

Boy Scouts & Burning Crosses: Bringing Balance to the Court's Lopsided Approach to the Intersection of Equality and Speech

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Abstract

This article identifies a previously-ignored pattern of Supreme Court decisions that privilege one competing constitutional value, either speech or equality, and subordinate the other—with little or no reasoning explaining its choice. In adjudicating such cases, including two cases decided last term, the Supreme Court has steadfastly treated these disputes as either a basic equality case or a simple speech case. This dichotomy is a problem because once the Court places a case within either a speech or equality paradigm, it is constrained by certain rigid analytical presumptions. These presumptions threaten to stunt the analysis and to deprive the Court of the flexibility necessary to reconcile the competing constitutional commitments. Consequently, a string of Supreme Court cases have privileged First Amendment interests of speech or association over equality interests. At times, the Court has not even recognized the equality dimensions of these cases in part because the equality interests were embedded in state antidiscrimination laws.

Analyzing a number of key cases including the Boy Scouts and burning cross cases, I show that, contrary to the Court's reductive assumptions, these cases are fundamentally about speech *and* equality. Rather than artificially force a case into a speech or equality box, my approach would fuse speech and equality doctrine. After setting forth a general framework to speech-equality intersections, this Article reconstructs the analysis of *Boy Scouts of America v. Dale* and *R.A.V. v. City of St. Paul* to show how a more balanced approach would produce a finer-grained analysis reflective of a holistic conception of the Constitution.

- I. Introduction
- II. Identifying the Supreme Court's Lopsided Approach to Equality-Speech Intersections
- III. The Proportionate Approach to Speech-Equality Intersections
- IV. The Supreme Court's Tendency to Privilege Speech over Equality
- V. Conclusion

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I. Introduction

Clashes between speech and equality interests have notoriously fractured “old ‘liberal’ alliances.”¹ The majority of academic literature in this area has focused on hate speech regulation,² and the issue has polarized, pushing most discourse to the fringes.³ The tendency has been either to slight the Constitution’s commitment to free speech or to neglect its dedication to equality. Civil libertarians and scholars aligned with them sometimes have displayed insensitivity to the unique injuries inflicted by hate speech, overlooked the special status of equality in the Constitution and put forth simplistic and paternalistic arguments.⁴ In upholding the First Amendment, the Fourteenth Amendment

¹ Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword, The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 44 (1992).

² See Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L. J. 1671, 1672, 1713 (2000). Another important focus of equality-speech literature has been pornography regulation. See, e.g., Ronald Dworkin, *Freedom’s Law* (1996); Catharine A. MacKinnon, *Only Words* (1993); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN’S L.J. 1, 24-28 (1985). As the Supreme Court has not addressed the clash between speech and equality interests in the pornography context—it summarily affirmed the *Hudnut* case without an opinion, see *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986)—this article does not explore the regulation of pornography.

³ As John Powell adroitly explains, scholars (and judges) tend to view such conflicts through the prism of an individual worldview favoring either speech or equality. The speech and equality worldviews are “different and distinct narratives” which are difficult to surmount in part because people rarely recognize that they are starting from a place that privileges one value or the other. John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 11 (1997). Much of the literature is tainted by this problem, and “there is seldom a serious effort to consider claims from anything other than the favored framework.” *Id.* at 13.

⁴ As Robert Post explains,

In recent years there has been an unfortunate tendency, by no means limited to the controversy surrounding racist speech, to avoid this difficult work by relying instead on formulaic invocations of First Amendment “interests” which can be captured in such conclusory labels as “individual self-fulfillment,” “truth,” “democracy,” and so forth. These formulas cast an illusion of stability and order over First Amendment jurisprudence, an illusion that can turn dangerous when it substitutes for serious engagement with the question of why we really care about protecting freedom of expression.

Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991) [hereinafter Post, *Racist Speech*]. Although Post refers only to proponents of hate speech laws, the same applies, in my view, to their civil libertarian opponents. Techniques used by civil libertarians include assigning their opponents the burden and demanding that they may

“often seems to drop out of the analysis . . . [or] is mentioned only in passing” by these scholars.⁵ “Like people with spectacles who often forget they are wearing them, [they] read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.”⁶ Sweeping proclamations often made about the First Amendment suggest that it is “the Constitution’s most majestic guarantee.”⁷ But such a view tends implicitly to subordinate all other provisions, including those that represent seminal “constitutional moments,”⁸ such as the Fourteenth Amendment.⁹ In fetishizing the First Amendment and elevating it above the very amendment that makes it applicable to the states, some critics¹⁰ of hate crime laws fail to

regulate only if they can avoid any line-drawing problems and slippery slope concerns, even though such problems and concerns permeate the law. See Powell, supra note 3, at 15-24. Other common techniques include the “take the bitter with the sweet” argument, which reminds people of color of the civil rights-inflected free speech precedent which benefited them, and trite invocation of First Amendment axioms such as the marketplace of ideas. For good examples of these arguments, see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L. J. 484 (1990). Even deeply reflective works at times tend to privilege implicitly one value over the other. See, e.g., Post, *Racist Speech*, supra note 4, at 278 (using the burden-shifting argument in imparting hate speech regulators with the “formidable task” of “carv[ing] out a new exception to the . . . first amendment”). With respect to the frequently touted marketplace of ideas, such arguments often fail to understand that “[a]ssaultive racial speech . . . is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow. Racial insults are undeserving of first amendment protection because the perpetrator’s intention is not to discover truth or initiate dialogue but to injure the victim.” Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 452 (1990). As discussed further below, whether hateful language is viewed as merely offensive or as a verbal assault often hinges on whether the individual is an insider or an outsider.

⁵ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136 (1991) [hereinafter Amar, *The Bill of Rights*].

⁶ Id. at 1137.

⁷ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 785 (1988); see also *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to the “preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment”); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (describing free speech as “the indispensable condition, of nearly every other form of freedom”).

⁸ Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

⁹ See Powell, supra note 3, at 21 (“In our legal history, and even today, there is often the assumption that the First Amendment is the essential amendment and the Fourteenth Amendment is the unessential or epiphenomenal amendment.”).

recognize that First Amendment analysis inevitably entails balancing of interests,¹¹ and often accommodates governmental interests that are both less compelling than equality and that lack equality's firm footing in the Constitution's text. State interests in regulating sexual morality or protecting individual reputation and privacy, for instance, are thought to be unobjectionable,¹² yet governmental attempts to ensure equality are somehow seen as an illegitimate "special" exception to the First Amendment.¹³

¹⁰ See, e.g., DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* 12-13 (2003); Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223, 235 (1996). These scholars tend to downplay the extent to which current First Amendment doctrine involves balancing of competing interests, including interests that are not constitutional values.

¹¹ See TRIBE, *supra* note 7, § 12-1, at 792 ("The 'balancers' are right in concluding that it is impossible to escape the task of weighing the competing interests . . ."); see also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356 (1989) [hereinafter Matsuda, *Victim's Story*] ("[A]bsolute protection of expression would render unconstitutional 'all of contract law, most of antitrust law, and much of criminal law.' The need to distinguish protected from unprotected speech is inevitable.") (quoting Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981)).

[T]he First Amendment is not absolute; there are numerous restrictions of 'free' speech which have been found constitutional. For instance, bribes, threats or 'intimidation', fighting words, defamation, criminal solicitation, misleading commercial speech, advertisement of illegal activities, television and radio advertisements for cigarettes, advocating the violent overthrow of the government if lawless action is imminent, obscenity, profane and indecent language, child pornography, attorneys' public speech during trials, federally-funded physicians informing clients about the abortion option, and certain types of labor speech are all subjected to some form of government regulation. All of these listed 'exceptions' are based upon the content of the speech.

Morrison Torrey, *Thoughts About Why the First Amendment Operates to Stifle the Freedom and Equality of a Subordinated Majority*, 21 WOMEN'S RTS. L. REP. 25, 28 (1999). But see Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 768, 776 (2001) (attempting to explain First Amendment doctrine by reference to an absolute bar on laws whose purpose is to punish speech).

¹² Cf. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C.L. L. REV. 133, 145 (1982) (noting instances where law protects injuries less substantial than racial equality); Post, *Racist Speech*, *supra* note 4, at 273-74 (noting analogy between defamation/invasion of privacy torts and hate speech).

¹³ See, e.g., Post, *Racist Speech*, *supra* note 4, at 278 ("It is a formidable task to carve out a new exception to the general protection of speech afforded by the armor of first amendment doctrine."). I find it curious that scholars often characterize hate speech regulation as dependent on a "new" exception to the First Amendment doctrine, given that *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding statute proscribing group libel), predate the cornerstones of the now-dominant wave of expansive First Amendment protection. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). These latter cases of course undermined *Chaplinsky* and *Beauharnais* (at least to some extent), but the point is that, as

On the other hand, in advocating for equality, critical race scholars often have failed sufficiently to respect the First Amendment and the concomitant need to strike a balance between the First and the Fourteenth Amendments. Their use of First Amendment theory and Supreme Court precedent is sometimes so loose and malleable that an “antibordination interpretation of the First Amendment”¹⁴ *itself* tends to subordinate the First Amendment.¹⁵

the laws that the Court approved in Beauharnais and Chaplinsky illustrate, hate speech regulation is hardly contingent on a new exception. Some critical race scholars have similarly erred, in my view, in urging a new exception for hate speech. See, e.g., Matsuda, *Victim's Story*, supra note 11, at 2357 (“Racist speech is best treated as a sui generis category.”). This characterization unwittingly tacitly supports those who would assign the burden to proponents of hate speech regulation and overlooks that hate speech should be understood as a subset of an extant category of unprotected speech, fighting words.

¹⁴ Mari J. Matsuda & Charles Lawrence III, *Epilogue: Burning Crosses and the R.A.V. Case*, in Mari J. Matsuda, Charles Lawrence III, Richard Delgado, and Kimberle Williams Crenshaw, *Words that Wound* 136 (1993).

¹⁵ For instance, some critical race scholars endorse international efforts to ban most, if not all, racist expression, not just face-to-face “fighting words.” See, e.g., Matsuda, *Victim's Story*, supra note 11, at 2341 (relying on Article 4 of the International Convention on Elimination of all Forms of Racial Discrimination which criminalizes “*all* dissemination of ideas based on racial superiority or hatred”) (emphasis added). Despite this sweeping language, Professor Matsuda states: “All ideas about differences between races are not banned [under the international consensus]. The definitive elements are discrimination, connection to violence, and messages of inferiority, hatred or persecution.” Id. at 2348. This is a paradigmatic example of a supposed stopping point that lacks discernable content. Matsuda’s suggestion that “a belief in intellectual differences between the races,” id., could not be interpreted to contain an element of “discrimination,” a “connection to violence” or a “message[] of inferiority” strains credulity. Id. Such efforts to “control racism,” id. at 2345, rather than merely the most virulent racial epithets, would basically gut the First Amendment. The failure to see that such proposals strike at the heart of the First Amendment betrays the lopsided disposition of such scholars. See id. at 2346 (arguing that U.S. resistance to Article 4 “represents an extreme commitment to the first amendment at the expense of antidiscrimination goals”). Another aspect of this lopsided approach is the castigation of white supremacist speech in the most forceful terms in contrast to the failure to see the harm caused by people of color who attack whites. See id. at 2361-362 (concluding that speech by a “white-hating nationalist” should be immune because it denotes “a victim’s struggle for self-identity in response to racism”). For other arguments privileging equality over speech, see Delgado, supra note 12, at 179-80 (arguing that the First Amendment would permit a tort action based on mere insult, such as calling a black male a “boy,” without requiring a showing of threat or intimidation); Powell, supra note 3, at 29-30 (discussing Charles Lawrence’s scholarship) (“[Lawrence] argues that it is not only appropriate to balance free speech and equality, but also that equality must prevail.”); Torrey, supra note 11, at 34 (asserting that in balancing the First Amendment against the Fourteenth, “clearly the latter should prevail”). Although I am critical of scholars such as Professor Matsuda, I do not mean to detract from their important contributions to hate speech discourse. Indeed, in various respects, I rely on her seminal insights.

In this article, I focus on how the Supreme Court has mistreated equality-speech intersections, although I do so against the background of the voluminous scholarly literature on hate speech. The Supreme Court’s analysis in key freedom of association and hate speech cases has been at least as lopsided as the scholarly discussion. As I demonstrate in the next section, there is a general trend in which the Court has treated disputes that implicate complex speech-equality intersections as simple speech cases. Conversely, at other times, the Court has reduced an intricate speech-equality intersection to a basic equality case. Rather than seeking a proportionate balance between these two constitutional imperatives, the Court has often either overlooked one interest entirely or addressed that countervailing interest in a curt, dismissive fashion. In a few key cases, which I examine in detail below, R.A.V. v. City of St. Paul¹⁶ and Boy Scouts of America v. Dale,¹⁷ the Court essentially sided with the civil libertarian camp, in that it privileged speech over equality. I demonstrate how the Court neglected the countervailing equality interests in each of these cases. I show that the Court has not embraced its obligation to interpret the Constitution as a whole and construe its provisions with sufficient flexibility so that the First Amendment and Fourteenth Amendment can coexist harmoniously.

This article attempts to create a greater awareness of this unfortunate trend and begin to articulate a method that affords respect to both constitutional interests, reconciling the First Amendment with “the massive transformation brought about by the Fourteenth Amendment.”¹⁸ The Court’s recent, and in various respects surprising, decision in Virginia v. Black, as well as Justice Thomas’ striking statement at oral

¹⁶ 505 U.S. 377 (1992).

¹⁷ 530 U.S. 640 (2000).

¹⁸ Amar, *The Bill of Rights*, *supra* note 5, at 1152; *see also* Cass Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 821 (1993) [hereinafter Sunstein, *Words, Conduct, Caste*] (“[T]he Equal

argument, provides a fresh and rich opportunity to revisit the issue of hate speech and, importantly, to situate it within a broader analysis of equality-speech conflicts. The proportionate approach to speech-equality intersections, which I sketch out below, addresses important concerns beyond the narrow issue of hate speech. It offers guidance to courts negotiating the thicket of intersectionalities in general, including the various speech-equality intersections discussed herein.

In Part II, I discuss as background a number of areas of the law in which speech and equality have intersected, and I identify the Court's pattern in which one constitutional value is privileged and the other subordinated with little or no reasoning explaining that choice. In Part III, I articulate an alternative to the Court's lopsided approach to equality-speech intersections. Drawing on the better insights from the critical race and civil libertarians literature, as well as the few scholars who have attempted to chart a middle course,¹⁹ I develop a proportionate approach to equality-speech conflicts.

The proportionate approach requires paying close attention to context and history, being cognizant of unconscious tendencies to privilege one value over the other and unpacking interests that the Court has slighted. Under this approach, one key conclusion, I argue, is that state equality-based laws—which in advancing equality sometimes interfere with speech interests—should generally be understood as first cousins to Section 5 of the Fourteenth Amendment, which expressly grants Congress the power to enforce the Constitution's commitment to equality. Although state equality-based laws do not

Protection Clause was originally conceived as an effort to counteract the disproportionate subjection of black people to private and public violence.”).

¹⁹ See, e.g., William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L. J. 2411, 2449 (1997); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993); Post, *Racist Speech*, *supra* note 4.

have the explicit textual imprimatur of Section 5, such laws complement Section 5 and are integral to a full effectuation of the equality commitment embodied in the Fourteenth Amendment. A proportionate, evenhanded approach to resolving equality-speech disputes would treat such laws with care and sensitivity, paying close attention to context and history, instead of brusquely overriding state laws whenever they are said to impede speech interests.

Part IV then fleshes out the differences between the lopsided and proportionate approaches by critiquing two important equality-speech cases, Boy Scouts and R.A.V. I trace how a number of the Court’s arguments in these cases overlooked equal protection considerations and demonstrate how the cases would be analyzed under the proportionate approach. In some cases, a proportionate approach would make a critical difference—R.A.V., for instance, would come out differently, in my view. In other instances, such as the Boy Scouts case, the outcome may not be as clear-cut, given factual aspects that the Court chose not to explore.²⁰ At a minimum, however, if the Court had employed the proportionate approach, it would have produced reasoning more credible than that in Boy Scouts. The Boys Scouts majority opinion not only misunderstands gay people but also does violence to antidiscrimination law. Contrary to precedent, it essentially transforms the right to free association into a “free pass out of antidiscrimination laws.”²¹ This section concludes by looking at Virginia v. Black, the recent case concerning the regulation of cross burning. Black suggests a fundamental shift in the Court’s approach to equality-speech intersections and moves the Court closer to the proportionate approach. Part V provides a conclusion.

²⁰ See *infra* Part IV.

²¹ Boy Scouts, 530 U.S. at 688 (Stevens, J., dissenting).

II. Identifying the Supreme Court’s Lopsided Approach to Equality-Speech Intersections

Despite the overwhelming scholarly focus on hate speech, potential conflict between equality and speech exists in various other areas of the law, including the regulation of employment and places of public accommodation. Although speech and equality clashes may be most important when someone’s job and livelihood is at stake, the Court has barely recognized the strong conflict that exists. Most notably, although it has repeatedly applied and enforced sexual harassment law,²² it has not fully explained how laws that monitor the sexual content of speech can coexist with the First Amendment. Although the R.A.V. decision suggested, with minimal analysis, that sexual harassment law is consistent with the First Amendment,²³ Justice Thomas subsequently argued that the very same analysis called into question sexual harassment law.²⁴ Justice Thomas’ argument shows that the Court’s failure to engage the complex relationship between equality and speech implicated by sexual harassment laws has cast a pall over the constitutionality of such laws.

In a Title VII case that did not involve a sexual harassment claim, Hishon v. King & Spalding,²⁵ a prominent corporate law firm asserted that the First Amendment protected its decision to deny a female attorney membership as a firm partner in violation of Title VII.²⁶ The Court rejected this argument, summarily announcing that “[t]here is no constitutional right . . . to discriminate.”²⁷ Although the Court correctly concluded

²² See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

²³ R.A.V. v. City of St. Paul, 505 U.S. 377, 409-10 (1992).

²⁴ See Avis Rent A Car Sys., Inc. v. Aguilar, 529 U.S. 1138 (2000) (Thomas, J., dissenting).

²⁵ 467 U.S. 69 (1984).

²⁶ See id. at 78.

²⁷ Id.

that admitting a woman partner would not impair the firm’s ability to express any message,²⁸ this finding did not address the freedom of association component of the firm’s argument. In the end, the Court’s dismissive treatment of the First Amendment argument—a full three sentences—denied the force of the argument²⁹ and erroneously suggested that the tension between equality and speech was entirely illusory.

Just as cursory was the Court’s analysis in an education case Runyon v. McCrary,³⁰ which dealt with discriminatory private schools. Holding that 42 U.S.C. § 1981 bars private racial discrimination in contracting, the Court applied the statute to private schools that excluded students on the basis of race.³¹ This construction of the statute, the Court announced, did not violate the First Amendment.³² The Court claimed to assume that “parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions.”³³ Nonetheless, it endorsed the lower court’s finding that “there is no showing that discontinuance of (the) discriminatory admission practices would inhibit *in any way* the teaching in these schools of any ideas or dogma.”³⁴ Simply announcing that “the Constitution places no value on discrimination . . . it has never been accorded affirmative constitutional protections,”³⁵

²⁸ See id.

²⁹ Just two terms later, the Court stated: “There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.” Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

³⁰ 427 U.S. 160 (1976).

³¹ See id. at 172; see also Bob Jones University v. United States, 461 U.S. 574 (1983) (holding that denial of charitable tax deduction to religious college that practiced racial discrimination did not violate the Free Exercise Clause).

³² See id. at 176.

³³ Id.

³⁴ Id. (quoting McCrary v. Runyon, 515 F.2d 1082, 1087 (1975)) (emphasis added).

³⁵ Id. at 161 (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)).

the Court chose to ignore the difficult cases raised by a construction of Section 1981 that could, say, bar a family from considering race in choosing a live-in babysitter, thereby intruding on considerable associational interests.³⁶

The Court thus failed candidly to acknowledge that there was an impingement on the schools' speech interest (its desire to teach segregation), even though the state imposed the burden indirectly through mandating the admission of students of color rather than directly dictating curriculum. Of course, there was a strong argument that the equality interest should have trumped in the end, in light of Brown v. Board of Education's affirmation of the importance of education and the school's general lack of selectivity and quasi-public nature.³⁷ But the Court's cursory analysis did not bother to reach this far. Instead, it rested upon the claim that forcing schools to admit children of color would not make it more difficult for them to "promote the belief that racial segregation is desirable,"³⁸ which is utterly implausible. It is hard to imagine that the Court actually expected white teachers to promote the inferiority of black children with those very children sitting right in front of them, thereby directly inflicting the stigmatic injury at the heart of Brown.

Just last Term, the Court, in another education case, addressed a speech-equality intersection in upholding the University of Michigan Law School's race-conscious admissions policy.³⁹ The Court held that in light of a university's First Amendment

³⁶ See id. at 187-88 (Powell, J., concurring); see also id. at 212 (White, J., dissenting) ("As the associational or contractual relationships become more private, the pressures to hold s[ection] 1981 inapplicable to them will increase."). Cf. Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 ("[T]he formation and preservation of certain kinds of highly personal relationships [enjoy] a substantial measure of sanctuary from unjustified interference by the State.").

³⁷ Cf. 427 U.S. at 173 n.10.

³⁸ Id. at 176.

³⁹ See Grutter v. Bollinger, 123 S.Ct. 2325, 2343 (2003).

interest in academic freedom, law schools have a compelling interest in obtaining a diverse student body.⁴⁰ The Court approved the University of Michigan Law School's flexible, individualized admissions process, which considers race as one of many factors, but in a companion case, the Court invalidated a rigid, points-based system used by the university's undergraduate college.⁴¹ In this context, the Court found that the speech and equality interests were complementary, not in conflict: the First Amendment interest of academic freedom enabled the law school to decide to consider race in furtherance of an admissions policy seeking educational diversity.⁴² Again, the Court's approach was somewhat lopsided; it told us plenty about equality, but precious little about speech, even though the speech interest may explain the Court's deference to the university, an integral aspect of the Court's holding. The Grutter Court's First Amendment analysis came off as a hazy afterthought. It did not explain how the scattered precedent suggestive of a First Amendment academic freedom interest applied to the case at hand, given the largely inapposite facts of the prior cases.⁴³ Nor did it make any attempt to sketch the metes and bounds of this new constitutional interest. As Justice Thomas aptly demonstrated,⁴⁴ this new interest in academic freedom could be used to the detriment of people of color unless it is some sort of one-way "ratchet" that can help, but not hurt, racial minorities.⁴⁵

Further, could an institution use its First Amendment right to promote diversity within its

⁴⁰ See id. at 2338-2342.

⁴¹ See Gratz v. Bollinger, 123 S.Ct. 2411(2003).

⁴² See Grutter, 123 S.Ct. at 2340.

⁴³ See, e.g., Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952).

⁴⁴ See Grutter, 123 S.Ct. at 2356-57 (Thomas, J. concurring in part and dissenting in part).

⁴⁵ Cf. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (interpreting Section 5 of the Fourteenth Amendment to permit Congress to enforce and define the equal protection guarantee, but not to "dilute" it).

walls to justify hate speech regulation?⁴⁶ Grutter inadvertently raises this question but provides remarkably little insight on speech-equality intersections.⁴⁷

Finally, in Metro Broadcasting, Inc. v. Federal Communications Commission, which the Court treated as a simple affirmative action case, the Court adopted a rationale arguably at odds with the Court’s First Amendment doctrine. The FCC justified its policies giving preferential treatment to people of color in the acquiring of broadcast media licenses by arguing that the policies would create more diverse content, a public benefit.⁴⁸ The Court endorsed the value of broadcast diversity and found that the FCC policies were suitably tailored to achieve this goal.⁴⁹ In so doing, the Court failed to consider that a governmental preference for particular speakers⁵⁰ or particular diverse content could be understood as content-based regulation.⁵¹ Content-based regulation, the Court has said on numerous occasions, presumptively violates the First Amendment.⁵²

⁴⁶ Cf. Post, *Racist Speech*, supra note 4, at 276-77 (discussing policy of Mount Holyoke College, which “seeks to inculcate the value of diversity, which it views as plainly inconsistent with racist expression”). Under this scenario, the posited First Amendment interest would threaten to turn the Amendment upon itself, using academic freedom potentially to undermine core free speech values.

⁴⁷ Additionally, Grutter adds another layer of contradiction to this already-muddled area of the law in that Justice O’Connor’s majority opinion appears to repudiate the anti-diversity argument she made in dissent in Metro Broadcasting. See 497 U.S. 547 (1990), overruled in part by, Adarand Constructors Inc. v. Peña, 515 U.S. 200 (1995) (“The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest.”); id. at 617 (decrying the government’s “equating race with [particular] thoughts and behavior” as “resting . . . on stereotyping”). It at least requires some explanation as to why diversity is a compelling interest and relying on race to foster diversity is permissible in one First Amendment context (academic freedom) but not another (broadcasting).

⁴⁸ See id. at 568.

⁴⁹ See id. at 567-69.

⁵⁰ See First Nat. Bank of Boston v. Belotti, 435 U.S. 765, 784-85 (1984); Roberts, 468 U.S. at 633-35 (O’Connor, J., concurring in part and concurring in the judgment) (“A ban on specific group voices on public affairs violates the most basic guarantee of the First Amendment—that citizens, not the government, control the content of public discussion.”).

⁵¹ Justice O’Connor tentatively raised this argument. See Metro Broadcasting, 497 U.S. at 617 (O’Connor, J., dissenting) (“The FCC’s extension of the asserted interest in diversity of views in these cases presents, at the very least, an unsettled First Amendment issue. . . . [T]he Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers.”).

⁵² See infra note 180 and accompanying text. Equality and the right to associate have also intersected in the voting context. See Smith v. Allwright, 321 U.S. 649, 663-66 (1944) (holding

The aforementioned cases, in particular Runyon, demonstrate how the Court's failure fully to resolve speech-equality intersections and firmly justify its conclusions have made the law in this area fragile and somewhat contradictory. Accordingly, it was easy for the Boy Scouts Court to rule against an excluded minority without even citing and distinguishing Runyon. The Runyon Court refused to see the impairment of the private school's expressive interest in inculcating the value of segregation, whereas as discussed more fully below, the Boy Scouts Court bent over backwards to defer to the Boy Scouts' effort to preserve its professed anti-homosexuality agenda.

III. The Proportionate Approach to Speech-Equality Intersections

Unlike the Supreme Court's lopsided analysis in the aforementioned cases, the proportionate approach provides a holistic framework that strives to harmonize diverse components of the Constitution and consistently recognize and effectuate the commitments underlying each provision. In contrast to the Court's lopsided, inadvertent approach to equality-speech intersections, the proportionate approach requires being cognizant of unconscious tendencies to privilege one constitutional commitment over another. It would preclude the adjudication of a case like R.A.V. without even considering the Court's equal protection case law. That is, it would not permit treating a case implicating a speech-equality intersection as a simple speech case. As I will demonstrate below, the Court, in cases like R.A.V., failed to recognize that the Fourteenth Amendment, inasmuch as it was ratified after the First Amendment, may require different outcomes and applications of general speech principles when a law

that political parties, which asserted that they were private associations, were state actors and thus their racial discrimination violated the Fifteenth Amendment); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 (2003).

addresses discrimination against groups such as people of color and women.⁵³ Equal protection law generally permits government to redress harm based on its own unequal treatment of suspect or quasi-suspect classes, including those discriminated against based on race, gender and religion. Extrapolating from this basic equal protection principle, Justice Brennan in Roberts v. United States Jaycees premised the Court’s holding that the state could require the Jaycees to admit women members on the “*special* harms distinct from their communicative impact” caused by private “invidious discrimination.”⁵⁴

In R.A.V., where the Court considered whether the City of St. Paul, Minnesota could ban cross burning, the Court flipped Justice Brennan’s conclusion. The special nature of discrimination against people of color, women and religious minorities—the very basis for treating them as suspect or quasi-suspect classes under the Equal Protection Clause—proved that the hate speech ordinance was aimed at a “distinctive idea,”⁵⁵ which made the ordinance especially vulnerable from a First Amendment perspective. In setting the First and Fourteenth Amendments at cross-purposes, the R.A.V. Court not only disregarded Roberts, but it neglected its obligation to harmonize the various parts of the Constitution. In contrast, the proportionate approach aims to afford equivalent respect and legitimacy to each of the competing constitutional provisions. A critical goal

⁵³ Compare with Abner Greene, *Government of the Good*, 53 VAND. L. REV. 1, 37-38 (2000) (arguing that the First Amendment should be interpreted to permit government considerable flexibility in expressing government viewpoints and subsidizing expression, except that the government may not “further ghettoiz[e] a discrete and insular minority”).

⁵⁴ 468 U.S. 609, 628 (1984) (emphasis added).

⁵⁵ R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992). The Virginia Supreme Court, applying R.A.V., performed a similar feat:

[C]onsidering the historical and current context of cross burning, and the statute’s reliance on such context for the provision of an inference of intent to intimidate from the mere act of burning a cross, it is clear that the Commonwealth’s interest in enacting the cross burning statute is related to the suppression of free expression as well.

Black v. Virginia, 553 S.E.2d 738, 775 (Va. 2001). Remarkably, the “virulent” nature of the burning cross provided the basis for its constitutional protection. Id.

of this careful balancing is to preserve the pluralism and diversity of society, a First Amendment *and* equality interest. To demonstrate, consider whether a state university should permit a law student group such as BLSA to exist and restrict membership to African-Americans. An unequivocal (and formal) application of equality principles would require nondiscrimination even if the practical effect were to dilute the organization's ability to promote solely the interests of African-American law students. Diluting or banning organizations such as BLSA, however, also diminishes a First Amendment interest in that it reduces the variety among organizations in a society that values pluralism and the attendant diversity of group expression. Consequently, equality and speech interests both ask us to strike a balance.

Second, the proportionate approach demands careful attention to context and history. Brown v. Board of Education is a cornerstone of a context-specific approach in that there the Court refused to rely on the deceptive formal equality of the law before it, as it had in Plessy v. Ferguson.⁵⁶ Even though the law restricted whites *and* blacks from interacting, the Court looked to the social meaning of the law and saw its racially stigmatizing purpose and effect. Similarly, the proportionate approach eschews resting on abstract generalizations or basic principles. It delves deeper, requiring a close look at the asserted interests on each side of the balance to understand which interest is weightier given the facts of the particular situation.⁵⁷ Further, the gravity of the individual interests should

⁵⁶ 163 U.S. 537 (1896), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954).

⁵⁷ As Justice Breyer stated in explaining his approach in Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000):

[W]here a law significantly implicates competing constitutionally protected interests in complex ways—the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the

be measured in part by contemplating how the law is felt by the particular people before the court (like the African-American children in Brown). For Supreme Court Justices, who tend to be isolated in a world of abstractions, “[t]his shift in perspective requires studying the actual experiences of those groups that have suffered oppression and heeding the voice of that experience rather than considering this viewpoint in the abstract.”⁵⁸

For instance, in the Boy Scouts case, this approach would require a close look at the impact of the exclusion on James Dale, the homosexual Scout leader ejected from the Scouts after officials learned of his sexual orientation. But the proportionate approach does not look *only* to the “bottom.”⁵⁹ The Boy Scouts opinion is striking in its utter failure to consider the impact of the exclusion on Dale, who sued to retain his membership after ten years of loyal service to the Boy Scouts. On the other side of the balance, the court must consider how forbidding the Boy Scouts to exclude openly gay people would impact the organization and its central goals.

Third, as Justice Breyer has cogently pointed out in his First Amendment opinions,⁶⁰ when there are competing constitutional interests, each should be examined carefully and thoughtfully, but a court should not subject one interest to a strict standard, which essentially puts a thumb on the scale. “[S]trict scrutiny—with its strong

statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others. . . .

Id. at 402 (Breyer, J., concurring).

⁵⁸ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1779 n.300 (1993). Judges should be careful not to “slight the heterogeneity of people of color” and should understand that there is no single “Black experience,” for example. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1784 (1989).

⁵⁹ Matsuda, *Victim’s Story*, supra note 11, at 2322; see also Devon W. Carbado, *Race to the Bottom*, 49 U.C.L.A. L. REV. 1283 (2002) (discussing various methodological questions raised by looking to the bottom).

presumption against constitutionality—is normally out of place where, as here, important competing constitutional interests are implicated.”⁶¹ Accordingly, I argue, like Justice Breyer, for applying intermediate scrutiny in such situations. However, Justice Stevens’ dissent in Boy Scouts (which Justice Breyer joined) veered dangerously close to applying strict scrutiny to the asserted First Amendment interest. His extensive evidentiary demands, detailed below, are inconsistent with a proportionate approach. In the end, even under the proportionate approach, Boy Scouts may be a close case. For purposes of this inquiry, more important than the ultimate outcome is the realization that neither the dissent’s rigorous analysis nor the majority’s toothless standard constitutes a sufficiently nuanced approach.

Finally, under the proportionate approach, state antidiscrimination laws should be understood as first cousins of laws enacted pursuant to Section 5 of the Fourteenth Amendment, which expressly grants Congress the power to enforce the Constitution’s commitment to equality.⁶² State equality-based laws “reflect[] the State’s strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services.”⁶³ It is true that the Fourteenth Amendment specifically declares that Congress has enforcement power, but does not mention the states. But neither is the “right of association,” which has formed a basis for many Supreme Court precedents (including Boy Scouts), mentioned in the text of the First

⁶⁰ See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 537 (2001) (Breyer, J., concurring); Nixon, 528 U.S. at 402 (Breyer, J., concurring).

⁶¹ Bartnicki, 532 U.S. at 537 (Breyer, J., concurring).

⁶² Compare with Amar, *The Bill of Rights*, *supra* note 5, at 1202 (arguing that under a holistic interpretation of the Constitution, the Nineteenth Amendment, although textually referring only to voting, should be read to invalidate gender discrimination with respect to political rights, such as jury service).

⁶³ Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984).

Amendment; it is “derived by implication” from textual rights.⁶⁴ Nor is the right to equal protection against the federal government found anywhere in the constitutional text, but that has not stopped the Court from importing the Fourteenth Amendment’s equality guarantee into the Fifth.⁶⁵ Such interpretive moves, which are not at all uncommon, rest on structural considerations that transcend the details of particular textual provisions viewed in isolation.

Moreover, although the point is apparently lost on the current Supreme Court majority, which has arrogated for itself the power to enforce the Fourteenth Amendment and saddled Congress with a cramped interpretation of the Section 5 power,⁶⁶ the framers of the Fourteenth Amendment preferred *legislative* enforcement as the primary means of protecting equality.⁶⁷ State power, indeed under some circumstances its duty,⁶⁸ to enact laws to eradicate discrimination can be understood as a derivative of the equal protection mandate generally, and specifically, Section 5. The framers of the Fourteenth Amendment assumed that states were the primary threat to equality. The equal protection guarantee, by its terms, applies only to the states—not to the federal

⁶⁴ TRIBE, *supra* note 7, § 12-26, at 1010; *see also id.* § 12-1, at 785 n.1 (“Freedom of association is not mentioned in the constitutional text, but it is recognized at least as a derivative safeguard of an individual’s rights of speech and assembly when exercised in a group.”).

⁶⁵ *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁶⁶ *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-16, at 959 (3d ed. 2000); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L. J.* 441, 477 (2000).

⁶⁷ *See, e.g., Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting); Sunstein, *Words, Conduct, Caste*, *supra* note 18 at 800.

⁶⁸ *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (state must “eliminate . . . all vestiges of state-imposed segregation”); *Green v. County School Bd. of New Kent Cty., Va.*, 391 U.S. 430, 437-38 (1968) (state that has discriminated has “affirmative duty” to take whatever steps are necessary to eliminate discrimination “root and branch”); *see also* Lawrence, *supra* note 4, at 439 (reading *Brown* to require “the affirmative disestablishment of societal practices that treat people as members of an inferior or dependent caste”). *Cf.* Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 *YALE L.J.* 507, 538 (1999) (“Bias crime legislation is simply an expression of the greater duty of the state to protect its vulnerable members.”).

government. As such, the Fourteenth Amendment requires states not to discriminate. But in light of their history of maintaining oppression in numerous respects,⁶⁹ the Constitution should encourage, if not require, them to do more than simply refrain from discriminating in the future.⁷⁰ Equality-based state laws redress “a number of serious social and personal harms” and secure the state’s interest in “wide participation in political, economic, and cultural life.”⁷¹

Further, voluntary state acknowledgment of the sins of its discriminatory past and construction of remedies to prevent future discrimination and eradicate the vestiges of past discrimination are preferable to coercive federal efforts.⁷² The former approach directly addresses the problem at its source rather than requiring another level of government to monitor the states and to impose a solution from on high. Rarely will federal monitoring reveal a nationwide problem broad and politically compelling enough to move Congress to enact legislation pursuant to Section 5. Consequently, Congress may overlook or fail to address low-level and/or regional instances of discrimination. Relatedly, federal legislation, when it is enacted, is often unduly broad, imprecise and crudely prophylactic in nature. Such laws raise complicated issues of comity and

⁶⁹ See, e.g., cases cited supra note 68.

⁷⁰ Hence, Justice Thomas’ assertion that, despite the long history of state discrimination erecting and facilitating obstacles to African-American progress, such as barring slaves from reading, states should now simply “‘Do nothing with us!’” is a peculiar understanding of the meaning of “justice.” Grutter v. Bollinger, 123 S.Ct. 2325, 2350 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglass).

⁷¹ Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984). States, of course, could not enforce conceptions of equality that would violate Supreme Court interpretations of the equality guarantee.

⁷² The Court’s equal protection and Title VII cases have emphasized the virtues of voluntary compliance. See, e.g., Johnson v. v. Transportation Agency, 480 U.S. 616, 650 (1987) (O’Connor, J., concurring) (relying on “this Court’s and Congress’ consistent emphasis on the value of the voluntary efforts to further the antidiscrimination purposes of Title VII”); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288-90 (1986) (O’Connor, J., concurring in part and concurring in the judgment).

tailoring with which the Court has famously struggled over the last few years.⁷³ The Court perceives Section 5 legislation as an accusation of discrimination from one sovereign to another, a charge it finds deeply troubling.⁷⁴ In addition, the Court’s federalism cases are motivated by its desire to keep Congress in its proper place and preserve for itself the power to interpret the Constitution.⁷⁵ All of these concerns are alleviated when states remedy discrimination in the first instance. The same federalism concerns that have driven the Court to shrink the Congress’ Section 5 powers—promoting local autonomy and experimentalism, separation of powers and comity concerns—should at least cause it to hesitate before trampling on state antidiscrimination laws.

In contrast to many of the Section 5 cases, which of course involved federal equality-based laws, when a state antidiscrimination law is at issue, the Court can promote and enhance both local sovereignty and the Constitution’s equality guarantee. In restricting Congress’ power to regulate discrimination, the Court has cited with approval

⁷³ See, e.g., *Nevada Dept. of Human Res. v. Hibbs*, 123 S.Ct. 1972, 1982 (2003); *Garrett*, 531 U.S. at 372-76 (requiring legislation to be congruent and proportional); Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. J. 1, 11 (2003) [hereinafter Post & Siegel, *Juricentric Restrictions*].

⁷⁴ See Post & Siegel, *Juricentric Restrictions*, *supra* note 73, at 13-14, 16.

⁷⁵ See *id.* at 2. The Federalist Justices have also indicated that permitting states to experiment with various regulatory approaches is preferable to uniform federal regulation. See *EEOC v. Wyoming*, 460 U.S. 226, 264 (1983) (Burger, J., dissenting) (“Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest. Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system.”). Regardless of what one thinks of this argument as a basis for restricting federal power, state equality-based laws do considerably contribute to the deliberative process regarding the regulation of societal discrimination. Several states banned discrimination in places of public accommodation before the federal government did so, which likely contributed to the eventual enactment of federal protections. See *Roberts*, 468 U.S. at 624; *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981) (“In 1885, ten years before the United States Supreme Court put its imprimatur on the ‘separate but equal’ fiction justifying the Jim Crow laws, the legislature of the State of Minnesota chose a different course, that of ‘full and equal’ privileges [regardless of race].”). Similarly, the pre-existing state disability discrimination laws helped form the consensus that moved Congress to pass the Americans with Disability Act. See *Garrett*, 531 U.S. at 368 n.5

state laws that address the same goal and has held out hope that groups such as people with disabilities may obtain relief at the state level.⁷⁶ In Garrett, for instance, the Court suggested that the widespread existence of state laws addressing disability discrimination undercut the need for the federal disability law.⁷⁷ The Court has not, however, connected this important function of state law in federalism cases to its speech-equality cases, such as R.A.V. and Boy Scouts, where, I will argue, the Court greeted state civil rights laws with antipathy.⁷⁸ Given that state civil rights laws in general are congruent with the Fourteenth Amendment and mitigate the “especially knotty issues”⁷⁹ of separation of powers and federalism implicated by congressional efforts, such laws should enjoy a special stature in our constitutional regime. Even if state efforts to advance equality should not receive the full latitude that a proper interpretation of Section 5⁸⁰ would afford the federal government, they ought not be hampered by an overreaching interpretation of the First Amendment that leaves little room for equality, as in R.A.V.⁸¹

⁷⁶ See Garrett, 531 U.S. at 374 n.9; see also Romer v. Evans, 517 U.S. 620, 629 (1996) (relying on the “severe consequence” of being deprived of protection under state and local antidiscrimination laws); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 572 (1995) (declaring that state antidiscrimination laws are “well within the state’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination”).

⁷⁷ See Garrett, 531 U.S. at 368 n.5 (noting that the states led the way in fighting disability discrimination; every state had such a law prior to the enactment of the ADA).

⁷⁸ Even when federalism principles are more apparent, the Court’s adherence to respect for state governments is hardly an unbroken line. See Bush v. Gore, 531 U.S. 98 (2000).

⁷⁹ Post & Siegel, *Juricentric Restrictions*, supra note 73, at 2.

⁸⁰ See Garrett, 531 U.S. at 376 (Breyer, J., dissenting) (setting forth the proper standard).

⁸¹ Additionally, many state antidiscrimination laws are sensitive to the constitutional requirement to balance equality and speech interests. Like Title VII, which exempts small employers with fewer than 15 employees and certain private clubs, see 42 U.S.C. § 2000e(b), state laws often mitigate First Amendment concerns by creating exceptions for truly private organizations. See, e.g., N. J. Stat. Ann. § 10:5-51 (West Supp. 2003) (statute at issue in Boy Scouts) (“Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution . . .”); McClure, 305 N.W.2d at 771 (interpreting statute at issue in

IV. The Supreme Court's Tendency to Privilege Speech over Equality

A. Roberts v. United States Jaycees' Foundational, Balancing Approach

The Court has balanced First Amendment interests against equality interests in a number of cases involving racial, gender and sexual orientation exclusion. Although the Court's early cases, starting with Roberts v. United States Jaycees,⁸² affirmed the importance of the Constitution's equality guarantee and state efforts to effectuate that guarantee, recent cases have privileged First Amendment interests, thereby subordinating equality. In privileging speech interests over equality interests and rendering the latter largely invisible, the Court has fallen prey to a form of First Amendment fetishism pursuant to which speech presumptively trumps equality. Such a strong First Amendment presumption, even if generally valid, has no place where the Court is tasked with balancing speech and equality, both of which are constitutional commitments of the highest order. It seems the Justices have gotten so wrapped up in the magical elixir of canonical First Amendment principles that they have at times neglected the application of such principles to the facts before them, failing to tether their grandiloquent proclamations to practical reality and the human beings whose lives and liberty rest in the Justices' hands. In contrast to this lopsided approach to speech and equality intersections, a proportionate analysis of the interests on both sides of the balance requires a detailed, fact-specific examination of each interest and the extent to which speech interests would be impaired by applying equality-based laws.

In Roberts, the Court assessed whether a state anti-discrimination law that mandated access for certain statutorily protected groups unconstitutionally trampled upon

Roberts) ("Private associations and organizations those, for example, that are selective in membership are unaffected by [the statute].").

⁸² 468 U.S. 609 (1984).

the First Amendment right of association, and in so doing it laid the foundation for future cases such as Boy Scouts. The United States Jaycees (“Jaycees”), a non-profit civic organization formerly called a chamber of commerce, had attempted to revoke the charters of local chapters in Minnesota that admitted women in violation of the organization’s bylaws.⁸³ After the Minnesota Department of Human Rights initiated an investigation of the Jaycees, the Jaycees brought suit in federal court against the state.⁸⁴ When the dispute reached the Supreme Court, the Roberts Court recognized the instrumental importance of association to speech. “[A] right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion” is “an indispensable means of preserving [such] individual liberties.”⁸⁵ Hence, association is often a necessary means of accomplishing expressive ends.⁸⁶

Moreover, the Roberts Court said, “There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”⁸⁷ The Roberts Court explained the primary danger of forced inclusion in the next sentence: “Such a regulation may

⁸³ See id. at 614-15.

⁸⁴ See id. at 615.

⁸⁵ Id. at 618; see also id. at 622 (“[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”); id. at 633 (O’Connor, J., concurring in part and concurring in the judgment) (“Protection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”); TRIBE, supra note 7, § 12-1, at 785 n.1 (“Freedom of association is not mentioned in the constitutional text, but it is recognized at least as a derivative safeguard of an individual’s rights of speech and association when exercised in a group.”); Post, *Racist Speech*, supra note 4, at 294.

⁸⁶ See ERWIN CHEREMERINSKY, CONSTITUTIONAL LAW 1180 (2001) (“Groups have resources—in human capital and money—that a single person lacks.”).

⁸⁷ Roberts, 468 U.S. at 623.

impair the ability of the original members to express only those views that brought them together.”⁸⁸ Therefore, in assessing speech-equality intersections, the harm stems not from the mere presence of a disfavored individual in the group. If the locus of the harm were the offense caused by mere presence, presumably *every* business owner forced by Title VII to hire African-Americans or women would have a valid First Amendment claim, but that clearly is not so.⁸⁹ Instead, the harm of forced inclusion arises from a governmentally compelled change in the message the association desires to express. Where an association is not attempting to express a particular message (as is the case with many businesses), or where the inclusion of an outsider does not impair the group’s goals or message, there is no legitimate speech-related objection. Just as the First Amendment usually requires people to tolerate speech that they find offensive, it normally requires people such as business owners to tolerate the presence of members of disfavored groups, absent a showing that such presence would unduly impair the organization’s speech or associational goals.⁹⁰

The Roberts Court was skeptical that the forced inclusion of women would alter the Jaycees message, but it ultimately declined to resolve that issue.⁹¹ It questioned whether the inclusion of women truly would change the character of the organization and thus impair the Jaycees’ speech interest. The Court refused to “indulge in sexual [] stereotyping” and “rel[y] solely” on “unsupported generalizations about the relative

⁸⁸ Id.

⁸⁹ See id. at 634 (O’Connor, J., concurring in part and concurring in the judgment) (“The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex.”).

⁹⁰ See Boy Scouts of America v. Dale, 530 U.S. 640, 663 (2000) (Stevens, J., dissenting) (interpreting Roberts).

interests and perspectives of men and women.”⁹² It noted: ““the specific content of most of the resolutions adopted over the years by the Jaycees has nothing to do with sex.”⁹³ The Court went on to conclude that any abridgement of the Jaycees’ speech interest was justified by the state’s compelling interest in prohibiting gender discrimination. “[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.”⁹⁴ The Roberts Court looked closely at both the equality and speech dimensions of the dispute. Ultimately declining to resolve the question of whether there was any impairment of the Jaycees’ First Amendment interests, it found that to the extent there was some impairment, it was too minimal to outweigh the stronger interest in gender equality. The Court’s close examination of both sides of the balance, recognition of the concrete harms of gender discrimination as well as the legitimacy of the state’s interest in redressing them and the Court’s skepticism about stereotypical assumptions established a balanced and sound, if somewhat ambiguous, framework for future cases.⁹⁵

B. The Court Departs from the Roberts Framework

In the Boy Scouts and R.A.V. cases, the Court neglected the Constitution’s equal protection command and departed from the framework established by Roberts. Although in this section I focus on unpacking the equality aspects of Boy Scouts and R.A.V., I do

⁹¹ See Roberts, 468 U.S. at 627-628 (“[E]ven if enforcement of the Act causes some incidental abridgement of the Jaycees’ protected speech, that effect is no greater than is necessary to accomplish the State’s legitimate purposes.”).

⁹² Id. at 628.

⁹³ Id. at 627 (quoting United States Jaycees v. McClure, 709 F.2d 1560, 1571 (8th Cir. 1983)).

⁹⁴ Id. at 628.

not mean to suggest that judges should privilege equality. Nor do I mean to suggest that equality should uniformly or usually trump speech interests. Because the Court's opinions in these cases privileged First Amendment analysis, I focus on the interest that the Court neglected, which in these cases happens to be the equality interest. In doing so, I accept the core First Amendment principles and precedents, but I conclude that equality considerations suggest that the Court should trim a few excessive applications of the First Amendment, such as those in R.A.V. and Boy Scouts.

In discussing equality, I draw on an anti-caste or anti-stratification conception of constitutional equality similar to that proposed by Cass Sunstein⁹⁶ and refined by subsequent scholars.⁹⁷ This conception of equality requires not mere equality in form but examines actual societal conditions from a historical perspective. It seeks to eliminate systematic disadvantages that relegate a specific class of people to perpetual second-class citizenship.⁹⁸ It understands that the "Civil War Amendments were based on a wholesale rejection of the supposed naturalness of racial hierarchy" and instigated "an attack on racial caste."⁹⁹ The Equal Protection Clause's more general wording, which does not restrict the Fourteenth Amendment to race, suggests a concern with protecting other classes to the extent that they are subject to a caste-like system.

⁹⁵ The Court followed this approach in a few brief opinions that relied substantially on Roberts. See New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 541 (1987).

⁹⁶ See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-29 (1994) [hereinafter Sunstein, *Anticaste Principle*]; see also Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976), reprinted in *Modern Constitutional Theory: A Reader* 505 (John H. Garvey & T. Alexander Aleinikoff eds., 1999).

⁹⁷ See, e.g., Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998) [hereinafter Yoshino, *Assimilationist Bias*].

⁹⁸ See Sunstein, *Anticaste Principle*, supra note 96, at 2436.

⁹⁹ Id. at 2435.

The current Court majority is often viewed as adhering to a colorblind conception of equality.¹⁰⁰ Complicating this picture is precedent such as Grutter, which departed from the colorblind ideal in order to create a diverse class of leaders in society,¹⁰¹ and Romer,¹⁰² which has been understood as a prohibition on state efforts to brand gays and lesbians as second-class citizens.¹⁰³ Earlier cases, including Runyon and Hishon, in which the Court rejected speech interests when they stood in the way of the judicial project of eliminating the subordinate status of African-Americans and women, also appear to be animated by anti-caste impulses. These cases, as well as foundational cases such as Brown v. Board of Education and Loving v. Virginia,¹⁰⁴ militate against an attempt to explain the Court's equality jurisprudence by reference to a single conception of equality.¹⁰⁵ Drawing on these extant strands of anti-caste-ism, the proportionate approach incorporates and extends a thicker understanding of equality than the formal, colorblind model.

This view of equality is less concerned with the *source* of a measure, whether that measure threatens equality or advances it, than the policy's concrete impact on equality. In my view, the courts have made too much of the public/private distinction and the state/federal distinction. Thus, state laws that advance equality should be afforded

¹⁰⁰ See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* (forthcoming) (manuscript at 1, on file with author); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954)).

¹⁰¹ Grutter v. Bollinger, 123 S.Ct. 2325, 2340 (2003).

¹⁰² See Romer v. Evans, 517 U.S. 620, 635 (1996) (“We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. . . . A State cannot so deem a class of persons a stranger to its laws.”).

¹⁰³ See Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMM. 257 (1996), reprinted in *Modern Constitutional Theory: A Reader*, supra note 96, at 727.

¹⁰⁴ 388 U.S. 1 (1967).

¹⁰⁵ See Balkin & Siegel, supra note 100 (manuscript at 2-3, on file with author).

greater respect, and private wrongs should not be discounted simply because they have not been blessed by governmental authority. State antidiscrimination laws make an important contribution to equality that might be overlooked if they are viewed as garden-variety exercises of the state's police power. Similarly, in regulating employment, a critical portal to socioeconomic advancement, Title VII should not be denigrated as a mere statute that simply regulates private conduct.¹⁰⁶ Antidiscrimination laws—federal *and* state, constitutional *and* statutory—work in tandem to regulate the public and the private and thus instantiate the Constitution's robust, anti-stratification conception of equality. Formal labeling and atomistic interpretations of the law, by contrast, often threaten to obscure the synergistic interconnectedness of antidiscrimination protections.¹⁰⁷ Legislative efforts to advance equality are rooted in the Equal Protection Clause and, unlike judicial efforts, also enjoy majoritarian support. Although I do not argue that the aforementioned distinctions (state/federal, public/private) should lose all legal significance, an approach that looks to personal experience suggests skepticism of formal demarcations that might elude non-lawyers. The individual who is denied a promotion, say, or access to an education due to race or gender is unlikely to gain any comfort from the knowledge that the employer or educational institution is private rather than public. In short, the nature of the harm suffered (and the effort to redress it) is far more important than its source. With these prefatory remarks, I now explicate how the

¹⁰⁶ See William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237-1242, 1269 (2001). (describing the Civil Rights Act of 1964, including Title VII, as quasi-constitutional law).

¹⁰⁷ See, e.g., *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 368 n.5 (2001) (noting that the states led the way in fighting disability discrimination, which created a consensus culminating in the ADA); Mary Anne Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 95 & n.116 (1995) (noting how Supreme Court appears to have incorporated sexual stereotyping rationale of Title VII cases into its equal protection gender jurisprudence); Eskridge & Ferejohn, *supra* note 106, at 1241-42 (identifying Title VII's impact on the *Romer* decision).

Court's speech analysis in R.A.V. and Boy Scouts slighted equality, understood from an anti-caste perspective.

First, in both cases, the Court essentially acted as if the equality interest did not even exist. Treating the New Jersey antidiscrimination law and the St. Paul hate speech law as presenting pure speech issues, the Court ignored concurrent developments in its equal protection jurisprudence that would have shed a very different light on the legitimacy of the state laws at issue. In erasing the equality interest, the Court unjustifiably privileged the speech interest. A second but closely related point is that the Court applied legal standards that were ill suited for harmonizing the speech and equality interests. In mechanically adopting rigid First Amendment tests that largely predetermined the outcome in each case,¹⁰⁸ the Court deprived itself of the flexibility necessary to unravel intricate speech-equality intersections. Even where the outcome of a particular case might be the same under the proportionate approach, as in the Boy Scouts case, the Boy Scouts majority's legal standard—which grants exemptions from antidiscrimination laws on the basis of a mere assertion of a First Amendment defense—does major violence to equality-based laws. Third, I explore the Court's misapprehension of context and show how it produced lopsided equality-speech analysis in each case.

James Dale became a Boy Scout at eight years old and was by all accounts “exemplary,” even earning the title of Eagle Scout.¹⁰⁹ He went on to become an active assistant scoutmaster of a troop in New Jersey. He came out of the closet during college

¹⁰⁸ See Rubinfeld, supra note 11, at 785 (“Current free speech law, like current equal protection law, is almost obsessively organized around the proliferation of well-known ‘standards of review’ or ‘levels of scrutiny.’”).

¹⁰⁹ Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).

at Rutgers and acknowledged his homosexual orientation during a college seminar that was covered by the school newspaper.¹¹⁰ When Scout leaders learned of this story, they sent Dale a letter expelling him from the group because he was a homosexual.¹¹¹ New Jersey punished this decision as discrimination in violation of its civil rights laws, and the Boy Scouts invoked the First Amendment as a defense. The U.S. Supreme Court agreed with the Boy Scouts that its expulsion of Dale was protected activity.¹¹² In analyzing the case, however, the Court essentially proceeded as if it was dealing with a basic speech case and refused to acknowledge the existence and complexity of Dale's countervailing equality interest.

As discussed above, the Roberts Court held that, even assuming an incidental impairment on the Jaycees' First Amendment right of association, the application of the Minnesota antidiscrimination statute to the Jaycees was constitutional because it furthered a compelling governmental interest, the eradication of discrimination against women. In striking contrast to Roberts' effort to obtain a balance between equality and speech, the Boy Scouts Court refused seriously to engage the case's equality dimension. As in Roberts, Dale argued that the state had a compelling interest sufficient to override any impairment of the Boy Scouts' speech interest.¹¹³ To say that the Court gave short shrift to this equality argument would give the Court too much credit. It dismissed the equality interest in one conclusory sentence. Chief Justice Rehnquist stated:

We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly

¹¹⁰ See id. at 644-45.

¹¹¹ See id. at 645.

¹¹² See id. at 661.

¹¹³ Brief for Respondent at 2-3, 12 n.8, 33-39, Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (No. 99-699).

burden the organization’s right to oppose or disfavor homosexual conduct. *The state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.* That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.¹¹⁴

Whereas Roberts attempted to reconcile equality and speech, Boy Scouts eliminated the conflict by mere judicial fiat. The Court did not even pause to tell us the “state interests embodied in New Jersey’s public accommodations law” that it was blithely rejecting. The unarticulated interest can be found by examining the Court’s equal protection jurisprudence. Just four years earlier, the Court had ruled in favor of gays and lesbians in a landmark discrimination case. Purporting to apply mere rational basis scrutiny in Romer v. Evans,¹¹⁵ the Court nonetheless invalidated a Colorado state constitutional amendment barring all state and local laws and policies against discrimination based on sexual orientation. The Court brushed aside plausible justifications for the amendment as blithely as the Boy Scouts Court would later dismiss Dale’s equality argument. In Romer, the Court concluded that the real—and constitutionally forbidden—motive behind the challenged law was “animus.”¹¹⁶ Despite this momentous precedent, which some constitutional scholars understood as an implicit form of heightened scrutiny for laws burdening gays and lesbians, or at least a step in that direction,¹¹⁷ the Boy Scouts Court did not mention Romer and the beefed-up equal

¹¹⁴ Boy Scouts, 530 U.S. at 659 (emphasis added).

¹¹⁵ 517 U.S. 620 (1996).

¹¹⁶ Id. at 632.

¹¹⁷ See, e.g., William N. Eskridge, *Destabilizing Due Process and Evolutive Equal Protection*, 47 U.C.L.A. L. REV. 1183, 1217 (2000) (describing Romer as a “cautious and imprecise equal protection trial balloon [that might be] followed by bolder rulings”).

protection scrutiny that the Court had employed.¹¹⁸ Justice Stevens' dissent, although very pro-gay in sentiment, also failed to appreciate Romer.

The Court's recent decision in Lawrence v. Texas, which struck down a sodomy law that criminalized gay sexual conduct, expressly reinforces Romer's robustness and continuing significance for gay equality.¹¹⁹ Romer, in the words of Justice Kennedy, who wrote both Lawrence and Romer, "serious[ly] ero[ded]" Bowers v. Hardwick, which had been the cornerstone of efforts to deny gay equality.¹²⁰ Lawrence, although principally based on due process rather than equal protection, adds to equality's momentum, in that the two constitutional commitments "are linked in important respects" and a decision on one ground "advances both interests."¹²¹ Somehow the same Court that ruled in favor of gay and lesbian equality in Romer and Lawrence did not think the equality interest in Boy Scouts even deserved discussion.¹²²

The Court's lapse may arise from the case's superficial similarity to the standard paradigm of a constitutional claim: A state law was applied in a way that was said to conflict with the Constitution. Because the Supremacy Clause dictates that state law

¹¹⁸ Boy Scouts' elision of Romer is not unlike Romer's own evasion of Bowers v. Hardwick, 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 123 S.Ct. 2472 (2003), a precedent difficult to square with Romer's holding.

¹¹⁹ See Lawrence, 123 S.Ct. at 2482 (noting the "tenable argument" that "Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause").

¹²⁰ Id. at 2474.

¹²¹ Id. at 2482; see generally Eskridge, *Destabilizing Due Process*, supra note 117 (arguing that due process and equal protection are interconnected and that both take into account backward-looking and forward-looking concerns).

¹²² Some might argue, contrary to Romer's analysis, that sexual orientation discrimination is subject to mere rational basis review, and that bare-bones level of scrutiny distinguishes Roberts, because gender classifications are subject to intermediate scrutiny. The difference in levels of equal protection scrutiny does not automatically resolve the issue, however. In Roberts, even though precedent held that gender classifications were subject only to intermediate scrutiny and needed to find support in "important" (rather than "compelling") state interests, the Court held that eradicating gender discrimination was a *compelling* government interest "*of the highest order.*" Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984) (emphasis added). Hence, the level of equal protection scrutiny does not necessarily dictate the weight that the equality interest warrants when balancing equality and speech interests.

must give way to federal rights,¹²³ the Court may have viewed Boy Scouts as any other First Amendment case. But the dispute here was considerably more complex, as discussed more fully below. The antidiscrimination law was no ordinary exercise of the state's police power. As argued in Part III, equality-based laws are rooted in the Civil War Amendments and the constitutional project of eradicating a castelike society. Because such laws emanate from the equality principles of the Civil War Amendments and alleviate a number of the constitutional problems created by federal antidiscrimination regulation, they should be entitled to greater respect than the Court has afforded them on occasion. At a minimum, the Boy Scouts Court should not have adjudicated the First Amendment claim without grappling with the countervailing equality interest.

In order to bolster its erasure of the equality interest, the Boy Scouts Court recast Roberts' holding. The Court distinguished Roberts by stating that Roberts had found no "serious burden[]" on the Jaycees' right of expressive association.¹²⁴ But Roberts held no such thing. Instead, after *questioning* the extent of impairment, the Roberts Court *assumed* that there was an impairment of the expressive interest and went on to *hold* that the state had an overriding compelling governmental interest in eliminating discrimination: "We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."¹²⁵ Some

¹²³ U.S. Const. art. VI, cl. 2.

¹²⁴ Boy Scouts, 530 U.S. at 658.

¹²⁵ Roberts, 468 U.S. at 623; *see, e.g.*, CHEMERINSKY, *supra* note 86, at 1189 ("The Supreme Court has held that the compelling interest in stopping discrimination justifies interfering with . . . associational freedoms.") (citing Roberts, 486 U.S. at 609); Eskridge, *supra* note 19, at 2449 ("Writing for the Court, Justice William Brennan conceded that the antidiscrimination law burdened the Jaycees' First Amendment associational rights but ruled that the law served a compelling state interest . . ."). The Roberts Court's assumption of an impairment of a speech

scholars have understood Roberts as demanding clear evidence of impairment of the speech interest and definitively concluding that there was no impairment in the case before it.¹²⁶ Yet the Court’s tentative language in this passage of its opinion weighs against such a reading.¹²⁷

The Roberts majority also may be understood as holding in the alternative that (1) there was no intrusion on the Jaycees’ speech interests; and (2) to the extent there was an intrusion, it was justified by a compelling interest.¹²⁸ Even under this reading, however, there was no basis for the Court to sever these conclusions and ignore entirely the second independent holding. There may ultimately be arguable reasons why the Boy Scouts are different from the Jaycees, as a constitutional matter, or why the interest in protecting women should be afforded greater weight than the interest in protecting gays and lesbians, but the Court failed entirely to engage these questions. Whereas the Roberts majority accepted that antidiscrimination laws “protect[] the State’s citizenry from a number of serious social and personal harms” by safeguarding “individual dignity [and ensuring access to] political, economic, and cultural life,”¹²⁹ the Boy Scouts Court was indifferent to the equality interests of people such as Dale. The Court privileged speech

interest prompted a sharply worded opinion by Justice O’Connor, who would have resolved the case by finding that the organization was not sufficiently expressive, and thus concurred in the judgment. See Roberts, 486 U.S. at 631-40 (O’Connor, J., concurring).

¹²⁶ See Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 104 (1998) [hereinafter Hutchinson, *Accommodating Outness*] (referring to “Roberts’ strict analysis of defendants’ expressive goals”); Darren Lenard Hutchinson, “*Closet Case*”: *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 96-97 (2001) [hereinafter Hutchinson, *Closet Case*].

¹²⁷ See Roberts, 468 U.S. at 627 (characterizing the claim of impairment as “attenuated at best”); *id.* at 628 (gender-based generalizations asserted by Jaycees “may or may not have a statistical basis in fact”); *id.* (“even if enforcement of the Act causes some incidental abridgment of the Jaycees’ protected speech”); *cf. also* Hutchinson, *Closet Case*, *supra* note 126, at 97 (concluding that the Court “likely undervalued the potential ideological differences between men and women”).

¹²⁸ See Hutchinson, *Closet Case*, *supra* note 126, at 96 n.90.

over equality and did so without even a glancing recognition of the importance of equality. Further, in mischaracterizing Roberts' holding, the Court diminished an important precedent for holding that an equality interest could trump a free speech interest. Boy Scouts thus jettisoned Roberts' "'equality-sensitive,' yet balanced, framework."¹³⁰ Although the Court did not admit to this departure, its analysis shows a failure to "honestly appl[y] . . . the central components of Roberts."¹³¹

R.A.V. similarly erased equality from the equation. Because the Court has been most vigilant in policing race and gender discrimination, while gays and lesbians, in light of Lawrence, are relative newcomers to the constitutional fold, R.A.V.'s equality elision seems more glaring than Boy Scouts'. The pattern, however, is much the same. Because of the elaborate structure of the R.A.V. opinion and the considerable extent to which it restructured First Amendment law, a detailed explanation of R.A.V.'s holdings and exceptions is necessary to lay the foundation for my critique. I will show that the Court in R.A.V., as in Boy Scouts, myopically treated the case at hand as if it were simply a First Amendment case.

The majority opinion in R.A.V. established two key holdings, one laudable and now uncontroversial, and one extremely contentious. The Court evaluated the St. Paul, Minnesota Bias-Motivated Crime Ordinance, which stated:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has

¹²⁹ Roberts, 468 U.S at 625.

¹³⁰ Hutchinson, *Closet Case*, *supra* note 126, at 86. Importantly, Roberts had indicated that the commercial nature of an organization weakens its associational interest in excluding particular groups. See Roberts, 468 U.S at 625-26; *id.* at 632-33 (O'Connor, J., concurring in the judgment). Although the Boy Scouts Court hinted that the Boy Scouts is not a "clearly commercial" organization, it failed expressly to cabin its deferential approach to noncommercial organizations. See BERNSTEIN, *supra* note 10, at 104 (noting uncertain issues after Boy Scouts).

¹³¹ Id.

reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹³²

Despite an array of content-neutral statutes that it could have invoked, the city relied on its bias law to prosecute the petitioner, a teenager who was charged with burning a cross in the yard of an African-American family that lived near his home.¹³³ Although the language of the ordinance was unduly broad—punishing particular expression if it merely “arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender”¹³⁴—the R.A.V. majority accepted the Minnesota Supreme Court’s “authoritative” narrowing construction that the ordinance reached only “those expressions that constitute ‘fighting words’ within the meaning of Chaplinsky.”¹³⁵ In Chaplinsky v. New Hampshire,¹³⁶ the Court had upheld a prosecution of a political protestor who insulted a police officer and in so doing violated a New Hampshire statute regulating offensive language.¹³⁷ Instead of revisiting Chaplinsky and the

¹³² R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1991) (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)) (internal quotation marks omitted).

¹³³ See id. at 379-80.

¹³⁴ Id. at 380.

¹³⁵ Id. at 381.

¹³⁶ 315 U.S. 568 (1942).

¹³⁷ The New Hampshire statute provided:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. at 569. Subsequently, the Court narrowed Chaplinsky in a string of cursory opinions. See Kent Greenawalt, *Insults and Epithets: Are They Protected Speech*, 42 RUTGERS L. REV. 287, 295-96 (1990) (citing, *inter alia*, Gooding v. Wilson, 405 U.S. 518 (1972) and Lewis v. City of New Orleans, 415 U.S. 130 (1974)). Chaplinsky remains problematic to the extent it conditions regulation of speech on the victim’s propensity to fight. Such an approach would appear to grant greater protection to a boisterous frat boy than a petite woman, an elderly man, or an African-

question of its continued validity and proper scope, the R.A.V. majority first held, despite dicta in several prior opinions, that there are limits on the government’s ability to regulate within a category of speech that the Court had described as “unprotected.” Such “unprotected” speech is in fact protected, R.A.V. held, insofar as the common First Amendment tenet prohibiting content and viewpoint-based discrimination extends even to such marginal expression.¹³⁸ Thus, even with respect to so-called fighting words, “[c]ontent-based regulations are presumptively invalid.”¹³⁹ To hold otherwise, the Court reasoned, would permit the government to ban, for example, “only those legally obscene works that contain criticism of the city government.”¹⁴⁰

Once the Court aligned the St. Paul ordinance with the myriad content-based laws that the Court had invalidated, the expected outcome was clear. Before saddling the bias law with a rigid presumption of constitutional invalidity, however, the Court should have consulted its equality jurisprudence. There is so little acknowledgement of equality in R.A.V. that a foreign reader of the majority opinion might not even grasp that the U.S. Constitution contains an Equal Protection Clause.¹⁴¹ This omission becomes even more apparent when one considers that Justice Scalia, a textualist, who should have been the

American professional, to the extent such people may be less inclined or able to fight. In essence, those people most effectively intimidated and silenced would receive the least protection from injurious verbal attacks. See Greenawalt, supra, at 297-99 (“The hurt in a particular instance may not correlate with a willingness to fight; indeed, words may hurt the defenseless more than those who are able to strike back.”); see also Lawrence, supra note 4, at 454 (“The fighting words doctrine is a paradigm based on a white male point of view.”).

¹³⁸ See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992) [hereinafter Amar, *Missing Amendments*] (describing this aspect of R.A.V.’s holding as an outgrowth of the Court’s “plainly right” decision in Texas v. Johnson).

¹³⁹ R.A.V., 505 U.S. at 377.

¹⁴⁰ Id. at 384.

¹⁴¹ See Amar, *Missing Amendments*, supra note 138, at 125 (“All nine Justices analyzed cross burning and other forms of racial hate speech by focusing almost exclusively on the First Amendment.”).

last to forget that the First Amendment applied to local government only because of the Fourteenth Amendment, wrote the majority opinion.¹⁴²

The R.A.V. Court's conclusion that the ordinance illegitimately singled out race, gender and religion for protection flies in the face of the manner in which the Court has interpreted the Equal Protection Clause. As the seminal footnote four in United States v. Carolene Products¹⁴³ demonstrates, the Court has long assessed the characteristics of groups in order to determine how rigorously it will scrutinize a law affecting that group.¹⁴⁴ Accordingly, the Court has distinguished traits associated with enduring forms of discrimination, including racial, gender and religious discrimination, from non-suspect classifications which burden other economic or social groups, such as unions.¹⁴⁵ Title

¹⁴² See id. at 151-52.

¹⁴³ 304 U.S. 144, 152 n.4 (1938).

¹⁴⁴ See Hunter, supra note 2, at 1672 (“[C]ourts must select which groups are entitled to heightened judicial review of laws that disadvantage them.”).

¹⁴⁵ See, e.g., Nevada Dept. of Human Res. v. Hibbs, 123 S.Ct. 1972, 1982 (2003) (distinguishing age and disability discrimination from gender discrimination, which “triggers a heightened level of scrutiny”); United States v. Virginia, 518 U.S. 515, 531 (1996) (“Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, ‘our Nation has had a long and unfortunate history of sex discrimination.’”) (quoting Frontiero, 411 U.S. 677, 684 (1973) (plurality opinion of Brennan, J.)); Shaw v. Reno, 509 U.S. 630, 649 (1993) (“Classifying citizens by race, as we have said, threatens special harms”); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985) (stating that broad legislative discretion and accompanying presumption of validity “give[] way . . . when a statute classifies by race, alienage, or national origin”); Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) (relying on the “unique evils” caused by gender discrimination); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (distinguishing age discrimination from adverse treatment of groups such as African-Americans, who have been “subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (distinguishing classifications in general from racial classifications “in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications ‘constitutionally suspect.’”) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

In contrast to the judicial precedent according race and gender suspect/quasi-suspect status, “‘the text of the First Amendment itself ‘singles out’ religion for special protections.’” Employment Div. v. Smith, 494 U.S. 872, 902 (1990) (O’Connor, J., concurring) (quoting Michael McConnell, Accommodation of Religion, 1985 S. CT. REV. 1, 9). Accordingly, religious adherents challenging governmental action typically rely on one of the First Amendment’s Religion Clauses, rather than resort to the more general Equal Protection Clause. As a result, the

VII, which the R.A.V. Court cited with approval in R.A.V., also singles out “race, color, religion, [and] sex” as prohibited forms of employment discrimination.¹⁴⁶ Suspect and quasi-suspect groups receive special protection in the form of careful judicial scrutiny under the Equal Protection Clause in light of a variety of factors including original intent, political power and immutability.¹⁴⁷ Classifications burdening the remaining groups are subject to mere rational basis review, meaning of course that the Court almost invariably upholds them.¹⁴⁸ Given that the Court *itself* had extended special protection to the very same groups identified in the St. Paul ordinance, and had declined to do so for other groups such as political parties, how could the R.A.V. Court conclude that the St. Paul ordinance’s distinctions were illegitimate? In so doing, the Court dismissed and subordinated the Civil War Amendments and their profound impact on the entire Constitution, including the First Amendment. The Civil War Amendments, including the Equal Protection Clause, teach that efforts by government (whether state or federal) to

Court has not squarely had to resolve whether religion is a suspect or quasi-suspect class because any religion-based government action that would violate the Equal Protection Clause would also likely violate the Free Exercise Clause or Establishment Clause. Whether viewed as a First Amendment or equal protection issue, however, the result is the same. Laws that target religion “trigger[] constitutional concern—and heightened judicial scrutiny.” *Id.* (O’Connor, J., concurring); see also Eskridge, *supra* note 19, at 2419 (“[T]he Free Exercise Clause operates as a super-Equal Protection Clause for classifications.”); Greene, *supra* note 53, at 11 (“religion is distinctive, for constitutional purposes”); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1783 (1996) [hereinafter Yoshino, *Suspect Symbols*]. That the special status of religion may be rooted in the First Amendment, rather than the Fourteenth, only underscores the R.A.V. Court’s narrow vision in disregarding the Speech Clause’s textual neighbors.

¹⁴⁶ 42 U.S.C. § 2000e-2(a) (2003).

¹⁴⁷ See, e.g., Hunter, *supra* note 2, at 1687-88. The immutability prong has been rightly criticized by various scholars. See, e.g., Yoshino, *Assimilationist Bias*, *supra* note 97, at 490 & n.14.

¹⁴⁸ See, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); Heller v. Doe, 509 U.S. 312, 318-21 (1993); see also Hunter, *supra* note 2, at 1686.

ensure equality are desirable and consonant with the Constitution—if the document is interpreted holistically, rather than in a doctrinally segmented fashion.¹⁴⁹

R.A.V.'s analytical head-on collision with Equal Protection Clause jurisprudence is evidenced by the Court's hypothetical of a law that would be permissible under its ruling: "We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses."¹⁵⁰

According to the Court, even though it is facially content-based, a law favoring a group lacking any history of serious discrimination (non-blue-eyed actors) would *not* give rise to First Amendment suspicion, while a law protecting African-Americans, women and religious minorities would be presumptively unconstitutional. The R.A.V. Court thus erroneously set the First Amendment and the Equal Protection Clause at cross-purposes.¹⁵¹ Under the Court's view, the government's ability to curb expression is at its apex when it legislates with respect to traits that *lack* historical and contextual significance, which stands Equal Protection Clause analysis on its head.¹⁵² Recognizing

¹⁴⁹ Cf. Amar, *The Bill of Rights*, supra note 5, at 1131 (criticizing those who have analyzed the Bill of Rights as if it were "chopped up into discrete chunks of text, with each bit examined in isolation"); Sunstein, *Words, Conduct, Caste*, supra note 18, at 802 (arguing that "the free speech principle can march hand-in-hand with the [Fourteenth Amendment] anticaste principle When tension does arise, courts ought to minimize infringements on either principle."). But see Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1647 (1993).

¹⁵⁰ R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992). Despite the Court's use of the term "actress," presumably the law would apply to blue-eyed women *and* men. I assume that the Court did not mean to suggest that the law would contain a gender classification.

¹⁵¹ "[J]urists should resist automatically treating liberty and equality as oppositional goals; their relationship is far more intricate and complicated than this reductionist approach recognizes." Hutchinson, *Closet Case*, supra note 126, at 96; see also Hunter, supra note 2, at 1719 ("Orthodoxy [a First Amendment concern] and exclusion [an Equal Protection concern] are not, and need not be, trade-offs. . . .").

¹⁵² As Justice O'Connor emphasized in the Court's landmark affirmative action case, "Context matters when reviewing race-based governmental action under the Equal Protection Clause." Grutter v. Bollinger, 123 S.Ct. 2325, 2338 (2003); see also Lawrence, supra note 4, at 437 (criticizing an "ahistorical and idealized" approach to First Amendment interpretation); Matsuda, *Victim's Story*, supra note 11, at 2361 (urging consideration of "the historical context in which racist speech arises, and attention to the degree of harm experienced by targets of different kinds of speech"). By contrast, when government seeks to protect groups that do not fit the Carolene

the equality interest would have led the Court to the conclusion that a law protecting outgroups is not more problematic than the blue-eyed-actress law; indeed, it is less so, because only with respect to the former law is there a strong countervailing equality interest.

In contrast to the broadened prohibition on content-based discrimination, the Court's second holding—that the St. Paul ordinance did not fit into any of R.A.V.'s exceptions to the ban on content-based regulation—provoked bitter disagreement among the Justices. After the Court announced its new rule, it unveiled several exceptions, which appeared to be an effort to cabin the effect of the decision and avoid unduly destabilizing the law. Although in theory the exceptions could have muted the harsh presumption against content-based discrimination, the majority's stingy application of the exceptions again steadfastly ignored equality considerations. The Court suggested that the exceptions shared a common thread in that regulations promulgated thereunder are not susceptible to the charge that the government is attempting to drive certain ideas from the marketplace.¹⁵³ Delineating its first exception, the majority said “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”¹⁵⁴ As examples of permissible legislation under this exception, the Court cited the federal

Products definition of a suspect class, *see generally* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 18 (2000) [hereinafter Post, *Prejudicial Appearances*] (discussing local ordinance prohibiting discrimination based on physical appearance), the constitutional force behind such a law may not be strong enough to withstand a First Amendment or other constitutional challenge.

¹⁵³ *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-88 (1991).

¹⁵⁴ *Id.* at 388.

statute that prohibits threats of violence against the President¹⁵⁵ and an obscenity law that targets only the most prurient obscenity.¹⁵⁶

The second exception allows regulation where a subclass of speech “happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is justified without reference to the content of the . . . speech.”¹⁵⁷ Therefore, a state could ban only obscene live performances by minors. Further, Title VII’s “general prohibition against sexual discrimination in employment practices” is not rendered unconstitutional simply because its ban encompasses “sexually derogatory ‘fighting words,’ among other words” that may produce a Title VII violation.¹⁵⁸ “Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”¹⁵⁹ Indicating that there might be other exceptions that escaped its memory,¹⁶⁰ the Court suggested that the test for assessing any law that did not neatly fit the foregoing exceptions would be whether there is a “realistic possibility that official suppression of ideas is afoot.”¹⁶¹ The Court’s exceptions surely left an ad hoc aftertaste,¹⁶² but more problematic than the

¹⁵⁵ Watts v. United States, 394 U.S. 705 (1969).

¹⁵⁶ R.A.V., 505 U.S. at 389.

¹⁵⁷ Id. (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

¹⁵⁸ Id. at 390.

¹⁵⁹ Id.

¹⁶⁰ See id.

¹⁶¹ Id.

¹⁶² In several respects, the Court failed to engage complex questions with respect to why its examples of permissible regulation were valid exceptions to the rule. For example, why should the regulatory ban on sexual harassment, 29 C.F.R. § 1604.11 (2003), which specifically targets speech based on its content, be treated as part of a ban on conduct rather than a freestanding speech ban? Why can’t hate speech bans similarly be viewed as part of a broader regime of antidiscrimination law (including employment and housing law) aimed at eradicating private action that effectively excludes women and people of color, among others, from public life? See Matsuda, Victim’s Story, supra note 11, at 2335 (“Gutter racism, parlor racism, corporate racism, and governmental racism work in coordination, reinforcing existing conditions of domination.”); Post, Racist Speech, supra note 4, at 299 (describing argument that “racist speech ought to be

exceptions themselves was the way the Court turned a blind eye to the Equal Protection Clause in applying them.

Remarkably, the Court concluded that the St. Paul ordinance “assuredly” “does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable.”¹⁶³ The Court denied that the ordinance singled out “a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.”¹⁶⁴ Yet the ordinance can be understood as exactly such a regulation. It proscribed unusually threatening symbols, specifically a burning cross or Nazi swastika, while permitting people to express racist and anti-Semitic ideas in any other mode, including *any oral expression*: the ordinance banned only certain physical objects, including signs, placed on public property.¹⁶⁵ The Court’s references to “disfavored subjects”¹⁶⁶ are thus vast

characterized as a ‘mechanism of subordination’ within a larger system of suppression, rather than as a form of communication”); Sunstein, *Words, Conduct, Caste*, supra note 18, at 828 (“[I]f R.A.V. is right on neutrality, it is not simple to explain why the civil rights laws survive constitutional attack.”); see also Cynthia Grant Bowman, *Street Harassment and the Ghettoization of Women*, 106 HARV. L. REV. 517 (1993) (arguing that street harassment based on gender should be a legally cognizable harm). Ironically, in the midst of an opinion that repeatedly privileges speech and subordinates equality, the Court flipped this paradigm momentarily, giving short shrift to speech by distinguishing and preserving sexual harassment law with a dubious, skeletal “secondary effects” argument (which had previously applied only to sexually explicit speech). The Court never has fully explained how sexual harassment law can coexist harmoniously with the First Amendment, which has created uncertainty. See Avis Rent A Car Sys., Inc. v. Aguilar, 529 U.S. 1138 (2000) (Thomas, J., dissenting from denial of certiorari) (arguing that R.A.V. supports holding sexual harassment laws unconstitutional). The issue of sexual harassment law is beyond the scope of this article.

¹⁶³ R.A.V., 505 U.S. at 393.

¹⁶⁴ Id. (emphasis in original).

¹⁶⁵ The ordinance applied only to a person who “places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika” 505 U.S. at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)). A sign with words on it might qualify as a “symbol, object, appellation, characterization or graffiti . . . place[d] on public or private property,” id. at 379, but mere spoken words, intangibles that cannot be “placed” *anywhere*, likely would not. Id. at 402. Even if a broader construction of the ordinance is tenable, the courts have an obligation to interpret a statute to mitigate constitutional problems—not to exacerbate them. See, e.g., Virginia v. Black, 123 S.Ct. 1536, 1557 (2003) (Scalia, J., concurring in part and dissenting in part) (stating that “where one of two possible interpretations of the state statute would clearly render it unconstitutional, and the other would not . . . we would adopt the alternative reading that renders the statute constitutional rather than

exaggerations. They erroneously suggest that the ordinance silenced any discussion on the subjects of race, religion or gender, or at least silenced one side of the debate, when in reality the law was a very narrow prohibition on a particular mode of communication that left open most means of expressing hateful ideas regarding the aforementioned subjects.¹⁶⁷ Moreover, understanding the narrow scope of the ordinance undermines the Court’s conclusion that the ordinance was intended to suppress particular ideas.¹⁶⁸ If that indeed was St. Paul’s intention, the city pursued its purpose in an extremely attenuated and ineffectual manner. Hence, the Court’s assertion that the ordinance, as narrowly construed by the state court, banned “fighting words *of whatever manner* that communicate messages of racial, gender, or religious intolerance” was hyperbolic.¹⁶⁹

Similarly, the Court’s contention that the law did not isolate “only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner” is difficult to understand from an equality perspective.¹⁷⁰ The Court’s belief that

unconstitutional”). Especially in light of the fact that the ordinance’s only specific examples of prohibited conduct are displaying a burning cross and swastika, both of which are physical objects, a properly narrow construction of the ordinance would exclude all verbal speech. As the Court noted, St. Paul asserted that “the ordinance applies *only* to ‘racial, religious, or gender-specific *symbols*,’ such as ‘a burning cross, Nazi swastika or other *instrumentality* of like import.” R.A.V., 505 U.S. at 393 (quoting Brief for Respondent 8) (emphasis added); see also id. at 391 (referring to displays, signs, and placards); id. at 435 (Stevens, J., concurring in the judgment) (referring to signs). The Court’s viewpoint discrimination conclusion hence relies on the rather implausible assumption that a person responding to the insult “all anti-Catholic bigots are misbegotten” would take the time to find some markers and poster board and respond with a sign, rather than immediately utter a verbal retort. R.A.V., 505 U.S. at 391-92.

¹⁶⁶ Id. at 391; see also id. at 381.

¹⁶⁷ Cf. Delgado, supra note 12, at 177 (“[P]rotecting members of racial minorities from injury through racial insults, and society itself from the accumulated harms of racism, is very different from prohibiting espousal of the view that race discrimination is proper.”).

¹⁶⁸ See R.A.V., 505 U.S. at 393.

¹⁶⁹ Id. (emphasis added).

¹⁷⁰ See Amar, Missing Amendments, supra note 138, at 149 (describing this claim as “incomprehensible and other-worldly” if taken at face value); Powell, supra note 3, at 30 (“Those in the free speech narrative are extremely reluctant to concede that racist speech is ever any more than offensive speech. . . .”); Sunstein, Words, Conduct, Caste, supra note 18, at 815 (“It is only obtuseness—a failure of perception or empathetic identification—that would enable someone to say that the word ‘fascist’ or ‘pig’ produces the same feelings as the word ‘nigger.’ In view of our

epithets based on race, religion, and gender, such as “nigger,” “kike,” and “cunt”¹⁷¹ are “merely obnoxious” and not “threatening” ignores the stubborn societal significance of these traits and their turbulent histories, including the aforementioned epithets.¹⁷² The Court’s argument becomes even more confounding when it attempts to compare racial discrimination with political affiliation and union membership. African-Americans—not political partisans—were systematically enslaved—“the ultimate violation of human dignity.”¹⁷³ Women—not union members—were denied the right to vote for most of our constitutional history.¹⁷⁴ And Jews were singularly devastated by the Holocaust.¹⁷⁵ Further, race, gender and religion, unlike many other traits, are typically “central to one’s self-image.”¹⁷⁶ Only someone oblivious to the sting of virulent discrimination—someone who had never been called one of the aforementioned epithets—could compare race, gender and religion¹⁷⁷ to political affiliation or union membership.¹⁷⁸ The R.A.V.

history, invective directed against minority groups, and racist speech in general, creates fears of violence and subordination that are not plausibly described as mere offense.”).

¹⁷¹ In using such charged language, I am not unmindful of the risk of “offending by speaking the upsetting words and phrases.” Greenawalt, supra note 137, at 291. I use such words nonetheless because it seems to me necessary in order to uncover and grapple with “the real issues” embedded within the discourse of hate speech regulation. Id.

¹⁷² See generally RANDALL L. KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002).

¹⁷³ Amar, *The Bill of Rights*, supra note 5, at 1135-36.

¹⁷⁴ See United States v. Virginia, 518 U.S. 515, 531 (1996).

¹⁷⁵ See Yoshino, Suspect Symbols, supra note 145, at 1781.

¹⁷⁶ Delgado, supra note 12, at 144.

¹⁷⁷ The ordinance also applied to fighting words regarding color, but this trait clearly is related to race. Although the ordinance mentioned “creed” as well, the intended meaning is uncertain. This term may simply be another reference to religious beliefs, much as color is linked with race. See Webster’s Third New International Dictionary 533 (1986) (defining “creed” as “a brief authoritative doctrinal formula . . . intended to define what is held by a Christian congregation, synod, or church to be true . . .” and “a formulation or system of religious faith”). “Creed” has sometimes been used more broadly in a way that could embrace political belief, but as explained in the text, the R.A.V. Court interpreted the ordinance not to cover political affiliation.

¹⁷⁸ Apparently relying on his own limited experience and viewpoint, Justice Scalia, writing for the Court, failed to consider the victim’s perspective. By contrast, in Roberts, Justice Brennan took note of the virulence of gender discrimination, finding that from the victim’s viewpoint, such

majority, doggedly resisting context, overlooked the fact that a person discriminated against based on her race or gender experiences an injury that cuts to the core of her personhood in a way that an insult imposed on account of her political party or union affiliation would not.

A second criticism is that in both cases the Court adopted legal standards incompatible with reconciling speech and equality. The R.A.V. Court erred in subjecting the equality-based law to harsh and exacting First Amendment scrutiny. The Boy Scouts Court adopted a legal standard that was different in some respects yet also the same. It diluted the showing required of a group asserting a First Amendment exemption from antidiscrimination laws so drastically that the evidentiary burden evanesced. The ultimate effect of relieving a First Amendment claimant of any cognizable burden is to hobble equality-based laws by riddling them with exceptions whenever an arguable conflict with a speech interest is asserted. Although the R.A.V. Court directed its ire at the St. Paul ordinance and the justifications the city offered in support of it, the Court simultaneously and discreetly reduced the First Amendment claimant's burden in finding viewpoint-based discrimination on the basis of a solitary and rather flimsy hypothetical. In both cases, therefore, the legal standard was calibrated to privilege speech and diminish equality.

Despite the R.A.V. Court's application of a presumption of unconstitutionality, in light of its exceptions to the ban on content-based regulation, the R.A.V. holding, in the end, seems to boil down to a determination of legislative motive. As the Court saw it, the

discrimination was sufficiently close to racial discrimination. See Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); see also Frontiero v. Richardson, 411 U.S. 677, 683-88 (1973) (Brennan, J., plurality opinion) (arguing that gender discrimination is comparable to racial discrimination).

ordinance was not simply content-based; it was also viewpoint-based.¹⁷⁹ This is a grave charge, as viewpoint-based laws (when the Court recognizes them as such) are invariably struck down.¹⁸⁰ In general First Amendment cases, “the Court has been ‘reluctant to attribute unconstitutional motives to the state, particularly when a plausible [permissible] purpose . . . may be discerned from the face of the statute.’”¹⁸¹ In determining whether viewpoint discrimination is afoot, however, the Court’s willingness to look closely at legislative motive has varied significantly from case to case.¹⁸² On the one hand, in United States v. O’Brien,¹⁸³ the Court declined to consider legislative motive. On the other hand, this refusal is inconsistent with the Court’s emphasis on motive in other cases, most notably in the flag burning cases, Texas v. Johnson¹⁸⁴ and United States v. Eichman.¹⁸⁵ The aggressive approach employed in the flag burning cases was warranted because the context clearly suggested that viewpoint discrimination was operating,¹⁸⁶ the law served no non-expressive purpose, such as protecting life, liberty or property,¹⁸⁷ and the law was directed at speech critical of the government, the suppression of which

¹⁷⁹ See R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (“The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”); id. at 395 (“The statements of St. Paul in this very case afford ample basis for, if not full confirmation of, [the suspicion of official suppression of ideas.]”).

¹⁸⁰ See TRIBE, supra note 7, § 12-1, at 790.

¹⁸¹ Id. at 817 (quoting Mueller v. Allen, 463 U.S. 388, 394-95 (1983)).

¹⁸² See id. at 818-19.

¹⁸³ 391 U.S. 367 (1968)

¹⁸⁴ 491 U.S. 397 (1989).

¹⁸⁵ 496 U.S. 310 (1990).

¹⁸⁶ The federal flag burning law was enacted in the aftermath of the Court’s controversial opinion striking down a Texas flag burning statute. See Eichman, 496 U.S. at 314. While the federal law may be viewed as an attempt to remedy the flaw in the Texas statute, it also evinces an attempt to accomplish the same unconstitutional purpose in a craftier manner.

¹⁸⁷ The statute prohibited private persons from destroying their *own* private property (a flag), despite the absence of any tangible non-speech harms arising from that destruction.

constitutes a unique threat to core First Amendment principles.¹⁸⁸ But the Court’s far-reaching approach, most clearly demonstrated by Eichman,¹⁸⁹ should have no place where on its face a law protects a vulnerable subset of citizens—rather than the government itself¹⁹⁰—and seeks to redress concrete harms such as a disproportionate exposure to violence and intimidation.¹⁹¹ Although equality-based laws may impact speech interests, as argued above, because of their special status under the Equal Protection Clause, equality-based laws ought to enjoy a presumption that the legislature enacted them in good faith.¹⁹² These cases show that the presence of a First Amendment claim in R.A.V. did not ineluctably lead the Court to apply an exacting legal standard. The Court was faced with a choice, and it selected the most daunting First Amendment standard—one that left little room for accommodating equality. Even the Court’s

¹⁸⁸ See, e.g., Johnson, 491 U.S. at 415. Justice Ginsburg made this point during oral argument in Virginia v. Black. See Linda Greenhouse, *An Intense Attack By Justice Thomas on Cross Burning*, N.Y. TIMES, Dec. 11, 2002, at A1 (“Justice Ruth Bader Ginsburg objected that there was a ‘big difference’ between [flag burning and cross burning]. ‘The flag is a symbol of the government.’ But burning a cross means ‘attacking people, threatening life and limb,’ she said.”). Despite this distinction, Justice Ginsburg ultimately dissented in Black.

¹⁸⁹ In Johnson, a viewpoint preference appeared on the face of the Texas statute in that it banned desecration “meant to ‘deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.’” Eichman, 496 U.S. at 313 (quoting Tex. Penal Code Ann. § 42.09 (Vernon 1989)). By contrast, in Eichman, “the Flag Protection Act contain[ed] no explicit content-based limitation on the scope of prohibited conduct,” id. at 315, and it took more work for the Court to uncover the viewpoint bias at the heart of the statute.

¹⁹⁰ Cf. Johnson, 491 U.S. at 409 (distinguishing the fighting words doctrine because “[n]o reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs”).

¹⁹¹ Cf. Harel & Parchomovsky, supra note 68, at 526 (“Just as the greater obligation of the parent to protect her child should not be perceived as discriminatory, so too the greater obligation of the state to protect its more vulnerable members should not be described as such.”).

¹⁹² Cf. Grutter v. Bollinger, 123 S.Ct. 2325, 2339 (2003) (“‘[G]ood faith’ on the part of a university is ‘presumed’ absent a ‘showing to the contrary.’”) (quoting Regents of the Univ. of Ca. v. Bakke, 438 U.S. 265, 318-319 (1978)); Sunstein, *Words, Conduct, Caste*, supra note 18, at 825 (“[C]ross-burning, swastikas, and the like are an especially distinctive kind of ‘fighting word’—distinctive because of the objective and subjective harm they inflict on their victims and on society in general. An incident of cross-burning can have large and corrosive social consequences. A reasonable and sufficiently neutral government could decide that the same is not true for a hateful attack on someone’s parents, union affiliation, or political convictions.”) (emphasis added).

aggressive, exhaustive search for unconstitutional intent,¹⁹³ however, did not yield convincing results.

Although some scholars have credited the Court's fears about viewpoint discrimination in R.A.V.,¹⁹⁴ a closer examination reveals them to be far less plausible. The R.A.V. majority explained that in "practical operation," the St. Paul ordinance would have nefarious effects.¹⁹⁵ The Court's sole illustration of such effects follows:

'[F]ighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all anti-Catholic bigots are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'¹⁹⁶

Thus viewed, the ordinance would handicap one side of a debate on race, gender, or religion, while licensing the other to "fight freestyle."¹⁹⁷

This argument simply does not hold up under close analysis. For starters, the vast majority of insults would be permitted or disallowed for *both* sides of the debate. Hence, an African-American civil rights advocate could not disparage white people based on race any more than a white racist could demean African-Americans qua African-Americans.¹⁹⁸ The Court posits that in a showdown between Catholics and anti-Catholics, the Catholics, in disparaging their opponents, could refer to them as "anti-

¹⁹³ See Kagan, *supra* note 19, at 877 ("[T]he viewpoint discrimination found in the ordinance existed not on its face, but only in application—and even in application, only with a fair bit of argument.").

¹⁹⁴ *Cf., e.g., id.* at 878 (suggesting that R.A.V.'s viewpoint neutrality holding has "at its core much good sense and reason").

¹⁹⁵ R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

¹⁹⁶ *Id.* at 392.

¹⁹⁷ *Id.*

Catholics,” but in responding, the anti-Catholics could not refer to their opponents as “Catholics” because that would run afoul of the ordinance.¹⁹⁹ When a speaker chooses to attack an entire group (which, of course, is not always the case) such as “anti-Catholic bigots,” the response is not always neatly symmetrical, as the Justices appear to think.²⁰⁰ This implicitly rational conception of debate is detached from the messy and sometimes arbitrary nature of street brawls.²⁰¹ Against the backdrop of an almost infinite array of retorts targeting either an individual or a group and not necessarily tracking the original insult, the claim that the ordinance violates the First Amendment because it requires a hypothetical speaker who wishes to cast his insult in terms of group membership to say “all advocates of religious tolerance” instead of “all Catholics” is a rather slender reed, especially if one keeps in mind that the ordinance did not restrict verbal retorts at all. Depriving one side of one particular debate of one arrow in his quiver of invectives (the ability to create a sign expressing one specific group insult) does not even approach a requirement that the speaker “follow Marquis of Queensberry rules.”²⁰² At most, this measly example might support an as-applied challenge if a government ever applied a law in such an odd fashion. The lonely hypothetical imagined by the Court surely does

¹⁹⁸ See *id.* at 391 (“Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views.”).

¹⁹⁹ See *id.* at 391-92. Even this assumption is questionable. Arguably, a reference to “anti-Catholics” invokes religion.

²⁰⁰ See *id.* at 435 (Stevens, J., concurring in the judgment) (“The Court’s reasoning is asymmetrical.”). Both the majority and dissent ignored the fact that the response might not track the content of the insult. For instance, the response to an attack on all anti-Catholics could easily be “Shut up, ugly!” or “I’m going to smack you all silly!” as it could be the Court’s posited response.

²⁰¹ Cf. *Watts*, 394 U.S. 705, 708 (1969) (“The language of the political arena is often vituperative, abusive, and inexact.”).

²⁰² *R.A.V.*, 505 U.S. at 392; see *id.* at 435 (Stevens, J., concurring) (“The St. Paul ordinance does not ban all ‘hate speech’ . . . Rather it only bans a subcategory of the already narrow category of fighting words. Such a limited ordinance leaves open and protected a vast range of expression on the subjects of racial, religious, and gender equality.”).

not suffice to invalidate the ordinance on its face.²⁰³ It should now be clear that the Court’s adoption of a legal standard that establishes a First Amendment violation whenever one side of an imaginable debate enjoys a negligible advantage tilts the speech-equality analysis decidedly in favor of speech.

Just as the R.A.V. Court diluted the threshold for showing viewpoint discrimination, the Boy Scouts Court suggested that parties may bypass antidiscrimination laws merely by asserting a First Amendment claim. Boy Scouts consequently abandons the pretext analysis at the heart of Roberts and central to Equal Protection Clause jurisprudence. The Boy Scouts majority’s analysis of whether one of the Boy Scouts’ expressive goals was opposition to homosexuality was a far cry from pretext review. After quoting a statement from the organization’s brief that it “teaches that homosexual conduct is not morally straight,”²⁰⁴ the Court announced that it “need not inquire further to determine the nature of the Boy Scouts’ expression with respect to homosexuality.”²⁰⁵ As Justice Stevens pointed out in dissent, this truncated analysis took an astoundingly deferential approach. Whereas in an earlier related case, Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,²⁰⁶ the Court had underscored its “constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court,” in order to determine whether petitioners’ activity was in fact protected speech,²⁰⁷ in Boy Scouts, the Court deferred to a position *in a*

²⁰³ See Sunstein, *Words, Conduct, Caste*, *supra* note 18, at 829 (“Viewpoint discrimination is not established by the fact that in some hypotheticals, one side has greater means of expression than another, at least—this is the critical part—if the restriction on means has legitimate, neutral justifications.”).

²⁰⁴ Boy Scouts of America v. Dale, 530 U.S. 640, 651 (2000) (quoting Brief for Petitioners 39).

²⁰⁵ Id.

²⁰⁶ 515 U.S. 557, 569 (1995).

²⁰⁷ Id. at 567.

brief.²⁰⁸ The Court’s approach makes no attempt to sift “genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand.”²⁰⁹ Permitting any litigant to immunize a discriminatory decision with a mere allegation in his brief would indeed “render civil rights legislation a nullity.”²¹⁰ Recognizing the important constitutional interest on the other side of the ledger would at a minimum require a meaningful examination of the asserted speech interest, although, as I argue below, such an examination need not be as stringent and invasive as Justice Stevens contemplates.

Equality considerations require a close examination of asserted First Amendment claims in order to determine whether the claimant’s refusal to comply with antidiscrimination laws rests on a genuine expressive interest or whether it is using the First Amendment to obscure simple prejudice, *i.e.*, whether the First Amendment claim is functioning as a pretext for unlawful discrimination. For instance, in Romer, the Court dismissed the state’s asserted non-discriminatory reasons for the constitutional amendment uniquely disabling gays and lesbians from seeking protection from state government. In a rather abbreviated and opaque fashion, the Romer majority concluded that the asserted state interests were not genuine and that the law actually rested on prejudice against gays and lesbians. The Court explained: “The primary rationale the State offers for Amendment 2 is respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to

²⁰⁸ Boy Scouts, 530 U.S. at 651.

²⁰⁹ Id. at 687 (Stevens, J., dissenting).

²¹⁰ Id.; see also Hutchison, *Closet Case*, supra note 126, at 135.

fight discrimination against other groups.”²¹¹ Hence, the “primary rationale,” importantly, was a First Amendment interest based on associational and religious freedoms. Yet the Court concluded that the “breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.”²¹² The lack of fit between the state’s purported ends and means, the Court said, revealed that the state’s justifications were incredulous.²¹³ This rationale is peculiarly at odds with Romer’s professed adherence to rational basis review and that minimal standard of review’s attendant refusal to require a close fit between ends and means. A similarly skeptical Court in the VMI case, applying intermediate scrutiny, refused to accept at face value the state’s asserted interest in educational diversity as a justification for excluding women from Virginia Military Institute.²¹⁴ Here too there was a potential countervailing First Amendment interest. If the University of Michigan has the constitutional authority to promote diversity by considering the race of the students it selects, as Grutter tells us, it is not clear why Virginia would lack the authority to promote a diverse array of educational options, including some single-sex schools. Perhaps recognizing this connection, the VMI Court was careful not to question the pedagogical value of diversity,²¹⁵ but it did determine that—notwithstanding Virginia’s puffery—the case was not really about diversity. Because the state had a long and pathetic history of discriminating against women and failed to advance its ostensible interest in diversity in an evenhanded fashion, *i.e.*, providing single-sex schools for men *and* women, the Court

²¹¹ Romer v. Evans, 517 U.S. 620, 635 (1996).

²¹² Id.

²¹³ Id. (“We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”).

²¹⁴ See United States v. Virginia, 518 U.S. 515, 535-36 (1996).

²¹⁵ See id. at 535.

rejected Virginia’s diversity argument.²¹⁶ Comparable analysis in Boy Scouts would have required an independent evaluation of the Boy Scouts’ assertion that it had excluded Dale because he created a genuine conflict with the group’s expressive goal, instead of reliance on invidious stereotypes, such as the belief that gays are likely to molest young boys.²¹⁷

The Boy Scouts majority erred in diluting the standard for assessing a potential First Amendment impairment to, at most, the equivalent of the rational basis standard, *i.e.*, an arguable conflict with speech suffices.²¹⁸ But Justice Stevens’ analysis leans too far in the other direction. He correctly identified the key question: “[W]hether the mere inclusion of the person at issue would impose any serious burden, affect in any significant way, or be a substantial restraint upon the organization’s shared goals, basic goals, or collective effort to foster beliefs.”²¹⁹ His application of the standard, however, displayed a troubling willingness to second-guess the Boy Scouts’ assertions of its expressive goals. Although a number of the points in his analysis surely have merit, he systematically picked off each piece of evidence, clearing the way for his strained, overreaching conclusion that: “In short, Boy Scouts of America is *simply silent* on homosexuality. There is *no shared goal or collective effort . . . at all . . .*”²²⁰ He entirely dismissed Policy Statements by BSA leaders stating that homosexuality was incompatible with scouting or scout leadership because they were made after Dale

²¹⁶ See id. at 536-37.

²¹⁷ See, e.g., BERNSTEIN, supra note 10, at 15 (noting history of stereotypical thinking that “male homosexuals were thought to be pedophiles and perverts”).

²¹⁸ Cf. Hutchinson, Closet Case, supra note 126, at 96 (finding that an “imagined impact of civil rights enforcement” on a speech interest suffices under Boy Scouts).

²¹⁹ Boy Scouts of America v. Dale, 530 U.S. 640, 683 (2000) (Stevens, J., dissenting) (internal quotation marks omitted).

²²⁰ Id. at 684 (emphasis added).

brought suit.²²¹ He rejected a 1978 BSA statement against homosexuality because, in his view, it was not “unequivocal” in that it was contingent on BSA’s policy not violating the law.²²² He somehow read this statement to prevent BSA from challenging the constitutionality of the New Jersey antidiscrimination law, and to permit it merely to seek change through the legislative process, despite any apparent textual basis for this distinction.²²³ He claimed that BSA’s policy statements that “homosexual *conduct* is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed”²²⁴ was beside the point because the Scouts never proved that Dale engaged in homosexual conduct, even though it requires no imagination to conclude that an “avowed” homosexual has likely engaged in homosexual conduct of some sort. He turned BSA’s words against the organization, arguing, among other things, that its policy of referring Scouts to religious leaders was inconsistent with any anti-homosexuality policy because some religions permit homosexuality.²²⁵ Finally, he claimed that BSA “abandoned” its 1991 and 1992

²²¹ *Id.* at 674 (finding that post-litigation statements have “little, if any, relevance . . . [and] [i]n any event, they do not bolster BSA’s claim”). Although viewing such statements with skepticism would be warranted given the timing of their issuance, Justice Stevens’ erasure of them was not.

²²² *Id.* at 673.

²²³ *See id.* The statement simply did not address the issue of whether BSA would challenge in court an antidiscrimination law that it deemed unconstitutional. The equivocation thus was largely devised by Justice Stevens.

²²⁴ *Id.* at 676 (emphasis in original). Justice Stevens’ claim that BSA conceded that it expelled Dale because of his sexual orientation rather than because it believed that he had engaged in sexual conduct appears to lack record support. The letter sent to Dale simply stated that the Boy Scouts “specifically forbid membership to homosexuals.” *Id.* at 645 (quoting Appendix 137); *id.* at 676 (stating that Dale was expelled “because of his sexual orientation” without citation to the record). BSA’s statement that it opposed membership for “homosexuals” did not specify whether it defined homosexuality by conduct or orientation.

²²⁵ *Id.* at 670 (“[A] number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals.”). *But cf. id.* at 651 (majority opinion) (rejecting lower court’s finding that exclusion of Dale was “antithetical to the organization’s goals” because “our cases reject this sort of inquiry”).

repudiations of homosexuality as inconsistent with its expressive goals when it issued a 1993 statement stating the following:

The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.²²⁶

Justice Stevens read the 1993 statement to fail because it (1) did not reiterate the points made in the 1991 and 1992 statements (thus, he deemed them “abandoned”); and (2) because the 1993 statement relied on members’ “expectations” of the organization, which he understood as a code word for discrimination instead of a genuine concern for the organization’s expressive goals. His take on the ambiguous 1993 statement certainly does not follow inevitably from the text. Indeed, Justice Stevens’ rush to find contradictions and abandonment of past positions reveals his heavy-handed approach to BSA’s First Amendment claim. In the end, one senses that it would have been much simpler, cleaner and respectful of speaker autonomy for him to concede an intrusion on BSA’s expressive interest, but find that it was slight (because there was no evidence that Dale had ever contravened BSA’s view of homosexuality by advocating homosexuality in his scouting activities and his mere presence in the Scouts did not by itself convey a message of any significance) and ultimately justified by Dale’s countervailing equality interest.

Justice Stevens’ intensive parsing of the Boy Scouts’ evidence would condition the right to association on a consistent record of clearly expressing the asserted idea.²²⁷

²²⁶ Id. at 674 (internal quotations omitted).

²²⁷ See id. at 676 (Stevens, J., dissenting) (“At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view.”).

Such a requirement is inconsistent with the manner in which real people, and by extension organizations, formulate their thoughts and ideas.²²⁸ In many instances, a person’s thoughts evolve over time and, as her thoughts change, so does her expression. Further, much expression is spontaneous and instinctual. Since any organization is an association of multiple individuals whose views will inevitably diverge to some extent, demanding perfect clarity and consistency in adhering to an ideal would seem to defeat most associational claims. An organization should not have to cultivate a perfectly consistent record of expression over many years—a type of constitutional “due diligence”—before the Court will recognize its right to take a particular expressive position.²²⁹ The right to associate for specific purposes and exclude those who would undermine such purposes ought not be limited to the Ku Klux Klan and groups whose views have been similarly vociferously expressed, notorious and historically consistent. Courts certainly should not take claims of expressive interests at face value, as did the Boy Scouts majority, but they need not subject such claims to the withering scrutiny adopted by the dissent. The proportionate approach, by contrast, employs an intermediate level of scrutiny, a standard that is better suited to balancing the competing interests in the speech-equality equation.²³⁰

²²⁸ Cf. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (“[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”); *id.* (“[A] narrow, succinctly articulable message is not a condition of constitutional protection.”).

²²⁹ Boy Scouts, 530 U.S. at 677 (Stevens, J., dissenting) (finding that BSA was “clearly on notice by 1990,” given its participation in related earlier cases, that it had a duty to “explain clearly and openly why the presence of homosexuals would affect its expressive activities, or to make the view of ‘morally straight’ and ‘clean’ taken in its 1991 and 1992 policies a part of the values actually instilled in Scouts through the Handbook, lessons, or otherwise”).

²³⁰ In general, Justice Stevens has expressed skepticism of the value of applying strict presumptions and levels of review to speech and equality claims. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451 (1985) (Stevens, J., concurring); Young v. American Mini Theatres, Inc., 427 U.S. 50, 65-66 (1976) (plurality opinion) (acknowledging that Court’s professed absolute rule against content-based

In light of Bowers, and its somewhat similar doctrinal gymnastics, it is tempting to dismiss the Boy Scouts majority's distortion of Roberts as another indication of the Court's devaluation of the strong claim to equality that gays and lesbians should enjoy under our Constitution. Yet after Lawrence v. Texas' recent overruling of Bowers and—just as importantly—its eloquent and expansive endorsement of gay equality, this interpretation seems less tenable. A more nuanced explanation is that despite the Justices' increasing willingness to protect gays and lesbians from adverse treatment that they view as illegitimate, such claims do not yet enjoy sufficient force to overcome the talismanic invocation of the First Amendment that some like Justice Kennedy (author of Lawrence and Romer, yet also a member of the Boy Scouts' majority) have a hard time resisting. Had Dale's equality interest not run up against a privileged First Amendment claim, the majority might have been able to see the discrimination lurking beneath the facade of a speech claim.

A final observation relates to the Court's treatment of context in R.A.V. and Boy Scouts. In this respect, the two cases differ considerably but both disappoint. As I have said, the R.A.V. Court deemed the St. Paul ordinance an instance of viewpoint discrimination, which it suggested reflected "the desire of the 'ins' to exert their political muscle by harming the 'outs.'"²³¹ In reaching this conclusion, the Court distorted the context in which the St. Paul ordinance was enacted in a manner that reveals a tin ear indifferent to the cries of people on the bottom.²³² The outsider of concern to the Court is the *political* minority—the bigot whose views purportedly have relegated him to the

regulation should not be understood literally). Justice Stevens also wisely challenged the majority's First Amendment absolutism in R.A.V. See 505 U.S. at 417.

²³¹ Greene, supra note 53, at 33-34.

²³² Cf. Kagan, supra note 19, at 877 ("[R]ecognizing viewpoint regulation may well depend on the decisionmaker's viewpoint").

fringes of a newly tolerant social milieu—not *racial* minorities.²³³ The process theory of equal protection review, championed by John Hart Ely²³⁴ and signified by the Carolene Products footnote four, seeks to protect political minorities, but not the *occasional* political loser, such as the racist in R.A.V. Although a white male may lose out when the city passes a hate crime ordinance, he is more likely to be in the majority on many other issues. As a member of the dominant race and gender, he is not subject to the “empathy failure” that frequently blocks attempts by people of color, women and gays and lesbians to form majority coalitions. Moreover, while outright appeals to racial hatred may marginalize the racist in political discourse, our political history suggests that he might enjoy considerable success with more subtle and strategic efforts to use race as a wedge issue. This equality perspective shows that, contrary to the Court’s suggestion,²³⁵ racists are “not anti-orthodoxy in any sense that incorporates the history and dynamics of race in the United States.”²³⁶ Although formal equality now enjoys societal consensus, this consensus, like formal equality itself, is skin deep. People of color, although approaching majority status in a handful of regions in this country, are many miles from harnessing the type of political power that might warrant deeming them an overweening majority and thus require judicial intervention to protect their disadvantaged opponents. Viewed in its proper context, the St. Paul ordinance is useful, but a mere drop in the bucket

²³³ “[T]oday’s First Amendment champions tend to see state and local ‘community standards’ of discourse as the paradigmatic threat to free speech” Amar, *The Bill of Rights*, supra note 5, at 1151. Further, as Nan Hunter has pointed out, “First Amendment jurisprudence has never fully comprehended the role that group identity dynamics played in the seminal case law protecting speech, but has rather treated those cases as emerging from disconnected, atomistic encounters between a repressive state and dissenting individuals.” Hunter, supra note 2, at 1672.

²³⁴ John Hart Ely, *Policing the Process of Representation: The Court as Referee*, Democracy and Distrust (1980), reprinted in *Modern Constitutional Theory: A Reader*, supra note 96, at 3.

²³⁵ See Hunter, supra note 2, at 1711 (noting how in the R.A.V. majority’s eyes “the racist comes to embody dissent and the African-American family in a predominantly White neighborhood represents conformity”).

²³⁶ Id.

toward eliminating the structural and material inequalities that persist despite the modest success of the civil rights movement. The Court’s allegiance to the ostensible “political minority” in R.A.V. demonstrates both that judges may fall prey to the same “empathy failure” that the Equal Protection Clause charges them with averting in the legislatures²³⁷ and that acknowledging the equality underpinnings of the St. Paul ordinance might have helped the Court avoid this pitfall in its First Amendment analysis.

Just as it exaggerated the viewpoint discriminatory effects of the ordinance, the Court downplayed the persistent inequities that equality-based laws seek to redress. The Court pejoratively suggested that the hate crime ordinance represented nothing more than group “favoritism,”²³⁸ much as Justice Scalia argued in dissent in Romer that laws prohibiting discrimination against gays and lesbians are “special” protections or preferences.²³⁹ This decontextualized perspective fails to consider that such laws counteract past and present discrimination; they are not gratuitous patronage handed out by government solely for political purposes. This familiar technique, whether employed against gays and lesbians or African-Americans, hinges on erasing the reality of discrimination against particular outgroups and then positing that any deviation from the supposed neutral baseline, such as a hate speech law, is “special,” *i.e.*, unwarranted and unfair. As Cheryl Harris has written:

²³⁷ See Yoshino, *Suspect Symbols*, supra note 145, at 1764-65.

²³⁸ R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (“The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”).

²³⁹ See Romer v. Evans, 517 U.S. 615, 636 (1996) (Scalia, J., dissenting) (accusing the majority of imposing the preferences of the elite); Hutchinson, *Closet Case*, supra note 126, at 125-26. The Romer Court rejected Justice Scalia’s argument. It explained: “We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” Romer, 517 U.S. at 631.

The law masks what is chosen as natural; it obscures the consequences of social selection as inevitable. The result is that distortions in social relations are immunized from truly effective intervention, because the existing inequities are obscured and rendered nearly invisible. The existing state of affairs is considered neutral and fair, however unequal and unjust it is in substance.²⁴⁰

The denial of specific protection to groups that are not covered by hate speech laws (such as union members) is unlikely to demonstrate that such groups are true political outsiders. Instead, it normally reflects the fact that unprotected groups have not experienced discrimination tantamount to that experienced by protected groups. Government is not doling out favors based on political preferences but rather is responding to real problems. Where it reasonably fails to see a problem, it need not regulate. “States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.”²⁴¹ The Court was able to see R.A.V. as an instance of “censorship in its purest form”²⁴² because it had shorn the case of its equality dimension, including outsider personal experiences²⁴³ and the virulent impact of the burning cross that would later form the basis for the

²⁴⁰ Harris, supra note 58, at 1777; see also id. at 1768 (“[C]olorblindness is a form of race subordination in that it denies the historical context of white domination and Black subordination.”); Hunter, supra note 2, at 1711 (“The R.A.V. result can be seen to exemplify the claim that seemingly neutral rules operate to reinforce bias, by distorting social reality and ignoring power imbalances.”).

²⁴¹ Burson v. Freeman, 504 U.S. 191, 207 (1992) (plurality opinion).

²⁴² R.A.V., 505 U.S. at 430.

²⁴³ For instance, the Court’s terse statement of the facts obscured the fact that the cross burning in R.A.V. was part of a broader racially-motivated campaign to drive an African-American family from the predominantly white neighborhood it was attempting to integrate. “In the spring of 1990 [the Jones family] had moved into [its] four-bedroom, three-bathroom dream house in St. Paul, Minnesota. They were the only black family on the block. Two weeks after they had settled into their predominantly white neighborhood, the tires on both their cars were slashed. A few weeks later one of their car windows was shattered, and a group of teenagers walked past their house and shouted ‘nigger’ at their nine-year-old son.” Matsuda & Lawrence, supra note 14, at 133.

Court's decision in Virginia v. Black.²⁴⁴ Only by overlooking the historical patterns of discrimination, which are central in equal protection analysis,²⁴⁵ and which explain the distinction between protected and unprotected groups, could the Court portray the St. Paul ordinance as perverse.

In the Boy Scouts case, the Court was more attentive to context, but its analysis was superficial. Its passive reflection of societal prejudice in evaluating the social meaning of gay presence and the expressive function of “coming out” created tension with the Court's equality jurisprudence. The Court concluded that “Dale's presence in the Boy Scouts would, at the very least, force the organization 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.”²⁴⁶ The Court did not claim that Dale had engaged in gay advocacy directed at scouts or anyone else during Boy Scouts activities, would do so in the future or had engaged in any flamboyant behavior revealing his sexual orientation at such activities.²⁴⁷ Nonetheless, the Court analogized Dale to a person in a parade who wears a liberatory banner,²⁴⁸ and the state's attempt to force the Scouts to embrace such an activist to the state effort invalidated by the Court in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston.²⁴⁹ There are two steps in this analysis. The Court concluded that (1) It would be evident to the world that Dale is gay; and (2) Dale's

²⁴⁴ See id. at 134 (citing R.A.V.'s “completely ahistorical and acontextual” approach as “exactly the kind of legal analysis this book is intended to counter”)

²⁴⁵ Whether the group has experienced a history of discrimination is one prong of the Carolene Products formulation for determining whether a group should be treated as a suspect class. See Yoshino, Suspect Symbols, supra note 145, at 1773.

²⁴⁶ Boy Scouts of America v. Dale, 530 U.S. 640, 653 (2000).

²⁴⁷ See id. at 690 (Stevens, J., dissenting).

²⁴⁸ See id. at 653-54.

²⁴⁹ 515 U.S. 557, 572 (1995).

mere presence in the Scouts, as a homosexual who had come out in another context, would indicate that the Boy Scouts approved of his sexual orientation or conduct.

It is difficult to see how Dale's mere presence at Boy Scouts functions would necessarily broadcast a message about homosexuality or indicate that the Boy Scouts endorsed any such message. To some extent, the first conclusion does not resonate with gay experience from the perspective of the "bottom." The Court misapprehended the complex texture and meaning of "coming out," overlooking outsider experiences as it did in R.A.V. As far as we know, Dale's only public acts evincing his sexual orientation were accepting a position as copresident of the Rutgers University Lesbian/Gay Alliance and speaking out about the "the psychological and health needs of lesbian and gay teenagers" at a Rutgers event that was covered by a newspaper.²⁵⁰ The newspaper published a photograph of Dale and identified him as a leader in the student organization.²⁵¹ Unless the Court embraced the hoary stereotype of a flamboyant, essentialized homosexual whose sexuality is incapable of being concealed,²⁵² its assumption of widespread knowledge must have rested on a belief that once the cat of Dale's sexuality was out of the bag it spread quickly throughout the community.

Although the newspaper article made it possible that people, including those in the Boy Scouts, would learn of Dale's sexual orientation, the effect of the publication should not be overstated. As Kenji Yoshino has explained:

Gays can never be out and done with it; they must continually reiterate their sexual orientation against a

²⁵⁰ See Boy Scouts, 530 U.S. at 645.

²⁵¹ See id.

²⁵² Given that stereotyping is the fulcrum of much equal protection analysis, see, e.g., Grutter v. Bollinger, 123 S.Ct. 2325, 2339, 2341-42 (2003); United States v. Virginia, 518 U.S. 515, 565 (1996); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226 (1995); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting), overruled in part by, Adarand, 497 U.S. at 227), one hopes that the Court did not rest on this troubling stereotype.

heterosexist presumption that reinstates itself at every pause. The most damaging failure of the closet symbol is perhaps that it misrepresents the continuum of a person's disclosure of his or her homosexual orientation as a binary constructed from the endpoints of that continuum. One is either "out" or "closeted": the closet with its rigid door between the "outside" and the "inside" does not lend itself to subtler gradations.²⁵³

Even gays and lesbians who have asserted their sexual orientation publicly may find that, because of the strong heterosexist presumption, certain associates—straight and gay—wrongly assume that they are heterosexual. Outing is a continual and volitional process and one that requires delicate judgment and negotiation, including consideration of the very real risk that speaking one's sexual identity will lead to exclusion and alienation.²⁵⁴ As a result, there would be nothing unusual in Dale being openly gay in the college context where he found support in a gay student organization but shrouding that identity in the less hospitable environment of the Scouts.²⁵⁵

The Court's finding of a First Amendment violation rests not only on an assumption of widespread community knowledge of Dale's sexual orientation but also on the further assumption that the community would interpret Dale's continued inclusion in the Boy Scouts as signifying the Scouts' endorsement of homosexual conduct. In contrast to R.A.V.'s tacit erasure of the discrimination that justified the St. Paul ordinance, this particular Boy Scouts conclusion, oddly, seems to overestimate the extent of societal discrimination against gays. This overestimation is consistent with the Court's

²⁵³ Yoshino, *Suspect Symbols*, supra note 145, at 1811.

²⁵⁴ See, e.g., Hutchinson, *Accommodating Outness*, supra note 126, at 89 (“[T]he stigma attached to non-heterosexual sexual practice renders coming out for ‘sexual others’ a complex, delicate, threatening, and often dangerous event.”).

²⁵⁵ See Yoshino, *Suspect Symbols*, supra note 145 at 1813 (“A court that regards the ‘public’ as monolithic, such that a single disclosure by a gay person of his or her homosexuality can be seen as potentially leaving that person’s homosexual identity open to all, puts additional pressure on gays to keep their identities totally secret.”).

exaggeration of the public curiosity in the sexual orientation of a non-celebrity such as Dale, which seems implicit in its assumption that the newspaper article would lead to Dale's sexual orientation becoming widely known throughout the community.

As to the endorsement point, a large and unselective organization's mere admission of a person does not normally imply its embrace of that individual's private sexual conduct or ideological activity carried on outside the scope of the organization's auspices.²⁵⁶ Antidiscrimination law *compels* an employer to refrain from discriminating, and any reasonable observer knows that. Ever since the civil rights movement, employment decisions have been tightly regulated at the state and federal levels. Even if one assumes—contrary to the normal legal presumption—a society in which the public is unaware of basic civil rights laws, at most a reasonable observer could interpret the employer's or group's failure to exclude a homosexual that engages in no homosexual advocacy during the organization's functions as a sign that the employer tolerates homosexual employees. But, as many gay and lesbian people have had to learn, tolerance—in the sense of holding your nose at or being deliberately indifferent to someone's personal conduct—is several steps from endorsing or celebrating that person's private decisions or identity.²⁵⁷ Thus, there must be something specifically about gay identity or conduct that, in the Court's mind, distinguishes it from other forms of identity or conduct and that ultimately justified excluding Dale.

Although the Court did not articulate this point expressly, the difference appears to be that Dale was not simply someone with a homosexual orientation but someone who had chosen to come out of the closet and affiliate with a gay and lesbian organization. As

²⁵⁶ As Justice Stevens argued, "The notion that an organization of [the Boy Scouts'] size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling." *Boy Scouts*, 530 U.S. at 697.

the Court repeatedly said,²⁵⁸ Dale was an “avowed” homosexual. This feature of the case—that Dale’s equality interest was deeply intertwined with his decision to speak his identity—makes Boy Scouts a uniquely difficult case. I do not contend that the answer is clear-cut even under the proportionate approach. Justice’s Stevens’ argument that the Boy Scouts’ exclusion of Dale was pretextual because the Scouts did not oust straight members who advocated gay openness and equality is not quite dispositive because a straight member cannot “come out.” A straight Scout’s revelation of his sexual orientation contains minimal social meaning because the expression simply confirms the heterosexist norm. By contrast, a gay person has the option to come out, and this expressive act undeniably adds force and meaning to the abstract advocacy of gay openness. Therefore, the Court may have viewed coming out as a political act, as a volitional²⁵⁹ statement about gay openness and equality that justified Dale’s exclusion. Given that politically tinged comings-out are the most visible and paradigmatic, it would not be surprising if this most expressive manner of revealing one’s sexual orientation preoccupied the Justices.

A fuller understanding of gay and lesbian experiences again provides a response that reveals the question to be closer than the Court may have assumed.²⁶⁰ Although the term “coming out” is most commonly understood to contain political implications,²⁶¹ at its root, it need not mean anything more than telling the truth or refusing to lie about the

²⁵⁷ Cf. Yoshino, *Suspect Symbols*, supra note 145, at 1792.

²⁵⁸ See Boy Scouts, 530 U.S. at 644, 655-56.

²⁵⁹ Coming out is not wholly volitional in that strong emotional convictions often impel a person to disclose her sexual identity.

²⁶⁰ See Yoshino, *Suspect Symbols*, supra note 145, at 1833 (noting that “those who are empowered to regulate an identity are not necessarily those who know even its fundamental characteristics”).

²⁶¹ See, e.g., Eskridge, supra note 19, at 2439-40, 2443 (describing “coming out” as “an act of community through which the uncloseted individual both joins a subculture and becomes an ambassador at large of that

fact of one's orientation or romantic relationships. For some gays and lesbians, including many in the African-American gay community, that is *all* it means. "Coming out" in this sense does not entail marching in parades or becoming politically active.²⁶² In fact, many openly gay people would never partake in such activities because they do not understand their sexual orientation as requiring alignment with a particular political agenda. An intersectionality perspective tells us that a person is not simply homosexual but also, for instance, Latino or Asian-American, man or woman, Republican or independent, Catholic or Muslim, politically active or apolitical. These additional and overlapping group identities often mitigate the extent to which a homosexual chooses to identify with a gay movement that is predominantly white, male and politically liberal. Thus, saddling all gay and lesbian people who are honest about their sexual orientation with a presumption that they are engaged in political expression would be overbroad.

Although initially one might think that the fact that Dale was discriminated against not solely based on his sexual orientation but also because of his choice to speak his identity justifies his exclusion, this intuition may not be sound. The speech component of Dale's interest might actually buttress his claim. Clearly, the Boy Scouts discriminated against Dale based on the content of his expression. If he had said that he was straight, he would not have had to leave the Scouts. Further, although the Boy Scouts invoked its right of association, Dale was being punished for associating with a gay and lesbian campus organization, and the ultimate result of a legal rule that reinforces the already immense pressure to remain in the closet might be a society without ACT UP

subculture as well"); Hutchinson, *Accommodating Outness*, supra note 126, at 122-23 ("Coming out is . . . a form of political action").

²⁶² Scholarly attempts to conflate sexual identity and political expression by arguing that they are "inextricably linked," e.g., Hutchinson, *Accommodating Outness*, supra note 126, at 116, although understandable, appear to essentialize.

and the Log Cabin Republicans, which would diminish pluralism.²⁶³ “Threats to ‘free speech’ may come as readily from private power (which is itself created by public power) as from the actions of the state.”²⁶⁴ Although private silencing is not normally thought to pose a First Amendment problem,²⁶⁵ here the Court legitimated, reinforced and inscribed into law the Scouts’ content-based discrimination.²⁶⁶ The Court was willing to recognize Dale’s claim to equal treatment only insofar as he was willing to sacrifice his right freely to express his sexual orientation.²⁶⁷ This is, in essence, a constitutional version of “Don’t Ask; Don’t Tell.”²⁶⁸ Those who reject the constitutional nature of private power’s threat to speech values may not be convinced by this argument. The claim, however, finds support in the Court’s equality cases and in the one equality-speech case that forthrightly balanced equality and speech, Roberts.

Whereas due process jurisprudence serves largely to reflect historically rooted values and confirm societal consensus, the Equal Protection Clause possesses more

²⁶³ See Eskridge, supra note 19, at 2443 (noting how the closet “disabled gay people from forming social and political groups”).

²⁶⁴ Sullivan, supra note 1, at 105-06; see Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 950 (1963) (discussing First Amendment concerns raised by “private centers of power [that] have come to possess extensive authority over the welfare of their individual members,” such as “labor unions, business associations, [and] professional societies”); see also Eskridge, supra note 19, at 2448 (“Gay experience resists making so much of the public-private distinction.”).

²⁶⁵ But see Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969) (“There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.”).

²⁶⁶ Because there were dueling speech interests, the very formulation of the Court’s rule, which predicated Dale’s inclusion on his remaining silent without providing any neutral justification for that decision or even acknowledging the choice undergirding its decision, officially validated one side of a private debate. Cf. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (stating that suit between private individuals may raise First Amendment concerns); Shelley v. Kraemer, 334 U.S. 1, 14-15, 19-20 (1948) (concluding that judicial enforcement of discriminatory action violates the Fourteenth Amendment).

²⁶⁷ See Boy Scouts of America v. Dale, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting) (criticizing the Court’s holding because “[Dale’s] openness is the sole and sufficient justification for his ostracism.”).

²⁶⁸ Cf. David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. REV. 319 (1994).

radical aspirations.²⁶⁹ Equal protection analysis does not accept social conventions as they are but rather asks with a critical gaze whether such conventions entrench a caste-like system.²⁷⁰ For instance, rather than acquiescing in a system that superficially privileges women by, for example, punishing only young men who drink and drive,²⁷¹ the Court has delved into the stereotypical underpinnings of such laws and self-consciously uprooted them.²⁷² The same equality perspective that upset the “pedestal/cage”²⁷³ and paved the way for Roberts calls for a skeptical view of the closet.

In many respects, the closet is the defining construct of gay identity, providing the gateway to personal autonomy and acceptance or to furious repression and self-hatred.²⁷⁴ Although there are important differences, the internalized psychological damage inflicted by the closet is not unlike the stigmatic harm that animated Brown v. Board of Education.²⁷⁵ The equality argument does not dissolve merely because Dale *could* have hidden his identity and instead “voluntarily” chose to come out of the closet at college. Certainly, we would not require a Jewish person to avoid statements indicating her religious faith in order to escape discrimination.²⁷⁶ Conversely, we might require a person with a medical condition to utilize medical assistance that would mitigate the disability rather than claim disability discrimination.²⁷⁷ The difference between these two

²⁶⁹ See Yoshino, *Suspect Symbols*, supra note 145, at 1773-74. But see Eskridge, supra note 121 (arguing that courts have deployed due process and equal protection analysis in a more complex and compatible manner).

²⁷⁰ See Yoshino, *Suspect Symbols*, supra note 145, at 1773-74 (stating that Equal Protection Clause “protects against traditions, however long-standing and deeply rooted”).

²⁷¹ See Craig v. Boren, 429 U.S. 190 (1976).

²⁷² See Yoshino, *Suspect Symbols*, supra note 145, at 1776, 1779-80.

²⁷³ See Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

²⁷⁴ See, e.g., Eskridge, supra note 19, at 2442; Yoshino, *Suspect Symbols*, supra note 145, at 1794, 1797.

²⁷⁵ 347 U.S. 483 (1954).

²⁷⁶ See Eskridge, supra note 19, at 2418-19.

²⁷⁷ See Sutton v. United Air Lines, 527 U.S. 471, 487-88 (1999).

scenarios is a substantive judgment about the value of religion and modern medicine, respectively. The Boy Scouts case likewise should have forced the Court to think about the closet and its impact on gays and lesbians and the extent to which the Justices should legitimate a rule that coerces gays and lesbians to remain in the closet.²⁷⁸

Notwithstanding the damaging effects of the closet in general, a look at the particular facts of the Boy Scouts case, which the proportionate approach requires, may dampen the persuasive force of Dale's claim. If Dale had been fired from his job or if the Boy Scouts was clearly a commercial organization, his claim would have been more closely analogous to Roberts as well as more firmly rooted in the anti-caste principle. Dale's reliance on the Scouts' provision of "important socialization skills, [a] chance to connect with peers and society through community service, and basic outlets for fun and support" seems less compelling to the extent such socialization is not tethered to commercial advancement²⁷⁹ and there are alternative avenues of social development for gays and lesbians. The proportionate approach seeks to balance speech and equality in order to preserve the pluralism and diversity of society, a First Amendment and equality interest. In general, purely social groups would seem to be closer to the private, protected end of the spectrum than the commercial end where First Amendment protection is at its weakest.²⁸⁰ The proper holding in Boy Scouts thus may boil down to unresolved factual questions: whether the Boy Scouts is purely social or whether special characteristics of the Scouts distinguish it from

²⁷⁸ Cf. Yoshino, *Suspect Symbols*, *supra* note 145, at 1774.

²⁷⁹ See Brief for Respondent at 37, Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

²⁸⁰ As the Court has explained, "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's

other social organizations. For instance, key factors might include the extent to which the Boy Scouts are intertwined with government, which might heighten the stigma of excluding gays, and the degree to which the organization is commercial in nature or functions as an avenue to socioeconomic advancement.²⁸¹ This anti-caste inquiry, whatever its ultimate result, is conspicuously absent from Dale.²⁸² At the end of the day, the Justices in the majority failed to stop and “consider [their] potential complicity in the oppression” of the closet, which equality considerations required them to examine.²⁸³

C. Virginia v. Black: The Court Returns to the Middle

Despite the Court’s practice of privileging speech over equality, the Court’s recent decision in Virginia v. Black signals a return to the middle, particularly when placed in the context of a term that saw unusual landmark victories for people of color,²⁸⁴ women,²⁸⁵ and gays and lesbians.²⁸⁶ Honestly facing the collision between speech and equality, the Black Court rendered a decision substantially revising the reasoning in R.A.V. and striving to accommodate both constitutional interests. Although

objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.” Roberts v. Jaycees, 468 U.S. 623, 620 (1984).

²⁸¹ See, e.g., id. at 633-35 (O’Connor, J., concurring in part and concurring in the judgment) (“[T]here is only minimal constitutional protection of the freedom of commercial association.”).

²⁸² The Court chose not discuss these issues even though Dale asserted that the Boy Scouts is a commercial organization and is intertwined with government. See, e.g., Brief for Respondent at 2-3, 12 n.8, 39, Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (No. 99-699) (“BSA is in many respects . . . a commercial entity.”).

²⁸³ Yoshino, *Suspect Symbols*, supra note 145, at 1775, 1788.

²⁸⁴ See Grutter, 123 S.Ct. at 2339; Desert Palace Inc. v. Costa, 123 S.Ct. 2148 (2003) (plaintiff-friendly interpretation of Title VII).

²⁸⁵ Nevada Dept. of Human Resources v. Hibbs, 123 S.Ct. 1972 (2003) (holding that pattern of gender-based discrimination justified Family and Medical Leave Act’s abrogation of state sovereign immunity).

²⁸⁶ Lawrence v. Texas, 123 S.Ct. 2472 (2003). Despite my reductive characterization of these cases for rhetorical purposes, they of course benefited more than just one discrete group. For instance, Title VII (Desert Palace) protects women as well as people of color.

unfortunately it did not expressly rely on the Fourteenth Amendment, several features of the Court’s analysis indicate that the decision represents a significant departure from the Court’s equality-neglecting recent past.

Black represents a substantial change in approach not just for the Court but also for some of the individual Justices who helped form the R.A.V. majority, most notably Justice Thomas and Justice Scalia. Moreover, the change appears to reflect Justice Thomas’ decision to inject his personal experiences with racist oppression into the Justices’ deliberative process. Whatever the precise catalyst, the resulting opinion, by Justice O’Connor, the most centrist Justice, pays close attention to context and history and rightly rejects the near-absolutism of R.A.V.²⁸⁷

Virginia v. Black arose from two separate cross burnings implicating three different defendants. In May 1998, three people burned a cross on the yard of an African-American family in Virginia Beach, Virginia. The cross burning was intended as retaliation for the father James Jubilee’s complaint about defendant Richard Elliott’s shooting firearms in Elliott’s backyard.²⁸⁸ Jubilee testified that, upon finding the remains of the cross in his yard, he became extremely anxious, knowing that “a cross burned in your yard . . . tells you that it’s just the first round.”²⁸⁹ A few months later, Barry Black led a Ku Klux Klan rally on the property of a person affiliated with the Klan

²⁸⁷ See Grutter, 123 S.Ct. at 2338 (opinion of O’Connor, J.) (warning against applying constitutional rules “out of context” and the “concrete situations that gave rise to [the claims]”); id. (urging courts to “carefully examin[e] the importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context”). Speech also must be assessed in its particular context. See R.A.V., 505 U.S. at 426 (Stevens, J., concurring in the judgment) (“The meaning of any expression and the legitimacy of its regulation can only be determined in context.”); see also TRIBE, supra note 7, at 831 (“The very notion of speech is, of course, incomprehensible outside a cultural and social context.”).

²⁸⁸ See Black, 123 S.Ct. at 1542-43.

²⁸⁹ Id. at 1543.

in rural Virginia.²⁹⁰ After speeches vilifying African-Americans, Latinos and Bill and Hillary Clinton, someone burned a cross. When a sheriff approached Black, he accepted responsibility for the cross burning.²⁹¹

Virginia prosecuted the defendants for violating its cross-burning statute, which provides:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.²⁹²

Both Black and Elliott were convicted by juries, but the jury instructions in their trials differed significantly. In Black's case, the judge instructed the jury (over Black's objection): "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."²⁹³ The jury at Elliott's trial, by contrast, did not hear that instruction.²⁹⁴ The third defendant, Jonathan O'Mara, pleaded guilty.²⁹⁵ A divided Virginia Supreme Court held that the state's cross burning statute was in conflict with R.A.V., which it considered "analytically indistinguishable."²⁹⁶

²⁹⁰ See id. at 1542.

²⁹¹ See id.

²⁹² Va. Code Ann. § 18.2-423 (1996).

²⁹³ 123 S.Ct. at 1542 (quoting unpublished state court decision in appendix).

²⁹⁴ See id. at 1543.

²⁹⁵ See id.

²⁹⁶ 262 Va. 764 (2001).

The Supreme Court was also divided, yet in important respects it upheld the cross burning statute. After reciting R.A.V.'s general ban on content-based discrimination, Justice O'Connor²⁹⁷ went on to find that the cross-burning statute fit into an R.A.V. exception. Pursuant to the exception for laws that are "based on the very reasons why the particular class of speech at issue ... is proscribable,"²⁹⁸ the Court held, "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation."²⁹⁹ Justice Souter, joined by Justice Kennedy and Justice Ginsburg, dissented, arguing that the case was very similar to R.A.V. and that the majority's "variation" of R.A.V. was not "acceptable."³⁰⁰ In both cases, Justice Souter contended, the state was attempting to suppress ideas.³⁰¹ Justice Thomas dissented on substantially different grounds,³⁰² which are discussed below.

A plurality of the Court ruled that the prima facie evidence provision, as interpreted by the model jury instruction, was unconstitutional.³⁰³ This provision, Justice O'Connor concluded, "strips away the very reason why a State may ban cross burning with the intent to intimidate . . . permit[ting] the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning

²⁹⁷ Chief Justice Rehnquist, Justice Stevens, Justice Scalia and Justice Breyer joined Justice O'Connor in this portion of her opinion.

²⁹⁸ 123 S.Ct. at 1549.

²⁹⁹ Id.

³⁰⁰ Id. at 1559 (Souter, J., dissenting); see also id. at 1561 (describing the majority opinion as "treating R.A.V.'s virulence exception in a more flexible, pragmatic manner than [R.A.V.'s] original illustrations would suggest").

³⁰¹ See id. at 1560.

³⁰² See id. at 1563 (Thomas, J., dissenting).

³⁰³ Chief Justice Rehnquist, Justice Stevens and Justice Breyer joined Justice O'Connor in this portion of her opinion.

itself.”³⁰⁴ The statute thus “ignores all the contextual factors” necessary to assess the extent to which a cross burning is protected expression.³⁰⁵ It blurred the critical distinction between cross burning intended solely as political expression (such as at a Klan rally not in the presence of African-Americans) and the same act directed at particular individuals such as the Jubilee family.³⁰⁶ Justice O’Connor indicated that incidental offense or resentment that onlookers may experience in seeing a Klan cross burning not intended to intimidate would not suffice to treat the cross burning as a constitutionally-proscribable fighting word.³⁰⁷ Despite her criticism of the prima facie evidence provision and the model jury instruction, Justice O’Connor left the door open for the state courts to cure this problem in the future, perhaps by severing the provision or construing it differently.³⁰⁸ Consequently, the Court affirmed the Virginia Supreme Court only as to Black (whose trial was infected with the erroneous jury instruction), but vacated the lower court decision as to Elliott and O’Mara.³⁰⁹

³⁰⁴ Black, 123 S.Ct. at 1550-51.

³⁰⁵ Id. at 1551.

³⁰⁶ See id. Citing cross burnings depicted in films such as *Mississippi Burning*, the Court noted that some cross burnings are intended neither to express political ideology nor intimidate a victim. See id.

³⁰⁷ See id.

³⁰⁸ See id. at 1552.

³⁰⁹ See id. Justice Scalia, joined in large part by Justice Thomas, wrote an opinion concurring in part, concurring in the judgment and dissenting in part. Justice Scalia objected to Justice O’Connor’s interpretation of the prima facie evidence provision and the jury instruction. See id. at 1552 (Scalia, J., concurring in part and dissenting in part). Justice Scalia concluded that Justice O’Connor was misapplying overbreadth doctrine and that the class of people with legitimate speech interests whose expression might be chilled was far too small to support a facial challenge to the statute. See id. at 1555-56. Because the flaw in Black’s conviction arose from the jury instruction and not the statute itself, Justice Scalia (unlike the plurality) would have permitted the state to retry Black.

In many respects, Justice O'Connor's Black opinion reflects the principles of Justice White's R.A.V. opinion concurring in the judgment, which Justice O'Connor joined. Whereas the R.A.V. Court said next to nothing about the history of racism, sexism and religious discrimination and proceeded as if "we know nothing about the origins of the practice of cross burning or about the meaning that a burning cross carries both for those who use it and for those whom it terrorizes,"³¹⁰ Justice O'Connor in Black carefully explicated "cross burning's long and pernicious history as a signal of impending violence,"³¹¹ which is consistent with Justice White's opinion.³¹² Rather than treat the burning cross as the subject of majority disfavor, Justice O'Connor made it plain why government would want to ban cross burning: "From the inception of the second [Ku Klux] Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology," which is "the faithful maintenance of White Supremacy."³¹³ The Klan used cross burnings to send messages such as "We are here to keep the niggers out of your town," and the threat to "cut a few throats" in order to "shut the Jews up."³¹⁴ "These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950."³¹⁵

³¹⁰ Matsuda & Lawrence, supra note 14, at 135.

³¹¹ 123 S.Ct. at 1549 (opinion of O'Connor, J.).

³¹² See R.A.V., 505 U.S. at 407 (White, J., concurring in the judgment).

³¹³ 123 S.Ct. at 1545 (quoting W. WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 127 (1987)).

³¹⁴ Id.

³¹⁵ Id.

In light of this history, Justice O’Connor concluded, the burning cross has “special force.”³¹⁶ Its importance and virulence as a threat can be fully understood only when placed in its proper historical context.³¹⁷ In R.A.V., Justice White, joined by Justice O’Connor, relied on history and context in arguing that the majority misapprehended its own exception. In important respects, Justice White’s opinion “echoes the critique made by critical race theorists.”³¹⁸ He wrote: “The ordinance falls within the first exception to the majority’s theory” because the city has identified race, religion, and gender because of “our Nation’s long and painful experience with discrimination.”³¹⁹ The ordinance was directed at a “class of speech that conveys an overriding message of personal injury and imminent violence . . . a message that it at its ugliest when directed against groups that have been the targets of discrimination.”³²⁰ Justice Stevens, who joined part of Justice White’s opinion, added that the “cross burning in this case— directed as it was to a single African-American family trapped in their home— was nothing more than a crude form of physical intimidation.”³²¹ He further castigated the majority for contradicting itself in permitting Congress to ban threats against the President “because those threats are particularly likely to cause

³¹⁶ Id.

³¹⁷ See Matsuda, *Victim’s Story*, supra note 11, at 2366 (“There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples—like all signs—that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context.”).

³¹⁸ Matsuda & Lawrence, supra note 14, at 135.

³¹⁹ 505 U.S. at 407 (White, J., concurring in the judgment).

³²⁰ Id. at 408.

³²¹ Id. at 432 (Stevens, J., concurring in the judgment).

‘fear of violence,’ ‘disruption,’ and actual ‘violence.’”³²² “Precisely this same reasoning . . . compels the conclusion that St. Paul’s ordinance is constitutional.”³²³

The Black majority corrected R.A.V.’s misapplication of the virulence exception. Just as the Court had concluded in R.A.V. that the statute barring threats of violence against the President came within an exception because the reasons why threats are not protected by the First Amendment have “special force” as applied to the President,³²⁴ the Black majority concluded that the reasons behind a ban on cross burning similarly possess special force. Whereas the R.A.V. majority fixated on the supposedly “nefarious” effects of the St. Paul ordinance, the Black majority was concerned about the “pernicious” history of cross burning.

Black disappoints, however, insofar as Justice O’Connor relied on R.A.V.’s suggestion that government cannot protect people of color, women and religious minorities without also protecting political partisans, union members and others to purge the taint of content-based discrimination. This was precisely the requirement Justice O’Connor protested in R.A.V. when she signed onto Justice White’s opinion.³²⁵ In Black, Justice O’Connor distinguished R.A.V. by stating: “Virginia does not single out for opprobrium only that speech directed toward ‘one of the disfavored topics’ It does not matter whether an individual burns

³²² Id. at 424.

³²³ Id.

³²⁴ 505 U.S. at 388-89.

³²⁵ See id. at 402 (White, J. concurring in the judgment) (attacking the Court’s “First Amendment underinclusiveness” holding); id. (stating that the majority’s perceived purported defect in St. Paul ordinance could be cured by adding “and all other fighting words that may constitutionally be subject to this ordinance”) (internal quotation marks omitted).

a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union, or homosexuality.'³²⁶

Further, Justice O'Connor said, "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial minorities."³²⁷

This much is true. But what does it prove? The same could be said of the St. Paul ordinance. It would ban the brandishing of a swastika aimed at a person who appeared to be Jewish even if in fact she were not Jewish, so long as the display aroused resentment either directly (because of a Jewish bystander) or vicariously (the non-Jewish target being offended on behalf of Jews). Although in both instances the laws might have occasionally protected members of nonsuspect classes, the vast majority of people impacted by cross burning are racial or religious minorities just as the vast majority of people protected by the St. Paul ordinance were members of a suspect or quasi-suspect class. Moreover, this clear effect was not happenstance in either case. It cannot be doubted that in enacting its cross burning statute, Virginia was aiming at *racial* intimidation, not intimidation of homosexuals or Republicans, just like the City of St. Paul. This is

³²⁶ 123 S.Ct. at 1549. Justice Stevens, for one, did not buy this distinction. He concurred separately to reiterate his and Justice White's view from R.A.V. that a statute singling out cross burning should be upheld "even though it does not cover other types of threatening expressive conduct." Id. at 1553 (Stevens, J., concurring).

³²⁷ Id. (emphasis added). In an effort to corroborate this conclusion, the Court cited the case of Jubilee and tried to cast doubt on the racial motivation behind the cross burning in his yard. The Court's unwillingness to see the racial discrimination in front of it is perplexing. It was no mere coincidence that Elliott and O'Mara responded to Jubilee's perceived criticism by burning a cross, as opposed to the sundry non-racial forms of venting their anger that were available. It is telling that "Elliott referred to Jubilee with a racial epithet confirming Jubilee's race." Black v. Virginia, 262 Va. 764, 768 (2001); see also id. ("In addition to the epithet, the record is replete with references to Jubilee's race."). Certainly from a victim's perspective, an African-American who awakes to find a cross in her yard is likely to interpret the social meaning of the cross more gravely than a white person and experience greater distress (although a white person might be quite upset as well). Cf. R.A.V., 505 U.S. at 407 (White, J., concurring in the judgment) (stating that certain speech expresses an "overriding message of personal injury and imminent violence . . .

clear from its decision to single out the *cross* as opposed to other harmful symbols, such as the swastika.³²⁸ No honest historical account can render the burning cross a racially neutral symbol, and Justice O'Connor's own opinion militates against any attempt to do so.³²⁹ It is beyond cavil that the central organizing principle of the Klan, and its employment of cross burning, is white racial supremacy.³³⁰ The Klan targets the overwhelming majority of its victims because they are viewed as either a direct or indirect threat to the Klan's racial ideology.³³¹ The belief in white purity, intermingled with religious overtones, ties together the Klan's hatred for African-Americans and Jews. And most other victims were either other people of color or whites who allied with African-Americans or Jews.³³² That other groups might be protected was incidental; it was not the motivating force behind the Virginia law. Therefore, instead of reifying the principle that protecting only suspect and quasi-suspect classes is illegitimate under the First Amendment, the Court should have acknowledged that the distinctions in both the Virginia law and the St. Paul ordinance were firmly grounded in Equal Protection Clause jurisprudence. Yet the Black Court failed to

a message that it at its ugliest when directed against groups that have been the targets of discrimination.”).

³²⁸ See Va. Code Ann. § 18.2-423 (1996).

³²⁹ See, e.g., Black, 123 S.Ct. at 1544 (“Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.”).

³³⁰ See id. at 1543 (stating that the Klan “imposed ‘a veritable reign of terror’” in response to “Reconstruction and the corresponding drive to allow freed blacks to participate in the political process”); id. at 1546 (“The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings.”).

³³¹ See id. at 1545 (“These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals.”).

³³² Cf. id. at 1546 (noting that the Klan attacked “blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement”); Matsuda, supra, at 2332 (“The same groups, using the same techniques, and operating from many of the same motivations and dysfunctions typically produce racist and anti-Semitic speech.”).

acknowledge this. Although the Court’s recent actions make clear that *stare decisis* does not approach an “inexorable command,”³³³ apparently in this case, respect for recent precedent counseled against an outright repudiation of R.A.V.

A plausible distinction between the laws in R.A.V. and Black is that the latter banned only cross burning whereas the St. Paul ordinance was construed to reach all fighting words that “arouse[d] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”³³⁴ While the St. Paul ordinance classified speech on the basis of three categories—race, religion, and gender—the Virginia statute homed in on a subset of expression in one or two of those categories, race and religion. Unlike the Justices who concurred in the judgment, however, the R.A.V. majority did not train its fire on any overbreadth of the ordinance. To the contrary, in its view, the ordinance was *too narrow* in that it isolated race, gender and religion and excluded all other traits.

Accordingly, whittling the statute down to the underlying conduct banned in R.A.V.—cross burning—would likely not have resolved the problem as it was described in the R.A.V. majority opinion.³³⁵

³³³ Lawrence v. Texas, 123 S.Ct. 2472, 2483 (2003).

³³⁴ R.A.V., 505 U.S. at 379.

³³⁵ Some may prefer narrow hate speech regulation, perhaps focusing on race, to the broader statute in R.A.V. Akhil Amar has forcefully argued that the Thirteenth Amendment, which bans slavery, would justify a hate speech law protecting only African-Americans from terrorizing speech that is tantamount to a badge of slavery, see Amar, *Missing Amendments*, supra note 138, at 155-58. Cf. Matsuda, *Victim’s Story*, supra note 11, at 2357-58 (suggesting proposal that would regulate speech only if “directed against a historically oppressed group;” hence, “[h]ateful verbal attacks upon dominant-group members by victims is permissible”), the current Court would likely view such a law as *more* problematic than the R.A.V. ordinance. Such a statute would not only isolate race as a trait, it would favor some races over others (*e.g.*, Africans–Americans would be protected, but not whites), and such a racial classification would have to survive strict scrutiny. See Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Such an asymmetrical statute would resemble a form of verbal affirmative action, and the Court would likely view it with great skepticism. It would also raise extremely difficult questions of classification: Are Latinos and Native Americans, who may suffer contemporary discrimination comparable to that experienced by African-Americans, entitled to similar protection even though their ancestors were not enslaved? Can government exclude women, who “like blacks . . . have

Despite the Black Court’s ostensible fidelity to R.A.V.’s generality principle, in fact it refused to require a ban on burning all symbols, rather than singling out the cross. As the Black Court noted, after its grant of certiorari, Virginia “enacted another statute designed to remedy the constitutional problems identified by the state court. See Va. Code Ann. § 18.2-423.01 (2002). Section 18.2-423.01 bans the burning of ‘an object’ when done ‘with the intent of intimidating any person or group of persons.’”³³⁶ As in Eichman, the federal flag burning case, the legislature here clearly intended to find another, more sophisticated means of accomplishing the same end—prohibiting cross burning.³³⁷ The Court, however, chose not to take this facially more-neutral alternative into account. Given the existence of the object-burning law, if the

suffered deeply entrenched and systematic status-based subordination based on physical traits fixed at birth?” Amar, *Missing Amendments*, supra note 138, at 160. Is it constitutional to grant a Black Nationalist *carte blanche* to deride white people with epithets like “cracker” and “honkey,” yet prohibit a white person from calling an African-American a “spook” or a “monkey?” See, e.g., Delgado, supra note 12, at 180 (arguing that the law should permit a tort action if a white person calls a black man a “boy” but generally not if a non-white person called a white person a “honkey”); Matsuda, *Victim’s Story*, supra, at 2361-62 (same). Such a law, unlike the evenhanded St. Paul ordinance, would justify the Court’s concerns about licensing one side of a debate to “fight freestyle.” R.A.V., 505 U.S. at 392. Drawing on a hypothetical analogous statute in the employment law context, would today’s Court uphold a version of Title VII that prevented whites from firing African-Americans on the basis of race but left African-American businesses and managers free to discriminate against white employees? The answer, in light of the Court’s history of reifying whiteness as something akin to a property interest, see Harris, supra note 58, at 1709, seems clearly to be “No.” Thus, the notion that “openly asymmetrical regulation of racial hate speech may be less, rather than more, constitutionally troubling,” Amar, *Missing Amendments*, supra note 138, at 160, appears out of step with current Equal Protection Clause doctrine.

In this article, I rely principally on the Fourteenth Amendment because of the fairness concerns raised by denying protection to women and gays and lesbians, which would seem to follow from relying solely on the Thirteenth Amendment. The Fourteenth Amendment’s text, which is not limited to race, offers a more capacious home for hate speech regulation.

³³⁶ 123 S.Ct. at 1544 n.1.

³³⁷ Cf. Black, 123 S.Ct. at 1560 (Souter, J., dissenting) (suggesting that viewpoint based discrimination is afoot “when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning”).

The legislature apparently latched onto a statement in the state court decision distinguishing a cross-burning law from an object-burning law. The Virginia Supreme Court stated: “[The legislature] did not proscribe the burning of a circle or a square because no animating message is contained in such an act.” Black, 262 Va. at 776.

Court had struck down the cross-burning law, there would have remained a law for prosecuting and punishing cross burners.³³⁸ Notwithstanding this more facially neutral option, Black upheld the cross-burning law. This decision may reflect the Court’s recognition that a more neutral law would not as effectively embody the community’s specific opposition to hate crime. As another opinion by Justice O’Connor’s recently confirmed, appearances matter when it comes to issues of race.³³⁹ Black thus grants government latitude to craft specific protections for groups that have historically suffered discrimination without extending the laws to cover every other type of fighting word.

In so doing, Black ultimately validates the power of symbolism and withdraws from a strict neutrality requirement regarding racial discrimination. The upshot of its holding is that government need not use a blunt instrument—broad, neutral regulation—such as an “object-burning” law to attack the most serious aspects of a problem. In R.A.V., the Court specifically rejected St. Paul’s argument that “a general ‘fighting words’ law would not meet the city’s needs because only a content-specific measure can communicate to minority groups that the ‘group hatred of such speech ‘is not condoned by the majority.’”³⁴⁰ But Justice O’Connor’s opinion in Black corrects R.A.V.’s erroneous conclusion.³⁴¹

³³⁸ Compare with Matsuda, *Victim’s Story*, supra note 11, at 2374 (discussing the “farc[e]” of anti-mask legislation, purportedly neutral regulation which has been used to target Ku Klux Klan).

³³⁹ See Grutter, 123 S.Ct. at 2341 (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . .”) (quoting Sweatt v. Painter, 339 U.S. 629 (1950)).

³⁴⁰ 505 U.S. at 392 (quoting Brief for Respondent 25).

³⁴¹ In this respect, Matsuda and Lawrence’s prediction that “R.A.V.’s incoherence and illogic are unlikely to withstand the test of even a few years time,” Matsuda & Lawrence, supra note 14, at 136, is correct. Black was decided little more than a decade after R.A.V. One year after R.A.V., the Court upheld a criminal penalty enhancement for racial bias that it deemed to be aimed at conduct, not speech. See

After Black, efforts to ban attacks on groups that have faced the most destructive oppression need not be concealed in a bland, beige wrapper in order to elude judicial efforts to ferret out content-based discrimination. Common sense tells us that the category of objects (other than the cross) that are typically burned as a means of intimidation is rather small, if not entirely empty. Because the extra speech regulated under the “object”-burning law is basically nil, the difference between an “object”-burning law and a cross-burning law boils down to a matter of form. Although the government could have regulated cross burning in a more neutral manner, Black approved narrower regulation that expressly targeted racially harmful expression.³⁴² This new flexibility clears the way for government to accomplish a key primary objective in passing hate crime laws: expressing its condemnation of the most virulent forms of oppression,³⁴³ even though R.A.V. deemed that governmental viewpoint illegitimate.³⁴⁴

Because intimidating expressive conduct such as cross burning can ordinarily be prosecuted under an array of background content-neutral laws,³⁴⁵ a chief contribution of more specific hate speech regulation is to express the

Wisconsin v. Mitchell, 508 U.S. 476 (1993). Some scholars have understood Mitchell to chip away at R.A.V. See Sunstein, *Words, Conduct, Caste*, *supra* note 18, at 827 (“R.A.V. and Mitchell are very close, and the Court did not adequately explain the difference between them.”). Under this view, Mitchell may be a precursor of Black.

³⁴² This preference for transparency, while laudable, is in tension with Justice O’Connor’s position in the University of Michigan affirmative action decisions, which favors ambiguous policies that covertly consider race over those that do so transparently. See Gratz v. Bollinger, 123 S.Ct. 2411, 2445-46 (2003) (Ginsburg, J., dissenting).

³⁴³ See Matsuda, *Victim’s Story*, *supra* note 11, at 2374 (“We know why state legislatures . . . have passed anti-mask statutes. It is more honest, and less cynically manipulative of legal doctrine, to legislate openly against the worst forms of racist speech, allowing ourselves to know what we know.”).

³⁴⁴ See 505 U.S. at 392 (criticizing St. Paul’s admitted effort to condemn “bias-motivated hatred and . . . messages ‘based on virulent notions of racial supremacy’”) (quoting 464 N.W.2d at 508, 511)).

³⁴⁵ See, e.g., *id.* at 380 & n.1 (citing Minnesota laws banning terroristic threats, arson and criminal damage to property).

government’s condemnation of hateful expression.³⁴⁶ Laws that advance equality by condemning tools of racial hierarchy—while permitting dissenting expression that does not take the form of fighting words—further a constitutional value of the highest stature enshrined in the Fourteenth Amendment. Government should not have to shroud its commitment to equality in a farce such as the object-burning law.

Black is significant not just because of the Court’s bottom-line holding and newly flexible approach to the issues, but also because of the line-up of Justices in the Black majority. Justice Scalia, despite writing the majority opinion in R.A.V., which appeared to foreclose hate crime regulation, and Justice Thomas, both switched sides.

Indeed, Justice Thomas moved from one end of the spectrum to the other. He went so far as to refuse to subject cross burning to *any* First Amendment analysis and to style his opinion a dissent from Justice O’Connor opinion, which he viewed as an unnecessary compromise. Moreover, by many accounts it was Justice Thomas’ bold speech³⁴⁷ at oral argument that changed the tenor of the

³⁴⁶ In some cases, hate crimes laws may also “relieve prosecutors, or plaintiffs, from having to establish all the requisites of a more general offense or tort,” Greenawalt, supra note 137, at 306, or establish greater penalties than would apply under other general laws.

³⁴⁷ The exchange between Justice Thomas and Deputy Solicitor General Michael Dreeben follows:

“QUESTION: Mr. Dreeben, aren’t you understating the--the effects of--of the burning cross? This statute was passed in what year?”

MR. DREEBEN: 1952 originally.

QUESTION: Now, it’s my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and--and the Ku Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror. Was--isn’t that significantly greater than intimidation or a threat?

MR. DREEBEN: Well, I think they’re coextensive, Justice Thomas, because it is--

QUESTION: Well, my fear is, Mr. Dreeben, that you’re actually understating the symbolism on--of and the effect of the cross, the burning cross. I--I indicated, I think, in the Ohio case that the cross was not a religious symbol and that it has--it was intended to have a virulent effect. And I--I think that what you’re attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was

Justices' debate.³⁴⁸ Justice Thomas asserted forcefully that in light of the "100 years of lynching and activity in the South by . . . the Ku Klux Klan" that the sole purpose of the cross was "to terrorize a population."³⁴⁹ Whereas in R.A.V., the absence of Justice Marshall—Justice Thomas' predecessor—was "palpable,"³⁵⁰ and almost certainly dispositive, in Black, Justice Thomas unexpectedly did what his predecessor would have done: "remind[] the Justices about the centrality of the Reconstruction Amendments."³⁵¹

Justice Thomas' highly unusual and intensely personal decision to bring to bear his own experiences with racism vindicates critical race theory's advocacy of the importance of looking to individual experience and considering the victim's story. Justice Thomas opened his opinion with the words: "In every culture, certain things acquire meaning beyond what outsiders can comprehend."³⁵² In this sense, the Pin Point, Georgia native was an insider, and the other eight

intended to accomplish and, indeed, that it is unlike any symbol in our society.

MR. DREEBEN: Well, I don't mean to understate it, and I entirely agree with Your Honor's description of how the cross has been used as an instrument of intimidation against minorities in this country. That has justified 14 States in treating it as a distinctive--

QUESTION: Well, it's--it's actually more than minorities. There's certain groups.

And I--I just--my fear is that the--there was no other purpose to the cross. There was no communication of a particular message. It was intended to cause fear--

MR. DREEBEN: It--

QUESTION: --and to terrorize a population." 2002 WL 31838589, at *22-24.

³⁴⁸ See, e.g., Greenhouse, supra note 188, at A1 ("During the brief minute or two that Justice Thomas spoke, about halfway through the hourlong argument session, the other justices gave him rapt attention. Afterward, the court's mood appeared to have changed. While the justices had earlier appeared somewhat doubtful of the Virginia statute's constitutionality, they now seemed quite convinced that they would uphold it as consistent with the First Amendment."); Clarence Page, *A Burning Cross Ignites An Issue of Free Speech*, NEWSDAY, Dec. 17, 2002, at A36.

³⁴⁹ 2002 WL 31838589.

³⁵⁰ Amar, *Missing Amendments*, supra note 138, at 160.

³⁵¹ Id. at 161. "[J]ustice Marshall would no doubt have insisted [that] these lessons must be pondered by the Justices, and communicated to the people." Id.

³⁵² Black, 123 S.Ct. at 1562 (Thomas, J., dissenting).

Justices were outsiders—only Justice Thomas, the Court’s sole African-American and sole Southerner, was intimately familiar with the legacy of racial oppression underlying Virginia’s cross burning statute.³⁵³ After years of sitting silently on the sidelines during oral argument and seeming generally disinterested, Justice Thomas finally learned to assert himself.³⁵⁴ Infusing the argument with historical implications, he transformed a dry legal discussion, purportedly detached from individual experience, into a visceral debate about speech *and* equality.

At the same time, Justice Thomas’ excessive fixation on the virulence of the Klan cross ultimately led him astray. In concluding that the ban on cross burning did not even raise a First Amendment issue, he inexplicably dismissed uses of the Klan cross that are not intended to intimidate, such as those done in the presence of only Klan members. Justice Thomas’ distaste for cross burning and its ugly history—although entirely understandable—appears to have obscured his ability to see the legitimate speech issue lurking beneath the putrid practice. Although in R.A.V. he had joined an opinion reaching out to create a First Amendment problem where previous Courts had intimated there was none,³⁵⁵ in Black, he opted to jettison First Amendment analysis altogether. The symbolic, constitutionally-protected burning cross at issue in R.A.V. over time somehow

³⁵³ See Post, *Racist Speech*, supra note 4, at 312-13 (discussing the importance of judicial consideration of experiences that are foreign to the particular judge); see also Matsuda, *Victim’s Story*, supra note 11, at 2374 (“Legal insiders cannot imagine a life disabled in a significant way by hate propaganda.”).

³⁵⁴ Although Justice Thomas has gradually developed a distinct viewpoint through opinions written in the last few years, see, e.g., Scott D. Gerber, *The Strong, Silent Supreme Type*, L.A.TIMES, Dec. 29, 2002, at M5, the Black opinion appears to be a turning point. Not long after Black, he issued a dissent that was even more impassioned and highly personal, if more wrongheaded. See Grutter v. Bollinger, 123 S.Ct. at 2350 (Thomas, J., concurring in part and dissenting in part).

³⁵⁵ Cf. Amar, *Missing Amendments*, supra note 138, at 127 (noting R.A.V.’s “ambitious reconceptualization and synthesis of First Amendment doctrine”); Sullivan, supra note 1, at 104 (“[D]idn’t Justice Scalia reach out unnecessarily in R.A.V. to condemn the government’s motives . . .?”); see also Powell, supra note 3, at 81 (discussing the “extreme lengths” to which the R.A.V. Court went to privilege free speech).

became pure conduct to Justice Thomas. This transformation in perspective is difficult to explain. Justice Thomas' experiences with racial discrimination in the South obviously predated R.A.V. If anything, after more than a decade of living the relatively sequestered life of a Supreme Court Justice, he should have been more insulated from virulent racial bigotry than he was when R.A.V. was decided and he had recently and barely survived the "high tech lynching" of his confirmation hearing. In the absence of any concrete recent experience newly sensitizing Justice Thomas to the seriousness of cross burning, Black appears to demonstrate an increased willingness on his part to express a voice that reflects his distinctive racial experiences, even when that requires parting company with his conservative brethren. Although Justice Thomas' thoughts on cross burning presumably are not new, only recently has he become emboldened to speak his views and wield them to shape not just his own opinion but also the outcome of a case.³⁵⁶

This emergence is highly valuable, although it does present potential perils.³⁵⁷ Some may criticize it as tending to foster a perception that social groups can obtain justice only when they are able to seat a member on the Highest Court,³⁵⁸ but Justice Thomas' idiosyncratic perspective is far too complex and confounding to be essentialized as a "black voice" or "black vote." The true lesson of Justice Thomas' emergence is that it instructs the other Justices to think twice about residing within their own personal experiences and assumptions,

³⁵⁶ See Greenhouse, supra note 188, at A1.

³⁵⁷ See, e.g., Dahlia Lithwick, *Personal Truths and Legal Fictions*, N.Y. TIMES, Dec. 17, 2002 (suggesting that Justice Thomas might have "hijack[ed] the argument into the murk of personal experience . . . [and] d[one] violence to the disinterested, lucid distance necessary for justice to be achieved").

³⁵⁸ See id. at A35; cf. Post, *Racist Speech*, supra note 4, at 313.

which often go unstated but surely color their opinions nonetheless. Considering and expressing one's personal experiences, as Justice Thomas did in Black, does not inexorably lead that Justice or others to a particular conclusion. Nor is it, contrary to some scholars' suggestion,³⁵⁹ a racial trump card or gender veto. Rather, considering the experience of those who have actually felt discrimination requires only serious and empathetic consideration of such persons' experiences and perspectives.

Although those who have experienced life on the bottom should speak their minds, their peers should critically evaluate such opinions. This testing sometimes may lead the speaker, as well as his peers, ultimately to abandon his articulated opinion.³⁶⁰ One must be vigilant to ensure that in reflecting on his own personal experiences he is not blinded by them.³⁶¹ A judge might rule contrary to his initial impression and the apparent interests of his group because of ultimate, overriding principles that transcend his individualistic experience. By stripping away the deceptive veneer of detached neutrality that veils the personal value judgments behind many judicial opinions, the proportionate approach leads to a fuller, more concrete and deliberative process that is appropriately self-conscious.

³⁵⁹ Post, *Racist Speech*, supra note 4, at 308-09 & n.201 (discussing Iris Marion Young, *Polity and Group Difference*, 99 ETHICS, 250, 261-62 (1989)); Torrey, supra note 11, at 34 (arguing that the Fourteenth Amendment "should carry more weight than earlier amendments which, after all, were written by a few elite, white propertied, heterosexual males").

³⁶⁰ See Emerson, supra note 264, at 881 ("[A]n individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view. He must consider all alternatives, test his judgment by exposing it to opposition, make full use of different minds to sift the true from the false.").

³⁶¹ Cf. Yoshino, *Assimilationist Bias*, supra note 97, at 525-26 (discussing the panoptic effect of racism, which can lead a rational person of color to overestimate the prevalence of discrimination).

This discursive process also entails an intriguing element of trust. As Robert Post has observed, the force of victims' experiences "cannot be directly experienced and hence evaluated by members of dominant groups. Its resolution must therefore depend, to one degree or another, upon acceptance of the representations of members of victim groups. As a practical matter, therefore, what is called into question is not merely the truth of these representations, but also the trust and respect with which they are received by members of dominant groups."³⁶² Thus, the salience of the experiences of people on the bottom turns in part on the credibility of the person articulating outsider experiences. In Black, the fact that the speaker was not the NAACP or some critical race scholar writing an amicus brief, but the stolidly conservative Clarence Thomas must have carried greater weight in his fellow Justices' eyes. The fact that Justice Thomas speaks very rarely in court, apparently choosing his opportunities with great care, only heightened the drama and the persuasive impact of his speech. In the same way, the words of a law clerk that is a member of an outgroup might carry considerable weight because they are spoken in the context of a potentially close and enduring personal relationship.³⁶³ Incorporating an approach that looks to personal experiences, if understood as just one component of constitutional analysis, carries the promise of grounding the Justices' lofty legal analysis in practical reality, making the Court's decisions both more democratic and comprehensible to the public.

³⁶² Post, *Racist Speech*, supra note 4, at 312-13; see also Lawrence, supra note 4, at 435 (discussing the "double consciousness" of African-Americans: "We often hear racist speech when our white neighbors are not aware of its presence.").

³⁶³ Cf. Yoshino, *Suspect Symbols*, supra note 145, at 1753-55 (recounting conversation between a gay law clerk applicant and a judge that had recently decided a major gay rights case but did not know the meaning of the term "queer").

V. Conclusion

Unlike an approach that consistently privileges speech or equality, under the proportionate approach, the “appropriate balance between equality and freedom of expression may be a complex, shifting matrix that includes several different forces”³⁶⁴ Although a self-contained model for resolving speech-equality conflicts would be desirable, it would also necessarily be facile and anachronistic in constitutional jurisprudence. What we can learn, however, is the importance of resisting the temptation to privilege one constitutional provision over another. A holistic approach to the Constitution that invests the First and Fourteenth Amendments with equal dignity requires otherwise. In many cases, a close look at each asserted interest, examined against the social history and context of the claim, would reveal that one side of the equation is less substantial. The hard cases remain, but I have attempted to show that R.A.V. and Black, when analyzed with the proportionate approach, do not reside within the small set of truly hard cases.

The Boy Scouts case is more difficult, in part because of factual questions the Court chose not to explore. Even if one agrees with the result, an opinion that recognized the equality considerations at work elsewhere in the Court’s case law and that reflected the actual experiences of people like James Dale would be more legitimate and deserving of respect than the terse analysis offered by the Boy Scouts majority. Paying close attention to context and history, listening to the experiences of the individual parties and respecting the important role that state

equality-based laws may play in our system can help correct the Court's lopsided approach to equality-speech intersections.

³⁶⁴ Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 749 (1993).