutional text in the chronological order in which they are enacted, rather than as integrated with the text, is a graphic reminder of the challenge faced by those charged with the regular articulation of the Constitution's meaning to interpret all of its provisions in light of what it, and we as a polity, have become.²

In earlier work, I have suggested how the great gaps in the timing of adoption of the 1787 Constitution, the Bill of Rights, and more recent amendments should inform constitutional interpretation.³ It is conventional for U.S. courts to begin analysis of constitutional questions either with a particular clause and its associated case law,⁴ or with the eighteenth century founding text,⁵ and move forward in time to see how founding decisions have either endured or been changed. My suggestion is that in resolving interpretive questions we try instead (or rather, in addition) to begin with the more recent amendments and what they stand

1. See Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637-40 (1991) (discussing rights protection and effective governance as among the purposes of entrenched constitutions); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1270-74 (1999) (discussing expressivism in comparative constitutional law). I am putting to one side for the present a number of other purposes for which constitutions may be adopted, e.g., solving various collective action problems, see Sunstein, *supra*, at 640-41, or declaring and establishing a nation's sovereignty, see H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al. eds., 1993).

2. See generally Ed Hartnett, A "Uniform and Entire" Constitution: or What if Madison had Won?, 15 CONST. COMMENTARY 251 (1998).

3. See Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001). In developing this approach, I owe much to the work of Bruce Ackerman, Ahkil Amar and Charles Black. See, e.g., CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Ahkil Reed Amar, *The Supreme Court, 1999 Term - Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 30 (2000) [hereinafter Amar, *Foreword*]; Ahkil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 800-01 (1999) [hereinafter Amar, *Intratextualism*]. For other very helpful work in related veins, see Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002); Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family*, 115 HARV. L. REV. 947 (2002).

4. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 846-49, 852-53, 855-59 (1992) (anchoring analysis in the Court's decisions in *Griswold v. Conn.*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973)).

5. See, e.g., *Printz v. United States*, 521 U.S. 898, 906-07, 911-13, 918-33 (1997) (relying primarily on the Court's prior jurisprudence); *New York v. United States*, 505 U.S. 144, 155-59, 160-62, 167-68, 174-77 (1992) (anchoring analysis in Court's jurisprudence and original understandings of the Tenth Amendment and Commerce Clause).

for and read these more contemporaneous constitutional commitments back into the older portions. *Fitzpatrick v. Bitzer*,⁶ which holds that Congress can abrogate the Eleventh Amendment immunity of the states when it acts under the Fourteenth Amendment, was based on a form of this holistic reasoning in which later enacted parts of the Constitution are a lens through which earlier parts should be interpreted. My argument is for inclusion of this “reverse chronological” method of holistic reasoning, in addition to methodologies in constitutional interpretation that assume the priority of earlier enacted provisions, in the canon of interpretive approaches.

Treating the more recent amendments as interpretive lenses for the older parts is justified by a meta-constitutional value of democracy. We have an old and very difficult to amend written constitution. As among reasonably arguable interpretations, we should choose those most consistent with how the weight of the Constitution has changed as popular commitments have shifted and been expressed in more recent amendments – at least absent a compelling other reason.⁷ So, just as the Court in *Fitzpatrick* read the Eleventh Amendment in light of the Fourteenth, the Court should read the powers granted to Congress in Article I in light of the post-Civil War commitment, expressed not only in the Fourteenth Amendment but several others, to the values of human equality and national citizenship. In Part I of this Essay, I discuss the possibility of re-reading the First Amendment through the lens of the Fourteenth and its progeny.

In Part II, I explore the possible benefit of comparative constitutional law in illuminating the question of holistic interpretation of First Amendment freedoms and equality rights — that is, how would we understand our older constitutional commitments if we were to re-understand them in light of our newer commitments? A number of Western democracies have constitutional case law interpreting constitutions that, from the outset, included commitments to rights and freedoms that, in the United States, became parts of our constitutional commitments at

6. 427 U.S. 445 (1976).

7. Compelling reasons might be found where constitutional amendments compel or authorize action inconsistent with very basic human rights and human dignity. As Walter Murphy has argued, the strongest moral arguments for democracy flow from the same commitment to equal human dignity that supports constitutional protection for human rights. See Walter Murphy, *Consent and Constitutional Change*, in *HUMAN RIGHTS AND CONSTITUTIONAL LAW* 123, 141-45 (James O'Reilly ed., 1992). Such commitments to human dignity, in turn, support constitutional limitations on democratic action that offends human dignity. Were there to be constitutional amendments authorizing or requiring action inconsistent with human dignity, commitments to democracy understood as an elaboration of human dignity suggest that the appropriate role of the courts would be to read those more narrowly, notwithstanding their more recent and procedurally democratic vintage.

very different times. Because Canada and Germany, for example, have always had to interpret their Charter of Rights and Basic Law, respectively, in light of their commitments both to freedom of expression and to equality of persons, their approaches may illuminate possibilities for harmonization of these constitutional values for the United States and based on the U.S. Constitution, understood holistically. Without denying important historic and institutional differences that exist among these three countries (differences that may well bear on what is a workable and legitimate interpretive choice within the U.S. constitutional tradition), the approaches of these other Western democracies illuminate a range of apparently reasonable choices that belie some of the certitudes of the U.S. Court's current jurisprudence. They offer alternative approaches to reconciling commitments to equality and freedom of expression that we might think of as one mirror for viewing the U.S. Constitution in light of all of its constitutional commitments. And in so doing they offer something of a response to Owen Fiss's efforts to resolve knotty questions about hate speech or campaign finance *within* the First Amendment in order to avoid pitting equality against liberty.⁸

Re-understanding the U.S. Constitution along the lines I suggest will not readily resolve these or other genuinely hard issues, as I try to indicate briefly in Part III of this Essay. The question of holistic interpretation focuses on the role of constitutional courts and constitutional law, which, I argue, is not simply to translate original intentions into contemporary settings, but to reflect how the weight of constitutional "intentions" must themselves be re-understood in light of constitutional change. I advance this argument here in the context of two issues — hate speech and campaign finance regulation — that implicate competing and important constitutional values. Each is currently conceived of as governed by First Amendment freedom of expression norms. Each also implicates constitutional values of equal citizenship and equality of persons. Both present an occasion to explore further the possibilities of re-understanding the U.S. Constitution so as enable it to continue to function well as a framework for governance and a charter of rights for the twenty-first century. What holistic interpretation, informed by comparative constitutional practice, may contribute to these discussions is a willingness to acknowledge both equality values and freedom of expression values in constitutional problems that, candidly understood, involve both. A third issue, the constitutionality of public regulation of candidate speech in judicial elections, will be discussed briefly, for what it

8. See OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996) [hereinafter FISS, *IRONY*]; OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996) [hereinafter FISS, *LIBERALISM DIVIDED*].

suggests about the Court's understanding of the judicial role and the need for judicial independence and its relationship to the First Amendment.

I. HOLISTIC INTERPRETATION

A central challenge for constitutional interpretation is change — change in human realities and change in the constitutional text itself. Owen Fiss has written with insight on the importance of the paradigms around which constitutional theory is often constructed.⁹ He notes the paradigm that informed Professor Kalven's view of the First Amendment — the street corner speaker — and has argued that the paradigm must be refocused on how to sustain the freedom of speech in a world where street corners play a less significant role in important discourse.¹⁰ The process of constitutional change through amendments itself informs constitutional interpretation, in part because that process carries with it or is interwoven with shifts in the factual paradigms that most concern us in the polity.¹¹ Our Constitution's initial concern with protecting

9. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1405-13 (1986) [hereinafter Fiss, *Free Speech and Social Structure*]; Owen M. Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613 (1995) [hereinafter Fiss, *New Paradigm*]. For interesting discussion of constitutional paradigms, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1169-71 (1995).

10. See FISS, LIBERALISM DIVIDED, *supra* note 8, at 8, 13-14, 49-55; see also Fiss, *New Paradigm*, *supra* note 9 at 1614-15; Fiss, *Free Speech and Social Structure*, *supra* note 9 at 1408-24 (discussing *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)).

11. For a skeptical view about the role of constitutional amendments, see David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001). I think Strauss goes too far in suggesting that constitutional amendments are irrelevant to the development of the small "c" "constitution," but I agree with his claim that constitutional amendments are only one part of an evolutionary process of constitutional change that includes not only constitutional amendments and judicial decisions but also shifts in understandings reflected in statutory, regulatory or common law developments at the federal and state levels. Although it may be correct as a matter of political judgment that methods other than constitutional amendment will be more effective in securing a desired change, this does not imply that constitutional text, in the form of later amendments, is not entitled to particular weight in argument over what constitutional law is. Constitutional text performs two distinctive functions that Professor Strauss acknowledges: It eliminates the legitimacy of outliers once a moderate degree of consensus has formed, and it settles issues that need resolution. In addition, constitutional text performs a third function in that it provides a textual framework for legal argument. While it is true, as Professor Strauss suggests, that a particular text may be subject to very different interpretations that may change over time in response to events and phenomena unconnected with the amendment, yet the presence of, for example, an equal protection clause defines a legitimate arena for legal dispute and argument. Cf. Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 271 (2002) (arguing that the Reconstruction Amendments, "under-enforced though they were, were not totally without effect"). Finally, I am concerned in this Essay not so much with the complex set of historical forces that have propelled changes in constitutional text and constitutional interpretations on issues of both First Amendment and equality law in the twentieth century, but with articulating a normative understanding of the role of constitutional amendments insofar as the constitutional text matters.

human liberty from improper restraint or coercion and the home and other property from unreasonable or uncompensated disturbances was supplemented by constitutional commitments to equality of citizenship, the centrality of voting and the rights of persons to the "equal protection of the laws." The assumption of white, propertied males as paradigmatic citizen-voters was rejected in a series of amendments.

Constitutional amendments provide legitimate occasions for interpretative change.¹² It is obvious to say that when the Constitution's text changes, the courts must apply the new text as written. How we come to understand and to construct what an amendment means is a complex question embracing virtually the entire range of views on constitutional interpretation. Evidence of original understandings, the text itself, precedents and historical practices all play a role, as does the fact that the authoritative text is amended at different times and by different generations, each bringing its own multiple and complex set of understandings of what the existing text means and what the amendment is to accomplish. It is the task of constitutional interpretation to integrate those many understandings or "constitutions" of the Constitution into a workable whole.¹³

In reading the Constitution holistically, I argue, some newer constitutional texts should be understood as "changing" the whole Constitution — as infusing the interpretive project more generally — rather than merely adding, or subtracting, some discrete portion of what came before it.¹⁴ In the original Constitution of 1789, equality of persons was at best a subordinate theme. Indeed, it could be argued that the original Constitution was wholly antithetical to equality — in its reliance on electoral processes excluding persons of African descent, and women, from political rights of participation and voting, and in its active protection of slavery for at least one generation after the founding. Not only

12. I do not claim that it is only by constitutional amendment that constitutional interpretation changes or should change, but rather that new constitutional texts provide the occasion for revised interpretations of constitutional law.

13. My emphasis on workability is framed by an understanding that the Constitution should be construed to facilitate effective governance consistent with principles of equal citizenship, representative democracy, law as the basis of legitimate government power, separation of powers, federalism and the protection of individual rights. These principles may pull in different directions in different cases and thus workability is at times in tension with simple models of coherence. For helpful discussions of the need for more complex models of interpretation, see, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); see also Richard H. Fallon, Jr., *The "Rule of Law" As A Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

14. In this sense my inquiry has much in common with and has been informed by the work of Bruce Ackerman and Akhil Amar. See, e.g., Ackerman, *supra* note 3; Amar, *Foreword*, *supra* note 3; Amar, *Intratextualism*, *supra* note 3. For my earlier acknowledgment of the intellectual debt I owe them, see Jackson, *supra* note 3, at 1267 n.35.

did the original Constitution protect slavery, it also treated slaves as formally less than a whole person in establishing the rules for counting population for purposes of allocating representatives to the states in the House of Representatives.¹⁵ Its provisions for the Senate suggest that the equality of concern to that generation was an equality of states, rather than persons. And not only was each state afforded two senators, but this provision was made essentially unamendable. Equality of states, of political communities, was thus of comparable — or perhaps even greater — importance, than principles of individual political equality. Political equality of citizens, such as existed importantly in the original Constitution, was reserved in practice (and, for the most part, in state law) only for white men.

Yet the original Constitution carried within it the seeds of a commitment to human equality,¹⁶ albeit as a subordinate rather than dominant theme. Egalitarian principles among the body recognized as citizens were immanent, first, in the composition of the House of Representatives. Determining membership by the population of the states is a proposition — however infested with the racism of the three-fifths rule — that can be seen as the beginning of the idea that voting power should be related to numbers of persons represented,¹⁷ an idea that comes to full

15. And in so doing, the three-fifths rule not only denied the humanity of slaves but also allocated voting power disproportionately to whites in slave states.

16. For different perspectives on the Constitution's original commitment to equality, see, e.g., GARY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 3-4 (1993) (treating the original Constitution as the "silver frame" around the nation's "golden apple" aspirations toward equality ("liberty for all") designed, as Lincoln saw it, to preserve that commitment and allow advances toward equality for all); GARY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 38-39 (1992) (arguing that Lincoln used the Gettysburg Address to substitute for the older Constitution, which lacked commitment to equality, his own new creation); Stephen M. Griffin, *The Age of Marbury: Judicial Review in a Democracy of Rights*, 44-46, 49-50 (2003) (unpublished manuscript, paper presented at Georgetown University Law Center's Commemoration of the Anniversary of *Marbury v. Madison*) (arguing that the original Constitution was not committed to political equality and that commitment to political equality evolved through African-American struggles in the twentieth century).

17. See *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) ("construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"); see also *id.* at 11-13 (noting Convention rejection of proposal to limit representatives from future Western states); *id.* at 14 ("[i]t would defeat the principle solemnly embodied in the Great Compromise — equal representation in the House for equal numbers of people — for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter."); *Karcher v. Daggett*, 462 U.S. 725 (1983) (congressional districts must be mathematically equal in size "as nearly as is practicable" and thus state districting plan with less than one-percent variances held unconstitutional). But cf. *United States Dep't of Commerce v. Montana*, 503 U.S. 442 (1992) (holding that Congress has more latitude in choosing methods to allocate representatives to the

fruition only in the one person-one vote cases of the 1960s. In addition, the decision in the 1787 Constitution to include relatively minimal qualifications for federal office may be seen as a manifestation of what, in the contemporary moment of the eighteenth century, was egalitarian openness to "merit," regardless of birth, property or background (again, though, within constrained racist and sexist norms of who was entitled to be understood as a full member of the polity). The ban on titles of nobility reinforced the sense that this constitution was, relative to other political systems in the minds of the framers, more open to the idea of human equality.¹⁸ The Constitution's commitment to regular popular elections (not for all members of Congress but at least for members of the House of Representatives)¹⁹ is unmistakable.

Deepening commitments to a basic norm of equality of citizenship and to the foundational character of popular election comes later — in Amendments Thirteen, Fourteen, Fifteen, Seventeen, Nineteen, Twenty-Three, Twenty-Four, and Twenty-six.²⁰ Slavery is abolished, a national citizenship based on birth in the United States is defined, states are prohibited from denying to persons the equal protection of laws, racial dis-

states and is not bound by the "as nearly as is practicable" mathematical equality principle in light of other constitutional constraints, including that each state have one representative). Note that the Court in *Wesberry* says that this result is required by Article I, section 2. 376 U.S. at 7-9. Justice Stevens, in concurrence in *Karcher*, says that the rule is not required by Article I, but by the post Civil War amendments. 462 U.S. at 745-50 (Stevens, J., concurring).

18. See GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 232-33, 238-39 (1991) (revolution set in motion tremendous change in norms of social equality); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 606-15 (1969) (describing republican values of the Revolutionary period and their influence on the drafting of the Constitution).

19. Note also the Constitution's evident assumption in Article I, section 2 that state legislators would be chosen by elections (federal voter requirements to be the same as for voting for the most numerous branch of state legislatures), and its ambiguous but strong commitment that the United States "guarantee" to each state a "republican form of government" in Article IV.

20. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 7 (1980). See also U.S. CONST. amend. XXII (generally limiting presidents to two terms in office). Arguably the Twenty-Seventh Amendment belongs on this list as well. It invokes an intervening election as a procedural device to forestall unduly self-interested behavior by elected representatives. See generally Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501 (2002) (treating the Twenty-Seventh Amendment as a "veil of ignorance" rule designed to mitigate self-dealing in congressional compensation by introducing uncertainty as to the effect of a vote in favor of higher compensation on being re-elected and hence on who would benefit from the higher pay). Note that although an election is the checking device insisted on, it is not elections *simpliciter*, but an *intervening* election. The theory of the Twenty-Seventh Amendment is that the political process — without additional regulation — was not sufficient to prevent self-aggrandizing financial behavior by incumbents. Its ratification as part of the Constitution after *Buckley v. Valeo*, 424 U.S. 1 (1976), was decided, then, arguably might bear on constitutional arguments for greater regulation of the financing of election campaigns. I do not explore this possibility here, however, in part because the interpretive complications surrounding the Twenty-Seventh Amendment's unusual, and long, process of enactment would require much further analysis. See Denning & Vile, *supra* note 11, at 279 n.129 (standing by itself, this very specific and concrete amendment may have little weight with respect to other parts of the Constitution).

crimination in voting is outlawed, the Senate is required to be chosen by popular election, gender discrimination in voting is outlawed (though only after being implicitly endorsed in section 2 of the Fourteenth Amendment), representation for citizens in the District of Columbia is provided, and poll taxes that effectively discriminate in voting based on wealth are prohibited. In addition to standing for principles of equality of all citizens, this course of reinforcing amendments surrounding political equality with respect to voting reflects the Constitution's increased presumption in favor of democratic representative decision-making — by which I mean, minimally, decision-making in which each adult citizen has the opportunity regularly to vote in contested elections for members of the representative bodies of government and to have his or her vote counted equally with that of other electors.²¹

Though not the only important and new constitutional commitments, these two — equality of citizenship and the foundational character of popular elections of representatives — have gained weight and gravity in the U.S. constitutional system over time. Although members of the Court have themselves disputed whether the equal representation principle in the House of Representatives derives from Article I or rather from the Fourteenth Amendment, there can be no dispute that the development of constitutional law on congressional districts followed decisions deriving a one-person, one-vote rule from the Fourteenth Amendment's Equal Protection Clause.²² The significance of these developments for constitutional interpretation more generally is reflected in the Court's breathtaking relegation of the "equal suffrage"

21. Cf. Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326 (1994) (democracy and majoritarianism as rule by simple majorities with each voter having one vote); Philippe Van Parijs, *Justice and Democracy: Are they Incompatible*, 4 J. POL. PHIL. 101, 102 (1996) (defining democracy "as the combination of majority rule; universal suffrage; and free voting."). There is, of course, an enormous literature and disagreement about what voting methods best accord with this principle of the equal value of each voter, including whether democratic voting should enable different weights to be accorded to different intensities of preferences held by voters on issues or candidates. I am not yet persuaded that the Constitution provides any clear basis on which to choose among these systems so long as each is honestly aimed at a process in which each voter's expressed preference for a candidate is given equal value in the weighing or counting process. The Constitution imposes some clear constraints on the full operation of even this limited principle at the national level, for example, in requiring that each state have at least one representative and two senators.

22. Compare *Wesberry v. Sanders*, 376 U.S. 1, 7-9 (1964) (holding that rule of equal size for congressional districts derives from provisions of Article I, section 2) with *Karcher v. Daggett*, 462 U.S. 725, 745-50 (1983) (Stevens, J., concurring) (arguing that equality principle for congressional districts derives from Fourteenth Amendment and not from Article I). For earlier articulation of the Fourteenth Amendment as a basis for the one-person, one-vote rule, see *Gray v. Saunders*, 372 U.S. 368, 381 (1963); see also *Colegrove v. Green*, 328 U.S. 549, 570 (1946) (Black, J., dissenting) (Fourteenth Amendment reinforces understanding that Article I, section 2 requires approximately equal population in congressional districts).

provisions for the U.S. Senate from a principle of American federalism to a "compromise" standing for no more generalizable principle.²³ Individual equality, at least in the political sphere of voting and elections, had moved from a subordinate to a dominant norm.²⁴

In important respects these constitutional changes have been very much reflected in vast parts of Court's jurisprudence. An enormous jurisprudence of equal protection has grown up protecting not only voting rights but also, in the wake of *Brown v. Board of Education*,²⁵ rights to be treated with fairness and equality in a wide range of governmental settings. Most of the cases in which these developments have advanced, however, have entailed the assertion of claims of individual right grounded in the Fourteenth Amendment and asserted against "state" interests, which are understood against a matrix that runs from permissible through compelling, but are not commonly understood as themselves implementing the Constitution.

In some areas, however, such as the scope of congressional power under Article I of the Constitution or, my subject here, the scope of the First Amendment (as opposed to the level of government to which it applies), it has not been conventional to read the newer parts of the Constitution as infusing our understanding of what came before.²⁶ Akhil

23. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964) (rejecting the argument that states may maintain one part of a bicameral legislature apportioned on a basis other than population and indicating that the U.S. Senate was "conceived out of compromise and concession" and thus is not a more generalizable principle of governance); see also *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 738 (1964).

24. The "incorporation" of the Bill of Rights' guarantees against the states, in criminal procedure and with respect to the speech and religion clauses of the First Amendment, might be understood in part as an extension of the model of national citizenship to the states and in part as motivated by a desire to distinguish the United States from the abuses of fascist and Nazi regimes in Europe and elsewhere. See Michael Klarman, *Rethinking The Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 43-44, 54-55, 57-58, 63-67 (1996) (citing Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 219 (1959) for suggesting that *Powell v. Alabama* may have been in part a response to the rise of Hitler in Germany, and DAVID BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 101 (1992), for suggesting that the criminal procedure revolution was in part a response to police states in Europe and Asia). Unlike the extension of equal protection analysis to the federal government described in the text below, the incorporation debate revolved around a "new" text, the Fourteenth Amendment, even though its new meaning was not elucidated until many years after its enactment.

25. 347 U.S. 483 (1954). *Brown* was decided in 1954, more than 80 years after ratification of the Fourteenth Amendment. Ratification of the Fourteenth Amendment obviously did not "cause" the Court's holding in *Brown*, but it did provide a textual occasion and normative basis for that decision. For discussion of the some of the international factors motivating government support for the Court's outcome, see Mary Dudziak, *The Little Rock Crisis & Foreign Affairs: Race, Resistance and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997); Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

26. There are counterexamples, that is, cases in which the Court expressly indicates that the meaning of earlier portions of the Constitution has changed or been affected by later enactments.

Amar's important work has drawn attention to the effects of the Fourteenth Amendment not only on the application of aspects of the Bill of Rights to the states but on shifting understandings of what those earlier constitutional texts stand for.²⁷ And a case can surely be made that the Court itself has read newer parts of the Constitution as affecting understandings of earlier parts, both with respect to racial segregation and the law of elections.

The parallels between the Court's extension of the principle of *Brown* to the federal government in *Bolling v. Sharpe*,²⁸ on the one hand, and its extension of the principles of *Baker v. Carr*²⁹ to *Wesberry v. Sanders*,³⁰ on the other, are noteworthy examples. In *Bolling*, the Court was explicit in tying its interpretation of the Fifth Amendment

See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Fourteenth Amendment, having been enacted after the Eleventh Amendment, empowers Congress to overcome state's constitutional immunity from suit when enforcing Fourteenth Amendment provisions); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (relying on enactment of Nineteenth Amendment to conclude that protective legislation for women employees was not constitutional); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding the draft against federalism claims and asserting that any doubt as to the scope of Congress' powers to raise armies through conscription was removed by the Fourteenth Amendment's establishment of national citizenship with correlative rights and duties); *infra*, text accompanying notes 28-33. Fourteenth Amendment equality interests have also been recognized as, in a sense, supporting "compelling state interests" in preventing discrimination in privately owned but public places of accommodation. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (rejecting First Amendment associational claim by Jaycees to exclude women from citizenship in light of states' important interest in assuring equality of access to public accommodations); *but cf.* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding application of state law banning sexual orientation discrimination by private associations unconstitutional where group was an "expressive association").

27. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 236-37 (1998) (asserting that in the eighteenth century, the paradigmatic speaker protected by the First Amendment was a popular publisher, while in the mid-nineteenth century the paradigmatic speaker became the popularly spurned abolitionist speaker, and arguing that this shift was reflected in a "new First-Fourteenth Amendment tradition that is less majoritarian and more libertarian"). See generally *id.* at 137-294 (discussing effect of Reconstruction on Bill of Rights).

28. 347 U.S. 497 (1954).

29. 369 U.S. 186 (1962).

30. 376 U.S. 1, 7-8 (1964) (concluding that the reference in Article I, section 2 to election of members of the House of Representatives by "the people" implied that if members are selected in districts, the districts must be of the same population in order to assure that "[a]s nearly as practicable . . . one man's vote is worth as much as another's"). *Wesberry* was argued after, but decided before, *Reynolds v. Sims*, 377 U.S. 533 (1964), which held that the Equal Protection Clause of the Fourteenth Amendment requires that both houses of state legislatures be apportioned in accordance with the one-person, one-vote rule. That rule was presaged by *Gray v. Sanders*, 372 U.S. 368, 377 (1963) (holding that use of county unit system in vote for statewide office violated the Equal Protection Clause); see also *infra*, note 32; *Colegrove v. Green*, 328 U.S. 549, 570 (1946) (Black, J., dissenting) (arguing that challenge to congressional districting should not have been dismissed as nonjusticiable and concluding that section 2 of the Fourteenth Amendment reinforced an understanding of Article I, section 2 that congressional districts should contain "approximately equal populations").

obligations of the federal government to the anti-discrimination obligations that the Fourteenth Amendment set for the states: The Court wrote:

"[W]e have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. . . . In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."³¹

And in the reapportionment cases, *Wesberry's* interpretation of Article I, section 2 as requiring that congressional districts within states follow the one-person one-vote rule, followed the Court's earlier consideration of a Fourteenth Amendment challenge to districting in elections for statewide office, in which the Court rejected analogies to the Electoral College (and its incorporation of the per-unit representation rule for states in the Senate) as based on a "conception of political equality [that] belongs to a bygone day" in light of the enactment of the Fifteenth, Seventeenth and Nineteenth Amendments.³² In both sets of cases, a principle of equality law, apparently derived from the Fourteenth Amendment, is applied to the states and state office; the same principle is also extended to the federal government and congressional office, as interpretations of older, pre-existing parts of the Constitution.³³

31. *Bolling*, 347 U.S. at 498, 500; *see also* *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (asserting that all laws curtailing the civil rights of a single racial group are constitutionally suspect but upholding such a law directed against Japanese Americans). Note the Court's extension of the constraints on state action in ameliorative programs (*see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)) to the federal government, notwithstanding section 5 of the Fourteenth Amendment in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995). With no change in the constitutional text understood as *constraining* the federal government (that is, the Fifth Amendment) and notwithstanding an explicit text *empowering* the federal government to enact appropriate legislation to enforce rights to equal treatment from the states (that is, the Fourteenth Amendment), we have moved from a constitutional regime in which the federal Fugitive Slave Law is enforced, to a constitutional regime in which federal statutes to aid descendants of former slaves and other racial minority groups are constitutionally suspect. *Adarand* stands as a particularly dramatic example of the Court's re-understanding of unchanged constitutional text (the Fifth Amendment) in light of the Court's understanding of later constitutional commitments.

32. *Gray v. Sanders*, 372 U.S. at 377; *see also id.* at 381 ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote.").

33. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (rejecting First Amendment freedom of association challenge to application of anti-discrimination law to private association). *Jaycees* did not involve the Court's implication of restrictions on the action of the federal government that were identical to those imposed on the states through the Fourteenth Amendment, but rather involved the indirect use of the Fourteenth Amendment as support for state government regulation claimed to violate the First Amendment. The Court found that the state's "compelling interest in eradicating [gender] discrimination" supported the constitutionality of a statute that interfered with the decision of the Jaycees, a private association, to discriminate based on gender in membership. *Id.* at 623. In explaining the high importance of this state interest, the Court discussed its Fourteenth Amendment case law:

Whether any single amendment to an existing constitutional text should, or will, be understood to affect our understanding of pre-existing principles will depend on a host of circumstances, including whether the amendment in question is understood as a narrow exception to a pre-existing norm or as a broader shift in values. As Professor Strauss has observed, the significance of a proposed flag burning amendment could be limited to the precise case of flag burning, if it were seen as a narrow exception to a more general First Amendment principle, or could instead be interpreted as authorizing government prohibition of a wider variety of "secular blasphem[ies]."³⁴ Holistic interpretation should try to give honest weight to constitutional change; a single amendment on a discrete topic may differ from a series of amendments on related principles. A single amendment authorizing the prohibition of a single form of expressive conduct should not be read as standing for a broader principle, particularly one inconsistent not only with a wide swathe of First Amendment law, but with the implications of the limitations on treason found in Article III of the Constitution and the implicit demands of a representative government for free political expression.³⁵ By contrast, the cumulative impact of the series of franchise expanding, equality expanding amendments is not captured fully by specific intentions of particular electorates that at different times ratified these different amendments.³⁶ To the extent that constitutional law is constituted by

In the context of reviewing state actions under the Equal Protection Clause, this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life. *See, e.g.,* Heckler v. Mathews, 465 U.S. 728, 744-745 (1984); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-726 (1982); Frontiero v. Richardson, 411 U.S. 677, 684-687 (1973) (plurality opinion). These concerns are strongly implicated with respect to gender discrimination in the allocation of publicly available goods and services.

Id. at 625. *But cf.* United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress lacked power under either the Commerce Clause or section 5 of the Fourteenth Amendment to establish a civil rights remedy for gender-motivated assaults).

34. *See* Strauss, *supra* note 11, at 1503-04. The amendment would not, however, be "irrelevant" because, on either view, it would permit regulation that, prior to its enactment, was forbidden.

35. *See* U.S. CONST. art III, § 3; *see also* Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 51, 168 (1961) (Douglas, J., dissenting). *See generally* Vicki C. Jackson, Cook v. Gralike: *Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 319-20 (discussing Australian High Court decisions finding implicit in commitments to representative democracy guarantees of freedom of political expression).

36. *Cf.* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 952-53 (2002) (arguing that levels of scrutiny in equal protection analysis can be understood as implementing constitutional commitments against particular forms of discrimination as suggested by subsequent amendments banning discrimination in voting).

and helps constitute a national identity, or narrative,³⁷ across generations, the overlapping concerns of these amendments have an import that exceeds the circumstances surrounding each particular enactment. And to the extent constitutional text matters, some amendments matter more than others and should as a normative matter be viewed as informing understandings of pre-existing texts.

In order fully to recognize the cumulative impact and import of these equality affirming, franchise expanding constitutional amendments, we must reason not only from the past, assuming the priority of the "original" Constitution and asking how it has been changed (and often with a presumption against change not clearly expressed in the amending text).³⁸ We must also reason from the present to the past — that is, ask how, in the light of these more recent democratic commitments, the older parts of the Constitution should now be understood, with a presumption that the older parts should be read and understood in light of the newer.³⁹ An interactive process of holistic constitutional interpretation contemplates both reasoning from the past to the present and from the present to the past, taking account of more recent amendments as well as the eighteenth century text. Reasoning in both directions is intended to better accommodate a fixed and difficult-to-amend constitution with fundamental values of democratic self-rule, which, I have argued, are better served by giving somewhat greater effect and priority to more recent amendments, as expressing the views of more recent supermajorities pursuant to the formal amendment process.⁴⁰

37. Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURT* 182 (1999).

38. Cf. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (refusing to interpret Fourteenth Amendment as a "radical[] change . . . in the relations of the State and Federal governments" absent more express language).

39. I am reasoning from a general approach to interpretation that takes into account concerns for the intent of the drafters and enactors, but does not accord those intentions the primacy that some would favor. The Court's development of constitutional law is very much based on a common law method of reasoning, not just from text but from precedents and changing social conditions. See David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). As Richard Fallon has shown us, constitutional interpretation must often draw on a number of methodologies for sound decision-making. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). And although strong versions of Professor Amar's "intra-textualism" seem somewhat unrealistic to me as a primary basis for interpretation, I have learned from and been influenced by Professor Amar's insightful description of a process of constitutional change in which we come to re-understand pre-existing provisions through the lens of later events. See, e.g., Akhil Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 153 (1992) (noting changing paradigm of what First Amendment, originally and then as incorporated against the states through the Fourteenth Amendment, protects — from the newspaper editor who speaks for the people to the dissident abolitionists).

40. Jackson, *supra* note 3, at 1288-92. Even if we gave priority to more recent amendments, we are still not capturing what current majorities or supermajorities need, but we are giving weight to views of majorities closer in time to the present and thus more likely to share the same

As I have laid out this approach in earlier writing,⁴¹ I will only briefly note here the important debt I owe to Charles Black, whose work on structure and relationship in constitutional law is foundational to my conception of holistic interpretation. As is well known, Black argued for the "method of inference from the structures and relationships created by the Constitution in all its parts or in some principal part."⁴² This method, he argued, would not displace other forms of reasoning but add to them, concentrating on the "practical rightness" to which he believed the method led. My claim builds on but goes beyond Black's, in that I argue that some later amendments should be given greater weight when multiple amendments reflect important values in tension with assumptions of earlier texts. In the interpretive process, the preexisting Constitution should be reconciled to the newer amendments, in addition to the more common effort to domesticate new amendments to the "basic" or foundational structure. The vector of synthetic reasoning, in other words, should move from the present back through the older Constitution as well as (more conventionally) from the founding to the present, in our collective efforts to define constitutional meaning.

My basic argument in support of this approach is one of constitutional legitimacy in a representative democracy. I begin from the proposition that constitutionalism depends on sustaining a workable tension between democratic self-rule and constitutional (self)-restraint.⁴³ In the United States, textual amendment of the Constitution is unusually difficult. In light of its difficulty, giving more weight to more recent amendments is an appropriate way of managing the tension between constitutionalism and self-rule. At the time the 1789 Constitution was drafted, and continuing through much of the twentieth century, large

experiences and values of today's popular constituency than the experiences and values of eighteenth century framers or even of the framers of the Fourteenth Amendment.

41. *Id.* at 1281-92.

42. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969).

43. Whether and to what extent the Constitution should be understood as a form of "self-restraint" is a large question discussed in the literature that examines the Constitution as a form of inter-temporal "pre-commitment." See, e.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 134-77 (1995); Bruce Ackerman, *Discovering the Constitution*, 93 *Yale L.J.* 1013, 1045-57 (1984); Jeremy Waldron, *Banking Constitutional Rights: Who Controls Withdrawals?*, 52 *ARK. L. REV.* 533, 535-59 (1999); cf. JON ELSTER, *ULYSSES AND THE SIRENS* 88-103 (1979) (analyzing political precommitments in democratic states). To the extent that a constitution can be so understood, that understanding depends on rather large assumptions about temporal continuities, and representativeness, of "the people" acting at any one time, or on assumptions of consent to the actions of earlier generations by virtue of living in a society governed by the Constitution. These assumptions are, to varying degrees, so heroic that theories other than those of "self"-imposed restraints must be understood to contribute to commitments to constitutionalism, including its value in protecting human rights as well as in facilitating democratic self-governance.

portions of the adult voting population were effectively excluded from political participation. Treating the original Constitution as presumptively untouched by later amendments, absent clear statement, gives added weight to decisions made by much earlier and less inclusively constituted generations of decision-makers.⁴⁴ Recognizing the gravitational pull of the more recent amendments (enacted by a more inclusive and democratic voting polity) on the entire Constitution is a better expression of democratic constitutionalism than are interpretive rules that privilege older portions of constitutional text because of their age.⁴⁵ In order to infer continuing democratic consent to the constitution, the power of living generations to make changes in the Constitution must be recognized and given an ungrudging interpretation.⁴⁶ And where broad new commitments emerge from multiple acts of constitution making over time by multiple majorities, it is particularly important to the Constitution's democratic legitimacy to give those newer commitments effect in understanding what the rest of the Constitution must mean in their light.⁴⁷

44. Women were excluded from entitlement to vote until 1920; African Americans were not enfranchised as a matter of formal federal law until the Fifteenth Amendment, and were in large numbers prevented from exercising their formal legal rights at least until well into the 1960s. For discussions of the implications of the exclusion of women from the creation of most of the Constitution's text, see, e.g., Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465 (1995); Mary E. Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1025-31 (1993); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992).

45. For my earlier treatment of objections based on the concept of an amendment and on demands of coherence, see Jackson, *supra* note 3, at 1285-88. A theory grounded in democracy must recognize that the "will" of the supermajorities might, in theory, be to constrain judicial implications from the enacted text. But it is notoriously difficult to assign a popular will on the interpretive implications of amendments, especially given the "up/down" character of voting on amendments and the limited opportunities for participation in their framing. Popular understandings of U.S. constitutionalism, moreover, suggest that it is perfectly sensible to read the suffrage-expanding amendments together as constituting a new constitutional commitment to equality — an equality whose contours remain highly contested, but whose ultimate value is not.

46. For a different but not unrelated approach to democratic constitutionalism, see Robert Post & Reva Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2026 (2003) (arguing for the importance "of ensuring that constitutional law remains in touch with the constitutional beliefs and experience of the American people."). For grudging and ungenerous interpretations of the Civil War Amendments, see, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (narrowly construing the Thirteenth and Fourteenth Amendments as not supporting the constitutionality of a federal ban on race discrimination in certain public facilities); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (narrowly construing privileges and immunities clause of the Fourteenth Amendment).

47. A single amendment to an existing Constitution represents only one vote, or set of votes, generally held within a limited window of time. The gravity of the equality principle of the U.S. Constitution comes, in part, from its having been instantiated in multiple amendments, enacted in different periods and extending to different groups, over a much longer period of time.

One cannot, then, ask simply how the intentions of the framers and ratifiers of the First Amendment should be translated into today's world in order to give effect to that vision. One must somehow incorporate in that question the changed understanding of the First Amendment that is entailed by a constitutional commitment to the "equal protection of the laws" and the primacy of one-person, one-vote principles at most levels of political governance.⁴⁸ Thus, it is not the task of a constitutional interpreter to "construct a text — a reading — that in the current context has the same meaning as the original text in its original context,"⁴⁹ where the "current context" includes new constitutional commitments. As Professor Lessig recognizes, *Bolling* is a form of constitutional synthesis, not translation.⁵⁰ My argument is that the domain of constitutional synthesis extends more broadly than many envision.

First Amendment jurisprudence already to a considerable degree integrates commitment to the importance of elections in its strong protection for "political speech." This idea has been immanent in understandings of the First Amendment since at least the early nineteenth century. As David Rabban wrote, "[D]espite persistent disputes about the meaning of free speech . . . since the ratification of the First Amendment, Americans overwhelmingly have agreed that constitutionally protected speech is essential to the proper operation of democracy."⁵¹ The Constitution's commitment to equality as a very basic norm is, by contrast, something relatively new in our constitutional order, something that has become foundational only after the inception of the constitutional scheme. The Fourteenth Amendment's words of equality enter the constitutional chronology almost eighty years after the First Amendment; delay in acceptance of equality principles in the fabric of national and state law led some to question whether the Fourteenth Amendment should have been considered a "sham" constitutional provision for much of its life.⁵² Although the Court invalidated state legislation under the Equal Protection Clause before it invalidated any state or federal statute

48. One might also inquire whether and how the First Amendment freedoms are affected by the Fourteenth Amendment's capacious concept of "liberty" (beyond application to the states) and of the "privileges and immunities of citizenship, questions I note but do not further address.

49. See Lawrence Lessig, *Fidelity as Translation: Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1370 (1997).

50. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 409-10 (1995).

51. DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920*, at 12-13 (1997). Rabban suggests that "consensus about the connection between free speech and democracy may be the single unifying free speech theme through American history." *Id.* at 13.

52. See, e.g., Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 3, 8 (Douglas Greenberg et al. eds., 1993).

under the First Amendment,⁵³ the Court did not clearly disavow a jurisprudence permitting formal separation of the races until 1954.⁵⁴ And while judicial enforcement of the First Amendment was weak until well after World War I,⁵⁵ the reference point in much of the Court's twentieth century First Amendment analysis is to an earlier time and framework.⁵⁶

The chronology reflected in the Court's analysis, even if we see it as more of a conceptual chronology of where in time in the constitutional narrative certain rights are located than a historical chronology of when those rights become the subject of sympathetic judicial interpretation, places the First Amendment well before the Fourteenth. For example, at the core of the Court's conclusion in *Buckley v. Valeo*⁵⁷ that expenditure limits are unconstitutional is the proposition that equality interests do not justify government efforts to suppress speech-related uses of money. Reading the First Amendment through the lens of the Fourteenth Amendment and its progeny, however, would suggest that human equality is a relevant governmental interest for purposes of applying these older parts of the Constitution, as the Court arguably

53. See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (reversing state murder conviction on ground that state statute unconstitutionally excluded black persons from jury service).

54. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The disavowal of racial classifications was even then cautious, rather than clear and wholehearted. See *Naim v. Naim*, 350 U.S. 985 (1956) (refusing to exercise jurisdiction to rule on constitutionality of law prohibiting inter-racial relationships).

55. The First Amendment as a judicially enforceable tool for the protection of dissent does not begin to mature in the Supreme Court's jurisprudence until the World War I period. See *Schenck v. United States*, 249 U.S. 47 (1919) (Holmes, J., dissenting). By the 1930s, the Court had invalidated convictions for dissident speech on First Amendment grounds. See *Herndon v. Lowry*, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353 (1937); see also *Fiske v. Kansas*, 274 U.S. 380 (1927). Professor Rabban identifies some lower court decisions before World War I in which free speech concerns motivate dismissals of prosecutions. See Rabban, *supra* note 51, at 117-21, 132, 145-46. State courts protected free speech rights in some political speech, election and libel cases. *Id.* at 153-63. Rabban also concluded that judicial opinion was less protective of free speech in the pre-WWI period than was the public, and that the Supreme Court was less protective than lower courts. *Id.* at 175.

56. See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 102 (1993) ("One of the most remarkable features [of First Amendment law] is that the Supreme Court decides whether an area is a 'public forum' by examining nineteenth century common law rules."). For a more recent example, see *United States v. Am. Library Ass'n*, 123 S. Ct. 2297, 2304-05 (2003) (treating as relevant fact that Internet is new source and that information exchange on the Net has not "immemorially been held in trust for the public" to justify rejecting a claim that the Internet is a "public forum," and rejecting First Amendment challenge to requiring use of pornography filtering software as a condition for receipt of public library funding). Although serious judicial enforcement of First Amendment speech rights and Fourteenth Amendment equality rights may have occurred at times and in an order inconsistent with their enactment dates, the chronology reflected in the Court's analysis as a conceptual matter locates the First Amendment at the time of the founding, as the above sources suggest, whereas the Fourteenth Amendment is understood as a latter-day change. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972).

57. 424 U.S. 1 (1976).

acknowledged in cases like *Roberts v. U.S. Jaycees*.⁵⁸ Similarly, in *R.A.V. v. City of St. Paul*,⁵⁹ the majority treated an effort to penalize “fighting words” based on race as a violation of the First Amendment while giving scant attention to whether equality interests could justify the line drawn by the statute.

In the event of a conflict between liberty of speech and equality of persons, holistic interpretation would ask, Is it true that the First Amendment must always remain “first”?⁶⁰ Are there principled reasons to think that the best reconciliation is to treat First Amendment rules as unaffected by later constitutional commitments to equality?⁶¹ Are there principled bases on which to synthesize First Amendment commitments to liberty and constitutional commitments to equality? The approaches of other Western democracies may prove helpful in answering these questions.

58. 468 U.S. 609, 623 (1984).

59. 505 U.S. 377 (1992).

60. See FISS, IRONY, *supra* note 8, at 12; cf. Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956).

61. An argument from a deeply negative conception of rights might deny the need for reconciliation. If both the First Amendment and the equal protection principle were understood simply as constraints on government action, perhaps they would not come into conflict and there would be no reason to rethink the First Amendment in light of equality principles. A changed understanding of the First Amendment in light of the Fourteenth that would have the effect of authorizing government restriction of private liberty, otherwise prohibited by the First Amendment, would restrict some liberty; it might thus be suggested that the protection of liberty is a reason of principle not to read the Fourteenth Amendment as at all affecting First Amendment freedoms of speech. But the “simply constraints” view is inaccurate, insofar as the Fourteenth Amendment explicitly authorized federal legislation that, the Court has held, can restrict conduct beyond that involved in direct violations of its provisions. See *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The “negative” view also fails to capture the role in current constitutional law that the Fourteenth Amendment has played in providing permission (or a reason) for state regulation of some liberties in the interests of equality. See, e.g., *Roberts*, 468 U.S. at 622-29. The racial equality norms of the Fifth and Fourteenth Amendments, moreover, have been invoked to restrain what some might view as constitutionally protected liberties of association. See Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22-23 (1959). These norms have also been invoked to penalize, in some settings, racial or sexual harassment that takes the form of speech. Compare Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1011, 1013-17, 1019, 1031 (1996) with Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649 (1997). See also Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439-49. We as a polity and our constitutional jurisprudence are thus in some respects already beyond the point of treating First Amendment freedoms as unaffected by later constitutional developments — though we in our judicial opinions often write and perhaps think as if that were the case.

II. HOLISTIC INTERPRETATION AND LEARNING FROM THE POST WORLD WAR II CONSTITUTIONS

Reading the “older” Constitution through the lens of the more recent amendments is actually fairly difficult for an American constitutionalist. We are conditioned in our law school training to begin with “the founding.” We are trained to develop theories that account for most (though not necessarily all) decisions. We continue to focus on U.S. Supreme Court decisions as the grist for our mill, for the most part, and those Supreme Court decisions have privileged the 1789 Constitution and its virtually accompanying Bill of Rights in important and not always visible ways.⁶² What would our constitutional law of freedom of speech look like if we were to “read” the First Amendment through the lens of later constitutional commitments to equality of citizenship, or if, in other words, freedom of speech had always been understood as a commitment contemporaneous with commitments to equality?

To aid in this re-imagining process, it is useful to consult comparative constitutional law. Many Western nations have constitutions strongly influenced by that of the United States, both positively, insofar as they include written limitations on government powers to be enforced through some form of judicial review, and negatively, insofar as some seek to avoid language that could give rise to *Lochner*-type decisions.⁶³ Becoming aware of how constitutional courts in other democratic nations with written constitutions approach similar problems has many potential benefits, in deepening understanding of the possibilities of interpretations that are available and also of deepening understanding of what is distinctive about our own constitutional commitments. In addition, deliberating about the choices made by other courts in actual cases may improve the quality of judicial reasoning by calling on judges to account — to themselves and others — through reasoning about why other democratic nations’ constitutional practices are inapposite, distin-

62. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11-13 (1883) (holding unconstitutional federal public accommodations law as beyond authority of Congress under section 5 of the Fourteenth Amendment because it was directed at private action unsupported by state law); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (reviewing course of amendments and rejecting, absent more clear language, argument that Fourteenth Amendment profoundly changed relations between federal and state governments with respect to protection of civil rights); *New York v. United States*, 505 U.S. 144, 159 (1992) (suggesting that while the scope of federal authority with respect to the states had expanded, the underlying structure of, and limitations on, that authority had not changed since the 1789 founding).

63. See, e.g., Sujit Choudhry, *The Lochner Era and Comparative Constitutional Law*, 2 INT’L J. CONST. L. 1 (2004); Heinz Klug, *Model and Anti-Model: The United States Constitution and the Rise of “World Constitutionalism,”* 2000 WIS. L. REV. 597 (2000); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296 (2003).

guishable from or (perhaps even) helpful to understanding a problem in U.S. constitutional law.⁶⁴

Unlike our Constitution, a number of other modern constitutions came of age in more recent times in which guarantees of equality coexist with other rights provisions from the outset.⁶⁵ Looking at decisions in such systems that share similar normative commitments to liberal democracy may help illuminate what a constitutional jurisprudence fully informed by commitments to human equality, undertaken at the same time as those to freedom of speech, might look like.

Canada, for example, adopted a Charter of Rights and Freedoms in 1982, after a several year process of discussion and debate.⁶⁶ Section 2 of the Charter protects freedom of expression, and section 15 of the Charter guarantees equality of treatment.⁶⁷ Section 1 of the Charter is understood to permit a law infringing other Charter rights to be upheld if it is "demonstrably justified in a free and democratic society."⁶⁸ In free expression cases, the Supreme Court of Canada construes section 2 broadly, readily finding infringements when the government regulates or prohibits speech (including criminal solicitations), but then measures the ultimate validity of the law through a section 1 analysis. Section 1 as interpreted requires a structured form of balancing in which infringements of constitutional values are upheld if authorized by law and proportionally related to both their legitimate governmental objective and the harm to constitutionally protected interests.⁶⁹ In its opinions, the Canadian Supreme Court has upheld statutes found to constitute infringements on free speech rights in light of the government's interest in promoting equality values expressed in sections 15 or 27 of the Charter.⁷⁰ The mediating principle between interests in speech and equality is found in the Court's section 1 jurisprudence of proportionality.⁷¹

64. It is also possible that comparative constitutional experience is more likely to be helpful in some areas than others. See, e.g., Vicki C. Jackson, *Narratives of Federalism*, 51 DUKE L.J. 223 (2001) (arguing that comparative constitutional decisions are more likely to be of assistance to individual human rights issues than to federalism issues).

65. Other constitutional systems differ from ours in not having written Bills of Rights, but nonetheless extrapolating from basic commitments to representative democracy some judicially enforceable limits on legislative action. See, e.g., *Australian Capital Television v. Commonwealth of Australia*, 104 A.L.R. 389 (1992).

66. See CHARTER OF RIGHTS AND FREEDOMS, CONSTITUTION ACT, 1982 (Canada).

67. *Id.*, §§ 2, 15.

68. *Id.*, § 1.

69. See generally *R. v. Oakes*, [1986] 1 S.C.R. 103, 135-43 (Supreme Court of Canada).

70. See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Supreme Court of Canada); *R. v. Butler*, [1992] 1 S.C.R. 452 (Supreme Court of Canada).

71. For more detailed discussion of proportionality, see *infra* text accompanying notes 151-60. Canada's Supreme Court readily finds infringements of section 2 expression rights and then evaluates constitutionality under section 1. Section 15 equality cases seem more likely to get resolved on question of infringement of section 15 itself rather than in the section 1 setting, though

Thus, in *Keegstra*,⁷² the Canadian Supreme Court narrowly upheld a criminal statute prohibiting the willful promotion of hatred against minority groups as against a freedom of expression claim.⁷³ Recognizing that the conduct being punished was speech, the court concluded that the limitation was “demonstrably justified in a free and democratic society” because it promoted constitutional values of equality and, in Canada, multiculturalism, while being sufficiently narrowly drawn to avoid chilling more valuable speech.⁷⁴ In *Butler*, the court upheld a pornography statute in part because it served values of gender equality.⁷⁵ And in *Libman v. Attorney General*,⁷⁶ the Canadian court, while striking down a law that substantially restricted independent expenditures in a referendum election, indicated its support for another statute regulating expenditures in elections for public office,⁷⁷ and indicated that if the

the Canadian court has on occasion found a section 15 violation but upheld the statute under section 1 analysis. See *Lavoie v. Canada*, [2002] 1 S.C.R. 769 (Supreme Court of Canada) (upholding rule limiting government jobs to citizens; a plurality of four Justices finds violations of section 15 but upholds the rule as demonstrably justified under section 1; two Justices find no section 15 violation at all; three dissenting Justices argue that section 15 is violated but without saving justification under section 1).

72. [1990] 3 S.C.R. 697 (Supreme Court of Canada).

73. *Id.* at 795.

74. *Id.* at 758, 771-78.

75. [1992] 1 S.C.R. 452, 478-81, 493-94 (Supreme Court Canada).

76. [1997] 3 S.C.R. 569 (Supreme Court of Canada). Since *Libman*, both provincial and national election statutes have been revised to provide for increased limits on third party expenditures. The constitutionality of the third party expenditure limits of the Election Act of 2000 was at issue in *Harper v. Canada (A.G.)*, [2000] 2 S.C.R. 764 (Supreme Court of Canada) (staying an interlocutory injunction against enforcement of the provisions of the 2000 Act); *Harper v. Canada (A.G.)*, 223 D.L.R. (4th) 275, 2002 AB. C. LEXIS 2671 (Alta. Ct. App. 2002) (holding invalid under the Charter the third party spending limits of the 2000 Act), motion for leave to appeal to Supreme Court of Canada granted by 227 D.L.R. (4th) vii (2003); see also *Harper*, 223 D.L.R. (4th) at 340, 2002 AB. C. LEXIS at *100 (Berger, J.A., dissenting); *Canada (Comm'r of Elections) v. Nat'l Citizens Coalition*, 2003 O.J. No. 3420, 2003 A.C.W.S.J. LEXIS 7075 (Ont. Ct. Justice 2003) (finding invalid a registration requirement for groups spending more than \$500 on political advertising). For discussion, see Colin Feasby, *Issue Advocacy and Third Parties in the United Kingdom and Canada*, 48 MCGILL L.J. 11, 31-32 (2003) [hereinafter Feasby, *Issue Advocacy*]; Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 TUL. J. INT'L & COMP. L. 5 (2001). More recently, Canada has enacted a ban on contributions by labor unions and businesses, together with some measure of public financing of elections. See An Act to Amend the Canada Elections Act & Income Tax Act, ch. 19, 2002-03 Bill C-24 (Can.); *Closing the Private Purse*, ECONOMIST, July 12, 2003.

77. *Libman*, 3 S.C.R. at 604-05, 618-20; see also *id.* at 602 (“Limits on independent spending are essential to maintain an equilibrium in the financial resources available to candidates and political parties and thus ensure the fairness of elections.”) At present there appears to be a tension between the views of the Supreme Court as expressed in *Libman* and the views of the Alberta Court of Appeals in *Harper* on this point. See *Harper*, 223 D.L.R. (4th) at 318-27, 2002 AB. C. LEXIS at *73-88 (disagreeing that *Libman* analysis establishes a sufficiently substantial and pressing concern about role of third party expenditures in Canada to warrant restrictions under section 1 analysis).

limits on independent expenditures were higher, they would be upheld.⁷⁸ The Canadian court recognized a broader governmental interest in the fairness of elections, an interest extending beyond the anticorruption concerns recognized by the U.S. Supreme Court in *Buckley*, specifically an interest in equal opportunities to participate in communicating with the electorate.⁷⁹ As the Supreme Court of Canada explained,

The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of political equality of citizens. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of freedom to spend does not hinder the communication opportunities of others.⁸⁰

For this reason, as well, the court stated, "Limits on independent spending are essential to maintain an equilibrium in the financial resources available to candidates and political parties and thus ensure the fairness of elections."⁸¹ The Canadian court thus recognized as legitimate an interest in equalizing the influence of money on the dissemination of information to voters, an interest deemed illegitimate in *Buckley*.⁸² Furthermore, the Canadian court recognized the need to reconcile freedom of expression with political equality.⁸³ Note that the court formulates its

78. *Libman*, 3 S.C.R. at 617-20.

79. *Id.* at 595-97, 598-99. See also David Strauss, *Corruption, Equality and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994) (arguing that approach focused on equal rights of candidates supports limitations of independent expenditures).

80. *Libman*, 3 S.C.R. at 598-99 (internal citations omitted).

81. *Id.* at 602. According to Elizabeth Garrett, the Quebec law was amended in response to *Libman*. Elizabeth Garrett, *Issues in Implementing Referendums in Israel: A Comparative Study in Direct Democracy*, 2 CHI. J. INT'L L. 159, 178 n.146 (2001) (discussing An Act to Amend the Election Act, the Referendum Act and Other Legislative Provisions, Statutes of Quebec 894 (1998), which now also allows and regulates "private interveners"). See also Feasby, *Issue Advocacy*, *supra* note 76; Colin Feasby, *Libman v. Quebec and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model*, 44 MCGILL L.J. 5 (1999).

82. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). One scholar has identified as central to *Libman* the concern that "a right to equal participation in democratic government" not be compromised. See Geddis, *supra* note 76, at 99.

83. See *Libman*, 3 S.C.R. at 606-07 (emphasis added):

[T]he legislature's objective, namely to enhance the exercise of the right to vote, must be borne in mind. Thus, while the impugned provisions do in a way restrict one of the most basic forms of expression, namely political expression, *the legislature must be accorded a certain deference to enable it to arbitrate between the democratic values of freedom of expression and referendum fairness. The latter is related to the very values the Canadian Charter seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society.* The impugned provisions impose a balance between the financial resources available to the proponents of each option in order to ensure that the vote by the

analysis both as a balance between freedom and equality *and* in Fiss-ian terms as involving provisions "not purely restrictive of freedom of expression."⁸⁴

Claims that government intervention in the distribution of information is necessary to protect free elections, it would appear, are subject to careful scrutiny in Canada and do not necessarily trump free speech concerns. In *Thomson Newspapers Co. v. Canada (A.G.)*,⁸⁵ the court struck down a statute prohibiting publication of polling information within three days of an election as unduly restrictive on speech rights. Scholars have criticized the apparent tension between *Libman*'s assumption that without government intervention voters may be unduly influenced by wealthier candidates and parties and its assumption in *Thomson* that voters are sophisticated enough that with disclosure of polling methods they can appropriately discount for inaccuracies and bias in the polls.⁸⁶ But whatever the consistency of the Canadian case law in resolving notoriously difficult constitutional problems, *Libman* at least sought to bring together in analysis constitutional commitments to electoral equality and constitutional commitments to freedom of expression.

The European Court of Human Rights has similarly recognized governmental interests in equality of expenditures on behalf of candidates as a "legitimate aim" for purposes of determining whether a derogation of free expression is permissible. In *Bowman v. United Kingdom*,⁸⁷ at issue was the validity under the European Human Rights Convention of a British law prohibiting all independent expenditures of more than five pounds with respect to a particular candidate during an election period. Although recognizing the legitimacy of the aim of the legislative scheme to promote equality between candidates and voters, the European Court of Human Rights found the measure disproportionately to intrude on freedom of expression.⁸⁸ The court found it of particular significance how low the limit on independent expenditures was, treating it as virtually a total barrier to independent persons expressing

people will be free and informed and that the discourse of each option can be heard. To attain this objective, the legislature had to try to strike a balance between absolute freedom of individual expression and equality among the different expressions for the benefit of all. From this point of view, the impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to promote political expression by ensuring an equal dissemination of points of view and thereby truly respecting democratic traditions.

84. *Id.*

85. [1998] 1 S.C.R. 877.

86. See Geddis, *supra* note 76, at 95-99 (drawing attention to tension between rationale in *Libman* about risks of undue influence of wealth in election process and *Thomson*'s model of rational voters able to discount skewed polls).

87. *Bowman v. United Kingdom*, 26 E.H.R.R. 1 (1998) (U.K.).

88. *Id.* at 10-13 (para. 38-47).

their opinion, and concluded that the intrusion on freedom of expression was disproportionate. The opinion would appear to leave open, as *Libman* did, the possibility that a less stringent limitation would be upheld.⁸⁹

In Germany, the Basic Law of 1949 begins with provisions of basic rights. Article 3 states that “all persons shall be equal before the law,” and includes specific gender equality guarantees as well.⁹⁰ Article 3 specifically provides that there can be neither favoring nor disfavoring “because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinion,” and prohibiting any disfavoring due to disability.⁹¹ Article 5 guarantees “freedom of expression”: “Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures,” as well as to inform himself.⁹² Freedom of the press is specifically guaranteed, and censorship is prohibited.⁹³ According to a leading American scholar of German constitutional law, Donald Kommers, the German court has developed a constitutional jurisprudence in which a “hierarchy of values” is deployed to reconcile competing constitutional values.⁹⁴ Thus, he suggests, Article 5 “operates within an interrelated set of other fundamental rights and liberties, constitutional principles, rules and standards, institutional and procedural devices.”⁹⁵

Coexisting with the commitment to understanding Article 5 within this “interrelated set of other fundamental rights” is a recognition of the

89. See Feasby, *Issue Advocacy*, *supra* note 76 at 13, 18, 24-31; see also K. D. Ewing, *The Political Parties, Elections and Referendums Act 2000 — Implications for Trade Unions*, 30 Industrial L.J. 199 (2001) (discussing the 2000 Act, which is described as instituting higher limits on third party spending in order to avoid conflict with *Bowman*). Implementing understandings of proportionality in election law is difficult, as experience in both Canada and Europe suggest. Although Canada’s law was amended in response to *Libman*, its constitutionality remains to be fully tested. See Feasby, *Issue Advocacy*, *supra* note 76, at 31-45 (discussing whether Canadian and British laws are overbroad). The constitutionality of recently enacted prohibitions on corporate and labor union expenditures for certain “electioneering communications” was before the U.S. Supreme Court at the time of initial writing of this Essay; these restrictions have now been upheld in *McConnell v. FEC*, 124 S. Ct. 619 (2003). Rulemaking proceedings before the FEC are pending as this Essay goes to press. See FEC Notice 2004-6 (Mar. 4, 2004).

90. Grundgesetz [federal constitution] art. 3 §§ 2,3 (F.R.G.) (translation published by German Press and Information Office, with amendments through July 16, 1998). The Basic Law is the constitution of Germany.

91. *Id.* art. 3, § 3

92. *Id.* art. 5, § 1.

93. *Id.*

94. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 361 (2d ed. 1997).

95. *Id.* (quoting Helmut Steinberger, *Freedom of the Press & Prior Restraints*, in COLKERRECHTALS RECHSTORNDUNG, INTERNATIONALE GERICHSTBARKEIT, MENSCHENRECHTE, FESTSCHRIFT FÜR HERMANN MOSLER (Rudolf Bernhardt et al. eds., 1983)).

central importance of freedom of expression.⁹⁶ According to the German court, "[T]he basic right to freedom of opinion is the most immediate expression of the human personality living in society and, as such, one of the noblest of human rights"; the court goes on to refer to Justice Cardozo's well-known comments on freedom of speech as the "indispensable condition of nearly every other freedom."⁹⁷ Because of the "fundamental importance of freedom of speech in the liberal democratic state," the German court said, the substance of this basic right cannot be limited by an ordinary law.⁹⁸ Thus, notwithstanding the reference to general laws as limiting rights set forth in Article 5, the general laws must themselves be interpreted in light of those basic rights.

As in Canada, commitments to human dignity and equality inform the German court's analysis of free speech issues. While this is revealed in a number of areas,⁹⁹ one notable example is the "Holocaust Denial" case.¹⁰⁰ The basic question was whether it was consistent with Article 5 to make it a criminal offense (enforceable through a prior restraint),¹⁰¹ to deny the massive slaughter of Jews by Germany during World War II. In upholding the government's authority to restrict such "holocaust denial" speech, the court distinguished between dissemination of opinion (most highly protected) and dissemination of claims of fact, while recognizing that the two are also intimately connected. But, the court

96. *Id.*

97. Luth Case, 7 BVerfGE 798 (1958), *translated and reprinted in* KOMMERS, *supra* note 94, at 364-65.

98. *Id.* at 365 (discussing the Article 5(2) reference to "general laws").

99. *See, e.g.,* KOMMERS, *supra* note 94, at 419-24. The German court has also on occasion invalidated laws relating to political contributions. In the Party Finance Case II of 1958, it concluded that a provision permitting the deductibility of political party contributions from income tax violated the "basic right of political parties to equal opportunity" because deductibility benefited corporate and higher income taxpayers over lower income taxpayers and, in light of differences between parties relating to the different interests of prospective donors, concluded that the challenged provisions "favor those parties whose program and activities appeal to wealthy circles" and were invalid. Party Finance Case II, 8 BVerfGE 51 (1958), *translated and reprinted in* KOMMERS, *supra* note 94, at 201-03. As Kommers describes a complex series of decisions, the court reaffirmed this holding in the early 1990s. *See* KOMMERS, *supra* note 94 at 214-15 (discussing Party Finance Case VII, 85 BVerfGE 264 (1992)).

100. Holocaust Denial Case, 90 BVerfGE 241 (1994), *translated and reprinted in* KOMMERS, *supra* note 94, at 382-87. I adopt here Professor Kommers's title of the case and am indebted to his book for its commentary and translation of the case. *See also* Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1 (2002).

101. The United States' strong commitments against prior restraints of speech, even where the speech may give rise to criminal penalties, is a relatively distinctive feature of U.S. free expression jurisprudence compared to others around the world. *See* Roger Errarra, *The Freedom of the Press: The United States, France and Other European Countries*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 63, 83-84 (Louis Henkin & Albert J Rosenthal eds., 1990); Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 10, 24 (1992).

concluded, there is less value to a statement of fact that is "demonstrably untrue."¹⁰² Indeed, "taken on its own," a false statement of fact "does not enjoy the protection of freedom of expression."¹⁰³ It went on to consider the statement in connection with the speaker's opinions (protected by Article 5) that German politics has been susceptible to "political blackmail," and upheld the restriction on holocaust denial as a justified limitation on Article 5 protections. Its reasoning explicitly invoked another constitutional right, "the right of personality" guaranteed by Article 2 of the Basic Law, and noted with approval as well the lower court's argument that the utterance of false holocaust denial is inconsistent with the "individuality" of Jews, in light of the "historical fact" that they were "singled out" under the Nuremberg laws:

[W]hat happened [then] is also present in this relationship [between Jews and the Federal Republic] today. It is part of their personal self-perception to be understood as part of a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies *vis a vis* each individual the personal worth of [Jewish persons.] For the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him.¹⁰⁴

Thus, concerns for the human dignity and equality of Jews were invoked, in a morally distinctive manner, to uphold restrictions on speech about a historical fact.¹⁰⁵

Both Canada and Germany, through different doctrinal formulations, have brought into an explicit balance and interplay commitments to freedom of expression and commitments to human equality. In doing so, these courts have reached judgments quite different from those that have been reached in the United States; though in Canada, it should be noted that *Keegstra*, the "hate speech" decision, was rendered by a closely divided court. Both Germany and Canada are generally regarded

102. Holocaust Denial Case, *translated and reprinted in* KOMMERS, *supra* note 94, at 384-85.

103. The court distinguishes between "representations of fact still of uncertain accuracy at the time they are uttered, and unverifiable within a short time," on the one hand, and cases like the instant one "when the falsity of the statement is already established." *Id.* at 387.

104. *Id.* at 386 (quoting from Constitutional Court decision quoting from a decision of the Federal Court of Justice); *see also* Brugger, *supra* note 89 at 8-20.

105. Cf. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000) (arguing that attachment to honor underlies European commitments to human dignity in ways not fully captured simply by looking at post-World War II constitutions). In the *Holocaust Denial Case*, the denial is arguably treated as a form of "defamation" or personal insult to Jews, in derogation of their right not to be discriminated against.

as enjoying a serious level of democratic constitutionalism.¹⁰⁶ The German court has for some years been regarded as among the most influential of the national constitutional courts in Europe, and in recent years, the Canadian Supreme Court's jurisprudence has been regarded as particularly important in countries around the world.¹⁰⁷ Each could fairly be regarded as among the leading constitutional courts in the world, a group that includes the United States Supreme Court. Their reasoning on these difficult issues does not show that the U.S. Court is wrong; indeed, most commentators (and all of the Justices) regard the result in *R.A.V.* as correct, although there is disagreement on the reasoning. But what they do show is that under modern conditions states may act affirmatively to protect equality, and in doing so, limit speech as well as other forms of conduct while sustaining high levels of democratic liberties.¹⁰⁸

To this extent, then, comparative constitutional law from these other constitutional democracies is suggestive that U.S. courts could interpret the meaning of freedom of speech with more weight given to the equality concerns of the later Constitution without impairing a robust constitutional democracy. In each of the foreign cases discussed above, the decisions weighed contemporaneously enacted individual rights provisions. Interestingly, the Supreme Court of Canada has also faced the question whether the more recently enacted Charter Rights should be understood to affect interpretation of the older parts of the Canadian Constitution, which date to 1867 (and largely concern federalist distributions of powers). Section 93 of the 1867 Constitution Act was intended to guarantee the rights of "dissentient," denominational schools (i.e., Catholic schools in predominantly Protestant provinces, and Protestant schools in Quebec), both those existing in 1867 and (in some respects)

106. One crude measure is the Freedom House Ratings of Political and Civil Liberties, available at www.freedomhouse.org/research/freeworld/2003/countries.htm. Canada and Germany, like the United States, have the highest possible rankings (1, 1, f). See also Rankings Compiled by the Polity IV Project (Political Regime Characteristics and Transitions, 1901-2001), giving their highest rankings to Germany (10, 10, 0), Canada, Australia, Austria, Costa Rica, Finland, and Denmark, among others (scores for Polity, Democracy, and Autocracy), available at www.bsos.umd.edu/cidcm/inscr/polity/index.htm. "Democracy" is defined there as "the general openness of political institutions," and "autocracy" as "general closedness of political institutions." "Polity" is calculated as a combined score, "computed by subtracting autocracy from democracy."

107. See Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 110, 114 (2002).

108. Institutional contexts matter, and differ considerably among the United States, Canada, and Germany. The United States is larger, with decentralized review subject to more constraints than Canada (i.e., no independent and adequate state ground doctrine in Canada), and might favor more formalist categorical approaches, as noted below. See also Gerald Neuman, *Human Rights and Constitutional Rights*, 53 STAN. L. REV. (2003) (noting that rights have "institutionalist" aspects that may diverge from supra-national aspects).

those "thereafter established."¹⁰⁹ After the Charter came into effect,¹¹⁰ an Ontario statute providing funding to Catholic schools was challenged as a violation of section 15's equal protection guarantees. The gist of the claim was that non-Catholic denominational schools in Ontario did not receive comparable funding. The challenge was rejected, in part, on the ground that the Charter should "not be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867."¹¹¹

A leading commentator in Canada concludes from this that "the Charter of Rights, although adopted later in time than the Constitution Act, 1867, is not to be read as impliedly repealing or amending those provisions of the earlier instrument that are inconsistent with the unqualified language of s. 15 Rather, s. 15 is to be read as qualified by the language of the earlier instrument."¹¹² This conclusion, however, may be overdrawn. The principal opinion in the *School Funding* case,¹¹³ written by Justice Wilson, laid weight on the explicitness of the guarantee of section 93, its importance to Confederation, and the unlikelihood that section 15 was intended to undo these protections.¹¹⁴ That Profes-

109. See Constitution Act, 1867, § 93(1)-(3) (Can.); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 54.1 (4th ed. 1997). Section 93's application to Quebec was recently limited. See Constitutional Amendment, 1997 (Can.) (adding section 93A concerning Quebec).

110. On the history of Canadian constitutional development, see HOGG, *supra* note 109, §§ 1.2-1.4; see also Jackson, *supra* note 3, at 1298-99. Two major periods of constitution-making should be noted: 1867, when a British statute provided a constitution for Canada, one largely focused on the division of powers; and 1982, when the constitution became fully "patriated" to Canada (i.e., could now be amended without British consent) and when a bill of rights — the Charter of Rights and Freedoms — was formally adopted as part of Canada's constitution.

111. Reference Re Bill 30, An Act to Amend the Education Act (Ontario Separate School Funding), [1987] 1 S.C.R. 1148, 1207 (Estey, J.); see also *id.* at 1197-98 (Wilson, J.) ("It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise."). The issues discussed in this opinion were complex, involving distinctions between the different parts of section 93 and Charter section 29. In subsequent cases, the Supreme Court of Canada has adhered to the view that the Charter and its equality guarantee cannot be relied on as a basis for attacking the discrimination in favor of Catholic and Protestant "dissentient" schools specifically authorized in section 93 of the 1867 Constitution Act. See Adler v. Ontario, [1996] 3 S.C.R. 609 (Supreme Court of Canada). At the same time, the Charter is invoked to inform interpretation of exercises of pre-existing powers. See *infra*, text accompanying notes 116-18; cf. Donahoe v. CBC, 1993 1 S.C.R. 319, 391 (McLachlin, J.) (suggesting a "distinction between using the Charter to negate another constitutional provision and using the Charter to ensure that the exercise of a constitutional provision conforms with the Charter," and giving as an example of the first *Reference re Bill 30*, and as an example of the second a case holding that provincial powers of legislative apportionment must comply with the Charter's guarantee of the right to vote).

112. HOGG, *supra* note 109, at § 52.9(c).

113. Reference re An Act To Amend the Education Act, [1987] 1 S.C.R. 1148.

114. *Id.* at 1194-99. Justice Wilson also noted in support of the judgment that section 29 of the Charter itself explicitly indicated that the Charter was not intended to affect section 93 rights. See *id.* at 1198 (Wilson, J.) (so arguing but also indicating that section 29 was merely declarative of

sor Hogg's characterization may be overdrawn is suggested not only by Justice Wilson's reasoned reliance on the specific provisions of Charter section 29 preserving the 1867 Act's provisions on dissentient schools, but also by a more recent lower court decision affirmed by the Canadian Supreme Court (though without discussion of this point). In the *Gun Reference Case*,¹¹⁵ Chief Judge Fraser of the Alberta Court of Appeals described at some length the "importance of interpreting the Constitution Act, 1867 . . . in a way which is consistent with constitutionally guaranteed equality rights [under the 1982 Charter]".¹¹⁶ She argued that the Charter had already been held to have "pollinating" effects on Canadian common law and statutory interpretation, and there was "no reason to exclude the Charter, a part of the Canadian Constitution — the supreme law of the land — from an interpretation of the division of powers provision in the Constitution Act, 1867."¹¹⁷ These two cases suggests that, in Canada, later enacted rights provisions may be read back into older power-allocating provisions of a constitution, but that whether to read later parts as affecting earlier ones may depend on the centrality of those earlier provisions to founding compromises and on their explicitness.¹¹⁸ In any event, a far larger body of Canadian jurisprudence provides an alternative model for how to integrate constitu-

what would have followed in any event, given the centrality of the section 93 compromise on Catholic and Protestant schools to the Confederation). Section 29 of the Charter provides: "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." Constitution Act of 1982, R.S.C. 1985, Pt. I, § 29. Not all of the justices agreed that section 29 was relevant. See 1 S.C.R. at 1209 (Estey, J.).

115. Reference re Firearms Act, [1998] 219 A.R. 201 (Alta. Ct. App. 1998), *aff'd* [2000] 1 S.C.R. 783.

116. *Id.* at 221 (para. 35); see *id.* at para. 303.

117. *Id.* at 221 (para. 35). The British Columbia Court of Appeals has distinguished the continued constitutional value of the compromise over minority religious rights embodied in section 93, from the Charter's effects on the allocation of powers as between the federal and provincial governments conferred by sections 91 and 92 of the 1867 Constitution Act. See *Egale Canada, Inc. v. Canada*, [2003] B.C. A. C. 35, 58-62, 2003 BC.C. LEXIS 2711, *58-68 (para. 102-12) (B.C. Ct. App., 2003) (rejecting trial court's reasoning that national government would lack power under section 91(26) to legalize same sex unions if that result were required by Charter section 15; distinguishing *Adler* and *In re Bill 30* as involving specific compromise over minority rights found in section 93); see also *Halpern v. Canada* (A.G.), 65 O. R. (3d) 161, 176 (2003), 2003 ON.C. LEXIS 153, **40 (para. 48) (Ont. Ct. App. 2003). The trial court in *British Columbia* had concluded that the Constitution Act of 1867, when it authorized federal regulation of "marriage" in section 91(26), meant only a union of a man and a woman, and that the Charter had to be read as limited by this limitation on federal power. See *Egale-Canada*, 182 B.C.A.C. at 42-43, 2003 BC C LEXIS at *13-15 (para. 31) (quoting trial court judgment). The court of appeals concluded that the common law definition of marriage in 1867 was not fixed into the meaning of the federal power over marriage under section 91(26). *Id.* at 46-50, 58-62, 2003 BC. C. LEXIS at *23-27, *29-35, *58-68 (paras. 50-56, 61-71, 102-13).

118. See *School Funding Case*, [1987] 1 S.C.R. at 1197-98 (referring to the provisions of section 93 as "a fundamental part of the Confederation compromise").

tional commitments to freedom of expression with constitutional commitments to equality in an interpretive tradition where, for the most part, both kinds of constitutional rights enter the constitutional narrative at the same time.

III. HOLISTIC INTERPRETATION AND FREEDOM OF EXPRESSION: HARD QUESTIONS

What effect would a more “holistic” form of interpretation, informed by comparative constitutional law from other Western democracies, have on the freedom of speech problems Owen Fiss has been concerned about? How would our constitutional law of freedom of speech change if it were re-envisioned, re-understood, as though the norms of equality of citizenship and popular election of representatives had been foundational throughout?¹¹⁹ I do not think there are clear answers to these questions, as is suggested by the disagreement within other constitutional courts over some of the same hard questions that the U.S. Supreme Court has addressed. But at a minimum, questions understood as raising conflicts between freedom of speech and equality would have to be seen as harder cases than some members of the present Court see them. Asking these questions — about how to reconcile commitments to equality and elections with commitments to freedom of speech, and about the approaches of other constitutional democracies also committed to these values — may help bring to the surface our embedded assumptions about the “firstness” of the older Constitution so that we can interrogate ourselves about those assumptions.

Owen Fiss has argued both that the idea that equality is an “architectonic” principle of the Constitution,¹²⁰ and that the First Amendment should be understood as committed to the production of a robust public

119. The First Amendment is widely, though not universally, understood most centrally to protect political speech. Compare Fiss, *supra* note 7, at 3-4 (arguing that First Amendment “freedom of speech” should be understood as embodying the goal of robust, political discourse); SUNSTEIN, *supra* note 56, at 122 (arguing that the “First Amendment is focused first and foremost on political deliberation”); and ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 55 (1965) with Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993) (criticizing “collectivist” versions of the First Amendment as failing to recognize that individual autonomy is inseparable from the goal of deliberative self-government). The concern for political speech can be explained by reference to the history and internal dynamic of the First Amendment itself, as well as by a contemporaneous constitutional commitment to a “republican form of government,” U.S. CONST. art. IV, § 4, which arguably requires a well-informed people free to discuss, criticize and change their governments. The subsequent deepening of the constitutional commitment to the role of popular elections for political office by an expanded electorate including previously subordinated groups lends further weight to the centrality of political speech, while at the same time introducing a greater concern for equality.

120. See FISS, IRONY, *supra* note 8, at 11.

debate, with government regulation and intervention to that end thus to be welcomed.¹²¹ He has raised questions about efforts to justify the regulation of hate speech, or campaign finance, in light of the equality principles of later amendments, in part because he suggests that there is no principled way in which to accommodate claims of liberty as against claims of equality.¹²² I will argue in this section that there are principled reasons to think that equality norms must be reconciled with our understandings of earlier guarantees of liberty; that both values can be accommodated through reasoned judicial decision-making; and that Fiss's alternative conception, grounded wholly within the First Amendment itself, does not avoid so much as submerge the problem of equality in free speech law.

A. *R.A.V. and Hate Speech*

First Amendment free speech doctrine both strongly incorporates norms of equality in some areas of law (including its ideas of content and viewpoint neutrality), and it strongly rejects them in others (*Buckley* being one example, and *R.A.V.* another). In resolving the hate speech issue in *R.A.V.*, the Court appeared to give short shrift to equality as compared to free speech values when it found the state's asserted interest in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination" insufficient to uphold the ordinance and expressed doubt that the ordinance was intended for that purpose.¹²³ The demands of holistic interpretation are that jurists con-

121. See generally FISS, *LIBERALISM DIVIDED*, *supra* note 8, at 7-30, 33-66, 90-120; FISS, *IRONY*, *supra* note 8, at 27-28.

122. See FISS, *IRONY*, *supra* note 8, at 15.

123. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992) (suggesting that a "content neutral" law could protect against harm to members of such groups and that the real purpose of the law was to express special official hostility to particular biases that, the Court said, the First Amendment forbids); see also *id.* at 383-85 (arguing that "fighting words" may have expressive content worthy of protection). The St. Paul statute prohibited the display of, *inter alia*, symbols such as a burning cross, or Nazi swastika, that "arouse[] anger, alarm or resentment" based on "race, color, creed, religion or gender" and had been construed by the state court to extend only to "fighting words." See *id.* at 381. The Court's apparent willingness to treat the expressions prohibited by the ordinance (as construed by the state court) as having some possible value, coupled with its failure to give serious weight to the harms to human equality from such acts, suggests that the First Amendment's protection of speech was treated in this context as more significant than the Fourteenth Amendment's equality of persons commitments. For a vivid anecdote about the "firstness" of the First Amendment and the subordinate role of the Fourteenth Amendment equal protection clause, see Lawrence, *supra* note 61, at 473-74, describing an account by John Powell:

My family was having Thanksgiving dinner at the home of friends. We are vegetarians and my two kids were trying to figure out which of the two dressings on the table was the vegetarian dressing and which was the meat dressing. One of our hosts pointed to one of the dressings and said, "This is the regular dressing and the other is the vegetarian dressing." I corrected him saying, "There is no such thing as

sider how the First Amendment could and should be re-read in light of the Fourteenth, at least as one part of the analysis.

Fiss's argument — that the First Amendment should be read to protect a social condition in which many voices can be heard and thus as warranting some forms of regulation — is one evocative of readings of expressive freedoms given elsewhere in the world under post World War II constitutions.¹²⁴ Fiss does not as explicitly invoke the constitutional experience of other nations in support of his First Amendment views, as do such First Amendment kindred spirits as Cass Sunstein.¹²⁵ Speculating, I wonder if this is because Fiss is committed at some level to the proposition that the First Amendment is first,¹²⁶ a commitment at work in his heroic efforts to ground *within* the First Amendment commitment to "liberty,"¹²⁷ or to the social condition of "freedom of speech," argu-

'regular' dressing. There is meat dressing and there is vegetarian dressing, but neither one of them is regular dressing."

This incident reminded John of the discussions he has had with his colleagues on the subject of regulating racist speech. "Somehow," he said, "I always come away from these discussions feeling that my white colleagues think about the first amendment the way my friend thought about "regular" [meat] dressing, as an amendment for regular people or all people, and that they think of the equal protection clause of the fourteenth amendment the way my friend thought about vegetarian dressing, as a special amendment for a minority of different people."

124. See, e.g., *The Television Cases*, 12 BverfGE 205 (1961) 9, *excerpted and translated in* KOMMERS, *supra* note 96, at 404. The German court observed that Article 5 of the German Basic Law, which protects an individual's rights "freely to express himself" as well as press freedoms, "requires that [television broadcasting, a] modern instrument of opinion formation should be neither at the mercy of the state nor [at the mercy of] one single social group." It therefore invalidated a federal statute organizing a public television station on the grounds that it had to require more diversity of control over the broadcasting decisions in the structure of the station's control. *Id.* at 405. In a number of German cases, the idea of the government's affirmative obligation to act so as to guarantee "every individual . . . the highest level of freedoms and of possibilities in the media" is expressed. KOMMERS, *supra* note 96, at 407 (quoting in part a Bundestag report). This affirmative conception comes through even more clearly in *Television III Case* (1981), 57 BverfGE 295, *excerpted and translated in* KOMMERS, *supra* note 96, at 409:

[M]ere freedom from governmental influence does not by itself imply that the broadcasting [industry] can freely engage in the comprehensive shaping of opinion making; defensive regulation alone cannot accomplish this task. Rather, [the accomplishment] of this task requires that a system be created to ensure that the diversity of existing opinions finds its greatest possible breadth and completeness through broadcasting, and that, as a consequence, comprehensive information will be offered to the public.

125. See SUNSTEIN, *supra* note 55, at 77-79.

126. See FISS, IRONY, *supra* note 8, at 12 (attributing this view to some "participants in the current debate" who would "resolve the conflict between liberty and equality in favor of liberty: the First Amendment should be first, they argue"). At this point Fiss seems to be positioning himself in between this view and the view of others that equality concerns trump liberty. *Id.* at 12-13. Elsewhere, in *LIBERALISM DIVIDED*, *supra* note 8, at 116, he describes *R.A.V.* as turning on the idea that "[t]he First Amendment is first" and then writes: "It might be possible, at least for purposes of argument, to allow Justice Scalia still his major premise — assume the firstness of the First Amendment — and still find the partiality of the *St. Paul* regulation acceptable."

127. See *supra* note 110 (noting Fiss' identification of conflict between liberty and equality).

ments for a more activist ("friendly") state that might be able to prohibit hate speech and pornography, and limit campaign expenditures as well as contributions. Although his argument from within the First Amendment has much attraction, on some issues, including hate speech, his argument does not in fact avoid the need to deal with tensions between freedom of speech and values of the equal dignity of each human being in the polity.

As noted above, Professor Fiss has urged that because some governmental interventions can be seen as increasing speech, they may thus be seen as consistent with First Amendment values. On campaign finance, he has suggested that limiting expenditures is necessary in order to avoid the kind of "drowning out" of the voices of the less well financed that, in the setting of a town hall meeting, would be performed by the parliamentarian.¹²⁸ Applying this insight to the problem of "hate speech," he characterizes *R.A.V.* as resting on the idea that the "First Amendment is first" among constitutional values¹²⁹ but argues that *R.A.V.* could be resolved in a way that avoids positing a conflict between liberty and equality if the anti-cross burning statute there were seen instead as a protection of the freedom of speech of its targets — so it would be supported by internal free speech values.¹³⁰ Although I recognize the elegant appeal of this argument, the problem is that the "silencing" effects of hate speech on individual victims are not what are so uniquely offensive about hate speech, for there are many forms of speech (including insults to one's intelligence, or other highly critical personal attacks) that also may be "silencing" for the victims.¹³¹

But note that as Fiss constructs it elsewhere, freedom of speech is not about "liberty" in the sense of individual autonomy but about a social condition of a robust marketplace of ideas. (I think Fiss undervalues the autonomy-protecting aspects of the First Amendment, but let me put that to the side for now.) For Fiss, then, the First Amendment is not so much a "negative liberty" but a form of positive welfare right, obligating the government to act on behalf of a particular social condition. The implications of this might well be that an action should lie to compel the government to act to fulfill its obligation for this social condition. In some modern constitutions (Ireland, India) positive rights are established as nonjusticiable directive principles. For constitutional textualists, the negative, prohibitory language of the First Amendment might support a more constrained reading here of the nature of any justiciable rights to compel government regulation.

128. See FISS, *LIBERALISM DIVIDED*, *supra* note 8, at 5-6, 19, 22, 26-27, 102-03, 118-19; see also, Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2479-81 (1997); FISS, *IRONY*, *supra* note 8, at 28. For a critique of the basic model of the "parliamentarian," see Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1528, 1530-34 (1997) (reviewing OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996)) (arguing that it is inconsistent with the First Amendment to assume the kind of agenda that parliamentary model requires).

129. See *supra* note 60 (on the firstness of the First Amendment).

130. See FISS, *LIBERALISM DIVIDED*, *supra* note 8, at 118-19; see also Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281 (1995).

131. See sources cited *supra* note 111. Fiss argues for a form of sociological understanding

As noted earlier, Fiss has concerns (or is at least somewhat ambivalent) about efforts to justify hate speech regulation in terms of the equality guaranteed by the Fourteenth Amendment. He suggests that such an explanation rests on the idea that because racial equality is favored by the Constitution, it is permissible for the government not to be neutral on the issue and thus to sanction government suppression of ideas contrary to those embodied in the Constitution. As Fiss articulates what he describes as a "strong view" of the First Amendment, "Everything should be up for grabs, even fundamental principles."¹³² He also is concerned whether there is any principled way to choose between equality and liberty, making the position of the defenders of the statute in *R.A.V.* on equality grounds "no more secure in their premises" than Scalia.¹³³ Yet he also criticizes the Court in *R.A.V.* for not giving more consideration to the Fourteenth Amendment's equality value to "tip the scale" in favor of the statute, even if it could not be sustained wholly within the terms of the First Amendment.¹³⁴

The main thrust of Fiss's argument, however, is that First Amendment freedoms should be understood internally to guarantee a positive social condition of "freedom of speech" and thus to warrant the government in enacting regulations that redistribute private power over speech to achieve a more robust public discourse. And on his view of cross burning as not only insulting but silencing, he seeks to justify the statute within the terms of First Amendment freedom, not as advancing the cause of equality (even if this was what motivated it),¹³⁵ but as an effort to protect the integrity, the robustness, of public debate. But I fear that Fiss's own deep commitments to freedom of speech and to government neutrality as between positions in the robust marketplace of ideas, on the one hand, and to equality for subordinate groups, on the other hand, cannot so readily be reconciled.

about silencing, an understanding deeply connected to social inequality. See FISS, *LIBERALISM DIVIDED*, *supra* note 8, at 119 (arguing that if "the speech is aimed at someone who would not be silenced, as indeed might be the case if the target is not a member of a disadvantaged group," application of hate speech statute would be unconstitutional in such a case).

132. FISS, *LIBERALISM DIVIDED*, *supra* note 8, at 115.

133. *Id.* at 1116.

134. FISS, *IRONY OF FREE SPEECH*, *supra* note 8, at 26.

135. FISS, *LIBERALISM DIVIDED*, *supra* note 8, at 119 (acknowledging that cross burning statute might have been motivated by concern for impact of this activity on social standing of minority groups but that "what is crucial for constitutional analysis is not the actual motive, but the possible justifications"). I am not sure this is an accurate description of the Court's approach in First Amendment cases, which at least some scholars think have constructed doctrine designed to provide particularly stringent scrutiny to government action that is likely to be motivated by a desire to suppress speech of particular viewpoints or on particular subjects. See, e.g., Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 38-44.

First, the more thoroughly condemned particular speech acts are, the more likely it will be that prohibitory legislation could be enacted. But the very circumstances that give rise to the enactment might suggest that the defect with the condemned speech is not its silencing of the viewpoints of its victims — viewpoints expressed in the existence of statutes condemning hate speech — but rather the defect is its infliction of humiliation, degradation and diminishment of their sense of equality as citizens and human beings.¹³⁶ Second, Fiss's *theory* of government intervention on behalf of the equal speech rights of subordinated groups might be used to support suppression not only of "fighting words" but also of more civil arguments for racist or sexist ideologies or arguments against the tenets of minority religious groups.¹³⁷ However, I think it is clear that he would not take this theory that far and that his defense of a possible different result in *R.A.V.* was limited to the context of "fighting words." But to the extent that racist speech has "silencing" effects, the degree of silencing — for example, of causing some members of the group to refrain from calling attention to themselves by speech — is likely to be affected by the pervasiveness of more "civilized" forms of the expression as well as by the more obvious descent into invective. Yet as the regulatable area of racist speech or arguably racist speech becomes larger, the threat to many First Amendment values — not only of individual autonomy but also of the search for better knowledge and the need for robust political challenge and discourse — may increase.¹³⁸

Third, Fiss's apparent willingness to ignore the actual purpose motivating legislation is in some tension with understandings of the First Amendment as being particularly concerned with government action that is motivated by a desire to suppress speech because of the ideas embodied in the speech.¹³⁹ If one were to construct a jurisprudence based on

136. Cf. Post, *supra* note 128, at 1532-33 (1997) (asserting that "even a modest review of the national media or academic publications" makes implausible any claim that "the silencing effects of pornography and hate speech produce systematic distortions in public discourse").

137. See *id.* at 1519. Fiss's account also raises the possibility within a free speech paradigm that the presence of hate speech regulation chills or silences other speech, both by members of protected groups and others.

138. Likewise affected might be the system's capacity to engender habits of tolerance. See Lee C. Bollinger, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

139. That is, if a legislature intends not to increase the freedom of speech for members of minority groups but rather to discourage expression of racist ideas or to advance the substantive social equality of discriminated against groups, Fiss, as I understand him, would nonetheless uphold the regulation if an independent adjudicator found that its effect would be to increase speech opportunities for minority group members. See FISS, *LIBERALISM DIVIDED*, *supra* note 8, at 123. Although Fiss has framed the primary purpose of the First Amendment as promoting robust expression in pursuit of self-government (rather than as primarily concerned with preventing self-interested behavior by existing governments or majorities from stifling discourse),

analysis of what groups would be particularly silenced by group-based aspersions, one might want legislative involvement in such a complex inquiry. Yet if the judicial doctrine is unconcerned with what the legislature's actual purpose is, how likely is it that legislatures will have carefully considered whether one group rather than another needs the extraordinary protection of speech suppression in order to facilitate their speech? As Fiss recognizes, his argument depends on "specific facts and context," turning on "a judgment as to whether the speech that is being regulated has a silencing effect and whether the robustness of public debate will be advanced by the state choosing the side that it does."¹⁴⁰ To the extent that this finding does depend on social facts, legislatures might be thought to have either special competence, or as much competence, as courts and thus one might want to craft doctrine in such a way as to ensure that some legislative attention was devoted to this.

Finally (and for my purposes most important): If the "silencing effect of words do not depend simply on their context but also on the social standing of those who hear them,"¹⁴¹ then the temptation to engage in backdoor equality work in service of the First Amendment is likely to be large indeed for both legislatures and courts. If a group's social status is subordinated, will it not ipso follow that hate speech directed their way will be deemed to be "silencing"?¹⁴² But if the inquiry into "silencing" is really an inquiry into subordination, it is hard to see how Fissian freedom under the First Amendment is not also "really" about the state's positive duty to "equally protect" its members. Put another way, the social and political degradation of a group will in some ways always have a range of effects across many areas including communications and expression. These "secondary effects" of regimes of subordination, in Fiss's view, justify regulation of speech because it can be said that the regulation is in service of more robust speech.

Reliance on the positive secondary speech effects of a suppression

he also believes that interventions should not be designed to suppress communication of ideas but to increase the range of ideas in public discourse. *See id.* at 59-66.

140. FISS, *LIBERALISM DIVIDED*, *supra* note 8, at 119.

141. *Id.*

142. It is at times unclear in Fiss's account whether the silencing effect is to be determined based on the particular individual victims involved or on the group of which they are a member, though I think he generally means the latter. Note that an individual who reports and protests such hate speech, but then also moves out of the neighborhood, has not been "silenced" but has been socially degraded in that he/she was harassed out of his/her chosen residence. If the inquiry is not done on a group basis, it is almost impossible to imagine how one could administer the scheme; if it is, then it seems likely that the question of subordination will be central to the question of silencing. But if it is sufficient to say that a socially degraded group member's speech will not be heard with the attention it would if the group were not subordinate, then the inquiry actually seems to depend more on "equality" concerns than on speech concerns.

of speech is an awfully blunt blade without some further limitation of the scope of its force. For example, permitting speakers in town squares (Kalven's paradigm) might drive some people out of the square — people for whom the shouting harangue creates an unpleasant environment for the exercise of "robust" but quiet speech about politics. Would we increase the "freedom of speech" overall by prohibiting speech corner haranguers? If the question were to be answered sociologically, we would need to know how many people would be attracted into more political speech by the street corner speaker than would be repelled. But surely that should not be the measure of the street corner speakers' rights, nor is it what is motivating Fiss's argument. Rather, I think Fiss's argument is motivated by conditions of group subordination, conditions that seem more fundamentally the province of our commitment to equality than our commitment to free speech, and conditions that provide more coherent limitations on the Fiss-ian argument for government regulation of speech.

So while I applaud Fiss's effort to invigorate the idea of freedom of speech within a doctrinal framework for government interventions on behalf of more freedom of speech, I do not think that his framework can be made to work without underlying commitments to the social and political equality of groups, commitments I share but which are far more integrally tied up with equality norms than with freedom of speech. Candor and clarity of analysis will be better served by more openly bringing into tension and balance these deep constitutional commitments — to freedom of speech and to human equality. And it may be (in part) the chronological "firstness" of the First Amendment that prevents us from seeing how to accomplish this balancing.

In order to give appropriate weight to freedom of speech and the equality of national citizenship in resolving the constitutionality of statutes prohibiting forms of "hate speech," I see no real escape from an inquiry into the relative value of the speech that the state seeks to prohibit in the interests of racial equality and the context in which the regulation arises. Given risks of censorship, confining allowable regulation to "fighting words" or "personally insulting invective" may well be necessary in order to avoid suppression of arguably legitimate inquiry and political dialogue. But within the confines of "fighting words" and invective — that is, words designed to provoke a violent (or, I would argue, incapacitated) reaction by its addressees in a context unlikely to allow, invite or even contemplate a reasoned response¹⁴³ — an appropri-

143. For reasons developed in feminist and critical race literature, a definition that focuses too narrowly on words' propensities to provoke violence from particular addressees may fail to include speech of equally low value and equivalent capacity for social harm that incapacitates its

ate balance of equality and free speech norms might well support a different judgment on the First Amendment question than that to which a majority of the Court came in *R.A.V.*¹⁴⁴

The importance of a contextualized analysis helps explain why some of the reasoning in *R.A.V.* is so inapposite. Justice Scalia analogizes the St. Paul hate speech law to an obscenity statute that applied only to anti-government comments.¹⁴⁵ Discrimination in punishing obscenity, or hate speech, based on whether the victim was anti-government, or Democrat or Republican, is directly contrary to the “checking” function of elections and the freedom of political speech that virtually all agree the First Amendment protects.¹⁴⁶ Justice White says such a rule would “unquestionably fail” equal protection rationality problem.¹⁴⁷ But there is nothing irrational about a government in power seeking to suppress criticism of its policies — the problem is that the “end” is illegitimate, and it is illegitimate because allowing a government in power to take such action interferes with the ability of the electoral process to perform its checking and legitimating functions. Thus, the most direct problem with such a statute is that it interferes with the legitimate basis of government — freedom of people to criticize their governors and make different choices in the next election. Even if the Constitution had neither a First Amendment nor an Equal Protection Clause, a constitutional court in a representative democracy would (and should) strike down such a statute.¹⁴⁸

immediate addresses through paralyzing shock, humiliation and incapacity to speak. See, e.g., Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 561-63 (1993); Lawrence, *supra* note 61, at 458-66; Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9-10 (1989); Note: The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Internment, 106 HARV. L. REV. 1129, 1133-34 (1993).

144. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). This Essay does not address nor seek to resolve all of the First Amendment issues presented by the St. Paul ordinance, including those addressed in Justice White's concurring opinion. See *R.A.V.*, 505 U.S. at 397, 411-14 (White, J., concurring in the judgment) (finding the ordinance overbroad and hence unconstitutional under the First Amendment). A full treatment might also need to consider whether institutional factors, such as the decentralized character of U.S. judicial review, see *infra* text accompanying notes 201-06, 219, bear on the correct resolution of the constitutionality of such an ordinance.

145. *Id.* at 384 (upholding the hate speech prohibition there at issue would “mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.”).

146. In an earlier piece, I have characterized the constitutional functions of elections as checking those already in power, choosing members of the government, and legitimating the governing capacities of those so chosen. See Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299.

147. *R.A.V.*, 505 U.S. at 406 (White, J., concurring).

148. See Jackson, *supra* note 35, at 310-27.

A statute that protects members of subordinated minority groups from invective based on their group status, in a sufficiently narrowly crafted statute, however, does not on its face single out speech based on whether it is pro- or anti-government, nor does it bear any significant risk of suppressing anti-government criticism. It imposes only a small limit on the exchange of ideas. It may contribute (a question of constitutional significance would be how significantly) to the ability of members of those groups to function on terms and with a sense of equality toward other members of the polity.¹⁴⁹ If such a statute were to be justified, it seems to me that it must rise or fall on the norm of equality (not "silencing"): People's right to be protected from subordination based on their race, gender, or religion, should not depend on whether they have something to say; it should depend on their being human beings.¹⁵⁰

How does a constitutional court make law in accommodating, reconciling or harmonizing values of equality and values of freedom of expression? There are a number of approaches, in addition to the categorical rule-based approach to freedom of expression used in the United States. For example, in Canada, and in a number of other constitutional systems, a basic tool of constitutional analysis is "proportionality."¹⁵¹ Consider the Canadian Supreme Court's analysis in *R. v. Keegstra*,¹⁵² which begins with all of the Justices in agreement that the challenged

149. A key point as well would be how narrowly drafted a "hate speech" statute is, because of the evident risks of deterring protected speech and of misuse of a loosely drafted statute. One possibility would be to follow Professor Fiss's lead and permit the restriction of hate speech directed at any group subordinated on the basis of categories that are constitutionally suspect—including race, religion, creed, gender, and (perhaps by now) sexual orientation. A different possibility is to follow what I take to be Germany's model on the Holocaust denial, and ground doctrine upholding hate speech directed against African-Americans in the unique national shame of slavery. There is a more than plausible basis for upholding more vigorous rules prohibiting hate speech directed at African-Americans, as remnants or "badges" of slavery. Cf. Amar, *supra* note 40, at 157 (suggesting Thirteenth Amendment basis to uphold state prosecution in *R.A.V.*). But it is not my purpose here to resolve either the issue in *R.A.V.* or to design a constitutional hate speech statute, but rather to suggest that it may not be necessary in the United States to avoid constitutional analysis that frankly acknowledges the equality interest at stake.

150. In *Virginia v. Black*, 123 S. Ct. 1536 (2003), the Court upheld in part a Virginia law that made it a criminal offense to burn a cross with intent to intimidate. In these opinions, the relationship between cross burning and racial violence was accepted as a historically sound basis for the statute's specifically singling out one form of symbolic expression as also closely associated with threats of violence.

151. On its use elsewhere, including Germany, and for preliminary consideration of its attractions and risks in the United States, see Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999); Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284 (1998). I use Canada here because it is highly accessible and in English.

152. [1990] 3 S.C. R. 697 (Supreme Court of Canada) (upholding conviction of anti-Semitic high school teacher who required students to parrot his views, under law prohibiting "willful promotion of hatred" against identifiable groups through non private communication).

statute infringed the "freedom of expression" secured by Charter section 2.¹⁵³ A question then arises under the Canadian Charter whether the statute's restriction was reasonable and "demonstrably justified in a free and democratic society."¹⁵⁴ This question, in turn, has two major components. The first asks whether the goal of the statute is itself consistent with Charter values and of "sufficient importance" to warrant some infringement on Charter rights. The court was also unanimous in concluding that the statute's goal was legitimate and of sufficient importance to warrant infringement of Charter rights.¹⁵⁵ The final phase of analysis is referred to as a three-step "proportionality" analysis. First, it asks whether the statute "rationally" fostered its legitimate goal. On this, the *Keegstra* court was again in agreement that it did so.¹⁵⁶ The disagreement arose in applying the other elements of proportionality analysis. Does the law "impair as little as possible," or as little as reasonably possible, the right or freedom in question,¹⁵⁷ a question that incorporates a "margin of appreciation."¹⁵⁸ The Justices in *Keegstra* divided on this point, and on the final question of the "proportionality between the effects of the [challenged] measures . . . and the objective which has been identified as of 'sufficient' importance."¹⁵⁹ This inquiry, the Canadian court has said, includes an attempt to determine

153. Constitution Act, 1982 (Can.), pt. 1, Canadian Charter of Rights and Freedoms, § 2.

154. *Id.* § 1.

155. *Keegstra*, 3 S.C.R. at 758, 787 (Dickson, J.); *id.* at 846-48 (McLachlin, J., dissenting); *see also id.* at 812 (McLachlin, J., dissenting). The majority specifically noted that eradicating racial and religiously based hatred was consistent with the Charter's goal of equality, under section 15 (which prohibits discrimination by the government and specifically preserves the government's authority to provide for affirmative action programs) and Charter section 27, which provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *Id.* at 756-58. These two provisions in the Canadian Charter are quite different from anything in the U.S. Constitution. Arguably, they provide a firmer textual basis for the court's conclusion in *Keegstra* (though not in the judgment of the Canadian dissenters).

156. It is not clear that the minimal rationality step in practice plays a role independent of the "legitimate and sufficiently important objective" inquiry other than to screen statutes so poorly designed to achieve a particular goal as to raise doubts whether the objective was actually intended.

157. *See Keegstra*, 3 S.C.R. at 846, *relying on* *R. v. Oakes*, [1986] S.C.R. 103, 139; *see also* *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, 772-73 (Dickson, C.J.) (asking whether challenged law abridges protected freedom "as little as is reasonably possible," and considering whether there is some "reasonable alternative scheme" that would allow the province to achieve its goals with fewer detrimental effects on religious freedom). *Cf.* Paul Horowitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 *UNIV. TORONTO FACULTY L. REV.* 1, 34 (1996) (treating *Edwards Books* as a relaxation of *Oakes*'s minimal impairment standard).

158. *Irwin Toy Ltd v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 999. The margin of appreciation, it has been argued, helps to avoid the difficulties of a U.S. style "least drastic means" test, given that it is often possible to imagine a "less drastic means." *See HOGG, supra* note 109, at § 35.11(b).

159. *Oakes*, [1986] 1 S.C.R. 103, 139.

the "proportionality between the deleterious and the salutary effects of the measures."¹⁶⁰

The core of the disagreement was over the beneficial effects of a hate speech law in promoting equality and the potential adverse effects on protected speech. The dissent was concerned that the effects of hate speech laws and prosecutions might be to glamorize the hatemongers in the eyes of the public (noting the inefficacy of hate speech prosecutions in Weimar Germany);¹⁶¹ the dissent noted as well instances of overbroad and inappropriate application of the laws by executive branch officials.¹⁶² The majority, however, concluded that the hate speech prohibition was likely to be efficacious in expressing severe disapproval of the conduct, thereby providing support to victims and expressing to the rest of Canada the need to condemn and avoid such conduct.¹⁶³ The hate speech statute was a "means by which the values beneficial to a free and democratic society can be publicized."¹⁶⁴ In response to the dissent's concern that the statute would result in the prosecution (and deterrence) of protected speech, the majority emphasized the *mens rea* requirement of willfulness, the limitation of the statute to public speech, and the availability of statutory defenses, including defenses of good faith or reasonable belief.¹⁶⁵ The majority noted with concern specific incidents relied on by the dissent to show the overbroad nature of the statute, but forcefully said that these were mistakes.¹⁶⁶ The majority acknowledged that "one of the strongest arguments" against upholding the hate speech statute was that a criminal prohibition was not necessary to accomplish the government's legitimate ends.¹⁶⁷ Recognizing that there were other

160. *Dagenais v. CBC*, [1994] S.C.R. 835, 889. I want to note here my debt to Professor Hogg's treatise for its helpful summary of the Canadian case law on which I relied in significant measure in writing the above paragraph. See HOGG, *supra* note 109, at §§ 35.8-35.12.

161. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 854 (McLachlin, J. dissenting).

162. *Id.* at 859 (McLachlin, J., dissenting).

163. *Keegstra*, 3 S.C.R. at 769-70.

164. *Id.* at 769.

165. Defenses include truth, or that the defendant "in good faith, expressed or attempted to establish by argument an opinion on a religious subject; [or] (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true." *Id.* at 715-16.

166. "That s. 319(2) may in the past have led authorities to restrict expression offering valuable contributions to the arts, education or politics in Canada is surely worrying. I hope, however, that my comments as to the scope of the provision make it obvious that only the most intentionally extreme forms of expression will find a place within s. 319(2). In this light, one can safely say that the incidents mentioned above illustrate not over-expansive breadth and vagueness in the law, but rather actions by the state which cannot be lawfully taken pursuant to s. 319(2). The possibility of illegal police harassment clearly has minimal bearing on the proportionality of hate propaganda legislation to legitimate Parliamentary objectives, and hence the argument based on such harassment can be rejected." *Id.* at 783.

167. *Id.* at 783-84.

ways in which condemnation and support could be shown, the court said that the proportionality test should not be read to make impermissible use of a strong means merely because less intrusive means were available, and concluded that the standard of "minimal impairment" was met because:

[T]here may equally be circumstances in which the more confrontational response of criminal prosecution is best suited to punish a recalcitrant hate-monger. To send out a strong message of condemnation, both reinforcing the values underlying s. 319(2) and deterring the few individuals who would harm target group members and the larger community by intentionally communicating hate propaganda, will occasionally require use of the criminal law.¹⁶⁸

I have discussed these opinions in *Keegstra* as an illustration of how a different kind of analysis might take place, one that candidly seeks to reconcile competing constitutional values under the discipline of a set of questions that require judgments of relative harms and benefits, in which a categorization of both the speech and the regulation plays a part — but only a part — in the analysis. I find much of value in both sides in *Keegstra*. Indeed, the majority's emphasis on the efficacy of a criminal statute in publicizing the government's disapproval of hate motivated speech suggests that, in thinking about how to reconcile free speech with equality, more government speech against hate speech would be an important (and perhaps better, because less liberty restricting) alternative, to the criminal prohibition. If the government's purpose is to provide support for victims and educate the public about the dangers of such speech, part of the proportionality analysis might well look at the efficacy of government speech, as compared to government prohibition of private speech, toward these ends.¹⁶⁹ Condemnation by indi-

168. See *id.* at 785. An American lawyer's reaction to these forms of reasoning might be that the discussion was not about law but about policy. A Canadian sympathetic to the court's jurisprudence might respond that the discussion concerned disagreement about the implementation of constitutional values. In the end, through a "proportionality" analysis, the court clearly upheld the statute and the conviction of a hatemongering public-school teacher who taught his students to repeat anti-Semitic dogma in their school work. In a later case, the court made clear that the limitations on government suppression of hate speech embedded in proportionality analysis had some force. In *Attis v. Bd. of Sch. Trs.*, [1996] 1 S.C.R. 825 (Can.), the court was faced with non-criminal, administrative sanction of a school teacher who, off duty, circulated pamphlets arguing that "Christian civilization was being undermined and destroyed by an international Jewish conspiracy." *Id.* at 836-37. The court upheld a disciplinary order that the teacher be moved out of the classroom to an administrative posting, but held that it violated the Charter to prohibit the teacher permanently from circulating such materials while still a school employee.

169. Many scholars have concluded that government funding of one-sided speech is permissible on relatively uncontroversial subjects. See, e.g., SUNSTEIN, *supra* note 56, at 229-31; Kagan, *supra* note 135, at 75 (suggesting permissibility of government funding of speech on one side of an issue, where the question has a verifiable answer, the harm associated with the position the government opposes is great and there is a substantial consensus on the issue); Robert C. Post,

vidual government officials or even by government bodies of hate speech might be practices that Owen Fiss might call "constitutionally favored,"¹⁷⁰ or that I might call "pro-constitutional."¹⁷¹ Also noteworthy is the Canadian jurisprudence's sensitivity to the nature of the remedy, a sensitivity often lacking in U.S. decisions.¹⁷² Thus, in *Attis v. Board of School Trustees*,¹⁷³ the Canadian court held that an employee could be removed from a teaching position and reassigned in light of his off-duty, anti-Semitic speech, but he could not be barred from speech for the duration of his government employ, the latter sanction being disproportional. This more fine-tuned approach seems at least to attempt to give weight both to the equality interests sought to be served by prohibitions of hate speech and to the free expression interests of the speaker.

My goal here is not to decide the constitutionality of particular hate speech prohibitions but rather to suggest that U.S. constitutional decisions on this problem should more frankly engage the constitutional interests in equality that are entailed and acknowledge the difficulty of the problem of reconciling freedom of expression with constitutionally sanctioned efforts to promote racial and other forms of equality. In these respects, the Court's opinion in *R.A.V.* failed. Whether to sustain regulation of hate speech is a difficult question, I think, no matter what

Subsidized Speech, 106 YALE L.J. 151, 186-87 (1996) (approving funding limitations based on "shared values" but not those that are more partisan). Fiss's view would differ, I think, since he has argued that funding allocation decisions, e.g., in the arts, should be made based on criteria to increase exposure to relatively less popular or available ideas. FISS, IRONY, *supra* note 8, at 44-45. For yet another view, see Abner Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001); Abner Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000) (arguing that government may use funds to advocate particular vision of the good, even if controversial, so long as government does not monopolize debate or hide true source of messages).

170. FISS, IRONY, *supra* note 8, at 48-49 (describing the "constitutionally favored" as "an intermediate category lying between the permissible and the obligatory").

171. See Jackson, *The Invisible Constitution* (Apr. 2002) (unpublished manuscript on file with author).

172. *But cf.* Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2567-68 (2003) (Breyer, J., dissenting from dismissal of certiorari as improvidently granted) (arguing that allocation of private attorney general power distinctively threatens First Amendment values). I should note that Fiss has argued that, for First Amendment purposes, distinctions between criminal sanctions and allocative decisions are for the most part not relevant. FISS, IRONY, *supra* note 8, at 34-35 (discussing arts funding and suggesting that both nonallocation and prohibition are "silencing" of disfavored speech). I disagree. U.S. First Amendment law will, I think, need to develop a more contextualized approach, perhaps embracing "proportionality" analysis, in order to accommodate itself to a world information economy that is unconstrained by national boundaries and in which the facilities of copying, aggregating, and disseminating information is so much greater than in the past, see, e.g., Adam Liptak, *A Web Site Causes Unease in Police*, N.Y. TIMES, July 12, 2003, at A12 (describing concern over publication of names, addresses and Social Security numbers of police officers), that the costs of more categorical approaches will become unsustainable. See Vicki C. Jackson, *Proportionality and the Constitution* (unpublished manuscript on file with author).

173. [1996] 1 S.C.R. 825 (Can.). See *supra* note 168.

system of analysis is used. In light of the possible efficacy of more government speech in opposition, and the risks of misuse of prohibitory statutes,¹⁷⁴ there is a real question whether criminal prohibitions can be justified; they are a very powerful tool to place in government hands. On the other hand, hate speech is not only of very low value in terms of any plausible First Amendment interests, but it also inflicts high injuries to the equal human dignity of its victims. The First Amendment's capacity to protect dissent and disagreement may not be well served by expanding the scope of its coverage to areas of very low value speech, like racial insults.

In *Virginia v. Black*,¹⁷⁵ the issue was the constitutionality of a statute prohibiting cross burning in public places or on another's property without consent, with the intent to intimidate a person or group of persons; the statute also made burning a cross "prima facie" evidence of an intent to intimidate. Relying on *R.A.V.*, the Virginia Supreme Court struck down the statute on the ground that it discriminated among expressive acts based on their content.¹⁷⁶ Although one might have thought that *R.A.V.* meant that while all forms of intimidating threats could be punished, it would be impermissible to single out the burning of particular items based on their symbolic message, the Court distinguished between the fighting words category at issue in *R.A.V.* and the threats of violence to which they found the Virginia statute directed. The Court reasoned that "true threats"¹⁷⁷ can be prohibited without vio-

174. For a claim that prosecutions under hate speech statutes risk being directed at members of minority groups for hate speech directed against majorities, see Nathan Courtney, *British and United States Hate Speech Legislation: A Comparison*, 19 BROOK. J. INT'L L. 727, 738-40, 762-63 (1993) (concluding that Great Britain's racial incitement laws, "though enacted for laudable reason, have been used to silence those they were seeking to protect"). For reports of attempted suppression of gay/lesbian literature in Canada under its pornography statute, see Sarah Lyall, *Canada's Morals Police: Serious Books at Risk?* N.Y. TIMES, Dec. 13, 1993, at A8; Mary Williams Walsh, *Chill Hits Canada's Porn Law*, L.A. TIMES, Sept. 6 1993, at A1. See also Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1116-20, 1141, 1142-72 (1993).

175. 123 S. Ct. 1536 (2003).

176. *R.A.V.* was a difficult precedent for the petitioners, as illustrated by the following passage from an amicus brief filed by the Anti-Defamation League et al. on behalf of neither party:

Under the scheme of § 18.2-423, it does not matter what substantive message a defendant intended to convey by burning a cross. While choosing a symbol that Americans uniformly view as emblematic of racial and religious hatred, the legislature did not choose to punish the mere expression of hatred. It rather chose to punish expression only when it crosses the constitutional line into assaultive speech and is accompanied by the intent to instill serious fear in those exposed to the message.

Brief of Amicus Curiae Anti-Defamation League et al. at *16, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107), available at 2002 WL 1870239.

177. *Black*, 123 S. Ct. at 1547-48. Is there a difference in the degree of harm to be expected from fighting words — expressive conduct that is likely to provoke violent responses — and

lating the First Amendment and that, given their historic linkage with violence, cross burnings could be singled out for prohibition as a particularly virulent example of the very reason that the category of true threats could be prohibited in the first place.¹⁷⁸

Justice O'Connor's opinion for the Court manifests an odd ambivalence toward social context and the history of prejudice and violence against disliked minority groups. On the one hand, the Court reviewed the history of cross burning and its linkage to Ku Klux Klan violence against African-Americans, Jews and immigrant groups, and concluded that the burning cross is "a symbol of hate," apparently to reinforce the appropriateness of singling out that particular symbol.¹⁷⁹ Yet after establishing the symbolic message of hatred exhibited by burning a cross, the Court then proceeded to treat the burning cross as a message-neutral form of intimidation, apparently concluding that the burning cross was legitimately singled out in the statute, not because of its message of racial and religious inferiority, but simply because of its message of intended violence.¹⁸⁰ Choosing this one symbol was permissible, the Court said, because it was a "particularly virulent form of intimidation"; Virginia need not prohibit "all intimidating messages . . . in light of cross burning's long and pernicious history as a signal of impending violence" — a history, however, that strongly suggested its association with a message of racial hatred and subordination.¹⁸¹

intimidation (expressive conduct that instills fear of violence from the speaker) that would support a relaxation of First Amendment concerns for content discrimination? Although that is not what the Court said, in its reference to "true threats" perhaps some comparison with the hate speech statute in *St. Paul* was implicit.

178. *Id.* at 1538, 1549-50. A similar argument, however, could have been made about the proscribed categories of "fighting words" at issue in *R.A.V.*

179. *Id.* at 1546. "Hatred," it should be noted, is a feeling typically directed at particular persons or groups, and the singling out of this particular symbol could be seen to raise issues like those that concerned the Court in *R.A.V.* See *Black*, 123 S. Ct. at 1559 (Souter, J., concurring in part, dissenting in part). At oral argument in *Virginia v. Black*, Justice Thomas asked counsel, "Aren't you understating the effects of the burning cross? We had almost 100 years of lynching . . . and this was a reign of terror and the cross was a symbol of that reign of terror" and added that cross burning is "unlike any symbol in our society." 2002 U.S. TRANS LEXIS 74, at *20-21 (U.S. Sup. Ct., Dec. 11, 2002). In his separate opinion, Justice Thomas argued that the statute involved no regulation of speech at all, but only of conduct. *Black*, 123 S. Ct. at 1565-66 (Thomas, J., dissenting).

180. See *Black*, 123 S. Ct. at 1549 ("It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion" or political affiliation, union membership, or homosexuality.); see also *id.* at 1564 (Thomas, J., dissenting) (suggesting that a white family would feel as threatened to see a burning cross on its yard as would a black family). Although it is surely correct that a burning cross on one's property would properly be understood as a threat of violence, it also would be understood in the United States as a distinctively racialized threat.

181. *Id.* at 1549; see *id.* at 1544-46. Justice Thomas argued, however, that because the statute prohibiting cross burnings was originally enacted by the State of Virginia at a time when Virginia

The majority in *Virginia v. Black* appears to uphold government power to prohibit forms of symbolic expression if they are peculiarly likely to be followed by physical violence and if the government must also prove that, in light of all the circumstances, the symbolic expression is intended as a threat.¹⁸² Despite its recognition of the historical association of the burning cross with violence and intimidation directed at racial and religious minority groups, the Court did not explicitly link its analysis of the free speech issue in the case with any governmental interest in promoting equality.¹⁸³ There was thus a lost opportunity for an opinion that would acknowledge not only the violence but the harms to our constitutional commitments to equality that such symbolic expression presents. However, the Court's willingness to consider history and context in giving meaning to particular symbols and its emphasis on more individualized, contextualized decision-making in the First Amendment area are noteworthy departures from *R.A.V.*'s more categorical rule-based approach, suggesting perhaps some convergence with the Canadian and German decision-making models described earlier.

B. Campaign Finance and Speech

Owen Fiss has extended his analysis to a number of important free speech issues, including campaign finance, which relates to claims for racial equality (at best) only indirectly.¹⁸⁴ But more generally, equality of participation in the electoral process is in some ways a central problem for the constitutionality of campaign finance regulation. In *Buckley*, the Supreme Court asserted that it is not a legitimate end of campaign finance regulation to increase equality in the electoral process by sup-

required the segregation of the races by law, it was plainly not the racism, but the violence associated with cross burnings, that Virginia was seeking to regulate. *Id.* at 1565-66 (Thomas, J., dissenting).

182. See *id.* at 1541, 1547-49. Note the resonances between Justice O'Connor's treatment of the burning cross — under her analysis for the Court it can be one factor, but not the only factor, in establishing a threat — and her opinion for the Court in *Grutter*, in which she held that universities may consider race, but only as one among many factors to be individually determined, in admissions. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2342 (2003). The operation of a more contextualized balancing approach to difficult constitutional questions is apparent in both of these decisions.

183. But cf. *Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting) (quoting work describing the Klan's opposition to racial equality). Nor did the Court conclude that cross burning is, in the United States, like denying the Holocaust — a form of expression that is so inconsistent with the dignity of a formerly subjugated minority group that commitments to equality for members of that group in the polity justify a limitation on such "speech."

184. For an argument that the Court's election-related decisions have an adverse impact on African-American voters, see Spencer Overton, *But Some Are More Equal: Race, Exclusion and Campaign Finance*, 80 TEX. L. REV. 987 (2002); see also Miles Rapoport & Jason Tarricone, *Election Reform's Next Phase: A Broad Democracy Agenda and the Need for a Movement*, 9 GEO. J. ON POVERTY L. & POL'Y 379, 397-98 (2002).

pressing the “speech” (i.e., expenditures for political speech) of some to increase the opportunities for others.¹⁸⁵ This statement assumes, without explanation, that the Fourteenth Amendment’s commitments to equality — whose effects are seen in decisions invalidating segregated schools, whether under federal or state control, or in “one-person, one-vote” decisions applied both to state legislatures and congressional districting — do not affect constitutional analysis of speech related to elections. The question of holistic interpretation is whether *Buckley* is not mistaken in viewing First Amendment free speech values as unaffected by our increased commitment both to the equality of persons generally and to the centrality of elections conducted in accordance with one-person, one-vote principles.¹⁸⁶

Elections, unlike many other settings of free speech, take place only within a structure determined by the government. Fiss’s vision of the state as a “friend” to freedom of expression has particular salience here, because it is obvious that the government needs to act affirmatively to facilitate the conduct of elections (an activity that is about both voting and speech). Campaign finance regulation, even if formally neutral, may have different effects on political parties or candidates supported by wealthier individuals than on political parties supported by the less wealthy,¹⁸⁷ and may also structure how difficult it is for new political

185. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (rejecting argument, made in support of expenditure limits, of government interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections,” because “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”). Regulation of campaign finance differs from regulation of hate speech across important First Amendment categories. Governmental viewpoint and content neutrality is of utmost importance in elections for political representatives. See e.g., *Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J., concurring) (obligation of the “state itself” to remain neutral as to “issues or candidates”). For an elected body, like a city council or the House of Representatives, to adopt a resolution condemning cross burnings, or racist speech, or to fund public programs promoting tolerance, is one thing; for a sitting government to endorse or expend public funds for a particular candidate for office is quite different. Moreover, campaign finance regulation, even when formally neutral, always presents some possibility for discrimination, in effect, since it is enacted by a political process that is by definition in the control of incumbents, a factor that contributes to the difficulty of the constitutional issues such laws present.

186. Fiss’s important argument — that in campaign finance we could see the government as the “parliamentarian” assuring that all important sides are heard in public debate — does not necessarily require resort to human equality norms; Not all sides get equal time in the frequently poly-sided problems dealt with in “town hall” meetings or legislative bodies. But in terms of the “content” of campaign finance regulation, we need some set of substantive principles to tell us why we may want to restrict some financing of some speech; a starting point that is constitutionally grounded lies in the fundamental equality of each person’s entitlement to participate in selecting political leaders through his or her vote.

187. For a range of perspectives on the relationship between wealth, money, markets and elections, see, e.g., BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002); Richard Briffault, *Point/Counterpoint: Public Funding and*

parties to make a difference. Thus, even were one to accept that promoting equality of participation is a legitimate end of regulation, the interpretive decisions would be difficult.¹⁸⁸

As noted above, Canadian constitutional law seems willing to uphold fairly stringent limitations on independent expenditures (and party expenditures) in order to prevent “undue” wealth influence and focus on money raising in elections.¹⁸⁹ German constitutional law arguably requires some sensitivity to the wealth effects of different forms of regulation, in order to avoid adding to the advantages enjoyed by the wealthier.¹⁹⁰ In both countries, then, it appears to be an accepted constitutional value that the government can intervene — within important limits¹⁹¹ — in order to promote more equal access to political influence in elections, as well as equal voting power.¹⁹²

Drawing clear conclusions about the constitutionality of particular

Democratic Elections, 148 U. PA. L. REV. 563, 573-79 (1999); Edward B. Foley, *Equal-Dollar-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Pamela Karlan & Samuel Issacharoff, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893 (1998); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994); Jamin Raskin & John Bonifaz, *The Wealth Primary*, 11 YALE L. & POL'Y REV. 2 (1993).

188. See *supra* note 185 (on the possibility of partisan discrimination in campaign finance legislation).

189. See *supra* text accompanying notes 76-89 (discussing *Libman* and *Bowman* cases).

190. See KOMMERS, *supra* note 94, at 53-54, 201-15 (*Party Finance* cases); for further discussion, see Samuel Issacharoff & Richard H. Pildes, *Law and the Political Process, Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 690-97 (1998).

191. The German court has emphasized that public funding cannot be at such a level as to diminish party incentives to gather financial support from citizens. See KOMMERS, *supra* note 94, at 214-15; Issacharoff & Pildes, *supra* note 190, at 696-97.

192. Although major restrictions on campaigns and political committees in fundraising, expenditures and contributions have been recently upheld by the U. S. Court, the Court did so primarily on the asserted rationales of preventing corruption and the appearance thereof, see, e.g., *McConnell v. FEC*, 124 S. Ct. at 656 (explaining reasons for contributions limits); the Court has not disavowed its assertion in *Buckley* that it is not legitimate for the government to seek, through campaign finance regulation, to equalize opportunities for influence in the political process, though its commitment to that position may be wavering, see, e.g., Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?* 85 MINN. L. REV. 1729, 1742 (2001) (noting that “to the extent that corruption includes the ‘undue influence’ of money over electoral outcomes, then the notion of corruption includes a significant component that reflects a concern about political inequality” and observing that “decisions after *Buckley* reflect the intermittent tendency of ‘corruption’ to morph into ‘inequality’”); see also Rick Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, Loyola Law School (Los Angeles) Public Law and Legal Theory, Research Paper No. 2004-1 (SSRN) (forthcoming 152 U. PA. L. REV. __ (2004)) (arguing that the Court is moving toward accepting a participatory self-government rationale for restrictions, as advocated in extrajudicial writings by Justice Breyer).

forms of campaign finance and election regulation is quite difficult,¹⁹³ however, and I do not do so here. There are at least three major problems for which recognition of the value of individual equality in campaign finance law does not provide ready answers. First, individuals have very different levels of desire to participate in political activity. Although each person only has one vote, not everyone votes, and some individuals may want to volunteer many hours of time to work for a particular candidate (just as some want to donate large sums of money), while others may have little or no interest in doing so. And even though the ability to donate time may be related to income or wealth, a regulatory regime that sought to equalize the impact of the more motivated with the impact of the less motivated by limiting the amount of time the more motivated could work on a political campaign could be an unwarranted interference with the liberty of the motivated to be more active. Second, the Constitution protects not only individual, but collective, associational efforts to speak on public issues, influence elections, and run candidates. Allowing aggregation in this way is not only constitutionally guaranteed but also necessary to a vibrant civil society. Aggregation means that some individual voices will be better heard than others, as some are more effective in aggregating. Crafting regulatory schemes that provide appropriate space for the exercise of associational freedoms in the election setting is thus a challenge not solved by mere invocation of equality as a norm.

Third, a major risk in election-related regulation is the risk of entrenchment by incumbents, or of major party efforts to exclude minority parties and independents.¹⁹⁴ If we focus for a moment on some of the risks of government abuse the First Amendment is called on to protect,¹⁹⁵ we might say that values of both freedom of expression and commitment to free popular elections caution that those in power may tend to perpetuate their own opportunities to stay in power, by suppressing opportunities for challenge. Since campaign finance reform is, in this country and a number of others, likely to remain under the active control of legislative decision-making and influence, risks of pro-incumbency provisions remain high. These risks — that campaign finance schemes

193. There is an extensive scholarly literature on this subject. For recent symposia, see, e.g., University of Richmond Symposium on BRUCE ACKERMAN & IAN AYERS, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE*, printed in 37 U. RICH. L. REV. (2003); Pamela S. Karlan, *Brennan Center Jorde Symposium on Constitutional Law: Elections and Change Under Voting with Dollars*, 91 Cal. L. Rev. 705 (2003); Symposium, *Baker v. Carr*, A Commemorative Symposium, 79 N.C. L. REV. (2001); see also *supra* note 187.

194. See generally Issacharoff & Pildes, *supra* note 174, at 688-89.

195. For helpful treatments, see, e.g., Vincent Blasi, *The Checking Function in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521; T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 534-40 (1978-79).

will be designed by those currently holding power and likely to be calculated to keep them in power — warrant some form of stringent review to make sure that results are opening up, and not closing down, political processes.¹⁹⁶ Thus, even were the Court to retreat from the *Buckley* position that equality is not a reason for regulation of campaign contributions, resolution of the appropriate limits to campaign regulation will be a difficult problem under any constitutional system committed to freedom of expression and free, fair and competitive voting.

IV. INSTITUTIONAL ROLES: WHEN JUDGES ARE ELECTED

The Court's 2001-02 Term involved another First Amendment issue raising institutional questions about the role of courts that implicates another longstanding concern of Owen Fiss's scholarship. In *Republican Party of Minnesota v. White*,¹⁹⁷ the Court struck down restrictions on the speech of candidates for judicial office that prohibited such candidates from stating their views on specific nonfanciful legal questions within the province of the court for which the candidate stood for election. The majority emphasized the importance of unfettered candidate speech in elections, relying on cases involving election for representative or executive office.¹⁹⁸ Although states need not use elections to choose judges, once a state decides to invoke the "energy and . . . legitimizing power" of an election, it must uphold the "First Amendment rights that attach to [the] roles" of candidate for public office.¹⁹⁹ This decision brings into focus two constitutional questions: The first concerns the institutional structure of the courts that decide constitutional questions; the second has to do with the role of categories in First Amendment law.

It is important to recognize the range of judges and juridical bodies in the United States that can decide constitutional questions, including those going to freedom of expression. Reliance on popularly elected judges is unusual (almost unheard of) in other Western constitutional democracies.²⁰⁰ Moreover, the United States is a populous country with

196. See, e.g., *Missouri v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 404 (Breyer, J., concurring) (arguing that Court should not defer to legislative approaches that "significantly increase[e] the reputation-related or media-related advantages of incumbency and thereby insulat[e] legislators from effective electoral challenge").

197. 536 U.S. 765 (2002).

198. See *id.* at 781-82, 783.

199. *Id.* at 788 (quoting Justice Marshall's dissent in *Renne v. Geary*, 501 U.S. 312, 349 (1991)).

200. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 849, 851 n. 9 (2001) ("The United States is all but alone in having judges stand for election;" noting that in some Swiss cantons and a few French municipalities judges are elected); see also HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF*

many judges. Not only is the corps of judges considerably larger than in either Germany or Canada,²⁰¹ but the jurisdiction of these courts is different. In Germany, only the Constitutional Court has the power to declare a law unconstitutional. In Canada, the Supreme Court's power of review over the provincial courts is greater than in the United States because of the Canadian court's authority to decide not only questions of federal law but also questions of provincial law, a power that may enable the court to resolve through statutory interpretation otherwise difficult constitutional questions.²⁰² Thus, both the range and the nature of judicial decision-makers are quite different as between these systems. The United States has far more judges with authority over constitutional questions than Canada or Germany, and the judges are selected in a larger variety of ways, yielding a less homogenous lower court judicial culture.

These differences, some might argue, would support a more categorical approach to freedom of expression issues²⁰³ — the idea here being that more formal categorical rules are more likely to be administered with consistency in a large and decentralized system than more nuanced, "balancing" approaches.²⁰⁴ Expressive freedoms (of parties to litigation as well as nonparties) may be thought to be particularly vulnerable to being adversely affected by erroneous decisions of lower court judges, as is suggested by the concern reflected in some First Amendment cases for the prospect of vague or broadly worded statutes having a "chilling effect" on constitutionally protected speech.²⁰⁵ Higher courts cannot always be counted on quickly to correct these errors, and thus, the reasoning goes, formal, bright line rules that may overprotect speech are the best practical accommodation to the possibilities of lower court error.

Although categorical rules may have advantages of administrability

THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE 23 (5th ed. 1986) ("Britain and France . . . [select judges by] appointment exclusively at all levels."); *but cf.* T. Leigh Anenson, *For Whom the Bell Tolls . . . Judicial Selection By Election in Latin America*, 4 SW. J. L. & TRADE AM. 261 (1997) (noting elections of justices of the peace in some Latin American countries and arguing in favor of electing judges in Latin America to fight corruption and enhance judicial legitimacy).

201. This is a point I have discussed over the years with Mark Tushnet, in connection with our collaboration on a course book and in teaching a course on Comparative Constitutional Law. I am indebted to him in more ways than I can remember for intellectual challenge and support.

202. See Martha Field, *Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107, 113-14 (Winter 1992).

203. See generally Kent Greenawalt, *Free Speech in the U.S. and Canada*, 55 LAW & CONTEMP. PROBS. 5 (Winter 1992) (on distinctively categorical U.S. approach).

204. See, e.g., Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 538-44 (1988).

205. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); see also *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972).

in a large and decentralized court system in which many courts exercise powers of constitutional review, there remains the question of what the most appropriate category is.²⁰⁶ In *Republican Party of Minnesota v. White*, the Court's attachment to existing constitutional categories "election" and "speech" outweighed arguments that the category "judge" was distinct from that of other elected representatives. These differences (recognized by widespread state practice),²⁰⁷ however, lent considerable support to restrictions on judicial candidate speech that are more stringent than those of candidates for non-judicial office. If one sees judges as representatives, they must see themselves as the representatives of all the people in interpreting the law, including the Constitution.²⁰⁸ All the people include those protected by rights against discrimination, and rights of fair criminal process, who may be persistent electoral minorities. Allowing judicial candidates to seek votes by implicit promises to ignore those rights is inconsistent with that representative role.²⁰⁹ Moreover, as the dissent argued, judges, in performing their central role of adjudication, are bound by due process norms of impartiality and fairness that do not apply to legislators.²¹⁰ A judge in office will predictably

206. The dissent in *Republican Party of Minnesota* accuses the majority of having adopted a categorical approach, essentially treating judicial elections like other elections for public office. See, e.g., 536 U.S. at 802 (Stevens, J., dissenting); 536 U.S. at 805-09 (Ginsburg, J., dissenting). But see 536 U.S. at 783 (writing for the Court, Justice Scalia states that, contrary to the dissents of Justices Stevens and Ginsburg, "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office"); but cf. *id.* at 793 (Kennedy, J., concurring) (arguing that because the "political speech of candidates is at the heart of the First Amendment . . . direct restrictions on the content of candidate speech are simply beyond the power of government to impose").

207. See 536 U.S. at 786 (stating that a majority of states now have some provisions governing judicial candidate speech); see also Brief of Amicus Curiae Conference of Chief Justices in Support of Respondents, *Republican Party of Minnesota v. Kelly*, 536 U.S. 765 (2002) (No. 01-521), available at 2002 WL 257559 (noting extensive practices, including resign-to-run-for-other-office provisions as well as limitations on speech, developed by states to enable elected judges to function with the independence and impartiality associated with judging and the demands of due process).

208. Cf. *Chisom v. Roemer*, 501 U.S. 380l, 410-11 (1991) (Scalia, J., dissenting) ("Surely the word 'representative' connotes one who is not only elected by the people, but who also, at a minimum, acts on behalf of the people. Judges do that in a sense — but not in the ordinary sense. As the captions of the pleadings in some States still display, it is the prosecutor who represents 'the People'; the judge represents the Law — which often requires him to rule against the People."); HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 116-18 (1967) (discussing concept of a representative as "acting for," in the sense of engaged in the activity of looking after the interests of a particular group; concluding that if one subscribes to "older jurisprudential doctrine, that the judge merely discovers and expounds the law," a judge does not "represent" a group; and suggesting that, rather than "acting for" those who choose the judge, a judge "represents justice," which "requires that he be free from other restraints").

209. I do not here address the adequacy of the procedures under the challenged law to determine the dividing line between permissible and prohibited speech by judicial candidates.

210. 536 U.S. at 803-04 (Ginsburg, J., dissenting). But cf. Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 255 (1976).

face questions of recusal or disqualification if she has spoken on issues pending before her extra-judicially in campaigning.²¹¹ The line between general statements of philosophy and more specific statements about legal issues might thus be understood as an effort to mediate the different senses in which a judge could be seen as a representative — as the electoral choice of a majority entitled to know something about the judge's views but also as the representative of the whole polity in assuring fairness to minority interests in adjudicatory decisions.

The Court did not grapple with this question, but rather came close to adopting a categorical approach in which judicial elections are indistinguishable from elections for representatives or executive office for purposes of the First Amendment.²¹² Reconciling the “due process” norms of impartiality and fairness of judgment with popular election of judges is a challenge, for the concepts are in some tension, representing different modes of what it might mean to be a public, judicial representative.²¹³ But the tension simply does not require an all or nothing

211. Popular election of judges may originally have been an effort to have less partisan control by the political branches over judicial selection, although in recent years it has been understood as a vehicle for popular influence or control of legal decisions. See Caleb Nelson, *A Reevaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993) (summarizing literature). Nelson argues that the main motivation for electing judges was to limit the power of existing governments by removing from executive or legislative control the power over judges. That is, he argues that it was not originally motivated by desire to have popular control of legal decisions but rather to avoid unhealthy concentrations of power in governors or legislators. See *id.* at 194-96, 203-07. See also Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-60*, 45 HISTORIAN 337, 343 (1983) (concluding that politically moderate lawyers controlled move in the ante-bellum period toward elected judiciaries in order to increase the status of the bench and the independence of judges). For competing views on the benefits of elections for judges, see, e.g., Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 105-06 (1998); Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149 (1998); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57 (1985).

212. Although Justice Scalia states that the Court is not going this far, see *Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002), the Court's decision was so read by the Eleventh Circuit in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (striking down the Georgia prohibition on false and misleading speech by judicial candidates because prohibition applied beyond misstatements made with actual malice). The Eleventh Circuit concluded that the implications of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), were that the same standard applied under the First Amendment to determine the validity of restrictions on judicial candidate's speech as that of candidates for nonjudicial office. *Id.* at 1320-22. It therefore adopted the actual malice standard of *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (reversing state invalidation of election where candidate innocently but incorrectly stated that he would take a lower salary than that required by law).

213. While there may be plausible arguments for popular voting for judges in terms of allowing people to choose a “Burke-ian” kind of “representative” in applying the law, arguments for allowing popular election of judges that treat judges as equivalent to representatives in a more “instructional” sense are troubling insofar as they further elide distinctions between everyday law

choice, between being “in” First Amendment protections if the activity is described as an election and “outside” if the activity is described as choosing a judge. What is mysterious is the way in which the categories “election” and “speech” had such power for the majority in this case, while the category of “judge” did not.

Why the state’s asserted interest in avoiding constitutional and role difficulties for elected judges arising out of campaign speech was not understood as compellingly in play here is somewhat mysterious.²¹⁴ Perhaps the case is another example of the power (could we say, the tyranny?) of the “firstness” of the First Amendment. But perhaps the majority’s view also relates to a decline in a belief in the special function of judges. Consider here Judith Resnik’s work emphasizing dramatic shifts in the (self) conception of federal judges.²¹⁵ If the federal judiciary now sees itself as more corporate in character,²¹⁶ and more administrative in function, does this contribute to a willingness generally to deny that the category “judge” has real distinctiveness from other categories of “public representatives?”²¹⁷

This decision seems like a step in the wrong direction, or a missed opportunity for more nuanced development of more appropriate categories. Indeed, the Court’s willingness to allow the further politicization of state judiciaries may undermine in the long run the ability of all courts — including the Supreme Court — to perform with the requisite degrees of independence and impartiality, actual and perceived.²¹⁸ While there may be more reasons for clear categorical lines in the United States because of its size and diversity at the judicial implementation stage, more contextualized analysis (perhaps benefiting from considering other nations’ approaches to proportionality), sensitive to the special role of courts in a constitutional democracy, can assist in defin-

and politics in ways that can depreciate the rule of law as a reliable and impartial form of justice. For different conceptions of the role of a representative, see generally PITKIN, *supra* note 208.

214. *Republican Party*, 536 U.S. at 775-83.

215. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Trial as Error, Jurisdiction as Inquiry: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) [hereinafter Resnik, *Trial as Error*]; cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (cautioning against move from adjudication to settlement)

216. See Resnik, *Trial as Error*, *supra* note 215, at 959-67 (describing and critiquing increased tendency of federal judges to speak, publicly, in a collective bureaucratic voice).

217. Cf. Richard Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and Ensuing Litigation*, 2000 SUP. CT. REV. 1, 60 (defending *Bush v. Gore* decision as “rough justice,” and possibly also “legal justice”).

218. Query, though, whether the decision might be understood as reinforcing the distinctive and hierarchically superior status of the federal Article III judiciary, by making it more difficult for the elected state court judiciaries to maintain modicums of the kind of appearance of impartiality and dignity that the federal courts expect for and of their own members.

ing what the appropriate categories are.²¹⁹

V. CLOSING THOUGHTS

In both Canada and Germany, there are some forms of speech constitutionally protected in the United States that can be constitutionally proscribed.²²⁰ Although it may be argued that proscriptions or limitations on speech must be understood in light of longstanding socio-legal commitments to a vision of human dignity that is less tolerant than that in the United States of offense and insult,²²¹ if the question is whether strong and competitive democracies with robust speech and counter-speech can coexist with the proscription of limited forms of speech based on its content, the answer from comparative constitutional analysis is yes. In many countries with strong traditions of democracy and protection of political and civil liberties, the government may punish some forms of hate-motivated speech. Indeed, in the U.S. tradition some such speech was proscribable into the 1950s. So the claim that it would be wholly inconsistent with U.S. constitutional commitments to reach a different result on the proscribability of hate speech is one that requires a response that goes beyond mere invocation of U.S. doctrine prohibiting content-based or viewpoint-based regulation of speech. At the same time, however, the U.S. free speech tradition is our constitutional tradition, and departures of too great a distance are not only unlikely but may tear at the pattern in ways that could have undesirable and perhaps unforeseeable effects.²²²

219. There are important institutional differences between the Supreme Court and the lower courts that might permit the Supreme Court to employ balancing, or proportionality analysis, in crafting categorical rules to be applied by lower courts. This Essay is already too long for such an analysis, but I briefly suggest that it would entail a weighing of the competing values of assuring information to a public in an election while preserving the judges' abilities (and the perception of their abilities) to decide cases fairly. *See also supra* note 172.

220. *See* Roger Errarra, *The Freedom of the Press: The United States, France and Other European Countries*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert J Rosenthal eds., 1990).

221. For a distinctive perspective, see Whitman, *supra* note 105, at 1285-86, 1313-32 (discussing how honor culture in Germany is rooted in a "tradition of social hierarchy," yielding modern laws not necessarily desirable or possible in the United States).

222. For example, German jurisprudence on the duty to provide for diversity in broadcasting appears to be fairly far removed from where U.S. law currently is. *See* KOMMERS, *supra* note 94, at 405 (translating Television Case of 1961 to say that article 5 of the Basic Law would permit a private broadcasting station if, *inter alia*, "its organization, like that of a public broadcasting company, offered sufficient assurance that all socially relevant interests would have the opportunity to express themselves"). The Fairness Doctrine, upheld in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) insofar as FCC regulations required radio stations to provide "free reply time" to persons who were politically attacked, more generally required coverage of "controversial issues" from "balanced perspectives," and was repealed in 1987 by the FCC. *See* Thomas W. Hazlitt, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation*

In considering adjustments at the margins of U.S. constitutional law, the Court might benefit from considering the more contextualized approaches of other Western democracies within the established doctrinal categories in which the Court works. The power of categorical approaches does not require that each categorical presumption be followed where sufficient countervailing considerations are present, where the context differs sufficiently. Important pieces of constitutional context, I have tried to argue, include the new commitment to human equality embodied in the Fourteenth Amendment and subsequent amendments to the Constitution — norms that can enter into the First Amendment conversation without overwhelming its basic commitments to a substantial sphere of unfettered liberty of expression.

Fiss, in the closing paragraph of *Irony of Free Speech*, called for “an improved sense of proportion,” one that recognizes that “the state can be both an enemy and a friend of speech.”²²³ That sense of proportion informs both Canadian and German jurisprudence. The United States provides a very different institutional and historic setting in which freedom of speech issues arise, but one in which we may nonetheless be able to learn something from constitutional interpreters elsewhere.

Policy, 14 HARV. J.L. & TEC. 335, 365 n.107 (2001). See also FISS, IRONY, *supra* note 8, at 72 (treating *Red Lion*'s “endorsement of state power” as a “stray, living at the margins of the law”).

223. FISS, IRONY, *supra* note 8, at 83. U.S. constitutional skepticism about the courts' ability to distinguish the state as friend from the state as enemy pervades not only First Amendment law but also equal protection law. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (rejecting argument that the government's benign uses of race should be reviewed under less stringent standard of review than invidious uses in part because of difficulty of distinguishing one from the other).