PENN STATE
LAW REVIEW

Is Hate Speech Becoming the New Blasphemy? Lessons from an American Constitutional Dialectic

Justin Kirk Houser*

Table of Contents

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2010; B.A., The Pennsylvania State University, 2007. I would like to express appreciation for the support of my family, especially my parents, Ralph and Catherine Houser, and my grandparents, Ralph and Shirley Houser and Warren and Julia Breon. I would like to thank Professor Larry Catá Backer for his tremendous support throughout my law school career and the writing of this Comment. I also wish to thank my good friend, mentor, and former professor, E. Calvin Golumbic, for the lifelong inspiration that he has given me.

BACKGROUND

INTRODUCTION

On May 10, 1836, as they were going about their daily business in New Castle County, Delaware, numerous citizens were shocked and alarmed to hear Thomas Jefferson Chandler exclaim in a loud voice, "The Virgin Mary was a whore, and Jesus Christ was a bastard!"[1] The moral outrage of the community was directed at Chandler, and he was arrested.[2] Following conviction in county court, he appealed his case to the Delaware Court of General Sessions.[3] The court affirmed Chandler's conviction, and upheld the constitutionality of the crime of blasphemy.[4] The court found that one who attacked the doctrines of Christianity "struck at the foundation of . . . civil society," because "the religion of the people of Delaware is *christian*."[5] The court opined that the people had a right to enjoy their chosen religion "without interruption or

1. *See* State v. Chandler, 2 Harr. 553, 1837 WL 154 (Del. Gen. Sess. 1837), at *1.
2. *Id*.
3. *Id*.
4. *Id*. at *14.
5. *Id*. at *11.

disturbance," for which "they may claim the protection of law guarantied [sic] to them by the constitution itself."[6]

On April 11, 2006, mourners attending the funeral of Cpl. David A. Bass, who had been killed in Iraq while serving with the U.S. Armed Forces, had to contend with a similar shocking outrage.[7] Like attendants at several other military funerals throughout the United States, they were confronted by a band of hostile protesters.[8] The Rev. Fred Phelps, pastor of the Westboro Baptist Church in Topeka, Kansas, and members of his congregation of approximately seventy-five individuals, most of whom are related by blood or marriage, were on hand to protest the funeral.[9] They held signs proclaiming, "Thank God for Dead Soldiers" and "Thank God for I.E.D.s," attempting to advance their message that the United States was under divine judgment for its tolerance of homosexuality.[10] Similar protests across the nation have been met with varied responses.[11] The protests were branded as the actions of a hate group by the Southern Poverty Law Center.[12] Groups such as the Patriot Guard Riders were formed to travel to funerals on an as-needed basis to drown out Westboro's protests by standing between the protestors and the mourners.[13] The church's plans to protest the funerals of nine murdered Amish girls in Lancaster County, Pennsylvania, in October 2006, were abandoned when a nationally-syndicated radio host brokered a deal to allow unfettered access to air time for church members instead.[14] Many states and municipalities passed laws banning or limiting such demonstrations at military funerals.[15] A Tennessee State Representative opined, "When you have someone who has given the ultimate sacrifice for their country, with a community and the family grieving, I just don't feel it's the appropriate time to be protesting."[16]

6. *Chandler*, 1837 WL 154 at *11.

7. Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, THE NEW YORK TIMES, Apr. 11, 2006.

8. *See id*.

9. *Id*.

10. *Id*.

11. *Id*.

12. SPL Center.org: Hate Groups Map, http://www.splcenter.org/intel/map/type.jsp?DT=26 (last visited Oct. 20, 2009).

13. Alvarez, *supra* note 7.

14. Alison Hawkes, *Fringe Group's Threats Gain Airtime*, THE DOYLESTOWN INTELLIGENCER, Oct. 9, 2006, at B1.

15. Alvarez, *supra* note 7.

16. *Id*. Apparently undaunted, the Westboro Baptist Church continues to spread their controversial message by raising constitutional questions; in December, 2008, they sought to place a sign proclaiming "Santa Claus Will Take You To Hell" along with other holiday displays in the Washington State Capitol Building in Olympia, causing disruption in state government for weeks. *See* Brad Shannon, *New Capitol Display Sought With Santa 'Hell' Warning*, THE SEATTLE TIMES, Dec. 10, 2008.

Although the factual background has changed over time, the conflict between freedom of expression and equal protection, two oft-cited pillars of modern American Constitutionalism, rages on. This conflict has developed in numerous theaters; on one hand, much has been said in the abstract about limitations on personal freedom in the interest of national security.[17] In another theater, however, that of hate speech, the United States must also address its relationship to the growing international consensus in favor of regulating undesirable speech to protect core social values.[18] This tension has emerged in several contexts on the national and world stage, including recent disputes over the ability of white supremacist groups to publicly burn crosses,[19] the ability of a radical minister and his followers to protest the funerals of American soldiers,[20] and the ability of pastors to preach sermons condemning homosexuality.[21]

There is a temptation to view this issue as a novel problem, a product of our own times, to be addressed using only contemporary insights and the tools of present consensus. This approach, however, largely overlooks the relationship between the *development* of the idea of the preeminence of freedom of speech, America's unique contribution to that development, and how this process can inform nationally and globally appropriate policies. As a part of this process, the rise and fall of secular blasphemy regulation speaks intelligently and helpfully to the current hate speech debate.

This Comment will attempt to shed light on how the United States' prior experience with blasphemy speech regulation can positively inform current approaches to hate speech. Important international comparisons will also be made where appropriate. In part one, the Comment will analyze the connection between the history of blasphemy regulation and

17. *See, e.g.,* Kyle Hawkins, *Gagging on the First Amendment: Assessing Challenges to the Reauthorization Act's Nondisclosure Provision*, 93 MINN. L. REV. 274 (2008) (discussing the system of nondisclosure required under "national security letters"); Derigan A. Silver, *National Security and the Press: The Government's Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. & P'Y 447 (2008).

18. The trend toward consideration of international law within American law has been observed even within opinions of the U.S. Supreme Court. This subject has been the focus of intense debate, and will likely remain so for some time. *See, e.g.*, David G. Savage, *A Justice's International View*, L.A. TIMES, Jun. 14, 2008, at A11 (reporting reactions to Supreme Court Justice Anthony Kennedy's references to international law in the decision in Boumediene v. Bush, 128 S.Ct. 2229 (2008)).

19. *See* Virginia v. Black, 538 U.S. 343 (2003).

20. *See Judge: Church that Protests Funerals Must Pay $5M*, YORK DISPATCH (York, Pa.), Feb. 26, 2008, § Local (addressing efforts of Westboro Baptist Church to picket soldiers' funerals).

21. *See Pastor Acquitted of Hate Speech*, MIAMI HERALD, Nov. 30, 2005, at 17A.

the development of hate speech regulation. First, it will review the history of blasphemy and its regulation within Europe and post-Revolutionary America. Specifically, the Comment will emphasize how the justification for blasphemy regulation evolved in tandem with state's conception of its role vis-à-vis its subjects and citizens. Second, it will review the rise of the concept of "hate speech" within American society, and the various judicial and extrajudicial attempts to address it. This review will necessarily consider the extent of the contemporary practice of speech valuation and regulation within the United States, in light of the tension between the American concepts of freedom of expression and equal protection, represented by the guarantees of the First and Fourteenth Amendments to the U.S. Constitution.

The second part of this Comment will present a summary of the current state of Constitutional jurisprudence with respect to the freedom of speech in general, and hate speech in particular. It will highlight the potential impacts of this jurisprudence on salient issues within the United States, such as the passage of the funeral protest laws.

The third part of this Comment will compare the American position, as it has presently evolved, with other international approaches to speech regulation. Three approaches to justifying the regulation of speech, in terms of a society's fundamental self-understanding, will be examined and addressed. These approaches, classified as traditional paternalism, modernist paternalism, and libertarianism, will be briefly examined in the context of the societies in which they flourish. Finally, the United States' experience with blasphemy regulation will demonstrate that its evolved approach, called qualified libertarianism, represents the most appropriate course for future speech regulation. This approach has not only served the United States well in the past, but represents a unique and crucial contribution to future international debate over hate speech regulation.

I. HISTORICAL OVERVIEW

Over the course of centuries, political justifications for regulating speech have developed with the conception of the role of the state.[22] This development can be seen in the regulation of blasphemy, which underwent several metamorphic changes in practice as justifications for regulation shifted.[23] Practical applications of blasphemy regulation, in

22. *See infra* Part I.A for a complete explanation of this development.

23. *Compare* An act for the more Effectual Suppressing of Blasphemy and Profaneness, 1698, 9 Wil. III c. 35, *reprinted in* 7 Statutes of the Realm 409 (1820) (setting out a strict crime of blasphemy on the basis of offending an established state theology), *with* State v. Chandler, 2 Harr. 553, 1837 WL 154 (Del. Gen. Sess. 1837) (defending blasphemy regulation as a bulwark against breaches of the peace).

turn, influenced novel theories of the role of speech regulation.[24] The development of these theories created the environment in which the present judicial and extrajudicial possibilities for the regulation of hate speech are debated.[25] It is therefore imperative to understand the universe of reference to formulate a solution that is relevant, practical, and consistent.

A. Blasphemy

Blasphemy, and its regulation, antedates the establishment of the United States of America, and, indeed, modern European civilization.[26] The western conception of blasphemy is rooted in the traditions of the three monotheistic faiths, Judaism, Christianity, and Islam.[27] In order to accurately characterize the development of American blasphemy law, I will look first at its historical origins in Western Europe. A working knowledge of the shifting justifications for blasphemy regulation is essential to understanding its application in the American colonies and, later, the United States.

1. Blasphemy as a Crime Against the Universal Church

The development of blasphemy law in Europe closely followed the emergence of a Christian society.[28] Medieval Europe developed around the central idea of a sovereign Christian authority, expressed in two distinct but often overlapping powers, ecclesiastical authority in the church and temporal authority in the state.[29] This ordering of society along religious lines ensured a baseline of stability across pre-Reformation Europe; the disputes chronicled in history, concerning the

24. *See generally* State v. Chandler, 2 Harr. 553, 1837 WL 154 (Del. Gen. Sess. 1837).

25. *See infra* Part I.A.

26. *See, e.g.*, *Leviticus* 24:16 (establishing death by stoning as the punishment for blasphemy); *Luke* 24:10 (teaching that blasphemy of the Holy Spirit is unforgivable); QURAN 9:47 (indicating punishment for those who return to blasphemy).

27. *See, e.g., Leviticus* 24:16, *supra* note 26, *Luke* 24:10, *supra* note 26, and QURAN 9:47, *supra* note 26.

28. *See* David Knowles, *Church and State in Christian History*, J. CONTEMP. HIST., Oct. 1967, at 5-8 (tracing the development of Christian Europe from the time of Constantine through the Middle Ages). *See also* Gilbert Huddleston, *Pope St. Gregory I ("the Great")*, THE CATHOLIC ENCYCLOPEDIA (1909), *available at* http://www.newadvent.org/-cathen/06780a.htm (citing Dudden for the proposition that from the time of Pope St. Gregory the Great (d. 604), the Pope "acted on the assumption that all were subject to the jurisdiction of the Roman See").

29. Knowles, *supra* note 28 (arguing from Pope St. Gregory's epistles that he taught of a unified commonwealth, with absolute ecclesiastical and temporal governance, embodied in a pope and emperor, "each supreme in his own department").

hierarchy of power among rulers vis-à-vis each other and the pope, all played out within this universe of thought.[30]

In England during this era, the crime of blasphemy was largely subsumed under the umbrella crime of heresy, and represented an offense against the Gregorian concept of the root of state authority.[31] When John Wycliffe, the proto-Reformer, and his followers, the "Lollards," suggested in the Fourteenth Century that this ordering of the state might be susceptible to question, the political-religious apparatus seized the opportunity to define the mechanism for blasphemy prosecutions.[32] Since the time of the Norman Conquest, a charge of heretical blasphemy had been tried before the ecclesiastical courts, which had authority to determine the orthodoxy of an individual's doctrine and conduct.[33] Nevertheless, by the 14th century, although guilt was determined by the ecclesiastical courts, punishments were meted out by the state.[34]

The tumultuous Protestant Reformation (1517-1648) altered the Gregorian justification of political existence in Europe forever, and laid the foundation for blasphemy regulation that would reach America's shores.[35] The latter part of this period, with its extensive religious wars, redefined government in both Western Europe and in the British Isles.[36] As these wars ended, a new society gradually emerged.[37] It was no longer defined by two poles of sovereign authority, but by a combination

30. *See, e.g.*, the tensions expressed in such documents as the Canons of the First Lateran Council (1123) between papal and secular authority. *See also* William McCready, *Papal Plenitudo Potestatis and the Source of Temporal Authority in Late Medieval Papal Hierocratic Theory*, 48 SPECULUM 654 (1973) (discussing the friction between temporal and ecclesiastical leadership and the theory of plenitude potestatis advanced by Pope Innocent III (reigned 1198-1216), in which the state was sometimes seen as an arm of the Church).

31. *See* LEONARD W. LEVY, BLASPHEMY 75-81 (1993).

32. *Id.* at 79.

33. *Id.* at 75-76.

34. *Id.* at 80.

35. *Cf.* MARTIN LUTHER, ON SECULAR AUTHORITY (1523), *reprinted in* THE PROTESTANT REFORMATION, at 43-52, 55-61 (Hans J. Hillerbrand trans. 1968), *available at* http://www.qub.- ac.uk/ iccj/sdixon/REFORMAT/THEOLOGO/HILL6224.HTM, *with* Martin Luther, *A Treatise on the Power and Primacy of the Pope*, THE BOOK OF CONCORD (1537), *available at* http://bookofconcord.org/-treatise.php (taken together, arguing that government authority is not a co-extensive power with an absolute spiritual ruler over a uniformly Christian state).

36. *See generally* John E. Drabble, *Mary's Protestant Martyrs and Elizabeth's Catholic Traitors in the Age of Catholic Emancipation*, 51 CHURCH HISTORY 172-85 (1982) (demonstrating the long-lasting governance effects of religious tension in England); Myron P. Gutmann, *The Origins of the Thirty Years' War*, 18 J. INTERDISCIPLINARY HIST. 749-770 (1988) (explaining the relationships among nations that gave rise to the Thirty Years' War, and discussing its effects on European civilization).

37. *See* Gutmann, *supra* note 36, at 749.

of the powers of sacred and secular into the nation-state and the national church.[38] On the continent, with the Thirty Years' War and the Peace of Westphalia (1648), spiritual authority was fractured and local rulers were free to adopt one of a limited number of confessions of faith to be applied to their subjects, whether Roman Catholic, Evangelical (Lutheran), or Calvinist (Reformed).[39]

While the Thirty Years' War raged on the Continent, England was experiencing its own Civil War (1642-1649).[40] That struggle, in which the Parliamentarians fought the ostensibly political excesses of King Charles I, has been characterized broadly as a proxy war between Anglo-Catholic (Royalist) and Protestant (Puritan) schools of thought.[41] Although the specific circumstances behind this war in England diverged from those on the continent, they can be regarded as a similar, albeit delayed, catharsis to the English Reformation itself, which was uniquely imposed from above by King Henry VIII in 1534.[42] Following its continental siblings, British society, after the Restoration of 1660 and the Glorious Revolution of 1688, firmly established Anglican Protestantism as the dominant state religion; there was limited tolerance for Protestant dissenters, but extensive disenfranchisement of Roman Catholics.[43]

In England as on the Continent, the lack of tolerance outside the nationally established religion demonstrated the rise of the idea of national sovereignty, including sovereignty over religion.[44] In other words, rather than a universal acquiescence to one true church which was the source of society's order, the national church was now a manifestation of the state, which could establish one of a limited number

38. *See* Instrumentum Pacis Caesareo-Suecicum Sive Osnabrugense [Treaty of Westphalia], Oct. 24, 1648, *reprinted in* EMIL REICH, SELECT DOCUMENTS ILLUSTRATING MEDIEVAL AND MODERN HISTORY 4 (1905), *translated in* The Avalon Project, *available at* http://avalon.law.yale.edu/17th_century/west-phal.asp (1648) (recognizing the rights of various principalities to co-exist in a Christian peace divided along confessional lines).

39. *Id.* This concept has been expressed using the Latin phrase *cuius regio, eius religio* ("whose rule, whose religion").

40. *See generally* SAMUEL R. GARDINER, HISTORY OF THE GREAT CIVIL WAR, 1642-1649 (London, Longmans, Green, & Co., 1886) (characterizing the war as a result of irreconcilable religious and political difficulties between the followers of Hooker (Anglican theologian) and the followers of Calvin (Puritan theologian)).

41. *See generally id.*

42. (First) Act of Supremacy, 1534, 26 Hen. 8, c. 1. This Act established the supremacy of the civil laws over the church, effectively nationalizing the Church of England. While Henry thus accomplished for England in one act what took myriad wars and treaties elsewhere, the lack of popular involvement led to a decisive realignment of society along Reformation principles, including tolerance, a century later.

43. *See* ALEXANDRA WALSHAM, CHARITABLE HATRED: TOLERANCE AND INTOLERANCE IN ENGLAND, 1500-1700 7 (2006) (outlining, inter alia, developments in religious tolerance in mid- to late-17th century England).

44. *See, e.g.,* (First) Act of Supremacy, 1534, 26 Hen. 8, c. 1.

of acceptable varieties of religion.[45] The aftermath of the Reformation essentially turned on its head the medieval theory that the state was an expression of the church.[46] Although documents such as the Peace of Westphalia assured some degree of toleration, they were frequently disregarded.[47]

Shaken from the steady, millennium-old moorings of Gregory the Great's duality theory of governance, Western Europe grasped for a new justification to order its society.[48] The passage of a century and several wars legitimized the confessional model of international governance, which removed ultimate temporal and spiritual authority from the church and reposed it in the state.[49] Accordingly, the state needed and assumed power, as Luther had predicted, to restrain the activities of those who sought to undercut its legitimacy.[50] Under this conception, blasphemy prosecution was essential as a defense against attacks on the state's justification for its own existence.[51] The stage was now set for the renegotiation of the basis for the crime of blasphemy.

2. Blasphemy as a Crime against the Authority of the State

In this new worldview, blasphemy continued to be perceived as a crime against the foundation of the state's existence.[52] As stated above,

45. *See id*.

46. *See* McCready, *supra* note 30 at 654.

47. The French King Louis XIV's revocation of the Edict of Nantes in 1685, for example, led to mass "conversion" and emigration to other parts of the continent by the French Huguenot Protestants. Louis XIV, Edict of Fontainebleau, Oct. 22, 1685, *reprinted in* ISAMBERT, RECUEIL GENERAL DES ANCIENNES LOIS FRANCAISES XIX 530, *reprinted in* J.H. ROBINSON, 2 READINGS IN EUROPEAN HISTORY 180-83 (J.H. Robinson trans., 1906), *available at* http://huguenotsweb.free.fr/english/edict_1685.htm. Throughout Europe, merciless persecution of the Anabaptists continued into the early 18th century, resulting in almost complete migration of that group to North America. For an excellent series of first-hand accounts of the persecution of Anabaptists by state churches of all confessions in continental Europe, particularly Switzerland and the Netherlands, during the 16th and 17th centuries, see THEILEMAN J. VAN BRAGHT, THE BLOODY THEATER OR MARTYRS MIRROR OF THE DEFENSELESS CHRISTIANS (1660, Eng. Reprint 2002).

48. *See* Instrumentum Pacis Caesareo-Suecicum Sive Osnabrugense [Treaty of Westphalia], Oct. 24, 1648, *reprinted in* EMIL REICH, SELECT DOCUMENTS ILLUSTRATING MEDIEVAL AND MODERN HISTORY 4 (1905), *translated in* The Avalon Project, available at http://avalon.law.yale.edu/17th_century/west-phal.asp (1648) (recognizing the rights of various principalities to co-exist in a Christian peace divided along confessional lines).

49. *See* REICH, *supra* note 48 at 4.

50. *See* LUTHER, ON SECULAR AUTHORITY, *supra* note 35 at 43-52, 55-61.

51. *See id*.

52. *See* ALEXANDER ADAM SEATON, THE THEORY OF TOLERATION UNDER THE LATER STUARTS 30-35 (1910) (setting forth the post-Reformation shift from state as an arm of the church to church as an arm of the state, and providing numerous examples of political instabilities in 16th and 17th century England that were based in religious differences).

however, this existence was no longer based on a Gregorian duality that afforded coequal authority to the church.[53] Now, authority rested entirely in the state as intermediary between God and subjects, according to the principle of the state as confessional sovereign.[54] The monarch of Britain was proclaimed "Defender of the Faith" and recognized as the head of the Church in England and Wales, Ireland, and Scotland, whenever he or she should be located within the realm.[55] It followed that an offense against the state- church was also an offense against the state.[56]

This principle is seen in early case law. In 1649, at the close of the English Civil War, John Lilburne was tried with treason.[57] In adjudicating this case, the court noted not only that "the law of England is the law of God," but emphasized its reciprocal, "The law of God is the law of England."[58] In other words, England's laws were an expression of the Divine Law.[59] Because of this intertwined foundation, an attack against one principle was treasonous as against the other.[60]

This theory of governance was also shown in the long, gradual path by which Dissenters, those outside the Established Church, were recognized in England during this period.[61] Notably, Puritans, Quakers, Baptists and other Non-Conformists were viewed, at best, as inconsistent with the proper ordering of the state; at worst, they were viewed as subversive and treasonous.[62]

Blasphemy cases during this period show the implementation of this theory of governance, and that blasphemy was prosecuted as an offense

53. *See supra* Part I(A)(1).

54. *See* SEATON, *supra* note 52 at 30-35.

55. J. S. BREWER, THE REIGN OF HENRY VIII: FROM HIS ACCESSION TO THE DEATH OF WOLSEY 405-06 (London, John Murray, 1884). This appellation, *Fidei Defensor*, was actually granted by Pope Leo X to King Henry VIII in 1521, before the English Reformation, when the duality of power concept was at its zenith. Although the title was revoked by Pope Paul III after the break between England and Rome, it was maintained by Henry and has been perpetuated by all British monarchs to this day as a representation of the monarch's role as head of the Established Church. *Id.*

56. *See* SEATON, *supra* note 52 at 30-35.

57. A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS UPON HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II TO THE REIGN OF KING GEORGE II 1307-11, 3d ed. (London, John Walthoe, 1742) [hereinafter COLLECTION OF TRIALS].

58. *Id.*; W. S. HOLDWORTH, 8 A HISTORY OF ENGLISH LAW 403 n.5 (1926).

59. *See* COLLECTION OF TRIALS, *supra* note 57, at 1307-11.

60. *See id*.

61. *See generally* SEATON, *supra* note 52.

62. For a detailed discussion of the development of toleration toward Dissenters in England, *see generally* SEATON, *supra* note 52. *See also* An Act for Exempting Their Majestyes Protestant Subjects dissenting from the Church of England from the Penalties of certaine Laws [hereinafter Dissenters Exemption], 1688, 1 Wil. & Mary c. 18 (1688), *reprinted in* 6 Statutes of the Realm 74 (1819).

against the foundation of the state.[63] In 1676, in *Taylor's Case*,[64] Lord Justice Hale characterized blasphemy as not only "a crime against the laws, State and Government," insofar as "Christianity is parcel of the laws of England," but also stated that to blaspheme "is to dissolve all those obligations whereby the civil societies are preserved."[65]

In 1698, Parliament passed the Blasphemy Act, which established numerous civil restrictions on those who, having been "educated in or at any time made Profession of the Christian religion," prohibiting them from denying the doctrine of the Trinity, asserting that there are more gods than one, or denying the authority of the Old and New Testaments.[66] This Act, although consistent with a governmental desire to repress dissent among the more radical nonconformists, Deists, and atheists, was rarely enforced.[67]

Just thirteen short years after the decision in *Taylor's Case*, however, the Toleration Act of 1689 represented a decisive crack in the post-Reformation confessional model of state legitimacy.[68] In the century that followed, additional efforts at toleration not only broadened freedom of speech and worship, but weakened the conception of the state as absolute guardian of the welfare of its subjects.[69] After an extended struggle, liberalization granted extensive rights not only to nonconforming Protestants, but also to Roman Catholics and Jews in the early 19th century.[70]

Within this period of history, sweeping changes occurred in the self-definition of the state vis-à-vis blasphemy regulation.[71] Toleration of religious opinions contrary to the established religion represented an implicit acknowledgement, at least on a practical level, that society could survive even if all individuals did not conform to a national norm.[72] Although not a complete acknowledgement, this shift suggested that society was a collection of individuals, rather than an absolute order which provided for the well-being of its subjects.[73] Accommodation of individuality and notions of popular sovereignty and the common weal

63. *See generally* Taylor's Case, 1 Vent. 293, 86 Eng. Rep. 189 (K.B. 1676).
64. *Id.*
65. *Id*.
66. An act for the more Effectual Suppressing of Blasphemy and Profaneness, 1698, 9 Wil. III c. 35, *reprinted in* 7 Statutes of the Realm 409 (1820).
67. LEVY, *supra* note 31, at 326 (1993).
68. Dissenters Exemption, *supra* note 62.
69. *See generally* LEVY, *supra* note 31.
70. *See* TODD M. ENDELMAN, THE JEWS OF GEORGIAN ENGLAND 1714-1830 44-47 (1999).
71. *See generally* LEVY, *supra* note 31.
72. *See generally id*.
73. *See generally id*.

were arising, evidenced in the growing power of Parliament in Britain.[74] A conception of the state as an outgrowth of individual and collective autonomy formed the core of these beliefs, represented chiefly in the social contract theory developed by Hobbes, Locke, and Rousseau.[75]

As the very justification for the ordering of society shifted once more, the justification for blasphemy regulation was again orphaned.[76] It sought a new justification, and found it in the republican concept of public morality.

3. Blasphemy as a Crime Against Public Morals and its Transplantation to America

When Sir William Blackstone issued his celebrated Commentaries on the Laws of England in 1765-1769, his characterization of the crime of blasphemy was based in public morals.[77] Predictably, Blackstone reaffirmed the traditional black-letter statement that blasphemy "is punishable at common law by fine or imprisonment; for [C]hristianity is part of the laws of England."[78] Blackstone further justified the state of the law, however, according to the theory that

> [C]rimes and misdemeanors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in its social aggregate capacity. . . . [H]uman laws can have no concern with any but social and relative duties; being intended to regulate only the conduct of man . . . considered as a member of civil society.[79]

The prosecution of blasphemy, then, was acceptable only if the impact of blasphemy upon society had such a negative effect as to threaten its very foundation.[80] For Blackstone, although blasphemy was

74. JOHN CALYER RANNEY, GWENDOLEN MARGARET CARTER, AND JOHN H. HERZ, MAJOR FOREIGN POWERS 23 (1957).

75. *See generally* JOHN LOCKE, THE TWO TREATISES OF GOVERNMENT (Yale U. Press 2003) (1689); THOMAS HOBBES, LEVIATHAN (Simon & Schuster 1997) (1651); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762) (Yale U. Press 2002). In addition to their influence on governance in the British Isles, it is useful from a comparative perspective to review the practical continental policies influenced by these philosophies, such as the benevolent dictator model adopted by Emperor Joseph II of Austria during the 1780s, and the "Declaration of the Rights of Man" adopted in Revolutionary France in 1789.

76. *See infra* Part I.A.3.

77. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *69-70.

78. *Id.*

79. *Id.*

80. *See id*.

essentially a religious crime, its "bad example and consequence" affected "the law of society" sufficiently to justify its regulation.[81]

Blackstone's effort to provide an effects-test justification for blasphemy regulation did not go uncriticized.[82] One of the newly-enfranchised class, a dissenting minister named Philip Furneaux, challenged Blackstone's entire justification for continued blasphemy regulation.[83] Although he drew on the ideas of those before him, Furneaux was the first prominent proponent of a pure market-based approach to free speech with reference to religious toleration.[84] Throughout his "Letters to the Honourable Mr. Justice Blackstone," Furneaux remonstrated against the existence of laws that punished spiritual offenses, including blasphemy.[85] Furneaux had a unique ethos in his argument.[86] Although he was a devout Christian and appreciated the truths of the doctrines that the state sought to uphold, as a dissenter, he had struggled to obtain equality under many of these statutes respecting the Established Church.[87]

Furneaux used a two pronged attack against religion-based category of laws, including blasphemy.[88] Using the weakened justification for the state's prerogative over religion, he attacked state regulation of spiritual crimes, whose punishments belonged to a "future world."[89]

More significantly, however, Furneaux argued for a market regulation of offenses that threatened society's religious sensitivities.[90] He argued, forcefully, that a religion grounded in truth—as he believed the Christian religion to be—was capable of defending itself against its enemies without recourse to the law.[91] According to Furneaux, blasphemers would be answered with theologically correct arguments, and their aberrant behavior would destroy their credibility with the public without a need for legal intervention.[92] Moreover, Furneaux argued, legal intervention might only arouse the curious and contribute to the success of the blasphemer's cause.[93] Furman advocated state

81. *Id.* at 69.
82. LEVY, *supra* note 31, at 327.
83. *Id.* at 327.
84. *Id.* at 328.
85. *Id.* at 327-30.
86. *See id*. at 327.
87. *See* LEVY, *supra* note 31 at 327 (showing that Furneaux had argued for dissenters' rights in previous cases and was capable of memorizing entire speeches to prove his point).
88. *Id.*
89. *Id*. at 328.
90. *Id*. at 329.
91. *Id*.
92. LEVY, *supra* note 31 at 329.
93. *See id*.

intervention only in the case of "overt acts that adversely affected the public peace."[94]

The dueling perspectives of Blackstone and Furneaux represent the tensions between the emerging nature of the state and its reflection in speech regulation. On the one hand, blasphemy regulation was justified as necessary to preserve public morals, public order, and to guard the people against that which would provoke them to breach the peace.[95] In this conception, the state acted as a moral guardian of the people, achieving an optimum result through planning and regulation.[96] On the other hand, blasphemy regulation was unjustifiable as an impermissible restraint on the development of society and the strengthening of its values through rigorous testing.[97] In this conception, the state acted as a facilitator of the organic growth of society, which could be trusted to advance according to its own devices.[98]

As American common law developed following the Revolution and separation from England, fundamental decisions had to be made concerning the applicability of the underlying rationale for blasphemy legislation in light of Constitutional guarantees of freedom of religion and the prohibition of an "establishment of religion."[99] Blasphemy's first test in the United States came with *People v. Ruggles*,[100] which sought to maintain the former justifications under the new regime.[101] The oft-cited holding in this case, that the state's interest in prosecuting blasphemy existed on the basis that Christianity was part of American common law, overlooks the lessons contained in the underlying analysis.[102] In determining whether Ruggles' conduct of "wickedly, wantonly and maliciously uttering, 'Jesus Christ is a bastard, and his mother must be a whore'" was punishable at law, the *Ruggles* court had to reach the threshold issue of whether blasphemy constituted a crime at the common law and, if so, on what basis.[103]

Ruggles argued that blasphemy regulations, which had been recognized as part of English common law, were implicitly abrogated following the American Revolution by the disestablishment of the national church.[104]

94. *Id.* at 328.
95. *See generally id*.
96. *See generally id.*
97. *See* LEVY, *supra* note 31.
98. *See generally id.*
99. *See* U.S. CONST. amend. I.
100. People v. Ruggles, 8 Johns. 290, 290 (N.Y. Sup. Ct. 1811).
101. *Id.* at 290.
102. *Id.*
103. *Id.*
104. *Id.*

Implicit in Ruggles' argument was the acceptance of Furneaux's overt acts test: that speech of a religious nature ought not be criminal at all if there is no overt act that immediately harms society.[105] Ruggles further argued that the protection of freedom of religion permitted him to express the viewpoints of another religion which would, if necessary, deny fundamental tenets of Christianity such as the virgin birth.[106] In short, Ruggles sought to establish that the paramount object of American governance was not the direct maintenance of the state, per se, through the regulation of its citizens welfare; rather, it was to serve as a protection of individual rights.[107]

In rejecting these arguments, the court retreated even beyond the safety of Blackstone.[108] It accused Ruggles of declaring moral equivalency between New York and "savage tribes and semibarbarous nations," and advocating for the dangerous excesses of Revolutionary France.[109] The court declared that, indeed, the basic conception of Christianity had been incorporated into American common law.[110] Moreover, as that religion formed the basis of social norms, attacks against Christianity's founder could be prohibited even apart from an establishment of religion.[111] These prohibitions were to protect civilized society from "a gross violation of decency and good order," and to restrict the blasphemer's ability to "corrupt the morals of the people."[112] In forming these opinions, the court in Ruggles was particularly solicitous of the "virtuous part of the community" and the "tender morals of the young."[113] The court implicitly adopted Blackstone's theory that the protection of community decency and social order justified regulation of blasphemy against the majority's religious culture.[114] For this reason, the court declared that the blasphemy statute did not prevent equivalent

105. *See Ruggles*, 8 Johns. at 290 (Ruggles argued that a constitutional reference to "licentiousness," in the provision that ostensibly justified the legislation, "refers to conduct, not opinions").

106. *Id.*

107. *See id.*

108. *See id*.

109. *Id.* (noting with respect to France that "none of the institutions of modern *Europe,* (a single and monitory case excepted,) ever hazarded such a bold experiment upon the solidity of the public morals" (emphasis in original)).

110. *Ruggles*, 8 Johns. at 290 (curiously holding that "Such offences have *always* been considered independent of any religious establishment or the rights of the church. They are treated as affecting the essential interests of civil society." (emphasis added))

111. *See id*. (stating that, "The people of this state, in common with the people of this country, profess the general doctrines of christianity, as the rule of their faith and practice," and reasoning therefore that "whatever strikes at the root of christianity, tends manifestly to the dissolution of civil government.")

112. *Id.*

113. *Id.*

114. *See id.*

statements against other religions, such as "the religion of Mahomet or the grand Lama."[115]

Even in a land without an established religion, the *Ruggles* court had come down plainly on the side of permitting blasphemy prohibition to ensure a productive and harmonious society.[116] The stability of the public, as the source of power within the new nation, was predicated on state protection of its religious scruples.[117]

Within its decision, however, the court recognized an important delineation of what constituted "blasphemy" and could be legitimately regulated.[118] It emphasized that Ruggles' blasphemous speech was "uttered in a *wanton manner* . . . with a *wicked and malicious disposition*, and not in a serious discussion upon any controverted point in religion."[119] According to the court, had the phrase been uttered by "learned men" in a "dispute upon particular . . . points," it would have been acceptable.[120]

The court was careful to draw a fine line between what it called "popular" blasphemy and "legal" blasphemy, as only the latter was punishable at law.[121] Legal blasphemy seems to have involved speech that, in the view of the court, was devoid of value.[122] Popular blasphemy, although it might sound the same to the uninformed listener, was permitted in that it had value in order to advance scholarly debate about "controverted points."[123] It did not serve to undercut society's moral norms, and was therefore not subject to regulation.[124]

The next test for blasphemy came eleven years later, in Pennsylvania.[125] In *Updegraph v. Commonwealth*, the Pennsylvania Supreme Court took great pains to decide what it termed "the question": whether Christianity was incorporated into the common law.[126]

The court answered this question in the affirmative after engaging in a lengthy discourse focusing on the merits of the Christian religion.[127] Like the New York court in *Ruggles*, however, the *Updegraph* court

115. *Ruggles*, 8 Johns. at 290.
116. *See id*.
117. *See id*.
118. *See id*.
119. *Id*. (emphasis added).
120. *Ruggles*, 8 Johns. at 290.
121. *Id.*
122. *See id.*
123. *See id*.
124. *See id*.
125. Updegraph v. Pennsylvania, 1824 WL 2393 (Pa. 1824).
126. *Id*. at *5.
127. *See id.*

sought to determine whether the crime of blasphemy had a place in the new republic.[128]

In his argument, Updegraph first claimed that the freedom of religion inherent in the Pennsylvania Constitution was inconsistent with a prohibition of blasphemy.[129] In the alternative, Updegraph argued that, even if blasphemy did exist at common law in Pennsylvania, his comments did not legally constitute blasphemy, because they were made as a "discussion" in a "deliberative assembly," during the course of a public debate.[130]

The court found for Updegraph on a technicality; his indictment did not include the word "profanely."[131] Nevertheless, the court concluded that Christianity was part of the common law.[132] As such, it could be protected by prohibitions against "atheism, blasphemy, and reviling the Christian religion."[133] According to the court, however, within the scope of Christian teaching, "Bare non-conformity is no sin."[134] Fundamental protection of Christian principles, without regard to denominational considerations, were essential, for without them, "no free government can long exist."[135] The court reasoned that, without these protections, "the dangerous temporal consequences likely to proceed from the removal of religious and moral restraints" would be legion and uncontrollable.[136]

Echoing Blackstone, the court held the ultimate basis for such moral restraints was "to preserve the peace of the country by an outward respect to the religion of the country."[137] The court held, "Every immoral act is not indictable, but when it is destructive of morality generally, it is, because it weakens the bonds by which society is held together, and government is nothing more than public order."[138]

128. *See id.*
129. *Id.*
130. *Updegraph*, 1824 WL 2393 at *5.
131. *Id.* at *13.
132. *Id.* at *8.
133. *Id.*
134. *Id.*
135. *Updegraph*, 1824 WL 2393 at *8 (These principles, in the view of the court, could be reduced to permitting public office to be held by "any believer in a God . . . with the necessary addition of a belief in a future state of rewards and punishments.").
136. *Id.* at *9. In yet another thinly veiled reference to the perceived horrors of the French Revolution, the court vividly depicted its genuine fear of where a slippery slope could lead. It envisioned a society in which debate societies would "dedicate the club-room to the worship of the Goddess of Reason, and adore the deity in the person of a naked prostitute." *Id.*
137. *Id.* at *12.
138. *Id.*

In condemning blasphemy, however, the court needed to articulate a standard for determining which speech weakened society's bonds. The court adopted the distinction between legal blasphemy and popular blasphemy and sought to value speech.[139] The court determined "a malicious and mischievous intention" to be the "broad boundary between right and wrong."[140] Accordingly, the court found that limited toleration of other religions was consistent with this practice.[141] For example, positive promotion of divergent religious beliefs, both Christian and non-Christian, were to be tolerated; it was only when someone crossed the line to attack the Christian religion that a person ran afoul of the law.[142]

After *Updegraph*, blasphemy regulation was justified on the principle that society had an interest in limiting speech that would threaten its fundamental stability.[143] Accordingly, blasphemy was punishable as an offense against the common law rooted in Christianity.[144] Furneaux's market-testing idea had failed to prevail against notions of ideological protectionism.[145] Because of its ideological protectionism, the court could reconcile the principles of freedom of conscience and worship and the freedom to commit blasphemy, finding them "directly opposed."[146] The definition of "blasphemy," however, was narrowed to speech or writing that displayed a "malicious and mischievous intention," that threatened the roots of society, and had no redeeming value.[147] The government had a role as an arbiter of the value of speech in terms of constitutional governance objectives.[148]

The third leading case for the exploration of the role of blasphemy in the American common law occurred in Delaware in 1837.[149] In *State v. Chandler*,[150] the defendant had again been found guilty of blasphemy for proclaiming that "the virgin Mary was a whore and Jesus Christ was a bastard."[151] Like its predecessors in New York and Pennsylvania, the

139. *Updegraph,* 1824 WL 2393 at *10.
140. *Id.*
141. *Id.* at *9 (citing with approval a speech by the Chancellor of the Philadelphia Bar stating that, at the time of the colonization, religious tolerance could be liberally given, in that "the number of Jews was too inconsiderable to excite alarm, and the believers in Mahomet were not likely to intrude.").
142. *See id.*
143. *See generally id.*
144. *See generally id.*
145. *See generally Updegraph*, 1824 WL 2393 at *9.
146. *Id.* at *12.
147. *See id.*
148. *See generally id*.
149. State v. Chandler, 2 Harr. 553, 1837 WL 154 (1837).
150. *Id.*
151. *Id*.

Delaware court accepted Christianity as a part of the common law, and blasphemy as a punishable offense.[152] It adopted the argument that blasphemy should be punished when it contravened public peace, noting that the common law "adapted itself to the religion of the country just so far as was necessary for the peace and safety of civil institutions; but it took cognizance of offences against God only, when by their inevitable effects, they became offences against man and his temporal security."[153] The court cited numerous statutes, including the blasphemy statute of 1826, to demonstrate that Christianity "has been and is now the religion preferred by the people of Delaware."[154]

Unlike its predecessors, however, the Delaware Court moved somewhat in the direction of Furneaux.[155] Instead of stopping at the pronouncement that Christianity was part of the common law, as was usually the case, the court added:

> We hold, and have already said, that the people of Delaware have a full and perfect constitutional right to change their religion as often as they see fit. They may to-morrow, if they think it right, profess Mahometanism or Judaism, or adopt any other religious creed they please; and so far from any court having power to punish them for such an exercise of right, all their judges are bound to notice their free choice and religious preference, and to protect them in the exercise of their right.[156]

Accordingly, whichever religion the people should adopt, laws to protect the peace by preventing attacks on it were constitutional.[157] Such protectionism, however, did not extend to the principles of any religion beyond the extent that they had an impact on the public peace.[158] Although it remained anchored in the language of the previous opinions, the Delaware court took a giant leap in the direction of Furneaux's argument.[159] In fact, the court quoted Furneaux with approval, stating, "We fully concur with the sentiments of Dr. Furneaux."[160] The court

152. *See id.*
153. *Id.* at *5.
154. *Chandler*, 1837 WL 154 at *9-*11.
155. *See generally id.*
156. *Id.* at *11.
157. *Id.* at *12.
158. *Id.* The court quoted an essay in support of its proposition:

> [*C*]*hristianity* requires no aid from force or persecution; she asks not to be guarded by fines and forfeitures. She stands secure in the armour of truth and reason. She seeks not to establish her principles by political aid and legal enactments. She seeks mildly and peaceably to establish them in the hearts of the people.

Id. (quoting AM. QUAR. REVIEW, June 1835, at 338).
159. *See generally Chandler*, 1837 WL 154.
160. *Id.* at *16.

concluded, "When human justice is rightly administered according to our common law and our constitution, it refuses all jurisdiction over crimes against God, unless they are by necessary consequence crimes against civil society, and known and defined as such by the law of man."[161]

With subtle semantic shifts, blasphemy law slowly began to depart from the moral protectionism advocated by Blackstone and toward the more utilitarian approach posited by Furneaux.[162] In a free society, government intervention into speech, whether against blasphemy or otherwise, was justified only in relationship to the effects that such speech had on society.[163] There must be some inherent judgment that speech lacked utility, and this judgment would facilitate the regulation of such speech.[164]

4. The Decline and Fall of Blasphemy Regulation

The few blasphemy cases that arose following *Chandler* were justified on the basis of preserving the public peace.[165] The last known charge of blasphemy in the United States was brought against Charles Lee Smith, an atheist who opened a store front selling literature in Little Rock, Arkansas.[166] He was prosecuted twice under a local ordinance prohibiting blasphemy in 1928, but the case was eventually dismissed.[167]

Finally, in 1952, in *Joseph Burstyn, Inc., v. Wilson*,[168] the Supreme Court effectively eliminated blasphemy regulations throughout the United States.[169] There, a New York statute permitted the "banning of motion picture films on the ground that they are sacreligious."[170] The Court held that the statute was invalid, considering at length a narrow definition of sacrilege that was inapplicable to American jurisprudence.[171] The Court then accepted, for the purpose of its analysis, the New York Court's interpretation of the meaning of

161. *Id.* at *13.
162. *See, e.g., id.*
163. *See generally id.*
164. This shift exemplified a much larger *zeitgeist*. It is no coincidence that this era marked the flourishing of such philosophers as Jeremy Bentham (1748-1832), whose utilitarian philosophy of 'the greatest good for the greatest number' had a profound influence on thought for generations to come. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford: Clarendon Press, 1907) (1780).
165. *See, e.g.*, JOHN P. JACKSON, JR., RACE, LAW, AND THE CASE AGAINST SEGREGATION 55 (2005).
166. *See id.*
167. *See id*.
168. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497 (1952).
169. *See id.* at 497.
170. *Id*.
171. *Id.* at 505-06.

sacrilegious, "that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule."[172] This definition was so different from the standard definition of sacrilege; indeed, it was far more akin to the ancient crime of blasphemy.[173] The Court then determined that such a provision was unconstitutional, even if based on ostensibly protecting the sensitivities of the majority in the interest of public security.[174] The Court justified this shift from the reasoning of the prior century by relying, as it often did, on statistical computations.[175] According to the latest reports from the Census Bureau, there were now in excess of 300 religious sects in America.[176] How, the Court reasoned, under a Constitution that guaranteed the free exercise of religion, and prohibited interference between church and state,[177] could it be expected to enforce the censorship of any film that might ostensibly offend one of these groups?[178] The court reasoned that such power is "far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society."[179]

In *Wilson*, which treats all sects on an equal footing, we see a logical leap from the protection of the majority interests as espoused in *Chandler*, to the manifestation of the principle of pluralism.[180] As seen in *Wilson*, this principle dictated that the existence of the freedom of speech, Holmes' "marketplace of ideas," was the best arbiter of what constituted appropriate speech.[181] This Court implicitly assumes this principle as it gives weight to the reaction of various individuals and groups to the banned film at issue in *Wilson*.[182] Notably, in illustrating

172. *Id.* at 504.
173. *Wilson*, 343 U.S. at 524-25.
174. *See id.* at 531-32.
175. *Id.* at 530-31.
176. *Id.*
177. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (establishing the phrase, "a wall of separation between church and state," within the traditions of American jurisprudence).
178. This attempt at disentanglement has not proven a resounding success, as subsequent history and litigation have proven. *Compare* Van Orden v. Perry, 545 U.S. 677 (2005) (holding that a display of the Ten Commandments on public grounds was constitutional) *with* McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (holding that a display of the Ten Commandments on public grounds was unconstutional). *See also* Pleasant Grove City v. Summum, 483 F.3d 1044 (10th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3289, 3524, 3528, 3017 (U.S. Mar. 31, 2008) (No. 07-665), as an illustration of the tension created by competing strains of traditionalism and pluralism.
179. *Wilson*, 343 U.S. at 504.
180. *See generally id.*
181. *See generally id.*
182. *See id.* at 509-14 (discussing the reactions of various reviewers and critics).

the plurality of views on the definition of sacrilege or blasphemy, Justice Reed's concurrence considered the opinion of groups as diverse as Protestant clergymen and *L'Osservatore Romano*.[183] Within this setting, Furneaux's argument of self-regulation by the market with respect to blasphemy, and other religious sentiments which may be held by a popular majority, had finally triumphed over the moral protectionism of Blackstone.[184]

5. The Retained Role of Obscenity Regulation

Nevertheless, an element of protectionism remained, with respect to the offense of obscenity. In the landmark obscenity case of *Roth v. United States*,[185] however, the prohibition of obscenity was expressly upheld as not contrary to the protection of the First Amendment.[186] In *Roth*, the Court defined obscenity as "material which deals with sex in a manner appealing to prurient interest," a distinctively objective standard.[187] The Court found obscenity to be valueless relative to the understood purpose of the First Amendment, which was to "assure unfettered interchange of ideas for the bringing about of social and political changes desired by the people."[188] Obscenity was deemed to be "utterly without redeeming social importance."[189] Moreover, the court found obscenity especially suited to regulation because of its intrusion into the home, where children might easily access its message.[190] Children, according to Justice Stevens' concurrence, "[are] not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[191]

These cases show the development of a clear presumption toward permitting speech, including blasphemy, with the understanding that American society was no longer homogeneous and there was no objective societal standard to measure what blasphemy might offend which religious group.[192] Obscenity was excepted from this presumption because it ostensibly had no value in the public debate.[193] Beyond its lack of value, its proscription was justified by referencing the interests of

183. *Id.* at 509, 513-14.
184. *See Wilson*, 343 U.S. at 509-14.
185. Roth v. United States, 354 U.S. 476 (1957).
186. *Id.*
187. *Id.* at 487, 489-90.
188. *Id.* at 484.
189. *Id.*
190. F.C.C. v. Pacifica Found., 438 U.S. 726, 748-49 (1978).
191. *Id.* at 757 (Stevens, J., concurring) (citing Ginsberg v. New York, 390 U.S. 629, 649-50 (1968)).
192. *See Burstyn*, 343 U.S. at 509-14.
193. *See Roth*, 354 U.S. at 484.

children.[194] This awkward shift, which split apart two traditionally related offenses, permitting the one and prohibiting the other, demonstrates the tension between an embrace of the First Amendment and a retention of the view that a nation is responsible for preserving its own social conscience. The shift away from blasphemy regulation occurred because it could no longer be justified in terms of preserving the public peace.[195] In the eyes of the Court, America's diversity served to justify a pluralistic philosophy that would have made prosecution of blasphemy for this purpose enormously complex and unwieldy.[196] Nor, in the light of this pluralism, did courts want to draw lines and formulate tests to determine whether potentially blasphemous speech had redeeming academic or social value, as they had done in the 18th and 19th centuries.[197] The Court, however, was more than willing to apply a nearly identical rationale to obscenity cases.[198]

In the context of obscenity regulation, the notion of safeguarding society from attacks on the sensibilities of its citizens survived.[199] This was possible because, with respect to obscenity, enough of a social consensus existed to justify its continued proscription.[200] Much as it had been in the early blasphemy cases, protection from moral outrage was recast in terms of the valuation of speech.[201] In addition to the idea of social value, the welfare of children and the peculiar nuances of modern broadcasting capabilities were called upon to preserve obscenity regulation.[202]

Although the rise of the First Amendment, coupled with the Fourteenth, shifted the balance in favor of a broad protection for free speech, it also created new tensions with respect to other rights, particularly that of equal protection under the laws.

B. Hate Speech

1. A Shift in the Balance: First Amendment Rights come to the Forefront

The freedom of speech, as a normative value, has always been highly prized in the United States; indeed, the words, "Congress shall

194. *Pacifica Found.*, 438 U.S. at 757 (1978).
195. *See Burstyn*, 343 U.S. at 509-14.
196. *See id.*
197. *See id. See also* People v. Ruggles, 8 Johns. 290, 290.
198. *See Roth*, 354 U.S. at 484.
199. *See generally id.*
200. *See generally id.*
201. *See generally id.*
202. *See id.* at 484.

make no law . . . abridging the freedom of speech" formed part of the first of the ten amendments proposed in the Bill of Rights.[203]

Nevertheless, the contours of the right remained undefined for an extended period. As seen above, the co-existence of blasphemy regulation, at the very least, to say nothing of obscenity regulation and the toleration of the Sedition Act of 1798, have always suggested that the right was not absolute, and that, like other fundamental rights, it had limits.[204] These events, however, only began to define how these rights interacted and how the boundaries between them should be defined.

A preliminary attempt at establishing this contextualization came during the First World War, in *Schenck v. United States.*[205] In *Schenck*, the Court, stating that "the character of every act depends on the circumstances in which it is done," found that virulent political opposition to the draft, consisting of mailing pamphlets to inductees urging them to resist, although possibly permissible in peacetime, is not protected by First Amendment during a time of war.[206]

In the American Constitutional system, however, the baseline for this contextualization has been set far on the side of an expansive right to speech. Six years after *Schenck*, the Supreme Court determined that the First Amendment freedom of speech was protected against state encroachment by the due process clause of the Fourteenth Amendment.[207] This decision proved to be the first in a long line of decisions that expanded the vitality of the right of freedom of speech.[208] Oliver Wendell Holmes' dissent in *Abrams v. United States*[209] provides the rationale for this expansion.[210] Holmes argued that "the ultimate good desired is better reached in free trade in ideas," and supported what came to be known as the "marketplace of ideas" concept for an expansive right to freedom of speech.[211]

203. U.S. CONST. amend. I. Indeed, the inclusion of this language was essential to the anti-federalists' assent to the passage of the corpus of the Constitution, despite objections raised by the Federalists that it was unnecessary and inherently assumed. *See* THE FEDERALIST No. 84 (Alexander Hamilton). *See generally* JUHANI RADINKO, JAMES MADISON AND FREEDOM OF SPEECH: MAJOR DEBATES IN THE EARLY REPUBLIC (2004).

204. *See* Act of July 14, 1798, ch. 74, 1 Stat. 596. *But see* New York Times v. Sullivan, 376 U.S. 254 (1964) (providing numerous examples, both historical and contemporary, to demonstrate that the Sedition Act, although untested in the Supreme Court, was found unconstitutional "in the court of history").

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

206. *Id.* at 51-52.

207. Gitlow v. People of the State of New York, 268 U.S. 652, 666 (1925).

208. *See, e.g.,* Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147 (1939) (holding that prior police approval for religious solicitation is unconstitutional).

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

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

211. *Id. See also* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (reaffirming the concept and holding that "the classroom is peculiarly 'the marketplace of ideas).

Nevertheless, the Court has not hesitated to explore the limit of the right of freedom of speech as it interferes with competing constitutional values. In some instances, these competing values are compelling enough to override the First Amendment freedom. In *Chaplinsky v. New Hampshire*,[212] the Court upheld the constitutionality of a New Hampshire law prohibiting one individual from addressing another with "any offensive, derisive, or annoying word," and so established what came to be known as the "fighting words" doctrine of constitutional speech restriction.[213] In so doing, the Court noted that "certain well-defined and narrowly limited classes of speech" were excluded from Constitutional protections.[214] This was so, the Court said, because these classes of speech center around "an immediate breach of the peace."[215] Such speech falls out of the First Amendment's protections because it is "no essential part of any exposition of ideas."[216] The Court in *Chaplinsky* suggests that freedom of speech can be limited, at least at the margins, based on judicial determinations of its academic and social value.[217] This argument is emblematic of the justification for gradations of blasphemy during the early republic, and survives in the context of obscenity regulation today.[218] It provides a basis for the idea, developed afterwards, that there can be content-based limitations on freedom of speech. The evolving tension between "content" and "categorical" bases for limitation will be further explored *infra*.

2. Hate Speech

At first glance, it seems simple to suggest that, given the default preference under the U.S. Constitutional structure for freedom of expression, hate speech, by default, is permissible. Nevertheless, as has been seen in the case of obscenity, the desire for prohibiting speech to defend community ideals remains strong.[219] It is therefore possible, even likely, that ingenuity in applying non-traditional approaches may accomplish an otherwise unconstitutional result. These non-traditional approaches include institutional speech codes,[220] Title VII "Hostile Environment Provisions,"[221] a conception of expression as an

212. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
213. *Id.* at 569.
214. *Id.* at 571-72.
215. *Id.* at 572.
216. *Id.*
217. *See generally Chaplinsky*, 315 U.S. 568.
218. *See supra* Part I.A.3.
219. *See supra* Part I.A.
220. *See generally* TIMOTHY J. SHIELL, CAMPUS HATE SPEECH ON TRIAL (1998).
221. 42 U.S.C.A. §§ 2000e (2006).

indistinguishable component of action,[222] and even, potentially, an attempt to differentiate based on the valuation of speech.

The rise of a national consciousness defining a distinct category of speech as "hate speech" can be traced to the post-World War II and Civil Rights Era.[223] During this era, American society was permeated with an increasing sensitivity to ethnic, racial, and religious prejudices following the conflict with Nazi Germany during the Second World War.[224] Moreover, this era also marked the zenith of the United States' conscious efforts to differentiate itself from the Soviet Union, which attempted to contrast its stated policies of racial equality with its capitalist rival.[225] To this end, with the fresh application of the post-Civil War Amendments' guarantees of equal protection and due process, the emphasis on equality as a distinctively American value reached a level it had not enjoyed since post-Civil War days; speech as well as action that was seen as hostile to the emerging value of equal protection came under increasing scrutiny.[226]

Within this milieu, academic theories helped to advance the notion that hate speech was far more destructive to the paramount right to equality than possessive of inherent value as free speech.[227] Psychologist

222. *See generally* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 49-51 (25th Anniversary ed. 1979).

223. *See* David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1563 (2004)

224. *See id.* (examining correlation between Civil Rights movement's legal success and international pressure from Nazi and Soviet propaganda).

225. S*ee, e.g.,* Clark Clifford, American Relations with the Soviet Union (Sept. 24, 1946), *available at* http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/index.php?documentdate=1946-09-24&documentid=4-1&studycollectionid=&pagenumber=1 (emphasizing that the United States needed to demonstrate, on the world stage, that "capitalism is at least the equal of communism"). Particularly emblematic of this tension was the situation of African-American singer Paul Robeson, whose comments on the world stage concerning race-relations in the United States threatened the United States' attempts to distinguish itself as ideologically superior to the Soviet Union. Vern Smith, *I Am At Home, Says Robeson at Reception in Soviet Union*, THE DAILY WORKER, Jan. 15, 1935. Enamored with his visit to Stalinist Russia in the mid-1930s, he emphasized what he felt was the difference between the United States and the U.S.S.R. In the former, he claimed, his success and recognition was merely "a condescending exception" to the rule of "Jim-Crowism." In the latter, he stated, "the Soviet theory is that all races are equal—really equal," and "[t]his is home to me." *Id.*

226. *See, e.g.,* Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954). In addition to the Fourteenth Amendment rationale for limiting hate speech, arguments have been advanced that prohibition of such speech, at least with respect to discrimination based upon race, is permitted under the Thirteenth Amendment's prohibition of badges and incidents of slavery, as articulated in the Civil Rights Cases, 109 U.S. 3, 21 (1883). For an interesting discussion of this perspective, *see* Harvard Law Review Association, *The Case of the Missing Amendments: R.A.V. v. St. Paul*, 106 HARV. L. REV. 124 (1992).

227. *See* ALLPORT, *supra* note 222 at 49-51.

Gordon Allport, active during this era, characterized societal toleration of hate speech, or "antilocution" as the first step on a scale of prejudice, the extreme end of which is extermination.[228] Allport examined antilocution largely in socio-psychological terms.[229] His findings, however, justified legal limitations on hate speech because of its deleterious societal effects under a *Schenck-Chaplinsky* framework that contextualized and assigns societal value to speech.[230]

3. Direct Regulation of Hate Speech Rejected

Nevertheless, the cases surrounding anti-Semitic marches in Illinois during the late 1970s illustrate the Court's rejection of using the defense of the right of equal protection as an absolute justification for proscribing hate speech.[231] First, the Court decided *National Socialist Party of America v. Village of Skokie*,[232] overturning an Illinois Supreme Court stay that had prohibited a neo-Nazi march.[233] The following year, in *Smith v. Collin*,[234] after the Seventh Circuit declared unconstitutional a municipal law prohibiting distribution of materials which encouraged hatred toward individuals of specific ethnic backgrounds, the Supreme Court denied certiorari, over the dissent of Justices Blackmun and White.[235] The practical and theoretical implications of these decisions were not lost on the justices. Although the dissenters primarily argued a circuit split rationale for hearing the case, they also pointed out that the denial of certiorari effectively affirmed an absolute protection of freedom of speech, ignoring a realistic possibility that "taunting and overwhelmingly offensive" speech might justify a contextual limit on grounds similar to that expressed in *Schenck*.[236] The dissenters felt that the possibility of such a limit was worthy of exploration, because of the "sensitivity" involved in the case.[237] Nevertheless, the majority's denial of certiorari signaled its repudiation of this analysis.

228. *Id.*
229. *See id.*
230. *See id.* at 51 (finding that intense antilocution will likely be related to open discrimination and violence, and stating that it is "almost certain" to be backed up by discriminatory action).
231. *See, e.g.*, Smith v. Collin, 439 U.S. 516 (1978); National Socialist Party of America v. Skokie, 432 U.S. 43 (1977).
232. *Skokie*, 432 U.S. 43 (1977).
233. *Id.*
234. Smith v. Collin, 439 U.S. 516 (1978).
235. *Id. See also* Collin v. Smith, 578 F.2d 1197, 1199-1200 (7th Cir. 1978) (providing factual background of dispute).
236. *Collin*, 439 U.S. at 919 (1978) (Blackmun and White, JJ., dissenting).
237. *Id.* at 918.

Following these cases, although bare regulation of hate speech under an equal protection framework was considered inappropriate, the possibility remained open for regulation and proscription via other means. One of these avenues was the concept of hate speech as related to action, which has presented the Court with some difficulty. The discord between the majority opinion and concurrence in *R.A.V. v. St. Paul*[238] crystallized this tension.[239]

4. R.A.V. and Black: Testing the Basis for Indirect Regulation of Hate Speech

In *R.A.V.*, which addressed the constitutionality of a St. Paul, Minnesota city ordinance, the "St. Paul Bias-Motivated Crime Ordinance," the Supreme Court found that the ordinance was facially invalid under the First Amendment.[240] Significantly, the Court arrived at a distinction between "content-based" prohibitions of speech, which are "presumptively invalid," and "categorical" prohibitions, which may be related according to their "constitutionally proscribed content."[241]

Within this analytical framework, the Court held the ordinance to be unconstitutional.[242] The Court found that the ordinance did not regulate speech on a categorical basis.[243] Rather, it distinguished *within* a particular category ("fighting words," or, within the language of the statute, speech "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others") on a content-based determination (on the basis of *race, color, creed, religion or gender* (emphasis added)).[244] According to the majority, proscribable speech, if it is to be proscribed at all, must be proscribed without respect to its target.[245] Comparing fighting words to a "noisy sound truck," the Court emphasized that the noise, due to its disruptive quality, can be regulated; but it cannot be regulated with respect to the underlying content of its message.[246]

238. R.A.V. v. St. Paul, 505 U.S. 377 (1992).
239. *See generally id.*
240. *Id.* at 379-80.
241. *Id.* at 383-84. The Court here emphasized, contrary to some interpretations of Chaplinsky, that such speech is, in fact, speech (not Constitutionally invisible) but that it was capable of regulation, as in the case of obscenity. *Id.* at 383. This nuance has implications for the utility of qualitative value alone as a framework for justifying governmental interference with speech.
242. *Id.* at 383-84.
243. *R.A.V.*, 505 U.S. at 377.
244. *Id.* at 380-382.
245. *See id.*
246. *Id.* at 386 (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

This distinction was not reached unanimously, and certainly not without criticism.[247] Justices White and Stevens authored stinging concurrences, which, although agreeing in the result on the basis that the statute was overbroad, sought to repudiate much of the majority's reasoning.[248]

Justice White's concurrence restates his view of the law as it stood prior to *R.A.V.*, a view based in *Chaplinsky*'s notions of value: put simply, certain speech is "worthless or of de minimis value to society."[249] Justice Stevens agreed that there was, indeed, a traditional hierarchy of protected speech, with "core political speech" ranking first, followed by commercial and non-obscene, sexually explicit speech, with obscenity and fighting words at the end of the list.[250] The Stevens concurrence, moreover, attacks the distinction within categorization, finding that it turns the hierarchy of protection on its head by permitting obscenity and fighting words that would otherwise be proscribable.[251] The majority approach, according to Stevens, "sacrifices subtlety for clarity," disallowing nuanced decision making to address community-specific problems.[252] Rather than a content-based analysis, which he felt was permissible given that words must be understood in context, Justice Stevens' concurrence evokes the classical distinction between subject-matter-based and viewpoint-based discrimination.[253] According to his reasoning, although subject-matter based regulation can often, in effect, regulate a particular viewpoint, this alone is not Constitutionally problematic.[254] Justice Stevens' concurrence points out a number of "safe harbors" expressed in the majority opinion to demonstrate its perceived unworkability.[255] For example, Stevens argues that obscenity prohibition, contextualized as to market, is no different than prohibiting cross-burning in sensitive neighborhoods.[256] The majority, on the other hand, argues that such prohibition is Constitutionally acceptable, in that it is not-content based.[257] Indeed, consistent with Allport's psychological structure, the petitioner's brief referred to burning a cross as the "first step in an act of assault."[258]

247. *Id*. at 416.
248. *R.A.V.*, 505 U.S. at 416.
249. *Id.* at 400 (White, J., concurring).
250. *Id*. at 422 (Stevens, J., concurring).
251. *Id.* at 422 (Stevens, J., concurring).
252. *Id.* at 426 (Stevens, J., concurring).
253. *R.A.V.*, 505 U.S. at 397, 420, 430 (citing numerous cases).
254. *Id.* at 432.
255. *Id.*
256. *Id.* at 419 n.1 (Stevens, J., concurring)
257. *Id.* at 387.
258. *R.A.V.*, 505 U.S. at 432 n.8 (Stevens, White, and Blackmun, JJ., concurring, citing Appellate Brief for Petitioner).

Accordingly, this case left several unanswered questions: Even if hate speech, under the guise of "fighting words," could not be regulated as to insular, discrete minority groups, could it be regulated generally? Under Justice Stevens' analysis, which he noted was not addressed by the Court, could hate speech be regulated, under the "fighting words doctrine," on a danger-based continuum?[259]

With respect to the latter question, some clarification came in *Virginia v. Black*.[260] In *Black*, a fractured Court again addressed the constitutionality of prohibiting cross-burning.[261] Here, the Court emphasized yet another distinction, that of "true threats," characterized as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[262] True threats, according to the Court, are not protected speech, and can be regulated to prevent the materialization of intimidation or actual violence.[263]

In *Black*, cross-burning was characterized as just such a true threat, and susceptible of proscription.[264] The court distinguished this ruling from *R.A.V.* on the grounds that, in *R.A.V.*, the statute at issue sought to discriminate against speech that was hostile with respect to a particular topic.[265] There, anti-racist speech was prohibited, but other, equally virulent speech was not prohibited.[266] For example, threats against persons based on "political affiliation, union membership, or homosexuality."[267] Simply put, the Virginia statute passed constitutional muster because "it doesn't matter [why] an individual burns a cross," provided that there is intent to intimidate.[268] Such regulation did not run afoul of the First Amendment because, under the "true threats" doctrine, it sought to prohibit "only those forms of intimidation that are most likely to inspire fear of bodily harm."[269]

Nevertheless, a plurality in *Black* found the statute unconstitutional, not because of its prohibition of cross burning with intent to intimidate, but because of a provision that declared that cross burning was prima facie evidence of intimidation.[270] With this provision included, the cross-

259. *Id.* at 419, n.1 (Stevens, J., concurring).
260. Virginia v. Black, 538 U.S. 343 (2003).
261. *Id.*
262. *Id.* (citing Watts v. United States, 394 U.S. 705, 708 (1969); R.A.V. v. City of Saint Paul, 505 U.S. 377, 388 (1992)).
263. *Black*, 538 U.S. at 343.
264. *See id.* at 362.
265. *Black*, 538 U.S. at 362.
266. *See id.*
267. *Id.* (quoting *R.A.V.*, 505 U.S. at 391).
268. *Id.*
269. *Id.* at 363.
270. *Black*, 538 U.S. at 365.

burning prohibition was overbroad and could serve as an unconstitutional attempt at chilling political speech.[271] According to the plurality, the "First Amendment does not permit . . . a shortcut" around finding intent to intimidate to fit within the "true threats" doctrine.[272] Speech can be prohibited, but only after a contextual analysis. This holding was not universally acclaimed, with Justice Stevens, in a concurrence, criticizing the plurality's interpretation of "prima facie" evidence, and arguing that the unconstitutional provision should have been upheld.[273] A concurrence and dissent by Justice Souter, which argued for the invalidation of the statute as an unconstitutional categorical distinction, and a dissent by Justice Thomas argued that the statute permissibly regulates conduct, and that First Amendment concerns of expression play no role in the analysis.[274]

5. Alternative Methods of Regulating Hate Speech

Title VII of the U.S. Civil Rights Act of 1964 has also served as an indirect avenue for regulation of hate speech.[275] Title VII provides protection from harassment to employees on the basis of race, sex, color, national origin or religion.[276] This protection was extended to situations in which the workplace sexual harassment creates "an intimidating, hostile, or offensive working environment."[277] Under this "hostile environment" theory of harassment, an avenue has been opened to prosecute hate speech on an effects-test basis.[278]

This test was enunciated more clearly in *Harris v. Forklift Systems, Inc.*,[279] in which the Court set forth guidelines for determining what constituted actual harassment under a hostile environment standard.[280] To reach the standard, the Court articulated the necessity of workplace "permeat[ion] with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[281] In so doing, the Court set out what it considered the "middle path between

271. *Id.*
272. *Id.* at 367.
273. *Id.* at 368 (Stevens, J., concurring).
274. *Id.* at 380 (Souter, J., concurring in part and dissenting in part); *id.* at 388 (Thomas, J., dissenting).
275. *See* 42 U.S.C.A. §§ 2000e (2006).
276. *Id.*
277. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citing the EEOC guidelines at 29 C.F.R. § 1604.11(a)(3)).
278. *See, e.g.,* Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).
279. *Id.*
280. *Id.*
281. *Id.*

making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[282] The Court required that the conduct create an environment that is both objectively and subjectively hostile and abusive.[283] Although varied tests have been applied to determine whether a hostile environment has been created, courts agree that it is a fact-centered and case-specific analysis.[284]

Hate speech has also been regulated using other methods. Institutional speech codes are one such method. The campus speech codes debate raged during the late 1980s and early 1990s.[285] During this period, attempts by institutions to regulate hate speech that was considered detrimental to fostering an open, effective academic community were regularly struck down by courts.[286] At the base, the regulations were struck down as violative of the "marketplace of ideas" principle of free speech as first set out by Holmes in *Abrams*.[287] Accordingly, such regulations were struck down as overbroad in *Doe v. University of Michigan*.[288] Moreover, attempts to limit hate speech at an institutional level, on the basis of the "fighting words" exception to unprotected speech, were not upheld in *UWM Post v. Board of Regents*.[289] The court in *UWM Post* drew a difference between "hostile" speech and speech that "tend[s] to incite an immediate breach of the peace," finding that not all of the first kind of speech, which was regulated, was equivalent to the second kind of speech, which could be regulated.[290]

In *Dambrot v. Central Michigan University*,[291] a speech code was overruled because it failed to account for speech that was uttered with a

282. *Id.* (internal citations and quotations omitted).

283. *Id.*

284. *See, e.g.,* Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991). This case, ironically, speculated that an employer's authorization of a cross burning on the premises by the Ku Klux Klan would "doubtless give rise to the employer's liability for racial harassment under Title VII." *Id.* at 1274 n.4. *Cf.* Virginia v. Black, 538 U.S. 343 (2003) (invalidating a provision of a law prohibiting cross-burning which permitted the act of cross burning to be used as prima facie evidence of discrimination). Thus, the tension between freedom of speech and equal protection is shown: An action which might be constitutionally protected under the First Amendment might be prohibited in the workplace context under Title VII.

285. For an excellent discussion of the campus speech codes debate, see generally TIMOTHY J. SHIELL, *supra* note 220 (reviewing the salient cases, the interrelation of Title VII hostile environment claims, and arguing for a proactive, rather than reactive, approach to regulation of campus speech).

286. SHIELL, *supra* note 220, at 90-91.

287. SHIELL, *supra* note 220, at 73.

288. Doe v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

289. UWM Post v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991).

290. *Id.* at 1172-73.

291. Dambrot v. Central Michigan University, 839 F. Supp. 477 (E.D. Mich. 1993).

non-offensive intent and speech that was uttered with the intent to create an offensive environment.[292] Such regulations could be interpreted subjectively and constitute an overbroad prohibition of speech.[293]

Most recently, hate speech has been legislated against in very specific contexts. The activities of Fred Phelps, pastor of the Westboro Baptist Church in Topeka, Kansas, and his followers, created enormous unrest following the beginning of the Second Iraq War in 2003.[294] Long a controversial figure for his outspoken protests against homosexuality, Phelps and his followers began picketing the funerals of fallen U.S. soldiers during the Second Iraq War.[295] Phelps and his church, consisting mostly of the members of his family, justified their belief with the rationale that the deceased soldiers had died in support of the cause of the United States, which they denounced with vile epithets.[296]

In response to these actions, the "Respect for America's Fallen Heroes Act" was passed by Congress and signed by the President on May 29, 2006.[297] It prohibited any protests within 150 feet of a road leading into any cemetery under control of the National Cemetery Administration, or within 300 feet of the cemetery impeding access to the cemetery, during a period beginning 60 minutes prior to, and concluding 60 minutes following, a funeral.[298]

In addition to the federal act, at least thirty-five states have passed statutes banning the protests in some form.[299] In Maine, the debate over the enactment of such a law weighed varying viewpoints, trying to balance free speech, security interests, and "human decency."[300] The Maine statute included elements common to most other state attempts to address this problem.[301] Protests at funerals were to be limited with respect to distance and time.[302] The restrictions were justified on the basis of security interests.[303] Several of these statutes have undergone

292. *Id.* at 482.
293. *Id.*
294. Michael Sangiacomo, *Preaching Pain Sect Damns America and its Heroes*, THE PLAIN DEALER (Cleveland, O.), Dec. 8, 2006, at B9.
295. *Id.*
296. *Id.*
297. 38 U.S.C. § 2413 (2006).
298. *Id.*
299. David Klepper, *Kansas Ban on Funeral Protests Gets Blocked*, THE KANSAS CITY STAR, Mar. 12, 2008, at A1.
300. Ann S. Kim, *Legislators Weigh Ban on Protests at Funerals*, PORTLAND PRESS HERALD (Maine), Feb. 9, 2007, at A1.
301. *Id.*
302. *Id.* These limitations seem to be tailored to survive the lower, rational-basis review of restrictions that apply merely to the "time, place, or manner" of speech, as articulated in *Linmark Associates, Inc., v. Township of Willingboro*, 431 U.S. 85, 93 (1977).
303. *Id.*

court challenges. For example, a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit issued an injunction against the enforcement of such a state law in Missouri.[304] The matter has not yet been reviewed by the Supreme Court.

Beyond state and federal legislative invention, the controversial speech has been addressed by private court action. Following the picketing of the funeral of his son, who had been killed in Iraq, in March, 2006, Albert Snyder filed a lawsuit in the U.S. District Court for the District of Maryland.[305] As the case proceeded, Mr. Snyder asserted claims of intentional infliction of emotional distress, invasion of privacy by intrusion upon seclusion, and conspiracy to commit these acts against the Westboro Baptist Church and three of its leaders.[306] Following a jury verdict in favor of the plaintiff on these three counts, damages were awarded in the amount of $2.9 million, with $8 million in punitive damages.[307] Upon motion for remittitur, the amount of punitive damages was reduced to $2.1 million.[308]

Following the judgment, liens were placed on the Westboro Baptist Church and the law office owned by the Rev. Fred Phelps.[309] According to a newspaper interview with Mr. Snyder's attorney, filing for bankruptcy could prevent collection of the compensatory damages, but would not permit the discharge of the punitive damages.[310]

In addition to legal remedies to meet the unique challenge posed by the Phelps' funeral protests, individuals have developed solutions to this issue.[311] One group, the "Patriot Guard," which claims some 60,000 members, was created with the specific purpose of traveling to the funerals of soldiers in order to "establish a buffer of steel and humanity," and thwart the attempts of Phelps' followers to protest the funerals.[312] By its own account, the group met with enormous success in the first few months of its existence, providing comfort to dozens of families.[313] According to Craig Hensen, one of the co-founders of the group, "We did see that our presence irritated the Phelpses."[314]

304. *Injunction on Protest Law Needed*, SPRINGFIELD NEWS-LEADER (Mo.), Dec. 10, 2007, at 1B.
305. Snyder v. Phelps, 533 F. Supp. 2d 567, 569-70 (D.Md. 2008).
306. *Id.* at 571.
307. *Id.* at 573.
308. *Id.* at 597.
309. Mike Hall, *Walls Close in on Phelpses*, TOPEKA CAPITAL-JOURNAL, Apr. 4, 2008, at 1A.
310. *Id*.
311. Sangiacomo, *supra* note 294, at B9.
312. *Id.*
313. *Id.*
314. *Id.*

ANALYSIS

II. SUMMATION OF THE CURRENT CONSTITUTIONAL VIEWPOINT

The present state of American Constitutional jurisprudence presents unique challenges for issues of hate speech. The historical development of blasphemy regulation within broader European-American society reveals the strength of an interest in proscribing speech to protect the community.[315] This protection was originally done literally, by sustaining the legitimacy of the state's foundations, in terms of a Gregorian church-state system, and later, in the national-church setting. By the time blasphemy regulation reached the United States, however, it was already uprooted from its original foundation. As the notion of the essence of the state had evolved, the means for its preservation also evolved. At this point, blasphemy regulation was justified as a means of public security.[316] An underlying assumption of common American social viewpoints justified blasphemy regulation to prevent breaches of the peace.[317]

A unique counterargument prioritized the freedom of speech and the free exercise of religion.[318] This argument set forth that, in a marketplace of ideas, the best outcome would ultimately triumph and would be enriched by its competition with lesser values.[319] Therefore, the existing social order could be preserved without proscriptive regulation.[320] Although this argument was initially eschewed in favor of a protectionist approach, it ultimately competed with the protectionist approach for recognition.[321] An emphasis on the equality of individuals, expressed during and after the Civil War, was enshrined within the Constitution in the form of the Thirteenth, Fourteenth, and Fifteenth Amendments.[322]

Within this heightened tension between the value of individual expression and the value of a peaceful society an uneasy gray area developed. As expressed by Justice Holmes in *Abrams*, the debate tipped in the direction of protection of freedom of speech.[323] The Fourteenth Amendment, that great symbol of equality, was used to apply the Bill of Rights to the states in a series of cases that showed that its

315. *See supra* Part I.A for the background of this development.
316. *See generally Chandler*, 1837 WL 154.
317. *See generally id.*
318. *See* LEVY, *supra* note 31 at 327.
319. *See id.*
320. *See id.*
321. *See, e.g.,* State v. Chandler, 2 Harr. 553, 1837 WL 154 (Del. Gen. Sess. 1837) (discussing the merits of the relative positions).
322. *See* U.S. CONST. amend. XIII-XV.
323. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

promise of equality could best be expressed in an equal opportunity on the part of all to participate in the marketplace of ideas.[324]

As part of this reordering around the marketplace of ideas, blasphemy regulation died a gradual, almost imperceptible death, from want of prosecution.[325] It was dealt its final blow under the guise of overturning a state law permitting censorship of sacrilegious films in 1952.[326] When the Court ended blasphemy regulation, they did not do so in an unqualified affirmation of the marketplace of ideas.[327] Rather, the Court used statistical evidence to support its finding that, with a pluralistic society, the United States could not practically provide protection from the threat of offensive religious language.[328] Indeed, the court found that such language was no longer a threat in part because of this religious pluralism.[329] Blasphemy's weakness was not so much that it constituted a limitation on speech, but that it could no longer be squarely defined in light of shifting social perspectives.[330]

Accordingly, where a common social ideology remained, some measure of protectionism could be adopted in its favor. Overwhelming support for a non-violent society led to the affirmation of the "fighting words doctrine."[331] Common objections to prurient speech and a consensus to protect the young from certain content led to the affirmation of obscenity regulation.[332] The marketplace of ideas was not completely unfettered.

To place limitations on certain categories of speech requires some implicit assumptions. The first assumption is that speech can be categorized. The second assumption, which closely parallels the first, is that categories of speech can be ranked in terms of social value. These assumptions make the type of discussions in *R.A.V.* possible.[333] That is, they demonstrate that attempts to value speech, beyond a few commonsense reference points, such as fighting words, leads to enormous disagreement and confusion about the bases for analysis.[334]

324. *See, e.g.*, Near v. Minnesota, 283 U.S. 397 (1931) (applying the First Amendment freedom of the press to the states through the Fourteenth Amendment); Gitlow v. New York, 268 U.S. 652 (1925) (applying the First Amendment freedom of speech to the states through the Fourteenth Amendment).
325. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497 (1952).
326. *See id*.
327. *See id*.
328. *See id*. at 530-31.
329. *See id*.
330. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 530-31.
331. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
332. *See generally* Roth v. United States, 354 U.S. 476 (1957).
333. *See generally* R.A.V. v. St. Paul, 505 U.S. 377 (1992).
334. *See generally id.*

This confusion led to a balancing analysis, in which First Amendment protections, although weighted, were balanced against other Constitutional rights.[335] One of these rights, the Fourteenth Amendment guarantee of equal protection, arose as a formidable contender to trump the First Amendment in close cases.

Enter "hate speech." As the United States grew increasingly sensitive, for political and strategic reasons, to its reputation in the international sphere, the equal protection guarantees of the Fourteenth Amendment were given a role in American jurisprudence that they had not enjoyed since the Reconstruction era.[336] The Fourteenth Amendment served not merely as a portal to ensure the application of other constitutional rights, but it arose as a distinct constitutional value in itself.[337] The corresponding acknowledgement of the benefits of pluralism and diversity forged a common social value worthy of protection.[338] In terms of a balancing analysis, it made little sense that the freedom of speech, protected as it was by the Fourteenth Amendment with respect to state action, could be used to destroy that Amendment's meaning.[339] In other words, constitutional language that recognized certain rights needed protection against the abuse of those rights.[340]

Although courts have generally exercised their deference to First Amendment preeminence in hate speech cases, this deference has been far from absolute.[341] Generally, laws directly restricting hate speech, whether outright prohibitions or more nuanced institutional speech codes, have not been upheld.[342] A distinction was drawn between categorical discrimination and viewpoint-based discrimination.[343] Accordingly, the societal consensus concerning the regulation of obscenity is expressed as a defense of the interests of the children and the more vulnerable in society.[344]

335. *See generally id*.
336. *See supra* Part I.B.
337. *See* Richard L. Wiener and Erin Richter, *Symbolic Hate: Intention to Intimidate, Ideology and Group Association*, 32 L. & HUMAN BEHAVIOR 463 (2008) (identifying the importance of the Fourteenth Amendment in recognizing a substantive social value of equal protection).
338. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497 (1952).
339. *See* SHIELL, *supra* note 220, at 2.
340. *See id.*
341. *See generally* Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. St. Paul, 505 U.S. 377 (1992).
342. *See generally* SHIELL, *supra* note 220.
343. *R.A.V.*, 505 U.S. at 383-84.
344. *See* F.C.C. v. Pacifica Foundation, 438 U.S. 726, 757 (1978) (Stevens, J., concurring).

The societal consensus against inequality has already justified regulation of hate speech in several forms.[345] Some kinds of hate speech, such as cross-burning, can be proscribed when there is intent to intimidate.[346] In an odd attempt to reconcile a hierarchy of speech values with First Amendment protections, the speech cannot be expressly limited as to a specific target.[347] Nevertheless, it can be implicitly limited as to that target.[348] A similar limitation is found in the hostile environment theory under Title VII, regulating speech in the workplace when it cumulatively creates a hostile environment toward a member of a minority group.[349]

For all that has been said about the value of the First Amendment and the marketplace of ideas, the belief remains strong that society's core values will not always triumph in the marketplace of ideas, and require external protection.[350] Beyond the margins of extremity, a lack of confidence that positive values will ultimately overcome negative ones, given a fundamentally fair marketplace, justify a broad scope for these limitations.[351]

Like the regulation of blasphemy, limitations on funeral protests are based in preserving the public peace.[352] Like obscenity regulation, these regulations are based in shielding the vulnerable from unwanted messages.[353] At their root, however, such limitations were passed in response to a specific social outrage.[354] They are fundamentally justified by a conception that the good is not always capable of defending itself; that values of tolerance and equality need external statutory protection from inappropriate verbal attacks. Such statutes implicitly assign value to speech, and acknowledge that market forces, expressed in terms of lawsuits and even the "Patriot Guard Riders" are not enough to compete against "bad speech."[355] It remains unclear whether these laws will withstand judicial scrutiny.

In cases such as these, the United States stands at a crossroads. As has been seen, even given the United States' strong deference to First Amendment values, a myriad of tools is available to regulate unwanted

345. *See Black*, 538 U.S. 343 (2003); *R.A.V.*, 505 U.S. at 377.
346. *See Black*, 538 U.S. at 343.
347. *See id.* at 380-82.
348. *See id.*
349. *See* 42 U.S.C.A. §§ 2000e (2006); Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991).
350. *See* SHIELL, *supra* note 220 at 1-4.
351. *See id.*
352. *See* Alvarez, *supra* note 7.
353. *See id.*
354. *See id.*
355. *See id.*

speech under other forms.[356] It is therefore not enough to say that hate speech cannot be regulated in the United States, or that the freedom of speech always, or even traditionally, trumps competing constitutional values. Accordingly, whether such regulation is appropriate, or even necessary, in terms of hate speech, and, if so, to what extent, is a value judgment. This value judgment is based not in terms of being "for" or "against" hate speech, but rather in how one perceives society and the role of the state in relationship to that society. The history of blasphemy jurisprudence provides powerful knowledge that informs this judgment.

There are three basic alternatives as one approaches the question of addressing hate speech. The first can be called traditionalist paternalism, and it reflects the ideology of the state as representative of a theological or ideological universe. An offense against that theology or ideology is therefore an offense against the state, for the state depends upon the external body of thought for its legitimacy.[357] In a traditionalist paternalistic state approach to hate speech, the offensive speech is treated like blasphemy; not only is not tolerated, it is severely punished as treasonous in order to preserve the legitimacy of the state.[358]

The second alternative, called modernistic paternalism, reflects the identity of the state as guardian of elite ideals which might become contaminated or distorted if left to individual market forces. Although viewed as the good, these values are acknowledged as delicate and subject to undesired manipulation. Accordingly, the state is perceived as a beneficent parent to the people, preserving their welfare and eliminating conflict to maximize social contentment and protect popular values.

The third alternative, called libertarianism, defines the state as facilitator, rather than corrector, of the marketplace of ideas. This approach acknowledges the ideals of Furneaux to their fullest extent, and affirms that competition in the marketplace of ideas will produce the

356. *See supra* Part I.B.

357. One should not make the mistake of relegating the potency of traditionalist paternalism to the European Middle Ages on the basis of the European experience with blasphemy. It survives in forms as varied as Islamic theocratic regimes and the remnants of Soviet-style Communism. *Compare* Philip Hoyle et al., *Ayatollah Revives the Death Fatwa on Salman Rushdie*, TIMES (London), Jan. 20, 2005 (showing relationship between religious edict and governmental policy) *with* FERDINAND JOSEPH MARIA FELDBRUGGE ET AL., ENCYCLOPEDIA OF SOVIET LAW 343-44 (1985) (identifying "defamation" of "Soviet political . . . system" as punishable in former USSR with "six months to seven years with or without exile"). This comment does not presuppose to address the consequences of the expression of this ideology across such varied regimes, but it is important to note that this conception of the role of the state transcends any given ideological or historical perspective, and remains a viable force in the community of nations today.

358. *See* Zahid Hussain, *Journalist Sentenced to Life for Blasphemy*, THE TIMES (London), Jul. 10, 2003.

best, and most enduring, result.[359] In absolute libertarianism, the state functions merely as a facilitator to ensure that speech is not hindered. In qualified libertarianism, the state functions as facilitator but also regulates at the margins. This alternative asserts that the marketplace of ideas is generally reliable as a catalyst for determining social values, but that excesses on either side of equilibrium should be controlled at the margins.

Some elements of all of these conceptions of the state are present in the varied U.S. jurisprudence on the subject, and this is partially why the case law is confusing in some respects. A traditionalist paternalist model, or even a modernist paternalism model, invites considerations of social values in regulating hate speech. The judiciary, much as in blasphemy of old and currently with respect to obscenity, is an arbiter of value. This approach justifies regulation in terms of its effect on society, much as blasphemy was regulated during the 19th century, and obscenity is regulated today. This type of protectionism requires intense judicial oversight and a proactive assignment of value to categories of speech. Such oversight was rejected in a blasphemy context, because of its impracticality in the face of religious pluralism.[360] It was upheld in an obscenity context, because enough social consensus existed to make it workable.[361]

Depending on how hate speech is viewed in terms of the legitimacy of the state, either paradigm could be followed to varying degrees. Although outright prohibition seems incompatible with previous decisions, these could be reversed. Without going to such an extreme, exceptions could be carved out, similar to the fighting words doctrine and, like obscenity, based on societal protection. This approach has already been taken to an extent.[362]

If the United States adopts the third alternative, such undesirable speech could be regulated minimally or not at all, leaving it to market forces to eliminate undesirable speech and positively affect desirable values. This market oversight could take the form of private actions to remedy excessive conduct, such as tort actions and the formation of groups to promote an alternative viewpoint. In such a context, the state would serve as facilitator of speech, ensuring that the ability to share ideas was not hindered. If a qualified libertarian approach is adopted, the state could justify the regulation at the margins, such as cross-burning

359. *See generally* LEVY, *supra* note 31.
360. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497 (1952).
361. *See* Roth v. United States, 354 U.S. 476 (1957).
362. *See supra* Part I.B.

that attempts to intimidate, while still affirming a fundamental belief in the marketplace of ideas.

III. COMPARISON WITH INTERNATIONAL NORMS

In order to see how each of the above approaches might actually work, it is helpful to review concrete alternatives of each alternative in other nations.

A. Traditionalist Paternalism

It is difficult to find a surviving traditionalist paternalistic regime in lands overwhelmingly influenced by western thought. This worldview today is most prominently represented by nations which strictly follow some form of shari'a law.[363] Most notably, Pakistan's penal code, which proscribes a sentence of death for blasphemy, is noted as among the strictest in the world in this regard.[364] Important comparisons can be drawn between this approach and what a traditional paternalist model to hate speech regulation might look like. The Pakistani approach advocates a method of statist control similar to that emphasized in European blasphemy regimes during the period prior to and immediately following the Protestant Reformation.[365] As demonstrated above, such an approach is grounded in a worldview that draws upon a particular theology or ideology, in this case Islam, as the explanation for, and foundation of, the state's existence. An offense against this foundation is an offense against the state itself, which indicates why the draconian punishments for blasphemy in such regimes hold sway. This theological values system provides both order and a method of maintenance for the state. As stated above, such regulations, although outwardly religious in character, have far more to do with the maintenance of political regimes than, ultimately, with theological concerns. It is for this reason that Siddique and Hayat point out that the blasphemy laws of Pakistan have

363. Shari'a is a generally accepted descriptor term for Islamic religious law, a comprehensive system of law governing all aspects of Muslim life. Its precise definition in terms of practical application, however, is unclear. For a good overview of this concept and a comparison of its application in numerous countries, *see* Ted Stahnke and Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 GEO. J. IN'TL L. 947 (2005).

364. *See generally* Osama Siddique and Zahra Hayat, *Unholy Speech and Unholy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT'L L. 303 (2008) (providing excellent overview of impact of blasphemy laws in Pakistan and their relationship to authoritarian regime).

365. *Compare id.* (demonstrating the identification of blasphemy as a crime against the state in Pakistan) *with* LEVY, *supra* note 31, at 80 (recounting the state's role in administering punishment for the crime of blasphemy).

been used to prevent a "breach of the peace."[366] In this type of regime, however, speech-curtailing legislation is designed to do more than prevent a breach of the peace and to maintain the leadership of one or more authoritarian figures, although it often has this effect. It is designed to maintain the ideology which is the primary foundation of, and explanation for, the state's very existence. Traditionalist paternalism regimes presume that the guardianship of the state's existence cannot be entrusted to its people, but that challenges to its foundation must be avoided, at best, or eliminated, at worst, but dealt with decisively at all cost to freedom. It is not enough to say that in such regimes the value of preserving the public peace trumps that of freedom of speech. It is more appropriate to characterize such regimes as using all tools necessary to perpetuate their own existence. Whether one views the state as the secular arm of God, as in medieval Europe, or the state as the Ummah, the community of all who live subject to Shari'ah law as derived from the Qur'an and the Sunnah,[367] the justification for blasphemy legislation as the protection of the raison d'etre for the state is essentially the same. Whatever the practical motivation is for such a justification, the principles are closely aligned.

B. Modernist Paternalism

The most high-profile modernist paternalistic regimes, with respect to hate speech, are Canada and Sweden. The Canadian criminal code provides punishment not only for "incite[ment] of hatred . . . likely to lead to a breach of the peace,"[368] but also for "every one who . . . wilfully promotes hatred against any identifiable group."[369] Although the statute provides for an exception for those who "in good faith" based their statement on "a religious subject" or in "a religious text,"[370] it has not been implemented without controversy, particularly with respect to its

366. Siddique and Hayat, *supra* note 364, at 307.

367. *See* Universal Islamic Declaration of Human Rights, Explanatory Notes, 1(b), *available at* http://www.alhewar.com/ISLAMDECL.html [hereinafter "Islamic Declaration"]; Islamic Declaration art. XXIII. It is important to note that there is some dispute over the extent of the concept of Ummah, which is defined in the Islamic Declaration as "World Muslim Community"; some would extend this concept to the extent of the original Islamic caliphate, and include all subjects, whatever religion, within its authority, basing their argument on the Dustur al-Madinah (Medina Constitution) of 622. *See, e.g.,* Dustur al-Madinah, Art. 25, available at http://www.constitution-.org/cons/medina/con_medina.htm (stating that "the Jews of the B'Auf are one community with the believers.").

368. Canada Criminal Code, R.S.C., c. C-46, § 319(1) (1985).

369. *Id.* § 319(2) (1985).

370. *Id.* § 319(3)(b) (1985).

2005 amendment to include "sexual orientation" as a classification for hate speech.[371]

Likewise, the Swedish government, with its "Act on Persecution of Minority Groups," passed in 2002, criminalized hate speech against a number of minority groups.[372] The conviction under this law of Pentecostal Pastor Åke Green, who preached a sermon condemning homosexuality on June 20, 2003, was the subject of intense international interest.[373] The conviction and sentence of one month in prison was ultimately overturned on appeal to the Göta Court of Appeal on Feb. 12, 2005, which was affirmed by the Supreme Court of Sweden on Nov. 29, 2005.[374] In its opinion, the Swedish Supreme Court relied on commitments to freedom of religion and freedom of expression guaranteed under the European Constitution, and the European Court's guidelines for determining the legitimacy of a restriction on speech.[375] These guidelines include "whether the restriction meets a pressing social need, whether it is proportionate to the legitimate purpose to be achieved, and whether the reasons asserted by the national authorities to justify it are relevant and sufficient."[376] The Court found that the European Court would likely find that while restrictions on hate speech were appropriate, in light of the European Convention on Human Rights' emphasis on the importance of religious freedom and the freedom of speech, a restriction on Pastor Green's speech would likely be found to be disproportionate and therefore invalid.[377]

In both of these instances, modernist paternalistic states permit enhanced limitations on the freedom of speech, particularly with respect to hate speech, as threats to the stability of society. The legitimization of this regulation is not based, as it is in traditionally paternalistic states, on some external source for the legitimacy of the state qua state. Rather, it is based in a preservation of the state's fundamental values as determined

371. *See MPs Extend Hate Crime Protection*, THE GLOBE AND MAIL (Toronto), Sept. 17, 2003. *See also* Rob Moll, *Weblog: The Bible as Canadian Hate Literature*, CHRISTIANITY TODAY, Apr. 2004, *available at* http://www.christianitytoday.com/ct/-2004/aprilweb-only/4-28-42.0.html.

372. Lagen om hets mot folkgrupp (Svensk författning-ssamling [SFS] 2002:800) (Swed.).

373. *See, e.g.*, Keith B. Richburg, *Swedish Hate Verdict Reversed, Sermon Condemning Homosexuals Ruled Not Covered by Law*, WASHINGTON POST, Feb. 12, 2005; *World Briefing | Sweden: Pastor's 'Hate Speech' Conviction Quashed,* NEW YORK TIMES, Feb. 12, 2005.

374. Supreme Court of Sweden, Åke Green case, 2005-11-29 p. 14 (Swed.), *available at* http://www.domstol.se/-Domstolar/hogstadomstolen/Avgoranden/2005/Dompa engelska_B_1050-05.pdf (English translation).

375. *Id.*

376. *Id.* (citing Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245 (1979)).

377. *Id.* at 16.

democratically. Unlike traditional paternalism, which views the state as justified apart from its people, in modernist paternalism the state exists directly for the benefit of its people. Modernist paternalism emphasizes the collective above the individual. Hate speech can therefore be criminalized, not because it necessarily threatens the foundation of the state itself, but because it prohibits what the state as a democratically legitimate institution has determined is in the best interests of the development of its people.[378] Nuanced exceptions to the outright prohibitions, as in the case of religious speech in Canada and the ultimate decision of the Swedish Supreme Court, *supra*, recognize that freedom of speech has a very important role to play within a democratic society.[379] Accordingly, restrictions on hate speech can be justified on the basis of "preventing disorder or crime, as well as to protect a person's good name or reputation."[380] The state as guardian of the safety of its citizens is the paramount object of modernist paternalism.

C. Libertarianism

The United States possesses perhaps the purest example of a libertarian regime. As discussed exhaustively, the United States initially inherited an early form of modernist paternalism.[381] With respect to many forms of speech, including blasphemy regulation, the United States has generally embraced the idea that an emphasis on free speech is not a mere social value, but operates as a transcending force to enable the development of societal values.[382]

This view of speech was emphasized in the overturning of blasphemy regulation and rose to prominence throughout the 20th century.[383] The "marketplace of ideas" concept primarily defined the state as marketplace facilitator. Nevertheless, as pointed about above, the emphasis on free speech had notable exceptions, such as obscenity

378. This giving over of power draws strongly on the idea that the people, in forming a state, create "something greater than the sum of its parts," to rule over them. *See generally* THOMAS HOBBES, LEVIATHAN (Simon & Schuster 1997) (1651). *See also* Supreme Court of Sweden, Åke Green case, 2005-11-29 p. 10 (Swed.), *available at* http://www.do-mstol.se/Domstolar/hogstadomstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf (English translation) (enumerating limitations on freedom of speech and adding, "To this list may be added the principle that this freedom may otherwise be limited if especially important reasons justify this.").

379. *See MPs Extend Hate Crime Protection*, THE GLOBE AND MAIL, Sept. 17, 2003. *See also* Supreme Court of Sweden, Åke Green case, 2005-11-29 p. 10 (Swed.), *available at* http://www.domstol.se/Domstolar/hogstadomstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf (English translation).

380. *Id.* at 11.

381. *See supra* Part I.

382. *See supra* Part I.

383. *See supra* Part I.A.

and other speech which overtly created undesirable social effects.[384] Although Furneaux's market-based arguments have been given their greatest practical application in the United States, they have not been completely triumphant. The role of the state as guardian is seen in these exceptions. They stand for the affirmation that the state has a credible power to prevent marginal influences which would thwart the mechanism of free speech in contributing to the development of society.

Within this qualified libertarian approach, the state's power to circumscribe the influence of speech is weakened, but remains. The difference from a modernist paternalistic state is one of degree, rather than kind. It is simply a variance in the degree to which the state is willing to make allowance for speech of marginal value in terms of its objectives. In the libertarian model, the state is seen as a reactive, rather than a proactive force. It corrects excesses, and does not unduly interfere. It provides for alternatives, such as lawsuits and even hostile environment claims in the employment context, to incentivize behavior, rather than directly regulating it. Although the United States demonstrates what may best be described as a qualified libertarian model, its approaches to obscenity and enabling of hate speech proscription under limited circumstances display clear modernist paternalistic tendencies.

IV. RECOMMENDATION

In a world increasingly defined by globalism, where competing perspectives and statist self-definitions increasingly conflict and adapt to each other, the United States has much to contribute to the debate. The United States' cautious embrace of a qualified libertarian regime has arguably been its greatest contribution to the world dialogue on speech issues vis-à-vis the state's self-definition. This movement, however, may be overcome by doubt and pressure to adapt more of the United States' latent modernist paternalistic tendencies.

Although it may have been motivated by less than ideologically pure reasons, such as the impracticality of regulation in a pluralistic society, the American jurisprudence with respect to blasphemy legislation has shown the world that Furneaux's arguments are fundamentally correct.[385] Within the marketplace of ideas, truly strong, valid ideas are able to compete and emerge victorious on a level playing field. By and large, religious groups have not rioted in response to blasphemous statements that have offended them. Rather, they have channeled their energies into mounting effective counter-arguments and

384. *See supra* Part I.B.
385. *See supra* Part I.A.

seeking solutions through the democratic political process, enriching the public debate.[386]

The beauty of a qualified libertarian approach to speech regulation is that it says nothing about what a society's values should be. A society is free to keep its traditional values, as it likes, or to exchange them for others. This advantage was recognized as early as the decision in *Chandler* in 1837.[387] The state does not function as the guardian of the substantive values of the people, so much as the process by which the people determine these values for themselves. These values are stronger and more authentic, as they have been determined rationally by their adherents.

Just as the Court wisely recognized that plurality of religious ideologies rendered moot the concern of public unrest about blasphemous statements,[388] the Court should likewise place its faith that the preeminent values of equality will survive in the ideological field of combat, provided that the playing field is level. This leveling of the playing field can allow for regulation of cross burning with intent to intimidate, while at the same time preserving the right to express the vilest of ideas in the confidence that they will be publicly repudiated. In a recent example, the funeral protests have been dealt with effectively completely apart from legislative solutions.[389] Private lawsuits, opposition groups and tactics to deflect the groups' speech have overwhelmed the undesirable speech and affirmed key social values without the need to resort to statutory law.[390]

Furneaux correctly recognized that the maintenance of values by force, as in blasphemy regulation, oppressed not only the people, but also the development of the state and the integrity of the philosophy thus "protected."[391] After a slow start, the United States began to cautiously apply Furneaux's principles.[392] By and large, they proved successful.

The "marketplace of ideas" concept was eventually accepted with respect to blasphemy regulation.[393] At its core, it argues that the most important and sacred values among us are able to defend themselves

386. For a discussion of the heightened role of religious groups within contemporary American political discourse, see generally CLYDE WILCOX AND CARIN LARSON, ONWARD CHRISTIAN SOLDIERS: THE RELIGIOUS RIGHT IN AMERICAN POLITICS (3d ed. 2006).

387. *See* State v. Chandler, 2 Harr. 553, 1837 WL 154 (Del. Gen. Sess. 1837), at *11 (affirming that a society can change its religious and ethical foundations as it pleases, and that judges must be respectful of those sentiments in interpreting law).

388. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 509-14 (1952).

389. *See supra* Part II.B.

390. *See* Alvarez, *supra* note 7.

391. *See* LEVY, *supra* note 31 at 327.

392. *See supra* Part II.A.3.

393. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 509-14 (1952).

against criticism and attack, and thereby become stronger. Active government protection of freedom of speech interests facilitates this process.

Taken as a whole, however, an absolute libertarian approach to speech regulation is untenable. Some speech is inherently destructive, such as the aphorism of yelling fire in a crowded theatre.[394] This destructiveness comes not from the idea, but from the effect that such speech would universally produce. The element of actual harm to disadvantaged groups by hate speech is part of this destructive capability. If we are to accept the postulates of Allport, hate speech, particularly when coupled with intimidatory intent as in *Black*, can be merely the first step toward more harmful actions.[395]

A qualified libertarian approach which recognizes a minimal role for regulation at the margins to ensure the fairness of the marketplace of ideas addresses this problem. Although it is tempting to blur the line between qualified libertarianism and modernist paternalism in terms of practical effect, they differ in their scope precisely because of their ideological underpinnings. Qualified libertarianism retains the view that the state is the facilitator of a free market in speech, which needs occasional correction to enable the people to best determine their own ideas. Modernist paternalism, on the other hand, views itself as the guardian of those very ideas and regulates to protect the ideas themselves.

The United States has shown from its experiment with blasphemy regulation that modernist paternalism is an inefficient means of promoting social values.[396] The previous attempt with blasphemy required distinctions between popular and legal blasphemy.[397] This distinction was rife with subjective determinism. Such paternalism forces an unwelcome, inorganic means of development on society, taking it in a direction that it does not want to go, or perhaps is not ready to go. In an attempt to protect underlying values, it neutralizes the very advantages that, as has been shown, go hand-in-hand with freedom of speech as paramount value.

Accordingly, experience has shown that a qualified libertarian approach, which views the state as facilitator with power to correct errors at the margins, is the most appropriate course to follow. This approach encompasses soft regulation. Soft regulation includes enabling private legal actions, and corrective actions within particularly sensitive areas,

394. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).
395. *See* Virginia v. Black, 538 U.S. 343 (2003); ALLPORT, *supra* note 222 at 49-51.
396. *See supra* Part I.A.
397. *See* People v. Ruggles, 8 Johns. 290, 290.

such as regulating hate speech that clearly tends toward violence, and encouraging the dissemination of counter opinions.

V. CONCLUSION

The success of the long-term American experiment in terms of deregulating blasphemy and other speech, provided that there is some baseline of value and that it is not inherently destructive, demonstrates that the application of this model to hate speech is most in keeping with the premises on which the American theory of governance and societal evolution is based.

In the future, the United States must address how it will deal with the concept of hate speech, which stands antithetical to the American concept of equality, in light of an international consensus which increasingly embraces proactive regulation of hate speech. The United States' experience in dealing with blasphemy regulation, and its pioneering legal and political model, provide insight into an appropriate way to address the issue of hate speech.

The concept of blasphemy, which is rooted in religious belief, became enshrined in European law during a period when the church and state were seen as contemporary expressions of divine rule upon the earth. As time passed, religious pluralism required this belief to be modified, and blasphemy was justified first in terms of a moral protectionism, and then in terms of promoting the public peace by protecting offense against common values. Eventually, within the United States, the idea, advanced by Philip Furneaux, that common values would inevitably triumph in the marketplace of ideas, led to a liberalized policy toward free speech in general, and blasphemy regulation. A revised conception of the role of the state as facilitator, rather than regulator, began to emerge in some respects.

The conception of state as facilitator speaks powerfully to the appropriate attitude toward hate speech regulation in the 21st century. This same approach will yield successful results in this area. Although absolute libertarianism is both impractical and irresponsible in light of practical effects of some speech, a qualified libertarianism, which accepts the need for government as facilitator to correct the excesses of the market of ideas at the margin, would be an appropriate means of implementation. This approach recognizes the demonstrable success of this attitude toward the role of the state, and also alleviates some concerns validly raised in modernist paternalism without accepting its underlying assumptions. If diligently applied, it can serve as an example for international export in the debate on the state's role in speech regulation. The United States has a rich contribution to the global

marketplace of ideas, and it should not hesitate to develop this contribution and offer it to the community of nations.