

**THE THIRD ANNUAL C. EDWIN BAKER LECTURE FOR LIBERTY,
EQUALITY, AND DEMOCRACY: THE CONSERVATIVE-
LIBERTARIAN TURN IN FIRST AMENDMENT JURISPRUDENCE**

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ABSTRACT

Conservative constitutional jurisprudence in the United States has an important libertarian dimension. In recent years, a conservative majority of the Supreme Court has strengthened the constitutional protections for property rights, recognized an individual right to own firearms, imposed limits on the welfare state and the powers of the federal government, cut back on affirmative action, and held that closely held corporations have a right to religious liberty that permits them to deny contraceptive coverage to their female employees. This libertarian streak also can be seen in decisions on freedom of speech and association. In several leading cases, conservative judges have used the First Amendment in a libertarian manner to invalidate regulations that reflected liberal or progressive values. For example, these judges have rejected efforts to limit the role of money in election campaigns, struck down restrictions on hate speech and pornography, expanded protection for religious speech within public schools and universities, and held that the right to free association takes precedence over state civil rights laws that bar discrimination based on sexual orientation.

This Article, which was presented as the third annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy at the West Virginia University College of Law, explores this trend in First Amendment jurisprudence. After providing an overview of the conservative-libertarian approach to the Constitution, the Article describes how this approach has been applied in cases on free speech and association. The Article then criticizes this First Amendment approach on several grounds. First, this approach draws too close a connection between free speech and property rights. In this way, it represents a partial revival of *Lochner*-era jurisprudence—a development that Baker strongly criticized throughout his career. Second, the conservative-libertarian view affords too much protection to speech that injures, abuses, or degrades other people. Third, the judges who hold this view tend to be social conservatives as well as libertarians, and deep problems arise in situations where these two aspects of conservative thought conflict with one another. Fourth, the conservative-libertarian approach fails to satisfy its own demand for ideological neutrality. Finally, by granting the government broad authority to restrict speech within public institutions, that approach tends to deny protection

to those individuals who are most vulnerable to state control, including prisoners, public employees, and those who serve in the military.

The root problem is that the conservative-libertarian approach is based on an excessively narrow and one-sided conception of the self—a view that stresses the ways in which we are separate and independent individuals but that fails to fully recognize that we are also social beings who find an important part of our identity and value in social relationships and participation in community. We need to develop an approach to the First Amendment that is based on a broader and richer conception of the self, the society, and the nature of constitutional liberty. The Article concludes by outlining such an approach, which it calls a liberal humanist theory of the First Amendment. On this view, the law should be allowed to impose reasonable restrictions on hate speech and pornography, as well as on the ability of wealthy individuals and corporations to influence elections. Freedom of association should not necessarily permit groups to exclude individuals on invidious grounds such as sexual orientation. The Justices have been right, however, to hold that public educational institutions generally must accord equal treatment to religious speakers.

I. INTRODUCTION

I am deeply grateful to the C. Edwin Baker Center for Liberty, Equality, and Democracy for asking me to speak here today. Professor Baker was one of the most brilliant constitutional theorists of his generation, and his work has had a profound influence on our understanding of the First Amendment freedom of speech and its relationship to individual self-realization and democratic culture. There can hardly be a greater honor for one who works in this field than to give a lecture in his memory.

Liberty, equality, and democracy are central to our constitutional order. But the Constitution sets forth those concepts only in outline and leaves a great deal of room for interpretation. The history of American constitutionalism has been an ongoing struggle between competing understandings of the Constitution and of the ways in which it embodies those values.

In recent decades, the progressivism of the New Deal and Warren Courts has given way to a more conservative view of the Constitution. But it is important to recognize that this view is not a monolithic one. In many cases, the conservative Justices have followed what may be called a traditional conservative position, which stresses the government's authority to enforce law and order and to promote traditional moral and social values. Thus, the Court has made it more difficult to sue the government and its officials,¹ restricted the

¹ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (imposing stringent standards for overcoming official immunity); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (narrowing taxpayer standing under Establishment Clause); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (restricting congressional power to authorize suits against the states

rights of criminal defendants,² reinstated the death penalty,³ limited the constitutional right to privacy,⁴ and lowered the wall of separation between church and state.⁵

But conservative jurisprudence also contains a second strand, which holds that the Constitution should be interpreted to promote a libertarian conception of individual freedom and to limit the power and functions of the state. In line with this view, the conservative Justices have expanded constitutional protections for property rights, declared that the Second Amendment protects an individual right to own firearms, cut back on the welfare state and the regulatory authority of the federal government, and held that, under the quasi-constitutional Religious Freedom Restoration Act, closely held corporations may refuse to provide contraceptive coverage to their female employees.⁶

The same conservative-libertarian trend can be discerned in the First Amendment area. Of course, Exhibit A is *Citizens United v. FEC*,⁷ in which Justice Anthony M. Kennedy and his colleagues declared that business corporations have the same First Amendment rights as natural persons, including a right to spend unlimited sums to influence the outcome of elections. But conservative judges also have taken a libertarian stance in several other

and their officers); *City of L.A. v. Lyons*, 461 U.S. 95 (1983) (limiting standing to obtain injunction against unconstitutional police conduct).

² See, e.g., *Maryland v. King*, 133 S. Ct. 1958 (2013) (holding that DNA may routinely be taken from individuals arrested for serious offenses); *Howes v. Fields*, 132 S. Ct. 1181 (2012) (interpreting *Miranda* rights narrowly); *Illinois v. Wardlow*, 528 U.S. 119 (2000) (holding that flight from police establishes reasonable suspicion to stop and frisk); *Teague v. Lane*, 489 U.S. 288 (1989) (limiting retroactive effect of decisions establishing new constitutional rules protecting defendants); *United States v. Leon*, 468 U.S. 897 (1984) (establishing good faith exception to Fourth Amendment exclusionary rule); *Stone v. Powell*, 428 U.S. 465 (1976) (restricting habeas corpus review for violations of that rule).

³ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁴ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding ban on “partial-birth abortion”); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (rejecting right to physician-assisted suicide).

⁵ See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding validity of prayer at town council meetings); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding state tuition aid to students in religious schools).

⁶ See *infra* Part II.B. This libertarian trend can be seen in other areas as well. For example, while conservative judges traditionally have tended to support the authority of the police, see *supra* text accompanying note 2, in recent years they have become somewhat more open to claims by criminal defendants. See, e.g., *Riley v. California*, 134 S. Ct. 2473 (2014) (holding that Fourth Amendment generally bars warrantless searches of arrestees’ cell phones); *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that Sixth Amendment Confrontation Clause bars admission of out-of-court testimonial statements). See generally Louis D. Bilionis, *Criminal Justice After the Conservative Reformation*, 94 GEO. L.J. 1347 (2006).

⁷ 558 U.S. 310 (2010).

leading cases. In *American Booksellers Ass'n v. Hudnut*,⁸ Circuit Judge Frank H. Easterbrook held that the state may regulate sexually explicit material to protect traditional morality but not to promote gender equality—a rationale that he condemned as a form of authoritarian “thought control.”⁹ Likewise, in *R.A.V. v. City of St. Paul*,¹⁰ Justice Antonin Scalia treated a city’s ban on cross-burning as an impermissible effort to impose ideological orthodoxy by punishing the expression of racist ideas. And in *Boy Scouts of America v. Dale*,¹¹ Chief Justice William H. Rehnquist ruled that the First Amendment freedom of association permitted the Scouts to deny membership to homosexuals on moral grounds.

As these cases indicate, conservative libertarianism has become one of the most powerful currents in First Amendment jurisprudence. This current can be seen in some major decisions from the Court’s most recent Term, including *McCutcheon v. FEC*,¹² which invalidated the federal ban on the total amount that wealthy individuals can contribute to political candidates and parties, and *Harris v. Quinn*,¹³ which struck a blow against public-sector labor unions.¹⁴ In all of these cases—most of which were decided by a vote of five to four—conservative judges have used the First Amendment to erect a barrier against regulation that aimed to promote liberal or progressive values.

Decisions like these clearly align with the political attitudes of the Justices.¹⁵ The phenomenon is more complex than that, however. In some major First Amendment cases, conservatives have voted to protect speech that

⁸ 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

⁹ *Id.*

¹⁰ 505 U.S. 377 (1992).

¹¹ 530 U.S. 640 (2000).

¹² 134 S. Ct. 1434 (2014).

¹³ 134 S. Ct. 2618 (2014).

¹⁴ See also *infra* text accompanying notes 363–369 (discussing *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), which struck down a state law establishing a buffer zone around abortion clinics).

¹⁵ For a recent study that highlights this point, see Lee Epstein et al., Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment (Aug. 6, 2013) (American Political Science Association 2013 Annual Meeting Paper), available at <http://ssrn.com/abstract=2300572>. For some general discussions of political polarization within the Court, see Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 *How. L.J.* 661 (2013); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court* (William & Mary Law School Research Paper No. 09-276, 2014), available at <http://ssrn.com/abstract=2432111>; GEOFFREY R. STONE, AM. CONST. SOC., THE BEHAVIOR OF SUPREME COURT JUSTICES WHEN THEIR BEHAVIOR COUNTS THE MOST (2013), available at http://www.acslaw.org/sites/default/files/Stone_-_Behavior_of_Justices.pdf.

they must have found highly objectionable. In *Texas v. Johnson*,¹⁶ for instance, Justices Scalia and Kennedy provided two of the critical votes to hold flag burning protected under the First Amendment. And in *Snyder v. Phelps*,¹⁷ most of the conservatives joined Chief Justice John G. Roberts, Jr., in extending protection to picketing near military funerals. Thus, the conservative-libertarian approach cannot be understood solely in terms of the Justices' immediate political inclinations or partisan commitments. Instead, as I shall show, that approach also reflects a deeper political and constitutional theory that is based on a distinctive conception of liberty, equality, and democracy.

In this Lecture, I want to explore the conservative-libertarian view of the First Amendment and to explain why I believe it to be flawed. Part II offers an overview of the libertarian strand in conservative constitutional jurisprudence. This position is rooted in a conception of the person as a separate and independent individual who is entitled to pursue his own aims so long as he does not injure others. Society is an aggregation of individuals, and the state is a necessary evil—an external force that is needed to protect individuals against one another, but which itself poses a serious threat to freedom. The Constitution is designed to protect the negative liberty of individuals against invasion by the government—a position that undergirds the conservative Justices' efforts to protect property and gun rights as well as to rein in federal power and the modern regulatory and welfare state.

In Part III, I show that this libertarian view also informs the approach that conservative judges often take to freedom of speech and association. In decisions like *Citizens United*, *McCutcheon*, *Hudnut*, *R.A.V.*, and *Dale*, these judges insist that the First Amendment requires the state to maintain a rigorous ideological neutrality, and they use this doctrine to protect their notion of individual liberty against state efforts to promote social and political norms such as equality, dignity, and community.

After explicating this approach to the First Amendment, Part III also briefly looks at some of its historical antecedents. As Mark A. Graber has shown, a form of conservative libertarianism played an important role in the free speech jurisprudence of the *Lochner* era.¹⁸ Some leading defenders of laissez-faire constitutionalism maintained that the same libertarian principles that justified economic freedom also supported freedom of speech.¹⁹ To some extent, then, the current conservative approach may be regarded as a return to *Lochner*-era jurisprudence. As we shall see, however, the current approach not

¹⁶ 491 U.S. 397 (1989); see *infra* text accompanying notes 370–373 (discussing *Texas v. Johnson*).

¹⁷ 131 S. Ct. 1207 (2011).

¹⁸ See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* ch. 1 (1991).

¹⁹ *Id.*

only has achieved far greater success in the courts but also goes considerably further in its willingness to allow free speech to trump other important values.²⁰

In Part IV, I criticize the contemporary conservative-libertarian approach to the First Amendment on several grounds. First, that approach draws too close a connection between free speech and property rights. Second, it affords too much protection to speech that injures, abuses, or degrades other people. Third, the judges who hold this view tend to be social conservatives as well as libertarians, and deep problems arise when these two aspects of conservative thought collide. Fourth, the approach fails to satisfy its own demand for ideological neutrality. And finally, the conservative-libertarian commitment to protecting free speech against the government generally applies only to individuals within the private sphere and not to those within governmental institutions. As a result, the approach tends to deny protection to those groups who are most vulnerable to state control, such as prisoners, public employees, and those who serve in the military.

The root problem, I shall argue, is that the conservative-libertarian approach is based on an excessively narrow and one-sided view of the self—a view that stresses the ways in which we are separate and independent individuals, but that fails to adequately recognize the social dimension of human life. We need to develop an approach to the First Amendment that is based on a broader and richer conception of the self, the society, and the nature of constitutional freedom.

Part V outlines such an approach, which I call a liberal-humanist view. Like conservative libertarianism, this view stresses the value of liberty. But it understands liberty in a more positive manner as the capacity to pursue the full development and realization of the self, not only through one's own individual activities but also through social relationships and participation in the community. Free speech has both an individual and a social dimension: when individuals communicate with one another, they not only are exercising their outward freedom and engaging in self-expression but also are participating in a form of social interaction. It follows that the freedom of speech carries with it a duty to respect the personhood of others, as well as the rights that flow from that status. On this view, there is no inherent conflict between the value of individual liberty and social values such as dignity, equality, and community. Instead, the law should seek to reconcile these values with one another. After sketching the liberal-humanist view, I briefly discuss how it would apply to *Citizens United*, *McCutcheon*, *Hudnut*, *R.A.V.*, and *Dale*, as well as to other controversial problems such as picketing at funerals and religious speech within public schools and universities.

Before I begin, let me say a word about terminology. I shall use *conservative-libertarian* to refer to the libertarian strand of conservative constitutional jurisprudence. More specifically, my focus will be on the views

²⁰ See *infra* text accompanying notes 457–71.

held by conservative federal judges because they are the ones who have reshaped First Amendment jurisprudence in the ways I wish to explore.

The term *conservative-libertarian* also is useful for marking the distinction between that position and other forms of libertarianism, including the civil-libertarian position associated with groups like the American Civil Liberties Union (ACLU). To be sure, there is some overlap between these two views, especially in the free speech area. Thus, in several recent cases, the majority has been composed of conservative libertarians like Justice Kennedy as well as liberals like Justice Ruth Bader Ginsburg.²¹ In some other cases, the Court has been nearly unanimous.²² This overlap can make the conservative-libertarian position more difficult to perceive. As I shall show, however, conservative libertarianism is not only a distinctive ideology but also constitutes one of the most important strands in contemporary First Amendment jurisprudence. We need to explore this view if we wish to see where free speech law currently stands and where it should go in the future.

II. CONSERVATIVE LIBERTARIANISM AND THE CONSTITUTION: AN OVERVIEW

A. *Basic Theory*

Conservative jurisprudence contains both a libertarian and a traditionalist strand. In this respect, it mirrors modern American conservative political thought,²³ as well as the conservative legal movement.²⁴

²¹ See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (striking down ban on sale of ultraviolet video games to minors). Likewise, it is not unusual for civil-libertarian scholars on the liberal end of the spectrum to agree with decisions by conservative-libertarian judges. See, e.g., Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993) (expressing qualified support for *Hudnut* and *R.A.V.*); Geoffrey R. Stone, *American Booksellers Association v Hudnut*: "The Government Must Leave to the People the Evaluation of Ideas," 77 U. CHI. L. REV. 1219 (2010) (praising *Hudnut*).

²² See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010) (striking down ban on depictions of unlawful cruelty to animals).

²³ For explorations of these two strands and the relationship between them, see PETER BERKOWITZ, *CONSTITUTIONAL CONSERVATISM: LIBERTY, SELF-GOVERNMENT, AND POLITICAL MODERATION* (2013); *FREEDOM AND VIRTUE: THE CONSERVATIVE/LIBERTARIAN DEBATE* (George W. Carey ed., rev. ed. 1998); *VARIETIES OF CONSERVATISM IN AMERICA* (Peter Berkowitz ed., 2004). For a comprehensive account of modern conservative thought, including the relationship between traditionalism and libertarianism, see GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945* (2d ed. 2006).

²⁴ See, e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 80, 142–46 (2d ed. 2008) (characterizing the movement as a coalition of libertarians and conservatives); J. Harvie Wilkinson III, *The Lost Arts of Judicial Restraint*, 16 GREEN BAG 2d 51, 52–53 (2012) (same). The Federalist Society, a driving force of the movement, describes itself as "a group of conservatives and libertarians" who have come together to support both "individual liberty" and "traditional values" against "orthodox liberal ideology." *About Us*, THE FEDERALIST SOC. FOR LAW AND PUB. POLICY STUDIES,

This Part presents an overview of the libertarian strand of conservative constitutionalism. Section A explores the theory on which this position is founded, drawing on classical thinkers like John Locke as well as contemporary legal, constitutional, and political theorists.²⁵ In this Section, I shall have to paint with a broad brush: libertarianism is a deep and rich body of thought with a long history, and I shall not be able to adequately explore its complexities here.²⁶ Instead, my goal is to sketch some of the main principles that characterize this approach.²⁷ In Section B, I show how these principles have informed a wide range of recent Supreme Court decisions.

1. Self and Society

At the core of the conservative-libertarian view is a conception of the individual. Following Locke, conservative libertarians regard individuals as

<https://www.fed-soc.org/aboutus/> (last visited Oct. 9, 2014); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY xi (2004) [hereinafter BARNETT, LOST CONSTITUTION] (describing the organization in similar terms).

²⁵ Some of the theorists I refer to would call themselves libertarians or classical liberals rather than conservatives. *See, e.g.*, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT ix, 569–83 (2014) [hereinafter EPSTEIN, CLASSICAL LIBERAL CONSTITUTION] (distinguishing his “classical liberal” position from both conservatism and progressivism); F.A. HAYEK, THE CONSTITUTION OF LIBERTY 519–33 (Ronald Hamowy ed., definitive ed. 2011) (postscript entitled “Why I am Not a Conservative”); Randy E. Barnett, *The Moral Foundations of Modern Libertarianism*, in VARIETIES OF CONSERVATISM IN AMERICA, *supra* note 23, at 51, 72–74 (contrasting his libertarian position with “traditional conservative or neoconservative approaches”). I use their work here for two reasons. First, their writings provide an illuminating account of the libertarian principles that have come to form an integral element of the jurisprudence of conservative judges. Second, with regard to many of the issues discussed here, the work of these theorists reasonably may be regarded as part of the broader American conservative movement described above. *See supra* text accompanying notes 23–24.

²⁶ For a valuable exploration of this history, see GEORGE H. SMITH, THE SYSTEM OF LIBERTY: THEMES IN THE HISTORY OF CLASSICAL LIBERALISM (2013). A collection of libertarian writings may be found in THE LIBERTARIAN READER: CLASSIC AND CONTEMPORARY WRITINGS FROM LAO-TZU TO MILTON FRIEDMAN (David Boaz ed., 1997).

²⁷ Some contemporary libertarian theory is rooted in the natural rights tradition. *See, e.g.*, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998) [hereinafter BARNETT, STRUCTURE OF LIBERTY]; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) [hereinafter NOZICK, ANARCHY]. Other theorists defend libertarian positions from a utilitarian or economic perspective. *See, e.g.*, LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS (Bettina Bien Greaves ed., Liberty Fund 1996). Still other theorists draw on both traditions. *See, e.g.*, RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW chs. 3–4 (2011) [hereinafter EPSTEIN, DESIGN FOR LIBERTY]; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 334–38 (1985) [hereinafter EPSTEIN, TAKINGS]. For the most part, these different theories accept the general principles described in this Section, although they may take varying routes to establishing them.

“free, equal, and independent.”²⁸ The freedom of the individual is rooted in her capacity to think for herself.²⁹ For the most part, however, the conservative-libertarian account of freedom is oriented toward the external world. In a broad sense, freedom consists of the ability to control one’s body, to direct one’s actions, and to acquire, possess, and dispose of external things, all without unwarranted interference from others.³⁰ In classical terms, these are the rights of life, liberty, and property.³¹

On the conservative-libertarian view, individuals also are equal. This equality is understood in formal terms: although individuals differ in many respects, such as in their abilities and social status and the amount of property they possess, they are equal in the sense that each has the same claim to liberty, as well as a right to equal protection and treatment under the law.³² By contrast, libertarians often reject an ideal of substantive or material equality on the ground that “liberty . . . is . . . bound to produce inequality in many respects.”³³

Finally, individuals are separate and independent. No one is naturally subject to or dependent upon the will of another.³⁴ Instead, every individual should be free to pursue his own good so long as he does not injure other people.³⁵

Following G.W.F. Hegel, I shall refer to this conception of the self as one of “inherent[.]” or “separate” or “exclusive” individuality.³⁶ Individuality is “exclusive” in the sense that the individual defines herself as sharply separate and distinct from other persons, as well as from the external world.³⁷

²⁸ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, § 95 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698) [hereinafter *LOCKE, GOVERNMENT*]; see also, e.g., EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 25, at 18 (adopting this formulation).

²⁹ See *LOCKE, GOVERNMENT*, *supra* note 28, bk. II, § 63; JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* bk. II, ch. XXI (Peter H. Nidditch ed., Clarendon Press 1975) (1700) [hereinafter *LOCKE, HUMAN UNDERSTANDING*].

³⁰ See *LOCKE, GOVERNMENT*, *supra* note 28, bk. II, §§ 4, 57.

³¹ See *id.* bk. II, § 123.

³² See, e.g., *id.* bk. II, §§ 4, 22, 54, 59, 142; HAYEK, *supra* note 25, at 148–49.

³³ HAYEK, *supra* note 25, at 148.

³⁴ See *LOCKE, GOVERNMENT*, *supra* note 28, bk. II, § 4.

³⁵ See, e.g., JOHN STUART MILL, *ON LIBERTY* 16 (Prometheus 1986) (1859); HERBERT SPENCER, *SOCIAL STATICS* 22–28 (1851); JOHN TRENCHARD & THOMAS GORDON, *CATO’S LETTERS* No. 15, at 110 (Ronald Hamowy ed., Liberty Fund 1995) (1755).

³⁶ G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 34 (Allen W. Wood ed., H. B. Nisbet trans., Cambridge Univ. Press 1991) (1820) (describing this conception of the will as “the *inherently individual* . . . will of a *subject*” or “*exclusive individuality*”); *id.* § 258, at 278 (describing it as “*separate individuality*”).

³⁷ *Id.* § 34.

To be clear, this notion of separate individuality does not necessarily mean that libertarians view individuals as atomistic or asocial.³⁸ Liberty includes the freedom to associate or interact with others.³⁹ Individuals may choose to form social relationships or to enter into contracts for mutual benefit.⁴⁰ From a libertarian perspective, however, the crucial point is that such actions are voluntary.⁴¹ There are no inherent bonds of connection between individuals that could make them responsible for one another. It follows that they may not properly be coerced to act for the benefit of others, for example, by rescuing a person in danger.⁴² On these grounds, libertarians often support the traditional rule of Anglo-American tort and criminal law that individuals generally have no affirmative duties toward others.⁴³

The conservative libertarians' vision of society flows from their conception of the individual. Society is composed of separate and independent individuals, who pursue their own interests and engage in voluntary interactions with others. Individual freedom includes the liberty to engage in economic activity.⁴⁴ A free market respects this liberty while at the same time coordinating the self-interested actions of individuals in a manner that promotes aggregate social welfare.⁴⁵ For these reasons, the market is one of the central institutions of a free society.

2. The Nature of Liberty and the State

Conservative libertarians understand liberty primarily in negative terms, as the absence of coercion or interference.⁴⁶ This conception of liberty applies not only to interactions between individuals but also to the relationship between individuals and the state.⁴⁷

³⁸ See, e.g., BARNETT, *LOST CONSTITUTION*, *supra* note 24, at 83–84; DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 127–28 (1997); EPSTEIN, *DESIGN FOR LIBERTY*, *supra* note 27, at 15–16; HAYEK, *supra* note 25, at 141.

³⁹ See, e.g., MILL, *supra* note 35, at 19.

⁴⁰ See, e.g., EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 25, at 337–40, 440.

⁴¹ See, e.g., BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 27, at 64–66; BOAZ, *supra* note 38, at 127–28.

⁴² See, e.g., NOZICK, *ANARCHY*, *supra* note 27, at ix.

⁴³ See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198–200 (1973) [hereinafter Epstein, *Strict Liability*]; Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980).

⁴⁴ See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 8–9 (rev. ed. 1982).

⁴⁵ See *id.* at 12–15.

⁴⁶ See, e.g., HAYEK, *supra* note 25, at 57–58, 69–70; Eric Mack, *Individual Rights*, in THE ENCYCLOPEDIA OF LIBERTARIANISM 244, 246 (Ronald Hamowy et al. eds., 2008) [hereinafter Mack, *Individual Rights*].

⁴⁷ See, e.g., EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 25, at 35, 311–13.

The conservative-libertarian attitude toward the state is a deeply ambivalent one.⁴⁸ Individuals need the state to secure their rights and to defend the society against foreign attack, as well as to establish and enforce the rules that the free market requires to function, such as the law of property and contracts.⁴⁹ For these purposes the state must be invested with considerable force. Yet the existence of a powerful state itself poses a substantial danger to liberty.⁵⁰ Accordingly, one of the overriding goals of conservative libertarianism is to protect the negative liberty of individuals against the power of the state.⁵¹

3. Law, the Constitution, and the Courts

This brings us to the Constitution. Just as a principal function of laws is to protect individuals from private wrongdoing, a primary function of constitutions is to safeguard their freedom against the state itself. The Constitution of the United States seeks to accomplish this not only by expressly placing certain rights beyond the government's power to infringe but also by dividing power between the different branches of the federal government, as well as between that government and the states. In these and other ways, the Constitution is said to embody classical liberal or libertarian principles.⁵²

Everything turns, however, on the way in which the Constitution is interpreted. For many conservative libertarians, it is essential that the Constitution be viewed as a fixed document with an objective meaning.⁵³ These requirements flow from their understanding not only of the Constitution but also of law itself. The role of law is to regulate the external interaction of free, equal, and independent individuals. To do so, the law must impose external, objective, formal rules that define the rights of individuals and forbid their violation.⁵⁴ These rules should be made as "clear and definite" as possible so as to promote equality, uniformity, and predictability and to minimize arbitrariness in application.⁵⁵ The rules may be derived from conceptions of natural law or morality, or they may be purely positive in origin. In either case,

⁴⁸ See *id.* at 4, 17–18.

⁴⁹ See *id.* at 18–19; HAYEK, *supra* note 25, at 206–09, 338.

⁵⁰ See, e.g., EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 25, at 17–18.

⁵¹ See, e.g., HAYEK, *supra* note 25, at 166.

⁵² See, e.g., BARNETT, LOST CONSTITUTION, *supra* note 24, ch. 3; EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 25, at xi, 45.

⁵³ See sources cited *infra* note 59.

⁵⁴ See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (developing such a theory of contracts); Epstein, *Strict Liability*, *supra* note 43 (developing such a theory of torts).

⁵⁵ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–84 (1989).

however, they must be objective rules whose basic meaning does not change over time (except through a deliberate process of legislative alteration).⁵⁶ If judges were permitted to interpret and apply these rules in accord with their own subjective values or sense of justice, that would undermine the stability and objectivity of the law and allow them to impose a sort of tyranny on others.⁵⁷

The same considerations apply to the Constitution, which is the fundamental law of the nation. Just as private individuals have an external and formal relationship to other individuals and the law, so do judges. As John Roberts explained during the hearings on his nomination to be Chief Justice, the role of a judge is to be an “umpire” who does not side with either of the parties before him, but who merely applies the existing rules in a neutral and impartial manner.⁵⁸ This view of the judicial function has led some conservatives, like Justices Scalia and Clarence Thomas, to insist that the touchstone for interpretation should be the original meaning of a constitutional provision.⁵⁹ Some other conservatives, such as Chief Justice Roberts and Justice Samuel A. Alito, Jr., may be less strongly committed to originalism.⁶⁰ But they, too, believe that constitutional interpretation should be made as objective as possible by placing strong reliance on sources such as history, tradition, and precedent.⁶¹

⁵⁶ See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 9–25 (1997) (arguing that a statute should be interpreted in accord with the meaning of the text when it was adopted).

⁵⁷ See *id.* at 17–18.

⁵⁸ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, S. HEARING 109–158, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

⁵⁹ See, e.g., SCALIA, *supra* note 56, at 37–47; Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); see also MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 164–67 (2013) (discussing originalism of Scalia and Thomas). Bruce Allen Murphy’s new biography of Scalia discusses his interpretive methods at length. See generally BRUCE ALLEN MURPHY, SCALIA chs. 10, 19, 22, 23 (2014). Overviews of the debate on originalism can be found in ORIGINALISM (Steven G. Calabresi ed., 2007) and INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990). For some sophisticated conservative-libertarian versions of this approach, see BARNETT, LOST CONSTITUTION, *supra* note 24, chs. 4–5; EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 25, at 45–54, 573–76.

⁶⁰ See, e.g., COYLE, *supra* note 59, at 69–70, 185 (suggesting that Alito is less committed to originalism than is Scalia); MURPHY, *supra* note 59, at 437, 443–44 (same); Charles W. Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 25–26, 28–29 (2011) (discussing Roberts and Alito).

⁶¹ See, e.g., Rhodes, *supra* note 60, at 22–29; *infra* text accompanying notes 75–77, 317–18 (discussing opinions of Alito in *McDonald v. City of Chicago* and Roberts in *United States v. Stevens*). *But cf. infra* text accompanying notes 170–71 (discussing Kennedy’s approach).

B. Constitutional Doctrine

Now let us explore some of the doctrines that flow from the conservative-libertarian approach to the Constitution.

1. Self-Defense and the Second Amendment Right to Bear Arms

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁶² For several decades, federal courts interpreted this provision to protect the right of states to have organized militias—an interpretation that was suggested by the Supreme Court’s 1939 decision in *United States v. Miller*.⁶³ During the late 20th century, however, some conservative and libertarian scholars mounted a sustained attack on this “collective rights” interpretation. They argued that the Second Amendment was intended at least in part to protect what Locke regarded⁶⁴ as the inalienable natural right of individuals to defend themselves against wrongful violence.⁶⁵ On this view, the Second Amendment safeguards an individual right to possess arms for self-defense and other lawful purposes.⁶⁶

In its 2008 decision in *District of Columbia v. Heller*,⁶⁷ the Court adopted this “individual rights” interpretation of the Second Amendment over strong dissents by the four liberal Justices.⁶⁸ In addition to the constitutional text, Justice Scalia’s majority opinion relied on the history of the provision, which he traced to a clause of the British Declaration of Rights of 1689 that protected the right of subjects to “have arms for their defence suitable to their conditions, and as allowed by law.”⁶⁹ According to Scalia, although this right was reserved to Protestants, “it was secured to them as individuals, according to

⁶² U.S. CONST. amend. II.

⁶³ 307 U.S. 174 (1939).

⁶⁴ See LOCKE, GOVERNMENT, *supra* note 28, bk. II, §§ 16–18, 128, 171.

⁶⁵ See, e.g., STEPHEN B. HALBROOK, THAT EVERY MAN BE ARMED (rev. ed. 2013); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1176–79 (1996); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 118–21 (1987).

⁶⁶ See sources cited *supra* note 65. For some critiques of this position and support for the opposing view, see MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY (2014); Symposium on the Second Amendment: *Fresh Looks*, 76 CHI.-KENT L. REV. 1 (2000).

⁶⁷ 554 U.S. 570 (2008).

⁶⁸ The case was initiated by “a group of libertarian activists” including Robert Levy of the Cato Institute, Chip Mellor and Clark Neily of the Institute for Justice, and Alan Gura, a practicing lawyer. MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS IN THE ROBERTS COURT 154–56 (2013).

⁶⁹ *Heller*, 554 U.S. at 592–93 (quoting Declaration of Right, 1 W. & M., ch. 2, § 7 (1689) (Eng.)).

'libertarian political principles,' not as members of a fighting force."⁷⁰ "By the time of the founding," Scalia asserted, the individual right to possess arms was recognized as "one of the fundamental rights of Englishmen."⁷¹ Both English and American writers equated it with the natural right to self-defense.⁷² According to Scalia, this is what the right meant in the first state declarations of rights as well as in the Second Amendment.⁷³ On these grounds, he struck down provisions of a District of Columbia law that effectively banned the possession of handguns within one's home.⁷⁴

Two years later, in *McDonald v. City of Chicago*,⁷⁵ the same majority, in an opinion by Justice Alito, reaffirmed *Heller*'s position that the freedom to have arms for "individual self-defense is 'the central component' of the Second Amendment right."⁷⁶ Alito further held that this freedom applies to the states through the Fourteenth Amendment on the ground that it is "deeply rooted in this Nation's history and tradition."⁷⁷

2. Economic Liberty and Property

The rights to economic liberty and property also are essential to the conservative-libertarian view. Judicial protection of these rights reached its zenith during the late 19th and early 20th centuries. In *Lochner v. New York*,⁷⁸ for instance, the Supreme Court declared that the Due Process Clause of the Fourteenth Amendment protected the liberty of individuals to work and to sell their labor to others, as well as the right of employers to purchase such labor.⁷⁹ On these premises, the majority invalidated a state maximum-hours law for bakery employees as a "mere meddlesome interference[] with the rights of the individual."⁸⁰

During this period, which became known as the *Lochner* era, a narrowly divided Court struck down a number of other state laws as violations

⁷⁰ *Id.* at 593 (quoting LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS*, 1689, at 283 (Univ. Microfilms 1981)).

⁷¹ *Id.* at 593–94.

⁷² *Id.* at 594–95.

⁷³ *Id.* at 602–03.

⁷⁴ *Id.* at 636.

⁷⁵ 130 S. Ct. 3020 (2010).

⁷⁶ *Id.* at 3036 (quoting *Heller*, 554 U.S. at 599).

⁷⁷ *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). For a rare critique of *Heller* and *McDonald* from a conservative-libertarian perspective, see EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 25, at 62–68.

⁷⁸ 198 U.S. 45 (1905).

⁷⁹ *Id.* at 56.

⁸⁰ *Id.* at 61.

of economic liberty and property rights.⁸¹ The Court also voided a number of federal statutes on the ground that they exceeded the powers delegated to Congress by the Constitution.⁸²

This path led to a historic confrontation between the Court and President Franklin Delano Roosevelt, whose New Deal was threatened by the Court's decisions.⁸³ In 1937, under intense pressure, the Court backed down.⁸⁴ It largely abandoned the doctrine of economic due process and began to recognize the power of Congress to exert broad authority over the national economy.⁸⁵

In recent decades, some libertarian scholars have sharply criticized the modern Court's hands-off approach to economic regulation and have argued for some degree of return to the constitutional doctrines of the *Lochner* era.⁸⁶ This view has attracted the support of some conservative-libertarian judges, including several members of the United States Court of Appeals for the District of Columbia Circuit.⁸⁷

⁸¹ See, e.g., *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525 (1923) (holding minimum wage law for women unconstitutional); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating law banning contracts that prevent workers from joining unions).

⁸² See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down federal law regulating labor relations in coal industry); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (voiding federal ban on interstate shipment of products made with child labor).

⁸³ See ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 117 (Sanford Levinson rev., 5th ed. 2010).

⁸⁴ *Id.* at 117–18.

⁸⁵ *Id.* at 117–19.

⁸⁶ One leader of this school of thought is Richard Epstein, whose 1985 book *Takings* presented a strong argument for this view. See EPSTEIN, *TAKINGS*, *supra* note 27. For some other works in this vein, see BARNETT, *LOST CONSTITUTION*, *supra* note 24; DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (2d ed. 2006). For criticisms of this movement, see CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005); Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., Apr. 17, 2005, available at http://www.nytimes.com/2005/04/17/magazine/17CONSTITUTION.html?_r=0.

⁸⁷ See, e.g., *Hettinga v. United States*, 677 F.3d 471, 480–83 (D.C. Cir. 2012) (Brown, J., joined by Sentelle, J., concurring), *cert. denied*, 133 S. Ct. 860 (2013); *id.* at 483 (Griffith, J., concurring); Douglas H. Ginsburg, *Delegation Running Riot*, 18 REG. 83, 84 (1995) (referring to substantive due process, takings, federalism, and several other constitutional doctrines as aspects of “the Constitution-in-exile,” which were “banished for standing in opposition to unlimited government,” but whose “memory . . . is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their lifetimes”).

To the disappointment of some conservative libertarians, this agenda has not made dramatic headway in the Supreme Court.⁸⁸ The conservative Justices have made no effort to revive the doctrine of economic due process, in part because some of them, such as Justices Scalia and Thomas, believe that it makes no sense to find any substantive protections in the Due Process Clause.⁸⁹

At the same time, however, the conservative Justices have sought to reinvigorate provisions, such as the Takings Clause of the Fifth Amendment, that they regard as providing a stronger textual basis for economic rights. For example, in *Lucas v. South Carolina Coastal Council*,⁹⁰ Justice Scalia held that the Clause applied not only to physical takings but also to some forms of environmental regulation that impose restrictions on property rights.⁹¹ In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,⁹² he wrote a plurality opinion that would have extended the Clause to state judicial opinions that narrowed existing property rights. And in the best-known and most controversial case, *Kelo v. City of New London*,⁹³ four conservatives interpreted the Clause to bar takings for the purpose of allowing economic redevelopment by private developers⁹⁴—a position that fell one vote short in the high court itself, but that ignited a powerful and highly successful national movement to restrict the power of eminent domain.⁹⁵

⁸⁸ See Jeffrey Rosen, *Second Opinions*, THE NEW REPUBLIC (May 4, 2012), <http://www.tnr.com/article/politics/103090/magazine/conservative-judges-justices-supreme-court-obama>.

⁸⁹ See, e.g., *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3061–63 (2010) (Thomas, J., concurring in part and in judgment); SCALIA, *supra* note 56, at 24–25.

⁹⁰ 505 U.S. 1003 (1992).

⁹¹ According to one scholar, Scalia's opinion in *Lucas* "relied heavily" on an amicus brief that Richard Epstein wrote on behalf of the libertarian Institute for Justice. Michael Blumm, *Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907, 910 (1993). Epstein believed that the decision did not go far enough, however. See MICHAEL AVERY & DANIELLE McLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 59 (2013).

⁹² 560 U.S. 702 (2010).

⁹³ 545 U.S. 469 (2005).

⁹⁴ *Id.* at 494 (O'Connor, J., dissenting).

⁹⁵ See, e.g., Leonard Gilroy, *Kelo: One Year Later*, REASON FOUND. (June 21, 2006), <http://reason.org/news/show/122269.html>. In another recent case, three Justices invoked the Equal Protection Clause of the Fourteenth Amendment as a limit on the power of cities to allocate burdens among taxpayers. See *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2087 (2012) (Roberts, C.J., joined by Scalia & Alito, JJ., dissenting) (asserting that "every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context").

3. Federal Power

In a series of cases, the conservative Justices also have sought to protect economic and other forms of liberty by imposing some “outer limits” on the power of the federal government.⁹⁶ For example, the Commerce Clause empowers Congress “[t]o regulate Commerce . . . among the several States.”⁹⁷ Under the Court’s post-1937 jurisprudence, this power extends not only to commerce that crosses state lines but also to activity that has a substantial economic effect on such commerce—a doctrine that the Court has used to uphold extensive regulation of the national economy as well as laws like the Civil Rights Act of 1964.⁹⁸ In 1995, however, *United States v. Lopez*⁹⁹ struck down a federal law that banned the possession of a gun within 1,000 feet of a school. Writing for the conservative majority, Chief Justice Rehnquist held that the “substantial effects” doctrine applied only to economic activity, not to noneconomic conduct such as gun possession.¹⁰⁰ *Lopez* was the first Supreme Court decision to strike down an exercise of the Commerce Power since the New Deal. It was soon followed by *United States v. Morrison*,¹⁰¹ in which the same majority used this reasoning to invalidate a provision of the Violence Against Women Act that afforded a federal remedy to victims of sexual assault.

Most recently, in *National Federation of Independent Business v. Sebelius*,¹⁰² the Court came within a hair’s breadth of striking down the Affordable Care Act, the centerpiece of President Barack Obama’s first term and one of the most important pieces of federal social and economic legislation passed in recent decades. In a joint opinion, Justices Scalia, Kennedy, Thomas, and Alito maintained that the Commerce Clause authorized Congress to regulate only action, not inaction.¹⁰³ On this ground, they asserted that a central provision of the Act—the individual mandate—was unconstitutional because it sought to compel individuals to act by buying health insurance.¹⁰⁴ Although this position was dressed in the garb of federalism, it clearly reflected libertarian concerns at least as much as concerns with the proper distribution of

⁹⁶ *United States v. Lopez*, 514 U.S. 549, 556–57, 566 (1995).

⁹⁷ U.S. CONST. art. I, § 8, cl. 3.

⁹⁸ *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding public accommodations title of 1964 Civil Rights Act); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding federal regulation of production of wheat for home consumption).

⁹⁹ 514 U.S. 549 (1995).

¹⁰⁰ *Id.* at 559–61, 565–67.

¹⁰¹ 529 U.S. 598 (2000).

¹⁰² 132 S. Ct. 2566 (2012).

¹⁰³ *Id.* at 2644, 2649 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

¹⁰⁴ *Id.*

power between the nation and the states.¹⁰⁵ At oral argument, Justice Scalia echoed the widespread libertarian objection that if Congress could require individuals to obtain health insurance, it also could require them to “buy broccoli.”¹⁰⁶ Likewise, after referring to tort law’s traditional refusal to impose affirmative duties on individuals, Justice Kennedy asserted that, because the Affordable Care Act “requires the individual to do an affirmative act,” it “changes the relationship of the Federal Government to the individual in a very fundamental way.”¹⁰⁷ In his controlling opinion, Chief Justice Roberts joined these four Justices in holding that Congress had no power to impose the individual mandate under the Commerce Clause.¹⁰⁸ The mandate escaped invalidation only because Roberts determined that it reasonably could be understood as an exercise of Congress’s power to tax.¹⁰⁹

In recent years, the Court also has limited federal power in other ways. In *National Federation*, the five conservatives—joined this time by Justices Stephen G. Breyer and Elena Kagan—held for the first time since the New Deal that Congress had exceeded its Spending Power. The majority ruled that it was improperly coercive for Congress to provide that states could continue to receive federal Medicaid funding only if they expanded their Medicaid programs to cover more low-income people.¹¹⁰ In several other cases, including *United States v. Morrison*,¹¹¹ the conservative majority has restricted Congress’s power to enforce the Fourteenth Amendment, a power that is expressly given in Section 5 of the Amendment.¹¹² In all these ways, the

¹⁰⁵ See, e.g., LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* ch. 2 (2014); Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 *UCLA L. REV.* 66, 100–19 (2013). The challenge to the individual mandate was spearheaded by the libertarian legal scholar Randy E. Barnett, see TUSHNET, *supra* note 68, at 2, 5–11, and was supported by many conservative and libertarian organizations, see U.S. Department of Health and Human Services v. Florida, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/u-s-department-of-health-and-human-services-v-florida/> (last visited Sept. 11, 2014) (linking to numerous amicus briefs filed by such groups). For a trenchant critique of this libertarian position, see ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* (2013).

¹⁰⁶ Transcript of Oral Argument at 13, *Dep’t of Health and Human Servs. v. Florida* (2012) (No. 11-398), *decided sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Scalia, J.), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.

¹⁰⁷ *Id.* at 31–32 (Kennedy, J.).

¹⁰⁸ *Nat’l Fed’n*, 132 S. Ct. at 2585–93 (opinion of Roberts, C.J.).

¹⁰⁹ *Id.* at 2594–99 (majority opinion).

¹¹⁰ *Id.* at 2633–40 (opinion of Roberts, C.J.); *id.* at 2666–67 (Scalia, J., et al., dissenting).

¹¹¹ 529 U.S. 598 (2000).

¹¹² See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Congress had no power under Fourteenth Amendment to subject states to suit under Title I of

Justices have used the doctrine of federalism to limit national power and thereby impose barriers to the expansion of the modern regulatory and welfare state, which conservative libertarians regard with deep skepticism.¹¹³

4. Rejection of Affirmative Rights

Conservative-libertarian judges also have limited the welfare state from another direction by holding that individuals have no affirmative rights to public services or benefits. As Judge Richard A. Posner has put it:

[T]he Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.¹¹⁴

On these grounds, Judge Posner and his colleague on the Seventh Circuit, Judge Easterbrook, have held in a series of cases that the Constitution does not require the states to protect individuals against private violence or other forms of injury.¹¹⁵ In *DeShaney v. Winnebago County Department of Social Services*,¹¹⁶ a conservative majority of the Supreme Court endorsed this position.¹¹⁷ Accordingly, the Justices refused to impose liability on a county child protection agency whose officials had failed to take adequate steps to protect a young boy who was being severely abused by his father.

Americans with Disabilities Act (ADA)); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (same for Age Discrimination in Employment Act). *But see, e.g., Tennessee v. Lane*, 541 U.S. 509 (2004) (reaching contrary result for Title II of ADA).

¹¹³ Another technique for limiting the welfare state is to interpret legislation in a narrowly textualist way that defeats its larger purposes. In *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014), a divided panel of the District of Columbia Circuit held that the Affordable Care Act does not provide subsidies for individuals who buy health insurance through exchanges run by the federal government—an interpretation that could effectively eviscerate the Act. The full court subsequently voted to vacate the panel opinion and grant the government’s petition for rehearing en banc. *See Halbig v. Burwell*, No. 14-5018, 2014 U.S. App. LEXIS 17099 (D.C. Cir. Sept. 4, 2014) (per curiam). On November 7, however, the Supreme Court granted review in another case that poses the same issue, thereby setting up a momentous confrontation over the Act’s future. *See King v. Burwell*, No. 14-114, 2014 WL 3817533 (U.S. Nov. 7, 2014) (granting certiorari to *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014)).

¹¹⁴ *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (citations omitted).

¹¹⁵ *See, e.g., id.*; *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc) (Easterbrook, J.).

¹¹⁶ 489 U.S. 189 (1989), *aff’g* 812 F. 2d 298 (7th Cir. 1987) (Posner, J.).

¹¹⁷ *See id.* at 195–96.

In several earlier decisions, the Court had made clear that the government has no constitutional responsibility to provide adequate housing, education, or other services.¹¹⁸ And in two deeply controversial decisions, *Maher v. Roe*¹¹⁹ and *Harris v. McRae*,¹²⁰ the Court ruled that the government does not interfere with the reproductive freedom recognized in *Roe v. Wade*¹²¹ when it opts to provide funding for childbirth but not for abortion. Writing for the five-member majority in *Harris*, Justice Potter Stewart expressed the conservative-libertarian position in forceful terms:

[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. . . . [T]he liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice [in this context, but] it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution.¹²²

For these reasons, the government had no constitutional obligation to fund an abortion even when it was needed to protect the woman's health and when the government had chosen to fund medically necessary procedures in general. In such cases, "the fact remains that the [funding denial] leaves [the] indigent woman with at least the same range of choice . . . as she would have had if [the government] had chosen to subsidize no health care costs at all."¹²³

5. Equal Protection and Racial Equality

In the affirmative-rights cases, the conservative judges adhere to a formalist view of the state as an external entity that is removed from the people and that has no constitutional duty to remedy social ills that it did not cause. On this view, the Constitution protects individuals against the state but does not require the state to promote their good.

The same understanding of the Constitution may be found in the conservative Justices' approach to racial equality. To begin with, they support

¹¹⁸ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education); *Lindsey v. Normet*, 405 U.S. 56 (1972) (housing).

¹¹⁹ 432 U.S. 464 (1977).

¹²⁰ 448 U.S. 297 (1980).

¹²¹ 410 U.S. 113 (1973).

¹²² *Harris*, 448 U.S. at 316–18.

¹²³ *Id.* at 316–17.

the Court's 1975 holding in *Washington v. Davis*¹²⁴ that the Equal Protection Clause condemns only purposeful discrimination.¹²⁵ On this view, the government has no constitutional responsibility to remedy racial inequalities that it did not cause, or even to correct disparate effects that result from its own policies.

In recent decades, the most important debates in this area have focused on whether the government may combat racial inequality through measures such as affirmative action. In this connection, the liberal Justices maintain that there is an essential difference between race-conscious policies “which seek[] to *exclude* and [those] which seek[] to *include* members of minority races.”¹²⁶ These Justices contend that while the Equal Protection Clause bars invidious and exclusionary uses of racial criteria, it should not necessarily be held to condemn race-conscious measures that are designed to “bring the races together” or to overcome “the legacy of centuries of law-sanctioned inequality.”¹²⁷

In response, the conservative Justices question whether courts can reliably distinguish between benign and malign uses of race.¹²⁸ Even well-intentioned policies can have pernicious effects.¹²⁹ More fundamentally, the conservatives assert that the opposing view is inconsistent with “the simple command” at the heart of the Equal Protection Clause “that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”¹³⁰ Echoing Justice John Marshall Harlan's

¹²⁴ 426 U.S. 229 (1976).

¹²⁵ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372–73 (2001) (applying this principle to disability discrimination); *McCleskey v. Kemp*, 481 U.S. 279, 292–93, 297–98 (1987) (applying it to racial disparities in capital punishment); see also *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (contending that just as the Equal Protection Clause is not violated by race-neutral laws that disproportionately impact racial minorities, the Free Exercise Clause is not violated by religiously neutral laws that incidentally restrict religious liberty).

¹²⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 830 (2007) (Breyer, J., dissenting).

¹²⁷ *Id.* at 829; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2434 (2013) (Ginsburg, J., dissenting) (citation omitted) (internal quotation marks omitted); see also *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1672 (2014) (Sotomayor, J., dissenting) (endorsing these views).

¹²⁸ See, e.g., *Parents Involved*, 551 U.S. at 742 (plurality opinion of Roberts, C.J.).

¹²⁹ See *id.* at 759 (Thomas, J., concurring); see also *Schuette*, 134 S. Ct. at 1638–39 (Roberts, C.J., concurring).

¹³⁰ *Parents Involved*, 551 U.S. at 730 (plurality opinion) (citations omitted) (internal quotation marks omitted); see also *id.* at 742–43 (defending the “fundamental principle” “that the Equal Protection Clause ‘protect[s] persons, not groups’”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235 (1995)).

classic dissent in *Plessy v. Ferguson*,¹³¹ the conservatives are inclined to hold that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”¹³²

The approach that these Justices take to affirmative action is consistent with conservative-libertarian theory in several ways. First, their view that all individuals must be treated the same regardless of race accords with the conservative-libertarian conception of the self. This conception is abstract and formal in the sense that it disregards the particular characteristics of persons, such as their race, ethnicity, and social standing, and instead conceives of them as free and equal individuals who have identical rights under the law.¹³³ Second, the conservatives’ rejection of the liberal claim that affirmative action can advance the public good by promoting a more just and inclusive society is consistent with what I have called separate or exclusive individuality—the view of individuals as separate from, and in competition with, one another—as well as with the view that society is merely an aggregation of these separate individuals rather than a larger whole with a common good.¹³⁴ From this perspective, a system of admissions or employment decisions can only be a zero-sum game in which any benefits granted to some individuals are wholly offset by losses to others. Finally, these Justices’ opposition to affirmative action reflects the conservative-libertarian view of the state as separate and apart from the society. On this view, the state has an obligation to maintain a position of detached neutrality with regard to competing individuals and groups rather than to take sides between them based on a substantive view of the society’s history, of current social conditions, or of what an appropriate social order would look like.

6. States’ Rights

Just as conservative libertarians believe that the state must treat individuals as free, equal, and independent, they hold that the federal government must treat the states in the same way. In cases like *New York v. United States*¹³⁵ and *Printz v. United States*,¹³⁶ the conservative Justices have breathed new life into the Tenth Amendment and the concept of state

¹³¹ 163 U.S. 537 (1896).

¹³² *Id.* at 559 (Harlan, J., dissenting). For opinions in which the conservative Justices quote this statement with approval, see *Parents Involved*, 551 U.S. at 730 n.14 (plurality opinion); *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring).

¹³³ See *supra* text accompanying notes 28–33; see also HEGEL, *supra* note 36, §§ 6, 37, 209.

¹³⁴ See *supra* text accompanying notes 34–45.

¹³⁵ 505 U.S. 144 (1992).

¹³⁶ 521 U.S. 898 (1997).

sovereignty and have used them to limit the federal government's power to impose burdens on the states and their officers.¹³⁷

In one of the most dramatic recent decisions, *Shelby County v. Holder*,¹³⁸ the Court struck down a provision of the Voting Rights Act of 1965 that established a formula under which states and localities with a history of racial discrimination were required to submit changes in their voting laws to the Justice Department or a federal court for preclearance. In an opinion joined by his four conservative colleagues, Chief Justice Roberts described the preclearance system as a “dramatic departure” from two of “the basic features of our system of government”—“the principle that all States enjoy equal sovereignty” and the principle that, under the Tenth Amendment, they retain “broad autonomy” to regulate elections.¹³⁹ Although he acknowledged that this departure had been justified by the extreme forms of discrimination that had existed in 1965, he held that the formula that determined which jurisdictions were covered was no longer rational under current circumstances.¹⁴⁰ In a powerful dissent, Justice Ginsburg insisted that the preclearance mechanism remained essential in view of “the variety and persistence of measures designed to impair minority voting rights.”¹⁴¹

One of the most remarkable things about the *Shelby County* opinion is that it stresses the adverse impact of this mechanism on the equal rights of the sovereign states while minimizing its importance for securing the equal rights of voters. We can shed some light on this paradox by considering the Court's decision in light of conservative-libertarian theory. As I have suggested, this theory views the states as free, equal, and independent jurisdictions subject only to the constraints of the federal Constitution. At the same time, the theory understands individual liberty and equality in formal terms. From this

¹³⁷ *New York* held that Congress may not “commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” 505 U.S. at 178 (alteration in original) (quoting *FERC v. Mississippi*, 456 U.S. 742, 764–65 (1982)). *Printz* held that Congress may not “conscript[] state officers” to enforce federal laws. 521 U.S. at 925, 935.

¹³⁸ 133 S. Ct. 2612 (2013).

¹³⁹ *Id.* at 2618, 2623–24.

¹⁴⁰ *Id.* at 2624–25, 2627–31.

¹⁴¹ *See id.* at 2633, 2651 (Ginsburg, J., dissenting) (citation omitted) (internal quotation marks omitted). After the ruling was handed down, “[s]tate officials across the South . . . aggressively move[d]” to enforce or adopt laws that might have the effect of reducing minority voting, such as laws requiring voters to show photo identification or reducing the number of early voting days. *See* Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, July 5, 2013, http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html?pagewanted=all&_r=0. Thus far, efforts to strengthen the Voting Rights Act in the wake of the *Shelby County* decision have made little headway in Congress. *See* Greg Gordon, *A Year Later, Holder, Civil Rights Groups Decry Impact of Voting Rights Ruling*, MCCLATCHYDC (June 25, 2014), <http://www.mcclatchydc.com/2014/06/25/231505/a-year-later-holder-civil-rights.html?sp=/99/104/#storylink=cpy>.

perspective, racial minorities should not receive special protection or be treated as wards of the federal government in the absence of the strongest showing of necessity. In this way, the conservative-libertarian approach led the Court to a decision that is defensible on paper but that can only be described as reflecting a “dramatic departure” from political reality, in which some states and localities actively seek to make it more difficult for minorities to vote.

7. Libertarianism and Social Conservatism: Religious Liberty, Abortion, and Sexual Orientation

Libertarianism does not claim to be a comprehensive theory of human life. It provides an account of the rights people have, but not of the goods they should pursue or the moral standards they should follow.¹⁴² For such an account, libertarians must look elsewhere.

The judges we are discussing tend to be social conservatives as well as libertarians. In some situations, these two strands of conservative thought are quite compatible with one another. The best recent example is *Burwell v. Hobby Lobby Stores, Inc.*,¹⁴³ in which three corporations, and the families who owned them, challenged federal regulations that implemented the ACA and that required company health insurance plans to cover all methods of contraception approved by the Food and Drug Administration—including methods that the plaintiffs believed could cause abortion in violation of their religious beliefs.¹⁴⁴ Over a forceful dissent by Justice Ginsburg,¹⁴⁵ Justice Alito and his conservative colleagues ruled (1) that closely held corporations were “person[s]” whose “exercise of religion” was protected by the Religious Freedom Restoration Act of 1993 (RFRA);¹⁴⁶ and (2) that the plaintiffs were entitled to an exemption under the RFRA because the government was unable to meet the statute’s “exceptionally demanding” standard for an infringement of religious liberty: even assuming that the government had a compelling interest in ensuring that female employees had access to contraception, there were less restrictive means of achieving that goal.¹⁴⁷

In *Hobby Lobby*, the majority was able to protect its conception of private liberty while also siding with parties that held a traditionalist view of

¹⁴² See, e.g., BARNETT, STRUCTURE OF LIBERTY, *supra* note 27, at 12–15.

¹⁴³ 134 S. Ct. 2751 (2014).

¹⁴⁴ *Id.* at 2761–67.

¹⁴⁵ *Id.* at 2787–806 (Ginsburg, J., dissenting).

¹⁴⁶ 42 U.S.C. §§ 2000bb to 2000bb–4 (1993); *Hobby Lobby*, 134 S. Ct. at 2767–75. The quoted language appears in § 2000bb–1(a).

¹⁴⁷ *Hobby Lobby*, 134 S. Ct. at 2779–85.

morality. In situations like this, the libertarian and social-conservative elements of conservative thought work in tandem with one another.¹⁴⁸

In other situations, however, these two elements may clash. The abortion cases provide a classic example. In *Roe v. Wade*,¹⁴⁹ the Supreme Court held that the liberty protected by the Due Process Clause of the Fourteenth Amendment was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁵⁰ Although *Roe* struck a dramatic blow for women’s reproductive freedom, it also galvanized the anti-abortion movement.¹⁵¹ During the 1980s, President Ronald Reagan appointed several pro-life Justices to the Supreme Court, which began to afford less protection to abortion rights.¹⁵² By the early 1990s, it appeared likely that the Court would overrule *Roe* and return power over abortion to the states. It was quite surprising, therefore, when the Court handed down a decision upholding

¹⁴⁸ *Hobby Lobby* also illustrates how conservative jurisprudence has recently moved in a libertarian direction. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court held that the Free Exercise Clause of the First Amendment does not permit government to substantially burden an individual’s religious practice except where necessary to promote a compelling interest. During the 1980s, the conservative Justices increasingly cut back on this protection. *See, e.g.,* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988) (declining to apply compelling-interest test to “incidental effects of government programs . . . which have no tendency to coerce individuals into acting contrary to their religious beliefs”); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (adopting rational-basis standard for rules that restrict religious liberty of inmates); *Goldman v. Weinberger*, 475 U.S. 503, 507–08 (1986) (applying deferential review to military regulations that impact religious liberty of service members). This process culminated in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which virtually overruled *Sherbert*. Writing for the *Smith* majority, Justice Scalia declared that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Id.* at 879 (citation omitted) (internal quotation marks omitted). Three years later, Congress enacted the RFRA for the avowed purpose of reinstating the *Sherbert* test. *See* RFRA, 42 U.S.C. § 2000bb(b)(1). In 1997, however, a largely conservative majority in *City of Boerne v. Flores*, 521 U.S. 507 (1997), reaffirmed *Smith* and held the RFRA unconstitutional as applied to the states, although the statute was left intact as applied to the federal government, *see* *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423–24 & n.1 (2006).

Hobby Lobby thus represents a striking change in the conservative Justices’ position. *Smith*’s restrictive reading of the Free Exercise Clause may be said to reflect a traditional conservative view that upholds the power of the state to restrict liberty so as to promote social order. By contrast, in *Hobby Lobby*, the conservatives interpreted the RFRA in an expansive way to protect private liberty against the government—an interpretation that reflects a libertarian stance at the same time that it also has the effect of protecting the traditionalist values held by the plaintiffs.

¹⁴⁹ 410 U.S. 113 (1973).

¹⁵⁰ *Id.* at 153.

¹⁵¹ *See* DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 600–20 (1994).

¹⁵² *Id.* at 667–72.

abortion rights in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁵³

The *Casey* decision resulted from a split between the two strands of conservative jurisprudence. The social conservative position was articulated most forcefully by Justice Scalia in a dissenting opinion joined by Chief Justice Rehnquist and Justices Thomas and Byron R. White.¹⁵⁴ Although Scalia expressed some sympathy for the pro-life position,¹⁵⁵ he did not rest his legal position on that ground. Instead, he maintained that the issue of when life begins could not be resolved through the use of reason, but involved a “value judgment” that should be made by the people through the democratic process.¹⁵⁶ He concluded that *Roe* should be repudiated because it took this decision away from the people in the name of a right to abortion that could be found neither in the text of the Constitution nor in the traditions of the American people.¹⁵⁷

By contrast, Justices Kennedy, Sandra Day O’Connor, and David H. Souter took a more libertarian position. In a joint opinion, they too indicated some sympathy for the pro-life view, noting that “[s]ome of us as individuals find abortion offensive to our most basic principles of morality.”¹⁵⁸ As judges, however, their obligation was “to define the liberty of all, not to mandate our own moral code.”¹⁵⁹ “At the heart of liberty,” they declared, “is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁶⁰ Accordingly, the Court had long held that the Constitution protects individual “decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹⁶¹ “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”¹⁶² Concluding that the right to terminate a pregnancy fell within this category, the three Justices voted to reaffirm *Roe*’s “central holding” that a woman has a constitutional right “to choose to have an abortion before viability and to obtain it without undue interference from the State,” although they modified *Roe* to allow states greater

¹⁵³ 505 U.S. 833 (1992).

¹⁵⁴ *Id.* at 979 (Scalia, J., dissenting).

¹⁵⁵ *See id.* at 982 (“The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life.*”).

¹⁵⁶ *Id.* at 979, 982–84, 995, 999–1002.

¹⁵⁷ *Id.* at 980–81.

¹⁵⁸ *Id.* at 850 (opinion of Kennedy, O’Connor & Souter, JJ.).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 851.

¹⁶¹ *Id.*

¹⁶² *Id.*

leeway to regulate the procedure.¹⁶³ Their position prevailed with the support of Justices Harry A. Blackmun and John Paul Stevens, who would have accorded stronger constitutional protection to reproductive choice.¹⁶⁴

The same tension between the libertarian and traditionalist strands of conservative jurisprudence appears in the Court's three major decisions on sexual orientation and the Constitution: *Romer v. Evans*,¹⁶⁵ a challenge to a Colorado referendum measure that forbade the state and its localities to protect gay and lesbian people against discrimination; *Lawrence v. Texas*,¹⁶⁶ an attack on a state law that criminalized homosexual sodomy; and *United States v. Windsor*,¹⁶⁷ an effort to overturn section 3 of the Defense of Marriage Act, which denied federal recognition to same-sex marriages that were valid under state law. In all three cases, Justice Scalia, writing for himself and some fellow conservatives, contended that the people have a right to make laws based on a traditional view of sexual morality, while Justice Kennedy wrote a majority opinion invalidating the measure on the ground that it was inconsistent with the liberty and dignity of gay and lesbian people and was motivated by animus against them.¹⁶⁸

In these cases, Scalia and Kennedy disagree not only about substantive matters but also about the proper approach to constitutional interpretation. Scalia's approach focuses on original meaning, history, and tradition.¹⁶⁹ In some cases, such as those involving the Establishment Clause, Kennedy shares this perspective.¹⁷⁰ But in other cases, Kennedy insists that constitutional interpretation must be responsive to contemporary understandings of human freedom and dignity. As he puts it in *Lawrence*: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."¹⁷¹

¹⁶³ *Id.* at 846, 853.

¹⁶⁴ *Id.* at 911 (Stevens, J., concurring in part and dissenting in part); *id.* at 930 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

¹⁶⁵ 517 U.S. 620 (1996).

¹⁶⁶ 539 U.S. 558 (2003).

¹⁶⁷ 133 S. Ct. 2675 (2013).

¹⁶⁸ *See, e.g., Lawrence*, 539 U.S. at 567 (Kennedy, J.); *id.* at 590, 599–603 (Scalia, J., dissenting).

¹⁶⁹ *See supra* text accompanying notes 59, 157; *see also infra* text accompanying notes 561–71.

¹⁷⁰ *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (Kennedy, J.) (holding that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings'" (quoting *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

¹⁷¹ *Lawrence*, 539 U.S. at 578–79. Kennedy takes a similar position in his decisions restricting capital punishment. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 560–61, 578 (2005) (emphasizing that the Constitution contains "broad provisions to secure individual freedom and

III. THE CONSERVATIVE-LIBERTARIAN APPROACH TO THE FIRST AMENDMENT

Now I want to look at the ways in which conservative judges have reshaped First Amendment jurisprudence. In Section A, I explore several of the key decisions that define the conservative-libertarian approach: *Citizens United*, *McCutcheon*, *Hudnut*, *R.A.V.*, and *Dale*. In these cases, the conservative Justices use the First Amendment to defend their conception of individual liberty against the imposition of social and political norms. In Section B, I discuss how the tension between libertarianism and social conservatism plays out in the First Amendment area. Section C examines areas in which the conservatives recognize broader state authority, such as speech on public property and within governmental institutions. Section D describes one of the central achievements of the conservative-libertarian approach: the extension of First Amendment protection to religious speech in public schools and universities. The Part concludes by outlining the main features of the conservative-libertarian approach and by examining the ways in which it resembles the jurisprudence of the *Lochner* era.¹⁷²

preserve human dignity,” and that the Eighth Amendment must be interpreted in accord with “the evolving standards of decency that mark the progress of a maturing society”) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

¹⁷² For some works that reflect a conservative-libertarian approach to the First Amendment, see DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* (2003); JONATHAN W. EMORD, *FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT* (1991); EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 25, chs. 24–28; GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (2014); JONATHAN RAUCH, *KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT* (expanded ed. 2014); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000). Previous discussions of the conservative-libertarian approach include STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 121–30 (1999) (exploring politics of free speech); Victoria Baranetsky, *The Economic-Liberty Approach of the First Amendment: A Story of American Booksellers v. Hudnut*, 47 HARV. C.R.-C.L. L. REV. 169 (2012); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383–84, 386–87, 393, 423 (describing “ideological drift” that has increasingly led conservatives to defend free speech); Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373, 1374, 1389–93 (2007) (discussing opposition of conservative-libertarian scholars to media-access rights); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993) (arguing that there has been “a rightward shift in the political center of gravity of free speech argumentation”); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155–63 (2010) (describing a libertarian position that underlies *Citizens United*, *R.A.V.*, and protection for commercial speech).

A. *Defending a Libertarian Conception of Freedom*

1. Money and Politics: *Citizens United v. FEC* and *McCutcheon v. FEC*

Among the most recent and best known of the major conservative-libertarian decisions is *Citizens United v. FEC*.¹⁷³ In January 2008, Citizens United, a conservative public interest group with libertarian leanings, released *Hillary: The Movie*, a forceful attack on Senator Hillary Rodham Clinton of New York, who was then a leading candidate for the 2008 Democratic presidential nomination. Because Citizens United was a nonprofit corporation, it was concerned that its plans to advertise the movie on television and to show it on video-on-demand might run afoul of a provision of the Bipartisan Campaign Reform Act of 2002—popularly known as McCain-Feingold—that prohibited corporations and unions from using general treasury funds to make election-related communications close to an election.¹⁷⁴ For this reason, Citizens United brought a lawsuit in federal court, maintaining that the statute was unconstitutional as applied to its plans to promote and show the film.¹⁷⁵

After the case was argued in the Supreme Court, the Justices took the highly unusual step of ordering a reargument at which the parties were directed to address a much broader issue: whether the federal ban on election-related speech by corporations—a ban that in one form or another had existed since 1947—violated the First Amendment.¹⁷⁶ In January 2010, the Court issued a dramatic five-to-four decision that struck down the ban. Writing for the conservative majority, Justice Kennedy ruled that the law was invalid because it had both the purpose and the effect of suppressing political speech at the core of the democratic process.¹⁷⁷

The view that free speech is essential to democracy has long been a key part of First Amendment jurisprudence. Classic statements of this view may be found in the judicial opinions of Justice Louis D. Brandeis and the writings of

¹⁷³ 558 U.S. 310 (2010).

¹⁷⁴ Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (2002) (codified at 2 U.S.C. § 441b (2000)).

¹⁷⁵ See *Citizens United*, 558 U.S. at 321.

¹⁷⁶ See *id.* at 322.

¹⁷⁷ See *id.* For some earlier conservative-libertarian decisions in the same vein, see *Davis v. FEC*, 554 U.S. 724 (2008) (striking down McCain-Feingold’s “Millionaire’s Amendment,” which relaxed campaign-finance limits for opponents of self-financing candidates); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (invalidating McCain-Feingold’s restriction on corporate “issue advocacy” advertisements prior to election); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (holding that state may not prohibit business corporations from making contributions or expenditures to influence voter referenda).

the philosopher Alexander Meiklejohn.¹⁷⁸ On this view, a central purpose of the First Amendment is to protect the ability of free and equal citizens to deliberate with one another about the common good. In this way, they are enabled to reach well-informed and reasoned judgments about public policy and to enjoy the freedom and dignity that derive from participation in democratic self-government.¹⁷⁹

At first glance, the majority opinion in *Citizens United* appears to be based squarely on this view. As Justice Kennedy explains, “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”¹⁸⁰ This right has its “fullest and most urgent application” in the electoral context, for “[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”¹⁸¹ Corporations as well as individuals should have “the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”¹⁸² Moreover, both individuals and corporations are capable of “contribut[ing] to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.”¹⁸³ Under the Constitution, it is for “the people” and not the government “to judge what is true and what is false.”¹⁸⁴ For these reasons, a ban on corporate electoral speech violates the First Amendment.

If we examine the majority opinion more closely, however, we can see that it ultimately rests not on the Brandeis-Meiklejohn view but on the conservative-libertarian understanding of personhood, society, and the state that I described in Part II. To begin with, while Brandeis and Meiklejohn hold a substantive conception of individuals in the political sphere as democratic citizens who are concerned with the public good, the *Citizens United* opinion is based on an abstract and formal conception of the person—a conception that is so abstract that it sees no distinction, in this context, between “natural persons” and business corporations.¹⁸⁵ Instead, the majority holds that both are entitled to the same rights under the Constitution.

At several points, the majority seeks to shore up this position by describing a corporation as merely an “association[] of citizens,” which should

¹⁷⁸ See *Whitney v. California*, 274 U.S. 357, 373–75 (1927) (Brandeis, J., concurring); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

¹⁷⁹ See, e.g., MEIKLEJOHN, *supra* note 178, at 24–28, 68–70.

¹⁸⁰ *Citizens United*, 558 U.S. at 339.

¹⁸¹ *Id.* at 339 (citations omitted) (internal quotation marks omitted).

¹⁸² *Id.* at 340–41.

¹⁸³ *Id.* at 342–43 (citations omitted) (internal quotation marks omitted).

¹⁸⁴ *Id.* at 355.

¹⁸⁵ *Id.* at 343.

have the same rights as the individuals who compose it.¹⁸⁶ But this usage is no less abstract. The Justices in *Citizens United* make no effort to elaborate on this notion by discussing the nature of the associations, the members who compose them, the purposes for which they are formed, or the procedures by which they operate. Although there is a sense in which a corporation is an association, it is a very different sense than what the term usually connotes in this context: a group of individuals who band together to promote their political views, or a public interest group such as the Sierra Club or the National Rifle Association. In contrast to these organizations, which are formed for political or ideological purposes, business corporations are formed for economic purposes. Whether a business corporation should be regarded as an “association of citizens” that is entitled to full political participation depends on the answer to two questions: (1) whether the individuals who form or invest in the corporation authorize it to represent them in the political—and specifically the electoral—realm, and (2) whether the polity, in establishing a mechanism for the creation of such corporations, has authorized them to act in this realm. Clearly, the answer to these questions will turn on one’s view of the relationship between the economic and political domains.

This brings us to the most fundamental difference between the classic democratic self-government view and the conservative-libertarian view that underlies *Citizens United*. For Brandeis and Meiklejohn, citizens have two different capacities: their capacity as private persons with their own particular interests, including their economic interests, and their capacity as citizens.¹⁸⁷ By the same token, there is a basic difference between the private and the public sphere.

The majority opinion in *Citizens United* tends to efface these distinctions. Instead, it sees personhood, property rights, and political participation as closely connected. In a remarkable passage, Kennedy implies that an individual’s wealth is part of his “identity.”¹⁸⁸ It follows that the government may not limit an individual’s ability to use his wealth to engage in political speech, for such a limit would violate the principle “that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”¹⁸⁹

¹⁸⁶ *Id.* at 349, 354, 356; *see also id.* at 386, 392–93 (Scalia, J., concurring). For a similar view, see EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 25, at 454–55. In *Hobby Lobby*, the majority goes even further in identifying corporations with “the people” who are associated with them. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). For a powerful critique of this position as it relates to religious liberty, *see id.* at 2793–97 (Ginsburg, J., dissenting).

¹⁸⁷ *See* MEIKLEJOHN, *supra* note 178, at 79–83.

¹⁸⁸ *Citizens United*, 558 U.S. at 350.

¹⁸⁹ *Id.*

In an earlier decision, *Austin v. Michigan Chamber of Commerce*,¹⁹⁰ Justice Thurgood Marshall wrote for the Court that the government could prevent corporations from using “resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.”¹⁹¹ *Citizens United* rejects this position and instead holds that all speakers have a right to use their wealth for expressive purposes.¹⁹² By denying corporations this right, “*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”¹⁹³

Of course, in both Supreme Court opinions and popular discourse, *marketplace of ideas* is often used as a general term for free and open discussion. In connection with *Citizens United*, however, the term has a more specific connotation.¹⁹⁴ The conservative Justices regard the marketplace of ideas or the “political marketplace” as analogous to—indeed as continuous with—the economic marketplace. The more money one has, the more speech one can buy. In turn, this increases one’s ability to persuade not only the public but also government officials. Kennedy acknowledges that speakers or contributors may use their wealth to gain “influence over or access to elected officials,” but argues that this is not a form of corruption that the law can seek to prevent.¹⁹⁵ Instead, it is the way the democratic system is supposed to work. “Favoritism and influence,” he writes,

are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.¹⁹⁶

On this view, the democratic process works by a sort of supply and demand in much the same way an economic market does: individuals and other participants offer contributions to, and make independent expenditures on behalf of, particular candidates, who respond by adopting the policies that their

¹⁹⁰ 494 U.S. 652 (1990).

¹⁹¹ *Id.* at 659 (citation omitted) (internal quotation marks omitted).

¹⁹² See *Citizens United*, 558 U.S. at 350–51.

¹⁹³ *Id.* at 354 (quoting *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 208 (2008)).

¹⁹⁴ For an effort to understand the marketplace of ideas in economic terms, see Richard A. Posner, *The Speech Market and the Legacy of Schenck*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 121 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

¹⁹⁵ *Citizens United*, 558 U.S. at 359.

¹⁹⁶ *Id.* (citation omitted) (internal quotation marks omitted).

supporters favor.¹⁹⁷ For the *Citizens United* majority, money plays a legitimate and indeed central role in this process. Of course, this conception of democracy is far removed from the Brandeis-Meiklejohn view. Although that view does not necessarily deny that money plays an important role in politics, it holds that democratic decisions ultimately should be made on the basis of reasoned deliberation by free and equal citizens about the common good. This is the sort of discourse that Brandeis maintains is “indispensable to the discovery and spread of political truth.”¹⁹⁸ By contrast, when *Citizens United* speaks of truth, it refers to the outcome of a market-like process in which wealthy individuals and corporations enjoy significant advantages.

Justice Kennedy does not deny that wealth confers an advantage in an unregulated political marketplace, but holds that the First Amendment does not allow the government to “equaliz[e] the relative ability of individuals and groups to influence the outcome of elections.”¹⁹⁹ Quoting *Buckley v. Valeo*,²⁰⁰ he asserts that “[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”²⁰¹

As this discussion suggests, *Citizens United* also involves a clash between two different conceptions of equality. Brandeis and Meiklejohn envision a political forum in which free and equal citizens debate matters of common concern. In *Citizens United*, the majority rejects this substantive view in favor of a formal conception of equality, in which all actors—the rich and the poor, individuals and corporations—have an equal right to use their economic resources for political purposes. It is this conception that Kennedy invokes when he asserts that McCain-Feingold unconstitutionally discriminates between speakers on the basis of their identity.²⁰²

This leads to the final difference I want to point out. As Brandeis and Meiklejohn understand it, freedom of speech has an important positive dimension—it is an essential element of the process by which democratic citizens govern themselves. To some extent, *Citizens United* also recognizes the positive value of free speech. In much of the opinion, however, this freedom is presented as a form of negative liberty. In Kennedy’s words, the First Amendment is “[p]remised on mistrust of governmental power.”²⁰³ The federal ban on corporate electoral speech amounted to a “vast” system of “censorship”

¹⁹⁷ This model is fully developed in public choice theory. See, e.g., MICHAEL HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981).

¹⁹⁸ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹⁹⁹ *Id.* at 350 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam)).

²⁰⁰ 424 U.S. 1 (1976).

²⁰¹ *Citizens United*, 558 U.S. at 349–50 (quoting *Buckley*, 424 U.S. at 48–49).

²⁰² *Id.* at 364.

²⁰³ *Id.* at 340.

which improperly sought to “control thought” by “silenc[ing] entities whose voices the Government deems to be suspect.”²⁰⁴

The difference between the two conceptions of political speech is crystalized in the Court’s most recent campaign-finance decision, *McCutcheon v. FEC*,²⁰⁵ in which the conservative majority struck down the provision of McCain-Feingold that imposed a ceiling of \$123,200 on the aggregate amount that an individual could contribute to candidates and political parties during each two-year election cycle.²⁰⁶ In the Brandeis-Meiklejohn tradition, Justice Breyer’s dissent maintained that a major purpose of the First Amendment was to protect the “collective” ability of the people to engage in political discussion and to communicate their “thoughts, views, ideas, and sentiments” to their elected representatives, “so that public opinion [can] be channeled into effective governmental action.”²⁰⁷ Because too much money can drown out the voices of “the general public,” the law should be allowed to impose limits to protect “the integrity of the electoral process.”²⁰⁸ In this way, he argued, campaign-finance laws seek “to strengthen, rather than weaken, the First Amendment.”²⁰⁹

Chief Justice Roberts’s plurality opinion flatly rejected this approach. For Roberts, the key First Amendment value at stake was not the collective interest in self-government but the individual right “to participate in democracy through political contributions.”²¹⁰ This right could not be restricted because the legislature or even the public itself believed that too much money was harmful to the democratic process, for “[t]he whole point of the First Amendment is to afford individuals protection against . . . infringements” that flow from “the will of the majority” or from its conception of the common good.²¹¹ Extending the approach of *Citizens United* from independent expenditures to campaign contributions, Roberts held that they could not be regulated “simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others.”²¹² Instead, the only legitimate basis for regulation was to prevent corruption—a concept that the plurality defined narrowly to apply only to an

²⁰⁴ *Id.* at 339, 354–56.

²⁰⁵ 134 S. Ct. 1434 (2014).

²⁰⁶ *Id.* at 1443.

²⁰⁷ *Id.* at 1466–68 (Breyer, J., dissenting).

²⁰⁸ *Id.* at 1467–68.

²⁰⁹ *Id.* at 1468.

²¹⁰ *Id.* at 1436, 1448–50 (plurality opinion).

²¹¹ *Id.* at 1449–50.

²¹² *Id.* at 1441.

effort to control official action, and not merely to “garner ‘influence over or access to’ elected officials or political parties.”²¹³

Like *Citizens United*, *McCutcheon* also placed considerable stress on the negative side of the First Amendment or the need to prevent censorship. As Roberts put it:

Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.²¹⁴

This emphasis on negative liberty comes through even more clearly in the next two cases I shall discuss: *American Booksellers Ass’n v. Hudnut* and *R.A.V. v. City of St. Paul*.

2. Pornography: *American Booksellers Ass’n v. Hudnut*

Controversy has long raged over whether the protections of the First Amendment should extend to explicit depictions of sex. Traditional Anglo-American law restricted such material on the ground that it was obscene and tended to undermine public morality.²¹⁵ During most of the 20th century, conservatives defended this traditional position while liberals argued for broader protections for freedom of expression.²¹⁶ In the 1960s, the Court gradually liberalized the law of obscenity.²¹⁷ But in 1973, under the leadership of Chief Justice Warren E. Burger, the Court returned to a more traditionalist position. In *Miller v. California*,²¹⁸ the majority held that a work could be banned as obscene if (1) it appealed to a prurient interest in sex, (2) depicted sex in a way that was “patently offensive” under the community’s standards, and (3) when taken as a whole, had no “serious literary, artistic, political, or scientific value.”²¹⁹

In the early 1980s, this longstanding debate between liberals and conservatives was transformed when two radical feminists, Catherine A. MacKinnon and Andrea Dworkin, proposed a law to restrict pornography not

²¹³ *Id.* at 1441–42, 1450–51 (quoting *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)).

²¹⁴ *Id.* at 1441.

²¹⁵ *See, e.g.*, *R v. Hicklin*, [1868] 3 Q.B. 360 (Eng.); HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY* 14–23 (1969) [hereinafter CLOR, *OBSCENITY*].

²¹⁶ *See* CLOR, *OBSCENITY*, *supra* note 215, at 14–23.

²¹⁷ *See, e.g.*, *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen.*, 383 U.S. 413 (1966).

²¹⁸ 413 U.S. 15 (1973).

²¹⁹ *Id.* at 24.

on traditional moral grounds but on the view that it undermined the equality of women and promoted discrimination and violence against them.²²⁰ In 1984, a coalition between such feminists and social conservatives led the city council of Indianapolis to adopt a version of this law.²²¹ The Indianapolis ordinance defined pornography as “the graphic sexually explicit subordination of women, whether in pictures or in words,” that also depicted women being subjected to violence or degradation, as enjoying rape, pain, or humiliation, or “as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”²²² The ordinance did not criminalize pornography, but it did impose civil sanctions on those who made, sold, or distributed such material.²²³

The ordinance was immediately challenged by a group of individuals, publishers, and civil liberties organizations. Applying conventional First Amendment analysis, the district court held the ordinance invalid on several grounds including vagueness.²²⁴ However, when the case reached the United States Court of Appeals for the Seventh Circuit, Judge Easterbrook struck down the ordinance on more provocative grounds: he accepted the city’s view that pornography causes serious harm to women, but held that the First Amendment grants absolute protection to speech that causes such harm.²²⁵

In contrast to Justice Kennedy in *Citizens United*, Easterbrook says very little about the positive values underlying the First Amendment. He does not maintain that expression should be protected because speakers are entitled to respect or because of the importance of free speech for democratic self-government. And while he refers to the traditional view that “the truth will prevail” in a “marketplace of ideas,” his support for this position is half-hearted at best.²²⁶ Easterbrook expresses deep skepticism about the idea of objective truth,²²⁷ as well as about whether the truth can overcome such irrational forces as unexamined beliefs, prejudice, self-interest, social conditioning, media bias, political propaganda, and entrenched social

²²⁰ See, e.g., Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

²²¹ See E.R. Shipp, *A Feminist Offensive Against Exploitation*, N.Y. TIMES, June 10, 1984, <http://www.nytimes.com/1984/06/10/weekinreview/a-feminist-offensive-against-exploitation.html>.

²²² *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985) (quoting Indianapolis Code § 16-3(q)), *aff’d mem.*, 475 U.S. 1001 (1986).

²²³ See *id.* at 325–26.

²²⁴ *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984).

²²⁵ See *Hudnut*, 771 F.2d at 327–32.

²²⁶ *Id.* at 330.

²²⁷ See *id.* at 331 (endorsing statement in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), that “[u]nder the First Amendment, . . . there is no such thing as a false idea”).

structures.²²⁸ In any case, he insists that speech is entitled to First Amendment protection regardless of whether it is likely to contribute to the search for truth.²²⁹

Instead of individual liberty, democratic deliberation, or the search for truth, Easterbrook understands free speech in terms of power. “Under the First Amendment,” he writes,

the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others.²³⁰

Nevertheless, “[o]ne of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful,” regardless of how much harm their acceptance might cause.²³¹

At first glance, Easterbrook’s account of speech as power seems remote from Justice Oliver Wendell Holmes’s notion that truth will emerge from the marketplace of ideas.²³² As I have shown elsewhere, however, Holmes’s own view is much like Easterbrook’s.²³³ According to Holmes, the world is governed by force. In the natural world, this takes the form of a Darwinian struggle for life in which the strongest prevail. In the social world, a similar struggle takes place between individuals, as well as between groups such as workers and employers. Law and politics also are determined by force. In a modern democracy, the majority rules not because it has any inherent right to do so, but because it—and the social groups of which it is composed—“have the power in their hands.”²³⁴ As a general matter, the majority is entitled to promote its own good and to impose its views on the rest of the society. As Holmes remarks in *Abrams v. United States*,²³⁵ it would be “perfectly logical” for the majority to take the same approach to speech and to censor any

²²⁸ *Id.* at 328–30.

²²⁹ *Id.* at 329, 330.

²³⁰ *Id.* at 327–28.

²³¹ *Id.* at 328.

²³² See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²³³ See Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 679–95 (2011) [hereinafter Heyman, *Holmes*].

²³⁴ OLIVER WENDELL HOLMES, *The Gas-Stokers’ Strike* (1873), in 1 THE COLLECTED WORKS OF JUSTICE HOLMES 504, 504 (Sheldon M. Novick ed., 1994).

²³⁵ 250 U.S. 616 (1919).

expression that interferes with its goals.²³⁶ In *Abrams*, however, he seeks to persuade people that their long-term interest is better served by abjuring this power and allowing free debate.²³⁷ Just as free trade in goods is the best way to determine what will promote the economic well-being of the society, free trade in ideas is the best way to determine which ideas will promote its political good.²³⁸ As I have suggested, however, Holmes rejects the notion that society is a unified whole that shares a common good. Instead, the society is composed of different groups who struggle for existence and power.²³⁹ Thus, when he says in *Abrams* that “the best test of truth is the power of the thought to get itself accepted in the competition of the market,” he is not asserting that free discussion will lead to an objective truth or one that can be shared by the whole community.²⁴⁰ Instead, the truth that emerges from the market will consist (as he says in a later opinion) of those beliefs that “are destined to be accepted by the dominant forces of the community.”²⁴¹

In *Hudnut*, Easterbrook expresses an essentially Holmesian view of speech and power,²⁴² yet he does not try to show that freedom of speech promotes the social good, even in the attenuated way that Holmes does. Indeed, Easterbrook stresses the deep harms that speech may cause. Why, then, should we protect freedom of speech? For Easterbrook, the answer seems to be a negative one: that however great the dangers of free speech may be, we should prefer them to the dangers posed by state regulation of speech. “Any other answer,” he writes, “leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.”²⁴³

This aspect of *Hudnut* highlights the gulf that exists between traditional conservatism and conservative libertarianism. For traditional conservatives like Sir William Blackstone, the natural condition of human beings is “wild and savage.”²⁴⁴ The function of law and civil society is not only to protect rights but also to civilize human beings.²⁴⁵ The only rational form of freedom is “civil

²³⁶ *Id.* at 630 (Holmes, J., dissenting).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See *supra* text accompanying notes 233–34.

²⁴⁰ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

²⁴¹ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). For a similar reading of Holmes, see GRABER, *supra* note 18, at 107–12.

²⁴² See Heyman, *Holmes*, *supra* note 233, at 704–05.

²⁴³ *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

²⁴⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125 (St. George Tucker ed., Philadelphia, Young & Small 1803).

²⁴⁵ See *id.*

liberty,” or that which exists within a legal and social order.²⁴⁶ For Easterbrook, on the other hand, any governmental effort to use law to affect the way that people are “socialize[d]” poses a profound threat to freedom that should be condemned as “thought control.”²⁴⁷

To guard against this danger, Easterbrook insists that the government must maintain strict ideological neutrality when it regulates speech. To this end, he invokes the First Amendment doctrine of content discrimination. As articulated in *Police Department v. Mosley*,²⁴⁸ this doctrine holds that, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²⁴⁹ The *Mosley* Court employed this principle to strike down a Chicago ordinance that banned picketing near a school but that made an exception for labor picketing.

In *Mosley*, the city discriminated between speakers based on the *subject matter* of their expression.²⁵⁰ By contrast, the city would have discriminated on the basis of *viewpoint* if it had permitted demonstrations on only one side of a disputed issue. It is generally agreed that viewpoint discrimination is the most pernicious form of content discrimination and that it strikes at the heart of the First Amendment freedom of speech.²⁵¹

This brings us to the rationale for Easterbrook’s decision to strike down the anti-pornography ordinance in *Hudnut*. The ordinance was based on the premise that pornography causes serious injury to women. Remarkably, Easterbrook does not dispute this premise, but willingly accepts it:

Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, “pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it

²⁴⁶ *Id.*

²⁴⁷ *Hudnut*, 771 F.2d at 324–25, 328–30. Of course, the traditional law of obscenity is also designed to affect “the socialization of men and women.” *Id.* at 325. In *Hudnut*, Easterbrook never questions this traditional law or explains why it poses less of a threat to liberty than the egalitarian approach taken by Indianapolis. *Id.* In this way as well, *Hudnut* reflects a conservative-libertarian position, which permits traditional restrictions on freedom while rejecting more modern or progressive ones. For further discussion of this point, see *infra* Part IV.D.

²⁴⁸ 408 U.S. 92 (1972).

²⁴⁹ *Id.* at 95–96.

²⁵⁰ *Id.* at 95.

²⁵¹ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]."²⁵²

"Yet," Easterbrook continues, "this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation"²⁵³—that is, on the impact that pornography has on the thoughts, beliefs, and attitudes of those who view it. But pornography (as defined in the ordinance) has this impact only because it reflects a particular view of women—for example, that they are mere sex objects who enjoy pain, humiliation, or rape. Under the ordinance, speech that embodies this view "is forbidden," while "[s]peech that portrays women in positions of equality is lawful, no matter how graphic the sexual content."²⁵⁴ Easterbrook concludes that "this is thought control. It establishes an 'approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not."²⁵⁵ Because it discriminates between these two different views, the ordinance is unconstitutional.

This was a remarkable use of the viewpoint-discrimination doctrine. For the most part, the material covered by the Indianapolis ordinance had little, if any, cognitive or ideological content.²⁵⁶ Moreover, the purpose of the ordinance was not to censor the expression of opinion, but to prevent what Easterbrook himself conceded to be serious harms. To bring the doctrine into play, Easterbrook first had to treat the material at issue as reflecting a particular view, so that he could then argue that the ordinance discriminated against it. Finally, he had to insist that, in regulating sexually explicit material, the state could not "prefer[]" the view that women are equal members of the community to the view that they are mere sexual objects to be used, hurt, or even killed for the pleasure of others.²⁵⁷

The MacKinnon-Dworkin ordinance suffered from serious problems of vagueness and overbreadth. For this reason, the precise grounds on which it was struck down may not seem to matter greatly. It is important to recognize, however, that *Hudnut's* viewpoint-discrimination rationale might well invalidate not only this ordinance but also any law that seeks to base the regulation of pornography not on traditional moral grounds but on the need to prevent harm to women or other groups. In all these ways, *Hudnut* is a striking

²⁵² *Hudnut*, 771 F.2d at 329 (quoting INDIANAPOLIS AND MARION COUNTY, IND. CODE § 16-1(a)(2) (1984)).

²⁵³ *Id.*

²⁵⁴ *Id.* at 328.

²⁵⁵ *Id.*

²⁵⁶ See Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606.

²⁵⁷ *Hudnut*, 771 F.2d at 325. *But see* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 211 (1987) (criticizing *Hudnut* on this ground).

example of a conservative-libertarian opinion that makes an extraordinary effort to protect its conception of individual liberty against the power of the state, as well as against regulations that are designed to promote progressive values like gender equality.

3. Hate Speech: *R.A.V. v. City of St. Paul*

Late one night in June 1990, Robert A. Victoria and several other teenagers burned a crudely assembled wooden cross in the yard of an African-American family who had recently moved into the neighborhood.²⁵⁸ Victoria was arrested and charged with violating a St. Paul, Minnesota ordinance that provided that a person is guilty of disorderly conduct, a misdemeanor, if he “places on public or private property a symbol, object, . . . or graffiti, including, but not limited to, a burning cross or Nazi swastika, which [he] knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”²⁵⁹

Before trial, Victoria moved to dismiss this charge on the ground that the ordinance violated the First Amendment. On its face, the ordinance clearly was overbroad, for speech does not lose constitutional protection merely because it “arouses anger, alarm or resentment.”²⁶⁰ However, the Minnesota Supreme Court ruled that the ordinance was limited to acts that not only were based on race, religion, or gender, but that also amounted to “fighting words”—a category of unprotected speech that was defined in *Chaplinsky v. New Hampshire*²⁶¹ as words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”²⁶² Having construed the ordinance narrowly, the state court held it consistent with the First Amendment.²⁶³

The Supreme Court of the United States reversed.²⁶⁴ In an opinion joined by four conservative colleagues, Justice Scalia adopted an approach much like that taken by Judge Easterbrook in *Hudnut*. Scalia did not discuss the positive values protected by the First Amendment or suggest that those values were promoted in any way by burning a cross on a family’s lawn. Instead, he interpreted the First Amendment to demand rigorous ideological neutrality to guard against the dangers of government censorship.²⁶⁵ He then employed the rule against content discrimination to strike down the ordinance. According to

²⁵⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

²⁵⁹ *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

²⁶⁰ *See, e.g., Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

²⁶¹ 315 U.S. 568 (1942).

²⁶² *Id.* at 572 (footnote omitted); *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).

²⁶³ *R.A.V.*, 464 N.W.2d at 511.

²⁶⁴ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

²⁶⁵ *See id.* at 382–90.

Scalia, while the government may ban *all* fighting words without violating the First Amendment, it may not ban only those fighting words that are based on race, religion, or gender, for this sort of “[s]electivity . . . creates the possibility that the city is seeking to handicap the expression of particular ideas.”²⁶⁶

This holding—which accords with the views put forward in an amicus brief submitted by the conservative-libertarian Center for Individual Rights²⁶⁷—involved a dramatic expansion of the content-neutrality doctrine. *Mosley* held that the government generally may not discriminate between different forms of *protected speech* because of their content.²⁶⁸ In *R.A.V.*, Scalia extended this rule to condemn discrimination within the realm of *unprotected speech*. This position is paradoxical to say the least. Under *Chaplinsky*, utterances such as fighting words are held unprotected on the ground that they “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁶⁹ Moreover, if the state may ban all fighting words, it is difficult to see why it may not choose to ban only the subset of fighting words that it believes to cause the greatest harm to that social interest. To show that the St. Paul ordinance posed a serious danger to First Amendment principles, Scalia was required to argue (1) that fighting words are not inherently valueless but instead are a mode of expressing broader ideas, such as hostility toward others on the basis of race, religion, or gender; and (2) that by singling out that subset of fighting words, the city actually may have been trying to suppress those broader ideas.²⁷⁰ This position is highly debatable: as Justice Stevens argued, the St. Paul ordinance, as construed, can readily be understood as an effort to focus on the most harmful kinds of fighting words.²⁷¹ Like *Hudnut*, *R.A.V.* is a classic conservative-libertarian decision which goes to great lengths to erect a barrier against what the judges perceived as an effort to impose ideological orthodoxy or “political correct[ness]” on the citizenry.²⁷²

²⁶⁶ *Id.* at 394.

²⁶⁷ Brief of Center for Individual Rights as Amicus Curiae in Support of Petitioner, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 11003954. This brief in turn relied in part on a recent opinion in which Judge Posner had discussed how the content-discrimination doctrine could be applied to unprotected speech. *See id.* at *13 (quoting *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991)). Scalia also cited *Kucharek*. *See R.A.V.*, 505 U.S. at 388.

²⁶⁸ *See supra* text accompanying notes 248–49.

²⁶⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²⁷⁰ *See R.A.V.*, 505 U.S. at 383–86, 391–96.

²⁷¹ *See id.* at 424 (Stevens, J., concurring in judgment).

²⁷² *Id.* at 415–16 (Blackmun, J., concurring in judgment) (“I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over ‘politically correct speech’ and ‘cultural diversity,’ neither of which is presented here.”).

4. Freedom of Association: *Boy Scouts of America v. Dale*

In *Boy Scouts of America v. Dale*,²⁷³ the Court extended the conservative-libertarian approach from cases involving freedom of speech to those involving freedom of association.

After a decade in Scouting, during which he rose to the rank of Eagle Scout, James Dale became an assistant scoutmaster in 1989.²⁷⁴ He first began to identify as gay the following year, when he arrived at college.²⁷⁵ In July 1990, a newspaper story described him as an officer of the Rutgers University Lesbian/Gay Alliance and interviewed him about the need for gay role models for youth.²⁷⁶ Later that month, the executive council of his local Boy Scouts of America (BSA) organization revoked his adult membership on the ground that “the Boy Scouts ‘specifically forbid[s] membership to homosexuals.’”²⁷⁷ After Dale brought a lawsuit challenging this action, the New Jersey Supreme Court ruled that the BSA was covered by a state law that forbade “public accommodations” to discriminate on the basis of a wide range of characteristics including sexual orientation.²⁷⁸ The Supreme Court of the United States reversed.²⁷⁹ Over the dissent of four liberal Justices, Chief Justice Rehnquist ruled that compelling the Scouts to accept an openly gay scoutmaster would violate the group’s First Amendment freedom of association.

We can shed some light on *Dale* by comparing it with an earlier leading decision in this area. In *Roberts v. United States Jaycees*,²⁸⁰ the Minnesota Supreme Court had ruled that a civic organization’s policy of denying membership to women violated the state’s public accommodations law. The organization then urged the United States Supreme Court to hold that this judicial decision violated the freedom of association. Writing for the Court, Justice William J. Brennan, Jr. explained that the First Amendment freedom of speech had long been understood to imply a corresponding “right to associate for expressive purposes.”²⁸¹ That right was “not absolute,” however, but could be limited “by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”²⁸² “[A]cts of invidious

²⁷³ 530 U.S. 640 (2000).

²⁷⁴ *Id.* at 644.

²⁷⁵ *Id.* at 644–45.

²⁷⁶ *Id.* at 645.

²⁷⁷ *Id.*

²⁷⁸ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

²⁷⁹ *Dale*, 530 U.S. at 644.

²⁸⁰ 468 U.S. 609 (1984).

²⁸¹ *Id.* at 623.

²⁸² *Id.*

discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils” by “depriv[ing] persons of their individual dignity and deny[ing] society the benefits of wide participation in political, economic, and cultural life.”²⁸³ Laws that ban such discrimination “plainly serve[] compelling state interests of the highest order” that are “unrelated to the suppression of expression.”²⁸⁴ In applying its public accommodations law to the Jaycees, the state had sought to achieve its ends in the least restrictive manner.²⁸⁵ Indeed, Brennan added, the Jaycees had failed to show that the admission of women as members would impose “any serious burdens” on the organization’s ability to express its views.²⁸⁶ “In any event,” he concluded, “even if enforcement of the Act causes some incidental abridgment of the Jaycees’ protected speech, that effect [is constitutionally permissible because it] is no greater than is necessary to accomplish the State’s legitimate purposes.”²⁸⁷

Although the *Dale* majority purported to use the same “compelling interest” analysis,²⁸⁸ it conducted that analysis in a very different way. To determine whether “the forced inclusion of Dale as an assistant scoutmaster” would infringe the BSA’s freedom of expressive association by significantly affecting its ability to advocate its views, the Court first had to ascertain the group’s position on homosexuality.²⁸⁹ In court cases, the Boy Scouts claimed that it had long held that homosexuality was incompatible with the Scout Oath and Law, which required members to be “morally straight” and “clean.”²⁹⁰ As Justice Stevens showed in his dissent, however, the evidence for this claim was weak.²⁹¹ The organization had rarely articulated this view outside the context of litigation.²⁹² The Oath and Law made no explicit reference to sexuality or sexual orientation.²⁹³ Indeed, the group’s publications and other statements generally indicated that sexual matters were outside the scope of the organization and that Scouts should seek guidance on such matters from their own families and religious leaders.²⁹⁴

In the face of these difficulties, Chief Justice Rehnquist suggested that it was inappropriate for the Court to conduct a searching inquiry into an

²⁸³ *Id.* at 628, 625.

²⁸⁴ *Id.* at 624.

²⁸⁵ *Id.* at 626.

²⁸⁶ *Id.* at 626–27.

²⁸⁷ *Id.* at 628.

²⁸⁸ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000).

²⁸⁹ *Id.* at 650.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 666–78 (Stevens, J., dissenting).

²⁹² *Id.* at 677–78.

²⁹³ *Id.* at 667–69.

²⁹⁴ *Id.* at 669–70.

organization's views.²⁹⁵ Instead, he simply "accept[ed]" the BSA's claims at face value and accorded "deference" not only to its "assertions regarding the nature of its expression," but also to its "view of what would impair its expression."²⁹⁶ In accord with this view, the majority agreed that the presence of an openly gay assistant scoutmaster would impair the group's expression by forcing it "to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."²⁹⁷

Under *Roberts*, the next step should have been to determine whether this interference was justified by a compelling state interest in the eradication of discrimination. In *Dale*, however, the majority subtly shifted the focus to the question whether the law would impose a substantial burden on BSA's ability to engage in expression.²⁹⁸ Having determined that it would, the majority simply asserted in conclusory terms that New Jersey could not apply its public accommodations law in this case because "[t]he state interests embodied in [that] law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."²⁹⁹

In *Dale*, then, the conservative majority once again used the First Amendment as a barrier against regulation from the left. But *Dale* embodies the conservative-libertarian view in deeper ways as well. As I have suggested, this view is founded on a notion of separate or exclusive individuality, in which a person sees herself as a free and independent individual who is sharply distinct from other persons and the world.³⁰⁰ This conception of the person leads to an emphasis on rights such as private property.³⁰¹ Just as property has traditionally been understood in terms of the right to exclude,³⁰² so *Dale* understands freedom of association in the same way—as a strong right *not* to associate with

²⁹⁵ *Id.* at 651 (majority opinion).

²⁹⁶ *Id.* at 651, 653. In *Hobby Lobby*, the conservative majority went even further: it held that, under the RFRA, when a government regulation requires a party to act in a certain way, the court may not question the party's sincere belief that the regulation substantially burdens its exercise of religion. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770–73 (2014); *see also id.* at 2797–800 (Ginsburg, J., dissenting) (criticizing this position); *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2808–16 (2014) (Sotomayor, J., dissenting) (same).

²⁹⁷ *Dale*, 530 U.S. at 653.

²⁹⁸ *Id.* at 657–59.

²⁹⁹ *Id.* at 659.

³⁰⁰ *See supra* text accompanying notes 34–37.

³⁰¹ *See supra* Part II.B.2.

³⁰² *See, e.g., Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Holmes, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it."); EPSTEIN, *DESIGN FOR LIBERTY*, *supra* note 27, at 77.

people one dislikes or disapproves of.³⁰³ To protect this form of negative liberty, *Dale* moves away from the balancing approach of *Roberts*, which assesses the strength of the competing interests, to a more categorical position that holds that the government may rarely, if ever, require individuals to associate if they believe that this would impair their own expression.

B. *Libertarianism and Social Conservatism*

Citizens United and *McCutcheon* held that, under the First Amendment, the government may not restrict money in politics to protect the democratic process. *Hudnut* and *R.A.V.* struck down laws that restricted speech in the name of gender and racial equality, while *Dale* held that state civil rights laws could not be used to combat discrimination that was based on a traditional conception of sexual morality. In each of these cases, the libertarian and traditionalist elements of conservative jurisprudence pointed in the same direction. That will not always be the case, however. This poses a serious problem for the conservative approach.

1. *United States v. Stevens* and Conservative-Libertarian Methodology

One of the leading efforts to tackle this problem may be found in the Supreme Court's recent decision in *United States v. Stevens*.³⁰⁴ At issue was a federal statute that banned depictions of illegal acts of cruelty to animals. Congress passed this legislation primarily to outlaw "crush videos," which the Court described as videos that "'appeal to persons with a very specific sexual fetish'" by "depict[ing] women slowly crushing animals to death 'with their bare feet or while wearing high heeled shoes,' . . . over '[t]he cries and squeals of the animals, obviously in great pain.'"³⁰⁵ The statute was drafted in such broad terms, however, that it also could be interpreted to apply to much more widely viewed works such as hunting videos. Robert J. Stevens was convicted of violating the statute by selling dog-fighting videos, but his conviction was reversed by the United States Court of Appeals for the Third Circuit, which ruled en banc that the statute violated the First Amendment.³⁰⁶ The government then sought review in the Supreme Court.

³⁰³ See *Dale*, 530 U.S. at 648 (emphasizing that freedom of association "plainly presupposes a freedom not to associate," and that this freedom may be violated by "[t]he forced inclusion of an unwanted person in a group") (citation omitted) (internal quotation marks omitted). For a libertarian argument that the First Amendment freedoms of speech and association entail "a right to exclude others," see EPSTEIN, *DESIGN FOR LIBERTY*, *supra* note 27, at 137–39.

³⁰⁴ 559 U.S. 460 (2010).

³⁰⁵ *Id.* at 465–66 (quoting H.R. REP. NO. 106-397, at 2 (1999)).

³⁰⁶ *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (en banc).

In defending the statute, Solicitor General Elena Kagan relied on the classic case of *Chaplinsky v. New Hampshire*,³⁰⁷ in which the Court unanimously declared that

[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.³⁰⁸

*New York v. Ferber*³⁰⁹ employed a version of this balancing approach to designate child pornography as a new category of unprotected speech.³¹⁰ Similarly, in *Stevens*, the government urged the Court to uphold Congress’s judgment “that the category of speech at issue—depictions of animals being intentionally tortured and killed—is of such minimal redeeming value as to render it unworthy of First Amendment protection.”³¹¹ This result, Kagan maintained, followed from a straightforward application of the principle found in *Chaplinsky* and *Ferber*: that “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”³¹²

In his majority opinion, Chief Justice Roberts rejected this position as “startling and dangerous.”³¹³ “The First Amendment’s guarantee of free speech,” he wrote,

does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that

³⁰⁷ 315 U.S. 568 (1942).

³⁰⁸ *Id.* at 571–72 (footnotes omitted).

³⁰⁹ 458 U.S. 747 (1982).

³¹⁰ *Id.* at 763–64.

³¹¹ Brief for the United States at 23, *United States v. Stevens*, 559 U.S. 460 (2009) (No. 08-769), 2009 WL 1615365, at *23 (citations omitted) (internal quotation marks omitted).

³¹² *Id.* at 8.

³¹³ *United States v. Stevens*, 559 U.S. 460, 470 (2010).

judgment simply on the basis that some speech is not worth it.³¹⁴

Roberts conceded that in cases like *Chaplinsky* and *Ferber*, the Court had described unprotected categories in terms of a balancing of social interests.³¹⁵ But he insisted that

such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.³¹⁶

Instead, Roberts asserted that history and tradition are the touchstones for determining whether a category of speech is unprotected by the First Amendment.³¹⁷ While he left open the possibility that “there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law,” he rejected the notion that the Court has any “freewheeling authority to declare new categories of speech [such as depictions of animal cruelty] outside the scope of the First Amendment.”³¹⁸

As the Chief Justice read the statute, many or even most of the works that it covered—such as hunting videos—were entitled to constitutional protection.³¹⁹ For this reason, while he did not rule out the possibility that “a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional,” he concluded that the current statute was so broad that it had to be invalidated.³²⁰

For our purposes, two things are especially notable about Roberts’s opinion in *Stevens*. First, although he claimed to be following the approach set forth in *Chaplinsky*, he recast that approach in a distinctly conservative fashion. *Chaplinsky* did say that the unprotected categories that it mentioned “have never been thought to raise any Constitutional problem,”³²¹ but it also made deliberate use of the language of social-interest balancing.³²² Likewise, *Ferber*

³¹⁴ *Id.*

³¹⁵ *Id.* at 470–71.

³¹⁶ *Id.* at 471.

³¹⁷ *Id.* at 468–69.

³¹⁸ *Id.* at 472.

³¹⁹ *See id.* at 481–82.

³²⁰ *Id.*

³²¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

³²² *Id.* at 572. The quoted portion of *Chaplinsky* relied on a book by the eminent First Amendment scholar Zechariah Chafee, Jr. *Id.* at 572 & n.5 (citing ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 149–50 (1941)). In the cited passage, Chafee rejected a historical

observed that the Court often had held a category of speech unprotected “because it may be appropriately generalized that within the confines of [that category], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that . . . the balance of competing interests is clearly struck” against First Amendment protection.³²³ Although this approach certainly has its difficulties,³²⁴ it is at least rational in its recognition that judgments about constitutional protection should take into account both the value of the speech and the harm that it causes to other important values. In *Stevens*, Roberts rejected such a rational approach in favor of one strictly based on history and tradition.

This leads to the second point. The *Stevens* approach denies First Amendment protection to speech that violates traditional standards of morality or propriety. For example, it justifies the conservative Justices’ continuing adherence to the doctrine that obscenity is unprotected.³²⁵ At the same time, the *Stevens* approach grants protection to speech that contravenes more contemporary principles like racial and gender equality, such as the expression involved in *Hudnut* and *R.A.V.* The *Stevens* approach thus offers a way to reconcile the traditionalist and libertarian strands of conservative First Amendment jurisprudence, while also erecting a barrier against efforts to regulate speech in the name of progressive values.

2. The Continuing Tension Between the Libertarian and Social-Conservative Strands

Although the *Stevens* approach has great appeal from a conservative-libertarian perspective, it does not completely resolve the tension between the two strands of conservative jurisprudence. This is true for several reasons. First, the conservative Justices do not always follow that approach. Indeed, Justice Alito dissented in *Stevens* itself, arguing that the Court was wrong to strike down a statute that was aimed at crush videos, a form of expression that had no social value and that could be regulated by analogy to the material at issue in

test and instead made clear that to determine whether a particular category of speech should be protected, competing “social interest[s] . . . must be weighed in the balance.” CHAFEE, *supra*, at 149–50; *see also* GRABER, *supra* note 18, at 145–46 (discussing Chafee’s approach). To be sure, Chafee proceeded to strongly caution against “any creation of new verbal crimes” because of the danger that they may be used to suppress “the serious discussion of topics of great social significance.” CHAFEE, *supra*, at 150–51. Although this caution is well-taken, it is highly doubtful that Chafee would have thought that it precluded a ban on expression as valueless as depictions of extreme cruelty to animals.

³²³ *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

³²⁴ For a discussion of these difficulties, *see* STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 33 (2008).

³²⁵ *See, e.g., Sable Comm’ns of Cal. v. FCC*, 492 U.S. 115, 124 (1989) (reaffirming that “the protection of the First Amendment does not extend to obscene speech”).

Ferber.³²⁶ Second, while *Stevens* abjures the Court's authority to create whole new categories of unprotected speech, it does not preclude the government from arguing that a particular regulation should be upheld through the application of strict scrutiny (or another appropriate standard of review). Finally, *Stevens* applies only to content-based restrictions of speech, not to other forms of regulation such as time, place, and manner limits. For these reasons, disagreements between the conservative Justices persist.

i. Violent Entertainment

A dramatic instance may be found in another recent decision on violent entertainment, *Brown v. Entertainment Merchants Ass'n (EMA)*,³²⁷ in which the Court struck down a California statute that banned the sale of ultraviolent video games to minors. In a majority opinion joined by Justice Kennedy and three liberal members of the Court, Justice Scalia contended that entertainment should receive no less protection than "discourse on public matters," since "it is difficult to distinguish politics from entertainment, and dangerous to try."³²⁸ He then held that the case was controlled by *Stevens* because there is no "longstanding tradition in this country" of denying either adults or children "access to depictions of violence."³²⁹ Finally, he determined that California could not satisfy strict scrutiny—a highly "demanding standard" that he said rarely could be met—because the state could not show a sufficiently strong connection "between violent video games and harm to minors."³³⁰

In a separate opinion joined by the Chief Justice, Justice Alito would have held the California law unconstitutionally vague.³³¹ At the same time, Alito sharply disagreed with the majority's more sweeping approach to the case.³³² In graphic detail, he described the "astounding" violence contained in some of the games in the record and asserted that it "appears that there is no antisocial theme too base for some in the video-game industry to exploit":

There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in "ethnic cleansing" and can

³²⁶ United States v. Stevens, 599 U.S. 460, 482, 493–95 (2010) (Alito, J., dissenting).

³²⁷ 131 S. Ct. 2729 (2011).

³²⁸ *Id.* at 2733.

³²⁹ *Id.* at 2734–36.

³³⁰ *Id.* at 2738.

³³¹ *Id.* at 2742–46 (Alito, J., concurring in judgment).

³³² *Id.* at 2742.

choose to gun down African-Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.³³³

Alito also was concerned that the interactive and highly realistic nature of the games might give them greater impact than earlier forms of violent material.³³⁴ For these reasons, he disagreed that strict scrutiny should apply, and contended that the Court should remain cautious in the face of new technology and “not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem.”³³⁵ In response, Justice Scalia accused Alito of “recount[ing] all these disgusting video games [merely] in order to disgust us,” and asserted that in this regard Alito’s argument “highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.”³³⁶

In these ways, *EMA* brings out in sharp relief the opposition between the traditional moralist position—represented by Alito’s concerns with the protection of basic decency and moral character—and the libertarian position—which in Scalia’s opinions goes together with strong commitments to value relativism and to content neutrality in First Amendment jurisprudence.³³⁷

ii. *Nonobscene Sexual Material*

A similar conflict between libertarianism and social conservatism has erupted in the area of sexually explicit expression. As I have noted, the conservative Justices adhere to the traditional view that obscene material is outside the First Amendment’s protection.³³⁸ But they are divided on the

³³³ *Id.* at 2749–50 (footnotes omitted).

³³⁴ *Id.* at 2750–51.

³³⁵ *Id.* at 2747, 2751.

³³⁶ *Id.* at 2738 (majority opinion). Justice Thomas dissented on the ground that “[t]he practices and beliefs of the founding generation establish that ‘the freedom of speech,’ as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.” *Id.* at 2751 (Thomas, J., dissenting).

³³⁷ In addition to *EMA*, see *supra* text accompanying notes 154–57, 168 (discussing Scalia’s dissents in the abortion and gay rights cases); *supra* text accompanying notes 264–72 (discussing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

³³⁸ See *supra* text accompanying note 325. In addition, although the Court has accorded a modicum of First Amendment protection to nude dancing, the conservative Justices have invoked a variety of theories to allow states and localities to restrict it. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (plurality opinion); *id.* at 302 (Scalia, J., concurring in judgment); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion); *id.* at 572 (Scalia, J., concurring in judgment). In the *Barnes* case, however, leading conservatives on the court of appeals were divided, with Judge Posner taking a libertarian position and Judge Easterbrook a traditionalist

government's power to regulate material that has not been proven to meet the test for obscenity established in *Miller v. California*.³³⁹ A good example is *United States v. Playboy Entertainment Group*,³⁴⁰ a constitutional challenge to a federal law that required "cable television operators who provide channels 'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission to hours when children are unlikely to be viewing."³⁴¹ By a vote of five to four, the Court struck down the statute in an opinion by Justice Kennedy, who is one of the Court's most libertarian members in free speech cases. While he acknowledged that the expression at issue might not seem "very important," and that many people might find it "shabby, offensive, or even ugly," he insisted that "[b]asic speech principles are at stake in this case."³⁴² "It is through speech that our personalities are formed and expressed" and that "our convictions and beliefs" are established and brought "to bear on Government and on society."³⁴³ For these reasons, the government should rarely if ever be permitted to regulate the content of speech.³⁴⁴

In this case, Justice Kennedy held that the statute violated the First Amendment because the government could have protected children in ways that involved less interference with adult access to sexual material.³⁴⁵ Chief Justice Rehnquist and Justices O'Connor and Scalia joined a dissenting opinion by Justice Breyer, who argued that no less restrictive means were available.³⁴⁶ In a separate dissent, Justice Scalia (who is one of the least libertarian Justices in cases involving sexual material) went further and argued that the government could have banned the material altogether on the ground that "commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasizing the sexually provocative aspects'" of even nonobscene material

one. See *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1089–104 (7th Cir. 1990) (en banc) (Posner, J., concurring); *id.* at 1120–35 (Easterbrook, J., dissenting). For a thoughtful discussion of the varieties of conservative First Amendment jurisprudence on display in this case, see Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611 (1992). The conservative Justices also have upheld restrictions on the location of adult movie theaters. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

³³⁹ See *supra* text accompanying notes 218–19.

³⁴⁰ 529 U.S. 803 (2000).

³⁴¹ *Id.* at 806.

³⁴² *Id.* at 826.

³⁴³ *Id.* at 817.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 827.

³⁴⁶ *Id.* at 840–45 (Breyer, J., dissenting).

should receive no First Amendment protection.³⁴⁷ The conservative justices were similarly divided in *Ashcroft v. ACLU*,³⁴⁸ which struck down a law that sought to protect children from exposure to Internet pornography, and in *Ashcroft v. Free Speech Coalition*,³⁴⁹ which invalidated a ban on “virtual child pornography” which was made not with real children but with computer-generated images or with actors who looked underage.³⁵⁰

iii. Dignitary Interests

The conservative justices also have split in some cases that pitted freedom of speech against dignitary interests. In *Florida Star v. B.J.F.*,³⁵¹ the Court held that the First Amendment precluded a rape victim from recovering damages against a newspaper that had published her name in violation of state law. Justices Kennedy and Scalia both supported the result,³⁵² while Chief Justice Rehnquist and Justice O’Connor joined a dissent by Justice White (a conservative on many First Amendment issues),³⁵³ who faulted the majority for failing “to strike an appropriate balance” between “the public’s right to know” and the victim’s “right to privacy.”³⁵⁴ In *Snyder v. Phelps*,³⁵⁵ Justice Alito strongly dissented from the Court’s decision, per Chief Justice Roberts, that the First Amendment did not allow the father of a soldier killed in Iraq to recover damages for intentional infliction of emotional distress from the Westboro Baptist Church, which had picketed the son’s funeral.³⁵⁶ Most recently, the conservatives divided in *United States v. Alvarez*,³⁵⁷ which struck down the

³⁴⁷ *Id.* at 831–32 (Scalia, J. dissenting) (quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966)). Justice Thomas agreed that “at least some” of the programming at issue probably could be suppressed as obscene. *Id.* at 829 (Thomas, J., concurring in judgment). He concurred in the judgment, however, because the government had not litigated the case on that theory, but instead had insisted that the speech could be restricted even if it was not obscene—a result that Thomas believed would “corrupt the First Amendment” by diluting the “exacting standards” that should apply to restrictions on protected speech. *Id.* at 830–31.

³⁴⁸ 542 U.S. 656 (2004).

³⁴⁹ 535 U.S. 234 (2002).

³⁵⁰ In both cases, Justice Kennedy wrote the majority opinion, and Chief Justice Rehnquist and Justices O’Connor and Scalia dissented; in *ACLU* they were joined by Justice Breyer, who wrote the principal dissent.

³⁵¹ 491 U.S. 524 (1989).

³⁵² Justice Kennedy joined Justice Marshall’s majority opinion, *see id.* at 525, while Scalia wrote separately, *see id.* at 541 (Scalia, J., concurring in part and in judgment).

³⁵³ *See* Blasi, *supra* note 338, at 656–57.

³⁵⁴ *Fla. Star*, 491 U.S. at 551 (White, J., dissenting). For a more recent privacy-related case in which the conservatives were divided, see *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

³⁵⁵ 131 S. Ct. 1207 (2011).

³⁵⁶ *Id.* at 1222 (Alito, J., dissenting). I discuss *Snyder* in more depth below. *See infra* Part V.C.

³⁵⁷ 132 S. Ct. 2537 (2012).

Stolen Valor Act, a federal law which made it a crime to falsely claim to have been awarded the Congressional Medal of Honor or other military decorations.³⁵⁸

iv. Anti-Abortion Speech

In another series of cases, the conservatives have disagreed about the extent to which the state may regulate pro-life expression outside abortion clinics.³⁵⁹ In one major decision, *Hill v. Colorado*,³⁶⁰ the Court upheld a state law that forbade pro-life “sidewalk counselors” from closely approaching women near abortion clinics without the women’s consent. Chief Justice Rehnquist and Justice O’Connor joined Justice Stevens’s majority opinion, which contended that the law struck a reasonable balance between the counselors’ freedom of speech and “[t]he unwilling listener’s interest in avoiding unwanted communication”—an interest that he contended was part of the broader right to privacy.³⁶¹ In a pair of forceful dissents, Justice Scalia (joined by Justice Thomas) and Justice Kennedy denounced the decision as an “assault” on the First Amendment rights of abortion opponents “to persuade women contemplating abortion that what they are doing is wrong.”³⁶²

Last Term, the Court revisited this subject in *McCullen v. Coakley*.³⁶³ At issue was a Massachusetts law that excluded speakers from a 35-foot buffer zone around the entrance to an abortion clinic.³⁶⁴ Justices Scalia, Kennedy, and Thomas contended that *Hill* should be overruled and that all laws that targeted speech near such clinics violated the First Amendment.³⁶⁵ Justice Alito agreed that the law constituted forbidden viewpoint discrimination.³⁶⁶ These views did not attract a majority, however. Instead, Chief Justice Roberts, joined by the four liberals, struck down the law on narrower grounds. The Chief Justice effectively abandoned *Hill*’s notion that individuals may be protected from unwanted communication in public places,³⁶⁷ and held that the buffer-zone law

³⁵⁸ Chief Justice Roberts joined Justice Kennedy’s plurality opinion, *see id.* at 2542, while Justices Alito, Scalia, and Thomas dissented, *see id.* at 2556 (Alito, J., dissenting).

³⁵⁹ In addition to the cases discussed in the text, *see Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1997).

³⁶⁰ 530 U.S. 703 (2000).

³⁶¹ *Id.* at 716, 719–25.

³⁶² *Id.* at 741–42 (Scalia, J., dissenting); *see also id.* at 765 (Kennedy, J., dissenting).

³⁶³ 134 S. Ct. 2518 (2014).

³⁶⁴ *Id.* at 2525–26.

³⁶⁵ *Id.* at 2543–46 (Scalia, J., concurring in judgment).

³⁶⁶ *Id.* at 2549–50 (Alito, J., concurring in judgment).

³⁶⁷ *See id.* at 2529, 2531–32 (majority opinion).

restricted too much speech.³⁶⁸ At the same time, he held that states had substantial interests in protecting women against obstruction, intimidation, and harassment, and suggested several less restrictive measures that might be compatible with the First Amendment.³⁶⁹

In the end, *McCullen* moved the Court's doctrine on anti-abortion speech in a conservative-libertarian direction, although markedly less than Scalia and his colleagues desired. In this way, the case illustrates how the conservative-libertarian approach has shifted the ideological center of gravity in First Amendment jurisprudence, even when that approach does not prevail in its strongest form.

v. *Flag-Burning*

Finally, in the most high-profile of all these cases, *Texas v. Johnson*,³⁷⁰ the conservatives divided over whether the government may ban desecration of the American flag. Justices Scalia and Kennedy provided the decisive votes for the Court's five-to-four decision to strike down such laws. In an emotional concurrence, Kennedy acknowledged that this judgment was a "painful [one] . . . to announce," but asserted that this cost was compelled by our commitment to the beliefs that the flag itself represents, "beliefs in law and peace and that freedom which sustains the human spirit."³⁷¹ "It is poignant but fundamental," he concluded, "that the flag protects those who hold it in contempt."³⁷² In an impassioned dissent, Chief Justice Rehnquist maintained that a prohibition on flag-burning was justified by flag's "unique position as the symbol of our Nation."³⁷³

³⁶⁸ *Id.* at 2534–40.

³⁶⁹ *Id.* at 2535, 2537–39. For example, the Chief Justice pointed to a New York City ordinance "that not only prohibits obstructing access to a clinic, but also makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'" *Id.* at 2538 (quoting N.Y.C. ADMIN. CODE § 8-803(a)(3) (2014)). Although this ordinance may be less restrictive, it also appears to be rather ineffective in protecting women from harassment and obstruction. See Benjamin Mueller, *New York's Abortion Protest Law is Praised by Justices, but Few Others*, N.Y. TIMES, July 30, 2014, http://www.nytimes.com/2014/07/31/nyregion/new-yorks-abortion-protest-law-is-praised-by-justices-but-few-others.html?_r=0. At the same time, the ordinance provides less clear guidance to protesters than the one struck down in *McCullen*. These facts suggest that the Court should have been more open to upholding laws that exclude speakers from a defined zone near abortion clinics. For an exploration of the competing rights to free speech and privacy in this context, see HEYMAN, *supra* note 324, at 149–55.

³⁷⁰ 491 U.S. 397 (1989).

³⁷¹ *Id.* at 421 (Kennedy, J., concurring). Likewise, Scalia later explained that he wished he did not have to free Johnson, but that he "couldn't help it." MURPHY, *supra* note 59, at 162–63.

³⁷² *Johnson*, 491 U.S. at 421 (Kennedy, J., concurring).

³⁷³ *Id.* at 422 (Rehnquist, C.J., joined by White & O'Connor, JJ., dissenting). Justice Stevens also dissented. See *id.* at 436. The following year, the Court reaffirmed *Johnson* by the same vote in *United States v. Eichman*, 496 U.S. 310 (1990).

C. Areas of Broader Governmental Authority

Up to this point, our focus has been on the classic situation in which the government, acting as sovereign, seeks to regulate expression by private parties. In this situation, the conservative Justices hold that the government should have little or no power to restrict the content of speech, except in areas where it traditionally has been subject to regulation in the interest of morality and social order. By contrast, these Justices are inclined to grant the government far greater power when it is acting not as sovereign but in other capacities such as proprietor, employer, educator, speaker, or patron.

It may seem paradoxical that the conservatives take a rather authoritarian position in the second set of cases when they take such a libertarian position in the first set. But I believe that both positions can be seen to flow from the basic premises of conservative-libertarian theory. That theory defines liberty as the ability to act as one chooses and to pursue one's own interests, free from external constraint. Authority is understood in similar terms, as the government's ability to act as it chooses and to promote "governmental interests," again without external constraint. Finally, the Constitution is seen as a formal framework that allocates authority to the different parts of government and that establishes the boundaries between government authority and individual liberty.

These premises help explain why conservative libertarians take such different positions in the two situations under discussion. When the government intrudes into the sphere of individual liberty by using its coercive power to restrict speech, its authority must be narrowly limited. By contrast, when the government acts within its own sphere—for example, by regulating what takes place on its own property or within government institutions—conservative libertarians hold that it should have broad authority to promote its own interests, even when this involves limitations on speech.

In this way, the libertarian and authoritarian positions are two sides of the same coin. In this Section, I briefly canvass the situations in which the conservative judges are inclined to uphold broad government authority, as well as some of the controversies that have arisen in this area.

1. Speech on Public Property

Traditionally, the courts held that citizens had no constitutional right to use public property for expressive purposes. In the words of Justice Holmes, "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."³⁷⁴ In the 1930s, however, the Supreme Court began to extend protection to such

³⁷⁴ Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895).

speech on the view that property such as streets and parks ultimately belonged to the public rather than to the government, and that such property had always been used for discussion and debate—a position that became known as the public forum doctrine.³⁷⁵ During the 1960s and early 1970s, this doctrine was often interpreted in an expansive way to protect speech whenever it was compatible with the normal activities of the property in question.³⁷⁶

In more recent decades, however, conservative Justices have often sought to narrow the doctrine. The leading case is *Perry Education Ass'n v. Perry Local Educators Ass'n*,³⁷⁷ which held that the doctrine only applied to two categories of public property: (1) “streets and parks,” which the Court labeled “traditional public forum[s],” and (2) property that the state has deliberately chosen to “open[] for use by the public as a place for expressive activity.”³⁷⁸ Although the government may regulate the time, place, and manner of speech within these forums, it may not regulate the content of that speech unless it can meet the demanding requirements of strict scrutiny.³⁷⁹ By contrast, *Perry* held that the government had broad power over all other public property, which it was entitled to “reserve . . . for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable” and viewpoint neutral.³⁸⁰ Echoing Holmes, the majority concluded that “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”³⁸¹

Under this approach, the courts have treated many forms of public property as nonpublic forums. In one dramatic instance, a conservative majority of the Court ruled that, even though they were owned and operated by a governmental agency, the terminals of the three international airports in the New York City area were not public forums for expression.³⁸² The conservative Justices also have taken a libertarian position with regard to privately owned

³⁷⁵ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

³⁷⁶ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972). See generally Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

³⁷⁷ 460 U.S. 37 (1983).

³⁷⁸ *Id.* at 45–46.

³⁷⁹ *Id.* at 46–54.

³⁸⁰ *Id.* at 46.

³⁸¹ *Id.* (citations omitted) (internal quotation marks omitted).

³⁸² *Int'l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992). As is often the case, Justice Kennedy differed with his conservative colleagues. In an opinion joined by three liberal Justices, he argued that “[o]ur public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat.” *Id.* at 693–94 (Kennedy, J., concurring in judgment). As a result of divergent analyses and overlapping majorities, the Court upheld a ban on the solicitation of funds within the airport terminals in the cited decision but struck down a ban on the distribution and sale of literature in a companion case, *Lee v. Int'l Soc. for Krishna Consciousness*, 505 U.S. 830 (1992) (per curiam).

forums, by overruling a 1968 decision that the First Amendment granted individuals a right to engage in expressive activities in privately owned shopping centers.³⁸³

2. Speech Within Governmental Institutions

In other cases, the conservative justices have granted the government broad authority to regulate speech within governmental institutions. These decisions seem to be based on the view that in this situation, the government is not using its coercive power to limit the liberty of free, equal, and independent private persons, but instead is exercising legitimate authority to control its own operations.³⁸⁴

i. Prisoners

The clearest instance of this approach may be found in decisions on the First Amendment rights of prisoners. In the leading case of *Turner v. Safley*,³⁸⁵ the Court voted five to four to uphold a regulation that banned most correspondence between inmates in the Missouri correctional system. Although Justice O'Connor conceded that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," she stressed that "[p]rison administration is . . . a task that has been committed to the responsibility of [the legislative and executive] branches," and that only they had the "expertise" and "resources" necessary to carry out this task.³⁸⁶ For these reasons, she concluded that the courts should uphold a regulation of prisoners' speech so long as it is "reasonably related to legitimate penological interests."³⁸⁷ She added that, in applying this standard, "courts should be particularly deferential to the informed discretion of corrections officials."³⁸⁸ In dissent, Justice Stevens objected that review under this standard was so deferential as to be "virtually meaningless"³⁸⁹—a concern that has been borne

³⁸³ See *Hudgens v. NLRB*, 424 U.S. 507 (1976) (overruling *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968)). *But cf.* *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that the Constitution permits states to grant such access).

³⁸⁴ See *Citizens United v. FEC*, 558 U.S. 310, 341 (2010) (stating that "these rulings were based on an interest in allowing governmental entities to perform their functions"); see also EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 25, at 540 ("When the state is exercising its managerial functions, it should get the benefit of a relatively relaxed standard of oversight that otherwise should be denied it in its regulatory function.").

³⁸⁵ 482 U.S. 78 (1987).

³⁸⁶ *Id.* at 84–85.

³⁸⁷ *Id.* at 89.

³⁸⁸ *Id.* at 90.

³⁸⁹ *Id.* at 100–01 (Stevens, J., dissenting in relevant part).

only out by later decisions.³⁹⁰ By contrast, Justices Thomas and Scalia have gone beyond *Turner* and have argued that, under the Constitution, a state may impose any deprivation on prisoners that it thinks fit, subject only to the Eighth Amendment's ban on cruel and unusual punishment.³⁹¹

ii. Members of the Military

The Court has also granted the government great leeway in the military context. In *Parker v. Levy*,³⁹² Justice Rehnquist declared that “the fundamental necessity for obedience [within the armed forces], and the consequent necessity for imposition of discipline,” may justify speech restrictions that would be impermissible in civilian life.³⁹³ On these grounds, he upheld the court-martial conviction of an army doctor who had denounced racism within the military as well as the nation's involvement in Vietnam, and who had declared that African-American soldiers should refuse to serve there.³⁹⁴ Similarly, in *Greer v. Spock*,³⁹⁵ a conservative majority asserted that “the business of a military installation . . . [is] to train soldiers, not to provide a public forum.”³⁹⁶ Accordingly, the majority ruled that political candidates had no First Amendment right to speak or to distribute literature on a military base even though it was otherwise open to the public.

iii. Public Employees

The traditional view was that the government could condition public employment on the surrender of one's right to free speech. As Justice Holmes memorably expressed the point, an individual “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”³⁹⁷ By the 1960s, the Court had moved away from this position. Recognizing that public employees often were capable of making important contributions to public discourse, the Court in *Pickering v. Board of Education*³⁹⁸ ruled that in cases where an individual was disciplined or fired for his speech, a court must

³⁹⁰ See, e.g., *Beard v. Banks*, 548 U.S. 521, 553 (2006) (Ginsburg, J., dissenting) (suggesting that under such an approach prison officials will always be able to prevail simply by asserting that in their “professional judgment the restriction is warranted”).

³⁹¹ See *id.* at 537 (Thomas, J., concurring in judgment).

³⁹² 417 U.S. 733 (1974).

³⁹³ *Id.* at 758–59.

³⁹⁴ *Id.* at 736–37.

³⁹⁵ 424 U.S. 828 (1976).

³⁹⁶ *Id.* at 838.

³⁹⁷ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517–18 (Mass. 1892).

³⁹⁸ 391 U.S. 563 (1968).

“balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”³⁹⁹

More recent decisions have substantially narrowed the First Amendment protections for speech by public employees. In *Connick v. Myers*,⁴⁰⁰ the Court ruled that employees have no protection when they discuss the internal affairs of the agency in which they work. And in another decision with great practical importance, the majority in *Garcetti v. Ceballos*⁴⁰¹ ruled that speech within the scope of an individual’s employment is categorically unprotected by the First Amendment, regardless of how much the speech may relate to matters of public concern. These decisions, which were determined by votes of five to four, are consonant with the conservative-libertarian view that when the government restricts speech of this sort, it “does not infringe any liberties the employee[s] might have enjoyed as . . . private citizen[s],” but simply exercises appropriate control and discipline over its subordinates, an activity that calls for broad judicial deference to “managerial discretion.”⁴⁰²

iv. *Public Schools*

During the 1960s, the Court dramatically expanded the First Amendment rights of students. In the landmark case of *Tinker v. Des Moines Independent Community School District*,⁴⁰³ the Court declared that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” and that they are entitled to “express [their] opinions, even on controversial subjects . . . , if [they do] so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.”⁴⁰⁴ Applying this standard, the Court held that a school could not suspend three students for wearing armbands to protest the Vietnam War.⁴⁰⁵

In recent decades, however, the Court has consistently sided with school officials by upholding their authority (1) to impose sanctions for a student’s “offensively lewd and indecent speech” at a school assembly in

³⁹⁹ *Id.* at 568.

⁴⁰⁰ 461 U.S. 138 (1983).

⁴⁰¹ 547 U.S. 410 (2006).

⁴⁰² *Id.* at 421–23. For another forceful expression of the conservative-libertarian approach, see *Rutan v. Republican Party*, 497 U.S. 62, 92 (1990) (Scalia, J., dissenting) (arguing that First Amendment should not preclude government from hiring and firing employees based on their political affiliation).

⁴⁰³ 393 U.S. 503 (1969).

⁴⁰⁴ *Id.* at 506, 512–13 (citations omitted) (internal quotation marks omitted).

⁴⁰⁵ *Id.* at 512–14.

Bethel School District No. 403 v. Fraser;⁴⁰⁶ (2) to censor the contents of a school newspaper produced by a student journalism class in *Hazelwood School District v. Kuhlmeier*;⁴⁰⁷ and (3) to restrict student speech that school officials understood to promote the use of illegal drugs in *Morse v. Frederick*.⁴⁰⁸ These decisions reflect the conservative view that the public schools have a “custodial and tutelary responsibility for [the] children” in their care and are entitled to substantial deference in how they carry out that responsibility.⁴⁰⁹

At the same time, these decisions also highlight the tensions that are present within the conservative position. In *Fraser*, Chief Justice Burger asserted that the public schools have a responsibility to instill in students “the shared values of a civilized social order” and to teach them “the boundaries of socially appropriate behavior”⁴¹⁰—a social-conservative view that is clearly at odds with a more libertarian view of the free speech rights of students. In *Morse*, Chief Justice Roberts declined to wade into the debate between these two views.⁴¹¹ Moreover, he reaffirmed the strong protection that *Tinker* accords to political speech.⁴¹² In a concurring opinion, Justices Alito and Kennedy underlined this point and repudiated the position taken by the school authorities and the Bush Administration “that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission’”—a position that these Justices contended would “strike[] at the very heart of the First Amendment” by giving school officials “a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed.”⁴¹³ In a separate concurrence, Justice Thomas took a starkly different approach. After arguing that “[e]arly public schools gave total control to teachers” and that “courts routinely deferred to schools’ authority to make rules and to discipline students,” he concluded that “the First

⁴⁰⁶ 478 U.S. 675, 685 (1986).

⁴⁰⁷ 484 U.S. 260, 273 (1988) (holding “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

⁴⁰⁸ 551 U.S. 393 (2007).

⁴⁰⁹ *Id.* at 406 (quoting *Bd. of Ed. v. Earls*, 536 U.S. 822, 829–30 (2002)).

⁴¹⁰ *Fraser*, 478 U.S. at 681, 683.

⁴¹¹ *See Morse*, 551 U.S. at 404.

⁴¹² *See id.* at 403–04.

⁴¹³ *Id.* at 422–23 (Alito, J., concurring). As Tushnet explains, this opinion reflected the concerns expressed in amicus briefs filed by conservative Christian groups like the Alliance Defense Fund and the Rutherford Institute, which sought to limit the power of school officials to restrict religious expression in the schools. *See TUSHNET, supra* note 68, at 240. In this way, the opinion is another illustration of the use of libertarian principles to protect traditional values.

Amendment, as originally understood,” provided no protection at all to student speech, and that *Tinker* should be overruled.⁴¹⁴

3. National Security and Foreign Affairs

In a number of cases, the Supreme Court has indicated that content-based restrictions will rarely satisfy strict scrutiny, even when they apply to nonpolitical expression such as sexually explicit programming or violent video games.⁴¹⁵ It is striking, therefore, that in another recent decision the conservative Justices used this standard to uphold a restriction on speech related to international affairs. In *Holder v. Humanitarian Law Project*,⁴¹⁶ the plaintiffs were nonprofit organizations that desired to support the lawful, nonviolent activities of two groups that the United States government had designated as foreign terrorist organizations. The plaintiffs proposed to engage in political advocacy on the foreign groups’ behalf, to train them to use international law to resolve disputes peacefully, and to teach them to petition the United Nations and other international bodies for relief.⁴¹⁷ Fearing that the proposed activities would violate a federal statute that made it unlawful to provide foreign terrorist organizations with “material support or resources” (a term that was defined to include any “service,” including “training” and “expert advice or assistance”),⁴¹⁸ the plaintiffs challenged the statute under the First Amendment but lost in the Supreme Court. Writing for the five conservatives and Justice Stevens, Chief Justice Roberts maintained that Congress had reasonably found that “the ‘tain[t]’ of [the foreign groups’] violent activities is so great that working in coordination with or at [their] command . . . serves to legitimize and further their terrorist means.”⁴¹⁹ He added that support for even nonviolent activities “can further terrorism by foreign groups” by “free[ing] up other resources within [those groups] that may be put to violent ends.”⁴²⁰ For these reasons, he concluded that the statutory ban on the proposed activities was necessary to promote “the Government’s interest in combating terrorism,” “an urgent objective of the highest order.”⁴²¹

⁴¹⁴ *Morse*, 551 U.S. at 410–11, 419, 421–22 (Thomas, J., concurring).

⁴¹⁵ See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 818 (2000).

⁴¹⁶ 561 U.S. 1 (2010).

⁴¹⁷ *Id.* at 14–15.

⁴¹⁸ 18 U.S.C. §§ 2339B(a)(1), (g)(4) (2012).

⁴¹⁹ *Humanitarian Law Project*, 561 U.S. at 30 (quoting Antiterrorism and Effective Death Penalty Act of 1996, § 301(a)(7), Pub. L. No. 104-132, 110 Stat. 1247 (note following 18 U.S.C. § 2339B (Findings and Purpose))).

⁴²⁰ *Id.*

⁴²¹ *Id.* at 28.

At first glance, the decision in *Humanitarian Law Project* appears to be at odds with the conservative-libertarian effort to sharply limit the government's ability to use its coercive power to restrict the speech of private parties. Roberts emphasized, however, that the statute did not prevent them from engaging in independent advocacy of any kind, but simply banned efforts that were undertaken in coordination with or under the direction of the foreign groups.⁴²² In my view, then, the decision rests in large part on the majority's belief that the judiciary should give Congress and the Executive great deference with regard to foreign affairs and national security.⁴²³

4. Government Speech and Support for Speech

It generally is agreed that when the government itself speaks, it is free to say what it wants.⁴²⁴ The conservative justices also have given the government great latitude when it supports speech in the context of a public program. A good example is *Rust v. Sullivan*,⁴²⁵ in which the Court voted five to four to reject a First Amendment challenge to a Reagan Administration regulation that banned abortion counseling or referral by clinics that received federal family-planning funds. Chief Justice Rehnquist's majority opinion relied heavily on the abortion-funding cases, *Maher v. Roe*⁴²⁶ and *Harris v. McRae*.⁴²⁷ In adopting the present regulation, Rehnquist wrote, the government was simply

exercising the authority it possesses under *Maher* and *Harris* . . . to subsidize family planning services which will lead to conception and childbirth, and declining to "promote or encourage abortion." The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." . . . "There

⁴²² *Id.* at 24–26.

⁴²³ *See id.* at 33–37. For a far-reaching argument that the government should be allowed to restrict speech to protect national security, see RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

⁴²⁴ *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

⁴²⁵ 500 U.S. 173 (1991).

⁴²⁶ 432 U.S. 464 (1977).

⁴²⁷ 448 U.S. 297 (1980). For discussion of these cases, see *supra* text accompanying notes 119–23.

is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”⁴²⁸

In several cases, Justice Scalia and Thomas have expressed this conservative-libertarian position in its purest form. According to these Justices, the First Amendment has no application at all in this area because a denial of funding “does not ‘abridge’ anyone’s freedom of speech”—a freedom that they understand in purely negative terms as the absence of government coercion.⁴²⁹

The other conservatives have not been willing to go this far, however. In *National Endowment for the Arts v. Finley*,⁴³⁰ the Court considered the constitutionality of a federal law that discouraged the agency from funding indecent art. Relying on *Rust*, Justice O’Connor upheld the law but cautioned that the First Amendment would not allow the government to use its funding power to suppress “disfavored viewpoints.”⁴³¹ In *Legal Services Corp. v. Velazquez*,⁴³² Justice Kennedy joined the four liberals to strike down a restriction on the arguments that legal aid lawyers could raise on behalf of their clients. And most recently, in *Agency for International Development v. Alliance for Open Society International, Inc.*,⁴³³ Chief Justice Roberts made clear that while *Rust* generally allows the government to control the content of speech *within* a public program, it does not permit the government to penalize individuals or groups because of the beliefs they hold or because of the speech they engage in *outside* the program.⁴³⁴ On these grounds, and over the dissent of Justices Scalia and Thomas,⁴³⁵ he held that the government could not deny funding for HIV/AIDS prevention to organizations that do not have a policy explicitly opposing prostitution.

D. Religious Speech

Although the conservative justices sometimes have been divided in the cases discussed above, they generally have been united in cases involving religious speech and the First Amendment. One of the most important decisions

⁴²⁸ *Rust*, 500 U.S. at 192–93 (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983), and *Maher*, 432 U.S. at 475).

⁴²⁹ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 595–98 (1998) (Scalia, J., concurring in judgment); *see also, e.g., Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (Scalia, J., dissenting).

⁴³⁰ 524 U.S. 569 (1998).

⁴³¹ *Id.* at 587–88.

⁴³² 531 U.S. 533 (2001).

⁴³³ 133 S. Ct. 2321 (2013).

⁴³⁴ *Id.* at 2328–31.

⁴³⁵ *Id.* at 2332 (Scalia, J., dissenting).

is *Rosenberger v. Rector & Visitors of the University of Virginia*,⁴³⁶ in which the Court ruled five to four that the university could not deny student-activities funding to an evangelical Christian student publication on the ground that it was primarily religious in character. Writing for the majority, Justice Kennedy held that the funding denial violated the First Amendment's ban on viewpoint discrimination.⁴³⁷ In a series of cases, the Court has invoked the same principle to hold that the Constitution not only permits but requires public schools to make their facilities available to religious groups on the same terms as other groups.⁴³⁸ As Steven P. Brown has shown in his book *Trumping Religion*, these decisions, including *Rosenberger*, were the product of a legal strategy that conservative-libertarian and religious groups devised to use the Free Speech Clause to protect religious expression within the public schools.⁴³⁹ This line of decisions is one of the signature achievements of the conservative-libertarian approach.

E. Conclusion: The Conservative-Libertarian Approach to Free Speech, Past and Present

The conservative-libertarian approach to the First Amendment appears most clearly in decisions like *Citizens United v. FEC*⁴⁴⁰ and *McCutcheon v. FEC*,⁴⁴¹ which ruled that Congress could not limit the role of money in politics; *American Booksellers Ass'n v. Hudnut*⁴⁴² and *R.A.V. v. City of St. Paul*,⁴⁴³ which struck down restrictions on pornography and hate speech; *Boy Scouts of America v. Dale*,⁴⁴⁴ which held that the Scouts could promote their traditionalist view of sexual morality by excluding gays from membership; and *Rosenberger v. Rector & Visitors of the University of Virginia*,⁴⁴⁵ which held that when a state university provided funding for student publications, it could not deny funding to a conservative Christian publication.

⁴³⁶ 515 U.S. 819 (1995).

⁴³⁷ *Id.* at 831.

⁴³⁸ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁴³⁹ See STEVEN P. BROWN, *TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS* (2002).

⁴⁴⁰ 558 U.S. 310 (2010).

⁴⁴¹ 134 S. Ct. 1434 (2014).

⁴⁴² 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

⁴⁴³ 505 U.S. 377 (1992).

⁴⁴⁴ 530 U.S. 640 (2000).

⁴⁴⁵ 515 U.S. 819 (1995).

The conservative-libertarian approach also plays an important role in other areas of First Amendment law. In decisions like *Harris v. Quinn*,⁴⁴⁶ for instance, the conservative Justices have limited the ability of public-sector labor unions to collect fees from non-members—a doctrine that, if taken further, could threaten the existence and vitality of those unions.

Consistent with their commitment to the free market, the conservative Justices also recently have taken the lead in broadening the constitutional protection for commercial advertising and other market-oriented speech.⁴⁴⁷ For example, in *Lorillard Tobacco Co. v. Reilly*,⁴⁴⁸ the five conservatives struck down a ban on tobacco advertising near schools and playgrounds.⁴⁴⁹ And in *Sorrell v. IMS Health, Inc.*,⁴⁵⁰ they invalidated a Vermont law that barred pharmaceutical companies from marketing drugs to individual doctors by obtaining and using confidential information about the drugs that the doctors had prescribed in the past. Although Justice Kennedy acknowledged that the state had an important interest in safeguarding medical privacy, he ruled that the law was a paternalistic interference with free speech in “the commercial marketplace,” which he extolled as a realm that, “like other spheres of our social and cultural life, provides a forum where ideas and information flourish.”⁴⁵¹

In all these cases, conservative judges took a libertarian approach to the First Amendment, and they used that approach to invalidate laws or policies that in their view threatened to subordinate individual liberty to liberal or progressive goals such as political reform, racial and sexual equality, gay rights, secularism, unionization, and anti-smoking efforts.

⁴⁴⁶ 134 S. Ct. 2618 (2014); *see also* *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277 (2012).

⁴⁴⁷ This represents a significant shift in approach: previously, conservative Justices often opposed broad protection for commercial speech, while liberal Justices supported it. *See, e.g., Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1985).

⁴⁴⁸ 533 U.S. 525 (2001).

⁴⁴⁹ *Id.* at 561–66 (majority opinion of O’Connor, J., joined by Rehnquist, C.J., & Scalia, Kennedy & Thomas, JJ.).

⁴⁵⁰ 131 S. Ct. 2653 (2011).

⁴⁵¹ *Id.* at 2671–72. Justice Thomas has gone the furthest in advocating protection for commercial speech. *See, e.g., Lorillard*, 533 U.S. at 572–75 (Thomas, J., concurring in part and in judgment) (arguing that strict scrutiny should often apply in this area and that “an asserted government interest in keeping people ignorant by suppressing expression is *per se* illegitimate and can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘noncommercial’ speech” (citation omitted) (internal quotation marks omitted)). For a conservative-libertarian defense of broad protection for commercial speech, see Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990). For a powerful early critique of affording constitutional protection to commercial speech, see C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

As I have tried to show, while these decisions clearly are related to the political inclinations of the judges, they also can be seen to reflect a deeper view. At the heart of this view is a conception of individuals as free, equal, and independent of one another. Society is an association of separate individuals, who pursue their own interests through competition or cooperation in the economic and political marketplace. The state is a necessary evil, for while a coercive power is needed to protect individuals from one another, this power itself poses a serious threat that must be guarded against. This function is performed by the Constitution, which not only divides and limits governmental power, but also sets forth “a charter of negative liberties” that protects the people against the state.⁴⁵² At the head of this charter stands the First Amendment.⁴⁵³ In interpreting the Amendment, judges should be guided by the original understanding or at least by history and tradition.⁴⁵⁴

On this conservative-libertarian view, freedom of speech serves a number of positive functions. To begin with, it allows individuals to form and pursue their own private interests and desires, as in *Hudnut* and the commercial speech cases, or their moral and religious beliefs, as in *Rosenberger* and *Dale*. Free speech also allows individuals to promote their interests and beliefs in the political and cultural marketplace, as in *Citizens United*, *McCutcheon*, and *Rosenberger*.

In general, however, the conservative-libertarian judges lay more stress on the negative than the positive value of freedom of expression. The First Amendment protects against government actions that invade individual liberty, interfere with the political process, or threaten to “drive certain ideas or viewpoints from the marketplace.”⁴⁵⁵ Above all, the First Amendment guards against government actions that strike at the very root of liberty by attempting “to control thought.”⁴⁵⁶

The conservative-libertarian approach to the First Amendment is not entirely novel. Instead, as Mark Graber shows in his important book *Transforming Free Speech*, a similar view was held by some leading conservatives during the late 19th and early 20th centuries, including scholars

⁴⁵² *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

⁴⁵³ *See Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 890 (1990) (describing First Amendment freedoms as “negative” in nature).

⁴⁵⁴ *See, e.g., United States v. Stevens*, 559 U.S. 460, 468–69, 472 (2010) (holding that courts should look to history and tradition to determine what categories of speech are unprotected); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in judgment) (“When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning . . .”); *id.* at 371–72, 375–76 (Scalia, J., dissenting) (contending that the First Amendment should be interpreted in accord with “its original meaning” or, when this is unclear, with “the widespread and longstanding traditions of our people”).

⁴⁵⁵ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992).

⁴⁵⁶ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (Kennedy, J.).

like Thomas Cooley, Christopher Tiedeman, and John Burgess and Justices like David Brewer and John Marshall Harlan.⁴⁵⁷ These men believed that the Constitution protected all forms of individual freedom, a position that led them to defend not only liberty of contract but also freedom of speech.⁴⁵⁸

As Graber explains, with the rise of early 20th-century progressive jurisprudence and the repudiation of *Lochner*, the conservative-libertarian defense of free speech disappeared from view.⁴⁵⁹ This older position appears to have had little direct influence on the libertarian position that conservative judges have developed in recent years. A comparison between the two positions, however, may shed some valuable light on the current approach.

Like the older form of conservative libertarianism, the current version sees “intimate constitutional relations between expression and economic rights”⁴⁶⁰—a position that clearly emerges in the campaign-finance and commercial-speech decisions.⁴⁶¹ In this way, it becomes clear that critics like Baker are right to characterize such decisions as essentially a return to the jurisprudence of *Lochner*.⁴⁶²

At the same time, there are some crucial differences between the older and newer forms of conservative libertarianism. Three points stand out. First, the jurists that Graber discusses focused on the defense of private property rights. For the most part, their concern for free speech was merely “incidental[]” to their basic commitment to limited government.⁴⁶³ In recent decades, the First Amendment has become one of the most important means by which judges have sought to advance a conservative-libertarian agenda.

Second, during the *Lochner* era, the conservative-libertarian defense of free speech played a more prominent role in legal treatises than it did in the courts. As Graber notes, “in no free speech case between 1897 and 1925 did the Supreme Court ever support the merits of a free speech claim,” and even after that time the conservative Justices’ record was quite mixed.⁴⁶⁴ In recent years, the conservative-libertarian approach to the First Amendment has enjoyed far greater success in the courts than it did during the *Lochner* era.

⁴⁵⁷ See GRABER, *supra* note 18, ch. 1.

⁴⁵⁸ See *id.*

⁴⁵⁹ See *id.* at 44.

⁴⁶⁰ *Id.* at 12 (describing the older view).

⁴⁶¹ See *supra* Part III.A.1 (discussing *Citizens United* and *McCutcheon*); *infra* Part IV.A (criticizing this position).

⁴⁶² See, e.g., Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish’s The Value of Free Speech*, 130 U. PA. L. REV. 646, 653 n.25 (1982) [hereinafter Baker, *Corporate Political Expenditures*].

⁴⁶³ GRABER, *supra* note 18, at 24.

⁴⁶⁴ *Id.* at 36, 45 & nn.140–42.

The final point relates to the scope of free speech. Like the current Justices, older writers like Cooley accepted the traditional rules that denied protection to categories such as obscenity and defamation.⁴⁶⁵ According to Graber, however, those writers also held more broadly that free speech was limited by the general principle that one's liberty does not extend to acts that injure other people.⁴⁶⁶ In decisions like *Hudnut* and *Snyder v. Phelps*,⁴⁶⁷ on the other hand, modern conservative-libertarian judges insist that speech may not be restricted merely because it causes serious harm to others.⁴⁶⁸

This doctrinal disagreement points to a fundamental conceptual difference between the two forms of conservative libertarianism. As Graber observes, the older view was based on a belief that the American constitutional order enshrined "certain fundamental substantive values" such as "the right of the citizen to be free in the enjoyment of all his faculties."⁴⁶⁹ These substantive values not only justified free speech but also established its limits.

By contrast, many contemporary conservative-libertarian judges are much more skeptical about substantive values.⁴⁷⁰ This point helps to explain why they focus less on the positive values served by free speech than on the need to protect negative liberty against governmental power.⁴⁷¹

⁴⁶⁵ See COOLEY, CONSTITUTIONAL LIMITATIONS 422 (4th ed. 1878); GRABER, *supra* note 18, at 18.

⁴⁶⁶ See, e.g., GRABER, *supra* note 18, at 34 (stating that Cooley endorsed John Stuart Mill's harm principle, including the idea that speech could be limited when it directly injured others).

⁴⁶⁷ 131 S. Ct. 1207 (2011).

⁴⁶⁸ See *supra* text accompanying notes 225, 230–31, 252–55 (discussing *Hudnut*); *infra* text accompanying notes 665–66 (discussing *Snyder*).

⁴⁶⁹ GRABER, *supra* note 18, at 36, 48; *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

⁴⁷⁰ See, e.g., *supra* text accompanying notes 155–57, 328–37 (Scalia), 226–31 (Easterbrook), 312–18 (Roberts). As we have seen, Justice Kennedy is a dramatic exception. His opinions on the First Amendment and other constitutional protections often invoke substantive values such as liberty and dignity. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (stating that for religious believers, "free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts"); *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (holding that Eighth Amendment forbids imposing death penalty on "an intellectually disabled person" because that would "violate[] his or her inherent dignity as a human being"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that anti-sodomy laws violate gay individuals' "dignity as free persons").

⁴⁷¹ As Justice Scalia once expressed the point, the First Amendment does not permit the suppression of material such as crush videos because "[i]t's not up to the government to tell us what our worst instincts are." Transcript of Oral Argument at 46–47, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769) (Scalia, J.).

IV. A CRITIQUE OF THE CONSERVATIVE-LIBERTARIAN APPROACH TO THE FIRST AMENDMENT

Although the conservative-libertarian approach to the First Amendment is a powerful one, I believe that it is deeply flawed. In this Part, I focus on five of the most serious problems with the view. First, it sees too close a connection between speech and property. Second, it affords too much protection to speech that injures others. Third, there are deep tensions between its libertarian and social-conservative elements. Fourth, it is incapable of meeting its own demand for ideological neutrality. And finally, it provides too little protection for speech by individuals within governmental institutions.

A. *Free Speech and Property Rights*

In decisions like *Citizens United v. FEC*⁴⁷² and *McCutcheon v. FEC*,⁴⁷³ the conservative Justices strike down legislation designed to limit the role of wealth in the electoral process. These decisions take the position that one's wealth is part of one's "identity," and that the freedom to speak includes a strong right to use one's resources for that purpose—a right that should extend not only to individuals but also to corporations.⁴⁷⁴ In these ways, the conservative Justices see a close connection between free speech and property rights.

The Court's position in these cases accords with broader currents in conservative-libertarian thought. Post-New Deal constitutional jurisprudence draws a categorical distinction between fundamental personal rights like speech, religion, and privacy, which are given a high level of protection, and property rights, which are subject to broad regulation for the public good.⁴⁷⁵ Libertarian theorists challenge this distinction.⁴⁷⁶ Indeed, they sometimes suggest that all rights are property rights rooted in a fundamental right to self-

⁴⁷² 558 U.S. 310 (2010).

⁴⁷³ 134 S. Ct. 1434 (2014).

⁴⁷⁴ *Citizens United*, 558 U.S. at 350–51; see *supra* Part III.A.1.

⁴⁷⁵ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965) (holding that laws that impact the constitutional right to privacy are subject to more searching judicial review than "laws that touch economic problems, business affairs, or social conditions"); *id.* at 497 (Goldberg, J., concurring) (observing that states may not abridge "fundamental personal liberties" simply by satisfying the rational basis test that applies in other cases); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (Black, J.) (asserting that "the liberties safeguarded by the First Amendment" "occupy a preferred position" in comparison with property rights); Robert B. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182 (1959).

⁴⁷⁶ See, e.g., BARNETT, LOST CONSTITUTION, *supra* note 24, at 260–61; EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 25, at 337–38.

ownership.⁴⁷⁷ In any event, these theorists contend that rights to economic liberty and property are entitled to no less constitutional protection than rights like free speech—a position they identify with the Lockean liberalism that characterized the founding period.⁴⁷⁸

I agree that Lockean liberalism deeply influenced the adoption of the Constitution,⁴⁷⁹ and that it can play an important role in contemporary constitutional theory. In my view, however, Lockean thought does not support the conservative-libertarian position on free speech and property rights. This point is worth exploring in some depth, for it shows that one of the most basic tenets of conservative libertarianism is unpersuasive even on its own terms.⁴⁸⁰

It is true that, in the *Second Treatise of Government*, Locke often uses *property* as a general term to refer to life and liberty as well as outward possessions.⁴⁸¹ He also asserts that individuals form civil society and government primarily to preserve their “property” in this extended sense.⁴⁸² In this way, Locke may appear to reject any categorical difference between the different kinds of rights, or even to hold that all rights are property rights.

On a closer reading, however, a very different picture emerges. Locke recognizes a basic distinction between *persons*, who are intelligent beings capable of freely directing their own actions, and *things*, which are not.⁴⁸³ An individual has a right to his own body, as well as a right to acquire things through his labor and to use them for “the Support and Comfort of his being.”⁴⁸⁴ For Locke, human beings have value in themselves, while property has instrumental value in fulfilling human needs.⁴⁸⁵

According to this view, property is subordinate to personhood—a principle that accounts for many of the inherent limitations on the Lockean right to property. First, only things—and not persons—can be the subject of

⁴⁷⁷ See, e.g., BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 27, at 78; BOAZ, *supra* note 38, at 61–70; Mack, *Individual Rights*, *supra* note 46, at 244. Some scholars argue that freedom of speech itself should be understood as a property right. See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996).

⁴⁷⁸ See, e.g., BARNETT, *LOST CONSTITUTION*, *supra* note 24, at 211–23, 260–61, 323–33; EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 25, at xi–xii, 17–18, 348–49, 383–84, 438; EPSTEIN, *TAKINGS*, *supra* note 27, at 134–40.

⁴⁷⁹ See, e.g., ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* (1985); MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC* (1997).

⁴⁸⁰ For another critique of this conservative-libertarian position, see C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986).

⁴⁸¹ See, e.g., LOCKE, *GOVERNMENT*, *supra* note 28, bk. II, §§ 87, 123. Unless otherwise noted, the following discussion will use *property* in the ordinary sense.

⁴⁸² See, e.g., *id.* bk. II, § 124.

⁴⁸³ See LOCKE, *HUMAN UNDERSTANDING*, *supra* note 29, bk. II, ch. XXI, §§ 4–13.

⁴⁸⁴ See LOCKE, *GOVERNMENT*, *supra* note 28, bk. II, §§ 26, 31–39, 44.

⁴⁸⁵ See *id.* bk. I, § 86; bk. II, §§ 26, 31–34.

property.⁴⁸⁶ Although one can contract to sell one's service to another for a limited time in exchange for wages, one cannot sell oneself in slavery.⁴⁸⁷ Moreover, because the right to property is founded on the needs of human beings, one is entitled to appropriate only so much as one can use for oneself and one's family; everything beyond that is the rightful share of others.⁴⁸⁸ Finally, Locke holds that property owners have a duty to afford "Relief" to others who lack means of subsistence in order to "keep [them] from extrem want."⁴⁸⁹ In these ways, the right to property is bounded by the law of nature, whose fundamental principle is the "*Preservation of all Mankind*."⁴⁹⁰

On Locke's view, property rights are subject to other limits as well. In a state of nature, an individual has a broad liberty to act for his own preservation.⁴⁹¹ When he enters into civil society, "*he gives up* [this liberty] to be regulated by Laws made by the Society" for "*the common good*," including the preservation of himself and others.⁴⁹² As Locke observes, these laws "in many things confine the liberty [individuals] had by the Law of Nature."⁴⁹³ And this is true of economic liberty in particular. In a state of nature, "different degrees of industry" result in different amounts of property.⁴⁹⁴ Initially, however, there could be little cause for disputes over property, because the world was so large in comparison with the number of people that one could appropriate as much as one could use and still leave "enough, and as good" for others.⁴⁹⁵ But this natural harmony was undermined by the invention of money, which made it possible for individuals to enlarge their possessions without any limit, resulting in "a disproportionate and unequal possession of the earth."⁴⁹⁶ Locke seems deeply ambivalent about these developments. On one hand, they arise from the "tacit and voluntary consent" of human beings and so cannot be regarded as illegitimate.⁴⁹⁷ But on the other hand, the unrestrained acquisition of property not only reflects an immoral lust for wealth and power,⁴⁹⁸ it also

⁴⁸⁶ See, e.g., *id.* bk. I, §§ 6, 17.

⁴⁸⁷ *Id.* bk. II, §§ 23–24, 85.

⁴⁸⁸ See *id.* bk. II, §§ 31, 37.

⁴⁸⁹ See LOCKE, GOVERNMENT, *supra* note 28, bk. I, § 42; bk. II, § 183.

⁴⁹⁰ *Id.* bk. II, §§ 7, 31, 135, 182.

⁴⁹¹ See *id.* bk. II, § 128.

⁴⁹² *Id.* bk. II, §§ 128–29, 131.

⁴⁹³ *Id.* bk. II, § 129.

⁴⁹⁴ See *id.* bk. II, § 48.

⁴⁹⁵ *Id.* bk. II, §§ 27, 31, 33–36, 51.

⁴⁹⁶ *Id.* bk. II, §§ 46–51.

⁴⁹⁷ *Id.* bk. II, § 50.

⁴⁹⁸ See *id.* bk. II, §§ 108, 110–11.

leads to conflicts over property and diminishes the capacity of other individuals to meet their own needs.⁴⁹⁹

For these and other reasons, when individuals enter into civil society, they authorize the government to make “positive laws” regulating economic activity in order to promote “the good of the Society” and its members.⁵⁰⁰ Such laws can “regulate the right of property”⁵⁰¹ as well as the freedom to make contracts.⁵⁰² The government may also impose taxes with the consent of the people or their representatives.⁵⁰³

According to Locke, rational individuals would willingly accept these limitations on their liberty and property in return for the benefits they receive “from the labour, assistance, and society of others in the same Community.”⁵⁰⁴ At the same time, the power to regulate does not give the government *carte blanche*: it is bound to protect the rights and promote the good of the people and may not arbitrarily deprive them of property.⁵⁰⁵ In addition, Locke contends that the protection of economic liberty is good policy which promotes the wealth of the society.⁵⁰⁶

Insofar as economic rights are subject to regulation for the common good, they can be characterized as *alienable rights*. Natural liberty in general is alienable in this sense.⁵⁰⁷ This is not true of all rights, however. In particular, Locke holds that an individual has no right to destroy his own life or to grant others arbitrary power over himself.⁵⁰⁸ It follows that life and freedom from arbitrary power are *inalienable rights* which individuals do not give up through the social contract.⁵⁰⁹

For our purposes, the most important rights that fall within this category are the freedoms of thought, belief, and speech. For Locke, government is essentially concerned with the outward dimension of human

⁴⁹⁹ See *id.* bk. II, §§ 36, 51. When Locke stresses that, in the period before “the *Invention of Money*,” “it was impossible for any Man . . . to intrench upon the right of another, or to acquire, to himself, a Property, to the Prejudice of his Neighbour,” *id.* bk. II, § 36, he implies that this is no longer the case after the invention of money has removed the natural limits to accumulation.

⁵⁰⁰ *Id.* bk. II, §§ 30, 50, 131.

⁵⁰¹ *Id.* bk. II, § 50; see also *id.* bk. II, §§ 45, 65, 120, 139.

⁵⁰² See *id.* bk. II, §§ 81–83. In this passage, Locke treats marriage as a contract that is similar to other contracts, and he indicates that contracts are subject to regulation by the “positive law” of the society. *Id.* bk. II, §§ 81–82; see also *id.* bk. II, § 24 (referring with approval to the biblical laws that limited the contractual power of masters over servants).

⁵⁰³ See *id.* bk. II, §§ 140, 142.

⁵⁰⁴ *Id.* bk. II, § 130.

⁵⁰⁵ See *id.* bk. II, §§ 131, 135, 137–40.

⁵⁰⁶ *Id.* bk. II, § 42.

⁵⁰⁷ See *id.* bk. II, §§ 129–31.

⁵⁰⁸ See *id.* bk. II, §§ 6, 17, 23.

⁵⁰⁹ See *id.* bk. II, §§ 135, 137.

life.⁵¹⁰ In pursuing their own preservation and acquiring possessions, individuals may come into conflict with others. Government is established to regulate the external interactions between individuals, to resolve disputes between them, and to protect their rights against invasion by others.⁵¹¹ To perform these functions, government is invested with the outward force needed to compel compliance.⁵¹²

By contrast, government has no legitimate power with regard to the inner realm of thought and belief. This doctrine lies at the heart of Locke's defense of religious liberty.⁵¹³ But the doctrine also extends to freedom of thought in general. When individuals enter into society, they give up the ability to use force against others, but "they retain . . . the power of Thinking" as they like.⁵¹⁴ The capacity to think for oneself is inherent in one's nature as an "intelligent Being."⁵¹⁵ One could not give up this capacity even if one wanted to.⁵¹⁶ This capacity is the foundation of human liberty, for it is what distinguishes us from things and enables us to freely direct our own actions.⁵¹⁷ Moreover, thought and belief are inward activities which cause no injury to others.⁵¹⁸ Finally, governments have no privileged insight into truth, and even if they had, there is no way to compel individuals to adopt particular beliefs.⁵¹⁹ It follows that the state has no jurisdiction over thought and belief: "[T]he business of Laws is not to provide for the Truth of Opinions, but for the Safety and Security of the Commonwealth, and of every particular man's Goods and Person."⁵²⁰

For all these reasons, the freedoms of thought and belief are inalienable rights. And the same is true of freedom of speech, to the extent that it is used to communicate one's thoughts and beliefs to others.⁵²¹ Unlike ordinary forms of liberty, these freedoms are not subject to the general power of government to

⁵¹⁰ See JOHN LOCKE, *A Letter Concerning Toleration* (1690), in *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS* 1, 12–13 (Mark Goldie ed., 2010) [hereinafter LOCKE, *Toleration*].

⁵¹¹ See LOCKE, *GOVERNMENT*, *supra* note 28, bk. II, §§ 87–89, 123–33; LOCKE, *Toleration*, *supra* note 510, at 12–13.

⁵¹² See LOCKE, *GOVERNMENT*, *supra* note 28, bk. II, §§ 3, 88–89, 130; LOCKE, *Toleration*, *supra* note 510, at 12.

⁵¹³ See LOCKE, *Toleration*, *supra* note 510, at 13.

⁵¹⁴ LOCKE, *HUMAN UNDERSTANDING*, *supra* note 29, bk. II, ch. XXVIII, § 10, at 353.

⁵¹⁵ *E.g.*, *id.* bk. II, ch. XXI, § 48, at 264.

⁵¹⁶ See, *e.g.*, LOCKE, *Toleration*, *supra* note 510, at 13, 44.

⁵¹⁷ See *supra* notes 475–77; see also LOCKE, *GOVERNMENT*, *supra* note 28, bk. II, §§ 57, 63.

⁵¹⁸ See, *e.g.*, LOCKE, *Toleration*, *supra* note 510, at 44.

⁵¹⁹ See *id.* at 12–14, 28–31.

⁵²⁰ *Id.* at 44–45.

⁵²¹ On the communication of "Thoughts" as "the chief end of Language," see LOCKE, *HUMAN UNDERSTANDING*, *supra* note 29, bk. III, ch. 1, § 3.

regulate for the common good. Instead, they may be restricted only when they are used to violate the rights of others, as with speech that threatens others with violence,⁵²² or religious practices that involve child sacrifice.⁵²³

For Locke, the freedoms of speech and thought also have a vital political dimension. Of course, individuals must use speech to form the social contract itself.⁵²⁴ Initially, all political power is vested in the people, who deliberate on what form of constitution to establish.⁵²⁵ Although they may delegate authority to a particular government, they retain the rights to freely choose their own representatives⁵²⁶ and to criticize the conduct of the government.⁵²⁷ Above all, the people have an inalienable right to determine whether the government has abused its power and forfeited its authority—a right that can be exercised only by means of speech and thought.⁵²⁸ These doctrines laid the foundation for the 18th-century theory of political freedom of speech.⁵²⁹

For all these reasons, I believe that conservative-libertarian theorists are mistaken when they appeal to Lockean thought to argue that all rights are property rights, or that there is no categorical distinction between property rights and personal rights like speech and thought. Although Locke placed a high value on the right to property, he held that it is rooted in and subordinate to the needs of persons. Property therefore is an alienable right which may be regulated to promote the common good and ensure the preservation of all members of society. By contrast, speech and thought are inalienable rights which lie at the basis of both individual and political freedom, and which can be restricted only to protect the rights of others.⁵³⁰

⁵²² See LOCKE, GOVERNMENT, *supra* note 28, bk. II, § 16.

⁵²³ See LOCKE, *Toleration*, *supra* note 510, at 37. It may be argued, however, that on a Lockean view some forms of speech should receive less protection—for example, that the government should be allowed to regulate speech that is part and parcel of an activity, such as commerce, which itself is subject to regulation for the common good. See HEYMAN, *supra* note 324, at 46.

⁵²⁴ See, e.g., LOCKE, GOVERNMENT, *supra* note 28, bk. II, §§ 95, 99.

⁵²⁵ See *id.* bk. II, §§ 95–99, 132.

⁵²⁶ See *id.* bk. II, § 222.

⁵²⁷ See, e.g., *id.* bk. II, § 93.

⁵²⁸ See, e.g., *id.* bk. II, §§ 149, 224–25, 230, 240.

⁵²⁹ See HEYMAN, *supra* note 324, at 8–9.

⁵³⁰ In an interesting article, John McGinnis has formulated a property-based approach to the First Amendment and has argued that this approach can find support in the thought of James Madison, who proposed the Amendment in the First Congress. See McGinnis, *supra* note 477, at 56–57, 64–71. It is true that in a 1792 essay on property, Madison asserted that “a man has a property in his opinions and the free communication of them.” JAMES MADISON, *Property* (1792), in WRITINGS 515, 515 (Library of Am., Jack N. Rakove ed. 1999) [hereinafter MADISON, *Property*]. It would be a mistake, however, to conclude that Madison saw no basic difference between free speech and property rights. As McGinnis recognizes, when Madison characterized

This discussion casts doubt on decisions like *Citizens United* and *McCutcheon*, which contend that a person's property is part of her "identity" and which strike down limits on the ability of both individuals and corporations to use their wealth to influence the electoral process.⁵³¹ In contrast to conservative-libertarian theorists, I do not believe that Lockean liberalism supports this result. To be sure, Locke recognizes that an individual's views are likely to be affected by his private interests.⁵³² But that is one of the main reasons that individuals are unwilling to remain in a state of nature.⁵³³ They establish civil society so that laws may be determined and disputes resolved not

free speech this way, he used *property* not in the narrow sense of material possessions but in the "larger and juster" sense of "every thing to which a man may attach a value and have a right." MADISON, *Property*, *supra* at 517; *cf. supra* text accompanying notes 481–82 (discussing Locke's extended sense of *property*). Elsewhere, Madison brought out the distinction between alienable and inalienable rights that I discussed above. He regarded free speech as a paradigmatic instance of the inalienable "natural right[s]" "which are retained" by individuals when they establish a government. *House of Representatives, Amendments to the Constitution*, in 5 THE FOUNDERS' CONSTITUTION 20, 26 (Philip B. Kurland & Ralph Lerner eds., 1987) (Madison speech of June 8, 1789, introducing the Bill of Rights); James Madison, *Notes for Amendment Speech* (1789), in 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1042 (1971). The category of inalienable rights applied even more emphatically to religious belief and practice, which the 1792 essay also described as a form of property. See James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 THE FOUNDERS' CONSTITUTION, *supra*, at 82; MADISON, *Property*, *supra*, at 515–17. These inalienable rights were not subject to general regulation by the government, although they did not license a person to violate the rights of others. See James Madison, *Report on the Virginia Resolutions* (Jan. 1800), in 5 THE FOUNDERS' CONSTITUTION, *supra*, at 141, 144 (indicating that free speech may be restricted to protect the right to reputation). By contrast, Madison recognized that property was subject to regulation for the public good. See JAMES MADISON, *The Federalist No. 10* (Nov. 22, 1787), in WRITINGS, *supra*, at 160, 162 [hereinafter MADISON, *Federalist No. 10*] (explaining that "[t]he regulation of [the] various and interfering interests [in property] forms the principal task of modern legislation"). Thus, Madison's views on free speech and property were fully consistent with the account of Lockean thought that I presented above.

Finally, it should be noted that Madison's essay on property apparently was intended to criticize the dominant Federalist Party for favoring powerful groups by placing too much emphasis on the rights of property in the narrow sense at the expense of the broader set of rights comprised in the "larger and juster meaning" of property. See MADISON, *Property*, *supra*, at 515, 517 (criticizing any government that "prides itself in maintaining the inviolability of property" while "violat[ing] the property which individuals have in their opinions, their religion, their persons, and their faculties"); see also STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 263–70 (1993) (discussing the series of essays that Madison wrote in the early 1790s). For this reason, it would be ironic to conclude that Madison's remarks on free speech and property provide any support for the Supreme Court's recent campaign-finance decisions.

⁵³¹ See *supra* Part III.A.1.

⁵³² See LOCKE, GOVERNMENT, *supra* note 28, bk. II, §§ 124–25.

⁵³³ *Id.*

by the self-interested “private judgement” of particular individuals, but by the impartial and evenhanded public judgment of the community.⁵³⁴

Thus, from a Lockean perspective, regardless of whether one’s property holdings affect one’s identity as a private person, they have no bearing on one’s identity as a member of the political community. The same is true for the Meiklejohnian view, which understands free speech in relation to democratic self-government.⁵³⁵ Like Locke, Meiklejohn draws a sharp distinction between one’s capacity as a private person and one’s capacity as a citizen.⁵³⁶ Although it is perfectly proper for individuals to pursue their self-interest in the private sphere, democratic deliberation should be oriented toward the public good.⁵³⁷ On both of these views, allowing individuals or other entities to make an unlimited use of their wealth to promote their private interests in the political sphere would undermine rather than promote constitutional government.

To be sure, it can be argued that the distinctions that Locke and Meiklejohn draw between public and private are overstated.⁵³⁸ There are indeed ways in which one’s identity may be shaped by one’s property.⁵³⁹ And of course individuals may draw on all aspects of their identities when they participate in public debate. Nevertheless, I believe that Locke and Meiklejohn ultimately are correct. Although individuals may identify with their private interests and property, they also are capable of distinguishing between that side of themselves and their identity as members of the political community, who have a responsibility to protect the rights and promote the good of all. If individuals were unable to make this distinction, but simply used the power of the state to promote their own private interests, democratic self-government would be neither legitimate nor possible.⁵⁴⁰

We are now in a position to assess the conservative majority’s claim that campaign-finance laws unconstitutionally discriminate on the basis of speaker identity. A law that banned wealthy individuals from engaging in democratic debate would rightly be condemned on this ground. But such a law

⁵³⁴ *Id.* bk. II, §§ 87–88.

⁵³⁵ *See supra* text accompanying notes 178–79.

⁵³⁶ *See* MEIKLEJOHN, *supra* note 178, at 80.

⁵³⁷ *See id.* at 79–80.

⁵³⁸ *See* HEYMAN, *supra* note 324, at 66.

⁵³⁹ For an illuminating account, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

⁵⁴⁰ *Cf.* JAMES MADISON, *The Federalist No. 51*, in WRITINGS, *supra* note 530, at 294, 297–98 (arguing that legitimate government does not exist in a society in which the stronger faction can readily and unjustly pursue its own interests at expense of the weaker faction); MADISON, *Federalist No. 10*, *supra* note 530 (arguing that a constitutional order should be designed to prevent such oppression, in part by making it more likely that elected representatives will discern and pursue “the public good”).

is a far cry from the ones at issue in *Citizens United* and *McCutcheon*. Contrary to Justice Kennedy's majority's view, the point of such laws is not to discriminate against *wealthy people*, but rather to limit the role that *wealth itself* plays in the electoral process. Far from being discriminatory, such laws treat all citizens as equal members of the body politic rather than as private individuals possessing unequal amounts of wealth. And rather than undermining the integrity of the democratic process, such laws seek to enhance it by preventing private interests from interfering with the ability of all citizens to engage in deliberation oriented to the public good.

These considerations have particular force when it comes to electoral spending by business corporations. From a Meiklejohnian standpoint, these entities are not citizens who have a right and responsibility to participate in democratic deliberation.⁵⁴¹ Moreover, as Locke stresses, different associations are formed for different purposes.⁵⁴² Business corporations are formed to advance their shareholders' economic interests, not to represent their political views. As Baker contends, when such entities participate in the electoral process, it is almost necessarily with a view to promoting their own private interests without regard to the public good.⁵⁴³

For these reasons, I believe that a democratic society should have the authority to impose reasonable limits on the role of money in election campaigns if its members believe that this would enhance democracy and protect it from corruption. In taking the opposite position, the majority in *Citizens United* and *McCutcheon* followed neither a Lockean nor a Meiklejohnian view, but rather a form of interest-group pluralism which holds that society is merely a collection of groups pursuing their own interests. More precisely, the majority's position is consonant with a Holmesian view that politics is essentially a struggle for power between competing groups, and that the function of free speech is to determine which groups hold the dominant power in the society.⁵⁴⁴ This position is antithetical to both of the other approaches, which understand constitutional government as government based on reason rather than force.⁵⁴⁵ By rejecting this position and by closely tying

⁵⁴¹ See *Citizens United v. FEC*, 558 U.S. 310, 423–24, 466 (2010) (Stevens, J., dissenting).

⁵⁴² See LOCKE, GOVERNMENT, *supra* note 28, bk. II, §§ 2, 77 (stressing distinctions between different associations); JOHN LOCKE, *Excerpts from A Third Letter for Toleration* (1692), in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS, *supra* note 510, at 69, 76 (same); LOCKE, *Toleration*, *supra* note 510, at 12–16, 18–20, 24 (arguing that the church and state are “absolutely separate and distinct” associations).

⁵⁴³ See Baker, *Corporate Political Expenditures*, *supra* note 462, at 652–55.

⁵⁴⁴ See Heyman, *Holmes*, *supra* note 233, at 712–14.

⁵⁴⁵ See LOCKE, GOVERNMENT, *supra* note 28, bk. II, §§ 1, 6, 8, 10, 11, 172; see also *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (maintaining that the founders believed “in the power of reason as applied through public discussion” and sought to establish a government in which “the deliberative forces should prevail over the arbitrary”).

freedom of speech to property rights, the conservative-libertarian approach tends to degrade that freedom rather than promote it.

B. Speech that Injures, Abuses, or Degrades Others

A second objection to the conservative-libertarian approach is that it grants too much protection to speech that injures, abuses, or degrades other people.

To begin, we may note a conceptual progression in some of the decisions we have discussed. *Citizens United* rests on a view of individuals and groups as separate, independent entities that compete with one another for economic and political power.⁵⁴⁶ In *Hudnut*, Judge Easterbrook accepts the premise of the Indianapolis ordinance—that some forms of pornography subordinate women by portraying them as mere sexual objects—but strikes it down on the ground that the First Amendment protects speech precisely because of the power that it has, even when this power is used to dominate others.⁵⁴⁷ The message of domination conveyed by pornography often is only implicit. In *R.A.V.*, however, Justice Scalia grants some protection to cross-burning and other forms of expression that overtly seek to dominate others.⁵⁴⁸

To be clear, I do not suggest that the conservative-libertarian judges in any way approve of violent or degrading pornography or racist hate speech. In *R.A.V.*, for example, the majority “wholeheartedly” endorses the state court’s view that “diverse communities” have an “obligation . . . to confront” “messages based on virulent notions of racial supremacy . . . in whatever form they appear.”⁵⁴⁹ Instead, my point is that these judges believe that, for First Amendment purposes, no principled distinction can be drawn between speech that undermines or assaults the personality of others and speech that does not.

This facet of the conservative-libertarian view can be traced to its conception of human beings as separate and independent individuals who have no inherent connection with one another. Understood in this way, the individual is a subject who sees himself as the center of the world, in contrast to all that is outside him. Although the individual may choose to cooperate with particular people, he may regard some others as objects to be used for his own purposes (as in *Hudnut*) or as enemies to be dominated or destroyed (as in *R.A.V.*). The problem with conservative libertarianism, then, is not that it approves of the destructive attitudes toward others that are embodied in these forms of

⁵⁴⁶ See *supra* Part III.A.1.

⁵⁴⁷ See *supra* text accompanying notes 230–31, 252–57.

⁵⁴⁸ Cf. Harry M. Clor, *Obscenity and Freedom of Expression*, in CENSORSHIP AND FREEDOM OF EXPRESSION 97, 100–01 (Harry M. Clor ed., 1971) (noting similar progression in area of obscenity).

⁵⁴⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (quoting *In re Welfare of R.A.V.*, 464 N.W.2d 507, 508, 511 (Minn. 1991)) (internal quotation marks omitted).

expression, but that it conceives of individuals as wholly subjective selves who may well hold such attitudes and who must be allowed to forcefully express them.

Expression of this sort can cause serious injury to its targets.⁵⁵⁰ It nevertheless may seem that such expression should be protected to safeguard the self-realization of the speaker. I believe that this view is mistaken for two reasons. First, an individual should have no right to pursue self-realization in a way that intentionally interferes with the legitimate self-realization of others.⁵⁵¹ Second, the expression of destructive attitudes toward others is also self-destructive, for it undermines the speaker's own humanity and his relationships with other people and the community. In this way, the conservative-libertarian effort to protect individual subjectivity proves to be self-defeating, for the unrestrained expression of subjectivity can injure the selfhood not only of others but also of the speaker herself.⁵⁵²

None of this is meant to say that speech always should be unprotected when it expresses hostility toward others or even when it causes them harm. Instead, my contention is simply that the conservative-libertarian view fails to adequately grapple with the problem of harmful, abusive, and degrading speech. In Part V, I shall contend that this problem should be redefined in terms of competing rights. On this view, freedom of speech is a fundamental right, but one that must be exercised with due regard for the rights of others—a perspective that will shed a different light on issues like hate speech and pornography.

C. *The Conflict Between Libertarianism and Social Conservatism*

This discussion of the harms that speech can cause leads to the next point. In a series of recent cases, Justice Alito has criticized the majority's libertarian rulings from a traditional moral perspective. In *United States v.*

⁵⁵⁰ See, e.g., *infra* text accompanying note 673 (discussing *R.A.V.*).

⁵⁵¹ See HEYMAN, *supra* note 324, at 166.

⁵⁵² For some other conservative-libertarian opinions that would protect speech that arguably causes serious injury to others, see *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (Roberts, C.J.) (holding that funeral picketing is entitled to protection), *discussed infra* Part V.C; *Avis Rent A Car Sys. v. Aguilar*, 529 U.S. 1138, 1140–41 (2000) (Thomas, J., dissenting from denial of certiorari) (arguing that employment discrimination laws that ban use of racial and ethnic epithets likely violate the First Amendment); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1192–207 (9th Cir. 2006) (Kozinski, J., dissenting) (contending that school had offered no valid reason to bar student from wearing t-shirt declaring that “HOMOSEXUALITY IS SHAMEFUL”), *vacated as moot*, 549 U.S. 1262 (2007); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1089–101 (9th Cir. 2002) (en banc) (Kozinski, J., dissenting) (maintaining that First Amendment should protect speech that intimidates doctors into ceasing to perform abortions), *cert. denied*, 539 U.S. 958 (2003); *Saxe v. State Coll. Area Sch. Dist.* 240 F.3d 200 (3d Cir. 2001) (Alito, J.) (holding that public school district's anti-harassment policy violated First Amendment).

Stevens,⁵⁵³ he contended that crush videos should be unprotected because their creation involves “horrific acts of animal cruelty,” and because the videos are “a form of depraved entertainment that has no social value.”⁵⁵⁴ The following year, in *Brown v. Entertainment Merchants Ass’n (EMA)*,⁵⁵⁵ he argued that the Court should leave open the possibility of state regulation of ultraviolent video games because of the impact they may have on “impressionable minors,” who soon would be able “to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.”⁵⁵⁶ In *Snyder v. Phelps*,⁵⁵⁷ he dissented from a ruling that the Westboro Baptist Church had a First Amendment right to picket the funeral of a fallen soldier—an act that he described as “a malevolent verbal attack on [the deceased] and his family at a time of acute emotional vulnerability.”⁵⁵⁸ And in *United States v. Alvarez*,⁵⁵⁹ he maintained that Congress should be allowed “to stem an epidemic of false claims about military decorations”—“lies [which] Congress reasonably concluded were undermining our country’s system of military honors and inflicting real harm on actual medal recipients and their families.”⁵⁶⁰

This running disagreement between Justice Alito and some of his colleagues highlights another problem for conservative First Amendment jurisprudence. Conservative judges tend to embrace both social conservatism and libertarianism. But there is a deep tension between these two strands of thought. This tension is not evident in cases where conservative judges strike down liberal regulation, but it emerges in sharp relief in the cases just mentioned. These cases raise the question whether conservative First Amendment jurisprudence is coherent. How is it possible to reconcile the two strands in a way that allows judges to choose between them in particular cases? Several answers to this question have been put forward, but none is satisfactory.

The first answer is an originalist one. This position would grant protection to speech except where it falls into a category that was unprotected at the time the First Amendment was adopted. Justice Scalia suggests this approach in *R.A.V.* when he writes that “[f]rom 1791 to the present, . . . our society, like other free but civilized societies,” has recognized “a few limited” exceptions to the general principle that the government may not restrict speech

⁵⁵³ 559 U.S. 460 (2010).

⁵⁵⁴ *Id.* at 482 (Alito, J., dissenting).

⁵⁵⁵ 131 S. Ct. 2729 (2011).

⁵⁵⁶ *Id.* at 2742, 2750 (Alito, J., joined by Roberts, C.J., concurring in judgment).

⁵⁵⁷ 131 S. Ct. 1207 (2011).

⁵⁵⁸ *Id.* at 1222 (Alito, J., dissenting).

⁵⁵⁹ 132 S. Ct. 2537 (2012).

⁵⁶⁰ *Id.* at 2556 (Alito, J., joined by Scalia & Thomas, JJ., dissenting). For an appreciative account of Alito’s moral conservatism, see TRIBE & MATZ, *supra* note 105, at 141–43.

because of its content.⁵⁶¹ On this view, the original meaning dictates whether a judge should take a libertarian or a social-conservative position in First Amendment cases.

There are several serious problems with this view. First, it overstates how libertarian the original understanding of the First Amendment was. Although scholars have differing views of this understanding, it clearly was far less protective than is modern First Amendment jurisprudence.⁵⁶² In this way, Scalia's formulation biases the contest between libertarianism and social conservatism from the outset.

Second, it is often difficult to ascertain the original understanding on a particular issue, either because of scarce evidence, because Americans held conflicting views, or because they simply did not consider the issue or frame it as we do today. In such cases, a judge's account of the original understanding is likely to be influenced by her normative views, and in particular by her inclination toward libertarianism or social conservatism with regard to that issue.

Third, as Scalia acknowledges in *R.A.V.*, in recent decades the Court has "narrowed the scope of the traditional categorical exceptions" to First Amendment protection in areas like defamation and obscenity.⁵⁶³ This development alters the situation in which conservative-libertarian judges find themselves. To take a strict originalist position in future cases might require them to overrule such landmarks of modern First Amendment jurisprudence as *New York Times Co. v. Sullivan*,⁵⁶⁴ which established a broad freedom to criticize public officials.⁵⁶⁵ That is a path that conservative-libertarian judges have shown no desire to take. Again, this departure from originalism opens the way for normative considerations—and especially varying commitments to libertarianism or social conservatism—to play a role in future cases in which judges are called upon to decide the appropriate scope of a categorical exception.

⁵⁶¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting) (asserting that "laws against libel and obscenity [clearly] do not violate 'the freedom of speech' to which the First Amendment refers [because] they existed and were universally approved in 1791"). In cases that involve challenges to state laws, Scalia would also look to the understanding that prevailed in 1868 when the Fourteenth Amendment was adopted. See *id.* at 372–73, 375.

⁵⁶² See, e.g., LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985).

⁵⁶³ *R.A.V.*, 505 U.S. at 383.

⁵⁶⁴ 376 U.S. 254 (1964).

⁵⁶⁵ *Id.* at 259–60 (holding such criticism protected unless knowingly or recklessly false). The common-law doctrine of seditious libel prohibited even truthful attacks on government officials, and held such attacks to be outside the liberty of the press. See 1 BLACKSTONE, *supra* note 244, at *150–53. At the time of the founding, Americans were divided about the extent to which defamation of public officials should be protected, and those who adopted the First Amendment did not attempt to resolve this controversial issue. See HEYMAN, *supra* note 324, at 14–15.

Fourth, the courts often have to apply the First Amendment to types of expression that hardly could have been imagined when the Constitution was adopted. This problem is well illustrated by *EMA*, the video game case. At oral argument, Justice Scalia pressed the state's lawyer to explain how a ban on depictions of violence could be reconciled with originalism: "[Y]ou're asking us to create . . . a whole new prohibition which the American people . . . never ratified when they ratified the First Amendment."⁵⁶⁶ As the advocate struggled to formulate an answer, Justice Alito interjected, "Well, I think what Justice Scalia wants to know is what James Madison thought about video games."⁵⁶⁷ As this exchange indicates, many of the issues that the Court faces today are so remote from those known to the framers that it makes no sense to search for originalist answers to them.

Finally, the Court has held that even protected speech may be regulated on the basis of content if the government has a sufficiently strong reason to do so.⁵⁶⁸ This form of analysis looks not to original meaning but to current needs. In a number of contested cases, the conservative Justices have disagreed about how demanding this review should be and about whether particular regulations satisfied it.⁵⁶⁹ These judgments too will be strongly influenced by the Justices' ideological leanings.

For all these reasons, the originalist approach is unable to resolve the basic conflict between libertarianism and social conservatism. And the same objections apply to a second approach—the position that the Court takes in *Stevens*—which looks more broadly to our nation's history and tradition.⁵⁷⁰ The character of this tradition (whether conservative, libertarian, or progressive) and its position on particular issues often will be contestable.⁵⁷¹ In any event,

⁵⁶⁶ Transcript of Oral Argument at 16, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448) (Scalia, J.).

⁵⁶⁷ *Id.* at 17 (Alito, J.).

⁵⁶⁸ *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

⁵⁶⁹ *See, e.g., supra* text accompanying notes 327–50 (discussing cases on violent entertainment and nonobscene sexual material).

⁵⁷⁰ *See supra* text accompanying notes 317–18. Justice Scalia takes a similar position in cases where the meaning of a constitutional text is not clear. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375–78 (1995) (Scalia, J., dissenting) (maintaining that in such cases "the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine").

⁵⁷¹ For example, in his majority opinion in *EMA*, Justice Scalia argued that the case was controlled by *Stevens* because the nation had no tradition of regulating depictions of violence. *EMA*, 131 S. Ct. at 2734. In support of this proposition, he observed that the Court had struck down such a law decades earlier in *Winters v. New York*, 333 U.S. 507 (1948). *See* 131 S. Ct. at 2734–35. Yet as the *Winters* dissent pointed out, that law had "been part of the laws of New York for more than sixty years, and New York is but one of twenty States having such legislation." *Winters*, 333 U.S. at 520 (Frankfurter, J., dissenting). Here the tradition was in the eye of the

the Court has shown a willingness to modify the traditional rules, and they often are inadequate to deal with new forms of expression.

A third way to reconcile the two strands would be to take a libertarian approach to speech that expresses ideas and a traditionalist approach to speech that does not. The majority opinion in *R.A.V.* suggests an approach like this when it quotes *Chaplinsky's* classic description of the unprotected categories as having “such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁵⁷² However, the conservative Justices disagree on what constitutes an idea, as well as on whether particular restrictions are based on the ideas contained in the speech or on the harm that it causes. In *EMA*, for example, Justice Alito argued that regulation of violent video games might be justified by their impact on young people, while Justice Scalia contended that Alito’s position would allow such games to be restricted because of “the *ideas*” they express—a term that he understood to include not only “racism” but also “violence” and “gore.”⁵⁷³ Cases like this suggest that determining whether a restriction is based on ideas is not a clear-cut inquiry, and that it is likely to be influenced by the judge’s libertarian or social-conservative tendencies.

In *Snyder v. Phelps*,⁵⁷⁴ Chief Justice Roberts stressed the role that free speech plays in democratic self-government.⁵⁷⁵ This suggests a fourth way to reconcile the two strands: the courts could take a libertarian approach to speech on matters of public concern, while allowing other speech to be regulated on traditional moral grounds.⁵⁷⁶ As *Snyder* itself shows, however, the conservative Justices disagree on the nature and limits of public debate. Chief Justice Roberts found that Westboro’s funeral picketing was directed toward matters of public concern, while Justice Alito contended that the group had clearly transgressed the bounds of legitimate public discourse and had mounted a “vicious verbal assault” that was intended to “wound the family and friends of the deceased.”⁵⁷⁷ Thus, the fourth approach does not resolve the conflict between the two strands but instead reproduces it.

beholder: one could rely on *Winters* to show that the nation either did or did not have a tradition of regulating violent entertainment.

⁵⁷² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); see also *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1124–26 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting) (arguing that First Amendment protection is limited to activity that expresses ideas), *rev’d sub. nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); Blasi, *supra* note 338, at 633–34 (discussing Easterbrook’s position).

⁵⁷³ *EMA*, 131 S. Ct. at 2738; *id.* at 2750–51 (Alito, J., concurring in judgment).

⁵⁷⁴ 131 S. Ct. 1207 (2011).

⁵⁷⁵ See *id.* at 1215.

⁵⁷⁶ Cf. *id.* at 1215–16 (contrasting protection given to speech on matters of public and nonpublic concern).

⁵⁷⁷ *Id.* at 1216–17; *id.* at 1222, 1224 (Alito, J., dissenting).

Finally, the same is true of a fifth approach, which would distinguish between the different spheres of social life. On this view, libertarian principles should apply to the market and the state—public realms in which people relate to one another as free, equal, and independent individuals—while social-conservative principles should apply to the family, a private realm of mutual dependence and support. For example, this approach would allow the law to regulate obscenity to protect the family, but would grant protection to commercial and political speech.

This approach accords with some conservative political thought,⁵⁷⁸ and it may come closer than any other to capturing the overall shape of conservative First Amendment jurisprudence. Yet the example of sexual material also points to some of the difficulties with this approach. While restrictions on the distribution of such material may protect the family, they also may interfere with the ability of adults to obtain the material. The family and the market are not sharply separate spheres. Regulations that seek to protect the family may interfere with the liberty of individuals in the market, while a refusal to restrict that liberty may have an impact on the family. The way one resolves this conflict will be affected by one's inclination toward libertarianism or social conservatism—a point that is exemplified by the divisions that the conservative Justices have experienced over issues like nonobscene sexual expression and violent entertainment.⁵⁷⁹

In all these ways, the conflict between these two strands of conservative thought proves resistant to resolution. In the cases we are discussing, there appears to be no clear, principled way for conservative judges to decide whether to take a libertarian or a traditionalist position. For these reasons, it is hardly surprising that they so often disagree.

The ultimate problem is that the two strands embody very different social, political, and moral views. Libertarianism exalts the value of individual freedom, while traditional conservatism stresses such values as tradition, order, authority, morality, religion, and community.⁵⁸⁰ The tension between these two sets of values can be seen in *R.A.V.*'s description of America as a “free *but* civilized societ[y].”⁵⁸¹ For conservative libertarians, individual freedom and social norms are antithetical, and it is very difficult to resolve conflicts or to bring them together in a coherent way.

⁵⁷⁸ See, e.g., BERKOWITZ, *supra* note 23, ch. 4 (discussing efforts of many modern American conservatives to protect economic and political liberty as well as traditional institutions such as the family).

⁵⁷⁹ See *supra* text accompanying notes 327–50.

⁵⁸⁰ See, e.g., NASH, *supra* note 23, ch. 3 (discussing traditionalism).

⁵⁸¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (emphasis added).

D. Ideological Neutrality

Opinions like *Hudnut* and *R.A.V.* treat ideological neutrality as an imperative in the regulation of speech and the application of the First Amendment.⁵⁸² From what has been said, however, it should be clear that the conservative-libertarian view itself is unable to meet this standard. That view accords speech broad protection except when it historically has been subject to regulation—a position that is tailor-made for striking down progressive regulation of speech while upholding regulation in the name of traditional morality.⁵⁸³ Moreover, even the libertarian element of the view reflects a particular ideological vision.⁵⁸⁴ Whether or not one accepts this libertarian position, it is difficult to claim that it is merely an ideologically neutral framework within which all views can compete, with an equal opportunity to influence public policy and be enacted into law.

To be clear, I do not mean to say that the problem with the conservative-libertarian view is that it is not ideologically neutral. In my view, while a theory of the First Amendment should afford protection to as broad a range of views as possible, any such theory ultimately will be based on a particular conception of self, society, and the state. In this sense, our goal should be to develop a substantively sound view rather than a neutral one. The problem with the conservative-libertarian approach is not that it lacks neutrality, but that it condemns other views on this ground while turning a blind eye to its own ideological character.

E. Speech Within Governmental Institutions

In the first two Sections of this Part, I criticized the conservative-libertarian approach for affording too much protection to some forms of speech. But there are other contexts in which this approach affords too little protection. That is especially true of speech by individuals within governmental institutions, including prisoners, public employees, and those serving in the military. The conservative judges tend to grant strong deference to these institutions and to allow them to broadly control the speech of those subject to their authority.⁵⁸⁵

An adequate discussion of this subject would require more space than I can give it here.⁵⁸⁶ It seems perverse, however, for an approach that emphasizes the need to protect free speech against the government to deny such protection

⁵⁸² See *supra* text accompanying notes 252–57 (*Hudnut*), 264–72 (*R.A.V.*).

⁵⁸³ See *supra* Part III.B.1.

⁵⁸⁴ See *supra* Part II.A.

⁵⁸⁵ See *supra* text accompanying notes 384–402.

⁵⁸⁶ For some critiques of the Court's decisions in this area, see TRIBE & MATZ, *supra* note 105, at 131–36; Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 725–28 (2011).

to those individuals who are most vulnerable to state control.⁵⁸⁷ Despite their particular statuses, prisoners, public employees, and members of the military also have inherent rights as human beings and citizens, and their speech is capable of promoting First Amendment values such as individual self-realization, democratic self-government, and the search for truth. When it does, their interest in free speech should not be given short shrift on the ground that they are subject to the authority of governmental institutions. Instead, the courts should approach such cases in a more careful and thoughtful way by balancing the competing values at stake, as the Supreme Court did in *Pickering v. Board of Education*.⁵⁸⁸ To offer just one example, I believe that the majority in *Garcetti v. Ceballos*⁵⁸⁹ was wrong to lay down a categorical rule that the First Amendment does not protect speech within the scope of an employee's duties. In a case like *Garcetti*, where an employee alleges serious governmental wrongdoing, there often will be a compelling case for First Amendment protection.

F. Conclusion

In this Part, I have identified several serious problems with the conservative-libertarian approach to the First Amendment: (1) it sees too close a connection between speech and property rights; (2) it rests on an overly subjective and individualist conception of the self, which leads it to give undue protection to speakers at the expense of other individuals and the community; (3) it suffers from a deep conflict between its libertarian and social-conservative elements; (4) it insists on a rigid notion of ideological neutrality which it cannot meet itself; and (5) it fails to give adequate protection to speech by individuals within governmental institutions. For all these reasons, I believe that the conservative-libertarian view is fatally flawed, and that we need to adopt a different approach to the First Amendment.⁵⁹⁰

⁵⁸⁷ This objection also has some application to the issue of student speech, where the conservative Justices' position has been less clear-cut. See *supra* text accompanying notes 403–14.

⁵⁸⁸ 391 U.S. 563, 568 (1968); see *supra* text accompanying notes 398–99.

⁵⁸⁹ 547 U.S. 410 (2006).

⁵⁹⁰ Of course, a leading alternative is the liberal or progressive form of civil libertarianism associated with scholars like Baker and Ronald Dworkin and with organizations like the ACLU. This view deserves much more consideration than it can receive here. As I have explained elsewhere, however, I believe that this view possesses some of the same strengths and weaknesses as the form of libertarianism discussed in this Lecture: on one hand, the civil-libertarian view properly provides strong protection for speech critical of the government, while on the other hand, it grants too much protection to speech that injures other people and it has an excessive commitment to ideological neutrality. See HEYMAN, *supra* note 324. For these reasons, it is worth considering a new approach to the First Amendment.

V. A LIBERAL-HUMANIST APPROACH TO THE FIRST AMENDMENT

In this Part, I present an alternative that I call liberal humanism. This view is liberal in that it places a high value on individual freedom; it is humanist in the sense that it seeks to promote the fullest realization of human nature and the good. On this view, there is no inherent conflict between individual liberty and substantive values such as human dignity, equality, and community. Instead, the goal of law should be to harmonize these values with one another. I begin by sketching the main features of this view and contrasting it with conservative libertarianism. I then explore its implications for First Amendment jurisprudence.

A. *Basic Theory*

1. Self and Society

Like libertarianism, the liberal-humanist view recognizes the inherent value of the individual. But this view seeks to incorporate individualism into a richer and more comprehensive conception of the self. Although there are important ways in which we are separate and independent individuals, we are also social beings who share a common life.⁵⁹¹ We realize our nature and find fulfillment not only through the development of our individuality, but also through social relationships and participation in community.

Speech and thought play a central role in both dimensions of human life. In addition to cultivating their own inner lives, individuals have a strong desire to communicate with others. At one level, communication involves an effort to convey thoughts, feelings, or information from one person to another. But on another and deeper level, communication creates or reinforces a relationship between the participants, within which they seek to develop mutual understanding, not only of the topics they are discussing but also of one another.⁵⁹² In these ways, communicative speech is not only *subjective*, expressing the speaker's own thoughts and feelings, but also *intersubjective* and *social*, involving a relationship between persons.⁵⁹³ And this is true not

⁵⁹¹ It was for this reason that Robert Nozick ultimately rejected the libertarian position that he had developed in *Anarchy, State, and Utopia*. See ROBERT NOZICK, *The Zigzag of Politics*, in *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* 286, 286–88 (1989).

⁵⁹² See Steven J. Heyman, *To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment*, 45 *CONN. L. REV.* 101, 130–31 (2012) [hereinafter Heyman, *Funeral Picketing*].

⁵⁹³ See, e.g., 1 CHARLES TAYLOR, *Theories of Meaning*, in *PHILOSOPHICAL PAPERS* 248, 259–60, 263–66 (1985); CHARLES TAYLOR, *Cross-Purposes: The Liberal-Communitarian Debate*, in *PHILOSOPHICAL ARGUMENTS* 181, 189–90 (1995); Robin West, *Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's Constitutional Identity*, 14 *CARDOZO L. REV.* 759, 761 (1993).

only when individuals converse with one another but also when they participate in discourse within a broader community.⁵⁹⁴

From what I have said, it follows that liberal humanism also rejects the conservative-libertarian view of society as a mere aggregation of separate and independent individuals. A society embraces a broad range of associations, from friendships, couples, and families to workplaces, religious bodies, and other groups. An individual often regards the relationships and communities that she belongs to as having important value in themselves, and may incorporate them into her identity: she may see herself as a daughter, a mother, a Jew, an architect, and so on. Moreover, many people feel a strong sense of belonging to the nation as a whole and regard this as a basic aspect of their identity.⁵⁹⁵

Once again, I do not mean to suggest that libertarianism necessarily fails to appreciate the importance of social relationships. Although some libertarians (such as the followers of Ayn Rand) may be radical individualists, others recognize the deep value that such relationships can have.⁵⁹⁶ But libertarianism and liberal humanism understand the nature of our sociality in fundamentally different ways. The difference emerges most clearly in the debate over a duty to rescue. Suppose that I see another person in grave danger, who will die unless I provide or summon immediate assistance—something that I can do without serious risk to myself. Libertarians maintain that, because the other person and I are essentially separate and independent individuals, the law would violate my autonomy if it required me to act.⁵⁹⁷ By contrast, liberal humanists contend that as human beings and members of the community, we have an inherent connection with one another which supports a duty to aid. This connection is not a matter of arbitrary choice but a fundamental aspect of who we are as social beings. Of course, the legislature must also take account of practical considerations in determining whether and how this duty should be given legal form. But as a matter of principle, there is nothing improper about requiring me to rescue in a situation like this.⁵⁹⁸

2. The State

Like conservative libertarians, liberal humanists are strongly aware of the need to protect liberty against the state. But they also recognize a positive

⁵⁹⁴ See Heyman, *Funeral Picketing*, *supra* note 592, at 134–35.

⁵⁹⁵ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989); *id.* at 422 (Rehnquist, C.J., dissenting).

⁵⁹⁶ See, e.g., *BOAZ*, *supra* note 38, at 127–28.

⁵⁹⁷ See *supra* text accompanying notes 42–43.

⁵⁹⁸ This view is developed in Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) [hereinafter Heyman, *Duty to Rescue*]. Leslie Bender has formulated a similar argument in feminist terms. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33–35 (1988).

relationship between the state and its citizens. Just as individuals have a duty to obey the state's law, the state has a reciprocal duty to protect their rights, to promote their well-being, and to ensure that they can meet their basic needs.⁵⁹⁹ But the relationship goes deeper than this. In a democratic society, the state is not—or should not be—a force that is simply separate from, let alone opposed to, the people. Instead, the state is a framework within which members of the political community can deliberate and act together for the common good, and thereby also shape and express their common identity.⁶⁰⁰

3. The Nature of Liberty

As this discussion suggests, the two views also hold fundamentally different conceptions of liberty. Conservative libertarians understand liberty primarily in negative terms, as freedom from interference by other individuals or the state.⁶⁰¹ For liberal humanism, this is an important form of liberty but not the only one. This view also conceives of liberty in a positive way, as a person's ability to act and to pursue her own good.

The state affirmatively promotes this form of liberty in a variety of ways. First, it enables individuals to act when it makes laws such as those that establish the legal framework for property and contract.⁶⁰² Second, the state promotes freedom when it protects individuals against the invasion of their rights by others, something which it does directly as well as by imposing tort and criminal liability on wrongdoers.⁶⁰³ Third, when the state provides benefits like access to health care, it increases the ability of individuals to pursue their own good and thereby enhances their liberty.⁶⁰⁴

A fourth way in which the state promotes freedom is by enabling individuals to enter into social relationships with others. For example, the state increases the freedom of same-sex couples when it recognizes their capacity to enter into lawful marriages. And conversely, as the Court stated in *United States v. Windsor*,⁶⁰⁵ laws like the Defense of Marriage Act can be seen “to restrict the freedom and choice of [such] couples.”⁶⁰⁶

⁵⁹⁹ See *infra* text accompanying notes 632–36.

⁶⁰⁰ See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 188, 300–02 (1995).

⁶⁰¹ See *supra* text accompanying notes 46–47.

⁶⁰² See *supra* text accompanying note 49.

⁶⁰³ See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 528–30 (1991) [hereinafter Heyman, *Protection*].

⁶⁰⁴ See, e.g., Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119, 1132–33.

⁶⁰⁵ 133 S. Ct. 2675 (2013).

⁶⁰⁶ *Id.* at 2693.

As this point suggests, freedom has not only an individual but also a social dimension. When I am isolated from others, I may feel constrained, limited, trapped within myself. From this perspective, social interaction is liberating, for it allows me to escape this isolation and to feel more at home in the world. Through interaction with others, I am enabled to do things (such as form social relationships and take part in collective activities) that I cannot do on my own. Thus, one of the most basic forms of freedom is to be in relationship or community with others.⁶⁰⁷

On a civic level, this social form of freedom consists of being a member of the political community. This notion is reflected in the Fourteenth Amendment, which was based on recognition that those who were formerly enslaved could not enjoy complete freedom so long as they were denied citizenship.⁶⁰⁸ The Fourteenth Amendment enhanced their freedom when it recognized them as citizens of the United States with all of the privileges and immunities that inhere in that status.⁶⁰⁹

Among the most important rights of citizenship is the ability to vote. Of course, this is a right that one does not have as an isolated individual, but only as a member of the community. When individuals vote, they exercise their liberty as citizens collectively through the democratic process. In this respect, freedom is something that exists not in opposition to the state, or even with its affirmative assistance or recognition, but rather through the active participation of citizens in the state. In all these ways, the state is capable of having a positive and not only a negative relation to liberty.

4. Law, the Constitution, and the Courts

The two views also have differing conceptions of law. For the conservative-libertarian view, law consists of the external, objective, formal rules that are needed to govern the interaction between separate and independent individuals.⁶¹⁰ The liberal-humanist view recognizes that some law (such as many of the rules of tort and contract law) is of this sort. At a deeper level, however, it understands law as the rules that govern or inhere in the

⁶⁰⁷ See, e.g., HEGEL, *supra* note 36, § 158. This notion can be discerned in the historical origins of the word *free*. As the Oxford English Dictionary explains, “[t]he original sense of the Indo-European base has been conjectured to be ‘one’s own,’” from which it came to mean “dear, beloved.” 6 OXFORD ENGLISH DICTIONARY 157 (2d ed. 1989). Thus, there is a close etymological relationship between *free* and *friend*. See *id.* at 192. The use of *free* to mean the opposite of servitude may have arisen “from the application of the word [*free*] as the distinctive epithet of those members of the household who were ‘one’s own blood,’ i.e. who were connected by ties of kinship with the head, as opposed to the unfree slaves.” *Id.* at 157.

⁶⁰⁸ See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION ch. 11 (1990).

⁶⁰⁹ See *id.*; U.S. CONST. amend. XIV, § 1.

⁶¹⁰ See *supra* text accompanying note 54.

relationships that exist within the society. Because these relationships change and develop over time, so do the rules that regulate them.

The same thing is true of the Constitution itself. Although it is a written document, many of the terms that it uses—such as “liberty,” “equal protection,” and “freedom of speech”—are broad and general ones whose meaning can be found only in the ways they are understood within the community.⁶¹¹ Many conservative libertarians hold that the relevant understanding is the one that was held at the time the particular provision was ratified.⁶¹² But that position rests on a misunderstanding of the nature and function of a constitution. On the liberal-humanist view, the Constitution sets forth the principles of liberty, equality, and so on that govern our common life. As the character of our common life develops, so does the meaning of those principles. On this view, it would make no sense to take constitutional principles as they were understood long ago and to impose them on our life today. Instead of being required by a commitment to liberty, such an approach would violate that commitment by forcing people to live in accord with principles they do not understand or accept.

For these reasons, the liberal-humanist view rejects an originalist approach to constitutional interpretation and instead adheres to the idea of a living Constitution. That idea does not mean that the Constitution should be interpreted solely on the basis of current views and without regard to history. The principles enshrined in the Constitution have developed over the course of time and cannot be understood apart from that development. But history cannot have the final word. For purposes of constitutional interpretation, what counts is how much persuasive power a particular understanding continues to have today. Thus, while it was proper for Justice Brennan in *New York Times Co. v. Sullivan*⁶¹³ to look to history for inspiration in rejecting the notion that individuals can be sanctioned for defaming the government,⁶¹⁴ it was equally proper for Chief Justice Earl Warren in *Brown v. Board of Education*⁶¹⁵ to repudiate the historical view that segregation was consistent with the ideal of equality under the law.⁶¹⁶

This leads to a final point: the role of judges. Conservative libertarians regard judges as “umpires” who do not enter into particular controversies, but who merely interpret and apply the formal rules of the law and the Constitution

⁶¹¹ For a sophisticated statement of this view, see POST, *supra* note 600, ch. 1.

⁶¹² See *supra* text accompanying note 59.

⁶¹³ 376 U.S. 254 (1964).

⁶¹⁴ See *id.* at 276 (asserting that “the attack upon [the validity of the Sedition Act] has carried the day in the court of history”).

⁶¹⁵ 347 U.S. 483 (1954).

⁶¹⁶ *Id.* at 492 (“In approaching [the problem of school segregation,] we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”).

in a neutral and objective way.⁶¹⁷ By contrast, on the view I have presented, the law and the Constitution cannot properly be understood from the outside, but must be interpreted *from an internal perspective*—that is, from the perspective of one who accepts their principles and lives in accord with them. In making decisions, judges should place great reliance on history, precedent, and well-developed techniques of interpretation. Ultimately, however, their function is to interpret the principles that govern our common life as we understand them today. This is a task that calls not only for legal knowledge and technical expertise but also for virtues such as wisdom, moderation, broadmindedness, empathy, an ability to imaginatively enter into the conflicting perspectives of the parties, a commitment to justice, a facility for articulating constitutional principles and for determining how they should apply to particular cases, and, not infrequently, a substantial measure of courage.⁶¹⁸

Of course, conservative libertarians would respond that this view invites judges to import their own subjective values into judicial decision making.⁶¹⁹ But if anything is clear from this Lecture, it is that conservative-libertarian judges bring their own views to bear no less than does anyone else. Judges must strive to interpret the Constitution not in a merely partisan, personal, or idiosyncratic way, but rather in accord with views that are held by the nation as a whole. In the end, however, judges must use all their faculties to discern the interpretation that most accords with our society's understanding of constitutional principles. In doing so, they are likely to disagree about many of the difficult cases that come before them. But such disagreement is inevitable. When the community itself is divided on matters of basic principle, it is too much to expect that this division will not be reflected in all their governmental institutions, including the courts. Nor is it possible to escape from this division by looking to tradition or original understanding for an authoritative meaning. In general, it is an illusion to believe that Americans in earlier times enjoyed a higher level of consensus than they do today. And as I have said, even if they did, it would be a grave mistake to impose an outdated meaning on people living in a very different time—a mistake that is most vividly illustrated by Chief Justice Roger B. Taney's disastrous opinion in the *Dred Scott* case,⁶²⁰ in which he sought to resolve the political conflict over slavery once and for all by appealing to what he took to be the original understanding of the Constitution: that blacks were inferior beings who "had no rights which the white man was bound to respect," who "might justly and lawfully be reduced to slavery for his

⁶¹⁷ See *supra* text accompanying note 58.

⁶¹⁸ On the role that the virtues play in judging, see Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2004).

⁶¹⁹ See, e.g., SCALIA, *supra* note 56, at 44–45.

⁶²⁰ *Scott v. Sandford*, 60 U.S. 393 (1857).

benefit,” and who even if they became free could never become citizens of the United States.⁶²¹

5. A Broader View of the Original Understanding

Although I have argued that we are not bound to follow the original understanding of the Constitution, I do not want to leave the impression that this understanding supports conservative libertarianism. Here again, it is valuable to briefly explore the thought of Locke, which strongly influenced the founding period and to which conservative libertarians often look for inspiration. The divergence between their view and Lockean liberalism is not limited to the relation between free speech and property rights which I discussed earlier.⁶²² Instead, I believe that Lockean thought is incompatible with some of the most basic facets of conservative libertarianism, and that it provides substantial support for the liberal-humanist approach which I am defending.

Let us begin with the nature of self and society. Although Locke characterizes individuals as “free, equal, and independent,” he also holds that by nature they are social beings who are meant to live together.⁶²³ Speech lies at the foundation of human society. In Locke’s words, “God having designed Man for a sociable Creature, made him not only with an inclination, and under a necessity to have fellowship with those of his own kind; but furnished him also with Language, which was to be the great Instrument, and common Tye of Society.”⁶²⁴

According to Locke, all human beings naturally belong to a single community—what he calls the “great and natural Community” of “*Mankind*.”⁶²⁵ It is by virtue of their membership in this community that they have freedom and rights.⁶²⁶ Life in this community is governed by the law of nature, which Locke identifies with reason.⁶²⁷ Reason is a faculty of the individual mind, but it is also intersubjective or social in the sense that it is “the common Rule and Measure, that God has given to Mankind” to allow them to

⁶²¹ *Id.* at 407.

⁶²² *See supra* Part IV.A.

⁶²³ LOCKE, GOVERNMENT, *supra* note 28, bk. II, §§ 77, 95.

⁶²⁴ LOCKE, HUMAN UNDERSTANDING, *supra* note 29, bk. III, ch. I, § 1, at 402; *see also* LOCKE, GOVERNMENT, *supra* note 28, bk. II, § 77 (“God having made Man such a Creature, that, in his own Judgment, it was not good for him to be alone, put him under strong Obligations of Necessity, Convenience, and Inclination to drive him into *Society*, as well as fitted him with Understanding and Language to continue and enjoy it.”).

⁶²⁵ LOCKE, GOVERNMENT, *supra* note 28, bk. II, § 128.

⁶²⁶ *Id.* bk. II, §§ 77, 95.

⁶²⁷ *Id.* bk. II, § 6.

live together in peace.⁶²⁸ In a state of nature, unrestrained subjectivity or “Self-love will make Men partial to themselves and their Friends” and lead them to act unjustly toward others.⁶²⁹ For this reason, individuals agree to form a particular political society for their own protection.⁶³⁰ The people and the government they establish adopt laws not on the basis of private, subjective preferences but through the public use of reason.⁶³¹

In contrast to the conservative-libertarian position that the Supreme Court adopted in *DeShaney*,⁶³² Locke holds that the community and the government have a duty to protect individuals against violence.⁶³³ Indeed, this is why they enter civil society in the first place.⁶³⁴ More broadly, Locke writes that “the *first and fundamental natural Law*” that is to govern the state “is *the preservation of the Society*, and (as far as will consist with the publick good) of every person in it”⁶³⁵—an obligation that easily can be understood to require government action to ensure that individuals are capable of meeting their basic needs.⁶³⁶

Nor are affirmative duties limited to the state. For Locke, the object of “the Law of Nature” is to ensure “the Peace and *Preservation of all Mankind*.”⁶³⁷ It follows that, under this law, an individual not only has a negative duty to refrain from harming others in their “Life, Health, Liberty, or Possessions,” but also has a positive duty to “*preserve himself*” and, “as much as he can, *to preserve the rest of Mankind*.”⁶³⁸ As I have suggested, this principle may require one to aid others in distress.⁶³⁹ In contrast to the

⁶²⁸ *Id.* bk. II, §§ 11, 56–57, 61, 63.

⁶²⁹ *Id.* bk. II, §§ 13, 123–26.

⁶³⁰ *Id.* bk. II, § 87.

⁶³¹ *Id.* bk. II, §§ 87–88.

⁶³² See *supra* text accompanying notes 114–17.

⁶³³ LOCKE, GOVERNMENT, *supra* note 28, bk. II, § 131; see also *id.* bk. II, §§ 149, 159, 171. For an argument that *DeShaney* is wrong as a matter of original understanding, see Heyman, *Protection*, *supra* note 603.

⁶³⁴ See LOCKE, GOVERNMENT, *supra* note 28, bk. II, § 123.

⁶³⁵ *Id.* bk. II, § 134; see also *id.* bk. II, § 159.

⁶³⁶ See Heyman, *Duty to Rescue*, *supra* note 598, at 699–706. The same governmental duties to protect individuals against violence and to meet their basic needs can be found in Blackstone’s *Commentaries*, one of the most influential law books in America when the Constitution and the Fourteenth Amendment were adopted. See 1 BLACKSTONE, *supra* note 244, at *124, *131, *141; Heyman, *Protection*, *supra* note 603, at 516–20.

⁶³⁷ LOCKE, GOVERNMENT, *supra* note 28, bk. II, § 7; see also *id.* bk. II, §§ 6, 8, 11, 16.

⁶³⁸ *Id.* bk. II, § 6.

⁶³⁹ See *supra* text accompanying note 489; see also Heyman, *Duty to Rescue*, *supra* note 598, at 701–03. Affirmative duties also find support in the work of Mill, who like Locke is an important source of inspiration for contemporary libertarianism. Although Mill holds that the law may restrict individual liberty only to prevent harm to others, he also maintains that “[a] person

libertarian position, Locke does not hold that individuals are mere “stranger[s]” to one another, with no bonds other than those they voluntarily form.⁶⁴⁰ Instead, he describes the natural condition of human beings as one of “Peace, Good Will, Mutual Assistance, and Preservation,” and the relationship between members of a particular society as one involving mutual “Trust” and “Friendship.”⁶⁴¹

In all these ways, Lockean natural rights theory provides support not for conservative libertarianism but rather for the liberal-humanist view I am presenting. Moreover, while Lockean theory had wide currency in 18th-century Britain and America, it often was combined with a more traditional conception of society (as in Blackstonian and Federalist thought), with the civic-republican tradition (as in radical Whig ideology and Jeffersonian republicanism), or with the Christian tradition.⁶⁴² Each of these views had an important communitarian dimension.

Of course, I do not claim that there is an easy or straightforward correspondence between the liberal-humanist position and 18th-century thought. This discussion does suggest, however, that this position has roots in the American political tradition that run no less deep than those of the conservative-libertarian position, and that the debate between them cannot be resolved by a simple commitment to follow the original understanding of the Constitution.

B. *A Liberal-Humanist Theory of Free Speech*

As we have seen, when individuals communicate, they not only exchange views and information but also form or reinforce a relationship with one another.⁶⁴³ At its deepest level, this relationship is based on mutual

may cause evil to others not only by his actions but by his inaction.” MILL, *supra* note 35, at 17–18. It follows that “[t]here are . . . many positive acts for the benefit of others, which [he] may rightfully be compelled to perform; . . . such as saving a fellow-creature’s life.” *Id.* at 17. See generally Heyman, *Duty to Rescue*, *supra* note 598, at 707–09 (arguing that recognition of affirmative duties is consonant with classical liberal tradition).

⁶⁴⁰ Epstein, *Strict Liability*, *supra* note 43, at 197–201 (offering libertarian defense of common-law tort doctrine that no one is “under a . . . duty to take steps to aid a stranger”). For an argument that the common law did impose a criminal-law duty to prevent violence, see Heyman, *Duty to Rescue*, *supra* note 598, at 685–90.

⁶⁴¹ LOCKE, GOVERNMENT, *supra* note 28, bk. II, §§ 19, 107; see also LOCKE, *Toleration*, *supra* note 510, at 21, 40 (stating that “Peace, Equity, and Friendship are always mutually to be observed” by individuals and groups).

⁶⁴² See, e.g., ROBERT BELLAH ET AL., HABITS OF THE HEART ch. 2 (updated ed. 1996) (discussing the biblical, republican, and individualist traditions); HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 29–31 (Univ. of Notre Dame Press 1996) (same); HEYMAN, *supra* note 324, at 8–11, 14–20 (discussing Blackstonian and republican ideology).

⁶⁴³ See *supra* text accompanying note 592.

recognition: individuals are capable of communicating only when they recognize one another as intelligent beings, that is, as persons.⁶⁴⁴ Thus, the right to communicate with others carries with it a corresponding duty to recognize their personhood as well as the rights that flow from this status—a duty that would be violated if, for example, the speech consisted of unjustified threats of violence against them.

These considerations provide the foundation for the liberal-humanist approach to the First Amendment. On this view, individuals have an inherent right to think for themselves and to communicate their thoughts and beliefs to others. But this right is limited by a duty to respect the rights of other people. Speech that unjustifiably infringes these rights may be limited by narrowly drawn laws, and such laws do not violate the “freedom of speech” protected by the First Amendment. As I have shown elsewhere, this general view was widely accepted at the time of adoption of the First as well as the Fourteenth Amendment, which made the right to free speech applicable to the states.⁶⁴⁵

Rights can be understood as specific instances of freedom.⁶⁴⁶ Thus, we can determine what rights people have by exploring what it means to be a free person in the different spheres of human life, including (1) the individual’s life in the external world; (2) her inner life of thought, feeling, and belief, together with their expression to others; (3) her participation in the social, political, and cultural life of the community; and (4) her intellectual and spiritual life. The right to free speech can be understood on all these levels. But in each case, the principles that support this right also support other fundamental rights that should receive legal protection, except in cases where the value of the speech outweighs the injury that it causes.

At the most basic level, freedom of speech and thought can be viewed as aspects of external freedom, or the right to control one’s own mind and body. But other individuals have the same right, including a right to personal security or freedom from violence. Likewise, the community has a right to keep the peace and protect its citizens.⁶⁴⁷ Acts of speech violate these rights when they amount to assaults, threats, fighting words, or incitement.⁶⁴⁸

As Baker eloquently argued, a central purpose of the First Amendment is to promote individual self-expression and self-realization.⁶⁴⁹ In this respect, free speech is an aspect of what Justice Brandeis called the right to “an

⁶⁴⁴ See Heyman, *Funeral Picketing*, *supra* note 592, at 130–31.

⁶⁴⁵ See HEYMAN, *supra* note 324, ch. 1.

⁶⁴⁶ See, e.g., 1 BLACKSTONE, *supra* note 244, at *125. For an in-depth version of the argument of this Section, see HEYMAN, *supra* note 324, ch. 4.

⁶⁴⁷ For a defense of the idea of community rights within the liberal tradition, see HEYMAN, *supra* note 324, at 40–42.

⁶⁴⁸ See *id.* at 48–51.

⁶⁴⁹ See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

inviolate personality.”⁶⁵⁰ Other rights in this category include privacy, dignity, reputation, and freedom from the infliction of severe emotional distress.⁶⁵¹

On a third level, free speech is a right of democratic citizenship. Under the First Amendment, individuals have a negative right to criticize the government as well as a positive right to participate in discussion and deliberation on matters of social, political, and cultural concern.⁶⁵² As I have suggested, however, all speech depends on relations of mutual recognition. It follows that the right to deliberate with others carries with it a duty to recognize them as fellow members of the community.⁶⁵³

On a fourth level, the First Amendment protects the ability to pursue truth. In this way, it safeguards what the Court has called “the sphere of intellect and spirit.”⁶⁵⁴ Finally, because all persons have an equal right to freedom, the First Amendment is also based on an ideal of equality—an ideal that is also embodied in the protections against discrimination contained in the Fourteenth Amendment and in federal, state, and local civil rights laws.⁶⁵⁵

C. *An Illustration: Funeral Picketing and the First Amendment*

As an illustration of this view, consider the issue of funeral picketing. In this Section, I explain how the liberal-humanist approach applies to this problem and contrast the approach that the Supreme Court took in *Snyder v. Phelps*.⁶⁵⁶

The Westboro Baptist Church is a tiny fundamentalist sect that is based in Topeka, Kansas. The church adheres to an extreme version of Calvinism that holds that God has consigned virtually all of humanity to perdition, apart from the church’s own members.⁶⁵⁷ In 2005, Westboro began to picket the funerals of soldiers killed in Iraq and Afghanistan in order to express its view that God was punishing the United States for tolerating homosexuality and other conduct

⁶⁵⁰ Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

⁶⁵¹ See HEYMAN, *supra* note 324, at 51–59.

⁶⁵² See *id.* at 61–64.

⁶⁵³ See *id.* at 177–79.

⁶⁵⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁶⁵⁵ See HEYMAN, *supra* note 324, at 68.

⁶⁵⁶ 131 S. Ct. 1207 (2011). The argument of this Section is developed more fully in Heyman, *Funeral Picketing*, *supra* note 592.

⁶⁵⁷ For an account of the group’s theology, see Rebecca Barrett-Fox, “Pray Not for this People for Their Good”: Westboro Baptist Church, the Religious Right, and American Nationalism 15–56 (Dec. 8, 2010) (unpublished Ph.D. dissertation, University of Kansas), available at http://kuscholarworks.ku.edu/dspace/bitstream/1808/7738/1/BarrettFox_ku_0099D_11255_DAT_A_1.pdf.

the church considers sinful.⁶⁵⁸ The picketers display large signs emblazoned with slogans like “Thank God for Dead Soldiers,” “Thank God for IEDs,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates America.”⁶⁵⁹ Westboro holds, or threatens to hold, similar demonstrations at the funerals of those killed by natural disasters or horrific acts of violence such as the massacre of 26 children and school personnel at Sandy Hook Elementary School in Newtown, Connecticut, in December 2012.⁶⁶⁰

Under the liberal-humanist approach, speech can be restricted only if (1) it violates the rights of others, and (2) these injuries are not outweighed by the value of the speech. Westboro’s speech violates the mourners’ rights in several ways. First, by going to funerals and holding up signs celebrating the violent death of the deceased, Westboro inflicts severe mental and emotional distress on the individual’s family and friends at a time when they are most vulnerable. This distress is no accident: as Westboro’s own statements make clear, it deliberately seeks out those attending a funeral and communicates with them through ““hard-hitting language”” that is ““designed to strike the heart of anyone who reads it.””⁶⁶¹ By intruding into their grief and interfering with their ability to mourn their loved ones, the picketing is also a gross invasion of privacy. Moreover, the picketing disrespects the dead in a way that injures both the family and the community as a whole, which is founded on respect for human dignity. Finally, the picketing interferes with the religious or spiritual liberty of the mourners themselves.

In all these ways, funeral picketing violates the rights of others. That is not the end of the matter, however, for the liberal-humanist approach recognizes that some forms of expression are so important that they should be privileged. That was true, for example, in *New York Times Co. v. Sullivan*,⁶⁶² which recognized a broad privilege to criticize the conduct of public officials. Is it also true of funeral picketing? The picketing does promote the self-realization of Westboro’s members. As I have said, however, individuals should have no right to pursue their own self-realization in a way that is designed to harm the legitimate self-realization of others.⁶⁶³ Likewise, while funeral picketing has value as an expression of Westboro’s religious beliefs, individuals should have no right to impose their beliefs on others, as the group

⁶⁵⁸ *Snyder*, 131 S. Ct. at 1213.

⁶⁵⁹ *Id.*

⁶⁶⁰ *See id.* at 1224 (Alito, J., dissenting); Timothy Stenovec, *Westboro Baptist Church Says It Will Picket Vigil for Connecticut School Shooting Victims*, HUFFINGTON POST (Dec. 17, 2012), http://www.huffingtonpost.com/2012/12/16/westboro-baptist-church-picket-connecticut-school-shooting_n_2312186.html.

⁶⁶¹ Heyman, *Funeral Picketing*, *supra* note 592, at 154 (quoting Brief of Appellants, Appendix at 1951, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) (No. 08–1026)).

⁶⁶² 376 U.S. 254 (1964).

⁶⁶³ *See supra* text accompanying note 551.

does when it goes to a funeral and attempts to communicate with the mourners in a way they cannot ignore. Funeral picketing also can be regarded as a form of political speech. But a funeral is such a deeply personal event that no one should have a right to force their political views on others in this setting. Finally, as Justice Alito argued in dissent, while Westboro may have a right to communicate its views to the public at large, it has many ways of doing so that do not have such a direct and harmful impact on the mourners at the time of the funeral.⁶⁶⁴ Under the liberal-humanist approach, then, funeral picketing is not entitled to constitutional protection.

The Supreme Court took a very different approach in *Snyder v. Phelps*. A federal jury had awarded Albert Snyder \$5 million for intentional infliction of emotional distress and invasion of privacy after Westboro picketed the funeral of his son, Matthew, a young Marine who had died in Iraq. Writing for an eight-member majority, Chief Justice Roberts barely considered whether the picketing was directed toward the mourners themselves. Instead, he described it as a demonstration that merely “coincide[d] with Matthew Snyder’s funeral,” but that essentially aimed to communicate with the public on matters of public concern, such as the “moral conduct” and “fate of our Nation.”⁶⁶⁵ Under the First Amendment, Roberts declared, speech of this sort is entitled to “special protection” and cannot be restricted even when it “inflict[s] great pain” on others.⁶⁶⁶

From a liberal-humanist perspective, the Court’s opinion has two basic flaws. First, it fails to grasp the actual human meaning of the expression at issue. Westboro intended its picketing to send a message of divine wrath and condemnation not only to the public but also to the mourners, and the mourners fully understood this message. Second, the Court fails to recognize that speech does not merely involve two distinct acts by individuals: the speaker’s subjective expression of her views and the equally subjective choice of the listener to accept, reject, or ignore those views. Instead, as I have said, speech of this sort is intersubjective or interpersonal—it involves communication between two or more persons, who have a duty to treat one another with at least the minimal respect due to human beings. To put it simply, there are some ways in which it is fundamentally wrong to speak to other people. Westboro’s funeral picketing falls into this category when it forcefully condemns its targets at a time when they are deeply vulnerable, and in a way that is meant to be impossible to ignore.

Although I disagree with the general approach the Court took in *Snyder*, I believe that the Court was right on one key point: that the standard governing the tort of intentional infliction of emotional distress—which

⁶⁶⁴ See *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

⁶⁶⁵ *Id.* at 1217 (majority opinion).

⁶⁶⁶ *Id.* at 1219–20 (internal quotation marks omitted).

imposes liability for conduct that is “extreme and outrageous”—is simply too vague to apply to speech that to some extent relates to matters of public concern. Thus, the Court was right to overturn the damages award. For the reasons I have given, however, I believe that the government should be allowed to restrict this form of expression—for example, by adopting buffer-zone laws that ban picketing within a certain distance of a funeral. Interestingly, despite its rhetoric, the *Snyder* majority suggests that such restrictions may be upheld as reasonable time, place, and manner regulations,⁶⁶⁷ and each of the federal appeals courts that have addressed this issue now agrees.⁶⁶⁸ In this way, while Westboro won the battle in *Snyder*, it may well lose the larger war over the regulation of funeral picketing.

D. Contrasting the Liberal-Humanist and Conservative-Libertarian Views

The view that I have outlined in this Part differs from conservative libertarianism in a number of critical ways. First, instead of negative liberty against government, the liberal-humanist view emphasizes the ways in which the First Amendment promotes positive values such as external freedom, individual self-realization, democratic self-government, and the search for truth. Second, while the liberal-humanist view recognizes that individuals have a right to property, it does not place that right on a par with “the fundamental personal rights” protected by the First Amendment,⁶⁶⁹ as the Court did in *Citizens United*. Third, the conservative-libertarian approach often allows individuals to express their subjectivity in ways that are destructive of the subjectivity of others. By contrast, the liberal-humanist view holds that communication is essentially intersubjective, and that the right to free speech is therefore limited by a duty to respect the personality and rights of others. Fourth, whereas the conservative-libertarian view is riven by a fundamental conflict between individual liberty and the claims of society, the liberal-humanist view sees these two values as part of a larger conception of *liberty within community*. Fifth, while the conservative-libertarian view insists that in regulating speech the government must maintain strict ideological neutrality, and that courts are capable of deciding First Amendment cases through the objective application of formal and categorical rules, the liberal-humanist view recognizes that such cases often involve a clash between important substantive values, such as free speech and dignitary interests, and holds that judges can reasonably decide such cases only through the exercise of thoughtful judgment on how those values can best be reconciled.

⁶⁶⁷ See *id.* at 1218.

⁶⁶⁸ See *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 690–93 (8th Cir. 2012) (en banc); *Phelps-Roper v. Strickland*, 539 F.3d 356, 362–66 (6th Cir. 2008); see also *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) (dictum), *aff'd on other grounds*, 131 S. Ct. 1207 (2011).

⁶⁶⁹ *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

With this background, we can now revisit some of the leading conservative-libertarian First Amendment decisions and explore how they would look from a liberal-humanist perspective. *Citizens United* and *McCutcheon* were discussed above.⁶⁷⁰ In this Section, I address *R.A.V.*, *Hudnut*, *Dale*, and *Rosenberger*.

1. *R.A.V.* and Hate Speech

In *R.A.V. v. City of St. Paul*,⁶⁷¹ Justice Scalia held that while a city can ban all fighting words, it may not impose greater restrictions on fighting words that are based on race, religion, or gender. In my view, this decision was misguided.⁶⁷² The Court was right to reaffirm the traditional view that the First Amendment does not protect some categories of speech, such as fighting words, incitement, and defamation. But the majority was wrong to insist that all speech that falls within an unprotected category must be treated alike. From a liberal-humanist standpoint, fighting words are unprotected because they violate the target's rights to personal security and dignity as well as the community's right to keep the peace. But when one individual hurls racial slurs at another she not only threatens his dignity and security but also injures him in a more profound way, by denying his very humanity. In this way, she violates the most fundamental right that an individual has—the right to be recognized and treated as a human being and a member of the community, a right that lies at the basis of all other rights.⁶⁷³

It follows that there is nothing unprincipled about imposing greater restrictions on racist (and other identity-based) fighting words than on fighting words in general: racist fighting words are more deeply wrongful and inflict greater injury than other forms and therefore merit a stronger response. In *R.A.V.*, the conservative-libertarian Justices failed to appreciate this point not only because of their concerns with political correctness but also because they adhere to an abstract conception of the self which regards all individuals as the same without regard to characteristics like race.⁶⁷⁴ From this standpoint, there is no important distinction between fighting words based on race and other fighting words. But as the liberal Justices pointed out in *R.A.V.*, this position ignores history and social reality, which show that traits like race often have been used to subordinate groups of people.⁶⁷⁵ It is perfectly reasonable for the

⁶⁷⁰ See *supra* text accompanying notes 531–45.

⁶⁷¹ 505 U.S. 377 (1992).

⁶⁷² For a fuller critique, see Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 689–98 (2002) [hereinafter Heyman, *Content Neutrality*].

⁶⁷³ On the right to recognition, see HEYMAN, *supra* note 324, at 170–72.

⁶⁷⁴ See *supra* text accompanying notes 32, 130–33.

⁶⁷⁵ See, e.g., *R.A.V.*, 505 U.S. at 408–09 (White, J., concurring in judgment).

law to seek to overcome this harm by according special treatment to racist fighting words.

2. *Paris, Miller, Hudnut* and Sexually Explicit Material

The conservative-libertarian position holds that the state may restrict sexually explicit material to protect public morality, but not to promote the equality and dignity of women. I am inclined to think that this position is wrong on both counts.

In *Roth v. United States*,⁶⁷⁶ the Supreme Court declared that obscene material, which it defined as that which appeals to a prurient interest in sex, is “utterly without redeeming social importance” because it does not promote the purpose of the First Amendment: “[T]o assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁶⁷⁷ The Court concluded, in the words of *Chaplinsky*, that this material was “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”⁶⁷⁸ In 1973, a conservative majority of the Court reaffirmed this position in *Paris Adult Theatre I v. Slaton*⁶⁷⁹ and *Miller v. California*.⁶⁸⁰ As we have seen, the conservative Justices adhere to this view and treat obscenity as a traditionally unprotected category of expression.⁶⁸¹

It is difficult to square the *Roth-Miller-Paris* position with the liberal-humanist view. On that view, the First Amendment serves not only to promote democratic self-government and the search for truth, but also to safeguard individual liberty and to promote self-fulfillment. For many people, sexually explicit material does have substantial value for self-fulfillment. More fundamentally, individuals should have the autonomy to decide for themselves what material they wish to see, so long as they do not violate the rights of others. The state should have the authority to restrict the public display of sexual material to protect children and unwilling viewers, and perhaps also to protect the public sphere itself from the intrusion of deeply personal material. But the state should have no authority to restrict the private creation, distribution, or use of such material simply to protect public morality or to promote its view of a good public culture. In a liberal society, individuals must be free to make their own moral judgments and to shape their own characters,

⁶⁷⁶ 354 U.S. 476 (1957).

⁶⁷⁷ *Id.* at 484.

⁶⁷⁸ *Id.* at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

⁶⁷⁹ 413 U.S. 49 (1973).

⁶⁸⁰ 413 U.S. 15 (1973).

⁶⁸¹ See *supra* text accompanying note 325.

and public culture should be the product of such free decisions.⁶⁸² The role of the law is not to impose a particular cultural ideal or conception of morality, but to protect the rights of individuals and the community.

In some cases, however, sexually explicit material does violate the rights of others. A good example is the phenomenon of “revenge porn,” in which an individual posts sexually explicit photos of an ex-lover without her consent—an act that violates her rights to privacy, personal dignity, and freedom from severe emotional distress.⁶⁸³

In recent decades, powerful arguments have been made that some forms of sexual material—such as that which graphically depicts sexual violence or abuse in a way that is meant to strongly appeal to the viewer—cause serious injuries to women in general.⁶⁸⁴ That was the rationale for the Indianapolis ordinance in *Hudnut*. As we have seen, Judge Easterbrook agreed that pornography “tend[s] to perpetuate [the] subordination” of women, and that this “in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.”⁶⁸⁵ But he insisted that the First Amendment should be understood to protect speech precisely because of the “power” that it has to impact the society, whether that impact is good or bad.⁶⁸⁶ This position is diametrically opposed to the one I have put forward here. On the liberal-humanist view, freedom of speech is a fundamental right, but one that is limited by the rights of others. People have a right to be free from “insult,” “injury,” “battery,” “rape,” workplace discrimination, and other forms of “subordination” that are incompatible with their status as free and equal citizens. If Easterbrook is right that violent pornography has such an impact on individuals and the community, that material should not receive First Amendment protection.

Of course, whether violent pornography does have such an impact is a deeply contested issue, and this is not the place to seek to resolve it. From a liberal-humanist perspective, however, three things are clear. First, contrary to Easterbrook’s position, freedom of speech should not be understood as a broad privilege to inflict serious harm on others.⁶⁸⁷ Second, in a liberal society, the prevention of harm to others provides a much more persuasive rationale for restricting expression than does the promotion of public morality. And third, when the state adopts otherwise permissible restrictions to prevent such harm, it

⁶⁸² See, e.g., BAKER, *supra* note 649, at 117–22.

⁶⁸³ See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

⁶⁸⁴ See, e.g., MACKINNON, *supra* note 257, chs. 11–16.

⁶⁸⁵ *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

⁶⁸⁶ *Id.*

⁶⁸⁷ See Heyman, *Holmes*, *supra* note 233, at 706–11 (criticizing the Holmesian understanding of free speech as a privilege to cause harm).

does not violate the rule against viewpoint discrimination, but simply fulfills its duty to protect its citizens against injury.⁶⁸⁸

3. *Dale* and Freedom of Association

The need to reconcile individuality and community also is central to the *Dale* case.⁶⁸⁹ There, the Supreme Court ruled five-to-four that the First Amendment freedom of association entitled the Boy Scouts to exclude homosexuals on moral grounds. As I have explained, this decision is consistent with conservative-libertarian theory, which is based on the idea of exclusive individuality.⁶⁹⁰ On this view, the individual is a free, equal, and independent being who has a right to possess his person and property and to defend them against interference by others. Although individuals are essentially distinct from one another, they may voluntarily choose to form associations for particular purposes. These associations are separate and independent entities in relation to outsiders. It follows that, in the same way that we have a basic right to exclude others from our persons and property, we have a basic right to exclude them from the associations we establish.

From a liberal-humanist standpoint, this understanding of free association is inadequate and one-sided. When individuals associate, they exercise freedom of choice, but they also express their nature as social beings who are inherently related to one another.⁶⁹¹ It follows that conservative libertarianism is mistaken when it views association strictly in individualist terms. Instead, associations also have an important social dimension. This is true in two ways. First, in many cases, an association is not merely the sum of its parts: while it is composed of independent individuals, it also involves a social relationship between them, which goes beyond mere external interaction and gives the association an inner life.

Second, in many cases, it is a mistake to see an association as a separate and independent entity that is sharply distinct from outsiders. While some associations are strictly private and self-enclosed, others exist within a web of relationships with outside individuals and groups. Associations of this sort can play an important role in the larger community. To put the point another way, we can understand the community itself to be made up not only of

⁶⁸⁸ For an in-depth critique of *Hudnut* and its reliance on the content-neutrality doctrine, see Heyman, *Content Neutrality*, *supra* note 672, at 698–703.

⁶⁸⁹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁶⁹⁰ See *supra* text accompanying notes 36–37, 300–03.

⁶⁹¹ See *supra* text accompanying notes 591–98 (discussing the social dimension of human nature), 623–25 (discussing Lockean thought).

individuals but also of all the relationships and associations that exist within it.⁶⁹²

This discussion sheds important light on the problem in *Dale*. If we conceive of associations in a conservative-libertarian manner as purely private, independent entities that are formed by the free choice of individuals, then associations should be entirely free to include or exclude whomever they choose. By the same token, those who are excluded suffer no cognizable injury. The problem looks rather different, however, if we view some associations, or classes of associations, as also forming an important part of the community itself. If these associations exclude individuals in an arbitrary and invidious manner, those who are excluded may be denied the right to participate in basic areas of communal life, stigmatized as inferior or unworthy, or treated like second-class citizens. And those consequences would injure not only the excluded individuals themselves and the groups to which they belong, but also the community as a whole, by undermining the principles of equality and mutual respect on which it is based.

In American life, these points are best illustrated by segregation and other forms of racial discrimination. During the 1950s and 1960s, it was sometimes said that outlawing these practices would restrict freedom of association by compelling whites to associate with African Americans.⁶⁹³ Yet as Charles L. Black, Jr. observed in a famous article, the true situation was not one of “mutual separation of whites and Negroes, but of one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior life of its own.”⁶⁹⁴ The belief that such treatment violated our nation’s commitment to equality was the basis for decisions like *Brown v. Board of Education*,⁶⁹⁵ which struck down state-imposed segregation, as well as for the enactment of federal and state civil rights laws that banned many forms of private discrimination.⁶⁹⁶

In *Dale*, the plaintiff alleged that the Boy Scouts’ revocation of his membership violated New Jersey’s civil rights law, the Law Against

⁶⁹² See *supra* text accompanying note 595. This is an important theme in the contemporary literature on “civil society.” See, e.g., Linda C. McClain & James F. Fleming, Symposium, *Forward: Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT. L. REV. 289 (2000).

⁶⁹³ See, e.g., Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21, 22 (denouncing what became the public accommodations title of the Civil Rights Act of 1964 as a violation of freedom of association); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (framing the issue in *Brown v. Board of Education*, 347 U.S. 483 (1954), as a choice “between denying . . . association to those individuals who wish it or imposing it on those who would avoid it”).

⁶⁹⁴ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960).

⁶⁹⁵ 347 U.S. 483 (1954).

⁶⁹⁶ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

Discrimination (LAD), which forbade “public accommodation[s]” to discriminate against individuals on grounds such as race, religion, sex, or “affectional or sexual orientation.”⁶⁹⁷ The state supreme court relied on two major factors to conclude that the BSA was a public accommodation within the meaning of this statute.⁶⁹⁸ First, the record showed that the BSA sought to increase its membership base by “reach[ing] out to the public in a myriad of ways” and encouraging as many people as possible to join.⁶⁹⁹ “Once Boy Scouts has extended this invitation,” the court wrote, “the LAD requires that all members of the public must have equal rights . . . and not be subjected to the embarrassment and humiliation of being invited[,] . . . only to find [the] doors barred to them.”⁷⁰⁰

Second, the court stressed that the BSA “maintain[ed] close relationships with . . . governmental bodies and with other recognized public accommodations.”⁷⁰¹ The organization received many forms of support from the federal and state governments.⁷⁰² Many troops were sponsored by local police and fire departments.⁷⁰³ Above all, the Boy Scouts maintained a close working relationship with the public schools, which chartered Scouting units, hosted meetings and recruiting events, and even allowed Scouting activities to take place on their grounds during the school day.⁷⁰⁴

On appeal, the United States Supreme Court paid scant attention to these facts, perhaps viewing them as relevant only to the question of whether the BSA was a public accommodation under state law. As I have suggested, however, these facts should have a strong bearing on the constitutional issue as well. Far from being a distinctly private organization, the BSA had extensive relationships with other institutions and played a key role in community life. Under the First Amendment, an association of this sort should not have *carte blanche* to exclude individuals on invidious grounds in view of the serious harm that such discrimination causes both to the victims and to the community as a whole. It seems unlikely that the Supreme Court would have reached the same result if the Boy Scouts had excluded racial minorities.⁷⁰⁵ That result

⁶⁹⁷ N.J. STAT. ANN. § 10:5–4 (West 2014).

⁶⁹⁸ Dale v. Boy Scouts of Am., 734 A.2d 1196, 1210–13 (N.J. 1999), *rev’d*, 530 U.S. 640 (2000).

⁶⁹⁹ *Id.* at 1211.

⁷⁰⁰ *Id.* (citation omitted) (internal quotation marks omitted).

⁷⁰¹ *Id.*

⁷⁰² *Id.* at 1212.

⁷⁰³ *Id.*

⁷⁰⁴ *Id.* at 1212–13.

⁷⁰⁵ *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983) (rejecting free exercise challenge to IRS decision denying tax exemption to racially discriminatory schools and universities); Runyon v. McCrary, 427 U.S. 160, 175–76 (1976) (rejecting free association challenge to federal law banning racial discrimination by private schools).

becomes increasingly difficult to defend as the Court and the country come to recognize that gay and lesbian persons are entitled to full civic equality.⁷⁰⁶ Instead, the BSA's First Amendment claim should fail for the same reasons as the Jaycees' contention that they had a constitutional right to exclude women in the *Roberts* case.⁷⁰⁷

Contrary to the conservative-libertarian view, this position should not be seen as sacrificing individual liberty to the social norm of equality. Although freedom of association generally includes the right to choose one's associates, it should not include the right to do so in an arbitrary way that excludes others from important aspects of communal life. That would undermine one of the most basic meanings of freedom: the right to be treated as a member of the community and to take part in its shared life.⁷⁰⁸ In this situation, a decision in favor of inclusivity would enhance rather than detract from the overall freedom of the society and its members.

4. *Rosenberger* and Religious Speech

While the principle of inclusivity would lead to a different result in *Dale*, it provides support for another line of conservative-libertarian decisions—those that hold that, under the First Amendment, public educational institutions may not refuse to provide religious groups with equal access to facilities and benefits that are afforded to other groups.⁷⁰⁹ For instance, in *Rosenberger v. Rector & Visitors of the University of Virginia*,⁷¹⁰ the university's Student Activities Fund (SAF) paid the printing bills for student publications devoted to “news, information, opinion, entertainment, or academic communications.”⁷¹¹ A group of evangelical Christian students submitted a bill for printing a newspaper called *Wide Awake: A Christian Perspective at the University of Virginia*.⁷¹² The SAF denied this request on the ground that the paper constituted a “religious activity,” which university guidelines defined as an activity that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”⁷¹³ In an opinion by Justice Kennedy, the conservative majority ruled that this denial violated the First Amendment ban on viewpoint discrimination because the SAF funded a

⁷⁰⁶ See *supra* text accompanying notes 165–68 (discussing *Romer*, *Lawrence*, and *Windsor*).

⁷⁰⁷ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); see *supra* text accompanying notes 280–87.

⁷⁰⁸ See *supra* text accompanying notes 607–09, 673.

⁷⁰⁹ See *supra* Part III.D.

⁷¹⁰ 515 U.S. 819 (1995).

⁷¹¹ *Id.* at 824 (quoting university's guidelines).

⁷¹² *Id.* at 827.

⁷¹³ *Id.* at 825 (alteration in original).

variety of publications on matters of concern to students—such as racism, crisis pregnancy, stress, and eating disorders—but refused to support publications that addressed such matters from “an avowed religious perspective.”⁷¹⁴

The Court’s reasoning is not entirely convincing. As Justice Souter pointed out in dissent, the SAF’s rationale for denying funding for *Wide Awake* was not that it addressed issues like racism from a religious point of view, but rather that it fell within the university’s definition of a “religious activit[y],” “in the very specific sense that its manifest function [was] to call students to repentance, to commitment to Jesus Christ, and to particular moral action because of its Christian character.”⁷¹⁵

I believe that the liberal-humanist approach can provide a stronger justification for the result in *Rosenberger*. Of course, it is reasonable for a state university to regard itself as an educational institution dedicated to secular rather than religious inquiry (and indeed any other position might violate the Establishment Clause). But when it comes to student life, this is too narrow a view. In this regard, the university should be seen as a community whose members seek, both individually and in groups, to form and pursue broader views about the world and the best way to live, and to share those views with others. The record shows that the SAF funded many student organizations and publications that advocated world views of this sort, including pacifism, environmentalism, animal rights, feminism, secularism, liberalism, and conservatism.⁷¹⁶ If the university chooses to support student organizations and publications that promote secular views about the world and the best way to live, there is no principled basis for denying support for publications like *Wide Awake* that promote views that are religious in character.

Like Justice Kennedy’s opinion, this argument relies on the viewpoint-neutrality doctrine, but it uses that doctrine in a less mechanical way. The flaw in the university’s policy was not that it discriminated against publications that addressed issues like racism or eating disorders from a religious perspective, but that it discriminated against publications that promoted a religious world view and way of life.⁷¹⁷ By denying support for a student group that sought to

⁷¹⁴ *Id.* at 826, 830–32.

⁷¹⁵ *Id.* at 895 (Souter, J., dissenting) (alteration in original).

⁷¹⁶ See Petition for Writ of Certiorari at 23, *Rosenberger*, 515 U.S. 819 (No. 94–329) (conservative and liberal publications); Brief for Petitioners at 4–5, *id.* (pacifist, environmentalist, animal rights, and conservative groups); Brief of Amici Curiae Christian Legal Soc’y et al. at 17, *id.* (secularist writings); Transcript of Oral Argument at 53, *id.* (petitioners’ rebuttal argument) (feminist groups).

⁷¹⁷ The briefs indicate that the SAF also funded some groups with religious associations, including the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society, on the ground that they were primarily cultural rather than religious in nature. See, e.g., Brief for Petitioners, *supra* note 716, at 5–6. Such a distinction seems difficult to draw in practice. In any event, the First Amendment should not permit a state university to favor cultural over religious world views.

do this, the policy violated the principle of inclusivity I discussed above—the principle that all members of the community are entitled to fully participate in its social and cultural life.

On the other hand, I believe that the same principle supports the Court's recent decision in *Christian Legal Society v. Martinez*.⁷¹⁸ Following the rules established by its national organization, the Christian Legal Society (CLS) chapter at the University of California, Hastings College of Law denied membership to students who engaged in “unrepentant homosexual conduct” or who for other reasons were unable to subscribe to the organization's evangelical Statement of Faith.⁷¹⁹ The law school rejected the chapter's application for recognition as an official student organization because its charter did not comply with a school policy that required such organizations to accept any student who wished to join.⁷²⁰ Writing for the Court, Justice Ginsburg dismissed the group's First Amendment challenge to the Hastings policy. In a classic conservative-libertarian opinion for the four dissenters, Justice Alito denounced this decision for marginalizing traditional religious groups and denying “freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.”⁷²¹ In my view, however, Justice Ginsburg was correct to hold that the Hastings “all-comers policy” was a reasonable effort to ensure that all students had an equal opportunity to participate in student groups; to promote diversity and “encourage[] tolerance, cooperation, and learning among students”; and to ensure that no student would have to pay mandatory activity fees to support a group that would exclude him from membership.⁷²²

VI. CONCLUSION

One of Professor Baker's deepest convictions was that the Constitution must be interpreted in light of our understanding of human beings and the liberty to which they are entitled. In this Lecture, I have explored a view that has become increasingly predominant in constitutional interpretation. This view, which I have called conservative libertarianism, regards people as separate and independent individuals who should be free to pursue their own goals with minimal regulation or restraint. Conservative judges have relied on this conception to promote libertarian positions in a wide range of areas, from enhancing gun and property rights to imposing limits on the regulatory and welfare state. In addition, these judges have frequently used the First

⁷¹⁸ 130 S. Ct. 2971 (2010).

⁷¹⁹ *Id.* at 2980.

⁷²⁰ *Id.* at 2979–81.

⁷²¹ *Id.* at 3000, 3019–20 (Alito, J., dissenting).

⁷²² *Id.* at 2989–91 (majority opinion).

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Amendment to strike down speech regulations that seek to promote liberal and progressive values.

I have argued that the conservative-libertarian approach to the Constitution is based on an abstract and one-sided conception of the self. Although we are separate individuals, we are also social beings who share a common life. An adequate conception of liberty must recognize both sides of our nature: it must affirm the value of individual autonomy as well as of the social dimension of liberty—the freedom that we find through relationship with others. On this liberal-humanist view, there is no basic or irresolvable conflict between individual liberty and social values such as human dignity, equality, and community. Instead, when one exercises rights such as freedom of speech and association, one must do so in a way that respects the personality of others and their status as members of the community. It follows that the First Amendment should be interpreted to allow some limits on speech that abuses or degrades other people, such as hate speech, pornography, and funeral picketing, as well as some regulation of association that invidiously discriminates against others. In addition, the liberal-humanist view conceives of political speech as democratic deliberation among free and equal citizens, and thus would permit some restrictions on speech that undermines our ability to engage in that process, such as unlimited electoral spending by corporations and wealthy individuals. In my view, an approach like this is the best way to promote the values of human freedom and dignity on which our Constitution is based.