# Resolved: Public colleges and universities in the United States ought not restrict any constitutionally protected speech.

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## Topic Analysis

This resolution is certainly an interesting one, and it is a topic that has had people writing and arguing about it extensively since at least the early-90’s. While in the early-90’s the discussion was not constrained to Public colleges and universities—scholars with objectives established by a certain style of feminism, and critical race theory engaged in questioning the assumed value of “Freedom of Speech” in US society, arguing that Free Speech was only free for some folks. These early discussions tended to revolve around questions of regulating pornography or hate speech—and they still shape much of the contours of this conversation today.

More recently, this discussion has emerged on college and university campuses, often related to questions about the relationships between different racial, gender, and folks with different sexual orientations on campus. Unique to the college environment, the concept of “Academic Freedom” gets added into the mix, and strong opinions are bound to emerge. Notions like “safe spaces,” “trigger warnings,” “hate speech,” and protest all work their way into these conversations. It is quite viable to pull pieces of strategy from each of these different aspects of the conversation, but as a starting point, this file primarily concerns itself with the historical conversation regarding hate speech, and the ability of language to wound.

The Affirmative in this file is based largely in the work of Judith Butler. Arguing that hate speech is important to confront, Butler’s argument is that the best confrontation with hate speech is one based in counter-readings and dissent from traditional interpretations. In short, Butler argues that only through allowing speech can we transform it. Considering that Judith Butler is often credited as one of the early authors working in “Queer Theory” it makes a lot of sense that she would approach injurious language from a more playful perspective. If you are interested in pursuing this strategy, I would highly recommend reading the entirety of *Excitable Speech*, and working to generate impacts based on the problematic nature of governmentality.

The negative strategy in this file is based largely on the need to regulate hate speech, because of the differential effects that it has on those who are targeted. This strategy relies largely on the notion that those who have been historically marginalized are differently effected by the invocation of hate speech, making it an unfair playing field. There are some cards which could be used to cut a type of balancing negative, which advocates for remedies to free speech, through democratization of speech rather than its regulation.

As a topic, I think that this is actually a pretty interesting topic—but it does appear to be highly biased for the affirmative. The Affirmative benefits from the ability to argue in favor of Free Speech, which conceptually at least, benefits from wide support in America. Additionally, the Affirmative gets to argue that public schools should be required to follow the constitution.

I think that in order to secure some ground, the Negative is going to have to discuss what it means for something to be “constitutionally protected.” Historically: time, place, and manner restrictions have been allowed in regulating free speech, which limits on content have not been. The clearest application of these concerns is probably around questions of civility and inclusion—and those are probably a smart place for debaters to focus their attention when preparing to debate the negative.

## Additional Readings

Butler, J. (1997). *Excitable speech: A politics of the performative.* New York: Routledge.

Cross, K. (2014) “Jack Halberstam’s flying circus: On postmodernism and the scapegoating of trans women.” *Feministing*. Online. http://feministing.com/2014/07/07/jack-halberstams-flying-circus-on-postmodernism-and-the-scapegoating-of-trans-women/#comment-1685242907

Fish, S. (1994) *There’s no such thing as free speech . . . and it’s a good thing, too.* New York, NY: Oxford University Press.

Halberstam, J. (2014). “You are triggering me! The neo-liberal rhetoric of harm, danger and trauma.” *Bully Bloggers.* Online. https://bullybloggers.wordpress.com/2014/07/05/you-are-triggering-me-the-neo-liberal-rhetoric-of-harm-danger-and-trauma/

Lee, O. (2001) “Weapons for the weak? Democratizing the force of words in an uncivil society.” Law & Social Inquiry 26.4 (Autumn, 2001): 847-890. JSTOR.)

MacKinnon, C. A. (1996) *Only words.* Boston, MA: Harvard University Press.

Matsuda, M.J., C.R. Lawrence III, R. Delgado, K. W. Crenshaw. (1993). *Words that wound: Critical race theory, Assaultive Speech, and the first amendment.* 49821st Ed. Boulder, CO: Westview Press.

Sorial, S. (2010) “Free Speech, Autonomy, and the Marketplace of Ideas.” Journal of Value Inquiry 44: 167-183.

## Affirmative Case

#### **I offer a value of agency, which Judith Butler connects to speech and explained in 1997:**

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

The main concerns of Excitable Speech are both rhetorical and political. In the law, "excitable" utterances are those made under duress, usually confessions that cannot be used in court because they do not reflect the balanced mental state of the utterer. My presumption is that speech is always in some ways out of our control. In a formulation that anticipates Felman's reading of the speech act, Austin writes that "actions in general (not all) are liable, for example, to be done under duress, or by accident, or owing to this or that variety of mistake, say, or otherwise unintentionally.:' (21) Austin then takes the occasion to delink the speech act from the subject in some instances: "in many such cases we are certainly unwilling to say of some such act simply that it was done or that he did if'(21) Untethering the speech act from the sovereign subject founds an alternative notion of agency and, ultimately, of responsibility, one that more fully acknowledges the way in which the subject is constituted in language, how what it creates is also what it derives from elsewhere. Whereas some critics mistake the critique of sovereignty for the demolition of agency, I propose that agency begins where sovereignty wanes. The one who acts (who is not the same as the sovereign subject) acts precisely to the extent that he or she is constituted as an actor and, hence, operating within a linguistic field of enabling constraints from the outset.

#### **The criterion that I propose is the destruction of the sovereign subject. Again, in 1997, Judith Butler explained the connection between speech and the sovereign subject:**

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

The sovereign conceit emerges in hate speech discourse in several ways. The one who speaks hate speech is imagined to wield sovereign power, to do what he or she says when it is said. Similarly, the "speech" of the state often takes a sovereign form, whereby the speaking of declarations are, often literally, "acts" of law. The effort to locate such illocutionary instances of speech, however, posed difficulties for Austin, and led him to devise a series of provisos and new distinctions to take account of the complexity of the performative terrain. Not all utterances that have the form of the performative, whether illocutionary or perlocutionary, actually work. This insight has important consequences for the consideration of the putative efficacy of hate speech. Rhetorically, the assertion that some speech not only communicates hate, but constitutes an injurious act, presumes not only that language acts, but that it acts upon its addressee in an injurious way. These are, however, two importantly different claims, and not all speech acts are the kinds of acts that act upon another with such force. For instance, I may well utter a speech act, indeed, one that is illocutionary in Austin's sense, when I say, "I condemn you;' but if l am not in a position to have my words considered as binding, then I may well have uttered a speech act, but the act is, in Austin's sense, unhappy or infelicitous: you escape unscathed. Thus, many such speech acts are "conduct" in a narrow sense, but not all of them have the power to produce the effects or initiate a set of consequences; indeed, many of them are quite comic in this regard, and one might read Austin's tract, How to Do Things with Words, as an amusing catalogue of such failed performatives.

### Contentions

#### I begin my defense of the resolution by noting that free Speech is being attacked on College campuses.

Friedersdorf, 2016 (Conor [Staff Writer at *The Atlantic*] “The Glaring Evidence that Free Speech is Threatened on Campus.” *The Atlantic.* 4 March 2016. Online. http://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/)

Or consider another narrow area of campus expression that is under threat: the formal speech, delivered to a broad audience. We’ll restrict our “threat survey” to a single year. In 2015 alone, Robin Steinberg was disinvited from Harvard Law School, the rapper Common was disinvited from Kean University, and Suzanne Venker was disinvited from Williams College. Asra Nomani addressed Duke University only after student attempts to cancel her speech were overturned. UC Berkeley Chancellor Nicholas Dirks participated in an event on his own campus that student protestors shut down. Speakers at USC needed police to intervene to continue an event. Angela Davis was subject to a petition that attempted to prevent her from speaking at Texas Tech. The rapper Big Sean faced a student effort to get him disinvited from Princeton. Bob McCulloch faced a student effort to disinvite him from speaking at St. Louis University. William Ayers was subject to an effort to disinvite him from Dickinson School of Law. Harold Koh faced a student effort to oust him as a visiting professor at New York University Law School. That list includes speakers from the right and the left. It involves several controversies that have nothing to do with antiracism. How many examples are needed to persuade Stanley that there is a problem? Because I only stopped listing them to avoid being tedious. Those examples are a mere subset of 2015 efforts to censor speakers based on their viewpoints. There are still more from 2014. Further roundups could be written about 2013, 2012, and beyond. Speech is frequently threatened. Speeches are regularly disrupted. Some are cancelled every year. To perceive no threat is to ignore reality.

#### **In order to support the resolution, I begin by observing that while language has the possibility to wound, the most effective counter to languages ability to hurt is to recognize that language doesn’t do what it says. Exploiting the gap between language and reality opens the possibility to subvert injurious language. Restricting this language only reifies the effects of language.**

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

Thus a statement may be made that, on the basis of a grammatical analysis alone, appears to be no threat. But the threat emerges precisely through the act that the body performs in the speaking the act. Or the threat emerges as the apparent effect of a performative act only to be rendered harmless through the bodily demeanor of the act {any theory of acting knows this). The threat prefigures or, indeed, promises a bodily act, and yet is already a bodily act, thus· establishing in its very gesture the contours of the act to come. The act of threat and the threatened act are, of course, distinct, but they are related as a chiasmus. Although not identical, they are both bodily acts: the first act, the threat, only makes sense in terms of the act that it prefigures. The threat begins a temporal horizon within which the organizing aim is the act that is threatened; the threat begins the action by which the fulfillment of the threatened act might be achieved. And yet, a threat can be derailed, defused, can fail to furnish the act that it threatens. The threat states the impending certitude of another, forthcoming act, but the statement itself cannot produce that forthcoming act as one of its necessary effects. This failure to deliver on the threat does not call into question the status of the speech act as a threat-it merely questions its efficacy. The self-conceit that empowers the threat, however, is that the speech act that is the threat will fully materialize that act threatened by the speech. Such speech is, however, vulnerable to failure, and it is that vulnerability that must be exploited to counter the threat. For the threat to work, it requires certain kinds of circumstances, and it requires a venue of power by which its performative effects might be materialized. The teleology of action conjured by the threat is disruptible by various kinds of infelicities. Nevertheless, the fantasy of sovereign action that structures the threat is that a certain kind of saying is at once the performance of the act referred to in that saying; this would be an illocutionary performative, in Austin's view, one that immediately does what it says. The threat may well solicit a response, however, that it never anticipated, losing its own sovereign sense of expectation in the face of a resistance it advertently helped to produce. Instead of obliterating the possibility of response, paralyzing the addressee with fear, the threat may well be countered by a different kind of performative act, one that exploits the redoubled action of the threat (what is intentionally and non-intentionally performed in any speaking), to turn one part of that speaking against the other, confounding the performative power of the threat.

#### **The possibility to subvert language that hurts us is crucial, because the vulnerability created by language occurs precisely because there is no language to describe it. Working to discover linguistic agency is key, because language is at the root of both the survival and the death of the body.**

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

"Linguistic survival" implies that a certain kind of surviving takes place in language. Indeed, the discourse on hate speech continually makes such references. To claim that language injures or, to cite the phrase used by Richard Delgado and Mari Matsuda, that "words wound" is to combine linguistic and physical vocabularies. The use of a term such as "wound" suggests that language can act in ways that parallel the infliction of physical pain and injury. Charles R. Lawrence III refers to racist speech as a "verbal assault;' underscoring that the effect of racial invective is "like receiving a slap in the face. The injury is instantaneous':(68) Some forms of racial invective also "produce physical symptoms that temporarily disable the victim ... :· (68) These formulations suggest that linguistic injury acts like physical injury, but the use of the simile suggests that this is, after all, a comparison of unlike things. Consider, though, that the comparison might just as well imply that the two can be compared only metaphorically. Indeed, it appears that there is no language specific to the problem of linguistic injury, which is, as it were, forced to draw its vocabulary from physical injury. In this sense, it appears that the metaphorical connection between physical and linguistic vulnerability is essential to the description of linguistic vulnerability itself. On the one hand, that there appears to be no description that is "proper" to linguistic injury makes it more difficult to identify the specificity of linguistic vulnerability over and against physical vulnerability. On the other hand, that physical metaphors seize upon nearly every occasion to describe linguistic injury suggests that this somatic dimension may be important to the understanding of linguistic pain. Certain words or certain forms of address not only operate as threats to one's physical well-being, but there is a strong sense in which the body is alternately sustained and threatened through modes of address. Language sustains the body not by bringing it into being or feeding it in a literal way; rather, it is by being interpellated within the terms of language that a certain social existence of the body first becomes possible. To understand this, one must imagine an impossible scene, that of a body that has not yet been given social definition, a body that is, strictly speaking, not accessible to us, that nevertheless becomes accessible on the occasion of an address, a call, an interpellation that does not "discover" this body, but constitutes it fundamentally. We may think that to be addressed one must first be recognized, but here the Althusserian reversal of Hegel seems appropriate: the address constitutes a being within the possible circuit of recognition and, accordingly, outside of it, in abjection. We may think that the situation is more ordinary: certain already constituted bodily subjects happen to be called this or that. But why do the names that the subject is called appear to instill the fear of death and the question of whether or not one will survive? Why should a merely linguistic address produce such a response of fear? Is it not, in part, because the contemporary address recalls and reenacts the formative ones that gave and give existence? Thus, to be addressed is not merely to be recognized for what one already is, but to have the very term conferred by which the recognition of existence becomes possible. One comes to "exist" by virtue of this fundamental dependency on the address of the Other. One "exists" not only by virtue of being recognized, but, in a prior sense, by being recognizable. The terms that facilitate recognition are themselves conventional, the effects and instruments of a social ritual that decide, often through exclusion and violence, the linguistic conditions of survivable subjects. If language can sustain the body, it can also threaten its existence. Thus, the question of the specific ways that language threatens violence seems bound up with the primary dependency that any speaking being has by virtue of the interpellative or constitutive address of the Other. In The Body in Pain, Elaine Scarry makes the point that the threat of violence is a threat to language, its world-making and sensemaking possibility. Her formulation tends to set violence and language in opposition, as the inverse of each other. What if language has within it its own possibilities for violence and for world-shattering? For Scarry, the body is not only anterior to language, but she argues persuasively that the body's pain is inexpressible in language, that pain shatters language, and that language can counter pain even as it cannot capture it. She shows that the morally imperative endeavor to represent the body in pain is confounded (but not rendered impossible) by the unrepresentability of the pain that it seeks to represent. One of the injurious consequences of torture, in her view, is that the one tortured loses the ability to document in language the event of torture; thus, one of the effects of torture is to efface its own witness. Scarry also shows how certain discursive forms, such as interrogation, aid and abet the process of torture. Here, however, language assists violence, but appears not to wield its own violence. This raises the following question: if certain kinds of violence disable language, how do we account for the specific kind of injury that language itself performs?

#### **Free Speech on College Campuses is under attack from a variety of different sources, and from every side of the political spectrum.**

Friedersdorf, 2016 (Conor [Staff Writer at *The Atlantic*] “The Glaring Evidence that Free Speech is Threatened on Campus.” *The Atlantic.* 4 March 2016. Online. http://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/)

To sum up: free speech on campus is threatened from a dozen directions. It is threatened by police spies, overzealous administrators, and students who are intolerant of dissent. It is threatened by activists agitating for speech codes and sanctions for professors or classmates who disagree with them. It is threatened by people who push to disinvite speakers because of their viewpoints and those who shut down events to prevent people from speaking. Harper and Stanley were unpersuaded that free speech is under threat not because they defend speech codes or sanctions––both say outright at different times that they are for untrammeled speech––but because they are blind to the number and degree of threats to speech. And this whole discussion has been restricted to documented, overt threats to speech. Chilling effects are harder to quantify or cite, but they are real. Professors and students see those around them being punished for their viewpoints and decide to hold their tongues rather than speak their minds. Stanley denies that this is a significant problem. And yet, last semester, without looking very hard, I found and spoke to tenured and non-tenured professors and students at Yale, his own institution, who told me that their speech was chilled. They feared that their place at the school would be jeopardized if they opined honestly about campus controversies; or did not want to be targets of intolerant activists like the ones who spat on lecture attendees because the activists disagreed with words spoken at the lecture. The evidence that free speech is threatened on college campuses is overwhelming. Doubters who can’t accurately characterize the evidence should study the relevant material more thoroughly before dismissing free-speech concerns and impugning the motives of the people who raise them––especially if, like Harper and Stanley, they earnestly believe that free speech should be protected. I urge them to look again at the evidence and to join other liberals already engaged in this fight. The marginalized college students of the future will thank them.

#### Even with the best intentions, violations of Free Speech waterfall, and everyone is harmed.

Friedersdorf, 2015 (Conor [Staff Writer at *The Atlantic*] “The Lessons of Bygone Free-Speech Fights.” *The Atlantic.* 10 December 2015. Online. http://www.theatlantic.com/politics/archive/2015/12/what-student-activists-can-learn-from-bygone-free-speech-fights/419178/)

20 years ago, opponents of speech codes warned that those with the impulse to suppress any speech were putting us on a slippery slope; that core, protected speech would inevitably be punished or chilled. Today’s campus-speech battles suggest they were correct. In October at UCLA, a fraternity hosted what they called a Kanye Western theme party. Attendees dressed up like Kanye West and his celebrity wife. Despite early press reports about some students wearing black face, students did not, in fact, incorporate black face into their costumes. Nevertheless, the Afrikan Student Union declared that the party was cultural appropriation. So far, there’s no First Amendment issue. The Afrikan Student Union had every right to protest something it found offensive. But in this case, UCLA administrators punished the fraternity that hosted the party by temporarily suspending it. And that ought to alarm you even if you think that the frat shouldn’t have thrown the party, because UCLA is a public institution. It must adhere to the First Amendment. And dressing up in virtually any costume, no matter how offensive, is protected speech. Imagine you were having a Halloween party at your house. Wouldn’t you find it outrageous if the city government came and ticketed you or one of your friends for wearing the wrong costume? Now, if asked beforehand, I would have urged the frat to choose a different theme. We should be sensitive to one another. But a Kanye Western party is far afield from the edge cases that define the outer boundaries of the First Amendment. If UCLA’s speech police get their way, they would set a precedent that significantly narrowed a core right. That would do the most harm to the people who rely most on the First Amendment: the powerless, the marginalized, and the unpopular; activists for minority causes, contrarian intellectuals, and dissident journalists. And when the unintended consequences of today’s activism harm the least powerful, most marginalized individuals of the future, UCLA graduates and administrators are highly unlikely to be among them. They can afford to be shortsighted. That said, even at UCLA right now, there are efforts to limit the free-speech rights of activists who criticize Israel while advocating for the human rights of Palestinians. Standing up for robust First Amendment rights on campus is as important as ever. But most student activism that concerns speech is now aimed at limiting it.

#### **Finally, responsible approaches to language recognize that language and violence are both intertwined, and what we do with that connection is what gives our lives meaning.**

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

Toni Morrison refers specifically to "the violence of representation" in the 1993 Nobel Lecture in Literature. "Oppressive language:' she writes, "does more than represent violence; it is violence: (16) Morrison offers a parable in which language itself is figured as a "living thing;' where this figure is not false or unreal, but indicates something true about language. In the parable, young children play a cruel joke and ask a blind woman to guess whether the bird that is in their hands is living or dead. The blind woman responds by refusing and displacing the question: "I don't know ... but what I do know is that it is in your hands. It is in your hands:' (11) Morrison then elects to read the woman in the parable as a practiced writer, and the bird, as language, and she conjectures on how this practiced woman writer thinks of language: "she thinks of language partly as a system, partly as a living thing over which one has control, but mostly as agency-as an act with consequences. So the question that the children put to her, 'Is it living or dead?' is not unreal, because she thinks of language as susceptible to death, erasure ... · (13) Here Morrison writes in a. conjectural way what the practiced woman writer conjectures, a speculation both in and about language and its conjectural possibilities. Remaining within a figural frame, Morrison announces the "reality" of that frame from within its own terms. The woman thinks of language as living: Morrison gives us the performance of this act of substitution, this simile by which language is figured as life. The "life" of language is thus exemplified by this very enactment of simile. But what sort of enactment is this? Language is thought of "mostly as agency-an act with consequences;' an extended doing, a performance with effects. This is something short of a definition. Language is, after all, "thought of," that is, posited or constituted as "agencY.' Yet it is as agency that it is thought; a figural substitution makes the thinking of the agency of language possible. Because this very formulation is offered in language, the "agency" of language is not only the theme of the formulation, but its very action. This positing as well as this figuring appear to exemplify the agency at issue. We might be tempted to think that attributing agency to language is not quite right, that only subjects do things with language, and that agency has its origins in the subject. But is the agency of language the same as the agency of the subject? Is there a way to distinguish between the two? Morrison not only offers agency as a figure for language, but language as a figure for agency, one whose "reality" is incontestible. She writes: "We die. That may be the meaning of life. But we do language. That may be the measure of our lives~' (22) She does not state: "language is agencY,' for that kind of assertion would deprive language of the agency she means to convey. In refusing to answer the children's cruel question, the blind woman, according to Morrison, "shifts attention away from the assertions of power to the instrument through which that power is exercised~ (12) Similarly, Morrison refuses to offer dogmatic assertions on what language is, for that would obscure how the "instrument" of that assertion participates in that very being of language; the irreducibility of any assertion to its instrument is precisely what establishes language as self-divided. The failure of language to rid itself of its own instrumentality or, indeed, rhetoricity, is precisely the inability of language to annul itself in the telling of a tale, in the reference to what exists or in the volatile scenes of interlocution. Significantly, for Morrison, "agency" is not the same as "control"; neither is it a function of the systematicity of language. It seems that we cannot first give an account of human agency and then specify the kind of agency that humans have in language. "We do language. That may be the measure of our lives:'

## Aff Cards

### **A2: Inclusivity Key**

#### **A2: Inclusivity should trump free speech. Free Speech key to challenging the politics of exclusion.**

Friedersdorf, 2015 (Conor [Staff Writer at *The Atlantic*] “The Lessons of Bygone Free-Speech Fights.” *The Atlantic.* 10 December 2015. Online. http://www.theatlantic.com/politics/archive/2015/12/what-student-activists-can-learn-from-bygone-free-speech-fights/419178/)

To his credit, my conversation partner, Jelani Cobb, is concerned about students and their grievances. He has also written, “That these issues have now been subsumed in a debate over political correctness and free speech on campus—important but largely separate subjects—is proof of the self-serving deflection to which we should be accustomed at this point.” He characterized this response as “outraged First Amendment fundamentalism.” I respectfully but vehemently disagree. First, it’s perfectly possible to debate free speech on campus and efforts to make campuses more inclusive. The media is full of both debates. Neither has been subsumed by the other. Second, how can one fully understand student activists without attentively listening and then engaging in conversation and, where there is disagreement or lack of clarity, debate? Without a culture of free speech there cannot be constructive dialogue. Third, the free-speech objections raised today are not fundamentalist in the least: The vast majority of examples at public universities fall easily within long-settled First amendment precedents––these are not edge cases––and at private colleges, one needn’t be a free-speech zealot to object to activists spitting on people or telling a man he’s disgusting and should resign because of an earnest email his wife wrote! Finally, civil libertarians don’t get to choose when to defend civil rights. I’d love to defend due process with choir boys and Girl Scouts as my examples. Instead, I objected to Anwar al-Awlaki being killed, because his killing posed a threat to due process. I’m tremendously sympathetic to college students who don’t feel welcome on their own campuses. Smart, idealistic, likable 18-year-olds are not the antagonists I’d pick in a free-speech fight if I were choosing. But I’m not. They are. Administrators and students chose to target speech; at UCLA they chose a course that would set precedents weakening the First Amendment for people far beyond themselves; at Yale, Dean Jonathan Holloway said in an interview with Professor Cobb that video of students yelling at a professor gave outsiders the false impression that the conflict there was about free speech. But Yale protestors chose to call in their official, written demands for the resignation of a faculty-in-residence at an undergraduate colleges for refusing to apologize for his wife’s email. So yes, the conflict at Yale is partly focused on trying to punish speech, due to the choices of students.

### **Limitations of Speech are Ineffective**

#### **Historically, codes adopted to limit free speech in defense of inclusion have failed, and were often counterproductive.**

Friedersdorf, 2015 (Conor [Staff Writer at *The Atlantic*] “The Lessons of Bygone Free-Speech Fights.” *The Atlantic.* 10 December 2015. Online. http://www.theatlantic.com/politics/archive/2015/12/what-student-activists-can-learn-from-bygone-free-speech-fights/419178/)

More than 20 years ago, Henry Louis Gates, the renowned historian and director of Harvard’s Hutchins Center for African and African American Research, published the essay “Let Them Talk” in The New Republic. “The struggle with racism has traditionally been waged through language, not against it,” he observed. “The tumult of the civil-rights era was sponsored by an expansive vision of the First Amendment ... This concrete history and context make it perplexing that a new generation of activists... should choose the First Amendment as a battlefield.” He was writing after the University of Michigan, the University of Wisconsin, and Stanford implemented speech codes targeted at racist and sexist speech. These were efforts to respond to increasing diversity on campuses, where a number of students spewed racist and sexist speech that most everyone in this room would condemn. But those speech codes were policy failures. There is no evidence that hate speech or bigotry decreased on any campus that adopted them. At Michigan, the speech code was analyzed by Marcia Pally, a professor of multicultural studies, who found that “black students were accused of racist speech in almost 20 cases. Students were punished only twice under the code’s anti-racist provisions, both times for speech by or on behalf of blacks.” Every speech code adopted in that era and challenged on First Amendment grounds was ruled unconstitutional. And even the critical race theorists who championed the codes acknowledged, “This debate has deeply divided the liberal civil-rights and civil-liberties community.”

### Butler Extensions

#### Insulting language creates our subjectivity, it is central to our epistemology.

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

The insult, however, assumes its specific proportion in time. To be called a name is one of the first forms of linguistic injury that one learns. But not all name-calling is injurious. Being called a name is also one of the conditions by which a subject is constituted in language; indeed, it is one of the examples Althusser supplies for an understanding of "interpellation:' Does the power of language to injure follow from its interpellative power? And how, if at all, does linguistic agency emerge from this scene of enabling vulnerability? The problem of injurious speech raises the question of which words wound, which representations offend, suggesting that we focus on those parts of language that are uttered, utterable, and explicit. And yet, linguistic injury appears to be the effect not only of the words by which one is addressed but the mode of address itself, a mode-a disposition or conventional bearing-that interpellates and constitutes a subject. One is not simply fixed by the name that one is called. In being called an injurious name, one is derogated and demeaned. But the name holds out another possibility as well: by being called a name, one is also, paradoxically, given a certain possibility for social existence, initiated into a temporal life of language that exceeds the prior purposes that animate that call. Thus the injurious address may appear to fix or paralyze the one it hails, but it may also produce an unexpected and enabling response. If to be addressed is to be interpellated, then the offensive call runs the risk of inaugurating a subject in speech who comes to use language to counter the offensive call. When the address is injurious, it works its force upon the one it injures. What is this force, and how might we come to understand its faultlines?

#### As and illocutionary speech act, the insult relies on the invocation of ritual, freeing language from its speaking, through connecting it to both the past and the future.

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

J. L. Austin proposed that to know what makes the force of an utterance effective, what establishes its performative character, one must first locate the utterance within ·a "total speech situation~' 2 There is, however, no easy way to decide on how best to delimit that totality. An examination of Austin's own view furnishes at least one reason for such difficulty. Austin distinguishes "illocutionary" from "perlocutionary" speech acts: the former are speech acts that, in saying do what they say, and do it in the moment of that saying; the latter are speech acts that produce certain effects as their consequence; by saying something, a certain effect follows. The illocutionary speech act is itself the deed that it effects; the perlocutionary merely leads to certain effects that are not the same as the speech act itself. Any delimitation of the total speech act in such illocutionary cases would doubtless include an understanding of how certain conventions are invoked at the moment of utterance, whether the person who invokes them is authorized, whether the circumstances of the invocation are right. But how does one go about delimiting the kind of "convention" that· illocutionary utterances presume? Such utterances do what they say on the occasion of the saying; they are not only conventional, but in Austin's words, "ritual or ceremonial:' As utterances, they work to the extent that they are given in the form of a ritual, that is, repeated in time, and, hence, maintain a sphere of operation that is not restricted to the moment of the utterance itself. The illocutionary speech act performs its deed at the moment of the utterance, and yet to the extent that the moment is ritualized, it is never merely a single moment. The "moment" in ritual is a condensed historicity: it exceeds itself in past and future directions, an effect of prior and future invocations that constitute and escape the instance of utterance.

#### **The danger of injurious speech is its capacity to shatter and individual, and to exclude them from the social world through the invocation of historical exclusions.**

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

Austin's claim, then, that to know the force of the illocution is only possible once the "total situation" of the speech act can be identified is beset by a constitutive difficulty. If the temporality of linguistic convention, considered as ritual, exceeds the instance of its utterance, and that excess is not fully capturable or identifiable (the past and future of the utterance cannot be narrated with any certainty), then it seems that part of what constitutes the "total speech situation" is a failure to achieve a totalized form in any of its given instances. In this sense, it is not enough to find the appropriate context for the speech act in question, in order to know how best to judge its effects. The speech situation is thus not a simple sort of context, one that might be defined easily by spatial and temporal boundaries. To be injured by speech is to suffer a loss of context, that is, not to know where you are. Indeed, it may be that what is unanticipated about the injurious speech act is what constitutes its injury, the sense of putting its addressee out of control. The capacity to circumscribe the situation of the speech act is jeopardized at the moment of injurious address. To be addressed injuriously is not only to be open to an unknown future, but not to know the time and place of injury, and to suffer the disorientation of one's situation as the effect of such speech. Exposed at the moment of such a shattering is precisely the volatility of one's "place" within the community of speakers; one can be "put in one's place" by such speech, but such a place may be no place.

#### Even calls for the censorship of language restage injurious speech in order to challenge the use of that speech.

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

To decide the matter of what is a threat or, indeed, what is a word that wounds, no simple inspection of words will suffice. We may think that an elaboration of the institutional conditions of utterance is necessary to identify the probability that certain kinds of words will wound under such circumstances. But the circumstances alone do not make the words wound. Or we may be compelled to claim that any word can be a word that wounds, that it depends on its deployment, and that the deployment of words is not reducible to the circumstances of their utterance. This last makes sense, but such a view cannot tell us why certain words wound in the way that they do, or why it is more difficult to separate certain words from their power to wound. Indeed, recent efforts to establish the incontrovertibly wounding power of certain words seem to founder on the question of who does the interpreting of what such words mean and what they perform. The recent regulations governing lesbian and gay self-definition in the military or, indeed, the recent controversies over rap music suggest that no clear consensus is possible on the question of whether there is a clear link between the words that are uttered and their putative power to injure. To argue, on the one hand, that the offensive effect of such words is fully contextual, and that a shift of context can exacerbate or minimize that offensiveness, is still not to give an account of the power that such words are said to exercise. To claim, on the other hand, that some utterances are always offensive, regardless of context, that they carry their contexts with them in ways that are too difficult to shed, is still not to offer a way to understand how context is invoked and restaged at the moment of utterance. Neither view can account for the restaging and resignifying of offensive utterance, deployments of linguistic power that seek at once to expose and counter the offensive exercise of speech. I will consider these at greater length in the chapters to come, but consider for a moment how often such terms are subject to resignification. Such a redoubling of injurious speech takes place not only in rap music and in various forms of political parody and satire, but in the political and social critique of such speech, where "mentioning" those very terms is crucial to the arguments at hand, and even in the legal arguments that make the call for censorship, in which the rhetoric that is deplored is invariably proliferated within the context of legal speech. Paradoxically, the explicit legal and political arguments that seek to tie such speech to certain contexts fail to note that even in their own discourse, such speech has become citational, breaking with the prior contexts of its utterance and acquiring new contexts for which it was not intended. The critical and legal discourse on hate speech is itself a restaging of the performance of hate speech. The present discourse breaks with the prior ones, but not in any absolute sense. On the contrary, the present context and its apparent "break" with the past are themselves legible only in terms of the past from which it breaks. The present context does, however, elaborate a new context for such speech, a future context, not yet delineable and, hence, not yet precisely a context.

#### **The recognition of the disjuncture between speech and effect is crucial to open agency.**

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

Those who seek to fix with certainty the link between certain speech acts and their injurious effects will surely lament the open temporality of the speech act. That no speech act has to perform injury as its effect means that no simple elaboration of speech acts will provide a standard by which the injuries of speech might be effectively adjudicated. Such a loosening of the link between act and injury, however, opens up the possibility for a counter-speech, a kind of talking back, that would be foreclosed by the tightening of that link. Thus, the gap that separates the speech act from its future effects has its auspicious implications: it begins a theory of linguistic agency that provides an alternative to the relentless search for legal remedy. The interval between instances of utterance not only makes the repetition and resignification of the utterance possible, but shows how words might, through time, become disjoined from their power to injure and recontextualized in more affirmative modes. I hope to make clear that by affirmative, I mean "opening up the possibility of agency; where agency is not the restoration of a sovereign autonomy in speech, a replication of conventional notions of mastery.

### **A2: Hate Speech Censorship Arguments**

#### **A2: Mari Matsuda & the CRT defense of hate speech censorship. The belief that hate speech reinscribes social systems operates on a flawed understanding of agency, and makes social structures harder to change.**

Butler, 1997 (Judith [American philosopher and gender theorist; Full-time Unicorn] *Excitable Speech*. New York, NY: Routledge, 1997. Print)

These arguments will be considered at length in subsequent chapters, but for introductory purposes, it is important to note that pornography is construed as a kind of hate speech, and that its performative force is described as illocutionary. Significantly, MacKinnon's argument against pornography has moved from a conceptual reliance on a perlocutionary model to an illocutionary one.12 In the work of Mari Matsuda, hate speech is understood not only to act upon its listener (a perlocutionary scene), but to contribute to the social constitution of the one addressed (and, hence, to become part of a process of social interpellation). The listener is understood to occupy a social position or to have become synonymous with that position, and social positions themselves are understood to be situated in a static and hierarchical relation to one another. By virtue of the social position he or she occupies, then, the listener is injured as a consequence of that utterance. The utterance also enjoins the subject to reoccupy a subordinate social position. According to this view, such speech reinvokes and reinscribes a structural relation of domination, and constitutes the linguistic occasion for the reconstitution of that structural domination. Although sometimes this view on hate speech enumerates a set of consequences that such speech produces (a perlocutionary view of the matter), there are other formulations of this position where the force of the performative is secured through conventional means (an illocutionary model). In Mari Matsuda's formulation, for instance, speech does not merely reflect a relation of social domination; speech enacts domination, becoming the vehicle through which that social structure is reinstated. According to this illocutionary model, hate speech constitutes its addressee at the moment of its utterance; it does not describe an injury or produce one as a consequence; it is, in the very speaking of such speech, the performance of the injury itself, where the injury is understood as social subordination. 14 What hate speech does, then, is to constitute the subject in a subordinate position. But what gives hate speech the power to constitute the subject with such efficacy? Is hate speech as felicitous as it appears in this account, or are there faultlines that make its constituting power less felicitous than the above description would imply? I wish to question for the moment the presumption that hate speech always works, not to minimize the pain that is suffered as a consequence of hate speech, but to leave open the possibility that its failure is the condition of a critical response. If the account of the injury of hate speech forecloses the possibility of a critical response to that injury, the account confirms the totalizing effects of such an injury. Such arguments are often useful in legal contexts, but are counter-productive for the thinking of nonstate-centered forms of agency and resistance. Even if hate speech works to constitute a subject through discursive means, is that constitution necessarily final and effective? Is there a possibility of disrupting and subverting the effects produced by such speech, a faultline exposed that leads to the undoing of this process of discursive constitution? What kind of power is attributed to speech such that speech is figured as having the power to constitute the subject with such success? Matsuda's argument presumes that a social structure is enunciated at the moment of the hateful utterance; hate speech reinvokes the position of dominance, and reconsolidates it at the moment of utterance. As the linguistic rearticulation of social domination, hate speech becomes, for Matsuda, the site for the mechanical and predictable reproduction of power. In some ways, the question of mechanical breakdown or "misfire" and of the unpredictability of speech is precisely what Austin repeatedly emphasizes when he focuses on the various ways in which a speech act can go wrong. More generally, however, there are reasons to question whether a static notion of "social structure" is reduplicated in hate speech, or whether such structures suffer destructuration through being reiterated, repeated, and rearticulated. Might the speech act of hate speech be understood as less efficacious, more prone to innovation and subversion, if we were to take into account the temporal life of the "structure" it is said to enunciate? If such a structure is dependent upon its enunciation for its continuation, then it is at the site of enunciation that the question of its continuity is to be posed. Can there be an enunciation that discontinues that structure, or one, that subverts that structure through its repetition in speech? As an invocation, hate speech is an act that recalls prior acts, requiring a future repetition to endure. Is there a repetition that might disjoin the speech act from its supporting conventions such that its repetition confounds rather than consolidates its injurious efficacy?

## Negative Case

#### First, Hate Speech policies have historically been rejected as unconstitutional impositions on the free speech of students.

Weberman, 2010 (Melissa [Law Clerk in the Eleventh Circuit Court of Appeals. J.D. from Emory Law] “University Hate Speech Policies and the Captive Audience Doctrine.” *Ohio Northern University Law Review* 36 Ohio N.U.L. Rev. 553. 2010. Online. LexisNexis.)

While universities continue to maintain and even strengthen hate speech policies, n70 they generally have not survived First Amendment attack. Policies at the University of Michigan, n71 Central Michigan University, n72 the University [\*563] of Wisconsin-Madison, n73 George Mason University, n74 Shippensburg University, n75 and Stanford University n76 have been struck down as unconstitutional under the First Amendment. n77 Indeed the very term "campus speech code" connotes ideas of overbreadth, vagueness, and the chilling of permitted speech - one scholar argued that, once the court labeled the Stanford policy as a "Speech Code," the policy was doomed. n78 The constitutional validity of a university hate speech policy was first [\*564] addressed in federal court in 1989. n79 In Doe v. University of Michigan, n80 the court considered the University of Michigan's "Policy on Discrimination and Discriminatory Harassment of Students in the University Environment," which it had adopted in response to increased incidents of racism and racial harassment. n81 For example, individuals distributed a flier declaring "open season" on African Americans, referring to them as "'saucer lips, porch monkeys, and jigaboos.'" n82 Outraged, university students planned a demonstration. n83 In view of the demonstrators, someone placed Ku Klux Klan attire in a dormitory window. n84 The University's hate speech policy prohibited "'[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status[.]'" n85 It restricted behavior that "'[i]nvolve[d] an express or implied threat'" or created "'an intimidating, hostile, or demeaning environment'" for individual pursuits in academic, employment, or extracurricular activities. n86 The court held that the policy was unconstitutional both on its face and under the University's interpretation and application of it. n87 It was unconstitutionally overbroad on its face because its language swept up and sought to punish substantial amounts of constitutionally protected speech. n88 For example, a graduate student who said that homosexuality was a disease that could be cured with counseling was found guilty of sexual harassment under the policy, speech protected by the First Amendment yet sanctionable under the policy. n89 The court also held that the policy was unconstitutionally vague on its face because students could not discern what speech was prohibited and what speech was protected. n90 The vagueness created a chilling effect on speech, as the policy deterred people from saying things they otherwise would have said because of fear that their comments would violate the policy. n91 To avoid a [\*565] charge of vagueness, "'men of common intelligence'" must not need to guess at a policy's meaning, and the policy must give sufficient warning of the banned conduct and set out clear standards for those who apply the policy. n92 The policy at issue was unconstitutionally vague because its terms "stigmatize" and "victimize" were unclear and elusive. n93 The policy also did not distinguish protected from sanctionable speech, so students were forced to guess whether a comment about a controversial issue would be sanctionable under the policy. n94 The policy at issue in Doe demonstrates the classic constitutional problems with university hate speech policies - they are often impermissibly overbroad and vague. n95 The hate speech policy at issue in UWM Post, Inc. v. Board of Regents of the University of Wisconsin System suffered from the same overbreadth problem as in Doe, but its terms were not vague. n96 The policy applied to "'racist or discriminatory comments, epithets, or other expressive behavior directed at an individual'" and prohibited such speech that intentionally demeaned the "'race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual'" and created "'an intimidating, hostile, or demeaning environment for education.'" n97 The court held that the language "'discriminatory comments, epithets, or other expressive behavior'" and "'demean'" were not vague, although other language in conjunction with that language was confusing. n98 This case demonstrates that, although the university policy was overbroad, its drafters found language that was sufficiently precise that students of common understanding need not guess at its meaning. n99 Thus, if precise language is used in hate speech policies, it is merely the overbreadth issue that troubles the policies. n100 The overbreadth doctrine is "'strong medicine,'" and courts have generally applied it "'only as a last resort.'" n101 A policy should not be "invalidated merely because it is possible to [\*566] conceive of a single impermissible application." n102 The facial overbreadth must be "'not only real but substantial in relation to the [policy's] plainly legitimate sweep'" in order to render the policy unconstitutional. n103 If hate speech policies are drafted more precisely, with a sensitivity to context, they will not be rejected as overbroad, as will be demonstrated in Part IV.

#### Second, “Free Speech” is not racially neutral, and is part of a broader historical tradition that allows racism to continue virtually unchecked.

Gillborn, 2009 (David [Professor of Education at the University of London] “Risk-Free Racism: Whiteness and So-Called ‘Free Speech.’” *Wake Forest Law Review* 44 Wake Forest L. Rev. 535. Summer, 2009. LexisNexis Academic)

"Whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem... . Whiteness has been characterized, not by an inherent unifying characteristic, but by the exclusion of others deemed "not [\*551] white.'" A key theme in critical race theory has been to document how White identity has been constituted historically by the law where (even after the formal abolition of slavery) being defined as White meant access to a wide range of freedoms and rights that were withheld from other races. In one of the most important contributions, Cheryl Harris examines the legal definition of Whiteness and argues that it is a form of property, where property is understood to include rights as well as physical "things": Although by popular usage property describes "things" owned by persons, or the rights of persons with respect to a thing ... property may "consist[] of rights in "things' that are intangible, or whose existence is a matter of legal definition." ... Thus, the fact that whiteness is not a "physical" entity does not remove it from the realm of property. Harris goes on to examine the different characteristics and functions of Whiteness, concluding that the most important characteristic is "the absolute right to exclude." She states that "whiteness and property share a common premise - a conceptual nucleus - of a right to exclude. This conceptual nucleus has proven to be a powerful center around which whiteness as property has taken shape." In the English call-in show, we see Whiteness' ability to set the boundaries for what counts as legitimate debate. Meanwhile, racist pseudoscience gains yet more airtime and is asserted as brave and true in a debate where White people construct a no-risk, win-win situation for themselves. First, White people remain untouched by the violence of discussions about race and intelligence that construct Black people as automatically deficient. As we saw in the call-in show, many White people see such exchanges as mere debate or discussion; at worst they become a voyeuristic spectacle of insult and assertion. But regardless of how White people experience the discussion, it remains an entirely risk-free environment for them. For example, White listeners to the radio show know that their children do not risk losing educational opportunities because of such talk. Even if teachers mistakenly buy into the nonsense of "IQist" talk, it is highly unlikely that White children will be harmed. White people can listen to debates about IQ, "stop and search," and DNA [\*552] profiling safe in the knowledge that they are unlikely to suffer humiliation or wrongful arrest as a result of racial disproportionality. In fact, Whites stand to directly benefit from such discussions. After all, it will be White people who gain if other Whites believe the arguments and engage in further racist stereotyping of Black people. In contrast, so-called "debates" about race and IQ can do nothing but harm to Black students: no matter how often the pseudoscience is debunked, the argument provides new fodder for those who wish to explain race inequality by looking anywhere except at the actions and beliefs of White people. And these are not mere academic debates. These processes have real and direct impacts in schools and classrooms. For example, in 2002 the British government began a concerted focus on "gifted' children, including setting up a National Academy for Gifted and Talented Youth (at a cost of around £ 20 million). At the time, antiracists warned that education policies which encourage academic selection are almost always likely to institutionalize further existing inequalities of achievement between different ethnic groups and that notions of giftedness and intelligence had an especially racist past. Decades of research, on both sides of the Atlantic, show that whenever teachers are asked to assess their students' "potential" against some academic or behavioral norm, Black students are typically underrepresented in the highest ranked groups (which benefit from additional resources) and over-represented in the low-ranked groups that typically experience teaching of lower quality, cover less of the curriculum, and, in the English system of "tiered" examinations, are likely to be entered for tests where the very highest grades are simply not available because they are restricted to a "higher" paper reserved for "more able" students. [\*553] Despite these clear, evidence-based warnings, the British government pursued its gifted and talented initiative with no formal safeguards to ensure that familiar patterns of race inequality were not further entrenched. Indeed, the Education Department took the unusual step of issuing a public rebuttal when my own warnings were reproduced in a national newspaper. An official statement was quoted as arguing: "The gifted and talented scheme will identify children by looking at ability, rather than attainment, to capitalise on the talents of the individual child, regardless of ethnic background." Incredibly this formal rebuttal demonstrated clearly that the Education Department was working under the common, but misguided, belief that "ability" and "attainment" are somehow different, as if ability were some inner quality or potential while attainment were merely a score on a test. In fact, the American Psychological Association had already rejected precisely this view some twenty years earlier: "A distinction is drawn traditionally between intelligence and achievement tests. A naive statement of the difference is that the intelligence test measures capacity to learn and the achievement test measures what has been learned. But items in all psychological and educational tests measure acquired behavior." Contrary to popular belief, therefore, there is no test of capacity to learn or academic potential: every test so far conceived measures only what a person has learned to that point. Despite the "scientific" facade that surrounds the industry of standardized testing, we must remember that tests - all tests - measure only whether a person can perform well on that particular test at that particular time. If a student is given suitable tuition for a test, including so called "cognitive ability tests" (the preferred term for contemporary IQ tests among those constructing and selling them), [\*554] then on average their performance improves significantly. Previous research has clearly demonstrated that, regardless of the form of assessment used (whether relying on teachers' judgments or on formal IQ/cognitive ability tests) in selective hierarchical contexts, the odds are stacked against Black children; predictably the Education Department's confidence in their approach was ill-founded. Its assumptions were demonstrably inaccurate and, three years after the official rebuttal, the department released data that confirmed antiracists' fears. In the first national data to offer an ethnic breakdown of the "gifted and talented" figures, it emerged that White students were most likely to be identified for inclusion in the initiative: one in ten White students were selected compared with one in twenty-five students identified as "Black Caribbean" and one in fifty of their peers with family heritage identified as "Black African." Conclusion Despite the numerous critiques that have debunked a belief in general intelligence, and especially the spurious link between "race" and intelligence, in the twenty-first century it remains the case that education policy (like radio call-in shows) continues to trade in racist assumptions that place disproportionate numbers of Black students in low-ranked teaching groups where they cover less of the curriculum and achieve systematically lower results. This is true of "tracking" systems in the United States and "setting" in the United Kingdom. At the other end of the educational spectrum, on both sides of the Atlantic, measures to reward so-called "gifted" youth systematically advantage children from the majority ethnic group. Despite claims that "free speech" never hurt anyone, we can see that, as Mahoney argues, unregulated racist talk (that is, speech that systematically denigrates a "racial" group) is part of a wider network of beliefs and practices that has real-world impacts on the educational and life chances of minoritized groups in general, and Black people in particular. In this Article, I have explored the element of "risk" involved in certain forms of speech and, drawing on the traditions of critical race theory, I have shown that risk is racially structured. White people do not generally risk demonization and stereotyping as a result of criminal or other negative acts by other White individuals. [\*555] In addition, Whiteness operates to invest speech with different degrees of legitimacy, such that already debunked racist beliefs can enjoy repeated public airings where they are lauded as scientific and rational by many White listeners, who simultaneously define as irrational, emotional, or exaggerated the opposing views of people of color. In the call-in show that I analyzed, White callers were no more eloquent than their minoritized counterparts; rather, they were already and always in an advantaged position because of the regime of Whiteness that operates in the United Kingdom (like the United States). The fundamental problem here is not the absence or presence of a Fairness Doctrine; the problem is that genuinely free speech is an impossibility in a context where "common sense" (what is rational and irrational) is determined by, and for, White people.

#### **Further, Defenses of Free Speech that don’t engage with the tangible effects of speech are both overly idealistic, and continue to reify patriarchy and racism.**

Cobb, 2015 (Jelani [Associate Professor at the University of Connecticut, Staff Writer for The New Yorker] “Race and the Free-Speech Diversion.” *The New Yorker*. 10 November 2015. Online. http://www.newyorker.com/news/news-desk/race-and-the-free-speech-diversion)

Faculty and students at both Yale and the University of Missouri who spoke to me about the protests were careful to point out that they were the culmination of long-simmering concerns. “It’s clear that the students’ anger and resentment were long in coming,” Holloway told me. “This is not about one or two things. It’s something systemic and we’re going to have to look at that.” The most severe recent incidents at both institutions—shouts of “nigger” directed at a black student at Missouri, a purported “white girls only” Yale fraternity party—will sound familiar to anyone who works at or even has substantial contact with an institution of higher education. Last month, women’s and civil-rights groups filed a Title IX complaint that campuses have not done enough to rein in Yik Yak, an anonymous forum that effectively serves as a clearinghouse of digital hostility. Last year, at the University of Connecticut, where I teach, white fraternity members harassed and purportedly shouted epithets at members of a black sorority; the incident generated an afterlife of hostility on Internet forums, where black female students were derided and ridiculed. Eight months ago, fraternity members at the University of Oklahoma were filmed singing an ode to lynching. These are not abstractions. And this is where the arguments about the freedom of speech become most tone deaf. The freedom to offend the powerful is not equivalent to the freedom to bully the relatively disempowered. The enlightenment principles that undergird free speech also prescribed that the natural limits of one’s liberty lie at the precise point at which it begins to impose upon the liberty of another. During the debates over the 1964 Civil Rights Act, Senator J. Lister Hill, of Alabama, stood up and declared his opposition to the bill by arguing that the protection of black rights would necessarily infringe upon the rights of whites. This is the left-footed logic of a career Negrophobe, which should be immediately dismissed. Yet some variation of Hill’s thinking animates the contemporary political climate. Right-to-offend advocates are, willingly or not, trafficking in the same sort of argument for the right to maintain subordination. They are, however, correct in one key respect: there are no safe spaces. Nor, from the look of things, will there be any time soon.

#### Finally, Student directed resistance to the “free speech” of bigots isn’t about censorship, it’s about fighting inequality.

Lafargue, 2016 (Ferentz [Director of the Davis Center at Williams College]. “’Coddled’ students and their ‘safe spaces’ aren’t the problem, college official says. Bigots are.” *The Washington Post*. 28 March 2016. Online. <https://www.washingtonpost.com/news/grade-point/wp/2016/03/28/coddled-students-and-their-safe-spaces-arent-the-problem-college-official-says-bigots-are/>)

In the work that I do as a diversity advocate in higher education, I hear often a concern that some of our efforts in pursuit of equity may be doing students a disservice — that we’re not preparing them for the “real world.” The implied logic is that if students feel empowered to voice their discontent with microaggressions experienced on campus, then they’re not developing the thick skin necessary to deal with the slights they’ll see in the workplace, out in the “real world.” Students should “toughen up,” and we should stop “coddling” them, we’re told. I’ve heard these sentiments expressed about the college’s efforts to counsel students against donning offensive Halloween costumes, the distribution of a “Pronouns Matter” pamphlet last fall and in more general discussions about what constitutes a “safe space” on campus. To be sure, the real world is full of anti-Semitism, homophobia, sexism and racism. The question is: Do we prepare students to accept the world as it is, or do we prepare them to change it? Telling students either explicitly or implicitly that they should grin and bear it is the last thing one should do as an educator. Yet that is essentially the gospel that the “wait until the real world” parishioners would have many of us adopt. The purpose of a college experience isn’t to make students feel as if they are in a well-insulated bubble. Just as depictions of a typical college student as a video game-addicted humanities major who uses the pronoun “they” and abides by a strict gluten-free diet disregards the lived experiences of countless students, so too do any allusions that colleges are idyllic enclaves. Enrolling at Williams for example, does not immediately reshape all students’ lives into concentric circles with Frosh Quad at their center. Instead, each student has a Venn diagram-like series of circles of their families, previous neighborhoods, schools and friend groups, all bartering for space among 2,100 other students. Over the last five years, to help mitigate some of the tensions that are bound to arise from this complex configuration, staff members at the Davis Center have been leading workshops on social identity formation and facilitation as part of the spring and fall training sessions for Junior Advisors. These trainings are complemented by an array of events during First Days that seek to provide the entering class an introduction to the identities and perspectives they are likely to encounter at Williams. Virtually every entering class arrives on campus better versed on issues related to gender, race and sexuality than their predecessors. Challenges posed by trying to keep up with the pace of this ever changing community partly explain why college students are such fraught discursive subjects. Rapidly shifting demographics, an evolving language of gender and sexual identity so vibrant it would make Hilda Doolittle [a modernist poet known for challenging gender norms] proud, are but just two of the factors pushing colleges through existential dilemmas. There are broader questions as well, such as: Is college a place for intellectual exploration? Or is it a glorified worker-training program? We are not immune to these debates here at Williams, and some of our students and their families bear the weight more than others. Students whose families are facing financial distress often feel guilty about engaging in any pursuit that is not alleviating their family’s hardships. The decisions these students are forced to make range from deciding whether to take time off from school to find jobs so they can better support their families to choosing majors based on projected earning expectations immediately after graduation. Moreover, for some students these debates are about far more than college; they represent yet another variable in trying to understand how and where they fit in society. Therefore, whether one is suspicious of the merits of college as a whole or cynical about the existence of “safe spaces,” the truth of the matter is that “coddled” college students aren’t the problem. The real culprits — on campuses and in the real world — are the persistent effects of homophobia, income inequality, misogyny, poverty, racism, sexism, white supremacy and xenophobia. When students refuse to accept discrimination on college campuses, they’re learning important lessons about how to fight it everywhere.

## Neg Cards

### The Dark Side of Free Speech

#### Free Speech is being used as a cover to disguise deep racial antagonisms, and to avoid discussing issues of race.

Cobb, 2015 (Jelani [Associate Professor at the University of Connecticut, Staff Writer for The New Yorker] “Race and the Free-Speech Diversion.” *The New Yorker*. 10 November 2015. Online. http://www.newyorker.com/news/news-desk/race-and-the-free-speech-diversion)

Of the many concerns unearthed by the protests at two major universities this week, the velocity at which we now move from racial recrimination to self-righteous backlash is possibly the most revealing. The unrest that occurred at the University of Missouri and at Yale University, two outwardly dissimilar institutions, shared themes of racial obtuseness, arthritic institutional responses to it, and the feeling, among students of color, that they are tenants rather than stakeholders in their universities. That these issues have now been subsumed in a debate over political correctness and free speech on campus—important but largely separate subjects—is proof of the self-serving deflection to which we should be accustomed at this point. Two weeks ago, we saw a school security officer in South Carolina violently subdue a teen-age girl for simple noncompliance, and we actually countenanced discussion of the student’s culpability for “being disruptive in class.” The default for avoiding discussion of racism is to invoke a separate principle, one with which few would disagree in the abstract—free speech, respectful participation in class—as the counterpoint to the violation of principles relating to civil rights. This is victim-blaming with a software update, with less interest in the kind of character assassination we saw deployed against Trayvon Martin and Michael Brown than in creating a seemingly right-minded position that serves the same effect. Here is the Atlantic’s Conor Friedersdorf on the free speech issues at play in the Yale protests: In “The Coddling of the American Mind,” Greg Lukianoff and Jonathan Haidt argued that too many college students engage in “catastrophizing,” which is to say, turning common events into nightmarish trials or claiming that easily bearable events are too awful to bear. After citing examples, they concluded, “smart people do, in fact, overreact to innocuous speech, make mountains out of molehills, and seek punishment for anyone whose words make anyone else feel uncomfortable.” What Yale students did next vividly illustrates that phenomenon. David French strikes a similar note of democratic indignation about the Missouri protesters in the National Review: The entire notion that these students need a “safe space” is a lie. They aren’t weak. They don’t need protection. They’re engaged in a classic struggle for power—for now against weak, ineffectual, and cowardly opposition. Why would they debate when they’ve proven they can dictate terms? Why would they answer tough questions when they have no satisfactory answers? So they simply push the press away, and the press meekly complies. Pathetic. At issue are a black student’s angry denunciation of a Yale professor and the Missouri protesters’ daft media strategy of blockading reporters from a public demonstration. The conflict between the Yale student and Nicholas Christakis, the master of the university’s Silliman College—whose wife, Erika, the associate master of the college, wrote an e-mail encouraging students to treat Halloween costumes that they find racially offensive as a free-speech issue, in response to a campus-wide e-mail encouraging students to consider whether their costumes could offend—was recorded on a cell phone and posted on the Internet. The Foundation for Individual Rights in Education, a national campus free-speech organization, posted the video to their Web site. Since then, a young woman who argues with Christakis in the footage has been called the “shrieking woman” by the National Review and subjected to online harassment and death threats. Surely these threats constitute an infringement upon her free speech—a position that has scarcely been noted amid the outraged First Amendment fundamentalism. This rhetorical victory recalls the successful defense in the George Zimmerman trial, which relied upon the tacit presumption that the right to self-defense was afforded to only one party that night—coincidentally, the non-black one. The broader issue is that the student’s reaction elicited consternation in certain quarters where the precipitating incident did not. The fault line here is between those who find intolerance objectionable and those who oppose intolerance of the intolerant.

#### Racist hate speech destroys the marketplace of ideas.

Weberman, 2010 (Melissa [Law Clerk in the Eleventh Circuit Court of Appeals. J.D. from Emory Law] “University Hate Speech Policies and the Captive Audience Doctrine.” *Ohio Northern University Law Review* 36 Ohio N.U.L. Rev. 553. 2010. Online. LexisNexis.)

Since the late 1980s, universities have confronted a growing hate speech problem on their campuses. Increasing racial, sexist, anti-Semitic, and [\*554] homophobic incidents on campuses have led many universities to enact rules of conduct that regulate harassing behavior directed at members of certain minority groups. Often the regulated conduct includes spoken and written words, raising difficult issues concerning the university students' free speech rights. Public universities face an exceedingly difficult situation in promulgating hate speech regulations that will survive First Amendment scrutiny. There is a vast amount of literature that discusses whether university hate speech policies may be permissibly drafted and whether they should exist at all. [\*555] The most fundamental rationale for freedom of speech is that it promotes finding truth. The optimal way to find truth, according to this view, is robust discussion in society. Therefore, almost all speech, regardless of its content, must be protected. "[A] free marketplace of ideas, open to even the most odious and offensive ideas," is best, "because truth ultimately will triumph in an unrestricted marketplace." "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market[.]" Many favor no restrictions on speech whatsoever in the university environment. The university, to them, is "peculiarly the marketplace of [\*556] ideas." The importance of freedom in universities "is almost self- evident" to them. The pursuit of knowledge is at the core of the university identity, and "impos[ing] any strait jacket" on speech would interfere with that goal. "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" Under the marketplace of ideas rationale, more speech will remedy hate speech, because the more speech in the marketplace, the more likely we will arrive at truth. As one scholar put it, "the only effective method of altering a world view that is deemed pernicious is to provide a persuasive response - that is, more speech." Through discussion, the "bad" ideas will give way to the "good" ones. Another commentator asserted that "fighting fire with fire - or speech with more speech," is the best means to remedy hate speech. In some settings, however, "more speech" is not a sufficient remedy to "pernicious" speech. Contrary to the marketplace of ideas that the First Amendment is designed to foster, hate speech in fact runs counter to that goal of more speech, denying others on campus the chance of hearing the target's ideas. Hate speech is inconsistent with the marketplace of ideas because it "inflects, skews, and disables the operation of the market[.]" It decreases the [\*557] total amount of speech in the marketplace by its silencing effect on its target groups. It systematically silences entire segments of society, through the "preemptive effect" that racist words have on further speech and through the distortion of "the marketplace of ideas by muting or devaluing the speech" of minority groups. Hate speech functions as a preemptive strike against further speech - when it strikes, it is unlikely that dialogue will follow, as the verbal attack disables its victims and renders them speechless. Moreover, the ubiquity of the messages of inferiority mutes and devalues the speech of the target groups. People unconsciously and irrationally give less credence to speech from members of the target group due to racist messages of inferiority. Thus, the preemptive effect that racist words have on their target's ability to speak back, combined with the unconscious devaluation of minority speech, silences speech rather than encourages it, contrary to how the marketplace of ideas is supposed to operate.

#### Hate speech connects with structures of oppression, harming the groups that it is directed towards.

Weberman, 2010 (Melissa [Law Clerk in the Eleventh Circuit Court of Appeals. J.D. from Emory Law] “University Hate Speech Policies and the Captive Audience Doctrine.” *Ohio Northern University Law Review* 36 Ohio N.U.L. Rev. 553. 2010. Online. LexisNexis.)

Hate speech harms groups that are the target of the speech. Under the tradition of group libel and the Supreme Court's decision in Beauharnais v. Illinois, n36 speech that is likely to direct contempt or scorn on identifiable groups should be regulated to prevent injury to the status of the members of those groups. n37 A more modern understanding of hate speech derives from the understanding of racism as "the structural subordination of a group based on an idea of racial inferiority." n38 Such expression is particularly unacceptable because it locks in the oppression of already marginalized groups; it is "a mechanism of subordination, reinforcing a historical vertical relationship." n39 Hate speech reinforces stereotypes in the public mind that subsequently guide action.

#### Hate speech harms the individual, denying their right to education.

Weberman, 2010 (Melissa [Law Clerk in the Eleventh Circuit Court of Appeals. J.D. from Emory Law] “University Hate Speech Policies and the Captive Audience Doctrine.” *Ohio Northern University Law Review* 36 Ohio N.U.L. Rev. 553. 2010. Online. LexisNexis.)

Beyond causing harm to the target groups, hate speech causes harms to the individual. n41 Racist speech, as one scholar asserted, is a form of "spirit-murder," n42 with injuries to the individual including feelings of fear, humiliation, isolation, vulnerability, resentment, and self- hatred. n43 Racist [\*559] expression is a "dignitary affront," n44 particularly powerful because "[r]acial insults . . . conjure up the entire history of racial discrimination in this country." n45 Bigoted insults may almost amount to physical violence to the target. n46 Specific physiological and emotional harms to the victims include "fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide." n47 Exposure to hate speech interferes with the targets' access to and enjoyment of educational opportunities in the university context. n48 In addition, hate speech alienates the student from the school. n49 When hate speech goes unpunished, the victim of the speech and members of the targeted group may feel disenfranchised from their university. n50 Lack of discipline from university officials may be perceived as approval of the racist message. n51 The cumulative effect of the individual harms and the alienation of the student may result in a hostile environment to the minority groups and a denial of an equal opportunity for education. n52 Thus, hate speech not only leads to stress, but it leads to a detrimental effect on academic opportunity and performance. n53 Implicit in this Article is a belief that university hate speech policies should thus be drafted to ensure equal access to education and prevent interference with the educational process.

#### Hate speech denies targeted groups of the basic rights.

Lee, 2001 (Orville [Asst. Prof. of Sociology at the new School]. “Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society.” *Law & Social Inquiry* 26.4 (Autumn, 2001): 847-890. JSTOR.)

Acts of symbolic violence targeting women and racial, ethnic, and sexual minorities, ranging from cross burnings to insults, remain a persistent feature of America's civil society. University presidents, administrators, students, as well as civil libertarians, political progressives, and conservative critics of "political correctness" continue to grapple with the practical lemma of defining the most appropriate strategy to regulate or diminish racial hate speech. Wittgenstein's assertion that "words are also deeds" is registered in the proposals advanced by proponents of speech regulation. In addition to rendering personal harm, racial epithets and degrading images are held to be a form of discriminatory conduct. In this regard, racist inhibits the achievement of self-evident rights of life, liberty, and the pursuit of happiness enunciated in the Declaration of Independence. Proponents of regulation offer these negative effects of hate speech as justification for establishing standards of civil speech. In opposition to this view, defenders of First Amendment protections of unpopular speech warn against ceding of speech regulation to the vicissitudes of state control. They that the state cannot be trusted to decide speech restrictions without evaluating the expressive content of speech.

### Middle Ground Advocacy

#### Neither Free Speech Absolutists or proponets of regulation fully account for the social force of words..

Lee, 2001 (Orville [Asst. Prof. of Sociology at the new School]. “Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society.” *Law & Social Inquiry* 26.4 (Autumn, 2001): 847-890. JSTOR.)

This disjuncture in the understanding of the force of words reveals a gap between how cultural theorists and legal theorists conceive the force of words in social speech. This essay will attempt to clarify two problematic features of the current normative stalemate over the regulation of speech. First, neither the First Amendment "absolutists" nor the proponents of speech regulation offer an entirely compelling view of the force of words, since neither side elaborates the conditions that constitute what I call the force of social speech. First Amendment absolutists conceive of the power of words only within a narrow range of events (e.g., the facilitation of democratic deliberation or the production of new political "truths"), while proponents of regulation fail to account for the larger system of symbolic power, which is more pervasive (and mundane) than the spectacular public episodes of racist speech. Second, because neither democratic political theory nor American constitutional jurisprudence recognizes the force of social speech as a problem for the democratic constitution of society, the corpus of American constitutional law and commentary does not provide definitive resources for articulating and limiting the most fundamental effects of this force. As a consequence, I will argue, it is necessary to consider a more expansive theory of speech (i.e., the force of words) and the risks the right of free speech entails for socially disadvantaged individuals within the community of enfranchised speakers.

#### A middle ground must be found between absolute free speech, and total state regulation of speech.

Lee, 2001 (Orville [Asst. Prof. of Sociology at the new School]. “Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society.” *Law & Social Inquiry* 26.4 (Autumn, 2001): 847-890. JSTOR.)

I develop this expansive theory through a synthesis of legal, democratic, and cultural theories. After a brief review in the first section of existing legal norms that govern the regulation of speech and sustain orthodox interpretations of the First Amendment, I discuss the heterodox arguments of those who promote speech regulation in the area of pornography and hate speech. These arguments, which endeavor to redefine speech as conduct, exemplify some of the limitations of claims that do not fully register the social force of words. After assessing the merits and limitations of this literature, I turn in the third section to cultural theories of symbolic power to develop a general critique of both free speech absolutists and the proponents of speech regulation. In section four I propose a potential way out of the current state of the debate over the First Amendment-which sets the first principles of "speech" and "equality" in fundamental opposition-by broadening the definition of speech and the force it imparts, and by assessing the unequal risk of being the object of this force that burdens particular individuals in American society. In this section, I introduce the categories of uncivil speech and state speech, consider the risks these forms of speech impose unequally on socially disadvantaged individuals, and propose juridical and deliberative-democratic remedies to more evenly distribute and attenuate both forms of risk. These remedies involve the democratization rather than the regulation of the force of words.

### A2: Butler

#### A2: Butler. There should be state supported guarantees to help direct linguistic agency.

Lee, 2001 (Orville [Asst. Prof. of Sociology at the new School]. “Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society.” *Law & Social Inquiry* 26.4 (Autumn, 2001): 847-890. JSTOR.)

Cultural theorists like Michel Foucault, Pierre Bourdieu, and Butler, who have theorized the social ontology of symbolic power, have not situated this force within democratic structures. In Butler's case, she seeks a nonjuridical solution to the problem of linguistic vulnerability, one that does not invoke state intervention. Her recognition of the force of words (the linguistic violence the individual experiences by virtue of being ontologically situated within language) marks a distinction from First Amendment absolutism, which prioritizes the principle of freedom of expression over addressing the negative effects of violent speech. However, Butler also recognizes the internal limits of such speech-the indeterminacy of the meaning of words and the contexts in which they are uttered-which she believes can be leveraged against the perpetual threat of linguistic vulnerability. “I would insist that the speech act, as a rite of institution, is one whose contexts are never fully determined in advance, and that the possibility for the speech act to take on a non-ordinary meaning, to function in contexts where it has not belonged, is precisely the political promise of the performative, one that positions the performative at the center of a politics of hegemony, one that offers an unanticipated political future for deconstructive thinking.” (Butler 1996, 161) I would argue, however, that it is not enough to leave this political promise to chance. If, in fact, the capacity to realize this agency in language is not equally distributed in American society, then the question of the external limits to the violence of speech, namely forms of democratic intermediation, should be posed, not in the guise of "sovereign speech," but by developing the capacity of disadvantaged speakers to fulfill the political promise of the performative. Like Butler, my intention is to emphasize linguistic agency-that is, speech rights versus juridical protections or proscriptions against specific words or images. Unlike Butler, I will consider ways to realize linguistic agency in social practice by taking account of the stratification of the capacity for this agency.

#### If you like this card, you should find this article, and cut a deliberative democracy negative strategy.

Lee, 2001 (Orville [Asst. Prof. of Sociology at the new School]. “Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society.” *Law & Social Inquiry* 26.4 (Autumn, 2001): 847-890. JSTOR.)

At the outset of this essay, I remarked that a gap exists between language of cultural sociology and the language of legal and political regarding the force of words in social speech. I have shown how proposals critical race theory and feminist legal theory that bring equality concerns bear on hate speech by constructing speech as conduct fail to articulate conditions of possibility for the force of words. Neither the definition speech as conduct nor the assertion of the equality principle promises blunt the impact of uncivil words on socially subordinated individuals United States. I have also shown that although Judith Butler's conception of the ontological conditions of linguistic vulnerability provides a more understanding of the force of words, her failure to consider conditions of linguistic vulnerability leaves individuals who are risk without legal-political strategies for attenuating the risk posed negative effects of words. In contrast, I have advanced two strategies, on deliberative democratic principles and First Amendment protections of the individual's private personality from libel, to democratize the words as it is regionalized in hate speech and state speech. These dual place emphasis on the rights to speech institutionalized in First Amendment doctrine and the implied right to privacy associated with amendment (among others). Neither strategy involves the restriction First Amendment rights. Neither do they reach for juridical alone (pace Matsuda, Lawrence, Delgado, and MacKinnon), rule out Butler) the possibility of democratic intermediation in toto, nor force of words unproblematized (pace First Amendment absolutism). are consistent with the "principle that debate on public issues should uninhibited, robust and wide open" (Sullivan). Cultural and legal theory find common ground in the analysis of the undemocratic effects of power. Such common ground can be achieved if legal theorists acknowledge the force of words as a problem for democracy and if cultural theorists consider the resources provided by democratic institutions and practices redistributing the social risks of speech.

### **Privatize Education**

#### Free Speech in higher education must be subjected to a different level of scrutiny than the strictest interpretation of the constitution which governs private individuals.

Greve, 1997 (Michael S. [Executive Director of the Center for Individual Rights, Washington D.C.] “Free Speech and Liberal Education.” *Academic Questions* 10.3 (Sept. 1997): 24-33. ProQuest.)

The same dynamic is at work in litigation involving institutions of higher education, although the substantive issues and the applicable legal doctrines are a bit different. The courts have afforded public colleges and universities much less authority to regulate student speech than they have extended to primary and secondary schools. The basis for this distinction lies in the different institutional purposes: whereas schools inculcate knowledge and values, universities serve the pursuit of knowledge. The activities we associate with this pursuit-research, inquiry, and open debate-require broader parameters for free speech than a kindergarten or high school class. Frequently, the courts have summarized the First Amendment considerations that apply to higher education under the rubric of ~academic freedom," a concept that has played no role in secondary school cases. The constitutional origin of ~academic freedom" lies in a handful of cases in the 1950s and 1960s, in which the Supreme Court struck down loyalty oaths for public college teachers. In an effort to protect academic institutions and their employees from McCarthyite witch hunts, the Supreme Court declared academic freedom "a special concern of the First Amendment." However, this special concern has remained ill-defined. For example, the Supreme Court has invoked "academic freedom ~ both to permit universities to fire teachers and, in very similar cases, to prevent teachers from being fired. To cut through the confusion, it helps to start with well-settled First Amendment principles and to ask how and why one would want to adjust these principles to the context of higher education. Two ground rules govern First Amendment disputes between the government and private speakers. The first is non-interference: outside very narrow categories of libel, incitement to riot, and obscenity, the state may not prohibit speech. The second rule is neutrality: the state may not tilt the playing field toward or against speech with a particular viewpoint or content. These two rules define what is commonly called the "marketplace of ideas'-a place of "uninhibited, robust debate." The Supreme Court has at times applied this marketplace ideal to the context of higher education. In the last of the big loyalty oath cases, Keyishian v. Board of Regents (1968),Justice Brennan declared that "the vigilant protection of constitutional freedoms is nowhere more vital" than in schools. "The classroom," Brennan continued, "is peculiarly the 'marketplace of ideas.'" This is music to the ears of teachers and students of the 1990s, beset as they are by PC administrators. Upon inspection, however, the marketplace ideal of higher education is more absurd than inspiring. Most obviously, professors at public colleges and universities are state employees. A teacher's free speech rights--inside or outside the classroom-should probably be broader than those of firefighters or police officers. But they cannot be as broad as the rights of a private citizen who has no relation with the state and does not draw a salary from the state. The private speaker may choose his subjects; the public college teacher may not. The state may not punish a newspaper for insulting its readers; it may, within bounds, discipline teachers for insulting students. And so on. More fundamentally, universities are not designed to be a marketplace of ideas. They are supposed to serve the pursuit and the transmission of knowledge and to provide a forum for reasoned debate, as opposed to a free-for-all. Justice Brennan maintained that a ~robust marketplace" is not only a good way but the only way of attaining the educational purposes of the university. This notion is not quite so absurd as the idea-which Brennan also defended-of improving elementary education by granting free speech rights to eight year-olds. But it is just as mistaken. It assumes that a marketplace of ideas works like a real marketplace: the marginally better products drive out the bad ones so long as consumer preferences are allowed free rein. But there is no room for naive optimism that a marketplace of ideas will permit good ideas to prevail over bad ones. As the great constitutional scholar Alexander Bickel remarked, we have seen too much in this century to believe this. There are good reasons for insisting on government non-interference and uncompromising neutrality in most settings--even, as I shall suggest, in the university setting. But the idea that ~marketplace ~ rules are conducive to civil debate is not among those reasons. Since passions will prevail unless the rules require mutual respect and civility, reasoned debate on campus requires more restrictive rules than those that govern a marketplace of ideas. For example, a marketplace must tolerate speech that is calculated to incite anger and animosity. But since such speech has a tendency to drown out reasoned debate, it is inimical to the purposes of higher education. By the same token, strict government neutrality often conflicts with a university's educational mission. For example: could a public university prohibit a student-sponsored campus event starring the Rev. Louis Farrakhan, on the grounds that the speaker's hateful message is incompatible with the university's educational mission and message of tolerance and civil debate? A police department may not deny a public rally permit on the grounds that the speaker's views are hateful But it is plausible to argue that a public university, in light of its educational mission, should enjoy somewhat broader latitude.

#### **Democratic political institutions, like public schools, can’t survive the culture wars—we must privatize all education.**

Greve, 1997 (Michael S. [Executive Director of the Center for Individual Rights, Washington D.C.] “Free Speech and Liberal Education.” *Academic Questions* 10.3 (Sept. 1997): 24-33. ProQuest.)

Democratic, political institutions, including public schools, work only on a presumption of trust and broad consensus: We must think of the people who run the institutions as our neighbors and fellow-citizens. But we no longer trust public institutions, because we fear that they have been overrun by our enemies. Both sides in the culture war, therefore, seek refuge in the aggressive assertion of rights. But the wholesale judicialization of public education is preferable only to unilateral disarmament; it is demonstrably detrimental to a sound liberal education. So long as both sides are trapped in the public sector, there is no escape from this negative-sum game. The only way out is to let us go our separate ways and to privatize the public education monopoly to the largest possible extent. The attraction of this option is most obvious in the primary and secondary school context. The same parents who insist (or would insist) on free speech and due process in public schools happily send their children to schools where there is almost no free speech, and no due process whatsoever. There are no defiantly worn black armbands in Catholic schools. But the parents feel in no way deprived of their rights, both because the schools work and because the parents have the most important right of all, which is the right to choose an environment of like-minded people, administered by people they trust. Some parents will choose the disciplinary environment of Catholic schools or the even more disciplinary environment of some black inner-city schools that have been started under school voucher programs; a few may choose, for whatever reasons, schools with the panoply of due process and free speech rights that have made such a mess of the public schools. But everyone will feel more free and better served. The tension between student rights and quality education is real-but only so long as we insist on running education as a public monopoly. In higher education, too, much would be gained if we could scale back the public sector. If wholesale privatization seems too radical a proposal, we should at least liberate private institutions from many of the existing legal controls. Foremost, we should reconsider the application of federal and state civil rights laws to private colleges and universities. The Citadel and VMI refrained from going private largely because even as private institutions, they would be subject to nondiscrimination laws and lawsuits that would imperil their educational mission. But there is no good reason why this need or should be so. Freeing higher education from the shackles of public law would do more for free speech, and for liberal education, and even and especially for diversity than can ever be accomplished by constitutional restraints and federal regulations.