SMU | Dedman School of Law

SMU Law Review

Volume 48 | Issue 1 Article 9

January 1994

# Free Speech Wars

Kathleen M. Sullivan

# FREE SPEECH WARS

*Kathleen M. Sullivan**

## I. INTRODUCTION

IT is a great privilege to participate in this lecture series in honor of Judge Irving L. Goldberg. When I was a law student, Judge Goldberg was already a legend—a hero we admired deeply for his wisdom, his principle, his courage, and for his willingness to enliven the pages of the Federal Reporter with his witty writing and love of puns. Some years later in the course of my practice, I again had occasion to admire Judge Goldberg's principled consistency. He would have upheld the right of privacy against both the abortion and the sodomy laws. That is, he held not only with Roe but also with Baker against Wade.[1] Fittingly, historian David Garrow, in his recent history of *Roe v. Wade*, gave Judge Goldberg the last word, quoting his statement that an opinion "should have not only a beginning and an end, but a future."[2] That certainly will always be true of Judge Goldberg's opinions.

## II. CHANGES IN THE POLITICS OF FREE SPEECH

My topic is a recent sea change in the politics of free speech. In the old days, the First Amendment was a banner for the political left in its struggle against censorial forces perceived as coming from the right. Holmes and Brandeis wrote the opinions that founded our modern free speech tradition in cases involving the prosecution of communists, anarchists, socialists, syndicalists, pacifists, and other "reds." The American Civil Liberties Union (ACLU), at the outset, represented mostly trade unionists and draft resisters. Street demonstrations by labor unions brought about modern public forum doctrine. And, after the long drought of McCarthyism, the civil rights marches, protests, and sit-ins of the 1950s and 1960s pioneered new First Amendment ground, establishing doctrines against vagueness, overbreadth, and prior restraint. In the old days, the enemies



* Professor of Law, Stanford Law School. Professor Sullivan delivered this as the Southern Methodist University Goldberg Lecture, April 14, 1994.

1. *See* Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973); Baker v. Wade, 769 F.2d 289, 293 (5th Cir. 1985) (Goldberg, J., dissenting) ("If ever there was a constitutional right to privacy, Texas has violated it by blatantly intruding into the private sex lives of fully consenting adults."), *cert. denied*, 478 U.S. 1022 (1986).

2. DAVID J. GARROW, LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *Roe v. Wade* 712 (1994).

of free speech were the forces of law and order, anti-communism, and Jim Crow.

True, by the 1960s and 1970s, free speech advocates applied the principles they had developed earlier in the century to defending causes of the political right as well as those of the left. A Ku Klux Klan rally led the Court in 1969 finally to put teeth in the clear and present danger test by upholding the right to engage in white supremacist speech, as long as it did not amount to incitement.[3] On this interpretation, the free speech principle was neutral. The right of free speech was prior to any particular idea of the good. "[O]ne man's vulgarity is another's lyric,"[4] and "the tenets of one man may seem the rankest error to his neighbor."[5] The state was required to leave the contest among viewpoints to private choice. This neutrality principle of course, was sometimes quite controversial. For example, the ACLU's defense of neo-Nazis who sought to goosestep in brownshirts past Holocaust survivors in Skokie, Illinois, stretched it nearly to the breaking point.[6]

But by the 1990s, both liberals and conservatives seemed to have reached consensus on this neutrality principle, at least on the Supreme Court. Recall how the Court upheld, within a few Terms of each other, the right of a white racist to burn a cross[7] and the right of Maoists to burn the American flag.[8] These cases had more in common with each other than fire. In the cases of both flag-burning and cross-burning, the Court denied the power of government to suppress symbolic conduct for its message, no matter how offensive it might be to people looking on. In this series of cases, Justice Brennan and Justice Scalia alike supported free speech libertarianism, signaling at least a temporary political consensus.

Just as the Supreme Court reached consensus on free speech libertarianism, however, new fractures and seismic shifts began to destabilize the politics of free speech in the nation at large. If it used to be that censorship was associated with the right and free speech libertarianism with the left, today the political poles have switched. Now we hear new calls from the left for speech regulation and arguments from the right against it. Professor Jack Balkin fittingly labels this phenomenon "ideological drift."[9] The old scorecard no longer tells us who the players are. Radical feminists team up with family-values fundamentalists to argue for the regulation of sexually explicit speech. And cigarette manufacturer Phillip

3. Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

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

5. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

6. *See* Village of Skokie v. National Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978); *see also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

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

8. United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 420 (1989).

9. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383.

Morris, accustomed to political support from Senator Jesse Helms, surprisingly finds the ACLU joining in a vigorous argument that tobacco advertising deserves First Amendment protection.

Let me highlight five examples of new calls for speech regulation coming from the left. First, there has been a movement by some feminists to regulate pornography as sex discrimination against women. Their claim is that much of the multi-billion dollar trade in sexually explicit magazines and videos amounts to the subordination of women in print and celluloid.[10] This movement, led by Catharine MacKinnon and Andrea Dworkin, has failed to achieve any lasting legal victory, having failed either at the polling place, on the mayor's desk, or in court.[11] But their arguments and their premises have percolated into the legal culture.

Indeed they have heavily influenced my second example: the movement to regulate "hate speech" through campus code or municipal ordinance. Advocates of hate speech regulation would regulate messages of racial inferiority conveyed in a persecutory, hateful, degrading, or insulting way.[12] Some of their proposals would apply to members of all races; some only to groups that have been historically oppressed. Some of their proposals track the old doctrine that fighting words are not protected by the First Amendment; some would extend that notion to words that cause fright or flight as well as fights.[13] Some of their proposals are limited to race; others extend to members of other ascriptive groups. But they all have in common the view that such speech constitutes subordination, and the remedy cannot be "more speech."

The third example of new calls for speech regulation from the left is advocacy of greater regulation of expenditures for speech by wealthy individuals and corporations. Since the mid-1970s, the Supreme Court has recognized that "money talks" in politics, but the Court has held such "speech" to be constitutionally protected. For example, the Court struck down federal ceilings on campaign expenditures[14] and state restrictions on speech by corporations in referendum campaigns.[15] Advocates of greater campaign finance regulation say this gives too much political influence to aggregated corporate wealth.

So far, my examples have come mostly from academic sources; let me turn now to a fourth and fifth example from the contemporary political arena. Consider the calls spearheaded by Attorney General Janet Reno

---

10. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 127-213 (1987).

11. *See, e.g.*, American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 334 (7th Cir. 1985) (invalidating as thought control an Indianapolis ordinance against the graphic sexual subordination of women), *aff'd mem.*, 475 U.S. 1001 (1986).

12. *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

13. *See, e.g.*, Thomas C. Grey, *Responding to Abusive Speech on Campus: A Model Statute*, RECONSTRUCTION, Winter 1990, at 50.

14. Buckley v. Valeo, 424 U.S. 1, 143-44 (1976).

15. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

for the curtailment of television violence.[16] The argument for such regulation is that violent programming makes for violent people by inuring them to violence and conditioning them to its use. Calls for regulation extend not only to over-the-air broadcasters, who have long resented their treatment as second-class First Amendment citizens,[17] but also to cable, video games, and other media not yet subject to comprehensive regulation.

Fifth and finally, consider various recent measures to curtail obstruction of abortion clinics by anti-abortion demonstrators: the passage of the federal Freedom of Access to Clinic Entrances Act,[18] the passage of various local ordinances establishing a protective "bubble" around clinics, and the issuance of injunctions such as the Florida order creating a buffer zone around an abortion clinic that the Supreme Court upheld in part last Term.[19] Here Operation Rescue and other anti-abortion groups say that they should be protected by the same free speech doctrines that protected the civil rights movement, but advocacy groups that typically argue for free speech pointedly have not flocked to their defense.

What do the new speech regulators in these five examples have in common? In common they reject the three pillars of the modern free speech consensus. Let me first describe what those pillars are, and then describe how the new speech regulators would shake them down.

## III. MODERN FREE SPEECH CONSENSUS

The modern free speech consensus rests on three fundamental distinctions: those between mind and body, public and private, and purpose and effect. Begin with the mind/body distinction. In First Amendment controversies, this distinction is sometimes called the speech/conduct or the expression/action distinction. Free speech libertarianism holds speech privileged above conduct. Government may regulate the clash of bodies but not the stirring of hearts and minds. Speech may not be curtailed in order to protect people from psychic injury or from anger, alarm, resentment, or emotional distress. "Sticks and stones may break my bones, but names can never hurt me." Speech may be curtailed to prevent material harm, but that harm must be real and nearly nigh. There must be clear and present danger. Domino theories will not do. Inciting a lynch mob may be punished, but preaching racial supremacy may not.

This mind/body distinction is inscribed deeply in modern First Amendment law. The flag-burning and the cross-burning cases held that when expression offends your sensibilities, the solution is not to call the sheriff but to turn the other cheek. Contrast the case of racially motivated violence. While the Court struck down St. Paul's punishment of racist sym-

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

17. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

18. Pub. L. No. 103-259, 108 Stat. 694 (1994).

19. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994).

bols, it upheld Wisconsin's aggravated penalties for throwing a racist punch.[20]

The second pillar of the modern free speech consensus is the public/private distinction. In our conventional view of the First Amendment, censorship is the restriction of speech by the government. To be sure, private parties sometimes restrict the speech of others too. Simon and Schuster rejected Bret Easton Ellis's manuscript of *American Psycho* as excessively violent and misogynist—they paid him his fee and packed him on his way.[21] Time Warner pulled Ice T's song *Cop Killer* from the record stores when police officers and others expressed outrage at its lyrics.[22] But such actions, the public/private distinction holds, are not rightly called censorship. They are, rather, exercises of editorial discretion, market judgment, social responsibility, or just plain taste. Why the different treatment? The government alone has a monopoly of force. If Simon and Schuster rejects you, you can go to Random House. If the government bans your novel, you may have to move to France.

The Supreme Court readily accepts this distinction, for example in cases holding that shopping center owners are not censors when they bar leafletters from their malls.[23] True, the Court has displeased free speech advocates in recent years by declaring more and more government action to be "private," freeing not only shopping center owners but the government itself from the constraints of the First Amendment in some areas. Not everything government does is "public," says the Court; in the modern world, government does many things other than wield coercive power. When government operates with its "private" rather than its "public" face, the Court has given it considerable discretion to discriminate among subject matters and speakers.

For example, the doctrine of the public forum has long held that government may not regulate the content of speech in public streets and parks. But in recent years, the Court has withdrawn more and more government property from public forum status, exempting it from First Amendment limitations that apply to government in streets and parks. Jailhouse entrances, military bases, teachers' mailboxes, charitable fund drives in federal offices, post office sidewalks, and airport terminals have all been held "non-public forums," or in other words, the operations of government with a private face.[24] In these settings, many content restric-

20. *Compare* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) *with* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

21. Roger Cohen, *Bret Easton Ellis Answers Critics of "American Psycho,"* N.Y. TIMES, Mar. 6, 1991, at C13.

22. Richard M. Clurman, *Pushing All the Hot Buttons*, N.Y. TIMES, Nov. 29, 1992, § 2, at 1.

23. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976).

24. *See*, respectively, Adderley v. Florida, 385 U.S. 39 (1966); Greer v. Spock, 424 U.S. 828 (1976); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985); United States v. Kokinda, 497 U.S. 720 (1990); International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992).

tions are allowed.

Likewise, the Court has held that in some cases, when the government acts as patron, it may impose speech-restrictive conditions on its grants. For example, in *Rust v. Sullivan*,[25] the Court held that the First Amendment did not bar government from conditioning the receipt of federal family planning funds upon the recipient's vow of silence about the availability or desirability of abortion. When government acts as patron, not policeman, the Court implied, the government is itself a speaker and may determine what is to be said. He who pays the piper calls the tune. He who takes the king's shilling becomes the king's man.

But even in these cases, the public/private distinction runs deep and retains some bite. Government is not as unfettered in its discretion as Time Warner or Random House. The Court has always cautioned that government may not "aim at the suppression of dangerous ideas" with carrots, just as it may not with sticks.[26]

This leads me to the third pillar of contemporary free speech law: the distinction between purpose and effect. In a variety of settings, the Court has said that viewpoint discrimination is the cardinal First Amendment sin. Thus it matters what government is aiming at, not just what it happens to hit. If a law aims at the content of speech, it is presumptively invalid. But if a law is content-neutral, then the fact that it hurts some speakers more than others is not of First Amendment concern.

For example, consider time, place, and manner regulation in the public forum. If such a challenged regulation is content-neutral in form, then the government nearly always wins. Yet some such regulations can be disproportionately rough on speakers with unpopular things to say. For example, a law against mutilating your draft card is especially rough on draft-card burners engaged in political protest; not many people use draft cards to light barbecues. But the Supreme Court readily upheld such a law.[27] Along similar lines, I once helped Professor Laurence H. Tribe argue that devotees of Hare Krishna had a First Amendment right to proselytize in the open spaces of the Minnesota State Fair and not be confined to a rented booth. We argued that Minnesotans would flock to the booths of the Methodists, Presbyterians, or Episcopalians, but that Hare Krishna, if confined to a booth waiting for customers, would have a long and very quiet day. In other words, we argued that the booth rule operated as de facto discrimination against unpopular or unorthodox groups. We lost; the Supreme Court upheld the booth rule as a reasonable regulation of the place of speech.[28]

In short, in free speech law, as in current equal protection doctrine, the disparate impact of government regulation does not matter. Only invidi-

25. 500 U.S. 173, 196 (1991).

26. *Id.* at 192 (citing Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548 (1983), quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).

27. United States v. O'Brien, 391 U.S. 367, 386 (1968).

28. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 n.12 (1981) ("The argument is interesting but has little force.").

ous intent raises a constitutional red flag. Not everyone has equal speaking opportunities, but, under the conventional view, that is not the fault of the state. As Anatole France once wrote ironically, "The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . . ."[29] Likewise, the Court has held that the First Amendment does not invalidate a rule that bars the Boy Scouts, as well as homeless demonstrators, from sleeping overnight in Lafayette Park.[30] The purpose/effect distinction serves to remove such laws from strict First Amendment review. Only censorship that is intentional, not merely negligent, concerns the current Court.

## IV. THE NEW SPEECH REGULATORS

Now come the new speech regulators who would shake each of these three pillars down.[31] They reject the notion that these three distinctions are worth preserving. Their specific attacks on these distinctions are linked with three broader trends in thought about knowledge, law, and power: social constructionism, legal realism, and egalitarianism.

### A. Social Constructionism

Begin with what the new regulators say about the mind/body distinction. They deny the childhood adage that "sticks and stones can break your bones but names can never hurt you." As every child knows from some early encounter on a playground, names can hurt and words can wound. Psychic and physical injuries are not that different. Indeed scars on the soul can be worse than those of the flesh; as Professor Charles Lawrence III interprets *Brown v. Board of Education*,[32] it was a speech case, prohibiting government from symbolically telling black children they were inferior in a way that would do permanent damage not to their bodies but rather to their "hearts and minds."[33] That kind of damage is reenacted, say advocates of hate speech codes, every time a white frat boy utters racist catcalls at a black woman student, and, they say, a public university should not be stopped by the First Amendment from stopping him.

The new speech regulators thus relativize the mind/body distinction by equating some verbal with physical assault. They deem hate speech an act of aggression with real costs to its victims: to be terrified into flight and silence can be as bad an injury as a punch in the nose. But much of the argument for the new speech regulation goes beyond equating some

29. Anatole France, Le Lys Rouge 91 (1894).

30. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 297 (1984).

31. In the following description of arguments made by the new speech regulators, I draw loosely from such works as Catharine A. MacKinnon, Only Words (1993); Cass R. Sunstein, Democracy and the Problem of Free Speech (1993); Balkin, *supra* note 9; and Frederick Schauer, *Uncoupling Free Speech*, 92 Colum. L. Rev. 1321 (1992).

32. 347 U.S. 483 (1954).

33. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 462.

speech with violent action. This stronger form of the argument goes further in denying the distinction between mind and body: it says speech constructs us and conditions our actions; it makes us who we are. Culture determines power; it is not the other way around. Speech and conduct are continuous; ideas construct reality and reflect it back. Therefore, both are equally regulable if regulation serves desirable ends.

In this view, the problem with pornography, hate speech, or television violence, is not just that they frighten women, coeds, or children, or move them to nightmares and tears. The problem is that they eroticize sexual dominance, reinforce racial hierarchy, or glamorize violence in ways that construct or reconstruct us. In this view, they make our society different—more sexist, more racist, more violent—than it would be if a different rhetoric prevailed. In this view, the speech to be regulated does not *cause* harm; it *is* harm. Thus, it is not enough to shield the tender eyes and ears of those offended; the speech must itself be eliminated and the speaker reeducated or transformed. If you want to change reality, you have to change the speech that constructs it.

These sorts of arguments reject individualistic epistemology in favor of a social constructionist view. We are not, say the constructionists, the rational and isolated monads hypothesized by liberal thought—freely choosing our own ends, desires, and preferences as we please. We are rather situated, or as Professor Michael Sandel puts it, "encumbered" by the cultural contexts into which we are born or thrust.[34] We do not just act on the world; the world acts on us and we are the product of the institutional forces around us. We are not only what we eat; we are what we read, what fashion tells us to be, what we see on television, whether the gospel station or MTV. Women are constructed by patriarchy in this view; hence the smile on the porn star's face is an emanation of false consciousness. Members of traditionally oppressed racial groups are constructed by racism. Individuals are constructed by their social environments and their social relations.

For the new speech regulators, this epistemology dictates a government response. If we are socially malconstructed, in their view, government should come to the rescue; we should use the First Amendment not as shield but as sword. Government should stop speech that constructs us in ways we decide we do not like, for example because we think it denies racial or sexual equality or makes our streets less safe. To the extent some of us have been socially constructed into silence, the effect of such regulation will be, they predict, to free our small, still voices, in the long run enhancing speech rather than restricting it.

### B. LEGAL REALISM

This brings me to the new regulators' dismissal of the conventional public/private distinction. Viewing constitutional law generally as a

34. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 181 (1982).

latecomer to the insights of legal realism, they would treat more nominally "private" action as public and thus regulable by the state. Why? Because in this view, private power can be just as dangerous to the liberties of the less powerful as can state power. Old free speech libertarians always knew who the enemy was: government, government, government, a.k.a. the awesome power of the state. New free speech regulators see the enemy elsewhere. Shopping mall owners shut the people out of what is today the functional equivalent of the streets and parks. The influence of money skews political campaigns. Corporations drown out other voices, defeating tax or insurance initiatives by blanketing the airwaves with expensive ads. Racist, sexist, anti-semitic, or homophobic verbal terror silences minorities on college campuses. And pornography is men's boot on women's neck, stifling any voice that might talk back.

What legal consequences follow from the new speech regulators' view? Taken to a logical extreme, this view would dissolve the usual narrow doctrine of state action, and permit the silenced or excluded actually to sue private entities for violating their First Amendment rights. Some states, unlike the United States Supreme Court, have actually adopted this view with respect to shopping centers.[35] The more moderate and common version of this view would simply eliminate the First Amendment as a barrier to more legislation that redistributes speech. In this view, government should be regarded as enhancing and not restricting speech when it tunes down the voice of the rich in political campaigns so that the less rich will have more of a fighting chance. And by shutting up campus bigots, this view holds, hate speech codes will enable the voices of the once-victimized to emerge and finally be heard.

Just as the assault on the mind/body distinction in free speech law stems from the epistemological trend of social constructionism, so the attack on the public/private distinction stems from the jurisprudential trend of legal realism. The basic premise here, derived from the thought of legal realists earlier in this century, is that there is no such thing, in organized society, as a purely private sphere. All private power is a product of law; you gain and keep your money because of the law of property, tort and contract. Those laws can change: the New Deal, for example, established that liberty of contract no longer barred the enactment of minimum wage and maximum hour laws.

All the new speech regulators want, they say, is a "New Deal for speech," to use Professor Cass Sunstein's phrase.[36] We abandoned laissez-faire philosophy in the marketplace for goods and services back in 1937. Why do we still have faith in the invisible hand in the so-called "marketplace of ideas"? How can Adam Smith, long laid to rest in due process and equal protection challenges to economic regulation, have found reincarnation in the First Amendment when the issue is the regula-

35. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (reviewing shopping center's claim in opposition to such a provision of the California Constitution).

36. SUNSTEIN, *supra* note 31, at 16.

tion of speech? In short, in this view, speaking power is as maldistributed in the marketplace of ideas as bargaining power was in the commercial marketplace before labor legislation, rent control, and various implied warranties came along. If we force IBM and AT&T into competition, why not break up the monied interests whose wealth enables them to dominate our television-driven political campaigns? If we apply the antidiscrimination rules of Title VII to sex discrimination in hiring and promotion, why not also to the "hostile environment" created when firemen plaster the stationhouse with glossies from the latest *Hustler* magazine? If we diversify the racial composition of our student bodies, why not use speech codes to redistribute speaking power as well as seats in the classroom from the traditionally advantaged to the traditionally oppressed?

### C. EGALITARIANISM

Once the new regulators' application of legal realism strips the private order of its presumptive immunity from regulation, the next question becomes what the governing norm of regulation ought to be. The new speech regulators implicitly value equality. They favor paternalism and redistribution for speech as for other markets. It follows from this implicit substantive commitment that they reject the third pillar of the conventional free speech consensus: the distinction between the purpose and effect of government regulation in which only purpose matters. They argue instead that what matters is the effect that government action has on public discourse, whether its purpose is deliberately censorial or not.

Intent-based analysis generally corresponds with notions of negative liberty and corrective justice. Freedom means freedom "from" government interference in the presumptively private order. State action that transgresses that boundary may be punished, like private trespasses. Effect-based analysis, in contrast, corresponds with notions of positive liberty and distributive justice. Freedom means freedom "to" avail oneself of promised liberties, and if the minimal preconditions for such an exercise are missing in the existing private order, then government may or perhaps must provide them.

In arguing for the priority of distributive justice, the new arguments for speech regulation resemble other shifts that look to consequences rather than intent. For example, intentional tort doctrines gave way to negligence and strict liability, on the theory that limiting liability to the morally blameworthy was less important than achieving the optimum level of social deterrence. Similarly, the Court in some cases has rejected color-blindness as the principle of equal protection in order to permit race-based remedies for past discrimination from which non-victims may benefit and for which non-sinners may pay. As Justice Blackmun argued in *Bakke* that, "[i]n order to get beyond racism, we must first take account

of race,"[37] so the new speech regulators argue that getting to free speech for all may depend on limiting the speech of some. In short, they would replace First Amendment corrective justice—stop government only when it commits the sin of "thought control"—with a notion of distributive justice in which regulation is permissible insofar as it brings about a more desirable distribution of speech. In this view, the purpose/effect distinction is largely jettisoned.

What legal consequences follow from rejecting this distinction? As already discussed, the new regulators by and large favor greater regulation of hate speech and pornography on redistributive grounds. They also advocate such measures as greater scrutiny of content-neutral regulations with adverse distributive effects, greater guarantees of access to the mass media for speakers with limited private resources, and reversal of decisions barring greater regulation of political campaign expenditures.

## V. CONCLUSION

The new speech regulators demand a response from those who would leave speech mostly deregulated; and they deserve a response that goes beyond the rote and reflexive invocation of free speech as an article of faith. The appeal to the First Amendment as self-evident truth may be no more effective, as Professor Henry Louis Gates Jr. recently cautioned, than Samuel Johnson's attempt to refute Bishop Berkeley merely by kicking a stone.[38]

Let me briefly sketch here the tentative beginnings of such a response—the outlines of a defense of progressive free speech libertarianism even in a postmodern age. The argument might take two forms. The first would try to articulate what distinctive attributes speech might have that make it different from the goods and services that government may freely regulate after the New Deal. For example, speech may be uniquely close to consciousness. Ideas can go underground more easily and intractably than goods and services. It is possible to round up goods sold on the black market, including samizdat or underground books and pamphlets, far more easily than it is to erase the traces that such literature leaves in the mind. Thus the enforcement of restrictions on speech might be inherently or structurally limited in a way that restrictions on other activities are not. Similarly, speech might be uniquely privileged as the currency of peaceful political change. Such categorical distinctions between speech and other activities, of course, will vary according to one's theory of why free speech is valuable in the first place.

A second approach would focus on institutional rather than on ontological concerns. It may be that any distinction we think of as ontological ultimately rests on institutional concerns, in which case the two ap-

37. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

38. *See* Henry L. Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37-38.

proaches converge, but that's another lecture. An institutional approach would try to articulate why we might mistrust government regulation of speech more than we mistrust government regulation of markets for goods and services.

Here are three possibilities. First, speech regulation may be more intractably ineffective than other forms of regulation. For example, consider the well-known "banned in Boston" phenomenon—making speech taboo may perversely increase demand. Second, there may be a greater risk of error when government regulates speech than when it regulates commercial markets—in other words, a greater danger of governmental abuse when government redistributes participation in public discourse than when it redistributes material power and income. For example, incumbents might systematically overestimate the bad consequences of speech by challengers or dissidents.

Third, there might be special dangers in trusting government to change culture even if we trust it to reallocate some aspects of material power. The new speech regulators engage in a non sequitur when they move from the premise that we are socially constructed to the conclusion that we should give the state a monopoly on our reconstruction. Epistemology does not entail polity. To recognize that we are socially constructed does not tell us what to do. For example, consumer boycotts, pressure for warning labels, and counter-demonstrations arguably have proved more effective than any speech code enacted to date. Indeed, speech codes have been applied to students of color and antipornography regulations against gay and lesbian literature. Using the state to change culture before power in an unequal world might systematically backfire; the state might be too reflective of prevailing ideologies to be a reliable instrument of ideological affirmative action.

These are but a few possible lines of defense of a constitutional regime that deregulates the "marketplace of ideas" even while it permits the regulation of markets for goods and services. Each merits far more elaboration and debate than there is time for here. But I believe this project a worthy one for those in my generation whose respect for the new speech regulators' insights does not extend to agreement with their proposed solutions.

# Book Review