THEY SHOULD BE FIRED: THE SOCIAL REGULATION OF FREE SPEECH IN THE U.S.

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ABSTRACT

The debate over First Amendment jurisprudence often assumes that the First Amendment reflects a choice of non-regulation over regulation. This article suggests, however, that it is more accurate to describe the First Amendment as reflecting a choice of *social* regulation over *legal* regulation. Social regulation of speech has generally been lauded and preferred in America for its autonomy-enhancing properties, as private parties in civil society often lack the overwhelming power of a government censor. A review of recent high-profile incidents of social speech regulation, however, suggests that the ubiquity of social media and the hegemony of corporations have increased the breadth, visibility, and mechanisms of social speech regulation to such an extent that its scope can now approach that of a government censor. These mechanisms generally entail economic pressure on corporations, designed to force them to fire and ostracize employees who engage in censorable, contested, or discreditable speech. While the level of offensiveness of these types of speech is not the same, the sanction often is the same—loss of livelihood. This article argues that if the expected benefits of social speech regulation in an era of social media are not to be outweighed by losses in citizen autonomy, an approach to social regulation that includes legal protections against domination is required, beginning in the crucibles of free speech — public schools and universities.

"Those who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . [T]hey knew that . . . fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss

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freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." [1]

INTRODUCTION

In 2012, the Chick-fil-A fast food chain was the object of a customer boycott,[2] and several colleges rescinded offers for the franchise to open branches on their campuses.[3] Some mayors promised to deny licenses for the chain's expansion into their cities,[4] and at one local franchise, an artist defaced the walls of the restaurant with protest graffiti.[5]

In 2017, Kathy Griffin was fired from CNN.[6] Less than a week later, all the bookings for her Celebrity Run Ins comedy tour had been cancelled,[7] as had her public appearance with Senator Al Franken.[8] Her endorsement deal with Squatty Potty was revoked,[9] and the President and First Lady of the United States called her sick and mentally ill.[10]

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[1] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[2] *See* Lawrence B. Glickman, *Chick-fil-A Day a Reminder That Boycotts Often Backfire*, BLOOMBERG (Aug. 3, 2012, 12:37 PM), https://www.bloomberg.com/view/articles/2012-08-03/chick-fil-a-day-a-reminder-that-boycotts-often-backfire.

[3] *See* Queer Voices, *Chick-Fil-A Scrapped By Northeastern University After Students Object to Company's 'Anti-Gay' Support*, HUFFPOST (Feb. 29, 2012, 6:23 PM), http://www.huffingtonpost.com/2012/02/29/chick-fil-a-franchise-northeastern-university-scrapped_n_1311755.html.

[4] *See* Kim Severson, *Chick-fil-A Thrust Back Into Spotlight on Gay Rights*, N.Y. TIMES (July 25, 2012), http://www.nytimes.com/2012/07/26/us/gay-rights-uproar-over-chick-fil-a-widens.html.

[5] *See* Anna Almendrala, *Chick-Fil-A in Torrance, Calif., Graffitied with 'Tastes Like Hate',* HUFFPOST (Aug. 3, 2012, 3:16 PM), http://www.huffingtonpost.com/2012/08/03/chick-fil-a-graffiti-torrance_n_1738807.html?utm_hp_ref=gay-voices&ir=Gay%20Voices&ncid=edlinkusaolp00000008.

[6] *See* Aric Jenkins, *CNN Fires Kathy Griffin Following Controversial Donald Trump Photo*, TIME (May 31, 2017), http://time.com/4799905/cnn-fires-kathy-griffin-donald-trump-photo/.

[7] *See* Jennifer Drysdale, *Kathy Griffin's Final Tour Date Canceled* [sic] *Amid Donald Trump Drama*, ET (June 2, 2017, 5:20 PM) http://www.etonline.com/news/218923_kathy_griffin_final_tour_date_cancel_ed_amid_donald_trump_drama/.

[8] *See* Burgess Everett, *Franken Backtracks, Cancels Event With Comedian Griffin After Trump Photo Controversy*, POLITICO (June 1, 2017, 9:48 PM), http://www.politico.com/story/2017/06/01/al-franken-kathy-griffin-cancels-event-239047.

[9] *See* Stephanie Nolasco, *Kathy Griffin Dumped by Squatty Potty, Lambasted by Trump Family Over Photo with Bloody Head*, FOX NEWS (May 31, 2017), http://www.foxnews.com/entertainment/2017/05/31/squatty-potty-drops-kathy-

Their offense—speech. Dan Cathy, CEO of Chick-fil-A, publicly stated that he supports a biblical definition of marriage,[11] and Kathy Griffin posed with a photo of a severed and bloody Donald Trump head.[12] Dan Cathy, Kathy Griffin, and the sea of newly unemployed speech offenders stretching between them, reveal an oft-overlooked truth about American free speech. It is not free. It is not subject to government regulation, but it nevertheless costs money, jobs, and livelihoods.

The debate over First Amendment jurisprudence often assumes that the First Amendment reflects a choice of non-regulation over regulation. This article suggests, however, that it is more accurate to describe the First Amendment as reflecting a choice of *social* regulation over *legal* regulation. Social regulation of speech has generally been lauded and preferred in America for its autonomy-enhancing properties,[13] as private parties in civil society often lack the overwhelming power of a government censor. A review of recent high profile incidents of social speech regulation, however, suggests that the ubiquity of social media and the hegemony of corporations have increased the breadth, visibility, and mechanisms of social speech regulation to such an extent that its scope now rivals that of a government censor.[14] Thus, if the expected benefits of social speech regulation in an era of social media are not to be outweighed by losses in citizen autonomy, an approach to social regulation that includes legal protections against domination is required, beginning in the crucibles of free speech— public schools and universities.

This article is divided into four parts. Part I of this article provides a brief historical overview of how similar concerns for

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griffin-after-photo-shoot-with-bloodied-trump-mask-secret-service-to-investigate-says-report.html.

[10] *See* NBC News (@NBCNews), *First Lady Melania Trump Issues Statement on Kathy Griffin "Beheading" Photo*, TWITTER (May 31, 2017, 8:26 AM), https://twitter.com/nbcnews/status/869938224835305473?lang=en.

[11] *See* Jena McGregor, *Chick-fil-A CEO Dan Cathy Steps Into Gay-Marriage Debate*, WASH. POST (July 19, 2012), http://www.washingtonpost.com/blogs/post-leadership/post/chick-fil-a-president-dan-cathy-bites-into-gay-marriage-debate/2012/07/19/gJQACrvzvW_blog.html?utm_term=.91ae6ecf468c.

[12] *See* Lauren Huff, *Kathy Griffin's Controversial Trump Photo Featured in New GOP Ad*, THE HOLLYWOOD REPORTER (June 1, 2017), http://www.hollywoodreporter.com/news/kathy-griffins-controversial-trump-photo-featured-new-gop-ad-1009692.

[13] *See* Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943) (noting the constitutional importance of leaving to individuals the choice of whether to receive or reject information).

[14] *See infra* Section III.

minority groups led the United States and Europe to adopt different approaches to speech regulation—the U.S. adopted social regulation of offensive speech while Europe opted for legal regulation. Part II discusses the theory of the social regulation of speech, focusing on the values underlying the U.S. free speech regime and the ways in which social regulation of speech is believed to serve those values. Part III discusses the practice of the social regulation of speech in the U.S., describing the increasingly corporate mechanisms of social speech regulation and the negative side effects of such regulation on citizen autonomy. Part IV addresses the law of social speech regulation, proposing changes in the way the First Amendment is applied to speech in public schools and universities as a first step to making the social regulation of speech more compatible with the goals of self-government and autonomy. This section advocates privileging public schools and universities, not as spaces of noninterference with speech, but as spaces in which citizens learn to engage in the social regulation of speech without domination.

I. BACKGROUND

In the earliest days of free speech protections, the relationship between free speech and costly speech was determined by the common law of libel and the prohibition on prior restraints.[15] According to Blackstone,

> The liberty of the press . . . consist[s] in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public. . . but if he publishes what is improper, mischievous, or illegal, he must take the consequence . . . "[16]

[15] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713–14 (1931).
[16] Alexander v. United States, 509 U.S. 544, 567–68 (1993) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 151–52).

This meant that while the government could not prohibit publication in the first instance, it could impose penalties after the fact for libelous or seditious publications, broadly defined. For centuries, the Blackstonian view of free speech was shared by both American and European democracies.[17] However, as the world's democracies became more racially and religiously diverse, they were forced to redefine freedom of speech, and that redefinition evolved in very different ways on the two sides of the Atlantic. For, in the 1960s, the rise of antisemitism in Europe and growing opposition to the Civil Rights Movement in the U.S. placed the European and U.S. democracies on very different trajectories in addressing offensive speech.

In Europe, growing antisemitism led to the creation and ratification of The International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[18] The ICCPR prohibits "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,"[19] while the ICERD obligates state parties to make the "dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination" punishable by law.[20] The ICCPR and ICERD were not ratified by the U.S. until almost 30 years later,[21] with reservations rejecting any obligation to regulate hate speech.[22] In much of Europe, however, the Covenant and Convention were ratified without reservation much earlier,[23] and recent local efforts have strengthened and expanded

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[17] GEOFFREY STONE ET AL, CONSTITUTIONAL LAW 1029 (7th ed. 2013) (noting that colonial assemblies imitated Parliament in vigorously punishing "seditious" expression).

[18] *See generally* Christian Tomuschat, *International Covenant on Civil and Political Rights*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INT'L LAW, http://legal.un.org/avl/pdf/ha/iccpr/iccpr_e.pdf (last visited Sep. 12, 2017).

[19] International Covenant on Civil and Political Rights, Dec. 19, 1966, 14668 U.N.T.S. 999.

[20] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 9464 U.N.T.S. 660.

[21] Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102d Sess. 1992), reprinted in 31 I.L.M. 645 (1992); U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994) http://hrlibrary.umn.edu/usdocs/racialres.html.

[22] Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102d Sess. 1992), reprinted in 31 I.L.M. 645 (1992).

[23] Office of the High Commissioner, *International Covenant on Civil and Political Rights*, UNITED NATIONS,

the core prohibitions of these agreements.[24] For example, in 2008, the European Union issued a framework decision requiring members to use criminal sanctions to deter individuals who "publicly incite[] violence or hatred" on the basis of "race, colour, religion, descent or national or ethnic origin."[25] Similarly, in May, 2016, concerns about internet hate speech led the European Commission and key IT companies to adopt a code of conduct designed to ensure prompt removal of online hate speech.[26]

The trajectory in the U.S. has been dramatically different, due in large part to the seminal decision in *New York Times v. Sullivan.*[27] The *Sullivan* case concerned a full page ad placed in the Times by civil rights activists in 1960.[28] The ad sought support for students in Southern states engaged in non-violent protests.[29] It asserted that the students were being met with an "unprecedented wave of terror" in their efforts to uphold the guarantees in the Bill of Rights.[30] In subsequent paragraphs, the ad set forth several specific examples of the "wave of terror," such as expelling students, ringing the school with shotgun-carrying police, padlocking the dining hall to starve students into submission, and arresting Dr. King seven times and bombing his home.[31] Though the Supreme Court acknowledged that several of the facts alleged in the ad were false,[32] thus bringing it within the scope of the common law of libel,[33] it nevertheless held that awarding Sullivan half a million dollars in damages for his claim violated the First Amendment.[34] In so doing, the

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http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (last visited Sep. 12, 2017).

[24] Office of the High Commissioner, *UN Committee on the Elimination of Racial Discrimination Publishes Findings on Canada, Djibouti, Ecuador, Kuwait, New Zealand, Russian Federation, Tajikistan and United Arab Emirates*, UNITED NATIONS (Aug. 28, 2017), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22002&LangID=E.

[25] *The Framework Decision on Racism and Xenophobia*, EUROPEAN COMM'N, http://ec.europa.eu/justice/fundamental-rights/racism-xenophobia/framework-decision/index_en.htm (last visited Sep. 12, 2017).

[26] *European Commission and IT Companies Announce Code of Conduct in Illegal Online Hate Speech*, EUROPEAN COMM'N (May 31, 2016), http://europa.eu/rapid/press-release_IP-16-1937_en.htm.

[27] 376 U.S. 254 (1964).

[28] *Id.* at 256.

[29] *Id.* at 256–257.

[30] *Id.* at 256.

[31] *Id.* at 257–58.

[32] *Id.* at 258–59 (noting, for example, that Dr. King was arrested four times, not the seven times alleged).

[33] *Id.* at 277.

[34] *Id.* at 264.

Court noted that the First Amendment must be interpreted in light of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[35] While the Court had in other areas suggested that exaggeration, vilification, and even false statement in the realm of religious and political debate were a small price to pay for the public deliberation at the heart of democracy,[36] *New York Times v. Sullivan* was the most radical extension of this principle, holding as it did that the traditional common law rules of libel were, in fact, unconstitutional. [37]

One central reason for this sweeping constitutionalization of the common law was the increasing use of libel suits to silence civil rights activists in the South and to punish the Northern newspapers critical of the South's violent reprisals against protestors.[38] Few would disagree that the ability to use libel law to bankrupt civil rights leaders and a sympathetic Northern press would have had an enormous negative effect on the nascent Civil Rights Movement.[39] Thus, the original approach in *Sullivan* made historical sense. Over the course of the subsequent half-century, however, the elaboration of the principles enunciated in the *Sullivan* case has created significant constitutional barriers to the regulation of hate speech in the U.S. One of the most significant of those barriers was erected in 1992, in the case of *R.A.V. v. St. Paul.*[40] In this case, the Court overturned a criminal sanction for cross-burning.[41] It held that the statute sanctioning speech and symbols reasonably guaranteed to "arouse[] anger, alarm or resentment in others on the

[35] *Id.* at 270.
[36] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).
[37] *See generally Sullivan*, 376 U.S. 254.
[38] John Bruce Lewis & Bruce L. Ottley, New York Times v. Sullivan *at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 2–3, 9–11 (2014).
[39] *See id.* at 63.
[40] 505 U.S. 377 (1992).
[41] *Id.* at 396.

basis of race, color, creed, religion or gender"[42] violated the First Amendment's prohibition on viewpoint discrimination.[43]

Thus, in order to protect against anti-Semitism, European nations adopted speech regulations designed to protect dignity and promote tolerance.[44] On the other hand, in order to protect the nascent Civil Rights movement, U.S. courts constitutionalized libel laws and discouraged regulation of speech.[45] To use another framework, Europeans dealt with anti-Semitism by leveling up, according all citizens the respect and dignity of aristocrats.[46] The U.S., on the other hand, dealt with the racist use of libel law by leveling down, denying all citizens any legal claim to civility and respect.[47] As a result, these days, though the speech regimes in both nations can be linked to their anti-discrimination efforts in the 1960s, speech regulations common in many European nations are largely unconstitutional in the U.S.[48]

This has led some to suggest that American free speech protection is absolute[49] and that the U.S. does not regulate offensive speech.[50] This is not true. As discussed in the next section, the U.S. regulates free speech through social rather than legal mechanisms, due to the belief that social regulation best advances the goals of self-government, truth-seeking, and self-expression.[51]

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[42] *Id.* at 380. Specifically, the statute provided that "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." *Id.*

[43] *Id.* at 395–96.

[44] Office of the High Commissioner, *supra* note 24.

[45] *See generally, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[46] Adrienne Stone, *'Insult and Emotion, Calumny and Invective': Twenty Years of Freedom of Political Communication* 19 (Melbourne Law Sch., Working Paper No. 565, 2011).

[47] *Id.*

[48] *Compare* Snyder v. Phelps, 562 U.S. 443 (2011) (holding that civil liability for protest signs that deliberately insulted grieving families violated the First Amendment), *with* Public Order Act 1986 (UK), https://www.legislation.gov.uk/ukpga/1986/64 (creating liability for the "stirring up of racial hatred" that includes prohibitions on harassment, and threats).

[49] Hugo L. Black, *The Bill of Rights*, 35 N.Y.U L. REV. 865, 874 (1960).

[50] *See* Eugene Volokh, *No, There's No "Hate Speech" Exception to the First Amendment*, WASH. POST (May 7, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/?utm_term=.1405de0dd17a.

[51] *See infra* Section II.

II. GOALS OF FREE SPEECH AND SOCIAL REGULATION

This section provides a brief summary of the three primary values underlying the preference for the social regulation of offensive speech in the U.S.—self-government, truth seeking, and self-expression. It also discusses the ideal of social regulation of speech as the best way to support and affirm these goals.

A. Values Underlying Free Speech

One of the primary values underlying free speech is democratic self-government. According to Robert Post, Dean of Yale Law School, the right of self-government is best understood as a right of authorship— a right to share in the making of the laws governing society through equal participation in public discourse and debate about those laws and policies.[52] As James Madison noted, however, in this process, "the censorial power is in the people over the Government, and not in the Government over the people."[53] Under this view, the government's obligation to ensure political equality among citizens advocating for their respective policy preferences requires it to accord equal status to the various ideas proposed by its citizens.[54] This precludes censoring the ideas of some citizens based on subjective criteria, or treating some citizens more or less favorably due to their policy ideas or political advocacy.[55] This equality of ideas, however, is limited to public discourse, normatively defined.[56]

If the government may engage in subjective censorship on the grounds of offense, however, it can limit the options and solutions citizens are permitted to discuss to those that favor its views,[57] for "offensive" is a term of inherently flexible and arbitrary boundaries.[58] It creates a broad space within which the government could have final say over citizen deliberation and

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[52] Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011).
[53] Letter from James Madison to James Monroe (Dec. 4, 1794) (available at https://cdn.loc.gov/service/mss/mjm/05/05_0799_0804.pdf).
[54] *See* Post, *supra* note 53, at 485.
[55] *See id.*
[56] *Id.* at 484–485 (limiting his equality of ideas argument to public discourse).
[57] Bo Zhao, *Legal Cases on Posthumous Reputation and Posthumous Privacy: History, Censorship, Law, and Culture*, 42 SYRACUSE J. INT'L L. & COM. 39, 89 (2014) (explaining how government censorship of offensive speech might create further censorship of other ideas and explorations that are a natural part of a democracy).
[58] *See* Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 LAW & CONTEMP. PROBS. 149, 160 (2017) (noting that it is difficult to distinguish between offensive speech and impermissible animus toward a particular viewpoint).

criticism, in the name of preventing offensive speech.[59] The interests of those in power in maintaining their power makes such a subjective censorial power susceptible to abuse.[60] It also underscores the need for the citizenry to retain the power to change their government and governors at will.[61] As these changes require collective acts, self-government relies heavily upon the ability of the polity to engage in free and uninhibited discussion and criticism of the government of the day.[62] For these reasons, U.S. courts have sometimes treated political speech, speech touching upon the practice of self-government, as entitled to more robust protection than non-political speech.[63] However, the difficulty of distinguishing between political and non-political speech in the first instance, and the fact that ordinary speech is seldom wholly one or the other, complicates such a hierarchical ordering.[64]

A second fundamental reason for prohibiting government regulation of offensive speech is closely related to the first—the truth-seeking rationale. This idea rests on the inevitable fallibility of human beings and the value of reason-giving. According to this view, silencing dissenting views, even in the name of preventing hate speech, may silence an unrecognized truth and thus deprive society of an opportunity for advancement.[65] The case of Galileo and the Catholic Church is a quin-

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[59] *See* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1458 (2017) (explaining that citizens require adequate structures for public discourse to maintain a self-governing society and to have autonomy in their speech and decisions).

[60] *Id.*

[61] *Id.*

[62] New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964).

[63] *See generally* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 90 (2017) (describing how the truth-seeking rationale is based upon the idea that the truth will emerge "from an open clash of conflicting ideas and opinions"). *Compare* Snyder v. Phelps, 562 U.S. 443, 451–52, 453 (2011) (finding that speech "relating to any matter of political . . . concern to the community" constitutes speech that is of public concern, which lies "at the heart of the First Amendment's protection") *with* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 759 (1985) (noting that "speech on matters of purely private concern is of less First Amendment concern" than speech concerning public matters).

[64] *See e.g.*, *Snyder*, 562 U.S. at 453–55 (explaining that determining whether speech is political or not depends on an evaluation of the content, form, and context of the speech and that each unique circumstance must be examined because what might be considered political speech in one evaluative criteria's circumstances might not be so in another).

[65] "[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is

tessential example of the dangers of silencing an unrecognized truth.[66] However, this view also finds value in erroneous dissenting views.[67] For, even erroneous dissenting views challenge taken-for-granted truths and force deliberation and reason-giving in the defense of those truths.[68] The process of reason-giving strengthens the power and legitimacy of the challenged truths.[69] Thus, at the heart of the truth-seeking rationale is the belief that no individual or single group of individuals, limited as s/he is by her socio-cultural context, is able to flawlessly differentiate between truth and error, between noxious ideas and those that will redound to the good of the polity.[70] This approach suggests that the value of an idea over time, its effect on the mores and social welfare of society, is always *a posteriori* knowledge, never *a priori* knowledge. The only way to know the value of an idea to a society over time is to allow that idea to percolate in society over time—to create a free and open marketplace of ideas.

Many advocates of hate speech regulation, however, are not directly attempting to exclude noxious ideas from the marketplace of ideas a priori, but rather to set boundaries on the manner in which such ideas are given expression in public fora. Even this more limited approach to speech regulation poses a problem for the marketplace of ideas by making class a gatekeeper for access to the marketplace. As was observed in the debate over England's blasphemy laws, "what it really comes to is that, where opinions are strongly held by an educated man, those opinions will be expressed in a way in which the law can-

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almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." JOHN STUART MILL, ON LIBERTY 33 (David Spitz ed., W. W. Norton 1975) (1859)); *see also* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (commenting that the Founders, among other things, "believed that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth" and that "they eschewed silence coerced by law").

[66] Jon D. Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. Pa. L. Rev. 129, 206 (2003) (quoting Galileo's abjuration, in which he disavows his theory that the earth is a sphere and condemns his own findings as heresy to avoid further torture by the church's inquisitors).

[67] "[I]f [the suppressed opinion is] wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." MILL, *supra* note 66.

[68] *Id.*

[69] *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring).

[70] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas.").

not touch, while those expressed by an uneducated man, simply because he is uneducated, will come under the penalties law."[71] Moreover, given that normative standards of civility are never fixed, but are always in process and evolving, the law must constantly choose whose norms and whose version of civility to impose upon all of society.[72] Robert Post argues that the law invariably chooses the norms of the dominant group,[73] placing all others under a disadvantage in the marketplace of ideas. While the issue of hegemony must necessarily infect all laws in a society based on majority rule, in Post's view, there is a material and problematic difference between imposing dominant cultural speech norms and the imposing of other cultural norms reified in law.[74] One way to account for this hierarchical ordering of the acceptability of hegemony would be the view of democracy as "government by discussion," making equality in the marketplace of ideas one of the most essential aspects of equality.

During the years before widespread internet use, when access to broadcast media was beyond the reach of most ordinary people, it would have been difficult to argue that a marketplace of ideas to which the general citizenry could contribute actually existed. The ability of ordinary citizens to speak out in ways that would meaningfully impact public deliberation was greatly circumscribed by high barriers to entry into the communication market.[75] Moreover, access to audiences was skewed along axes of wealth and power; for media that provided access to the largest audiences were also the most expensive. Thus, critiques of power and alternative narratives were silenced in many ways by the cost of access to broadcast technologies. In the Web 2.0 era,[76] however, our technology has finally caught up with our theoretical frameworks, and almost anyone with a mobile phone can shop their ideas in a global marketplace.

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[71] Robert Post, *Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 131 (Ivan Hare & James Weinstein ed., 2009).
[72] *Id.*
[73] *Id.*
[74] *Id.* at 132–33 (arguing that speech norms are analogous to religious truths and thus, the government must be required to be neutral among the many speech communities competing for dominance).
[75] April Mara Major, *Norm Origin and Development in Cyberspace: Models of Cybernorm Evolution*, 78 WASH. U. L.Q. 59, 101 (2000) (comparing the ease of internet communication with the high entry barriers of print publishing and broadcast media).
[76] *See generally* Mike Wolcott, *What is Web 2.0?*, CBS: MONEY WATCH (May 1, 2008), https://www.cbsnews.com/news/what-is-web-20/ (explaining in depth the Web 2.0 era).

While name recognition and wealth continue to play a role, they are not prerequisites for an idea to "go viral."[77] Ordinary people can capture the attention of a global audience with little more than an idea and an internet connection. They can endorse the government or attack the government, call for cooperation or call for discrimination. In the internet era, barriers to audience access have been rendered largely obsolete, and the space for counter-speech[78] is far more coextensive with the space occupied by dominant narratives than at almost any other point in our history.[79] As will be discussed later, however, both the marketplace idea and the self-government idea contain certain presuppositions about the buoyancy of good ideas (they will rise to the top) and the nature of the citizenry (they have the critical capacity and engagement to distinguish between good and bad ideas) that have not always been borne out in practice.[80]

The third rationale supporting social regulation of offensive speech lies in the concept of human autonomy, and construes the right of self-expression as a necessary aspect of realizing that autonomy. This idea relies on notions of the rational human being whose capacity for expression is central to the realization of her highest human functioning.[81] It places a premium on "the notion of self-respect that comes from a mature person's full and untrammeled exercise of capacities central to human rationality."[82] Under this view, freedom of speech is essential to the expression of personality and identity.[83] Studies on the links between language and identity are innumerable and suggest that language and other means of self-expression play a fundamental role not only in the construction but in the actual-

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[77] Nancy Fox, *Leverage Your Online Opportunities*, 34 No. 2 LAW PRAC. 16, 16 (2008) (explaining that when something is viral it "spreads rapidly and exponentially").
[78] Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. REV. 553, 554 (2000) (defining counterspeech as speech designed to remedy or counter "bad" speech).
[79] However, the recent proposed changes in net neutrality laws may narrow that space. *See* Olivia Solon, *Ajit Pai: The Man Who Could Destroy the Open Internet*, THE GUARDIAN (July 12, 2017, 7:42 AM), https://www.theguardian.com/technology/2017/jul/12/ajit-pai-fcc-net-neutrality-open-internet (enumerating the Trump Administration's attempts to chip away at net neutrality).
[80] *See infra* Section III.
[81] David A. J. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62–63 (1974).
[82] *Id.* at 62.
[83] *See* Adrienne Stone, *Defamation of Public Figures: North American Contrasts*, 50 N.Y. L. SCH. L. REV. 9, 24 (2006) (noting the importance of free speech to the expression of individual identity and personality development).

ization of identities.[84] Accordingly, protection of freedom of speech as self-expression is essential to an individual's ability to promote her own development and to control her destiny through autonomous decision-making.[85] As a result, under the strong version of this view, restrictions on the types of communications human beings can receive, send, or be exposed to expresses contempt for human rationality and fundamentally disrespects the idea of individual sovereignty.[86]

Moreover, while Supreme Court precedent treats the self-expression rationale as subordinate to those of self-government and truth-seeking,[87] it has been argued that this rationale is actually the highest and most important objective of the First Amendment.[88] According to this argument, the reason self-government and truth-seeking are important is because they are the most conducive to individual development and self-realization.[89] Thus, the self-realization rationale itself should rank higher in a lexicographical ordering than the mere means to the goal of self-realization. While U.S. jurisprudence has yet to go this far, it has consistently acknowledged that a fundamental goal of the First Amendment is to protect rights of self-expression.[90]

B. Social Regulation Affirms and Preserves these Goals

This section discusses the idealized defense of social speech regulation and the ways it is believed to promote and preserve the values of self-government, truth-seeking, and self-expression.

First, social regulation preserves self-government by entrusting the regulatory power over speech to the people themselves, rather than to the government. This makes it difficult for the government to undermine popular self-determination by usurping the mechanisms of public discussion and directing

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[84] JAMES PAUL GEE, AN INTRODUCTION TO DISCOURSE ANALYSIS: THEORY AND METHOD 141 (2d ed. 2005).
[85] Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 625–26 (1982).
[86] *See* Richards, *supra* note 82, at 62.
[87] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.").
[88] Redish, *supra* note 86, at 593.
[89] *Id.* at 594.
[90] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (explaining that protection of self-expression is a "fundamental concern of the First Amendment"); *see also* Consol. Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530, 534 n.2 (1980) (stating that an interest in self-expression is protected by the First Amendment freedom of speech provisions).

them toward the promotion of its own self-interest.[91] For, if the government cannot control the types of speech that enter the public forum, it cannot bias reporting and media toward its own goals and positions. It also cannot silence dissent or insulate incumbents from criticism. The earliest history of America demonstrates that the line between unpopular political speech and speech that is injurious to society is an extremely subjective one, susceptible to abuse.[92] The strong First Amendment limitations on governmental policing of speech seeks to reduce the risks of such abuse by placing the power to censor in private, rather than public hands—thus limiting the degree to which the government can manipulate speech restrictions as a means of enhancing its own power. For, with its vast resources and expansive police powers, the government can force national conformity through ignorance and mistake, and then prevent remediation by foreclosing dissenting speech across all communicative media. Private censorship, on the other hand, is assumed to be partial and community-based, with private censors unable to control the national speech market. Thus, citizens continue to have access to opposing views in some fora, allowing for at least the possibility of dialogue and improvement—of the minority persuading the majority through appeals to public reason. Such avenues would be foreclosed by a fully centralized silencing of dissent. Thus, private censorship seems to allow a more partial and fluid regulation of offensive speech.

Similarly, in the idealized version, social regulation of offensive speech safeguards the marketplace of ideas, while government regulation of offensive speech would undermine the truth-seeking and legitimacy rationales at the heart of that ideal.[93] For example, one assumption of the truth-seeking ra-

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[91] Alexander Miklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256 (1961).

[92] The history of the Alien and Sedition Acts seems to illustrate this point. Passed in 1798, these Acts were a response to concerns about the French Revolution and potential war with France. The Alien Act allowed the President to deport aliens deemed "suspicious," while the Sedition Act punished the writing, uttering, or publishing of "any false, scandalous or malicious . . . writings" against the government or President "with intent to defame them or to bring them 'into contempt or disrepute. . . or to excite against them . . . the hatred of the good people of the United States.'" Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 73 (2002). These Acts were used to jail political opponents and to silence criticism of the Federalist President and his allies in Congress. *See* James Morton Smith, *President John Adams, Thomas Cooper, and Sedition: A Case Study in Suppression*, 42 MISS. VALLEY HIST. REV. 438, 438 (1995).

[93] *See e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

tionale is that the truth is more likely to be the product of more speech rather than less speech—of open deliberation and debate rather than debate constrained by subjective limitations on which ideas can be presented and how they can be presented. While private actors can and do censor speech, their reach is far more limited than that of the government, for private actors can only force speakers to seek out another venue, while the government can force speakers out of the marketplace entirely. Thus, private regulation is more supportive of the "more speech" paradigm, for it functions to ensure that so long as an idea has proponents, however few, it will never completely disappear from the marketplace. Whether this is truly a good, given the argument that some ideas SHOULD disappear from the marketplace, leads to the second rationale for the truth-seeking marketplace —legitimacy of process. This approach argues that even ideas which time and public deliberation have shown to be noxious should be allowed in the marketplace, because laws imposed on a silenced minority, unable to speak in their defense, are inherently illegitimate.[94] Thus, the legitimacy of anti-discrimination laws rest in part on racists having a fair opportunity to express their views and argue for their ideas in the court of public opinion.[95] In this construction of legitimacy, the rejection of the views of the racist must be a function of the independent rejection of their arguments by the myriad private parties to whom they are addressed, rather than the wholesale national silencing of their views by the government.[96] The legitimacy view is not without its detractors,[97] but the approach taken by the U.S. thus far is to encourage counterspeech and to allow private actors to affirm or reject competing ideas through economic sanctions.[98]

Lastly, social regulation of speech is considered more compatible with the autonomy or freedom of expression rationale. For example, as demonstrated in the discussion of the self-government and truth-seeking rationales above, social regulation of speech generally allows a more diverse range of viewpoints and expression than legal regulation, due to its local and

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[94] Ronald Dworkin, *Foreword in* EXTREME SPEECH AND DEMOCRACY, at viii–ix (Ivan Hare & James Weinstein eds., 2009).
[95] *Id.*
[96] *Id.*
[97] Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1640 (2010).
[98] *See* United States v. Alvarez, 567 U.S. 709, 726–27 (2012) (explaining that counterspeech can achieve the government's interest without resorting to censorship).

individualized nature.[99] As a result, social regulation of speech eliminates the requirement that all speech acts meet the approval of a majority of the polity. It rejects making the right of free speech subject to government approval, and thus does not premise the right of free expression on one's membership in the dominant discourse community.[100] Social regulation of speech does still favor speech rooted in the dominant discourse community, but is to be preferred over government regulation because of its partial nature. It has the ability to only partially restrict speech rooted in minority discourses. This allows room for minority forms of expression in alternative fora and reserves to individuals multiple avenues for self-expression. Given the centrality of self-expression to authentic freedom and the actualization of identity, the preservation of avenues for self-realization is a central requirement for a pluralistic democracy composed of rational autonomous beings. The partial and open nature of social sanctions allows greater space for the self-expression of minorities than would more centralized determinations of the worth of various methods of self-expression and actualization.

III. MECHANISMS OF THE SOCIAL REGULATION OF OFFENSIVE SPEECH

This section of the article discusses the mechanisms of the social regulation of offensive speech in the U.S, and the negative side effects of social regulation in an era of social media.

A. Community Pressures on Corporations

As discussed above, U.S. First Amendment jurisprudence presupposes that free speech ideals are best advanced by the decentralized social regulation of offensive speech.[101] While this may originally have been constructed as an expectation that individuals would close their ears or turn the channel when faced with speech they found distasteful,[102] it has operated far differently in practice. Social regulation of offensive speech has developed a distinct and often collective mechanism of en-

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[99] *See id.* at 726–27.
[100] Post, *supra* note 72, at 130.
[101] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[102] *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971) (partially justifying according free speech protection to vulgarities on an individual's jacket by noting that those offended could "simply" avert their eyes).

forcement—market pressures on corporations—that has transformed it into something much more than individual avoidance, though still less than criminal sanctions. When individuals or political figures express ideas or use language that members of a given community find offensive, social regulation increasingly targets the organizations with which the offender is affiliated.[103] While individual complaints may have little effect, communities within society are often successful in using boycotts and protests to persuade corporations and other organizations to impose economic sanctions on those who violate social norms of communication and civility, often by fining or firing the offenders. Thus, social regulation of speech is not synonymous with non-regulation, but rather reflects a preference for regulation that employs less comprehensive sanctions than government regulation—community mediated economic sanctions rather than nationwide criminal sanctions.

The prevalence of social media means that ordinary people have far more widespread and efficient avenues for demanding social and economic sanctioning of speech than in previous eras; the nature and extent of the sanctions, however, vary in accordance with the nature of the speech and the wealth and social class of the speaker. Recent examples of the social censoring of speech discussed in online news sources, while not comprehensive,[104] suggest that social regulation acts upon three types of disfavored speech—speech that can be censored, speech that is contested, and speech that can be discredited.

1. Speech That Can be Censored

For speech to be considered censorable, there generally must exist a widespread consensus that the speech is socially unacceptable and sanctionable. Speech in this category is most akin to what is commonly known as "hate speech."[105] It is publicly stigmatized and considered harmful across a wide range of speakers of different races, ethnicities, and religious or political

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[103] *See, e.g.*, Severson, *supra* note 5; *see also* Jenkins, *supra* note 7.

[104] I reviewed about 50 news stories on incidents of social regulation of speech, drawn from my own Google searches, recommended news articles, and lists compiled by Business Insider. I ultimately based my categories on 33 speech-sanctioning incidents between August, 2012, to the present, after removing undated incidents, insufficiently documented incidents, and incidents related to violations of employer privacy rules. A list of links to these articles is on file with the author.

[105] Hate speech consists of "speech designed to promote hatred on the basis of race, religion, ethnicity or national origin." Mariana Mello, Hagan v. Australia*: A Sign of the Emerging Nation of Hate Speech in Customary International Law*, 28 LOY. L.A. INT'L & COMP. L. REV. 365, 365 (2006).

ideologies.[106] The racial slurs used by individuals on social media are a classic example of censorable speech, as are slurs against women, religious minorities, and, increasingly, the LGBTQ community.

For example, Curt Schilling, former World Series-pitcher-turned-ESPN-analyst, shared a post on Facebook that showed an overweight transgender man in a wig with a caption that read "LET HIM IN! to the restroom with your daughter or else you're a narrow-minded, judgmental, unloving racist bigot who needs to die."[107] Schilling added the comment, "A man is a man no matter what they call themselves. I don't care what they are, who they sleep with, men's room was designed for the penis, women's not so much. Now you need laws telling us differently? Pathetic."[108] The post and comment generated intense criticism, causing ESPN to release a statement defining itself as an inclusive company and noting that Schilling had been fired.[109] In another incident, a Michigan firefighter lost his job after calling an African American woman a "b****" and a "n*****" on Facebook and telling her to go back to the fields.[110] In addition, the communications director of an internet company was fired after an outcry on social media over a tweet that read, "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!"[111] While public figures, like Curt Schilling, have long been subject to social regulation of their speech, it is only recently that social media platforms have rendered the speech of non-public figures visible enough to become an object of social regulation.

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[106] *See* Alexander Brown, *The "Who?" Question in the Hate Speech Debate: Part 1: Consistency, Practical, and Formal Approaches*, 29 CAN. J.L. & JURIS. 275, 276–81 (2016); *see also* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 133, 134–37 (1982) (demonstrating the various harms caused by hate speech to show why this type of speech is considered unacceptable and that a remedy should be available).

[107] Richard Sandomir, *Curt Schilling, ESPN Analyst, Is Fired Over Offensive Media Post*, N.Y. TIMES (Apr. 20, 2016), http://www.nytimes.com/2016/04/21/sports/baseball/curt-schilling-is-fired-by-espn.html.

[108] *Id.*

[109] *Id.*

[110] Cassy Arsenault, *Belding Firefighter Let Go For Racist Remarks*, FOX17 (Dec. 12, 2106, 10:41 PM), http://fox17online.com/2016/12/12/belding-firefighter-let-go-for-racist-remarks/.

[111] Ed Pilkington, *Justine Sacco, PR Executive Fired Over Racist Tweet "Ashamed"*, THE GUARDIAN (Dec. 23, 2013, 6:26 PM), https://www.theguardian.com/world/2013/dec/22/pr-exec-fired-racist-tweet-aids-africa-apology.

The social costs of using censored speech are generally extremely high, as economic losses are often compounded by social stigma. The strength and dominance of the social norms that sanction censorable speech force most speakers to recant immediately, though many are still relegated to the fringes of society even after apologizing. (Though, as always, money and social class can brunt the effect of social sanctions). While stigma and loss of one's livelihood are materially different from the government's ability to criminalize this type of speech, they are nevertheless significant sanctions, and have had a dramatic effect on actual speech practices in the U.S. The long, embarrassing history of racism in America, and the relative newness of meaningful racial progress, have made racist hate speech one of the most visible objects of social censorship. However, the political gains and power of LGBTQ rights groups and women's rights groups mean that sexist, homophobic, and transphobic speech are increasingly drawing community ire.[112] Indeed, concern over the expansion of the categories of censorable speech is often considered to have been a factor in the 2016 electoral victory of Donald Trump.[113]

2. Speech That is Contested

Sometimes, however, the social regulation of offensive speech is partial and inconsistent, because the offensiveness of the speech is contested, the speaker is privileged, or some other countervailing consideration demands forbearance. I call this category of speech contested speech, for there are competing discourse communities with contrasting interpretations of the sanctionability of the speech. In the paradigmatic case, one community views the speech as censorable hate speech, while another views the speech as valuable and legitimate political discourse. As a result, the sanctioning of the contested speech will vary across fora, in accordance with the relative power and visibility of the contesting communities in each forum.

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[112] *See, e.g.*, Seth McLaughlin, *Trump Apologizes for 'Locker Room Banter' After Past Recordings Emerge*, WASH. TIMES (Oct. 7, 2016), http://www.washingtontimes.com/news/2016/oct/7/trump-apologizes-locker-room-banter-recordings/; Daniel Victor, *ESPN's Curt Schilling Criticized Again After Post About Transgender People*, N.Y. TIMES (Apr. 20, 2016), https://www.nytimes.com/2016/04/21/sports/baseball/curt-schilling-espn-transgender.html?_r=0.

[113] *See* Associated Press, *'No More Political Correctness' for Trump Supporters,* PBS: NEWSHOUR (Apr. 10, 2016, 3:28 PM), http://www.pbs.org/newshour/rundown/no-more-political-correctness-for-trump-supporters/.

The current social disagreement over the Black Lives Matter[114] and anthem protests[115] are an example of contested speech. A significant portion of Americans believe that the Black Lives Matter movement is the new frontier of civil rights and that the anthem protests are an important nonviolent means of drawing attention to the social injustices resulting from police brutality.[116] At the same time, an equally significant portion of Americans believe that the Black Lives Matter movement is a hate movement that advocates violence against police officers, that the anthem protests disparage veterans, and that both are part of a larger ploy to destabilize America.[117] This has created an atmosphere of social regulation that is somewhat schizophrenic. For example, when the Women's Na-

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[114] *About the Black Lives Matter Network,* BLACK LIVES MATTER, https://blacklivesmatter.com/about/what-we-believe http://www.blacklivesmatter.com/about (last visited Aug. 31, 2017) (explaining that the Black Lives Matter movement formed in 2012 following the acquittal of George Zimmerman, who was charged with murdering 17-year-old Trayvon Martin.). Black Lives Matter is a response to perceived devaluing of black lives in American society as a result of anti-Black racism. *Id.* This devaluation often manifests itself in policing practices that leave African-Americans dead or wounded for minor infractions, such as traffic violations. *See id*.

[115] Such protests began in 2016 with NFL player Colin Kaepernick kneeling while the National Anthem played before football games "to protest police brutality and social injustice." Billy Witz, *This Time, Colin Kaepernick Takes a Stand by Kneeling*, N.Y. TIMES (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/sports/football/colin-kaepernick-kneels-national-anthem-protest.html. Additional athletes have joined the protest as well. *See* Arnie Stapleton, *More Than 200 NFL Players Sit or Kneel During National Anthem*, CHI. TRIB. (Sept. 24, 2017, 10:17 PM), http://www.chicagotribune.com/sports/football/ct-nfl-national-anthem-kneeling-20170924-story.html.

[116] *See* Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement,* THE GUARDIAN (July 19, 2015, 5:00 AM), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement; *see also* Les Carpenter, *Kaepernick's Anthem Protest is Perfect Way to Highlight America's Race Problem,* THE GUARDIAN (Sept. 9, 2016, 7:00 AM), https://www.theguardian.com/sport/2016/sep/09/colin-kaepernick-national-anthem-protest-nfl-race-issues.

[117] *See* J.F., *The Misplaced Arguments Against Black Lives Matter,* THE ECONOMIST (Aug. 18, 2017), https://www.economist.com/blogs/economist-explains/2017/08/economist-explains-15; *see also* Dave Boyer, *Trump Takes Aim at Black Lives Matter, Slams 'Hostility and Violence' Against Police*, WASH. TIMES (May 15, 2017), http://www.washingtontimes.com/news/2017/may/15/donald-trump-police-need-better-protection/; David B. Larter, *Legendary SEAL Leader: National Anthem Protests Disrespect the Military,* NAVY TIMES (Sept. 9, 2016), http://www.navytimes.com/news/your-navy/2016/09/09/legendary-seal-leader-national-anthem-protests-disrespect-the-military/; Brendan Bradley, *Everything Wrong With the Black Lives Matter Movement,* THE HILL (Dec. 6, 2016, 8:22 PM), http://thehill.com/blogs/pundits-blog/civil-rights/309140-everything-wrong-with-the-black-lives-matter-movement (describing the Black Lives Matter movement as a group "benefit[ing] from controversy" and a "new form of tyranny").

tional Basketball Association (WNBA) teams Phoenix Mercury, Indiana Fever, and New York Liberty appeared for games in plain black warmup shirts in support of the Black Lives Matter movement,[118] a significant portion of the U.S. population was offended and felt that they should be penalized.[119] However, when the players were fined by the WNBA for their actions, the angry outcry from an equally significant portion of the population led to the fines being withdrawn.[120] Similarly, when a group of 11- and 12-year-old members of a youth football team in Beaumont, Texas chose to kneel for the national anthem as a way of protesting police brutality, numerous individuals in the community were outraged and death threats were issued against the young players.[121] The executive board of the team allegedly responded by stating that any Beaumont Bulls player who chose to kneel at subsequent games would be suspended from the team.[122] This response produced its own backlash, which led to that threat being withdrawn.[123] However, the Bulls' head coach was nevertheless dismissed for the remainder of the season.[124]

The protests for and against professorial candidate Steven Salaita reflect a similar dynamic, entailing not only contested content, but also a speaker considered privileged. After being offered a tenured faculty job at University of Illinois at Urbana Champaign (UIUC), Steven Salaita wrote various tweets considered by many to be anti-Semitic, such as "Zionists: transforming 'anti-semitism' from something horrible into something honorable since 1948."[125] The tweets led to an outpouring of opposition from students, faculty, and donors at UIUC.[126] These individuals and groups believed that Salaita

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[118] *See* Nick Eilerson, *WNBA Withdraws Penalties for Players' 'Black Lives Matter' Protests*, WASH. POST (July 23, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/07/23/wnba-withdraws-penalties-for-players-black-lives-matter-protests/.

[119] *See* Ananth Pandian, *WNBA Fines Three Teams and Players for Black Lives Matter T-shirts,* CBS SPORTS (July 21, 2016), https://www.cbssports.com/nba/news/wnba-fines-three-teams-and-players-for-wearing-black-lives-matter-t-shirts/.

[120] *See* Eilerson, *supra* note 119.

[121] *See* Adam Harris, *The Fight of their Lives*, BLEACHER REPORT (Sept. 26, 2016), http://thelab.bleacherreport.com/the-fight-of-their-lives/.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] Subir Grewal, *The Salaita Tweets: A Twitter/Outrage Concordance*, DAILYKOS (Aug. 18, 2015, 3:09 PM) http://www.dailykos.com/story/2015/8/18/1412900/-The-Salaita-Tweets-A-Twitter-Outrage-concordance.

[126] *See id.*

was anti-Semitic and thus unfit to teach UIUC students, some of whom are Jewish.[127] After consideration of the various comments, threats, and communications, UIUC revoked Steven Salaita's offer of employment.[128] The revocation of the job offer led to another outcry, motivated in part by concerns for academic freedom and breach of contract.[129] As a result, the America Association of University Professors added UIUC to its list of censured universities,[130] while UIUC paid Salaita $600,000 as part of a settlement agreement.[131] The public censure of the university by other organizations in society and the large settlement suggest that Salaita's speech was contested rather than clearly censorable.

3. Speech That Can be Discredited

A third category of speech is discreditable speech. Discreditable speech is generally condemned for its lack of concern for individuals or groups rather than for its promotion of hate toward individuals or groups. In essence, discreditable speech is speech that critics believe displays high levels of ignorance or callousness toward the plight of victimized or marginalized groups. Given that sins of omission are often treated less severely than sins of commission, it would not be surprising to find social regulation of speech making a sharp distinction between censorable speech and discreditable speech—between hate speech and insensitive speech. However, the racial and political fault lines triggered by the Obama presidency and the increased coverage of hate speech in the aftermath of Trump's campaign have resulted in the line between censorable and discreditable speech becoming increasingly blurred. For example, a paradigmatic case of discreditable speech occurred in 2013, when a twenty-two year old posted Halloween pictures of herself

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[127] *Id.*
[128] *Id.*
[129] *Id.*; *see also* Jake Flanagin, Opinion, *Steven Salaita and the Quagmire of Academic Freedom,* N.Y. TIMES: OP-TALK (Oct. 2, 2014, 11:49 AM), https://op-talk.blogs.nytimes.com/2014/10/02/steven-salaita-and-the-quagmire-of-academic-freedom/.
[130] *See* Associated Press, *University of Illinois Censored for Pulling Steven Salaita Job Over anti-Israel Tweets*, THE GUARDIAN (June 13, 2015, 11:43 PM), https://www.theguardian.com/us-news/2015/jun/14/university-of-illinois-censured-for-pulling-steven-salaita-job-over-anti-israel-tweets.
[131] *See* Jodi S. Cohen, *University of Illinois OKs $875,000 Settlement to End Steven Salaita Dispute,* CHI. TRIB. (Nov. 12, 2015, 2:55 PM), http://www.chicagotribune.com/g00/news/local/breaking/ct-steven-salaita-settlement-met-20151112-story.html?i10c.referrer=https%3A%2F%2Fwww.google.com%2F.

dressed as a victim of the Boston Marathon bombing.[132] With the bombing itself still fresh in the memories of the nation and the victims, the condemnation was almost immediate. The tweeter lost her job and received innumerable threats of death and violence.[133] Two years later, a less paradigmatic incident occurred, also over Halloween attire. A Yale faculty member sent an email to students, arguing that college students should be permitted to wear racially offensive costumes.[134] While the university expressed support for the teacher,[135] many students and other faculty viewed the email as additional damning evidence of the racial insensitivity of the Ivy League, and they engaged in direct protests that ultimately led the teacher to resign.[136] More recently, students at Claremont McKenna College physically barred speaker Heather MacDonald from her assigned campus venue, as her "War on Cops" arguments were viewed as discounting the importance of black lives.[137]

The current trend toward strong social regulation of contested and discreditable speech, in addition to hate speech, greatly complicates the issue of speech regulation. For while the active malice of hate speech seems to argue for regulation, bad intent is generally not nearly so clear in cases of contested speech and discredited speech. This suggests that while U.S. First Amendment law has maintained its "level down" approach, by denying everyone the honor and respect that once attended noble birth,[138] many engaged in the social regulation of speech are seeking to level up—striving to secure for every-

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[132] *See* Rachel Zarrell, *What Happens When You Dress as a Boston Marathon Victim and Post It on Twitter*, BUZZFEED (Nov. 2, 2013, 2:24 PM), https://www.buzzfeed.com/rachelzarrell/what-happens-when-you-dress-as-a-boston-marathon-victim?utm_term=.vqdVyP5V4#.ntkObNYOx.

[133] *See id.*

[134] Associated Press, *Yale Teacher Resigns Over Halloween Costume Controversy*, CBS NEWS (Dec. 7, 2015, 11:52 PM), http://www.cbsnews.com/news/yale-teacher-resigns-over-halloween-costume-controversy/.

[135] *See* Abby Jackson, *Yale Faculty Members Rally Behind the Administrator Whose Email Sparked Racial Tensions*, BUS. INSIDER (Nov. 30, 2015, 1:31 PM), http://www.businessinsider.com/yale-faculty-members-support-erika-christakis-2015-11; Abby Jackson, *Yale University is Standing Behind 2 Administrators at the Center of the School's Racial Tensions*, BUS. INsider (Nov. 18, 2015, 1:04 PM), http://www.businessinsider.com/yale-president-supports-administrators-involved-in-halloween-email-2015-11.

[136] Jackson, *Yale Faculty Members Rally Behind the Administrator Whose Email Sparked racial Tensions*, *supra* note 136.

[137] Howard Blume, *Protestors Disrupt Talk by Pro-Police Author, Sparking Free Speech Debate at Claremont McKenna College*, L.A. TIMES (Apr. 9, 2017, 10:20 AM), http://www.latimes.com/local/lanow/la-me-ln-macdonald-claremont-speech-disrupted-20170408-story.html.

[138] Stone, *supra* note 47, at 19.

one, but particularly for marginalized groups, the honor and respect traditionally accorded to the high born. These two aims are opposed to each other, and must be balanced in some way if social regulation of speech is to be effective.

B. Direct Regulation By Corporations

Another form of social regulation of speech is direct regulation by social media corporations, which serve as an increasingly large forum for public expression.[139] While social regulation of speech is often initiated by communities to enforce community speech standards, in direct regulation, corporations themselves create corporate standards to govern the type of speech that can be used on their social media platforms.[140] First Amendment protections that insulate offensive speech from government regulation in traditional public fora do not apply to privately owned social media platforms.[141] Thus, all three major social media forums—Facebook, Twitter, and YouTube—have written policies that authorize the censoring of hate speech.[142] Facebook reserves the right to censor speech that "directly attacks people based on their race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender, or gender identity, or serious disabilities or diseases."[143] Twitter prohibits its users from engaging in hateful conduct, defined as "promot[ing] violence against or directly attack[ing] or threaten[ing] other people on the basis of race, ethnicity, national origin,

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[139] Shannon Greenwood et al., *Social Media Update 2016*, PEW RESEARCH CTR. (Nov. 11, 2016), http://www.pewinternet.org/2016/11/11/social-media-update-2016/.

[140] *See, e.g.*, Kaya Yurieff, *Should Web-Hosting Companies Restrict Who's on Their Platforms?*, CNN (Aug. 14, 2017, 4:51 PM), http://money.cnn.com/2017/08/14/technology/godaddy-daily-stormer/index.html ("[P]rivate organizations and companies can censor speech in their offices and on their platforms."); *see also* Adam Thierer, Opinion, *Speech Policies for Information Platforms are Hard*, FORBES (Sept. 16, 2012, 12:20 PM), https://www.forbes.com/sites/adamthierer/2012/09/16/speech-policies-for-information-platforms-are-hard/print/.

[141] Due to the state-action doctrine, the First Amendment generally does not protect access to privately owned websites. *See, e.g.*, Hammer v. Amazon.com, 392 F. Supp. 2d 423, 432 (E.D.N.Y. 2005) (holding that an author failed to establish a First Amendment claim when suing private online retailor Amazon.com for negative reviews); *see also* Civil Rights Cases, 109 U.S. 3, 10–12 (1883) (establishing the state-action doctrine that the constitution only protects against governmental acts and not private actors). *But see* Davison v. Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d 605, 609–12 (E.D. Va. 2017) (finding that a resident adequately alleged that a government official's Facebook page was a limited public forum under the First Amendment).

[142] *See infra* notes 144–146.

[143] Facebook, *Community Standards: Hate Speech*, https://www.facebook.com/communitystandards (last visited Nov. 14, 2017).

sexual orientation, gender, gender identity, religious affiliation, age, disability, or disease."[144] Similarly, YouTube prohibits "content that promotes violence or hatred against individuals or groups based on certain attributes, such as race or ethnic origin, religion, disability, gender, age, veteran status, sexual orientation/gender identity."[145]

These hate speech codes partially reflect the reality that social media companies are global platforms. Whatever the local U.S. standard, the global standard, as reflected in the EU online conduct code adopted by Facebook, Twitter, YouTube, and Microsoft in May, 2016,[146] is the centralized regulation of hate speech. Thus, the speech codes adopted by U.S. social media companies increasingly reflect global (legal) rather than local (social) approaches to hate speech.[147] Moreover, with the rising use of privately owned social media—70% of U.S. adults use Facebook for expressive communication[148]—the First Amendment increasingly operates as a ban only on certain enforcement mechanisms (criminal penalties and fines), rather than as a ban on censorship itself. The remedies available to social media companies—-removal of posts, banning from the forum—do not violate the First Amendment,[149] despite constituting overt censorship, nor do attempts to impose community norms of communication through corporate fines and the loss of private employment.[150] The First Amendment operates only to prohibit the use of the wide-ranging power of the government to police speech, but leaves other avenues of speech policing

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[144] Twitter, *Twitter Rules*, https://support.twitter.com/articles/18311 (last visited Nov. 14, 2017).

[145] YouTube, *Hate Speech*, https://support.google.com/youtube/answer/2801939?hl=en (last visited Nov. 14, 2017).

[146] Alex Hern, *Facebook, Youtube, Twitter, and Microsoft Sign EU Hate Speech Code*, THE GUARDIAN (May 31, 2016, 8:16 AM), https://www.theguardian.com/technology/2016/may/31/facebook-youtube-twitter-microsoft-eu-hate-speech-code.

[147] Marvin Ammori, *The "New"* New York Times*: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2263 (2014).

[148] Aaron Smith, *Pew Research Findings on Politics and Advocacy in the Social Media Era*, PEW RESEARCH CTR.,13 (July 29, 2014), http://www.pewinternet.org/2014/07/29/politics-and-advocacy-in-the-social-media-era/.

[149] *See* Langdon v. Google, Inc., 474 F. Supp. 2d 622, 631–32 (D. Del. 2007) (holding that internet search engine providers' networks were not "public fora" as required to support website owner's claim that providers violated his right to freedom of speech by not showing his ads).

[150] *See* Kalev Leetaru, *Has Social Media Killed Free Speech?*, FORBES (Oct. 31 2016, 10:56 PM), https://www.forbes.com/sites/kalevleetaru/2016/10/31/has-social-media-killed-free-speech/print/.

open.[151] Thus, people wishing to establish community speech norms can still do so; however, they must appeal to a corporation's self-interest, not to their legislator's fiduciary obligations.

C. Side Effects of the Social Regulation of Offensive Speech

This section discusses the ways in which the actual social regulation of offensive speech departs from the theory of social speech regulation discussed in Section II. Whereas Section II summarized the idealized and theoretical benefits of relying on the social regulation of offensive speech, this section considers the side effects that limit, and in some ways undermine, those benefits.

As mentioned in Section II, a key strength of the social regulation of speech is that it benefits self-government and truth-seeking by preventing the government from controlling the "truths" citizens are permitted to hear.[152] Social regulation, unlike government regulation, leaves room for speakers who are criticized or censored by one group to merely migrate to a different platform and a different group—allowing the idea continued access to the "marketplace." This strength of social regulation also functions as a huge weakness, for one effect of this migration in an era of tailored social media has been the creation of closed communities of like-minded people, cut off from the wider marketplace of ideas.[153] For example, after Curt Schilling was dismissed from ESPN, a platform with bipartisan appeal, he found new employment as a political commentator for Breitbart[154]—a forum with a much more ideologically homogenous audience. Thus, rather than permitting the fullest range of discussion and deliberation of ideas, decentralization often increases the polarization of society, by creating multiple segregated discourse communities, completely and deliberately disengaged from one another.[155] This phenomenon has become

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[151] For an example, see Jim Edwards, *James Damore, the Google Employee Fired for his Controversial Manifesto, is (Almost Certainly) Not a Victim of a Free-Speech Violation*, BUS. INSIDER (Aug. 8, 2017, 6:45 AM), http://www.businessinsider.com/james-damore-google-anti-diversity-manifesto-free-speech-2017-8 (discussing the power of an employer to control an employee's speech).

[152] *See supra* Section II.

[153] CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO? 17, 19 (2001).

[154] Les Carpenter, *Curt Schilling Joins Breitbart to Fight "Progressive, Socialist Agenda*", THE GUARDIAN (Oct. 24, 2016, 4:01 PM), https://www.theguardian.com/sport/2016/oct/24/curt-schilling-joins-breitbart-radio-show.

[155] *Trevor Noah Talks Tomi Lahren Backlash, Being Called a "Sellout"*, HOLLYWOOD REP. (Dec. 7, 2016, 9:40 AM), http://www.hollywoodreporter.com/news/trevor-noah-

increasingly evident across social and traditional media platforms. The polarized nature of Twitter discussions[156] and the lack of dialogue between readers of CNN and readers of Fox News are well documented.[157] Thus, while social censorship allows for the possibility of the robust exchange of ideas through a bustling marketplace, the reality is often one in which self-censoring interacts with corporate censoring to create intra-community ideological hegemony, making national reasoning and deliberation across communities extremely difficult, if not impossible.

In addition, the strengths of social regulation of offensive speech assume that private censors cannot "blanket" the market, but this assumption is increasingly false. While modern America has come a long way from the days in which two entities, the government and the church, controlled the avenues of mass communication through licensing requirements,[158] control of communicative media in today's United States is only slightly more decentralized. A mere six companies control ninety-percent of the U.S. media,[159] and the Constitution places no restraints on their ability to censor speakers and messages.[160] This has resulted in numerous high profile accusations of corporate censorship believed to be harmful to the democratic process. For instance, in 1998, Fox News was accused of censoring reports that revealed issues with the widespread use of Bovine Growth Hormone.[161] In 2004, Sinclair Broadcasting refused to allow ABC affiliates to air a Nightline episode that listed the

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tomi-lahren-backlash-interview-racism-trump-953715 (discussing Trevor Noah's response to backlash from liberals when he invited a conservative talk show personality onto his show).

[156] Marc A. Smith et. al., *Mapping Twitter Topic Networks: From Polarized Crowds to Community Clusters*, PEW RESEARCH CTR. (Feb. 20, 2014), http://www.pewinternet.org/2014/02/20/mapping-twitter-topic-networks-from-polarized-crowds-to-community-clusters/.

[157] Shanto Iyenger & Richard Morin, *Red Media, Blue Media*, WASH. POST (May 3, 2006, 6:00 PM), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/03/AR2006050300865.html.

[158] LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 6 (1985).

[159] Ashley Lutz, *These Six Corporations Control 90% of the Media in America*, BUS. INSIDER (June. 14, 2012, 9:49 AM), http://www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6 (noting that the six companies are Comcast, News Corp, Disney, Viacom, Time Warner, and CBS).

[160] Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 330 (1999) ("[P]rivate censorship is not subject to judicial review.").

[161] William A. Wines & Terence J. Lau, *Can You Hear Me Now?—Corporate Censorship and Its Troubling Implications for the First Amendment*, 55 DEPAUL L. REV. 119, 145 (2005).

names and photos of service members killed in Iraq, allegedly out of concern that it would decrease support for the Iraq war, which the Sinclair CEO supported.[162] Censorship of anti-war views was also behind the decision by Cumulus and Cox Communications, who owned hundreds of radio stations, to prevent the airing of songs by the Dixie Chicks, due to the lead singer's criticisms of then-President George Bush.[163] Similarly, Disney prohibited affiliate Miramax from disseminating the film *Fahrenheit 9/11* for fear that its criticism of the Bush family would imperil Disney's tax cuts in Florida, governed by Jeb Bush.[164] The censorship by these conglomerates did not merely drive the unwanted speech to another platform; in many cases, it silenced the speech in ways every bit as far-reaching as government censorship. Moreover, it is far from clear that the decisions to censor were credible instances of social regulation—defined as flowing from the judgment of the community—rather than bare corporate censorship based on profit motives. Thus, while independent, decentralized decisions to censor content due to offense or conflicts of interest need not undermine informed self-government, the concentration of radio, television, and newspaper ownership in a few hands allows precisely the sort of information control that the First Amendment seeks to prohibit. Allowing six CEOs to control what Americans see and hear, to pick and choose which political ideas Americans should be exposed to and which current events they should be informed about, seems as inimical, if not more inimical, to self-government and truth-seeking than control of such issues by the ruling majority. For while this ideological hegemony is not governmentally imposed, it nevertheless works to undermine the central purpose of the First Amendment and to block the benefits that would otherwise flow from the choice of private censorship over governmental censorship. As McChesney, a communications professor at the University of Illinois-UC, has noted, "the public's right to hear a variety of voices and properly digest their messages is the central platform of a democracy," and "[a] popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both."[165]

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[162] *Id.* at 153–54.
[163] Jeffrey Gilbert, *The Dixie Chicks: A Case Study for the Politics of Hollywood*, 9 TEX. REV. ENT. & SPORTS L. 307, 313–14 (2008).
[164] Wines & Lau, *supra* note 162, at 154.
[165] ROBERT W. MCCHESNEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE TWENTY-FIRST CENTURY 29-30 (2004).

The ideal of social regulation of offensive speech is further complicated by the finite nature of time. More speech may well be better, but the more ideas the public must evaluate across the same span of time, the less time is afforded to the evaluation of each idea. Every idea presupposes some truth about the world, but if individual listeners lack the time or engagement to investigate these underlying truths, they will rely on shorthands, such as speaker or source, as proxies for facticity. When this speaker truth is combined with the prevalence of closed communities, however, rational self-governance flounders. A statement becomes hateful because it was proffered by Fox News and neutral because it was reported by CNN. Thus, nonpartisan evaluation of language and even critiques of facticity becomes impossible, if not obsolete, creating a marketplace in which truth is purely subjective and always political—a truth-seeking marketplace in which there is no truth. Arguably, this state of the market has already arrived. President Trump routinely calls news with which he disagrees "fake news[,]"[166] a designation widely accepted by his supporters.[167] Moreover, his spokeswoman, Kellyanne Conway, has coined the term "alternative facts," which appears to presuppose the existence of conservative truths that directly contradict liberal truths.[168] Thus, the labels "true" and "fact" are increasingly serving as shorthand affirmations of a speaker's politics, rather than as rational evaluations of an underlying reality. This bifurcation of truth value and content fatally undermines the utility of the market place of ideas as a vehicle of rational self-governance.

Lastly, the unstructured social regulation revealed in the examples in Section III is in many ways incompatible with the autonomy ideal that lies at the core of self-expression and self-

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[166] Emily Jashinsky, *Trump Downgrades* CNN *from 'Fake News' to 'Very Fake News'*, WASH. EXAM'R (Feb. 16, 2017, 2:19 PM) http://www.washingtonexaminer.com/trump-downgrades-cnn-from-fake-news-to-very-fake-news/article/2615057.

[167] Jackie Wattles and Brian Stelter, *Kayleigh McEnany Appears in Pro-Trump 'News' Video After Leaving CNN*, CNN: MONEY (Aug. 6, 2017, 4:12 PM) http://money.cnn.com/2017/08/06/media/kayleigh-mcenany-trump-campaign/index.html (noting that a longstanding claim by Trump and his supporters is that mainstream news outlets are presenting "fake news"); Heather Digby Parton, *The Big Lie Pays Off: Trump Voters Believe Fake News (About the News Being Fake)*, SALON (Oct. 19, 2017, 8:00 AM), https://www.salon.com/2017/10/19/the-big-lie-pays-off-trump-voters-believe-fake-news-about-the-news-being-fake/.

[168] *See* Mahita Gajanan, *Kellyanne Conway Defends White House's Falsehoods as 'Alternative Facts'*, TIME (Jan. 22, 2017), http://time.com/4642689/kellyanne-conway-sean-spicer-donald-trump-alternative-facts/.

government. Unstructured social regulation can offer speakers only two things—communal goodwill (the community abstains from interfering with one's expression) or communal hindrance (the community interferes with one's expression). Thus, unstructured social regulation makes the speaker's autonomy depend on another's goodwill, which is indistinguishable from making the speaker subject to another's dominion.[169] In this view, autonomy that exists only because of another's beneficence, which they can withdraw at any moment, is not autonomy at all.[170] It is benign dominion.[171] Such dominion, however benign, is a denial of autonomy.[172] It is questionable whether any kind of freedom of expression can exist when anyone, for any reason, at any time can take away another's livelihood in retaliation for her speech. This is not a call to give the government the power to take away one's liberty in retaliation for one's speech, but rather to suggest that social regulation of speech must be coupled with the legal protection of autonomy. Thus, this is a call for non-dominating social regulation of speech.

The next section addresses one way in which the nation and society could move closer to a regime of social regulation of speech that is non-dominating. This approach is an incremental and ultimately partial approach, but nevertheless represents a necessary step in securing freedom of speech in an era of closed local communities, nationalized social media communities, and daily corporate imposition of economic speech sanctions.

IV. NON-DOMINATING SOCIAL REGULATION OF SPEECH

The problems that flow from the social regulation of offensive speech inhere mainly in its implementation rather than in its theory. Allowing communities and individuals to enforce their own standards of free speech, short of imprisonment and financial ruin, can enhance commitments to pluralism, deliberation, and public reasoning. However, the effectiveness and worth of this enforcement is dependent on the nature of the community regulating the speech and the existence of legal pro-

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[169] *See* PHILIP PETTIT, JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD 77–78 (2014).
[170] *See id.* at 2.
[171] *See id.* at 2–3.
[172] *See id.*

tections against domination. There is undoubtedly a plurality of ways one could seek to create a speech community committed to civility, tolerance and public deliberation, as well as numerous ways one could protect citizens against domination. The approach endorsed by this article, however, is one as old as American democracy itself—the development of an educated citizenry. As Jefferson noted, when citizens engage in actions which suggest they are not "enlightened enough to exercise their control with wholesome discretion, the remedy is not to take it from them, but to inform their discretion."[173] Thus, the remedy for unstructured social regulation which injures autonomy is not government regulation, but rather improvement of the operation of social regulation through citizen education. In the U.S., the bulk of citizen education takes place in public schools and universities. Thus, it is in these places that we must seek to impart the skills necessary for non-dominating social regulation. This requires a significant revision in the way the First Amendment is applied to speech in public schools and universities.

The Supreme Court has suggested that restrictions on the First Amendment rights of public school students requires a showing that the speech would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[174] Later, however, it narrowed this ruling in *Hazelwood School District v. Kuhlmeier*[175] by applying a nonpublic forum analysis which held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[176] These days, it is generally accepted that public schools may censor speech that is "indecent,"[177] disruptive,[178] that promotes illegal behavior,[179] or that violates the rights of other students.[180] The rationale for allowing such censorship in public schools is the need for public

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[173] Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) (on file with the U.S. National Archives and Records Administration).
[174] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).
[175] 484 U.S. 260 (1988).
[176] *Id.* at 261.
[177] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).
[178] *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177 (9th Cir. 2006), *cert. granted*, *judgment vacated sub nom.*, Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).
[179] Morse v. Frederick, 551 U.S. 393, 402 (2007).
[180] *Harper*, 445 F.3d at 1177.

schools to model the type of public discourse necessary in a diverse democratic political order. [181] While this may be the goal of permitting such censorship in the public schools, in application it is often a bare exercise in domination, which has helped promote a culture of social regulation as domination. This article suggests that the analysis of free speech violations in a public school should not end with the question of whether the speech was disruptive, but should also include consideration of whether the school's response was an exercise in domination. If First Amendment values include autonomy, it cannot be enough that the speech regulation eliminated the disruptive behavior. Such a regulation, for both constitutional and pedagogical purposes, must also be designed to promote public reasoning, civility, and dialogue. This means that a school could not ban a Christian student from wearing a t-shirt opposing homosexuality, unless such an action was part of a larger effort to promote dialogue and authentic engagement with opposing views. [182] The question of speech in the context of education must go beyond silencing or tolerance, and must address engagement. Engagement, like most aspects of democratic citizenship, is not imbibed with mother's milk. It must be taught.

Unfortunately, what few attempts there are to teach tolerance and civility in the public schools are often frustrated by the continuing racial and ethnic segregation of these schools. For example, white students typically attend schools that are 75% white, and they have the least exposure to other races of any group. [183] Similarly, African-American and Hispanic students overwhelmingly attend schools comprised almost entirely of their racial/ethnic group. [184] School segregation, combined with residential segregation, thus ensures that many students are not exposed to viewpoints and perspectives significantly different from their own until they reach college.[185] As a result, for many students, practical lessons in civil discourse across differences are incapable of being apprehended until they arrive at a

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[181] *Bethel*, 478 U.S. 675 at 683.
[182] *Harper*, 445 F.3d at 1172–73.
[183] Jason M. Breslow, *Separate and Unequal: The Return of School Segregation in Eight Charts*, PBS (Jul. 15, 2014), http://www.pbs.org/wgbh/frontline/article/the-return-of-school-segregation-in-eight-charts/.
[184] *See id.*
[185] *See* Amy S. Wells, et al, *How Racially Diverse Schools and Classrooms Can Benefit All Students*, THE CENTURY FOUND. (Feb. 9, 2016), https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/ (noting that colleges are generally more racially and culturally diverse than the public schools the students previously attended)

university and are finally exposed to high degrees of cultural, religious, and political diversity. However, the point in their education when civil discourse rooted in tolerance of divergent views could be most meaningfully taught and is most necessary, is also the point at which such efforts are most likely to be prohibited by the Constitution. Following the rule set forth in *R.A.V. v. St. Paul*,[186] courts have held that attempts by universities to cope with the rise in racist incidents that have attended increased campus diversity (through campus speech codes[187]) are unconstitutional viewpoint discrimination.[188]

This observation is not an endorsement of wholesale government regulation of offensive speech at all levels of society, but rather a suggestion that a middle ground that permits regulation of offensive speech on public university campuses is needed. In *Bethel School District v. Fraser*,[189] the Supreme Court noted that:

> [The] fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially

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[186] R.A.V. v. St. Paul, 505 U.S. 377, 391–92 (1992) (holding that "[t]he First Amendment does not permit [parties] to impose special prohibitions on . . . speakers who express views on disfavored subjects").

[187] *See* Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1025, 1030 (2008) (noting that in the 1980s and 90s, civil rights advocates promoted speech codes as a means of protecting minorities from hate speech.)

[188] Dambrot v. Cent. Michigan Univ., 55 F.3d 1177, 1184 (6th Cir. 1995).

[189] 478 U.S. 675 (1986).

> appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[190]

Currently, it is unclear when students can learn these fundamentals values. If their public schools are too homogenous, and their diverse public universities are prohibited from restricting offensive speech, must their first introduction to "the boundaries of socially appropriate behavior" be the increasingly common dismissal from their employment? It is easy to argue that the loan officer and the firefighter should have known better. However, if their first introduction to diversity was a college campus where such speech was enabled and where sanctions for racial slurs and sexist epithets were constitutionally forbidden, at what point were they to have learned the self-restraint so essential for reasoned public deliberation in a diverse polity? There is much to condemn in the recent campus protests attempting to completely silence controversial views,[191] but the question must be asked, at which point in their public school and university careers were students taught skills of disagreement without domination?

The problem of the 21st century, like the problem of the 20th century, remains the color line, and students continue to be taught directly by their parents, or indirectly through their segregated schools and neighborhoods, that there is a racial hierarchy within which some lives matter more than others. The time for continuing to deny this reality is long past. Colleges and universities remain, for many students, the first places in which they are actually exposed to the true diversity of the marketplace of ideas. They are also spaces in which domination along axes of race and ideology become most tempting. If there are any skills for navigating that marketplace and resisting that

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[190] *Id.* at 681.

[191] *See, e.g.*, Thomas Fuller & Christopher Mele, *Berkeley Cancels Milo Yiannopoulos Speech, Donald Trump Tweets Outrage*, N.Y. TIMES, (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html?mcubz=3; Jeremy W. Peters, *In Ann Coulter's Speech Battle, Signs That Conservatives Are Emboldened*, N.Y. TIMES (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/us/politics/ann-coulter-university-of-california-berkeley.html?mcubz=3.

temptation, college offers the last best chance for students to learn them.

Thus, rather than constantly striking down speech codes at public universities as inconsistent with the First Amendment, this article urges that courts instead allow hate speech regulations in colleges and universities that promote non-domination, civil dialogue, and public reasoning. Such an exception to a blanket ban on governmental regulation of hate speech is warranted in light of the unique and central role public universities play in the creation of an educated citizenry. It takes time to create a citizenry capable of non-dominating social regulation of speech, and the court must not handicap the very institutions to which we have entrusted that task by assuming their task is complete before it has even begun. For the same reason, however, the penalties for violating such codes should not be expulsion or suspension. Rather, colleges and universities should treat violations of their speech codes as failures of sympathy[192] and adopt "penalties" that promote dialogue and connection, such as community service or multicultural education. These approaches are likely to be particularly helpful in the context of contested and discreditable speech, as the case for malicious intent is much less pronounced in those instances. However, though victims may disagree, these penalties are also likely to be appropriate in the contexts of censorable speech, for the premise of university education is that students are still capable of learning and unlearning. Though bare censorship might silence the offensive speaker, only engagement on equal footing with the disparaged groups offers a meaningful possibility that the earlier feelings of disparagement might become respect for a fellow citizen. This is especially needed given that many students are members of both majority and minority groups—i.e. African-Americans Christians or European-American homosexuals—and thus do not fall into an easy binary of oppressed and oppressor.

While this article proposes a shift in penalties, it is, nevertheless, still a vote in favor of regulation of speech on college campuses, a position that will be anathema to many. However, it is important to remember not only the higher educational mission of universities, which cannot be realized without

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[192] *See* Richard Rorty, *Human Rights, Rationality and Sentimentality in* THE PHILOSOPHY OF HUMAN RIGHTS 241, 254 (Patrick Hayden ed., 2001) (explaining sympathy as "an increasing ability to see the similarities between ourselves and people very unlike us as outweighing the differences," where the relevant similarities are ordinary everyday things like loving our parents).

speech regulation, but also that speech is never completely "free" in practice. The idealized regime in which offensive speech has no consequences and individuals are completely free from external pressures to comply with hegemonic norms of civil discourse does not and has never existed under any version of the First Amendment. Social regulation of offensive speech has always been permitted in some form in U.S. society. The goal is to move such regulation from dysfunction and closer to the ideal. Thus, allowing campuses to regulate speech in ways that promote non-domination will not create some *sui generis* exception for hate speech sanctions, but rather will allow public colleges and universities to better equip students to be full participants in a civil society that has increasingly recognized and taken steps to prevent, the real world harms of offensive speech. It will equip them to do that in a way that has less cost for the overall autonomy of speakers in society.

V. CONCLUSION

The rise of Donald Trump in the 2016 election cycle highlights the challenges that arise when a nation's commitment to popular regulation of speech outstrips the ability of its populace to engage in dialogue and deliberation across difference.[193] Free speech protections without a corresponding commitment to fostering dialogue and tolerance incentivizes low-content speech at the expense of the informationally rich speech so essential to self-governance.[194] The result is that in polarized elections, an increasingly common state of affairs, arguments in the public debate become increasingly based on prejudice rather than on reason—until prejudice itself becomes a reason.

The insight of the founding generations in perceiving speech as the guardian of democracy was not misplaced, but the speech they had in mind was speech within a context of public debate and reason, not speech for silencing and intimidation. The benefits of making the people the guardians of public deliberation are very real, but the public must be taught to be guardians. Citizens bring to the voting booth and public deliberation the knowledge and skills they acquired during the course of their education. We as a nation must ensure that that education includes not merely the ability to consume static in-

[193] *See supra* Section VI.
[194] *Id.*

formation through literacy and numeracy skills, but also the skills needed to engage in the dynamic and instantaneous communicative practices in a pluralistic society in ways that respect others' autonomy and that promote non-domination.