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Spencer Bradley

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ABSTRACT

In the wake of Charlottesville, the rise of the alt-right, and campus controversies, the First Amendment has fallen into public scrutiny. Historically, the First Amendment's "marketplace of ideas" has been a driving source of American political identity; since *Brandenburg v. Ohio*, the First Amendment protects all speech from government interference unless it causes incitement. The marketplace of ideas allows for the good and the bad ideas to enter American society and ultimately allows the people to decide their own course.

Yet, is the First Amendment truly a tool of social progress? Initially, the First Amendment curtailed war-time dissidents and unpopular political movements. Since *Brandenburg*, the Court's jurisprudence has turned towards free-speech absolutism. Today, free-speech discourse focuses on the right of what is said without discussing what the effect of that discourse is. Rather than allowing the "market" to decide what is and is not acceptable within public discourse, the Supreme Court has made the First Amendment a truism. The result is a fetishization of free speech without understanding its broader implications.

This Comment argues that the Court's jurisprudence consistently reflects sociopolitical values of the dominant political ideology. This Comment begins by examining the history of the First Amendment in the context of World War I and the development of the "clear and present danger" doctrine, which was used to suppress anti-war dissidents. This doctrine evolved into the *Brandenburg* incitement test, which embodied free-speech abso-

* J.D. Candidate, The Pennsylvania State University's Dickinson Law, 2019. This project has been an undertaking of wrestling with difficult issues and one's own perspectives. I would like to acknowledge the conversations with Lisa Portmess, Vernon Cisney, Gary Mullen, Martin Skladany, Carla Pratt, and Clifford Kelly.

lutism. Following this legal analysis, this Comment credits the philosophy of John Stuart Mill with laying the philosophical justification for the Court's jurisprudence. This Comment critiques free-speech absolutism and its values, specifically tolerance and the "marketplace of ideas," by considering the power dynamics at play during speech acts, specifically hate speech. This critique concludes by offering several possible solutions, including tort remedies, to solve the power imbalance created by the Court's jurisprudence.

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I. INTRODUCTION

In the name of freedom of speech, the University of Chicago invited Steve Bannon, former chief strategist and advisor to the Trump administration, to debate his political philosophy.[1] Conversely, a controversial Drexel professor, George Ciccariello-Maher, resigned after a year of death threats because he publicly criticized masculinity and white-ness.[2] Two speakers, and yet one's

1. *University Statement on Planned Debate*, UCHICAGONEWS (Jan. 25, 2018), https://bit.ly/2GANB4a [https://perma.cc/3PFE-UBVD].

2. Marwa Eltagouri, *Professor Who Tweeted, 'All I Want for Christmas Is White Genocide,' Resigns After Year of Threats*, WASH. POST (Dec. 29, 2017), https://wapo.st/2EHbRjq [https://perma.cc/DZB2-2TMV]. For a discussion on white genocide, which is a sociological term discussing the belief that "white" European culture is being destroyed by immigration and fertility trends, see Kathy

free-speech rights were vindicated as part of academic freedom, while the other's very life and livelihood was put at risk despite his "freedom of speech."

Despite the First Amendment's prohibition on the "abridgment of speech," some speech receives social censorship when it critiques societal norms, while other speech, if potentially censored on hate-speech grounds, receives passionate defenses.[3] Recent events have forced a reconsideration of the First Amendment's power, limitations, and value to society—namely, the rise of the alt-right,[4] protests,[5] Charlottesville,[6] and the Myanmar Genocide.[7] One may question whether the First Amendment, in an increasingly diverse society with multiple group identities that have historically lacked power, is compatible with other Constitutional guarantees and norms.[8] If these values are incompatible, how do we save the intellectual history worth saving? While not without exception,[9]

Gilsinan, *Why Is Dylann Roof So Worried About Europe?*, ATLANTIC (June 24, 2015), https://bit.ly/2PRAA5F [https://perma.cc/HT9H-PWET].

3. U.S. CONST. amend. I; *see also* Jelani Cobb, *The Mistake the Berkley Protesters Made About Milo Yiannopoulos*, NEW YORKER (Feb. 15, 2017), https://bit.ly/2H6hpAT [https://perma.cc/GA5K-RHLT] (discussing the dilemma between balancing the rights of vulnerable people versus the rights of aggressive speakers).

4. Paul P. Murphy, *White Nationalists Use Tiki Torches to Light Up Charlottesville March*, CNN (Aug. 14, 2017), https://cnn.it/2LrZKr3 [https://perma.cc/8UTV-CZZQ] (detailing the "Unite the Right" march).

5. Natalie Shutler & Erwin Chemerinsky, *The Free Speech-Hate Speech Trade-Off*, N.Y. TIMES (Sept. 13, 2017), https://nyti.ms/2x1gsb0 [https://perma.cc/EC5Z-AYWE] (discussing the difficulties of balancing constitutional guarantees and individual autonomy).

6. *See* Associated Press, *Officials: White Nationalist Rally Linked to 3 Deaths*, POLITICO (Aug. 12, 2017), https://politi.co/2H4fCwg [https://perma.cc/LW6P-YLLJ] (detailing the effects of the "Unite the Right" rally); Linda Qiu, *Trump Asks, 'What About the Alt-Left?' Here's an Answer*, N.Y. TIMES (Aug. 15, 2017), https://nyti.ms/2vItQyD [https://perma.cc/NWN4-F7N3] (detailing how the President's claim that both counter-protesters and protestors are to blame for Charlottesville ignores the factual and ideological differences between both sides).

7. *See* Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar's Militar*y, N.Y. TIMES (Oct. 15, 2018); *see also* Roland Hughes, *Myanmar Rohingya: How a 'Genocide' Was Investigated*, BBC NEWS (Sept. 3, 2018), https://bbc.in/2PyUXVB [https://perma.cc/9Q7T-2WH9]. A military official perhaps surmised the dehumanization best: "[H]e 'couldn't accept the term Rhingya, which does not exists in Myanmar.'" Foster Klug, *Rohingya Say Myanmar Targeted the Educated in Genocide*, AP NEWS (June 5, 2018), https://bit.ly/2EFUU95 [https://perma.cc/8M7G-YBHZ].

8. *See* Judith Butler, *Limits on Free Speech?*, ACADEME BLOG (Dec. 7, 2017), https://bit.ly/2AdbfvW [https://perma.cc/6VB5-4AFP] (commenting on the tension between diversity and the dignity of all individuals and allowing speech, under the First Amendment's justification, to dehumanize and harass minority groups and individuals).

9. *See* Miller v. California, 413 U.S. 15, 36–37 (1973) (holding that obscenity regulations could be constitutional); Brandenburg v. Ohio, 395 U.S. 444, 448

American jurisprudence believes that freedom of speech is vital to our American sociopolitical system.[10] Yet, what values does free speech extol?

This Comment argues that one of the First Amendment's philosophical justifications—tolerance—creates contradictory values; rather than allow for the free exchange of ideas, the First Amendment entrenches and legitimizes ideas that deny others their humanity, rendering any criticism "one idea of many."[11] While proponents of free speech justify its unregulated nature because it respects individual autonomy and opinion, increases our access to ideas, protects dissent, and respects citizens' rights to self-governance,[12] such a position is, at best, incomplete and, at worst, harmful. Rather than fostering the exchanging of ideas, apolitical tolerance becomes a means of entrenching ideas used to delegitimize minority groups' very autonomy, because all perspectives possess equivalent truth value.[13] Thus, tolerance becomes a tool to prevent any change within society and preserves legal, social, and political structures currently in place.[14]

The position of this Comment traces major developments in First Amendment interpretation. Part II first discusses the Court's development of the "clear and present danger" test, which sanc-

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(1969) (holding the state may not regulate speech which is not likely to cause imminent, lawless action); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (articulating the "fighting words" doctrine, under which words that cause direct disruptions of the peace can be regulated); Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that political speech could be restricted when it presented a "clear and present danger").

10. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."). The Court further noted, "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

11. *See* Jonathan Schonsheck, *The "Market Place of Ideas:" A Siren Song for Freedom of Speech Theorists*, *in* FREEDOM OF EXPRESSION IN A DIVERSE WORLD 27, 34–35 (Deirdre Golash ed., 2010) (questioning the validity of the metaphor, finding ideas are not exchanged but rather maintained and expressed).

12. *See* MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 1–17 (2001) (detailing classical assumptions of the First Amendment).

13. Jelani Cobb, *The Mistake the Berkley Protesters Made About Milo Yiannopoulos*, NEW YORKER (Feb. 15, 2017), https://bit.ly/2H6hpAT [https://perma.cc/CW6T-BZAW].

14. *See infra* Part III; *see also* BUNKER, *supra* note 12, at 14–15 (detailing the necessity of protecting dissent and the difficulties with couching freedom of speech in tolerance alone).

tioned governmental suppression of free speech.[15] Part II then discusses the Court's movement away from support of government suppression of dissident speech to a speaker friendly "incitement" standard.[16] Finally, Part II turns to the philosophical underpinnings of Anglo-American thought which justify freedom of speech.[17] Part III critiques freedom of speech by discussing the values which justify freedom of speech.[18] Ultimately, this Comment argues that one of free speech's justifications—tolerance for other perspectives—may be contradictory to societal development and the assertion of minority identities. It proposes several solutions to this problem: (1) censorship of ideas that extol supremacy over historically marginalized groups; (2) development of a more responsive "incitement" standard that benefits historically marginalized groups; (3) democratic deliberation embedded in principles such as the Fairness Doctrine; and (4) private tort action.[19] Ultimately, this Comment uses a philosophy and law perspective to answer the question: does an unregulated marketplace of ideas cost society?[20]

II. BACKGROUND

A. The Court's War-Time Speech Jurisprudence and the Clear and Present Danger Test

In *Schenck v. United States*,[21] the Court upheld Charles Schenck's conviction under the Espionage Act.[22] The Espionage Act, specifically its prohibition of government criticism, criminalized speech that disrupted military duties or obstructed military recruitment, whether or not such advocacy impaired recruitment.[23] Schenck was convicted under the Espionage Act for circulating a pamphlet that dissuaded servicemembers from serving during

15. *See infra* Part II.A–B.
16. *See infra* Part II.C.
17. *See infra* Part II.D.
18. *See infra* Part III.A–B.
19. *See infra* Part III.C–D.
20. The limits of a philosophical and legal mode of analysis are several: the mixture of philosophy with law may reduce the analysis of tolerance and free speech to a *non*-legal mode of analysis, merely proposing a philosophy as to free speech. *See* BUNKER, *supra* note 12, at 59–60 (quoting PHILIP BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 12–13 (1982)) (detailing the difficulties of interdisciplinary analysis of law and ultimately finding several methods of constitutional analysis: historical, textual, structural, prudential doctrinal, and prudential).
21. Schenck v. United States, 249 U.S. 47 (1919).
22. *Id.* at 53.
23. Espionage Act of 1917 § 3, Pub. L. No. 65-24, 40 Stat. 217 (repealed 1921).

World War I.[24] Schenck was a Socialist Party general secretary, and the pamphlet alleged that war was a form of despotism and called for citizens to rise up against the state.[25] Schenck argued that the First Amendment prevented Congress from criminalizing his anti-war activism.[26] The Court, in an opinion by Justice Oliver Wendell Holmes, rejected Schenck's First Amendment defense. Justice Holmes considered "whether the words used [were] used in such circumstances and [were] of such a nature as to create a clear and present danger that they [would] bring about the substantive evils that Congress has a right to prevent."[27] The Court found that the pamphlet created the same type of danger as a man falsely shouting "fire" in a crowded theater.[28] Ultimately, the Court held that the needs of war required suppressing speech that, in peace, would have been permissible.[29] Sedition in war created a clear danger to Congress's wartime goal of military recruitment.[30]

Justice Holmes's "clear and present danger" test for determining whether the government could censor speech persisted in *Debs v. United States*,[31] which Justice Holmes also authored. In *Debs*, Eugene Victor Debs, a prominent Socialist politician and activist, appealed a conviction for incitement and obstruction of military conscription under the Espionage Act.[32] The Court held that *Schenck* disposed of any First Amendment protections afforded to Debs.[33] The Court affirmed Debs's conviction, relying again on the danger that his speech posed to the military's recruitment efforts.[34]

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24. *Schenck*, 249 U.S. at 49.

25. *Id.* at 49, 51.

26. *Id.* at 49.

27. *Id.* at 52.

28. *Id.* ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.").

29. *Id.*

30. *Id.* at 53 (deferring to military goals is consistent with a vast deference in America's jurisprudence to war-time goals). For another example of constitutional rights being subordinated to war, see Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii 138 S. Ct. 2392 (2018).

31. Debs v. United States, 249 U.S. 211, 216 (1919).

32. *Id.* at 212. For the content of the speech for which Debs was imprisoned, see Eugene Victor Debs, Speech at Canton, Ohio (June 16, 1918), https://bit.ly/1HIJee4 [https://perma.cc/5WKH-EEN5] ("You need at this time especially to know that you are fit for something better than slavery and cannon fodder. You need to know that you were not created to work and produce and impoverish yourself to enrich an idle exploiter.").

33. *Debs*, 249 U.S. at 215 (citing Schenck v. United States, 249 U.S. 47 (1919)).

34. *Id.* at 216.

While Justice Holmes's subsequent dissents and concurrences would eventually add nuance to First Amendment jurisprudence, the Court continued to sanction governmental restrictions on speech.[35]

In *Abrams v. United States*,[36] the Court upheld the convictions of several Russian radicals under the Espionage Act by applying the "clear and present danger" test.[37] The *Abrams* Court emphasized the defendants' "otherness," which distinguished their politics and their national origin as both dangerous and unpatriotic.[38] Notably, Justice Holmes dissented in this case on the grounds that the supposed threat of the speech was an abstraction.[39] Justice Holmes, departing from his previous jurisprudence,[40] likened free speech to a market of ideas, wherein citizens choose from the disseminated ideas and determine the weak opinions from the strong.[41] However, Justice Holmes did not abandon the "clear and present danger" test, instead relying on the nature of what the pamphlets advocated—in this case, non-intervention in the Bolshevik Revolution.[42] Justice Holmes distinguished this reasoning from his *Schenck* decision because the context of the speech had changed; in *Schenck*, the United States was at war, whereas in *Abrams*, it was not.[43]

The Court continued to sanction political censorship in *Gitlow v. New York*.[44] In *Gitlow*, the Court upheld the defendant's convic-

35. *See* Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 678–85 (2011) (summarizing how Holmes's jurisprudence reflects a power dynamic in democratic society wherein suppression of dissidence is logical, but it is desirable to have conflicting opinions in the public sphere to improve our own views).

36. Abrams v. United States, 250 U.S. 616 (1919).

37. *Id.* at 624.

38. *Id.* at 617 ("All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States [in] terms varying from five to ten years, but none of them had applied for naturalization."); *see also* Mark Kessler, *Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger*, 27 LAW & SOC'Y REV. 559, 569–73 (1993) (discussing the racial or ideological underpinnings of the "clear and present danger" test).

39. *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting) (noting that the only "disruption" to the United States was advocacy against intervention in Bolshevik Russia).

40. Kessler, *supra* note 38, at 579 (noting that while Holmes did not change his belief in "clear and present danger" he found the pamphlets to be silly).

41. *Id.* at 630 ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

42. *Abrams*, 250 U.S. at 630.

43. *Id.* at 630–31.

44. Gitlow v. New York, 268 U.S. 652, 671–72 (1925).

tion under New York's anarchy statute,[45] which criminalized the advocacy of overthrowing the government.[46] Gitlow was a left-wing Socialist and board member of the Revolutionary Age, a left-wing publication.[47] Gitlow arranged the printing and distribution of a manifesto detailing the left-wing section of the Socialist Party's policies and goals.[48] Specifically, the manifesto advocated for political action by Socialists to capitalize on economic and social unrest, caused by labor strikes, to ultimately yield social change in the country through revolt.[49] The Court applied the "clear and present danger" test to uphold the New York statute as a valid exercise of state power to proscribe action, but it noted that the abstract teaching or musings about a doctrine was permissible.[50] Justice Holmes dissented, insisting that there was no "clear and present danger" from the publication of such a manifesto and noting "[e]very idea is an incitement."[51] Justice Holmes noted that the manifesto merely stated the theory and desirability of an undetermined uprising but constituted no present threat.[52]

The Court continued applying the "clear and present danger" test in *Whitney v. California*.[53] The Court was presented with a left-wing advocate convicted under an anti-syndicalism statute[54] for

45. *Id.* at 669–70. Specifically, New York Penal Law criminalized "criminal anarchy" which was "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony." *Id.* at 654.

46. *Id.* at 654 (citing N.Y. PENAL LAW § 240.15 (McKinney 2018) (originally enacted and cited as N.Y. PENAL Law §§ 160–161 (1909))).

47. *Id.* at 655.

48. *Id.* at 655–56.

49. *Id.* at 657–58.

50. *Id.* at 665.

51. *Id.* at 673 (Holmes, J., dissenting).

52. *Id.*

53. Whitney v. California, 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

54. CAL. PENAL CODE §§ 11401–02 (1919) (repealed 1991). The relevant text includes:

> The term "criminal syndicalism" as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.
>
> Sec. 2. Any person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism.

membership in the Communist Party.[55] The Court held that the statute was not "unreasonable" towards the aims of preventing unlawful action against the state.[56] In doing so, the Court effectively sanctioned political speech suppression if the speech or advocacy "threatened" the state.[57] Justices Brandeis and Holmes concurred with the disposition of the case, but did so by relying on evidence of actual conspiracy by the defendants with Californian Communist Party members.[58]

Justice Brandeis, in criticizing the Court's implicit endorsement of censorship, noted the "[f]ear of serious injury cannot alone justify suppression of free speech and assembly."[59] Justice Brandeis further noted, "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[60] Justice Brandeis urged the Court to adopt larger protections for speech to sift through evil ideas through discourse, rather than suppression.[61]

Yet, the Court did not limit its regulation of free speech to political speech. In *Chaplinsky v. New Hampshire*,[62] the Court upheld a New Hampshire statute criminalizing offensive speech towards another in a public place when the speaker has the "intent to deride, offend or annoy him."[63] Distributing literature that denounced religion as a "racket" and caused a public stir resulted in Chaplinsky's conviction.[64] When a marshal attempted to remove Chaplinsky, Chaplinsky referred to the marshal as a "'?God damned racketeer? and ?a damned Fascist.?'"[65] The Court upheld Chaplinsky's conviction because the statute prohibited the use of

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Whitney, 274 U.S. at 359–60.

55. *Whitney*, 274 U.S. at 366.

56. *Id.* at 372.

57. *Id.*

58. *Id.* at 379 (Brandeis, J., concurring).

59. *Id.* at 376.

60. *Id.* Further, Justice Brandeis stated, "There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one." *Id.* Justice Brandeis, while acknowledging there was a conspiracy in the present case, required actual harm to justify censorship. *Id.*

61. *Id.* at 377 ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."). Yet, Justice Brandeis does not define what constitutes "evil," a distinction Kessler notes. Kessler, *supra* note 38, at 578.

62. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

63. *Id.* at 569.

64. *Id.* at 570.

65. *Id.* (quoting Complaint, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (No. 225)).

"classical fighting words," words which would plainly excite listeners to breach the peace.[66] The Court reasoned that these restrictions limited criminalization to the public space and narrowly punished *verbal acts*, rather than the content of the speech.[67] While the Court in *Chaplinksy* required an act to justify censorship, the specter of *Schenck* and its progeny questioned this distinction.[68] When did speech become an act and thus punishable by the state? In the 1950s, the Court would find that association was enough "speech" to constitutionally criminalize such an act.

B. McCarthy-Era Regulations

The Smith Act[69] altered the political and social landscape of the First Amendment, relying on the threat of international Soviet Communism to criminalize and censor Communist ideas, activism, and advocacy.[70] The Justice Department used the Smith Act as a weapon to prosecute communists as it was "easy to prove that communists [had] made communist speeches and read communist books."[71] Ultimately, the Smith Act targeted those who sympathized with left-wing causes, Soviet or otherwise, and left hundreds either unemployed or labelled as criminals for mere association.[72]

In *Dennis v. United States*,[73] the Court upheld the Smith Act despite the defendants' claims that the Smith Act violated their First Amendment rights.[74] The defendants were leaders of the U.S.

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66. *Id.* at 573.

67. *Id.* at 574.

68. *Id.* at 571 ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

69. Smith Act, 18 U.S.C. § 2385 (2018). Section 2385 criminalizes advocating the "duty" or "necessity" of overthrowing the government of the United States by force or violence. *Id.*

70. *See* Mark A. Sheft, *The End of the Smith Act Era: A Legal and Historical Analysis of* Scales v. United States, 36 AM. J. LEGAL HIST. 164, 165–66 (1992) (detailing the legislature and the Justice Department's support for a sedition law against political subversives). While initially written to forbid aliens from advocating the violent overthrow of the government, the bill was expanded by Represent of Representatives after 12 minutes of debate. *Id.*

71. *Id.* at 167 (quoting C. HERMAN PRICHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960, at 66–67 (1961)).

72. *See* Geoffrey Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1400 (2005) (noting that "[m]ore than 11,000 people were fired from federal, state, local, or private employment for alleged disloyalty").

73. Dennis v. United States, 341 U.S. 494 (1951). *See also* Claudius O. Johnson, *The Status of Freedom of Expression Under the Smith Act*, 11 W. POL. Q. 469, 473 (1958) (detailing the theoretical shifts from the sedition statutes to the Smith Act).

74. *Dennis*, 341 U.S. at 516.

Communist Party and were convicted of transforming the World War II-era Communist Political Association[75] into the Communist Party during the Cold War.[76] The Court upheld their convictions using Judge Learned Hand's modified "clear and present danger" test, factoring in the danger posed by the speech in conducting its analysis: "'[courts] must ask whether the gravity of the ?evil,? discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[77] The danger in question was the threat of government abolishment; thus, a compelling "clear and present danger" was the overthrowing of the United States government.[78]

The Court emphasized that the Communist Party's development as a "highly organized conspiracy" was a justifiable danger to warrant criminal conviction, even though, from 1945 to 1948, there had never been an attempt to overthrow the United States government.[79] The mere organizing of a political party that theoretically could turn into a violent coup was enough to constitute criminal activity.[80] Effectively, the "clear and present" danger test of *Gitlow* and *Debs* changed from present danger to *theoretically possible* danger, based on the size, values, and potential of the Communist Party.[81]

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75. *Id.* at 498 n.1. The Court provides the following history:

> Following the dissolution of the Communist International in 1943, the Communist Party of the United States dissolved and was reconstituted as the Communist Political Association. The program of this Association was one of cooperation between labor and management, and, in general, one designed to achieve national unity and peace and prosperity in the post-war period.

Id.

76. *Id.* at 498 (noting the petitioners changed the Communist Political Association into the Communist Party, which aligned with the Soviet Union's Communist ideology).

77. *Id.* at 510 (citing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

78. *Id.* at 508.

79. *Id.* at 511.

80. *Id.* Further, Justice Frankfurter concurred with the judgment, not because of a "clear and present danger," but because of national security reasons. *Id.* at 547 (Frankfurter, J., concurring).

81. *Dennis*, 341 U.S. at 511–12. The jury instructions noted:

> [Y]ou cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasona-

After *Dennis*, the Smith Act returned to plague the Court in *Yates v. United States*.[82] The *Yates* defendants were 14 members of a conspiracy to "advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence," and organize the Communist Party.[83] The defendants brought two claims to challenge their convictions: first, the defendants argued that the term "organize" was erroneously interpreted; thus, the jury instructions were erroneous.[84] Second, the petitioners claimed that the jury instructions were erroneous because they did not require "incitement to action."[85]

The Court, in resolving the appellants' first issue, relied upon its *Dennis* decision and held that the term "organize" meant an establishment or founding of a new organization.[86] Turning to the second issue, the Court defined "advocate" in the Smith Act as:[87]

> The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence.[88]

The trial court refused to distinguish between advocacy per se and advocacy with a purpose towards incitement.[89] The Court found that the trial court had misconstrued the difference between advocacy "of forcible overthrow as an abstract doctrine and advo-

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> bly and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

Id.

82. Yates v. United States, 354 U.S. 298 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978) (overruling the partial acquittal of some defendants and orders granting new trials to cure inadequate proof).

83. *Id.* at 300 (citing 18 U.S.C. § 2385 (2018)).

84. *Id.* at 303.

85. *Id.*

86. *Id.* at 304. The defendants argued the word "'organize' means to 'establish,' 'found,' or 'bring into existence,' and that in this sense the Communist Party was organized by 1945 at the latest." *Id.* Defendants argued that because they were indicted in 1951, the statute of limitations had run. *Id.* The Court found "organize" undefined by both the statute and the legislative history. *Id.* at 305–07. However, the Court noted the Smith Act specifically targeted the Communist Party. *Id.* at 308.

87. *Id.* at 312.

88. *Id.* at 313 n.18 (quoting United States v. Schneiderman, 106 F. Supp. 906, 935 (S.D. Cal. 1952)).

89. *Id.* at 317–18.

cacy of action to that end," and thus misconstrued *Dennis*.[90] Furthermore, the Court found conviction must lie in the advocacy to do something, now or in the future.[91]

Turning to the defendants' convictions, the Court affirmed the convictions for five of the *Yates* defendants based on their mere membership in the Communist Party.[92] However, the Court found that the other nine defendants were activists because they attended classes teaching "sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points."[93] Thus, the Court remanded the case for a new trial to find whether the defendants' advocacy passed the threshold into overt acts.[94]

Justices Black and Douglas jointly dissented on the same grounds as their individual dissents in *Dennis*.[95] Justice Black, though agreeing with the Court's construction of "organize,"[96] would have reversed every conviction because he believed that the First Amendment forbade Congress from creating laws like the Smith Act.[97] Justice Black noted that under the Court's approach, convictions rested upon merely "agreeing to talk as distinguished from agreeing to act."[98] Justice Black further noted that Smith Act prosecutions were indistinguishable from the same authoritarian governments the First Amendment sought to prevent.[99] In time, the Court would adopt Justice Black's free-speech jurisprudence, as the Court moved further and further away from supporting government censorship.

C. Brandenburg *and the Non-Incitement of Hate Speech*

Brandenburg v. Ohio[100] presented the next evolutionary step in the Court's free-speech jurisprudence. Brandenburg, a leader of an Ohio Ku Klux Klan group, was convicted[101] under Ohio's Crimi-

90. *Id.* at 320.
91. *Id.* at 325; *see also* Johnson, *supra* note 73, at 477.
92. *Yates*, 354 U.S. at 330.
93. *Id.* at 331.
94. *Id.* at 333.
95. *Compare Yates*, 354 U.S. at 339 (Black, J., dissenting), *with* Dennis v. United States, 341 U.S. 494, 581 (Douglas, J., dissenting), *and Dennis*, 341 U.S. at 579 (Black, J., dissenting).
96. *Yates*, 354 U.S. at 340 (Douglas, J., dissenting).
97. *Id.*
98. *Id.*
99. *Id.* at 344.
100. Brandenburg v. Ohio, 395 U.S. 444 (1969).
101. *Id.* at 444–45.

nal Syndicalism statute.[102] The evidence supporting his conviction consisted of tapes describing a possible "revengeance" that advocated for the forced relocation of African-Americans to Africa and Jewish people to Israel.[103] The Court found the syndicalism statute unconstitutional[104] because the Constitution prevents state censorship unless the advocacy aims towards incitement or producing imminent "lawless action and is likely to incite or produce such action."[105] Thus, *Brandenburg* requires a court to determine whether speech will incite listeners to commit imminent, lawless activity prior to enforcing censorship.[106]

The Court began a decisive move towards free-speech absolutism[107] in *R.A.V. v. St. Paul*.[108] There, confronted by a cross burning inside a local black family's fenced-in property, the Court invalidated a Minnesota statute prohibiting the action:

> [O]n 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. . . .[109]

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102. *Id.* ("[A]dvocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." (quoting OHIO REV. CODE ANN. § 2923.13)). For the modern version of the statute struck down in *Brandenburg*, see OHIO REV. CODE ANN. § 2917.01 (West 2018).

103. *Brandenburg*, 395 U.S. at 447. Further, the tapes showed participants with weaponry and a cross burning. *Id.* at 445–46.

104. *Id.* at 448. This effectively overruled *Whitney v. California*, 274 U.S. 357, 371 (1927) (holding the California Anti-Syndicalism Act criminalizing the advocacy of violent means to effect political change involved such danger to the state as to allow the state to regulate it). The Court noted that subsequent decisions of *Dennis* and *Yates* discredit the criminalization of mere advocacy. *See Brandenburg*, 395 U.S. at 447–48.

105. *Brandenburg*, 395 U.S. at 447. Justices Black and Douglas concurred in the result. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (Black, J., concurring). However, Justice Douglas found the *Brandenburg* test still problematic because of its inherent reliance on the "clear and present danger" jurisprudence of the past, allowing for incitement to be regulated. *Id.* at 455 (Douglas, J., concurring).

106. *See* Larry Alexander, *Incitement and Freedom of Speech*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 101, 107–114 (David Kretzmer & Francine Kershman Hazan eds., 2000) (discussing the *Brandenburg* test and how it seems to insulate the speaker from their speech's results).

107. An absolutist view of free speech would be that of Justice Hugo Black: "I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal." Yates v. United States, 354 U.S. 298, 340 (1957) (Black, J., dissenting).

108. R.A.V. v. St. Paul, 505 U.S. 377, 387 (1992).

109. *Id.* at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990), *invalidated by R.A.V.*, 505 U.S. at 391)).

Justice Scalia, writing for the majority, found the statute to engage in "content-based regulations," that would discriminate solely based on the content of the speech—such as speech that states the President is a fascist.[110] Justice Scalia noted that there were several categories of speech that the Court could, consistent with the First Amendment, regulate because of their "constitutionally proscribable content."[111] Specifically, Justice Scalia allowed for the regulation of secondary effects of the speech, but did not allow the regulation of speech content that may be offensive or harmful.[112]

Justice Scalia reasoned that if the government proscribed speech solely because the entire class of speech was subject to regulation because of their effects, then the threat of government viewpoint did not exist.[113] Thus, threats against the President,[114] obscenities,[115] and price regulation to prevent fraud[116] are all regulable, because the purpose of their regulation applies to all types of speech within that class and does not discriminate against specific instances of speech.[117] Yet, the government may regulate proscribable speech due to its secondary effects, which allows for regulation without reference to the content.[118]

The Court held that the *R.A.V.* ordinance was facially unconstitutional because it regulated fighting words through their connection with political ideas, resulting in viewpoint discrimination.[119]

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110. *Id.* at 382.

111. *Id.* at 383. Justice Scalia described several exemptions, the first being the government's ability to proscribe libel generally, but not seditious libel. *Id.* at 384. Further, child pornography could be proscribed. *Id.* One could proscribe threats against the President. *Id.* at 388. Finally, the state may regulate "secondary effects" of speech. *Id.*

112. *Id.* at 386. The Court effectively allows for the "non-verbal" or "non-communicative" aspects of speech to be regulated but not the underlying message of the speech; thus, blending the two concepts when hate speech is implicated. *Id.* at 386–87.

113. *Id.* at 388.

114. *Id.* (noting the Court had upheld the facial validity of the threat against the president statute in *Watts v. United States*, 394 U.S. 705, 707 (1969)).

115. *Id.* (stating the state may regulate a sexual obscenity but not an obscenity which includes an offensive political message); *see also* Kurcharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990) (finding an obscenity statute constitutional when obscenities as a whole are regulated).

116. *R.A.V.*, 505 U.S. at 388 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumers Councils, Inc., 425 U.S. 748, 771–72 (1976) (upholding a Virginia law prohibiting a pharmacist from publishing, advertising or promoting the price of prescription drugs)).

117. *Id.* at 388–89.

118. *Id.* at 389.

119. *Id.* at 391; *see also* Vill. of Skokie v. Nat'l Socialist Party, 373 N.E.2d 21 (Ill. 1978). In *Skokie*, the court, despite the testimony that the Nazi threat was to show "'that we are not through with you,'" rejected the circuit court's injunction

Notably, Justice Scalia dismissed a potential due-process argument.[120] He asserted that even if the purpose behind the ordinance was to ensure the basic human rights of groups historically discriminated against, the danger of censorship required limited circumstances prior to use of the equal protection argument.[121] Thus, the Court favored, albeit unintentionally, free-speech principles over the rights of those threatened by the speech.[122]

Virginia v. Black[123] is the latest demonstration of the Court's ideological shift in free-speech jurisprudence. In *Black*, the Court invalidated a portion of a Virginia statute criminalizing the burning of a cross with the intent to intimidate a person or group of persons.[124] The statute included a provision establishing that such burning of a cross was prima facie proof of intent to intimidate.[125] The Court held that the prohibition on cross burning was consistent with *R.A.V.* because it fit one of the narrow exemptions of *R.A.V.*; it banned an action, not any specified viewpoint expressed via cross burning.[126] However, the Court held that the prima facie element of the statute was unconstitutional as interpreted by the jury instruction and created a risk of idea censorship.[127]

Dissenting, Justice Thomas rejected the majority's reasoning that one burns a cross for a plethora of reasons, noting that the sole

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against the display of swastikas in the march. *Skokie*, 373 N.E.2d at 22. The court rejected the "fighting words" doctrine, limiting it solely to words which directly cause violence. *Id.* at 23–25 (citing Cohen v. California, 403 U.S. 15, 20–29 (1971)). The court conceptualized the display of a swastika as a political act, divorced from the *effect* of the display of the swastika in a predominantly Jewish Community. *Id.* at 24. Further, the court reasoned that the suppression of unpopular speech would lead to general suppression. *Id.* at 25 (citing Rockwell v. Morris, 211 N.Y.S.2d 25 (App. Div. 1961)).

120. *R.A.V.*, 505 U.S. at 395 (finding the statute was not narrowly tailored and singled out bias against a viewpoint).

121. *Id.*

122. *See* Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the* R.A.V. *Case*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 133, 135 (1993) [hereinafter *Epilogue*] (discussing the *R.A.V.* case and its ignorance of minority rights).

123. Virginia v. Black, 538 U.S. 343 (2003).

124. *Id.* at 348 (citing VA. CODE ANN. § 18.2-423 (1996)).

125. *Id.*

126. *Id.* at 362–63 (finding the burning of the cross with the purpose to intimidate was within *R.A.V.* exception).

127. *Id.* at 366–67 (holding the jury instruction unconstitutional). The jury instructions, in discussing the mens rea of the crime, noted cross burning "by itself, is sufficient evidence from which you may infer the required intent." *Id.* at 364. The Court believed this instruction created an "unacceptable risk of the suppression of ideas." *Id.* at 365. Such instruction created a risk of undeliberated convictions without determining if the cross burning was intended to intimidate. *Id.* at 367.

group engaged in cross burning in the United States was the Ku Klux Klan.[128] Justice Thomas emphasized the historical effects of intimidation on the black community, noting that the Klan used cross burnings as a method to inspire terror among all minority communities.[129] Justice Thomas argued that the intent of the statute was to prevent the Klan from reemerging prior to desegregation in the American South, rendering the concern that the state sought to censor the Klan historically inaccurate.[130] Finally, Justice Thomas rejected the majority's belief that the statute's prima facie instruction was irrebuttable because a defendant could provide evidence to rebut that presumption.[131]

As the cases above demonstrate, the First Amendment has moved beyond the "clear and present danger" test of *Schenck*.[132] Now, the ability of the state to regulate speech requires purposeful incitement towards imminent, rather than potential, lawless action or harm to the state and its interests.[133] However, this development has moved from discrimination of ideas to ignoring the harms those ideas cause in communities.[134] Understanding why society would tolerate ideas that harm communities is vital to understanding the scope of the First Amendment; for this reason, we turn to the philosophical underpinnings of the First Amendment.

D. John Stuart Mill and the Marketplace of Ideas

Fundamentally, the First Amendment protects the marketplace of ideas.[135] John Stuart Mill, the eminent English philosopher, gave a traditional rationale for freedom of speech: if we cannot socially parse out the false information, and instead suppress what is false, we deny others the ability to reason and learn.[136] Additionally,

128. *Id.* at 388–89 (Thomas, J., dissenting). Specifically, the majority alleged that Scottish tribes burned crosses to communicate and thus stood for the proposition that one may burn a cross for a plethora of reason. *Id.* at 352.

129. *Id.* at 390–92.

130. *Id.* at 394.

131. *Id.* at 397.

132. Schenck v. United States, 249 U.S. 47, 52 (1919).

133. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

134. *Epilogue*, *supra* note 122, at 135.

135. Abrams v. United States, 250 U.S. 616, 630 (1919) (Brandeis, J., dissenting); *see also* Jared Schroeder, *Shifting the Metaphor: Examining Discursive Influences on the Supreme Court's Use of the Marketplace Metaphor in Twenty-First-Century Free Expression Cases*, 21 COMM. L. & POL'Y 383, 412–30 (2016) (discussing the use of discourse theory in the Supreme Court's jurisprudence and describing different contexts of the "marketplace of ideas," which refers to the ability of citizens to choose the dominant ideas among the "market").

136. JOHN STUART MILL, ON LIBERTY 36 (Andrew UK Ltd. 2011) (1859) (ebook) ("Wrong opinions and practices gradually yield to fact and argument: but

suppression could potentially censor a truth clouded in falsehoods.[137] Further, censorship prevents the truth from being reexamined as society progresses, and ultimately, what was once true at a particular time, could become a dogmatic truism at a later time.[138] Thus, a dogmatic pronouncement of "the truth" instills fear in the uneducated and restricts their freedom to understand or choose what is right or true.[139] By engaging in discourse, truth reveals itself and the "number of doctrines which are no longer disputed or doubted will be constantly on the increase."[140]

However, censorship is a dualistic principle: the majority may not censor the minority, nor can the minority control the majority by seeking refuge from criticism.[141] Through discourse, our own thoughts face others: "forgetting that the unlikeness of one person to another is generally the first thing which draws the attention of either to the imperfection of his own type, and the superiority of another, or the possibility, by combining the advantages of both, of producing something better than either."[142]

Further, Mill recognizes potential limitations of freedom of speech. Similar to the "clear and present danger" test, Mill notes:

> An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.[143]

This quote enounces Mill's *harm* principle, wherein government may regulate speech that incites violence when harm could occur to others.[144] The only proper limit to speech is to protect others from harm.[145] Mill does not suppose the harm principle is a sufficient condition for intervention; rather, it is a necessary condi-

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facts and arguments, to produce any effect on the mind, must be brought before it.").

137. *Id.* at 30.

138. *Id.* at 38. Mill uses the example of Christianity which was once persecuted and viewed as heresy by Marcus Aurelius and which later evolved into an oppressive religion. *Id.* at 42–43. Further, Mill argues that by censoring opinions the state increases the social stigma associated with them and radicalizes such opinions. *Id.* at 42.

139. *Id.* at 44.

140. *Id.* at 53.

141. *Id.* at 29.

142. *Id.* at 79.

143. *Id.*

144. *Id.* at 24.

145. *Id.* at 64.

tion for intervention.[146] However, Mill concedes that actions that cause harm establish a "prima facie case for punish[ment] . . . by law."[147] A common issue traps the harm principle as well as the clear and present danger and *Brandenburg* tests: ambiguity in what meets these standards.[148]

Despite writing in the 1800s, Mill, alongside Immanuel Kant and John Milton,[149] remains a paradigm liberal philosopher of free speech.[150] Recently, Timothy Garton Ash stands as an authority on Millian principles in the public sphere.[151] Ash argues that governments must limit speech regulation as much as possible while simultaneously developing shared norms to allow for mutual understanding.[152] Ash endorses a Millian position of harm which requires objective pain or consequence, while subjective offense or psychological effects are not enough to warrant regulation.[153] Speech becomes regulatable only when it is dangerous speech.[154]

Dangerous speech modernizes the *Brandenburg* test, which requires questioning whether the speaker intends violence, whether violence is likely, and whether violence is temporally imminent.[155]

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146. MILL, *supra* note 136, at 100 ("[I]t must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference.").

147. *Id.* at 25.

148. *See generally* David Brink, *Mill's Moral and Political Philosophy*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 21, 2018), https://stanford.io/2GLxP6P [https://perma.cc/2LND-7QJ9] (discussing the ramifications of a weak principle for regulation versus a stronger justification). Specifically, what are the societal interests which are "harmed" and how powerful must those interests be?

149. *See generally* Helga Varden, *A Kantian Conception of Free Speech*, *in* FREEDOM OF EXPRESSION IN A DIVERSE WORLD 39 (Deirdre Golash ed., 2010) (describing Immanuel Kant as another liberal political philosopher who viewed the state as necessary to provide protections for citizens as the state represents no individual person); *see also* Schroeder, *supra* note 135, at 390 (discussing how John Milton influenced the founder's thinking as to American freedoms).

150. *See* Steven P. Lee, *Hate Speech in the Marketplace of Ideas*, *in* FREEDOM OF EXPRESSION IN A DIVERSE WORLD 13, 24–25 (Deirdre Golash ed., 2010) (discussing Millian principles towards hate speech). Lee contends that hate speech regulation requires a discussion of the risks of government misuse of that authority. *Id.* at 24. Further, the realization of free speech forces us to confront the undermining effect of this speech on tolerance and diversity. *Id.* at 25. However, it is the purpose of this Comment to critique why government regulates and controls speech.

151. *See* TIMOTHY GARTON ASH, FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD 75 (2016).

152. *Id.* at 81.

153. *Id.* at 89.

154. *Id.* at 135.

155. *Id.* at 135–37 (citing Susan Benesch, *Dangerous Speech: A Proposal to Prevent Group Violence*, DANGEROUS SPEECH PROJECT (Feb. 23, 2013), https://

The state, to protect all citizen's rights, must actively protect those whose speech is legitimate while punishing those who intend to incite violence.[156]

For example, the state could not prohibit a provocateur from threatening to expose undocumented students, but if the provocateur were to advocate violence against said students and knows that those listening would engage in such violence, then the state could hold them responsible.[157] Thus, liberalism requires unregulated speech in most circumstances, with censorship used only in the rare circumstances of violence or imminent violence.

The Supreme Court's *Brandenburg* analysis embodies the free speech of liberal political philosophy; yet, this mode of analysis ignores the question of who benefits from the wild west of free speech.

III. CRITIQUE OF LIBERAL SPEECH AND THE VIOLENCE OF SPEECH ITSELF

A. The Broken Marketplace

The philosophy of John Stuart Mill and Justice Holmes pervade American jurisprudence through the market place of ideas metaphor.[158] Yet, such analysis of American jurisprudence ignores the real politick of the Supreme Court's First Amendment jurisprudence, wherein the marketplace of ideas analogy assumes that the marketplace is a fair and tolerant one—much like an economic market.[159]

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bit.ly/2A5Ugxy [https://perma.cc/P482-WYFJ]). Ash also adopts the framework of Susan Benesch in determining when hate speech becomes violent: whether the speaker has a powerful influence, whether there is a vulnerable and impressionable audience, whether the speech act is a call to violence, whether there is a social or historical context of violence, and whether the dissemination is influential itself. *Id.* at 135–37.

156. *Id.* at 140–44 (discussing civic responsibility and the Charlie Hebdo cartoons and the lack of support those creators had because of fear of violence to support their position).

157. *See* Maya Oppenheim, *UC Berkeley Protests: Milo Yiannopoulos Planned to 'Publicly Name Undocumented Students' in Cancelled Talk*, INDEPENDENT (Feb. 3, 2017), https://ind.pn/2tGHwua [https://perma.cc/R33P-U6LF] (discussing the use of "speaking" events to harass undocumented students).

158. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) (describing the free trade of ideas); *see also* Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35, 80 (2010) (noting the different justifications for free speech by Mill and Holmes).

159. Schonsheck, *supra* note 11, at 34–35 (noting unlike a real market, the marketplace of ideas does not require exchanges of ideas, but rather the speaker retains their ideas regardless of opposing ideas).

The First Amendment, rather than promoting the exchange of ideas, becomes a means of ideological entrenchment, wherein ideas never leave the public discourse because they are prima facie a "potential truth": Holocaust denial possesses the same "truth" value as anti-racism or anti-sexism.[160] The Supreme Court, rather than grapple with the secondary effects of its free-speech jurisprudence, has accepted the entrenchment and protection of hate speech at the cost of minority communities in the service of powerful socioeconomic groups and ideologies.[161]

Freedom of speech, like "any political right in general, is not measured by some sort of abstract scheme of 'justice,' or in terms of any other bourgeois-democratic phrases, but by the social and economic relationships for which it is designed."[162] Rather than analyzing political rights in a vacuum, we must analyze these rights within the larger social, economic, and political frameworks that rights exist within, if we hope to understand what values they protect and what values they harm.[163]

A philosophical analysis must ask how society produces, reproduces, and interprets values.[164] Those who interpret these values are a professional class of people, "intellectuals," such as social and

160. Steven P. Lee, *Hate Speech in the Marketplace of Ideas*, *in* FREEDOM OF EXPRESSION IN A DIVERSE WORLD 13, 20–25 (Deirdre Golash ed., 2010) (analyzing the marketplace of analogies in economic terms and finding justification for regulation because hate speech functions like a negative market externality).

161. *Contra* JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 104–17 (1999) (arguing that while free speech can rightfully be seen as reinforcing some social norms, the civil rights movement shows an instance wherein the free speech of civil rights activists was instrumental to prevent state oppression of civil rights activists). Further, Weinstein argues that characterizing free speech as either an ally or nemesis to equality is a false narrative and requires careful analysis of the specific regulation at work. *Id.* at 123. For a concise summation of the court's role as a reactionary body, see Robert Hunter, *A Reactionary for a Reactionary Body*, JACOBIN (Feb. 1, 2017), https://bit.ly/2RfUooc [https://perma.cc/MN7K-GCXG] (describing the Courts' institutional limitations), and Richard Bellamy, *The Democratic Qualities of Courts: A Critical Analysis of Three Arguments*, 49 REPRESENTATION 333, 344 (2013) (arguing courts only uphold the people's democratic values insofar as they are given legitimacy by the court).

162. Rosa Luxemburg, *The Russian Revolution*, *in* THE ROSA LUXEMBURG READER 281, 302 (Peter Hudis & Kevin B. Anderson eds., 2004). It should be noted the original context of Luxemburg's analysis was suffrage. *Id.*

163. *Id.* (noting the Soviet concept of suffrage was developed within the context of the transition from tsarist Russia to a revolutionary government). For examples of how larger societal interests impact the development of constitutional rights, see Johnson, *supra* note 73, at 473 (noting that Justice Frankfurter found justification in national security for the Smith Act).

164. *See* Antonio Gramsci, *The Prison Notebooks: The Intellectuals*, *in* AN ANTHOLOGY OF WESTERN MARXISM: FROM LUKÁCS AND GRAMSCI TO SOCIALIST-FEMINISM 112, 117–18 (Roger Gottlieb ed., 1989).

political elites who determine *how* society values norms.[165] This class includes the judiciary which, having the "province and duty" to say what the law is, determines the scope of any right, and thus the underlying rationale of the right.[166]

In the case of First Amendment jurisprudence, the right to free speech existed, albeit qualified by fundamental American socioeconomic norms and hierarchies.[167] Through interpretation, the right to free speech exists to the extent the Court deems it worth existing, often benefitting those not in the minority but in the majority.[168] Juxtaposed to the elite intellectual, a non-politically powerful citizen is unable to express themselves freely; they may only express themselves within the confines of what is acceptable to the overall social power structure, whether it be in the face of the Red Scare or in the unregulated market of today.[169]

Yet, one could argue that the fundamental value of free speech remains because of tolerance and that the Court has moved away from its mistakes in upholding the Smith Act.[170] Regardless of whether racist speech begets violence, so long as the speech does not meet the causal "incitement" test of *Brandenburg*, it remains a "valid" part of the community discourse, despite societal condemnation and its potential harm or offense to the community.[171] Tol-

165. *Id.* The intellectual class includes judges who function as "'[t]echnicians of repression' and 'moral and intellectual leaders.'" *See* Pablo Ciocchini & Stefanie Khoury, *A Gramscian Approach to Studying the Judicial Decision-Making Process*, 26 CRITICAL CRIMINOLOGY 75, 77 (2018).

166. Marbury v. Madison, 5 U.S. 137, 177 (1803).

167. *See* Dennis v. United States, 341 U.S. 494, 509 (1951); Debs v. United States, 249 U.S. 211, 214 (1919).

168. *See* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 60–71 (2014) (describing the history of the Court upholding speech regulations when threatened by subversion or anti-war sentiments).

169. Thus, in a case like *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the ideology of freedom of speech outweighed the rights of African-American peoples to be free from racism, implicitly suggesting that racism is a right more enshrined than the right to be black. *See Epilogue*, *supra* note 122, at 135.

170. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also* WEINSTEIN, *supra* note 161, at 16–24 (detailing the espionage and Red Scare cases). Additionally, Weinstein argues that the *Brandenburg* test functions well in practice and in theory. *Id.* at 25. This Comment does not dispute the uses of the *Brandenburg* test, but it considers what we give up when we choose "tolerance" as a political value. *See infra* Part III.B.

171. *But see* Sean E. Mulholland, *White Supremacist Groups and Hate Crime*, 157 PUB. CHOICE 91, 109 (2013) (finding that the presence of white supremacist chapters in a county raises the overall hate crime rate by 19.1 percent).

erance of ideas remains a vital component of democracy, even if it carries negative repercussions.[172]

However, when discussing the benefits of free speech, we too often ignore the potential costs that this value has imposed on rational democracy and minority communities.[173] Tolerance of those who would dehumanize minority groups begs the question: is this tolerance worth the cost, or, in the alternative, is this the type of society foreseen by those who advocated for free speech?

B. Tolerance: What Is It Good for?

Herbert Marcuse, the Frankfurt School philosopher, noted that tolerance has changed from a means of political discourse to an "end" that limits discussion because all viewpoints, regardless of facts or logic, remain tolerated.[174] Tolerance, instead of serving human ends, such as ending war, terror, and oppression, allows the good and the bad to mingle because tolerance is no longer practiced.[175] Rather than require engagement with alternative viewpoints, tolerance allows each viewpoint to co-exist when their fundamental truth-values are at odds.[176]

Tolerance does not discriminate the good from the bad or the conservative from the liberal, but it allows for the expression of ideas, even when their use is to spread disinformation and cause actual, empirical harm.[177] Historically, tolerance may have been necessary when repression of ideas and peoples were commonplace, but in today's world, tolerance serves the interests of the state.[178] This phenomenon requires sober reflection to understand what benefits hate speech provides to society, given its condemnation by both science and morality alike.[179]

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172. BUNKER, *supra* note 12, at 16 ("[P]romoting free speech through the First Amendment helps to teach tolerance by exposing citizens to diverse views that may not otherwise be inclined to endure.").

173. *See* Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. St. Paul, 505 U.S. 377 (1992).

174. Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 81, 82–83 (1965).

175. *Id.* at 82.

176. Schonsheck, *supra* note 11, at 35 (noting how despite scientific support, Darwinian evolutionism is considered to be on the same level of legitimacy, as an idea, as creationism).

177. Marcuse, *supra* note 174, at 85; Mulholland, *supra* note 171, at 109.

178. *Id.* Marcuse notes those whose "truths" were murdered by the state: Arnold of Brescia, Hussites, and other members of the Reformation. *Id.* at 91. Such state interests include state-violence through the police, armed forces, and economic suppression of individuals' voting and buying power. *Id.* at 85.

179. *Id.* at 93.

Turning to American racism, Supreme Court jurisprudence frustrates community-based attempts to remove or reduce activities and speech that dehumanize minority groups.[180] Rather than protect the democratic interests of those groups, the Court's interpretation of the First Amendment and its values implicitly protect the interests of racists who burn crosses and display swastikas, leaving such communities without recourse.[181] In striking down content restrictions, the Court justifies, through tolerance, protection of powerful interests that create conditions where hate speech flourishes, rather than respect for humanity.[182] Tolerance serves not the interests of the vulnerable, as often believed, but the interests of those who possess economic, social, and political power; thus, the Court too often reinforces the social hierarchies already in place, essentially allowing for cultural entrenchment through the law.[183] Thus, communities cannot progress and decide that such "tolerance" is illusory because that would reflect "special bias" against viewpoints like white supremacy. Under the Court's jurisprudence, every political position is as legitimate as any other, regardless of whether its political ideology seeks to liquidate or deport millions of Americans.[184]

However, a more sinister aspect of tolerance may be at play in American jurisprudence: when speech threatens the underpinnings of America's racial, political, and economic hierarchies, the state eschews tolerance for stability.[185] Further, when communities at-

180. R.A.V. v. St. Paul, 505 U.S. 377, 379–80 (1992) (detailing an anti-Nazi and cross-burning ordinance).

181. *Id.* at 415–16 (Blackmun, J., concurring) (arguing the majority misconstrues First Amendment values by protecting harassment of minorities). However, one should note that Blackmun would have struck down the statute solely on overbreadth grounds, as opposed to the majority's shrinking of the "fighting words" doctrine. *Id.*

182. Marcuse, *supra* note 174, at 88 (noting that tolerance cannot be indiscriminate and equal when life and freedom are at stake). Rather than protect minority interests from harassment, the Court implicitly sanctions harassment. *See R.A.V.*, 505 U.S. at 396 (describing the ordinance as reflecting special hostility towards particular biases). The majority neglects to acknowledge the historical and social meaning of what cross-burnings or swastikas entail. *See also Epilogue*, *supra* note 122, at 135.

183. Marcuse, *supra* note 174, at 95 (describing the inability of social dissent to emerge when dominant ideology controls political and media power).

184. *Id.* at 94. Thus, while one can find the views such as cross-burning reprehensible, one must "tolerate" it in the name of the First Amendment. *See also* Virginia v. Black, 538 U.S. 343, 347 (2003); *R.A.V.*, 505 U.S. at 396; Brandenburg v. Ohio, 395 U.S. 444, 445 (1969).

185. *See* Luxemburg, *supra* note 162, at 302. If we view the right to free speech within its historical, social reality, when the speech threatens society, it can be censored. *See* Dennis v. United States, 341 U.S. 494, 509 (1951) (finding the Government may act before any revolutionary activity occurs).

tempt to prohibit hate speech to prevent the fostering of racism, the Court then weaponizes tolerance to protect hate speech.[186] Eventually, the proliferation of "fake news," propaganda, conspiracy theories, and racialized-science ideas become indoctrinated into the cultural, social, and political system as legitimate, reinforcing the same status quo because every idea must be subject to inquiry.[187] To move towards a society that can free itself from this confusion, society must cease accepting tolerance and equal choice of "all ideas" and move toward an alternative: recognizing the current regime as "false" tolerance and move towards progressive "true tolerance."[188]

Marcuse argues that for tolerance to flourish, we must be intolerant of those viewpoints which eschew empiricism, shared humanity, and individuality; in short, we must become intolerant of those views which paralyze society from progress.[189] Thus, society would be tolerant of speech and actions that work towards the freedom of individuals, but intolerant of that which seeks to stifle or oppress those who society oppresses.[190] Such practice expresses itself in the phenomena of "no platforming" of Nazis and other fascists.[191] For a less politically charge example, even the exclusion of hearsay embodies Marcusian principles.[192]

In short, the type of free speech embodied by Marcusian principles does not restrict speech because of its offense, but it does restrict speech in order to promote a vision of "human diversity" which seeks to move beyond consumer culture and systemic oppression.[193] The words of fascists, neo-Nazis, misogynists, and rac-

186. Marcuse, *supra* note 174, at 104 (noting the concentrated power of decision makers, even in democratic societies).

187. *Id.* at 98; *see also* Michael Barthel et al., *Many Americans Believe Fake News Is Sowing Confusion*, PEW RES. CTR: JOURNALISM & MEDIA (Dec. 15, 2016), https://pewrsr.ch/2h4cNyZ [https://perma.cc/L767-7W8H] (noting 64 percent believe fake news has caused confusion).

188. Marcuse, *supra* note 174, at 102–05. Marcuse further notes that to even discuss tolerance, we must "re-examine the issue of violence and traditional distinction between violent and non-violent action." *Id.* at 102.

189. *Id.* at 100.

190. *Id.*; *see also* Clarence Morris, *On Liberation and Liberty: Marcuse's and Mill's Essays Compared*, 118 U. PA. L. REV. 735, 744 (1970) (detailing Mill and Marcuse's different conceptions of liberty).

191. MARK BRAY, ANTIFA: THE ANTI-FASCIST HANDBOOK 148–50 (2017) (defining no platforming as the act of denying fascists the opportunity to speak).

192. *See* Brian Leiter, *The Case Against Freedom of Speech*, 38 SYDNEY L. REV. 407, 438–39 (2016). Specifically, hearsay is shown by its untrusty nature to be harmful to the discourse by an empirical standpoint. *Id.* at 409.

193. *See* BRAY, *supra* note 191, at 149. For a discussion of the complexities of who decides what promotes "human diversity," see *infra* Part III.C. This Comment assumes proposals within the present constitutional framework and thus lim-

ists do not promote human diversity: by nature the words of these groups are exclusory of the other (non-whites, women, and LGBTQ peoples) and exist to destroy or exploit others.[194] Thus, to move forward towards human liberation, society must adjust its norms to tolerate and promote positions that seek to expand human flourishing while censoring speech that seeks to harass, harm, or dehumanize minority groups and reinforce present social norms.[195] Yet, who decides what values are and are not tolerable?

C. The Political Values of Free-Speech Absolutism: Implicit Acceptance of Racism, Sexism, and Warmongering

Because of the American legal regime's fetish for tolerance, the high standard for prohibiting speech remains the incitement standard.[196] However, this incitement standard is effectively impossible to meet; if a Nazi march through Skokie and a cross burning intended to intimidate are not incitement, then what is incitement?[197] Conversely, in protecting culturally dehumanizing expression, such speech harms groups whose human rights become subject to recurrent litigation.[198] By construing speakers who advocate violence through intimidation and cultural "incitement"[199] as not within the "majority preference," the Court valued the rights of racist speakers without examining the potential costs of attempting to eradicate anti-Semitism, Islamophobia, or Jim Crow beliefs from

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its proposals to those that are potentially able to survive strict scrutiny. Additionally, the frameworks proposed do not and should not be construed to mean anything offensive is *ipso facto* within this framework. Rather, determining what is within these frameworks requires historical and social groundings.

194. *Id.*

195. Marcuse, *supra* note 174, at 102.

196. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

197. R.A.V. v. St. Paul, 505 U.S.377, 382 (1992); Vill. of Skokie v. Nat'l Socialist Party, N.E.2d 21 (Ill. 1978).

198. *See* Philip N.S. Rumney, *The British Experience of Racist Hate Speech Regulation: A Lesson for First Amendment Absolutists?*, 32 COMM. L. WORLD REV. 117, 136 (2003) (describing free speech as a mechanism to infringe on others' rights). It should be noted that this Comment's analysis is limited solely to hate speech, which is embodied in cultural, historical, and political exploitation. The requirement of empirical evidence for what is and is not "dehumanizing" helps to limit the potential for suppression.

199. *See* Albin Eser, *The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 119, 124 (David Kretzmer & Francine Kershman Hazan eds., 2000) (discussing the German criminalization of public incitement and the rationale being the protection of an indeterminate group of people). Additionally, unlike the United States, a rationale for German restrictions of speech is a right of "personal respect." *Id.* at 135.

communities.[200] This system of constitutional rights protects the rights of racist speakers and assumes that the underlying social foundations are free and equal, whereas in reality, power concentrates in fewer hands.[201] To ground society in "true" tolerance and move away from the current regime which uses tolerance as a means of preserving the status quo, we must rely on rational, empirical evidence in the service of social progress.[202]

To affect progress, a Marcusian framework would require the suppression of those hegemonic or culturally ingrained ideas, policies, and movements that promote regressive social policies that ultimately lead to dehumanization.[203] However, the fundamental issue with this solution lies in who decides which ideas are progressive and regressive.[204] Marcuse proposes a progressive, equality-minded technocratic elite.[205] These elites would repress regressive ideas that reinforce social dominance and promote the values of the oppressed.[206] Rather than reinforce power structures as the Court has, these elite would act to promote progress.[207]

However, Marcuse's theory of tolerance begs the fundamental question, what makes the promotion of a "progressive" educated elite, and a progressive tolerance, preferable to the neutral attitude

200. *See R.A.V.*, 505 U.S. at 392; *see also* Sean E. Mulholland, *White Supremacist Groups and Hate Crime*, 157 PUB. CHOICE 91, 92 (2013) (noting the increasing level of hate-group chapters in the United States).

201. Marcuse, *supra* note 174, at 92. To move beyond tolerance towards progress of humanity at large, we must not examine constitutional rights and apply values like tolerance and progress to them, but we must flip this order to put progress before tolerance. *Id.* at 104.

202. *Id.* at 105.

203. *Id.* For a discussion of the historical harms which accompany this dehumanization, see John Hagan & Wenona Rymond-Richmond, *The Collective Dynamics of Racial Dehumanization and Victimization in Darfur*, 73 AM. SOC. REV. 867, 895 (2008) (detailing the state-sponsored social dehumanization in the Darfur genocide).

204. *Id.* at 106.

205. *Id.* Marcuse notes these elites would be analogous to Plato's *philosopher kings. Id.* Rather than embody the Gramscian "intellectual," who articulate the state ruling class's interest, these Marcusian elites would work towards social progress. *See* Gramsci, *supra* note 164.

206. Marcuse, *supra* note 174, at 107–08. Marcuse further notes the historical basis to promote the views of the "oppressed" classes: the development of democracy from the English Civil War and the French Revolution, as well as the ending of military and nationalist dictatorships in China and Cuba. *Id.* at 108.

207. *Id.* at 107. While Marcuse does not note whether these elites would be judges, such a role would perhaps be preferable to all branches of government making these decisions. *See* CHEMERINSKY, *supra* note 168, at 52–53 (noting the Court has predominately done more harm than good regarding protecting vulnerable minorities). Such an approach would also democratize the decision-making process beyond nine robed justices. *Id.*

of the current system?[208] The fundamental issue with allowing any small cabal of individuals to decide what is and is not tolerable is the ability to concentrate power in the hands of the few.[209] While Marcuse allows us to re-examine the foundations of tolerance, the solution is not to create a new form of repressive tolerance but to effect societal transformation with the oppressed social classes asserting their subjectivity.[210]

Marcuse and Draper represent two polarities of thought regarding tolerance's role in social progress; Marcuse's theory of tolerance is a means of social domination that requires an inversion; we must become intolerant of intolerance and those ideas that oppress.[211] However, Draper conceives of tolerance as a means to push society's boundaries as to what is tolerable and what is not, in the service of societal progress.[212]

While both viewpoints raise questions as to the best means of affecting social change, ultimately both see tolerance as a dialectical tool to affect progress.[213] Their work enounces the difficulty in establishing legal values and tools to achieve social progress without

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208. Hal Draper, *An Analysis of Current Controversies Free Speech and Political Struggle*, INDEP. SOCIALIST, Apr. 1968, at 12, https://bit.ly/2EDv4BQ [https://perma.cc/F52Y-KML4] (arguing against Marcuse's philosophy as a means of promoting further suppression of ideas); *see also* Samuel Farber, *A Socialist Approach to Free Speech*, JACOBIN (Feb. 27, 2017), https://bit.ly/2FmGU3T [https://perma.cc/8ZVR-XJLV] (arguing for freedom of speech for its own sake remains a valuable norm). This Comment was inspired and expands upon Farber's criticisms of Ash and Marcuse, while proposing alternative solutions beyond free speech absolutism as a value. *Id.*

209. Draper questions the idea of the suppression of freedom of expression:

> As long as we (the good guys) are not in power, we demand free speech and other such liberties and we deserve them, because we are right. But wait till WE get power: we are not going to be so foolish as to let YOU, who are wrong, make trouble and corrupt the People.

Draper, *supra* note 208, at 13.

210. *Id.* at 16 ("And this movement both requires, and also helps to bring about, the fullest opening-up of society to democratic controls from below—not their further restriction. It means the breaking up of anti-democratic limitations and restrictions. It means the greater unleashing of new initiatives from below.").

211. Marcuse, *supra* note 174, at 115.

212. Draper, *supra* note 208, at 13 ("[I]t is never a matter of deciding whether the right of free speech is 'negated' by some 'higher value,' . . . but simply a matter of passing from one ground to a different ground . . . ."). Essentially, Draper inverts Marcuse: rather than have free-speech, progress, and tolerance as hierarchies, these are all *horizontal* values which interact. *Contra* Marcuse, *supra* note 174, at 104.

213. Marcuse, *supra* note 174, at 114–15. For a discussion of political responses, see Maximillian Alvarez, *Antifascism and the Left's Fear of Power*, BAFFLER (May 16, 2018), https://bit.ly/2GyTY7Y [https://perma.cc/7MHQ-JY3J].

sacrificing some values.[214] If we wish to cease to be tolerant of intolerance, we must be cautious to limit intolerance's scope to find "pure" tolerance as envisioned by Marcuse, while avoiding the potential for abuse envisioned by Draper.[215] Ultimately, any solution must respect this tension, with the ghost of Mill serving as a Jacob Marley.

D. Alternatives to Speech Suppression: Brandenburg *2.0, Deliberative Democracy, and Tort Action*

The Marcusian model reveals potential blind spots in our free-speech justifications but does not necessarily provide an alternative beyond a "progressive" intellectual class.[216] However, understanding what "tolerance" protects—not the vulnerable minority but the status quo—allows us to craft solutions to this legal, philosophical, and ultimately democratic problem.[217] One alternative is to expand the reach of the *Brandenburg* incitement test.[218]

The *Brandenburg* test asks whether advocacy incites the listener to imminent lawless action and whether such advocacy is likely to produce such action.[219] A stronger causal understanding of the third factor, likelihood to occur, could allow for stronger regulation of hate speech.[220]

Treating hate speech like a proximate cause of harm could hold speakers accountable for the actions of listeners.[221] For example,

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214. Draper, *supra* note 208, at 13 (noting the concern that turning over suppression of racist speech is a double-edged sword to be used against progressive causes). Draper additionally has faith in the ability of democracy to overcome injustice through dissent and in confronting fascism with speech and action. *Id.* at 14, 16.

215. Marcuse, *supra* note 174, at 109; *see also* BRAY, *supra* note 191, at 155–56 (detailing the discussion of "who decides" as a question of popular sovereignty rather than one of elite decision-making).

216. Marcuse, *supra* note 174, at 109.

217. *Id.* at 94 (arguing that tolerance makes all viewpoints "true" and thus prevents progress). This protection of the status quo serves the interests of the powerful. *Id.* at 95.

218. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

219. *Id.*

220. *See* Alexander, *supra* note 106, at 115–16 (discussing possible punishment of speech where the speaker risks injury to persons through ordinary causality). Alexander offers an example: a speaker who, knowing the utterance of the word "God" will cause a cathedral to collapse, says the word and the church collapses. *Id.* at 114. There is a causal connection and the speaker should be punished because of that causal connection. *Id.* at 115. By tracing the casual connection, Alexander's standard expands the incitement standard to an intended or expected result standard.

221. *Id.* at 116 (discussing how courts have constantly opposed this "unreasonable risk" element).

the law could criminalize the speech of someone who tells their Twitter or radio followers to harass, harm, or kill others knowing that their audience will act on such direction, especially in communities experiencing race-motivated violence. While private racism, or racism done through ignorance, would be unconscionable, it would escape liability unless the speaker habitually preached the desirability of harming a minority and thus established a causal link.[222]

A second solution requires a balancing of "personal respect" of the speaker with the "personal respect" of the groups affected by the speech.[223] While a speaker possesses the right to speak, there is not a reciprocal right to unchallenged speech.[224] Creating mechanisms which create public forums wherein diverse speakers of all ideological stripes engage with one another, moderated by a mutually selected third party to serve as a check to respectful or delegitimizing discourse would help solve the tension between a speaker's statements and their opponent's desire to counter that speech on the fly.[225]

This "respect" principle would require deliberative discourse between interest groups at odds with one another to understand one another and to do so in a mutually agreed upon method of discourse.[226] In a deliberative model, citizens face the empirical, fact-based data and subjective realities from those who live with racism, sexism, and oppression, while simultaneously allowing those with "unpopular" opinions to speak.[227] Communities, home listeners, and students would be exposed, then and there, to the data, realities, and humanity of each other, while allowing speakers to see the "other," encouraging robust civility and discourse.[228] While

222. *Id.* at 114–16.

223. *See* Eser, *supra* note 199, at 135 ("[A] general statute, according to its wording, may restrict the basic right, but the statute itself must be interpreted in light of the significance of this basic right in a free and democratic state . . . .").

224. BRAY, *supra* note 191, at 153.

225. *Id.* at 156. Such a proposal could be analogous to the revival of the Fairness Doctrine. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416 (July 25, 1964).

226. JAMES FISHKIN, WHEN THE PEOPLE SPEAK 122 (2009). Fishkin offers empirical support that deliberative democratic principles help resolve public opinion.

227. *Id.* at 127 (providing empirical support for the claim that when people deliberate regarding policy, biases shift).

228. *See also* ASH, *supra* note 151, at 230–31 (discussing methods of promoting robust civility). Such a proposal must be construed to acknowledge that white people have never been a historically marginalized group and thus cannot lay claim to this proposal as a method of enforcing moral equivalencies between "Black Lives Matter" and "All Lives Matter." Ian Olasov, *How Did "All Lives*

forcing the openness, or even the requirement of alternative viewpoints, be they racist, liberal, conservative, or socialist, and thereby "discriminating" against the individual speakers, such restrictions would help curve "repressive" tolerance by pushing the legitimacy of such views, similar to a political debate.[229] In essence, citizens would hear these ideas and understand their repercussions to the community, and rather than allow and tolerate ideas which seek to harm or exclude historically marginalized groups, a potential dialogue and change of ideas can occur when these adversaries are given a forum and "forced" to engage with one another to determine policy decisions.[230] While potentially requiring both more administrative and bureaucratic policy-making procedures, such an approach would move away from a "repressive" tolerance of ideas towards active engagement with others in the marketplace of ideas.[231]

A third and perhaps more workable solution would be the creation of a tort action.[232] The State, if given criminal power to suppress, is a quick line to totalitarianism and the suppression of dissidents, but a private remedy would provide an individualized private remedy to social harm.[233] Hate speech, like racist speech, harms the individual and often threatens that individual with further violence, through either normalizing dehumanization or actual incitement, thereby dehumanizing masses of people.[234] Rather than require social debate as to whether hate speech is socially val-

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Matter" Come to Oppose "Black Lives Matter"? A Philosopher of Language Weighs In., SLATE (July 8, 2016), https://bit.ly/2EEaUsd [https://perma.cc/GMP6-3ZDH].

229. BRAY, *supra* note 191, at 159 (questioning why the suppression of white supremacy is somehow more deplorable than allowing it to flourish).

230. *Id.* at 160.

231. See *id.* at 163–64 for a discussion of anti-fascism and the university, wherein the university is trapped in a quagmire of competing values: free expression of ideas and protecting students. A deliberative model would be adaptable to universities where speakers are engaged with disparate viewpoints and cannot merely handwave students, faculty, or outsiders from engaging with them. *Id.* at 150 (noting a viewpoint that one has a right to free speech, but also a right to be told to shut up).

232. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 89, 89 (1993) (detailing tort-remedies for racial epithets).

233. BRAY, *supra* note 191, at 164 (detailing Milo Yiannopoulus's efforts to expose and harass transgender students).

234. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17, 49 (1993) (discussing the victim's response to racial speech and violence).

uable, as the debate between hate speech has been cast,[235] a private tort action would allow victims of hate speech to vindicate their autonomy and heal their communities.[236] While a tort action would carry difficulties,[237] the ability of society to force, not through violence or imprisonment but through litigation, a showing of the harm that these words cause would allow for a non-criminal reaction to hate speech.[238] A tort could require the speech to: (1) include a statement of inferiority, for example of racial inferiority; (2) target a politically and socially oppressed group; (3) persecute, exhibit hate, or degrade; and (4) arise from the speaker's intent to harm, degrade, dehumanize, or intimidate the listener.[239]

Additionally, rather than damages, there could be a community justice and deliberation component to share experiences and break through the ideology which creates hate speech.[240] Such action would require extensive case-by-case analysis of the speech and what type of speech should be universally condemned to balance the interests of both speakers and victims.[241]

Ultimately, the solutions presented above are not the sole method of grappling with freedom of speech issues. However, their purpose is to show that the binary between speech restrictions and free-speech absolutism conflates the potential democratic solutions available when lawyers, philosophers, and policy-makers consider what values and norms free speech should serve.

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235. *Id.* at 31–32 (detailing the development of social libertarian thought, which values freedom of expression).

236. Delgado, *supra* note 232, at 92–93 (detailing social harms of racial stigmatization, as well as the harms that are inflicted on the perpetrator). *But see* ASH, *supra* note 151, at 89 (arguing that while racist speech causes harm, the law must respond to objective harm). However, Ash ignores the difference between offense, which merely is bothersome, and hate speech, which is "persecutory, hateful and degrading." *See also* Matsuda, *supra* note 234, at 36.

237. Delgado, *supra* note 232, at 104–06 (detailing the issues with calculating damages). Ultimately, such concerns could be resolved by compensating for subsequent hateful actions. *Id.* at 106.

238. *But see* International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195 ("States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin."). A tort action could include other minority groups.

239. Matsuda, *supra* note 234, at 36. This Comment adapts Matsuda's paradigm for recognizing hate speech.

240. *Id.* at 48 (discussing hearing the victim's story in response to the hate speech which affects them).

241. *Id.* at 38.

IV. CONCLUSION

What can the Court's history tell us about free speech? While the First Amendment enshrines free speech, those in power have often contorted it to serve the preservation of power during historical times of crisis.[242] While free speech embodies intellectualism, liberty, and discourse, the values that First Amendment jurisprudence serves reveal that the Amendment does not always reflect the free exchange of ideas, but one of serving power—at worst, endorsing wholesale oppression, and at best, sanctioning hate speech without accounting for the cost to minority groups.[243] This philosophical and legal conundrum has no easy answers and requires a public reckoning with who free speech serves and what free speech actually achieves.[244] Ultimately, rather than blindly accepting freedom of speech as desirable, society should reexamine the use of free speech today, and not rest on free-speech paradigms of John Stuart Mill and Justice Holmes.

If the courts continue making ideologically blinded determinations of when speech is or is not inciting, then ordinary people must develop an alternative, otherwise the law merely protects the status quo and presents no opportunity for the aggrieved to voice their concerns.[245] Without a rethinking of our First Amendment and the values it serves, the Constitution becomes meaningless and the solutions become extra-legal; the streets become a literal battlefield of ideas.[246] Ultimately, as a "political" and normative question, the scope of the First Amendment will continue to resurface in American political life. When it does, we must be willing to grapple with whether the First Amendment serves human ends.

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242. *See* PETER H. IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 291 (1999) (describing the Court's reaction to the Red Scare in *Whitney v. California*, 274 U.S. 357 (1927) and *Gitlow v. New York*, 268 U.S. 652 (1925)).

243. *Compare* MILL, *supra* note 136, at 36–37, *with* Marcuse, *supra* note 174, at 90–91. Marcuse notes Mill's examples of persecuted truths is validated by an *ex post* viewing of history. The conclusion of Marcusian philosophy is that we cannot wait for history to determine whether we were correct or not, and thus society must embody values prior to tolerance. Marcuse, *supra* note 174, at 90–91.

244. *See* Marcuse, *supra* note 174, at 95 (noting that abstract tolerance is invalidated by the current invalidation of the democratic process).

245. *Id.* at 116–17; *see also supra* Part II (discussing the voiding of community responses to racism and fascism).

246. *See* BRAY, *supra* note 191, at 164–65 (detailing the far right, race-motivated murder, and subsequent hate crimes at the University of Maryland). The University did not respond to racist flyers, and ultimately civil responses to hate speech will evolve into a real battle. *Id.*

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