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Resurrecting Free Speech

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IT is a great honor to be here as the Levine lecturer. I want to extend my sincerest thanks both to the Law School and to the Levine family.

In the usual course, death precedes resurrection, and so upon hearing my title, you might object that, after all, free speech is alive and well. The Supreme Court, you might think, seems to have settled the free speech controversies that divided it through most of this century.

Earlier in the century, for example, the Court routinely upheld the prosecution of political dissent. In recent Terms, by contrast, the Court has routinely upheld the free speech rights of politically obnoxious speakers, whether it be a white racist burning a cross or a young Maoist burning a flag.

The flag-burning and cross-burning cases, you will recall—*Texas v. Johnson*,[1] *United States v. Eichman*,[2] and *R.A.V. v. City of St. Paul*[3]—had more in common with each other than fire. In each of those cases, the Supreme Court denied the power of government to suppress symbolic conduct for its message, no matter how offensive it might be to people looking on. On the Court, at least, free speech issues in recent years have commanded a rare political consensus, producing even occasional unanimous votes[4] and uniting Justices from Brennan to Scalia.[5]

Across the land, though, things are not so simple. Across the land, a sea change has been blowing in the politics of free speech. Just as the free speech principle seemed to have become settled at the Supreme Court, it has become unsettled in its intellectual foundations and in its usual grounds of political support.

In the old days, after all, the First Amendment was a banner that mostly the left marched under in a struggle against censorship perceived as coming mostly from the right. The Holmes and Brandeis opinions that founded our modern free speech tradition were written

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1. 491 U.S. 397 (1989).
2. 496 U.S. 310 (1990).
3. 112 S. Ct. 2538 (1992).
4. *See, e.g.*, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 107 (1991) (unanimously invalidating New York's "Son of Sam" law, which required escrow of proceeds from writings about crime).
5. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

in cases involving the prosecution of communists, socialists, syndicalists, anarchists, pacifists, trade unionists, and assorted other so-called "reds."[6]

The American Civil Liberties Union got its start representing trade unionists and draft resisters. And, after the long drought in free speech law during the era of McCarthy, it was the civil rights marches, protests, and sit-ins of the 1950s and 1960s that pioneered much modern First Amendment ground. The enemies of free speech in these canonical histories were the forces of law and order, anticommunism, and Jim Crow.

But today, the First Amendment, once thought of as a judicial device for rescuing left-wing causes from the jaws of right-wing politics, is thought by many liberals to do something like the opposite.

Why is that? First, principles of free speech neutrality have extended First Amendment protection from causes of the political left to causes of the political right. It was a Ku Klux Klan rally that led the Court in 1969 finally to put teeth in the "clear and present danger" test by upholding the right to engage in white supremacist speech.[7] And it was the ACLU's defense of neo-Nazis, who sought to goose-step in brown shirts past Holocaust survivors in Skokie, Illinois, that stretched that neutrality principle nearly to the breaking point,[8] costing the Civil Liberties Union many contributions along the way.

Most recently, the Court unanimously upheld, in the *R.A.V.* case, the free speech right of a young skinhead to burn a cross in a black family's backyard.[9] The majority reasoned that such an act may be punished as trespass, or burglary, or terrorism, or arson, but not as a symbol arousing racial hatred or alarm.[10]

Second, the Court has tested the politics of free speech by extending the free speech principle to protect the speech rights of the wealthy as well as what the Court of the 1930s and 1940s was fond of calling the "poorly financed causes of little people."[11] Today, the free speech principle benefits not only the leaflets of what Justice Holmes called "poor and puny anonymities,"[12] but also the expensive television advertisements of such litigants as the First National Bank of

6. *See* Schenck v. United States, 249 U.S. 47 (1919) (Holmes, J.); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting, joined by Brandeis, J.); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting, joined by Brandeis, J.); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring, joined by Holmes, J.); *see also* Herndon v. Lowry, 301 U.S. 242, 256 (1937) (reversing *Gitlow*).

7. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

8. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

9. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2550 (1992).

10. *See id.* at 2541 n.1.

11. Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (striking down a ban on door-to-door distribution of circulars).

12. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

Boston. In a case called *First National Bank of Boston v. Bellotti*,[13] the Court struck down a Massachusetts statute requiring that corporations abstain from political speech in referendum campaigns.[14]

In *Buckley v. Valeo*,[15] the Court likewise struck down Congress's attempt to place ceilings on the expenditures that candidates or their supporters could make in political election campaigns.[16] This decision is part of the reason for today's expensive candidacies, from California senatorial candidate Michael Huffington to presidential contender Ross Perot. In *Buckley v. Valeo*, the Court said that redistribution is not contemplated by the First Amendment;[17] the kind of redistribution we permit from landlord to tenant or employer to employee does not extend to those who have unequal wherewithal for speech.

In these decisions, the new free speech critics say, the First Amendment is no longer a force for liberation, but rather, in their view, a tool for entrenching the status quo. In their view, the time right now for freedom of speech is something like 1937 was for freedom of contract. On the advent of the New Deal, the Court finally stopped declaring the liberty of contract, which it found in the Fourteenth Amendment, an obstacle to minimum wage, maximum hour, and other redistributive economic laws.[18] So, too, these new free speech critics say, the Court should now remove freedom of speech as a constitutional obstacle to the legislative redistribution not of money but of speaking power.

Sometimes, the new critics say, constitutional liberties undergo what Professor Jack Balkin calls "an ideological drift."[19] Freedom of contract was one thing to nineteenth-century abolitionists and quite another to corporations who used it later in that century to constitutionalize a principle of laissez-faire. So too for speech, they say. The principle that once protected socialists and civil rights marchers has now come—unfortunately, in their view—to protect skinheads and wealthy businessmen.

Hence, the current shift among the players on the scorecard of free speech. It used to be that censorship was associated with the right and free speech libertarianism with the left. But today, in so many controversies, those political poles have switched. Now we hear new calls for speech regulation coming from the left and increasing endorsement of free speech from the right.

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13. 435 U.S. 765 (1978).
14. *Id.* at 767.
15. 424 U.S. 1 (1976) (per curiam).
16. *Id.* at 58-59.
17. *Id.* at 48-49.
18. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
19. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375, 383.

To illustrate, consider five familiar recent examples under the headings, respectively, of sex, hate, money, and violence.

First, there has been a movement by some feminists to regulate pornography as a form of sex discrimination against women, on the theory that sexually explicit magazines and videos treat women as objects who are subordinate to men.[20] True, this movement has failed to achieve any lasting legal victory. Its one successful legislative victory was thrown out in federal court, on the ground that a law forbidding the graphic depiction in words or pictures of the sexual subordination of women amounted, under the First Amendment, to a form of thought control.[21]

But the arguments of these anti-pornography activists have had a great deal of influence, at least academically, on my second example, the movement to regulate hate speech—that is, speech that conveys messages of racial or other group-based inferiority in a persecutory, or insulting, or degrading way. In common with the anti-pornography feminists, hate speech regulators view such speech as subordination and think that *more* speech—that old common cure for bad speech—is in these cases an inadequate remedy.[22] This is not an area, they say, where we can rely on good counsel to drive out bad.

Advocacy of such hate speech regulation, of course, has split old liberal coalitions, and opposition to such measures has come largely, not just from the ACLU, but from many on the political right.

A third example of this phenomenon of the switch in the political valences of free speech is those calls, again coming largely from the left, for greater regulation of money in politics. The Supreme Court has, since the 1970s, recognized what many people already know, that "money talks." But the Supreme Court held that when money talks, that "speech" is constitutionally protected. For example, recall the *Buckley* and *First National Bank* cases that I mentioned a moment ago. The new advocates of campaign finance regulation say that such decisions gave too much leeway to the distortive political influence of aggregated wealth.

For a fourth example, consider calls for the curtailment of television and other media violence coming not only from "family values" groups and parents' groups, but also from the Democratic administration, and indeed, last autumn, from the Attorney General herself.[23] Here the argument, which has affinity with the arguments for hate

20. *See, e.g.*, Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law, 127-210 (1987).

21. American Booksellers Assoc., Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001, *reh'g denied*, 475 U.S. 1132 (1986).

22. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 146 (1982).

23. *See* Michael Wines, *Reno Chastises TV Networks on Violence in Programming*, N.Y. Times, Oct. 21, 1993, at A1.

speech and pornography regulation, is that violent programming creates violent people; violent images inure people to violence and condition them to its use. This argument, again, like the anti-pornography and hate speech arguments, says that speech is not harmless, not trivial; rather it constructs us, it makes us who we are. And they hold, as a result, that speech must be sometimes regulated to protect the liberty, including the expressive liberty, of those who are exposed to it.

Fifth and finally, as an example of this flip-flop in the politics of free speech, consider the recent issue of demonstrations against abortion in the immediate vicinity of abortion clinics. The recently enacted federal Freedom of Access to Clinic Entrances Act,[24] as well as various local "bubble" ordinances passed by local municipalities,[25] have been passed with the aim of preventing anti-abortion demonstrations from obstructing patient access or escalating into violence.

The concern with terrorism in this context is a real one, of course, as illustrated by the recent killings of doctors and other workers at abortion clinics in Florida and Massachusetts.[26] But there have been other speech movements that people said would be bound up inextricably with violence. And it's no accident that Randall Terry, the leader of Operation Rescue, cites as precedent some of the demonstrations that were advanced in the cause of racial civil rights.[27] Operation Rescue and other anti-abortion groups say that laws limiting their demonstrations stray from the appropriate realm of violence and conduct and obstruction and blockading, into the inappropriate realm of their speech—demonstrations, pickets, placards, chants, prayers. They say they are being singled out for expressing an unpopular viewpoint and that loose predictions that protest will turn violent should no more stop Randall Terry from peaceful demonstration, as long as it is peaceful, than they once did Reverend Martin Luther King, Jr.

Liberal advocacy groups who have joined many unpopular speakers, including others on the right, have been loathe to join these speakers as amici curiae in court. This is understandable in light of the countervailing interest in abortion cases that many libertarians support. But it is striking that the polarity of the free speech debate here is so reversed from what one might have expected in the past.

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24. 18 U.S.C. § 248 (1994).

25. *See, e.g.,* San Diego, Cal., Mun. Code § 52.1001 (1993); San Jose, Cal., Code § 10.08.030 (1993); Boulder, Colo., Rev. Code § 5-3-10 (1981 & Supp. 1987).

26. *See* Christopher B. Daly, *Gunman Kills 2, Wounds 5 in Attack on Abortion Clinics; Suspect in Boston-Area Shootings Escapes*, The Wash. Post, Dec. 31, 1994, at A1 (chronicling shootings at abortion clinics during the past two years).

27. *See* Paul Richter, *Clinton Signs Law Banning Abortion Clinic Blockades*, L.A. Times, May 27, 1994, at 20 (quoting Randall Terry as stating: "If Bill Clinton had signed a bill like this in the 1960s, there never would have been sit-ins at lunch counters in the South.").

Thus, when the Supreme Court upheld several speech restrictions in a Florida abortion clinic injunction last July,[28] it was striking that it was the so-called "conservative" Justice Scalia who wrote a scathing dissent in support of the protesters[29] and the so-called "liberal" Justice Stevens who would have gone furthest in upholding the power of the state to regulate speech.[30]

So much for the evidence that free speech has undergone a shift in political valence. Now, let me try to give an account of the intellectual foundations that might underlie this shift.

To oversimplify greatly, the now-conventional free speech consensus can be boiled down to three basic and fundamental distinctions: the distinction between mind and body, the distinction between public and private, and the distinction between government's purpose in enacting laws and government's effect. The new speech regulators challenge all three of these distinctions.[31]

What are these three distinctions? How does the Supreme Court apply them? What does the conventional wisdom say? And what do the new critics reply?

First, mind/body. The distinction between mind and body—or, as it is usually called in this context, speech and conduct, or expression and action—holds that speech is privileged above conduct in the sense that government may properly regulate the clash of bodies but not the stirring of hearts and minds. Speech may be curtailed, the Supreme Court has held, to prevent material harm, but only if that harm is real, material, and nearly nigh. Domino theories will not do. Normally, if speech offends your sensibilities or causes you anger, resentment, or alarm, the free speech consensus says your solution is not to call the sheriff but to turn the other cheek.

Physical violence, the Court says, is a different matter. While the Court struck down St. Paul's punishment of racist symbols in the cross-burning case,[32] a Term later, in *Wisconsin v. Mitchell*,[33] it held that Wisconsin was allowed by the First Amendment to aggravate the penalties for racially motivated punches—two years for a regular, old

28. *See* Madsen v. Women's Health Center, 114 S. Ct. 2516 (1994).

29. *Id.* at 2534 (Scalia, J., concurring in judgment in part and dissenting in part).

30. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part).

31. Each description of the new speech regulators' positions that follows is drawn loosely from one or more of the following works: Catharine A. MacKinnon, Only Words (1993); Mari J. Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993); Cass R. Sunstein, Democracy and the Problem of Free Speech (1993); J.M. Balkin, *supra* note 19; Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. Colo. L. Rev. 935 (1993); Frederick Schauer, *Uncoupling Free Speech*, 92 Colum. L. Rev. 1321 (1992).

32. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992).

33. 113 S. Ct. 2194 (1993).

bar room punch, but seven years for a racially motivated one.[34] The Court said that difference was permissible because the assault law punished conduct not speech, or was aimed at bodies not minds.[35]

Now, the new critics who would regulate more speech and upset the now conventional free speech consensus question this mind/body distinction. They say that when your parents told you that "sticks and stones may break your bones but words can never hurt you," they meant well but they lied, as every child knows from some early encounter on a playground.

But the new critics take the point further than merely equating some psychic with some physical harm. The new speech regulators argue also that speech constructs us and conditions our actions; culture makes us who we are.[36] We are, they say, not only what we eat; we are what we read, what fashion tells us to be, what we see on television, whether it be the gospel station or MTV. Culture determines power, they say; it is not the other way around. Pornography, hate speech, and television violence do not just cause fights, or fright, or flight; they actually construct a society that is more sexist, more racist, more violent than it would be if a different rhetoric prevailed. And, here's the crucial move: they say that if we are socially malconstructed, government should be free to reconstruct us in a better light by regulating not only our actions, as it already does, but our speech as well.

The second distinction crucial to the modern free speech consensus, as to so many other liberal doctrines, is that between the public and the private realms. Censorship is understood narrowly as the restriction of speech by government. If a private publisher rejects my novel, I may simply go across the street; that is not censorship, but rather editorial judgment, market forces, or maybe just plain taste. But if government bans my novel, that is censorship. Why the different treatment? Because the government alone, in the conventional view, has a monopoly of force. If Simon & Schuster rejects my novel, I can go to Random House, but if the government bans my novel, I may have to flee to France.

As with the mind/body distinction, the new speech regulators charge that this public/private distinction greatly oversimplifies the situation. In their view, private power can be even more censorial than what old-style free speech libertarians call the awesome power of the state. If pornography silences women, if hate speech silences minorities, and if corporate spending drowns out other voices in political campaigns, they say, then government should be free to silence the silencers, and the First Amendment should not stand in its way.

34. *Id.* at 2197.
35. *Id.* at 2201.
36. *See* Michael J. Sandel, Liberalism and the Limits of Justice 181-83 (1992).

We have long accepted, the new critics say, that other inequalities, such as inequalities of bargaining power, may be regulated by the state, and so a little cultural trust-busting might now be in order. In this view, government should be regarded as enhancing, not restricting, speech when it tunes down the voice of the rich in political campaigns or shuts up campus bigots, for such regulation, they argue, will in effect lower barriers to entry and enable the voices of the once excluded to be heard. After all, they say, if we abandoned laissez faire in the marketplace for goods and services back in 1937, why keep the faith in the invisible hand in the "marketplace of ideas"?

The purpose/effect distinction—the third distinction basic to contemporary free speech law—holds roughly that it matters what government aims at, not merely what government happens to hit. Government may not aim, under the First Amendment, at the suppression of "dangerous" ideas; viewpoint discrimination is the cardinal First Amendment sin. Under this conventional wisdom, content-based laws—laws that aim at an idea or message—are suspect and will virtually always be struck down, but if a challenged law is content-neutral, then the mere fact that it hurts some speakers more than others does not trigger First Amendment concern. Disparate impact is not decisive; speakers need not be exempted from generally applicable laws.

For example, the First Amendment does not entitle me to park my car in a no-parking zone just because I cover it with bumper stickers advocating various political candidates or world peace. The no-parking law is not aimed at my bumper stickers or my political slogans, but is aimed simply at my car. Government lacks censorial purpose here and so can avoid serious First Amendment review.

Once again, the new critics find fault with this distinction between purpose and effect. They say that effects might matter sometimes even more than purpose, the reverse of the current doctrine. For example, a law that has the effect of keeping my bumper stickers out of a prominent place in the public view might be just as bad as a law aimed purposely at my bumper stickers. In the critics' view, some content-based laws might be desirable and some content-neutral laws might not; it all depends on whether they bring about consequences that are conducive—or, on the other hand, harmful—to the purposes free speech is supposed to promote.

Such a view sees free speech as valuable because it is instrumental to some other end—truth, self-government, individual autonomy, collective tolerance, or, as some new free speech regulators urge, deliberative public discourse. If speech is instrumental to such ends, say the new critics, then the ends are prior to the means. Content regulation may or may not be an evil; it all depends on whether it impedes or enhances the relevant instrumental end. Content-neutral regulation

may impede those ends too, and if it does, they say, it should enjoy no First Amendment immunity.

Do these three lines of attack on the conventional wisdom leave First Amendment law in a rubble? Not if we can answer them in a way that resurrects free speech. Let me take these distinctions in reverse order and sketch brief answers on purpose/effect and public/private, and then concentrate on the distinction between speech and conduct.

The key assumption of the purpose/effect distinction is that politics will safeguard free speech if we make sure that enough oxen are being gored. Judicial intervention is required, however, when politically powerless minorities are singled out. The purpose/effect distinction remains a sensible rule of thumb for distinguishing these political situations.

Recall, for example, Lady Godiva riding naked on horseback into Coventry Market to protest the repressive tax policies of her inhumane husband. Suppose that the government wants to prosecute Lady Godiva and has a choice between enacting two kinds of law. The government might enact a law that says "no nude tax protests," because it wants to keep things narrow, reaching Lady Godiva but not too many others. This law will reach Lady Godiva all right, but the First Amendment will stop it because the statute singled out an idea: it said "no tax protests."

Suppose, instead, that in order to get Lady Godiva, the government has to pass a more general law that says "no nudity in public, period." The theory of the distinction between content-based and content-neutral laws is that Lady Godiva won't need the First Amendment to help out here because politics will do the trick. First, all the nude sunbathers will come in and lobby with Lady Godiva to try to stop the law, and, even if they are not very well-funded, so will the owners of nude dancing establishments such as the Kitty Kat Lounge. In other words, if you gore enough people's oxen, the law won't pass at all. Singling out a despised speaker by passing a law that is content-based is easy, though, and that is when the speaker needs the courts.

On the public/private point, suffice it to say that, even if speech is conceived as exchanged on a "market," it does not follow that it should be regulated just the same as commercial markets for goods and services. Here, let me be clear that I am talking only about metaphorical "markets" in ideas, *not* markets in the products that convey ideas. Of course, there are many markets for the products in which speech is packaged: media markets, cable markets, broadcasting markets, publishing markets, markets for information of all kinds, from credit to other topics. When I focus on the marketplace of ideas, I mean regulation of speech or speakers and not of their commercially tradeable products. In the words of a former Chairman of the Federal Communications Commission, Mark Fowler, an advocate of deregula-

tion of broadcasting, "[T]elevision is just another appliance. It's a toaster with pictures."[37] The First Amendment does not bar most regulations of television as an appliance, but it does bar many regulations of what it shows.

Why is that? Because ideas are different from commodities. Ideas are not scarce in the way that resources are, but of course there might be scarcity in the availability of means for their dissemination. So in their purely economic attributes, speech markets surely may be regulated somewhat like other markets. For example, newspapers may be barred from owning radio stations, just as AT&T may be forced to allow local phone services to compete. Antitrust laws may constitutionally be applied to sellers of words as well as widgets. If cable television has a chokehold monopoly over the video programming that enters your living room, then perhaps it can be required by government to give its rivals, the over-the-air broadcasters, a guaranteed channel or two as a kind of antitrust remedy.[38]

In short, a television may be regulated insofar as it is a toaster, but the pictures on it may not be placed so readily under government control. Contrary to the new critics' suggestions, regulating the marketplace of ideas for the content of the ideas amounts to a very different proposition from regulating ordinary economic transactions. A new idea, or a proposal for law reform, for example, does not trade in private exchanges like a car or like fast food. Even if ideas are in some sense "commodities," they have a variety of external effects that make them unlike items typically made for personal consumption.[39]

On the one hand, ideas are often a kind of public "good," like clean air or national defense, that can confer benefit on many persons other than their immediate purchasers or consumers. We all can pass on the ideas we read in books to our family, friends, and others for free, or even overhear them in the subway. If that is the case, the producer of the idea will never capture its benefit from us.

But ideas, conversely, can also be a public "bad," by which the producer causes external harms for which he never has to pay. For example, even if a race-baiter speaks only to his followers in the paying audience, minority citizens living in the town alongside them may suffer anger, and even loss of productivity, just from knowing that his speech or his goose-stepping march is taking place within their midst.

For these reasons, we might expect regulation of the so-called "marketplace of ideas" to be a good deal trickier than the regulation of air

37. Cass R. Sunstein, The Partial Constitution 212 (1993) (citing Bernard D. Nossiter, *The FCC's Big Giveaway Show*, The Nation, Oct. 26, 1985, at 402 (quoting Mark Fowler)).

38. *See* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2468 (1994).

39. *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 558-59 (1991).

travel, or trucking, or industrial pollution, as if they were not already tricky enough.

Even if the analogy between ideas and commodities were more perfect, there might still be institutional reasons to mistrust government regulation of speech more than of other goods and services.[40] For example, the incumbent regime might be prone to exaggerate the dangers of its ideological competitors in order to keep itself in power, provided there are no term limits to stand in its way. The stakes of making errors about your opponents can sometimes literally be quite high. Hence, Justice Brandeis' admonition about ancient Salem, that "[m]en feared witches and burnt women,"[41] a history that he thought counseled in favor of liberal toleration of allegedly subversive political dissent.[42]

One might object that this danger is hardly confined to the regulation of speech. Incumbents might also be self-dealing in the realm of economic regulation. There, too, they might favor their friends and punish their enemies, especially if campaigns continue to be privately financed. But at least in that sphere there is more potential for the interests of different groups to even out over time. Government might have a more systemic interest in quashing dissenter opposition across the board.

Furthermore, speech might have a tendency to lead regulation to backfire. It just might not work to regulate it the way we regulate other goods, which might tell us something about its different nature.

Consider the "banned in Boston" phenomenon. Censor something and demand increases. In other words, the public may have an incorrigible taste for controversy that causes censorship to have perverse effects.

For example, recall how Senator Jesse Helms and others led a vigorous political war against the National Endowment for the Arts, claiming that a small taxpayer subsidy of a posthumous exhibit of Robert Mapplethorpe's photographs violated the taxpayers' right to be free of subsidizing "blasphemy" and "smut."[43] Robert Mapplethorpe was not a household word at the beginning of the controversy, but he certainly was at the end. And the price of Mapplethorpe photos inflated considerably as a result.

Finally, the "marketplace of ideas" metaphor may simply be misconceived at its core.[44] Consider that when we speak our ideas, we

40. *See* Frederick Schauer, *The Second-Best First Amendment*, 31 Wm. & Mary L. Rev. 1, 5-6 (1989).

41. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

42. *Id.* at 375 (Brandeis, J., concurring).

43. *See* Marjorie Heins, Sex, Sin and Blasphemy: A Guide to America's Censorship Wars 129 (1993).

44. *See* Margaret Jane Radin, Market Rhetoric and Reality: Commodification in Words and the World (forthcoming 1995).

might not, properly understood, be "selling" them to others at all. We are not just putting out information as a datum on the basis of which others might act according to their existing welfare functions. There may be a difference in kind, not degree, one might argue, between, wearing a T-shirt with a protest message, which is protected by our current First Amendment,[45] and mass merchandising piles of T-shirts on public streets, "seven shirts for $20." Of course, sales of T-shirts, as of books or televisions, may facilitate speech, but speech is not the same as selling.

In short, when we speak we try to govern others, to change their preferences, rather than merely to ascertain and satisfy them. For that reason, the analogy to market regulation, whether you are for it or against it, might be simply misguided in the marketplace of ideas.

Let me turn last to the mind/body distinction, the distinction with which I began, and elaborate some replies here to the new speech regulators' claims.

To recap briefly, current First Amendment law gives speech more leeway than conduct.[46] Now the time has come to ask why.

The answer cannot be, even for a First Amendment devotee, that speech is always and necessarily less harmful than conduct, for that plainly is not so. Imagine, for example, that a well-financed group of bigots purchased vast amounts of air time on television and radio to beam into a community around-the-clock messages claiming that some minority religious or racial group was "dirty" or "dangerous" or "the source of all evils in the land."[47] Surely, such an insidious campaign of malicious propaganda could harm the local members of the targeted group far more gravely than a single instance of a racially motivated punch. And the harm would not be solely psychic, for the propaganda campaign might stimulate numerous listeners to fire members of the targeted groups from their jobs, exclude them from restaurants and stores, or even beat them to a pulp. Those responsive actions, of course, would themselves be punishable under assault or anti-discrimination laws. But if harm were the only issue here, one might well attempt to nip the problem in the bud by ordering that propaganda off the air.

Likewise, the answer cannot be that speech is always and necessarily more "private" or self-regarding than conduct is. Speech is not psychologically interior, like conscience. Nor is it conventionally shielded from public contemplation, like acts of sex or procreation. Justice Douglas, for example, once captured the spatial as well as the decisional sense of the right to reproductive privacy when he wrote

45. *See* Cohen v. California, 403 U.S. 15 (1971).

46. *See* Texas v. Johnson, 491 U.S. 397, 406 (1989) (stating that governments may regulate expressive conduct more freely than they may regulate the written or spoken word).

47. *See* Radin, *supra* note 44.

that anticontraception laws violated the "sacred precincts of marital bedrooms"[48]—a reminder that the mind/body distinction alone cannot mark the outer limits of government.

But speech is neither interior like conscience nor private like sex. Speech, by definition, depends on interaction with others. It takes two to tango, and at least two to have free speech. Speech implicates even more than the duet of a willing listener and a willing speaker.

For one thing, speech depends on language, which is a collective social creation over time. For another, the concepts and ideas that we deploy likewise come from a collective culture, an accretion of past lives in which we are steeped and educated, whether we like it or not. Even if we adapt and refashion these ideas and concepts through our own creative endeavors, we do not invent them ourselves out of nothing, in a personal equivalent of the "Big Bang."

Finally, speech is generally directed at others whom we seek to persuade or govern. Even when we talk to ourselves or sing in the shower, there is always an imagined, or remembered, or desired audience. In short, the existing mind/body distinction in free speech law cannot be explained on the ground that speech is too private, too interior, or too secret, to fall within the regulatory jurisdiction of the state.

If speech is not harmless and not private, then why does the First Amendment put government regulation of speech, as opposed to conduct, to such demanding tests? The new speech regulators suggest that once it is admitted that speech has any public consequences, then the jig is up and the free speech principle must fall. They would protect both speech and conduct that is beneficial and condemn both speech and conduct that causes harm. They would look straight through to consequences and would not distinguish between speech and conduct at the threshold.

I would not so readily jettison the existing constitutional regime, for two reasons: one having to do with jurisprudence and the other having to do with the values that are served by speech.

First, the jurisprudential argument follows from the familiar problem of how we make rules for the general run of cases. To be sure, in a particular case we might be able to identify the harm of speech *ex post* and to deem it the equivalent of the harm caused by force. Imagine, for example, that a bad husband engaged in calculated and pervasive psychological abuse and manipulation of his wife, or vice versa, using words so skillfully for his or her purposes that the offending spouse never had to resort to fists. If we found the victim spouse in this state, we might seek to liberate that person from mental captivity, and we might even excuse that person from crimes that the abuse caused him or her in turn to commit. But if in the wake of such a case we tried to enact a general law—for example, a criminal prohibition

48. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

on "verbal cruelty" or "psychic torture"—then serious problems of identification might arise, and the law might deter far more speech *ex ante* than we would ultimately be willing to condemn *ex post.* First Amendment law's frequent relativistic adages—"one man's vulgarity is another's lyric,"[49] or in this case, one person's torture is another person's repartee—reflect a concern that we might make mistakes and that the risk of error ought not lie with the speaker. True, any general rule will tend to be overinclusive in relation to the paradigm case. But, much free speech law rests on an empirical hunch that predicting harm from speech is likely to be *more* fraught with error than, for example, predicting the bad consequences to our health from a gallon of effluent into our harbors or some number of particles of pollutant per cubic feet of air.

But suppose you think language is not all that difficult and we could draft better statutes. After all, perhaps we could perfect our ability to predict harm from speech simply through advances in technology or social science, in which case we would need some better reason than reducing risk of error in order to privilege speech over conduct. A second possible reason has less to do with the ambiguity of language than with the function that speech serves in our collective life.

Speech, one might say, is the process by which we think together. Through speech, we forge a body politic governed by a collective mind. But through speech, we also forge the strands of opposition to any set of decisions that we have provisionally embraced to regulate our conduct through the processes of government and the enactment of law. The free speech principle preserves this continual possibility of opposition to the state, and this explains our attachment to the speech/conduct distinction.

Under this approach, it is critical to our autonomy individually, or to our self-government as a whole, that we be able always to say, "Maybe we ought to change our conduct regulations." Indeed, we could not govern ourselves without speech, for it is the medium—the only legitimate medium we recognize—by which we advance from one regime of conduct regulation to another. Speech, in other words, is the currency of peaceful political change.

What laws we enact through parliamentary debate provisionally bind our conduct, and unless and until those laws are changed, again through processes of debate, our dissenting views are not grounds for disobedience through our actions. But, as long as the speech/conduct distinction holds, we are still free in the meantime to vent, and rage, and scream, and yell, or even politely argue that the laws that bind our conduct are misconceived and ought best be changed.

Let me use one example to try to make this point more concrete. Recall the cross-burning case in which the City of St. Paul punished

49. Cohen v. California, 403 U.S. 15, 25 (1971).

young Mr. Viktora for burning a cross—the historic symbol of white supremacist terror once and still deployed by the KKK—in the wee hours of the morning on a black family's lawn.[50] If one asks if that was speech or conduct, the answer is, it was 100% both, as is flag-burning, or draft-card burning, or nude dancing.[51]

The First Amendment issue here, though, was not what cross-burning is in some essential sense, but rather what the City of St. Paul aimed at when it punished R.A.V. In *R.A.V.*, the Court readily conceded that Viktora could be punished for his conduct if it were described as trespass, burglary, arson, or terrorism under general criminal laws.[52] What he could not be punished for was displaying a symbol tending to raise "anger, alarm or resentment in others on the basis of race."[53] While the decision in *R.A.V.* was unanimous, it rested on two different sets of reasoning.

Four Justices wrote that the problem was that these responses were too psychological; we ought to wait for that kind of speech that makes the listener want to punch the speaker in the nose—fighting words, not just frightening words.[54]

But five Justices gave a different account of why the cross-burning could not be punished. Those Justices said that government could not, through punishment, condemn Viktora's racist symbol for its message.[55] To be sure, if Viktora sought to act on his racist beliefs in a variety of ways, his conduct could be punished or regulated, and thus the force of his racist views necessarily contained. Under prevailing antidiscrimination laws, he could not refuse to rent an apartment on the basis of race nor he could refuse to give someone a job on the basis of race. Indeed, following *Wisconsin v. Mitchell*,[56] St. Paul could even escalate the punishment for racially motivated arson over the maximum allowable for setting other kinds of fires.

But what the city could not do under the First Amendment, said the majority in *R.A.V.*, was to forbid Viktora from holding and expressing a racist view. The speech/conduct distinction permits his racism to be contained, but not extinguished. Government may "speak" symbolically against racism through regulation of racist conduct—such as antidiscrimination laws or the aggravation of penalties for racially motivated crimes—but government may not go so far as to "ventriloquize" through Viktora by making him a puppet for the majority view.

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50. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541 (1992).

51. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1495 (1975).

52. *R.A.V.*, 112 S. Ct. at 2541 n.1, 2546 (distinguishing the St. Paul ordinance from laws that are "directed not against speech but against conduct").

53. *Id.* at 2548.

54. *Id.* at 2559-60 (White, J., concurring).

55. *Id.* at 2550.

56. 113 S. Ct. 2194 (1993).

He can be made to act in, but not swear allegiance to, conformity with the government's order.

The speech/conduct distinction thus serves to prevent the state from compelling citizens to adhere to orthodoxies, including the orthodoxies we enact in our conduct-regulating laws. Antidiscrimination laws reflect the "orthodoxy" that racism is wrong. But we may obey those laws under protest. Speech is the vehicle by which protest continues as an undercurrent to the governing law. One need not romanticize the lonely dissenter to see his freedom of expression as of value. One need only see dissent as a necessary medium for altering the rules that govern the greatest part of our lives, our behavior.

So much for the argument that speech and conduct should be assessed identically from the perspective of their potential harms. Let me turn now to the broader form of the new speech regulators' argument—the claim not only that speech mechanically causes harms, whether they be physical or psychic, but that speech organically constructs us. Under this claim, if speech constructs us badly or inculcates values that make for a worse society than we ought to have to endure, then it should be regulated. Here the claim is not that speech causes individual harm, but that it causes cultural harm, and that government regulation can perform helpful acts of cultural reconstruction.

To this argument I have two basic replies. The first is that, as a descriptive matter, I believe that the critics overstate the extent to which we are socially constructed. True, we do not spring into the world like Athena from the head of Zeus, as fully informed and rational and self-determining beings, nor do we choose our ends or the means for attaining them in a social or cultural vacuum. But we are not the mechanical product of culture either. We are not simply mass produced by the invisible conveyor belts of sex in movies or violence on TV. If we were, then the radical feminists who drafted the anti-pornography ordinances described earlier could never have managed to escape false consciousness under patriarchy long enough to draft those laws. Rather, the structures of social construction are multiple, like so many tectonic plates seething beneath the social surface. Their interaction is conflicting and imperfect, ensuring that there are many cracks and fissures through which resistance and creativity might escape.

But even if we were as socially constructed as the new speech critics say, and even if the sources of our social construction were readily identifiable, it simply does not follow that speech regulation by the government will reconstruct us in a better way. From the proposition that we are socially constructed, it does not necessarily follow that government should reconstruct us. Epistemology is not the same thing as political science, and refinements in our understanding of knowledge cannot by themselves dictate any particular form of political organization. In short, to see ourselves as socially constructed

does not tell us institutionally what to do. Thus, I believe that a number of the new arguments for speech regulation with a post-modern twist have a massive non sequitur at their core. Why trust the state—the very source of some of the bad, old social structures—to get the new ideology right? There might be strong reasons to distrust the state in reordering our ideological preferences, even if we trust it to solve other problems in our collective life.

Using the state to change culture before power in an unequal world can often backfire, for example, if speech codes are applied to students of color, or antipornography laws to gay erotica.[57] On the other hand, great change in our history has often bubbled up from below, through private social movements—the civil rights movement, the women's movement, the environmental movement, or even pressure for warning labels on violent or misogynist CDs. Consumer boycotts and counter-demonstrations arguably have proved far more effective than any speech code could ever be at attaining its intended ends.

In sum, the death of the enlightenment does not require us to dismantle existing protections for free speech, for the speech/conduct distinction continues to serve a pragmatic function. Even if our notions of self-determining subjects have given way to notions of social construction, and even if we have increased our understanding of the reality of speech's harmful effects, that is not reason enough to place control of culture as well as conduct monolithically in the hands of the state.

57. For example, after Canada's highest court legalized the suppression of sexual works deemed degrading to women, see Butler v. The Queen, 1 S.C.R. 452 (Can. 1992), law officials raided a gay bookstore and seized copies of a lesbian erotic magazine. *See* Mary Williams Walsh, *Chill Hits Canada's Porn Law*, L.A. Times, Sept. 6, 1993, at A1, A17; Carl Wilson, *Northern Closure*, The Nation, Dec. 27, 1993, at 788.