ANTI-LGBT FREE SPEECH AND GROUP SUBORDINATION

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This Article is about the tension between liberty and equality. It examines this tension in the context of disputes over free speech and LGBT rights. In the modern Civil Rights Era, the social and legal climate has become increasingly intolerant of bullying, embraced liberal sexual and gender norms, and sought to institute formal equality for formerly disfavored groups. The conservative movement has responded in part by seeking refuge from progressive change in constitutional jurisprudence, articulating theories of both the First and Fourteenth Amendments to effectively protect the status quo. Because of a receptive Supreme Court, dominant conceptions of both equal protection and free speech are informed today by libertarian ideology, reflecting a commitment to limited government oversight and regulation. A libertarian view of the Constitution, however, ensures that meaningful liberty and equality exist not for everyone but only for some. To create a more equitable society, constitutional interpretation must more adequately balance libertarian interests in the exercise of individual rights—like free speech—with the need for governmental action to promote the public good and address group-based harms.

This Article draws from the field of critical race theory to advocate for an antisubordination approach in mediating competing claims of equality and liberty. Unlike a libertarian free speech jurisprudence that treats all speakers and viewpoints as equally worthy of constitutional respect, an antisubordination approach to free speech is attentive to historical and contemporary modes of group-based oppression. Simply put, if the triumph of a free speech claim would enforce a status hierarchy that positions historically marginalized groups as inferior, that free speech claim should fail.

The need to reconceptualize liberty and equality came into sharp relief in the Supreme Court's 2020 decision in Bostock v. Clayton County. *The* Bostock *Court held that Title VII prohibits discrimination against gay and transgender employees,*

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but the majority concluded by expressing concern for religious and conservative dissenters. The Court suggested that constitutional and statutory principles of religious freedom and free speech might override antidiscrimination commands in appropriate cases. The jurisprudence that emerges from these developing cases will help determine the scope of equality, the breadth of First Amendment liberties, and the Constitution's role in addressing inequity for all marginalized groups.

INTRODUCTION

Before the 1990s, those who opposed social and legal rights for sexual and gender minorities did so primarily by playing offense. They criminalized same-sex sexual conduct, censored queer speech, banned openly gay persons from working in governmental positions or as teachers, scoffed at pleas for statutory antidiscrimination protections, and cast gay and transgender people as socially deviant and mentally ill.[1] As the LGBT rights movement gained momentum in securing formal legal protections, religious and conservative dissenters began to change their strategy from offense to defense.

Today, anti-LGBT forces often deploy a public-relations narrative that paints religious conservatives as victims of so-called elites and secularism.[2] In so doing, they seek refuge in the very legal mechanism that first facilitated disadvantaged minorities' campaigns for equal treatment: the First Amendment.[3]

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1. *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1289 (2005) (briefly describing a history of LGBT oppression).

2. Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 9 (2016).

3. As Professor Carlos Ball explains, the First Amendment has played a "crucial role" in the LGBT rights movement, allowing individuals to "criticize discriminatory

Civil rights statutes that protect gay and transgender people from discrimination in employment, education, housing, and places of public accommodation increasingly spark objections rooted in free speech, free association, and free exercise.[4] This legal sleight of hand aligns with a shared sense of victimhood within modern conservative movements,[5] effectively casting the oppressors of the past as the oppressed of today.

The Supreme Court helped lay the groundwork for these First Amendment claims, tucking concerns for religious objectors into the very opinions that ushered in LGBT gains under equality principles. From Justice Scalia's angry dissent in *Romer v. Evans*[6] to the more recent majority and dissenting opinions in the marriage equality decisions of *Windsor*[7] and *Obergefell*,[8] conservative members of the Court have consistently, and with increasing intensity, framed opponents of gay rights as the true victims of liberal intolerance.[9] In 2018, the Court's majority in *Masterpiece Cakeshop*[10] embraced free-speech and religious-liberty claims as potential sites of refuge for those who dissent from emerging norms around LGBT equality.[11] Notably, the Court went out of its way to express disapproval of a local official who factually observed that people throughout history have misused religion to oppress vulnerable groups, and it then characterized this official's observation as evidence

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government policies and social norms, and to organize politically in order to provide sexual minorities with many of the legal rights and protections long available to heterosexuals." CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 1–2 (2017).

4. *See* Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2102 (2017) (noting that relaxing laws around sexuality and family has been "polarizing," and objectors "now more typically frame their complaints in the language of religious liberty" and seek "recourse under the First Amendment").

5. *See, e.g.*, KATHERINE J. CRAMER, THE POLITICS OF RESENTMENT: RURAL CONSCIOUSNESS IN WISCONSIN AND THE RISE OF SCOTT WALKER 40 (2016) (explaining that many conservatives have "animosity toward government" in part because they feel "overlooked, ignored, and disrespected"); THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA 98 (2004) (explaining that many conservatives believe "society's real victims" are "evangelical Christians"); ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT 15, 35 (2016) (explaining that many conservatives feel that the "government curtailed the church," and they "seek[] release from liberal notions" of what to think and feel); ARLENE STEIN, THE STRANGER NEXT DOOR: THE STORY OF A SMALL COMMUNITY'S BATTLE OVER SEX, FAITH, AND CIVIL RIGHTS 23 (2001) (explaining that conservative Christians feel "that secular establishments—teachers, principals, city councilors and their ilk—ignored them, mocked them, and sometimes victimized them"); JOAN C. WILLIAMS, WHITE WORKING CLASS: OVERCOMING CLASS CLUELESSNESS IN AMERICA 69 (2017) (noting that many conservatives are "proud of their Christian morality" and feel "deeply wounded when it [is] depicted as homophobic ignorance").

6. 517 U.S. 620, 636 (1996).

7. United States v. Windsor, 570 U.S. 744 (2013).

8. Obergefell v. Hodges, 576 U.S. 644 (2015).

9. For a robust discussion of these cases, see *infra* Part III.

10. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

11. *See id.* at 1737 (Gorsuch, J., concurring).

of anti-religious animus.[12] Most recently in 2020, the Court in *Bostock*[13] cabined its decision that federal workplace law prohibits sexual orientation and gender identity discrimination by gesturing to future cases rooted in constitutional and statutory religious liberty objections. The Court suggested that, in some cases, exemptions to LGBT-inclusive antidiscrimination statutes might be warranted.[14]

On the first day of the Court's new term in the fall of 2020, just one week after President Trump nominated the reputedly conservative Amy Coney Barrett to fill the seat of the notoriously liberal Justice Ruth Bader Ginsburg,[15] Justices Thomas and Alito amplified in blunt and urgent terms their deep concern for apparent religious victims of LGBT equality. In *Davis v. Ermold*,[16] the Court declined to hear a free exercise claim from Kim Davis, a Kentucky clerk who refused to issue marriage licenses to same-sex couples following the Court's decision in *Obergefell*.[17] Thomas and Alito agreed with the denial of certiorari, but they authored a separate opinion to urge the Court at some later date—presumably after the confirmation of Justice Barrett and the attendant cementing of originalist constitutional methodology—to overrule *Obergefell*.[18] They characterized same-sex marriage as a Court-created "problem that only it can fix" given that it was the Court, after all, that had wrongly and "undemocratically" chosen "to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment."[19] "Davis may have been one of the first victims of this Court's cavalier treatment of religion in its *Obergefell* decision," they explained, "but she will not be the last."[20]

One explanation for why the Supreme Court has gradually grown more receptive to First Amendment principles as possible mechanisms to blunt the effects of LGBT equality is that the Court currently interprets the First Amendment through a libertarian lens. In the past decade, conservative interest groups scored a series of resounding First Amendment victories at the Supreme Court. In *Citizens United v. Federal Election Commission*,[21] for example, the Court struck down certain regulations on corporate spending in elections,[22] overruling past precedent that

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12. *Id.* at 1729.

13. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

14. *Id.* at 1754.

15. Anne Gearan et al., *Trump Announces Judge Amy Coney Barrett Is His Pick for the Supreme Court*, WASH. POST (Sept. 26, 2020), https://www.washingtonpost.com/politics/trump-barrett-supreme-court/2020/09/26/4a417d60-000e-11eb-b555-4d71a9254f4b_story.html.

16. 141 S. Ct. 3 (2020).

17. *Id.* at 3.

18. *Id.* at 4.

19. *Id.*

20. *Id.* at 3.

21. 558 U.S. 310 (2010) (concerning federal regulations on "electioneering communications" by corporations and unions).

22. The Court rejects the premise that the government can treat speakers in the political process differently based on their identity, regardless of how loud some speakers might be or how often they might speak. *Id.* at 343, 354–56. The Court instead requires formal equal treatment, i.e., speaker-neutrality, complaining that an anti-distortion rationale for

approved similar limits under the egalitarian rationale that deep corporate pockets could overwhelm other voices and distort the marketplace of ideas.[23] In *Hobby Lobby*,[24] the Court granted closely held, for-profit religious companies an exemption from a law requiring employers to provide health insurance to their employees that includes contraception coverage.[25] And in *Janus*,[26] the Court—expressing deep concern over governmental attempts to "compel" speech[27]—held that public unions cannot collect fees from nonunion members who nevertheless benefit from the union's work, overruling past precedent[28] that permitted unions to collect such fees under the egalitarian rationales promoting labor peace[29] and avoiding a free-rider problem.[30]

These cases are important for what they say about the Court's willingness to favor corporate interests over those of the working class. They are perhaps even more important for what they reveal about an emerging consensus among the conservative Justices regarding the very meaning of the First Amendment. Professor Kathleen Sullivan explains that the outcomes in these and other recent First Amendment disputes are "best explained as representing a triumph of the libertarian over the egalitarian vision of free speech."[31] A libertarian First Amendment represents a negative check on the government's ability to interfere with private ideas,[32] limiting—and often outright prohibiting—the regulation of speakers, speech subject matter, and viewpoints.[33] Judicial commitment to this ideology leaves little room for governmental oversight that attempts to achieve equitable economic and social outcomes.[34] The impulse behind this approach is a fear that a more regulatory

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limiting corporate speech "muffle[d] the voices that best represent the most significant segments of the economy" and deprived the electorate "of information, knowledge and opinion vital to its function." *Id.* at 354–55.

23. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668 (1990).

24. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

25. *Id.* at 736.

26. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., 138 S. Ct. 2448 (2018).

27. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.* at 2463.

28. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 209 (1977).

29. "Labor peace" reflects the concern that, if public unions cannot collect dues from nonunion employees, a different union could represent those employees and cause conflict and disruption. *Janus*, 138 S. Ct. at 2465. The Court conceded that preserving labor peace is a compelling interest but found no evidence that multiple-union representation conflicts are a problem. *Id.* at 2466.

30. Unions argued that "fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs." *Id.* The Court held that "avoiding free-riders is not a compelling interest." *Id.*

31. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010).

32. *Id.*

33. *Id.* at 155, 163.

34. *See* Stephen J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 236 (2014) ("[C]onservative judges have used the First Amendment to erect a barrier against regulation that aimed to promote liberal or progressive values.").

governmental role regarding speech could lead to government tyranny.[35] It is perhaps not surprising, then, that the First Amendment, fortified today by libertarian interpretations that leave little room for state intervention, has become the primary source of legal rhetoric and authority for conservatives who oppose LGBT equality.

This Article is about the tension between liberty and equality. It critiques the current trajectory of First Amendment jurisprudence that is guided by libertarian ideology, and it argues instead for a First Amendment that embodies egalitarian, antisubordination principles. An antisubordination approach to the First Amendment—and specifically to free speech claims—is not new. In fact, the Supreme Court itself has implicitly embraced the equitable principles embodied by an antisubordination approach in past free-speech controversies.[36] Unlike a libertarian First Amendment that treats all speakers and viewpoints as worthy of equal constitutional respect, an antisubordination First Amendment is attentive to historical and contemporary modes of group-based oppression and marginalization.[37] A requested departure or exemption from antidiscrimination law rooted in free speech should fail if its success would perpetuate the subordination of a historically oppressed group by enforcing a status hierarchy that positions these groups as inferior.

This Article thus humbly steps into and contributes to a vibrant intellectual conversation ongoing since at least the early 1980s—a time when hate speech against women and people of color was a growing problem on college campuses.[38] It joins those who advocate for antisubordination as a theory that could resolve disputes between First Amendment and equality claims. There are compelling reasons for revisiting this issue today. During the Trump Administration, hate speech and hate-motivated violence rose, almost certainly due in part to the divisive and racialized rhetoric coming from the President himself.[39] The executive branch worked hard to roll back protections for vulnerable minorities through new regulations, deregulation, and executive orders, and it was particularly hostile to

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35. OWEN M. FISS, THE IRONY OF FREE SPEECH 2 (1996) (explaining that a libertarian theory of the First Amendment is premised on an outdated view that the state is the "natural enemy of freedom").

36. *See infra* Section II.C.

37. *See infra* Section II.A; *see also* Reva B. Siegal, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004) (defining the antisubordination principle as the "conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups").

38. *See generally* MARI. J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) [hereinafter WORDS THAT WOUND].

39. *See, e.g.*, Qasim Rashid, *In Harm's Way: The Desperate Need to Update America's Free Speech Model*, 47 STETSON L. REV. 143, 171–73 (2017) (walking through some of Donald Trump's hate-fueled rhetoric, and social media responses to it, during his candidacy and while President); Griffin Sims Edwards & Stephen Rushin, The Effect of President Trump's Election on Hate Crimes (Jan. 14, 2018) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652 (finding, based on empirical evidence, that "President Trump's election coincided with a statistically significant surge in hate crimes, even when controlling for alternative explanations").

LGBT issues.[40] The country is increasingly divided, and those divisions often track along identity-based lines.[41] Hate speech against racial and other minorities is again on the rise across college campuses and elsewhere, but unlike in the 1980s, popular sentiment has shifted away from its protection in the pursuit of uninhibited discourse.[42] Social norms have changed, and young people especially are looking to the law to protect people from hateful and intolerant speech.[43]

As youth culture and progressive movements forcefully condemn hurtful speech and embrace equality norms,[44] movements long interested in undermining civil rights laws are increasingly turning to the First Amendment for defenses to and requests for exemptions from generally applicable laws.[45] These claims have appeal in part because of the Supreme Court's gradual ideological shift to the right.[46] This shift is likely to accelerate following the confirmation of three Trump-appointed Justices who were vetted and promoted by the right-leaning Federalist Society—an organization concerned about any governmental efforts that threaten the scope of individual and corporate freedom.[47] There is a real risk that the Court's enthusiastic embrace of the First Amendment as a defense to antidiscrimination laws will undermine minority groups' hard-earned, formal equality gains.

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40. Dara E. Purvis, *Trump, Gender Rebels, and Masculinities*, 54 WAKE FOREST L. REV. 423, 428 (2019).

41. *See, e.g.*, Yvonne Lindgren, *Trump's Angry White Women: Motherhood, Nationalism, and Abortion*, 48 HOFSTRA L. REV. 1, 45 (2019) (arguing that "Trump's anti-immigrant, pro-American narrative" played on "white working- and middle-class American's fears of being culturally eclipsed by outsiders" and "drew upon white backlash against perceived cultural threats").

42. Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919, 1921 (2017) (explaining that "[a]lmost everyone condemns hate speech" today, "except the legal system").

43. *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 10 (2017).

44. *See* Kim Parker & Ruth Igilnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z So Far*, PEW RES. CTR.: SOC. & DEMOGRAPHIC TRENDS (May 14, 2020), https://www.pewsocialtrends.org/essay/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far/ (discussing trends relating to generational differences in attitudes on gender identity and politics).

45. *See* Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 DUKE J. CONST. L. & PUB. POL'Y 13, 26, 45–48 (2017) (explaining that the First Amendment "protect[s] not only the expressive activities of equality advocates, but also the communicative actions of its opponents and others who resist expansive equality claims").

46. Michael A. Bailey, *If Trump Appoints a Third Justice, the Supreme Court Would Be the Most Conservative It's Been Since 1950*, WASH. POST (Sept. 22, 2020), https://www.washingtonpost.com/politics/2020/09/22/if-trump-appoints-third-justice-supreme-court-would-be-most-conservative-its-been-since-1950/ (discussing how the Supreme Court's ideology has shifted rightward in recent decades and will continue to do so following President Trump's third and final appointment).

47. *See, e.g.*, Paul Waldman, Opinion, *Why the Religious Right Is So Freaked Out by the Supreme Court's LGBTQ Ruling*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/opinions/2020/06/16/why-religious-right-is-so-freaked-out-by-supreme-courts-lgbtq-ruling/ (explaining that many voted for President Trump to deliver Federalist Society approved Justices and socially conservative legal victories).

This Article primarily focuses on the long-fought culture war over LGBT rights because this battle is one of today's most visible manifestations of the tension between First Amendment liberties and equality principles. The Article thus adds to existing literature by applying and refashioning legal theories about antisubordination—born in past conflicts over racist hate speech—to the modern LGBT-rights context. Specifically, the Article explains how an antisubordination approach to free speech resolves competing First Amendment and equality claims, regardless of which variation the free-speech claim takes or which doctrinal "test" a court applies.

Part I offers an overview of the broader historical clash between liberty and equality at the Supreme Court, highlighting the Court's oscillation between libertarian and egalitarian principles in conceptualizing racial equality. Part II discusses what an antisubordination approach to free speech means, and it does so by drawing from the Court's antisubordination approach to equal protection claims in cases like *Brown v. Board of Education*[48] and *Obergefell v. Hodges*.[49] This Part contrasts an egalitarian free speech jurisprudence with the Court's contemporary libertarian approach reflected in its content- and speaker-neutrality rules.

Part III walks through the history of the Supreme Court's major gay- and trans-rights decisions. This history shows that the Justices' concerns about how LGBT equality potentially affects First Amendment liberties have gradually become more frequent and intense. It shows that the Court's latest LGBT rights decisions lay a foundation for future successful First Amendment exceptions and carve-outs from antidiscrimination laws. Part IV contrasts First Amendment arguments based on antisubordination principles with current First Amendment jurisprudence that tends to preserve the status quo. The section begins with the Ninth Circuit's analysis in *Harper v. Poway Unified School District*[50] to resolve competing claims to free speech and LGBT equality as a good example of the antisubordination approach in action. Next, this section assesses free speech claims that seek to undermine LGBT-inclusive antidiscrimination laws and explains how an antisubordination approach could lead to more equitable outcomes. Finally, this section argues for an egalitarian, antisubordinating, interpretative lens for both equality and liberty claims to ensure that real equity is within reach for all vulnerable persons.

I. LIBERTY AND EQUALITY IN TENSION: A BRIEF OVERVIEW

The United States has a long and contentious history of conflict when assertions of individual liberty collide with governmental efforts to promote public interests. In 2020, the U.S. response to the novel Coronavirus demonstrated the strength of the nation's impulse towards individualism and libertarianism above other interests.[51] In response to state and local orders to shelter-in-place, social

48. 347 U.S. 483 (1954).

49. 576 U.S. 644 (2015).

50. 445 F.3d 1166 (9th Cir. 2006), *vacated on procedural grounds*, 549 U.S. 1262 (2007).

51. For a discussion among academics in various disciplines on the limitations of the U.S. response to the Coronavirus, see Sean Illing, *Is America Too Libertarian to Deal with the Coronavirus?*, VOX (May 24, 2020), https://www.vox.com/policy-and-politics/2020/5/22/21256151/coronavirus-pandemic-american-culture-keith-humphreys.

distance, and wear face masks in public during the uncertain early days and months of the pandemic, civil unrest and right-wing protests besieged governmental centers.[52] To many, governmental efforts to minimize the spread of disease and fortify health care providers' ability to effectively respond was an unacceptable assault on liberty.[53] Indeed, in May 2020, the conservative Wisconsin Supreme Court became the first judicial body to nullify a governor's pandemic-related executive order,[54] echoing in its analysis the cries of protesters who argue that such orders infringe on individual liberty.[55]

This public health crisis and the attendant ideological conflicts over appropriate governmental responses are recent yet poignant examples of how those accustomed to certain freedoms often resist perceived threats to those freedoms, especially when those threats come from state action designed to achieve goals related to public welfare. A recurrent flashpoint is governmental efforts to promote equality. The Supreme Court has mediated the tension between liberty and equality at critical junctures, often in the context of race discrimination, and it has repeatedly favored the liberty interests of the powerful over the equality interests of the vulnerable. This favoritism for liberty over equality is in part why, as Professor Erwin Chemerinsky argues, the Court has failed at two of its most important functions: "to protect the rights of minorities who cannot rely on the political process and to uphold the Constitution in the face of any repressive desires of political majorities."[56] But it has not always failed, which offers promise for the future. Awareness of the basic historic outline of this ongoing constitutional tension puts into proper context today's battles over free speech and antidiscrimination law, and it plants some seeds for a reimagined doctrinal future.

Fierce struggles between competing liberty and equality interests are perhaps inevitable in a country that throughout its history has accepted racial apartheid of its own making. Prior to the Civil War, it was slaveowners' economic liberty to own Black persons as "property" that shamefully prevailed over the most

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52. *See, e.g.*, Benner v. Wolf, 462 F. Supp. 3d 154, 166 n.14 (M.D. Pa. 2020) (noting the protests in an order upholding Pennsylvania's COVID-19-related executive orders); Ramsek v. Beshear, No. 3:20-cv-00036-GFVT, 2020 WL 2614638, at *1–3 (E.D. Ky. May 21, 2020) (discussing the protests in an order upholding Kentucky's executive orders).

53. *See* Editorial Board, *We the People, in Order to Defeat the Coronavirus*, N.Y. TIMES (May 1, 2020), https://www.nytimes.com/2020/05/01/opinion/coronavirus-civil-liberties.html.

54. Wis. Legislature v. Palm, 942 N.W.2d 900, 914 (Wis. 2020).

55. The Chief Justice in her concurrence explicitly invoked the racist presidential executive order that the Supreme Court upheld in 1944's *Korematsu v. United States*, 323 U.S. 214 (1944), which required the internment of all persons of Japanese ancestry during World War II. *Palm*, 942 N.W.2d at 922–23 (Bradley, J., concurring). "We mention cases like *Korematsu*," she said, "to remind the state that urging courts to approve the exercise of extraordinary power during times of emergency may lead to extraordinary abuses of its citizens." *Id.* at 923.

56. ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 10 (2014).

basic human dignitary claims to be treated equally as persons.[57] After the Civil War, Congress enacted the Civil Rights Act of 1875, attempting to prohibit private discrimination on the basis of race in certain places of public accommodation.[58] Still, claims to discriminate on the basis of race prevailed due to a cramped conception of equality and a bloated understanding of liberty. In *The Civil Rights Cases*,[59] the Supreme Court held that, whatever the Reconstruction Amendments' promises of racial equality mean, they do not give Congress the power to regulate "social rights" and interfere "with the autonomy and freedom of citizens in their private lives."[60] While cloaked in doctrine regarding congressional power, the holding belies the Court's commitment to libertarianism—in this case reflected in individuals' liberty to exclude those with whom they do not wish to associate.

After the Court in *Plessy v. Ferguson*[61] incorporated this exclusionary liberty into the very meaning of the Equal Protection Clause, the legal fiction of "separate but equal" shaped life across the United States until the school desegregation cases of the 1950s.[62] In *Brown v. Board of Education*,[63] the Court famously held that racially segregated K-12 schools violate the Equal Protection Clause, leading to a gradual dismantling of formal Jim Crow segregation in all facets of public life.[64] *Brown* and its progeny represent an ideological shift at the Supreme Court in which egalitarianism and a concern for historically oppressed groups trumped unfettered claims to individual freedom as guiding principles for interpreting the Constitution. The Court even repudiated in spirit its commitment to individuals' freedom to discriminate in its congressional power jurisprudence, finding that Congress had the power to enact the Civil Rights Act of 1964[65] and prevent private race discrimination in places of public accommodation.[66] By the end

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57. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (holding that Blacks cannot be U.S. citizens in part because the Constitution's framers assumed that Black persons had "no rights which the white man was bound to respect").

58. Civil Rights Act, 18 Stat. 335 (1875).

59. 109 U.S. 3 (1883).

60. BALL, *supra* note 3, at 158.

61. 163 U.S. 537 (1896).

62. In *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950), the Court came close to directly challenging "separate but equal" by holding that a law school designated for Black students in Texas was inherently unequal to white law schools due to inaccessible intangible benefits. For a brief discussion of *Sweatt*'s role in the eventual dismantling of "separate but equal," see Derek W. Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 579–80 (2012).

63. 347 U.S. 483 (1954).

64. *See, e.g.*, John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 409–10 (noting that, while *Brown* did not explicitly overrule *Plessy*, the Court's subsequent per curiam decisions dismantled "separate but equal").

65. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17.

66. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (finding that Congress's prohibition of race discrimination in places of public accommodation was a valid exercise of its powers under the Commerce Clause because Congress "had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce").

of the 1960s,[67] the Court was taking an aggressive stance against segregation in K-12 schools, imposing a mandate on K-12 schools to affirmatively integrate.[68] Professor Derek Black describes the Court's remedial order in 1968's *Green v. New Kent County*[69] as the "most aggressive support for school desegregation" yet because it imposed an "unrelenting standard[] for achieving it" and rejected "the relevance" of schools' and parents' "preferences."[70]

Unfortunately, 1968 was a presidential election year, and white backlash to Black civil rights was growing.[71] On the campaign trail, Richard Nixon promised to "slow the pace of school desegregation" and "limit the use of bussing" students to out-of-neighborhood schools as a remedial tool for achieving integration.[72] Nixon promoted "freedom of choice," opposed withholding federal funds from schools that remained segregated, and told campaign workers that the Court was "wrong on *Green*."[73] Opposing aggressive desegregation efforts became a central theme of Nixon's "Southern Strategy" campaign for President[74] "as popular objections to the desegregation decisions of the Warren Court mounted."[75] These political positions were rooted in appeals to liberty: the liberty of white parents to send their children to local schools with other white students.[76]

Nixon's election in 1968 undoubtedly brought about the end of the Supreme Court's egalitarian focus due to Nixon's appointment of four staunchly conservative Justices during his first term.[77] In addition to its embrace of an anticlassification over an antisubordination approach to equal protection claims, as

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67. In the 1950s, following *Brown I*, the Court punted on the remedial component of desegregation, imposing a relatively toothless mandate on public schools to end race discrimination with "all deliberate speed." Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955). For a critique of this remedial benchmark, see Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581, 594 (2006) (arguing that the "all deliberate speed" standard "invited school officials, politicians, and ordinary citizens to stall").

68. *See* Green v. Cty. Sch. Bd., 391 U.S. 430, 437–39 (1968).

69. *Id.*

70. Derek W. Black, *Accounting for Historical Forces in the Effort to Align Law with Science*, 54 ST. LOUIS U. L.J. 1151, 1157 (2010).

71. Jeremy D. Mayer, *Nixon Rides the Backlash to Victory: Racial Politics in the 1968 Presidential Campaign*, 64 HISTORIAN 351, 351, 353 (2002).

72. David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1090 (2004).

73. Brad Snyder, *How Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 416 (2000).

74. *See generally, e.g.*, IAN HANEY-LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 22–34 (2014) (describing Richard Nixon's use of a "Southern Strategy" to stoke resentment among whites who felt alienated by the Black civil rights movement).

75. Reva Siegal, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 16 (2013).

76. *See, e.g.*, Myron Orfield, Milliken, Meredith, *and Metropolitan Segregation*, 62 UCLA L. REV. 364, 380 (2015) (explaining that "Nixon's electoral strategy centered on appealing to suburban whites threatened by urban riots, crime, student protests, and racial integration strategies").

77. *See* ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA 49 (2020).

I discuss in depth below,[78] the Court effectively enshrined educational "freedom of choice" into law through several doctrinal developments limiting lower courts' ability to enforce racial integration in K-12 schools. The Court in the 1973 *Keyes*[79] decision eliminated one of the most powerful legal tools available to address the problem of "white flight"[80] and its role in the entrenchment of racially segregated public schools.[81] *Keyes* stands for the rule that lower courts may order and oversee a school's desegregation efforts only if there is evidence of intentional governmental discrimination.[82] In effect, courts became powerless to intervene when schools remained racially segregated due to private individual decisions about where to live and educate their children—private decisions often motivated by overt and implicit racial bias.[83] Paired with other recent minor changes to rules regarding when desegregation orders are permissible and should end, segregation has increased as courts have rushed to "return school districts to local authorities."[84]

Keyes marked the Court's return to libertarianism after its brief affair with egalitarianism, committed again to individual freedom from state oversight even in the face of compelling group-based interests. The Roberts Court continues this tradition in the education context today, striking down public schools' voluntary, race-conscious efforts to bring about racial integration as, in and of themselves, racially discriminatory.[85] In 2007, the Court in *Parents Involved* employed a libertarian approach to adjudicating the constitutionality of solutions for ending de facto racial segregation, crediting individuals' interest in being free from governmental classification over minority groups' interest in attending integrated schools.[86] In removing yet another legal tool for attaining educational equity, four Justices in the plurality triumphantly declared: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[87] This proclamation relies on a rigid belief in a meritocracy in which individual circumstances

78. *See infra* Section II.B.

79. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

80. "White flight" refers to the idea that "[w]hites who object to integration in a city's public schools and who have the flexibility and the resources may decide to 'flee' by sending their children to private schools or by choosing to live in another community," thus perpetuating segregation. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 629 (1983).

81. *Keyes*, 413 U.S. at 210–12.

82. *Id.* at 208 (suggesting that "a finding of intentionally segregative school board actions" is required to support the issuance of a desegregation order).

83. *See id.*at 198–203.

84. Freeman v. Pitts, 503 U.S. 467, 489–90 (1992) (describing local control as the "ultimate objective"); *see also* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 728–30 (2004) (critiquing the cumulative impact of the Court's post-*Swann* desegregation cases as worsening segregation).

85. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

86. "[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Id.* at 730 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)) (rejecting the government's efforts to voluntarily address de facto racial segregation in K-12 schools absent a proven history of intentional segregation).

87. *Id.* at 748.

purportedly reflect free choice. The long and continuing legacy of slavery, Jim Crow segregation, the War on Drugs, mass incarceration, police brutality, and implicit and explicit racial biases all demonstrate that the United States has never and likely never will embody the true meritocracy central for a fair and functioning libertarianism.[88]

The tension between liberty and equality is an old yet active fault line that shakes and disrupts our social norms, laws, and the very nature of our public discourse. By the end of the Trump Administration, the federal executive, judiciary, and Senate were increasingly influenced by and often beholden to far-right ideology. This was in many ways a product of the hypnotic power that individualism has wielded since President Nixon took office in 1968 and which was vividly articulated when Ronald Reagan famously declared during his inauguration in 1981 that "[g]overnment is not the solution to our problem; government is the problem."[89] The Supreme Court tends to support this potent rhetorical framing because, for much of its history, the Court's interpretative frame for assessing rights claims has likewise embodied conservative libertarianism.[90] Meanwhile, the Court has repeatedly eschewed interpretive approaches that could bring about equity for marginalized groups that may lack the very liberties those in power seek to protect.[91]

Yet there is hope. The short-lived, liberal Warren-era jurisprudence on race, speech, and other areas demonstrates that there are progressive alternatives to settling disputes between liberty and equality. Antisubordination is one such mediating theory.

II. AN ANTISUBORDINATION THEORY OF FREE SPEECH

"Free speech" is both a rallying cry and effective legal tool for those who favor limited government. A hands-off approach to the Free Speech Clause is rooted in classic liberal thought that views "liberty" as inherently about freedom from government.[92] Freedom from government is particularly appealing in the context of speech given the risk that too much governmental oversight and regulation could lead to censorship of ideas.[93] Indeed, the government regularly censored certain

88. For an in-depth description of the structural racism embodied in law that perpetuates racial inequalities today, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1–19 (2010).

89. President Ronald Reagan, Inaugural Address (Jan. 20, 1981), https://www.reaganfoundation.org/media/128614/inaguration.pdf.

90. As Professor Stephen Heyman argues, "libertarians understand liberty primarily in negative terms, as the absence of coercion or interference. This conception of liberty applies not only to interactions between individuals but also to the relationship between individuals and the state." Heyman, *supra* note 34, at 242.

91. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 212–14 (1973); *Parents Involved*, 551 U.S. at 701.

92. FISS, *supra* note 35, at 9 (explaining that "the liberalism of the nineteenth century was defined by the claims of individual liberty and resulted in an unequivocal demand for limited government," whereas "contemporary liberalism acknowledges the role the state might play in securing equality and sometimes even liberty").

93. *See, e.g.*, Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 745 (2002) (explaining that, in the context of free speech, there is "considerable risk" of "empowering the censors to ban the expression of opinions they happen not to like").

subjects and viewpoints (including those of LGBT interest)[94] before the liberal Warren Court began infusing the First Amendment with libertarian principles.[95] In the twentieth century, marginalized groups relied on a relatively unregulated Free Speech Clause to advocate against their own oppression and effectuate legal and social change for the better.[96]

In the 1980s, critical race theorists and other progressives began to challenge the prevailing libertarian view of the Free Speech Clause as insufficiently responsive to the problem of hate speech. These scholars compellingly argued that hate speech against historically oppressed groups interferes with constitutional and statutory commitments to equality.[97] The underlying constitutional critique was that a vision of free speech that almost always trumps claims to equality is rooted in an antiquated conception of liberty that ignores the positive role that governments can and should play to promote equality.[98] One way to resolve tension between free speech liberties and equality demands is to use antisubordination principles in free speech analysis.

This Part describes what an antisubordination interpretation of the First Amendment means and how it contrasts with the libertarian orthodoxy of today. It ties existing antisubordinating threads in equal protection jurisprudence to the free speech realm, illustrating that such an approach to speech regulation is neither novel nor contrary to the Constitution's original meaning. Finally, it responds to potential criticisms rooted in concerns about judicial competence and pragmatic constitutionalism. Doctrinal change can be time-consuming and difficult, but impassioned persistence has paid off at many junctures in past civil rights struggles, and successes show the benefit of this persistence.[99]

A. Defining Antisubordination

What does antisubordination mean, and how can judges apply it in constitutional disputes? Asking courts to incorporate antisubordinating principles into free speech claims might seem daunting or even too idealistic given the inherent definitional ambiguities. Nevertheless, legal scholars for decades have relied on this concept to solve knotty legal disputes.[100] The Supreme Court itself has both implicitly and explicitly invoked antisubordination as a basis for striking down governmental action under the Equal Protection Clause. It is thus instructive to

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94. *See* BALL, *supra* note 3, at 15–45 (discussing rampant governmental censorship of queer publications, including prosecutions for obscenity).

95. *See, e.g.*, Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 356–57 (1995) (noting that the Warren and Burger Courts "gave more weight . . . to individual interests in free speech").

96. *See* SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 163 (1994) (arguing that "the broadest content-neutral protection of offensive speech" paved the way for legal gains by historically oppressed groups).

97. *See generally* MATSUDA ET AL., *supra* note 38.

98. *See generally id.*

99. *See Civil Rights Movement Timeline*, HISTORY (Dec. 4, 2017), https://www.history.com/topics/civil-rights-movement/civil-rights-movement-timeline.

100. *See generally* MATSUDA ET AL., *supra* note 38.

examine the application of antisubordination principles in equality disputes to understand how this theory could work in First Amendment claims.

Two of the best examples of antisubordination theory at work in the Supreme Court's equal protection jurisprudence appear in *Brown v. Board of Education*[101] and *Obergefell v. Hodges*.[102] In *Brown*, the Supreme Court confronted head-on the ugly application of formal, race-based segregation in public K-12 schools.[103] Famously, the Court morally and legally anchored its equal protection analysis to the psychological *effects* of separate schools on Black schoolchildren: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[104] The Court's focus on perceived status-based inferiority led to a widespread understanding among scholars and judges that race classifications that have the purpose *or effect* of enforcing racial hierarchy were the principal equal protection harm in *Brown*.[105] This is the antisubordination theory at its heart.

When the Court decided *Obergefell* in 2015, both the Court and equal protection jurisprudence looked much different than they did in 1954 when *Brown* came down.[106] That these cases were decided more than 60 years apart—*Brown* during the liberal Warren era and *Obergefell* during the conservative Roberts era—is a testament to the enduring relevance of antisubordination in constitutional theory.

In *Obergefell*, the Court legalized same-sex marriage across the country.[107] The majority's analysis did not rely on the simple fact that same-sex marriage bans classify on the basis of sexual orientation and are thus inherently suspect,[108] nor did the Court search for evidence of animus against gay, lesbian, and bisexual people as an impermissible governmental purpose.[109] Instead, the majority explained that

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101. 347 U.S. 483 (1954).

102. 576 U.S. 644 (2015).

103. *Brown*, 347 U.S at 486–93.

104. *Id.* at 494.

105. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Struggles over* Brown, 117 HARV. L. REV. 1470, 1534 (2004) (explaining that the post-*Brown* presumption against racial classifications was based on an understanding that its purpose was to "dismantle . . . practices that enforced racial hierarchy"); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1022 (1986) (arguing that a close examination of *Brown* shows that antisubordination "dominated the Court's analysis").

106. *See* A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 257–60, 292–95 (2015).

107. *Obergefell*, 576 U.S. at 680.

108. Scholars have long been perplexed about the standard of review in the Court's gay rights cases because it repeatedly eschews "strict" or "intermediate scrutiny" analysis that accompanies suspect and quasi-suspect classifications, but it nevertheless finds in favor of sexual minorities. *See, e.g.*, Holning Lau & Hillary Li, *American Equal Protection and Global Convergence*, 86 FORDHAM L. REV. 1251, 1261–63 (2017) (arguing that *Obergefell* is one example of the Court collapsing traditional tiers of scrutiny in favor of more fluid balancing).

109. The Court often relied on an impermissible governmental purpose—animus—to strike down antigay laws, but *Obergefell* is a seeming departure. *See* William D. Araiza,

same-sex marriage bans have "the effect of teaching that gays and lesbians are unequal in important respects" and are thus "demean[ing]."[110] The Court went on to unambiguously state that state-sanctioned disapproval of same-sex relationships "serves to disrespect and *subordinate*" gays and lesbians as a group.[111] As I have argued elsewhere,[112] the Court tacitly recognized that government-backed efforts to reserve marriage for different-sex couples in the face of decades-long cries for formal equal treatment enforced a status hierarchy—with heterosexuals in a position of superiority vis-à-vis gays, bisexuals, and lesbians. This too is the antisubordination theory at work.

In short, the government subordinates when it enforces status hierarchies. As Professor Jack Balkin explains, status refers to "the degree of prestige and honor that individuals or groups enjoy," and status hierarchies "emerge between groups with distinctive identities or styles of life," where some groups receive positive associations and others receive negative associations.[113] The government, through creation, enforcement, and adjudication of law, plays a key role in both creating and imposing positive and negative group associations.[114] While scholars concede that subordination is hard to succinctly define,[115] there is a general consensus that the government subordinates when it perpetuates perceptions of inferiority regarding historically marginalized groups.[116] As cases like *Obergefell* indicate, subordination does not require intentionality; subordination can occur no matter how state action effectuates group-based inferiority.[117] Under this theory, in the free speech context, if elevating one party's free speech interest over another party's equality interest would perpetuate perceptions of inferiority about a historically oppressed group,

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Animus and Its Discontents, 71 FLA. L. REV. 155, 168 (2019) (noting that, unlike in past gay rights cases, *Obergefell* "has a more ambiguous relationship to animus" because the Court did not "explicitly condemn" same-sex marriage bans as reflecting animus).

110. *Obergefell*, 576 U.S. at 670.

111. *Id.* at 675 (emphasis added).

112. Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1134 (2017).

113. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321–23 (1997).

114. *See id.*

115. *See, e.g.*, Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 87, 115–16 (2000).

116. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (arguing that the Equal Protection Clause should be concerned with state action that "aggravates" or "perpetuates" the special disadvantaged status of groups); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1288 (2011) ("[T]he antisubordination principle is concerned with protecting members of historically disadvantaged groups from the harms of unjust social stratification.").

117. *See, e.g.*, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1014 n.224 (1993) ("The concept of subordination focuses not on intent, nor on an abstract rejection of racial classifications, but on racial hierarchy.").

then the free speech claim should fail.[118] Likewise, an equality claim should fail in the face of a free speech objection if it too would have a subordinating effect.[119]

To return to the concern that judges are ill-equipped to make decisions based on a principle as abstract as antisubordination, Professor Mari Matsuda, with tongue planted firmly in cheek, responds: "The larger question is how anyone knows anything in life or in law. To conceptualize a condition called subordination is a legitimate alternative to denying that such a condition exists."[120] Matsuda then offers a nonexhaustive list of the kinds of evidence about group-based social indicators of subordination "available to fact finders," including: "[w]ealth, mobility, comfort, health, and survival—or the absence of these."[121] This factor-based analysis for identifying group subordination has firm constitutional grounding. Indeed, the suspect and quasi-suspect classification framework at the very heart of equal protection claims developed precisely because of the Court's special concern for groups that historically suffered discrimination and lacked the requisite political power to effectuate their own interests.[122]

Further, judges already do the kind of hard intellectual work required for analyzing complex sociolegal issues in myriad other contexts. Take true threats, for example. In *Virginia v. Black*,[123] the Court held that cross-burning can sometimes constitute an unprotected true threat.[124] In coming to this conclusion, the Court "used history to define, contextualize, and cabin the constitutional harm"[125] and racist motivations inherent in most cross-burnings in precisely the way that antisubordination analysis would require.[126] In obscenity prosecutions, judges must consider contextual questions about whether the speech at issue, when "taken as a whole, lacks serious literary, artistic, political, or scientific value,"[127] and then rule on dispositive motions regarding the prosecution's evidence to that effect. In cases

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118. Professor Charles R. Lawrence III made this pitch as early as 1992: "If we are truly committed to free speech, First Amendment doctrine and theory must be guided by the principle of antisubordination." Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 804 (1992).

119. Professor John Powell argues that determining whether either an equality or free speech claim should prevail requires an evaluation of whether elevating one over the other would hamper "participation" in important aspects of civic life—an analysis that shares commonalities with antisubordination. John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 66–67 (1996).

120. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND, *supra* note 38, at 39.

121. *Id.*

122. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

123. 538 U.S. 343 (2003).

124. *Id.* at 359–64.

125. Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 95 GEO. L.J. 575, 628 (2005).

126. "The *Black* majority utilizes the tools of analysis recommended by critical race theorists to understand the harm caused by cross burnings and to determine how First Amendment doctrine should respond to cross burnings." *Id.* at 632.

127. Miller v. California, 413 U.S. 15, 24 (1973) (articulating a three-prong test for determining whether speech is obscene and therefore unprotected by the First Amendment).

about alleged Establishment Clause violations, judges must sometimes parse highly contextual evidence about whether the government's involvement with a religious display or practice goes too far in psychologically coercing observers.[128] In equal protection challenges involving facially race-neutral laws, judges must sift through a host of historical, empirical, and testimonial evidence, often informed by social science data, to discern whether a governmental body or actor intended to discriminate based on race.[129] In identifying the scope of fundamental rights in substantive due process claims, the Supreme Court's conservative Justices consistently demand a deeply contextual approach that "examin[es] our Nation's history, legal traditions, and practices."[130] And in some sex discrimination cases, courts must immerse themselves in evidence about geographic and workplace specific environments to determine what constitutes evidence of impermissible sex stereotyping.[131]

These are just a few examples among many where legal outcomes require nuanced treatment of history, theory, and application of principles from interdisciplinary fields. Courts can conduct this layered analysis to unearth governmental subordination because they regularly do so elsewhere.

B. Contrasting the Libertarian Approach to Free Speech

The Supreme Court's modern approach to free speech in many ways mirrors its modern approach to equal protection. The Court over time has generally become far less concerned with inequitable outcomes and far more concerned with formal equal treatment. *Obergefell* is a welcome outlier. Such an ideological shift reflects a belief that the Constitution "should be interpreted to promote a libertarian conception of individual freedom and to limit the power and functions of the state."[132] This view is apparent in both the Court's anticlassification approach to the Equal Protection Clause and its content- and speaker-neutrality rules of free speech. To understand the Court's contemporary First Amendment jurisprudence, it is thus useful to reflect on how the Court's equal protection doctrine evolved.

1. The Libertarian Shift in Equal Protection Doctrine

Beginning in earnest in the 1970s, equal protection jurisprudence got a conservative makeover. Some scholars attribute this shift to rightwing backlash over

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128. Lee v. Weisman, 505 U.S. 577, 592–99 (1992) (reasoning that a clergyperson giving a prayer at a high school graduation ceremony psychologically coerced students into religious participation and thus violated the Establishment Clause).

129. *See, e.g.*, N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 220–22 (4th Cir. 2016) (remanding a challenge to aspects of North Carolina's facially race-neutral voting laws due to plausible evidence of intentional race discrimination).

130. Washington v. Glucksberg, 521 U.S. 702, 710 (1997); *see also* Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) ("The Due Process Clause affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental." (internal quotation marks omitted) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

131. For an in-depth discussion about the contextual approach necessary to identify the specific sex stereotypes at play in different environments, see Luke A. Boso, *Real Men*, 37 U. HAW. L. REV. 107, 142–53 (2015).

132. Heyman, *supra* note 34, at 235.

affirmative governmental measures taken to better the lived realities of racial minorities, dismantle structural inequalities, and redress the country's long history of legal and social discrimination against people of color.[133] In short, this era marked a turn in thinking about governmental classifications. Instead of striking down only those classifications that subordinated and oppressed historically marginalized groups,[134] the newly conservative Court began to employ an anticlassification approach. Under this approach, all explicit governmental invocations of race are suspect and likely unconstitutional, regardless of their purpose or effect.[135] *Regents of the University of California v. Bakke*[136] is an early example of this shift. There, a plurality voted to apply "strict scrutiny" to a race-conscious affirmative action program at the Medical School of the University of California at Davis, reasoning that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[137]

This anticlassification approach soon spread to all suspect or quasi-suspect traits (like sex),[138] and presumably applies to sexual orientation and gender identity if courts find that they too are dubious grounds for governmental distinction.[139]

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133. *See* John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1735–40 (2000) (arguing that the Court's shift towards formal equality, focusing on facial classifications and discriminatory intent as the lynchpins of unconstitutional race discrimination, demonstrated the Court's receptiveness to white backlash against Black civil rights).

134. The "tiers of scrutiny" analysis that has long-structured equal protection was initially borne from the Court's concern about historically oppressed groups that are relatively powerless to effectuate their interests in a broken majoritarian political process. *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1062 (2007) (explaining that the "core insight" of footnote four in *Carolene Products*, which led to heighted scrutiny for certain classifications, was the Court's hostility for group subordination).

135. "Under the antisubordination approach, only oppressive uses of racial classifications warrant the application of strict scrutiny. In contrast, under the anticlassification approach, . . . racial classifications in all forms are discouraged." Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1272 (2014).

136. 438 U.S. 265 (1978).

137. *Id.* at 291.

138. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222 (1995) (citing "consistency" for the rule that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification" (citations omitted)); *see also* Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 145 (2000) (noting that *Adarand*'s consistency principle means that all sex classifications receive intermediate scrutiny). Since *Craig v. Boren*, 429 U.S. 190 (1976), the Court has applied intermediate scrutiny to sex classifications that ostensibly favored men over women. The effect of the sex classifications in most cases prior to *Adarand*, however, disadvantaged women as well as men, given the ways in which they reinforced harmful sex stereotypes. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688 (1973). The consistency principle thus differs from cases like *Craig* because it applies even if the effect of a sex classification benefits women in ways that do not reinforce harmful stereotypes.

139. *Cf.* Peter Nicolas, *Gayffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 WASH. U. L. REV. 733, 777 (2015)

Under this theory, it is the governmental classification itself that stigmatizes and injures due to its focus on groups rather than an individual's own merit.[140] The effect of this approach is that state actions designed to benefit historically oppressed groups receive stringent forms of judicial review, limiting the government's ability to achieve equitable outcomes and mitigate or dismantle the structural systems that continue to oppress.[141] An anticlassification approach does little to disrupt the status quo, and it therefore diminishes the likelihood that those in dominant groups who have power will share it or cede any ground.

In addition to the emergence of an equal protection theory that views certain classifications as per se suspect regardless of their intended use or effects, the Court also changed its tune regarding discriminatory intent. After *Brown* and prior to the early 1970s, the Court did not neatly distinguish between discriminatory intent and effect, and it was more willing to dismantle structural components of racism.[142] In 1976's *Washington v. Davis*,[143] however, the Court formalized the rule that governmental actions that disparately harm racial minorities do not automatically trigger strict scrutiny.[144] Instead, plaintiffs challenging such actions must prove that the government intended to discriminate due to race.[145]

Today, proving discriminatory intent is required in challenges to facially neutral state actions that disparately impact *any* suspect or quasi-suspect class.[146] In addition, based on doctrinal developments subsequent to *Washington*, proving discriminatory intent is extremely onerous.[147] As Professor Ian Haney-López

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(conceding that it "would be hard to argue" that the consistency principle embodied by the anticlassification approach does not apply if the Court were to hold that sexual orientation and gender identity qualify as suspect or quasi-suspect traits).

140. Justice Thomas repeatedly makes this point when discussing race-based affirmative action programs. In his *Grutter* dissent, for example, Justice Thomas argued that "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part).

141. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that "equal application" of the law does not save an otherwise facial race classification; instead, the claim of equally harsh application of a race-based rule sends a message of inequality and inferiority); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that "separate but equal" in K-12 education violates equality principles because racial segregation stigmatizes and promotes feelings of racial inferiority).

142. *See* Derek W. Black, *Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge*, 43 CONN. L. REV. 503, 510 (2010) (noting that, in this period, "plaintiffs could challenge vast racial inequalities").

143. 426 U.S. 229 (1976).

144. *Id.* at 242.

145. *Id.* at 239.

146. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (rejecting the claim that a hiring preference for veterans was unconstitutional sex discrimination under the Equal Protection Clause because there was no proof that the preference was designed with the intent to harm women and favor men).

147. *See* McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (rejecting definitions of "intent" as "volition" or "awareness of consequences," and instead requiring evidence "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part

explains, how courts define and analyze discriminatory intent is "so exacting" that it is almost never found.[148] For example, in the Court's 2020 decision to uphold the Obama-era Deferred Action for Childhood Arrivals ("DACA") program despite the Trump Administration's efforts to eliminate it and deport thousands of people living in the United States brought in unlawfully by their parents, a plurality nevertheless found that the decision to rescind DACA was not motivated by discriminatory intent against Latinos.[149] Claimants pointed to bigoted statements by President Trump as evidence, including "declarations that Mexican immigrants are 'people that have lots of problems,' 'the bad ones,' and 'criminals, drug dealers, [and] rapists.'"[150] Still, the plurality characterized these statements as "remote in time and made in unrelated contexts" and not "probative of the decision at issue."[151] Based on the difficulty in proving discriminatory intent, even in the face of overwhelming evidence, the vast majority of policies that inequitably affect vulnerable groups presumably pose no equality problems under the prevailing equal protection framework.[152]

2. The Libertarian Shift in Free Speech Doctrine

This same commitment to individualism and formal equal treatment, regardless of inequitable results, also manifests in modern free speech jurisprudence. This becomes apparent after a close look at key doctrinal developments, the most important of which is the free speech rule that the government may regulate (most) speech only in content-neutral ways.[153] "Content neutrality" refers to the axiom that state actors cannot regulate speech based on what the speaker is saying.[154] Specifically, the government must be neutral vis-à-vis a speaker's viewpoint as well as the subject of the speech.[155]

The command of content neutrality was initially a minority-friendly theory of free speech because, in historic practice, the government sought to silence and punish minority views.[156] Thus, the rule of content neutrality had a truly liberating effect given the usual way in which formal power was used to suppress minorities'

'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" (citations omitted)).

148. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783, 1853–59 (2012) (analyzing Supreme Court equal protection cases where race-neutral laws have been challenged as racially discriminatory).

149. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020) (plurality opinion).

150. *Id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

151. *Id.* at 1916 (plurality opinion).

152. *See* Randall Kennedy, *Reconsidering* Palmer v. Thompson, 2018 SUP. CT. REV. 179, 208–12 (2018).

153. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

154. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 235 (2012).

155. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000).

156. *See* FISS, *supra* note 35, at 12 (noting that free speech libertarians "often refer to the role that free speech played in securing equality during the 1960s").

associations and calls for reform. For example, content neutrality facilitated the Black civil rights movement by giving activists much needed freedom to advocate for the end of segregation without risking punishment based solely on the views they expressed.[157] As Professor Erwin Chemerinsky explains, "[F]ree speech assisted the drive for desegregation, the push to end the war, and the efforts of historically marginalized people to challenge convention and express their identities in new ways."[158]

A theory of free speech that requires content neutrality is comparable to a theory of equal protection that views identity-based classifications as inherently suspicious in at least two ways. First, both doctrines ushered in antisubordinating change at their inception; dominant groups openly used race classifications to harm and exclude minorities, and dominant groups openly used legal sanctions to chill minority speech on certain topics.[159] Second, dominant groups today have subverted both doctrines to protect privileged status and views on the inferiority of certain groups.[160]

Past academic and public furor over gendered and racialized hate speech offers one example of how content-neutral rules governing speech regulation can contribute to the subordination of historically oppressed groups. In the 1960s and 1970s, people of color, women, and sexual minorities achieved incredible legal victories, but they were greeted in the 1980s by intense backlash and resentment on college campuses due to their perceived undeserving presence.[161] Critical legal theorists, including critical race theorists, forcefully argued that hate speech on campuses impeded constitutional and statutory antidiscrimination equality principles.[162] For the victims of hate speech, the resulting psychological and dignitary harms, as well as basic safety concerns, can lead to diminished educational returns.[163]

Yet the Supreme Court in *R.A.V. v. City of Saint Paul*[164] made it much harder for universities to enact formal codes and policies designed to limit hate speech. In *R.A.V.*, the Court, in an opinion by Justice Scalia, struck down an

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157. *Id.*

158. CHEMERINSKY & GILLMAN, *supra* note 43, at 11.

159. Colker, *supra* note 105, at 1013–14 (arguing that formal equality developed as a theory of equal protection because formal *inequality* was initially the government's primary mechanism for subordinating women and people of color).

160. *See* WALKER, *supra* note 96, at 130–32.

161. *Id.* at 132 (explaining that white college men in the 1980s viewed affirmative action policies with disdain and "resented the prospect that jobs would be reserved for females" and "racial minorities").

162. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND, *supra* note 38, at 65 (wryly observing the "very sad irony that the first instinct of many civil libertarians is to express concern for possible infringement of the assailants' liberties while barely noticing the constitutional rights of the assailed").

163. *See, e.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, *in* WORDS THAT WOUND, *supra* note 38, at 89–91 (discussing the "severe psychological impact" caused by prejudice).

164. 505 U.S. 377 (1992).

ordinance that criminalized cross-burning as a subcategory of constitutionally unprotected "fighting words."[165] Even though "fighting words" writ large have received no First Amendment protection since 1942's *Chaplinsky v. New Hampshire*,[166] the *R.A.V.* Court reasoned that the government engages in impermissible content discrimination when it explicitly prohibits only racist fighting words.[167] In this case, content neutrality prevented the oppressed from obtaining any protection from their oppressors. Protecting hate speech directed at minorities implicates the government in enforcing long-standing status hierarchies.

Today, conservative politicians, activists, and private individuals frequently rely on content-neutrality norms to complain about perceived suppression of hateful ideology. For example, right-wing provocateurs like Milo Yiannopoulos and Ann Coulter are regular fixtures in contemporary debates about whether universities should allow speakers on campus who have a history of incendiary rhetoric.[168] In some cases, public universities have rescinded speaking invitations due to potential student unrest and protests, sparking cries of governmental censorship.[169] Take another example: During the social upheaval wrought by the COVID-19 pandemic and highly publicized incidents of racialized police brutality, President Trump took to Twitter, calling people involved in the demonstrations against the police killing of George Floyd "thugs" and invoking language used by white supremacists in the 1960s, stating, "[W]hen the looting starts, the shooting starts."[170] Twitter took the unprecedented step of limiting the public's ability to see and share the President's tweet.[171] Although Twitter is not a state actor subject to the First Amendment, President Trump decried Twitter's action as censorship of conservative views, and he issued a retaliatory executive order to "defend free speech."[172] In situations like these, the rhetoric and law of content neutrality has become a shield for hate speech.

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165. *Id.* at 386 ("The government may not regulate use [of fighting words] based on hostility—or favoritism—towards the underlying message expressed.").

166. 315 U.S. 568, 571–73 (1942).

167. *R.A.V.*, 505 U.S. at 403 (White, J., concurring).

168. *See generally, e.g.*, Suzanne B. Goldberg, *Free Expression on Campus: Mitigating the Costs of Contentious Speakers*, 41 HARV. J.L. & PUB. POL'Y 163 (2018) (arguing that colleges should strictly apply content-neutral rules and allow incendiary speech while also taking affirmative steps to mitigate harms caused by hateful speech).

169. Thomas Fuller & Christopher Mele, *Berkeley Cancels Milo Yiannopoulos Speech, and Donald Trump Tweets Outrage*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html; Thomas Fuller, *Berkeley Cancels Ann Coulter Speech over Safety Fears*, N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/us/berkeley-ann-coulter-speech-canceled.html.

170. Tony Romm & Allyson Chiu, *Twitter Flags Trump, White House for 'Glorifying Violence' After Tweeting Minneapolis Looting Will Lead to 'Shooting,'* WASH. POST (May 29, 2020), https://www.washingtonpost.com/nation/2020/05/29/trump-minneapolis-twitter-protest/.

171. *Id.*

172. Tony Romm & Elizabeth Dwoskin, *Trump Signs Order That Could Punish Social Media Companies for How They Police Content, Drawing Criticism and Doubts of*

Another doctrinal development demonstrating the Supreme Court's libertarian turn in free speech is its embrace of speaker neutrality.[173] "Speaker neutrality" refers to the theory that the Free Speech Clause "is indifferent to a speaker's identity or qualities—whether animate or inanimate, corporate or nonprofit, collective or individual."[174] This emerging principle is apparent in at least two free speech areas.

One example of speaker neutrality stems from the conservative Burger Court's sudden shift on the protected status of commercial speech in the 1970s. In 1942, the Supreme Court in *Valentine v. Chrestensen* held that purely commercial advertising received no First Amendment protection.[175] This was almost certainly in reaction to the Court's retreat from its *Lochner*-era jurisprudence in which it struck down hundreds of economic regulations under a constitutionalized theory of laissez-fair economics.[176] Judicial protection of commercial speech could be perceived as just another indication of the Court's special solicitude for economic interests. In 1976, however, the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[177] overruled *Valentine*, reasoning that, "[s]o long as we preserve a predominately free enterprise economy,"[178] consumers and society have "an interest in the free flow of commercial information."[179] Protection for commercial speech is decidedly libertarian in that it limits the government's "ability to structure or facilitate" consumer choice and "privilege[s] the negative over the positive state."[180]

A second and related example of speaker neutrality manifests in the Court's increasing willingness to protect corporate political speech. Like the protection of commercial speech, this doctrinal shift began with the Burger Court when, in 1978's *First National Bank of Boston v. Bellotti*,[181] the Court held for the first time that corporate political speech is entitled to First Amendment protection.[182] After reviewing its free speech jurisprudence and the "free marketplace of ideas" values those cases purport to reflect, the Court reasoned that there "is no support . . . for the proposition that speech that otherwise would be within the protection of the First

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Legality, WASH. POST (May 28, 2020), https://www.washingtonpost.com/technology/2020/05/28/trump-social-media-executive-order/.

173. *See* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2220, 2244 (2018) (citing the rule of speaker-neutrality as an impediment to using the First Amendment to achieve progressive ideals, such as "the correction of unjust distributions produced by the market and the dismantling of power hierarchies based on traits like race, nationality, gender, class, and sexual orientation").

174. Sullivan, *supra* note 31, at 156.

175. 316 U.S. 52, 54–55 (1942).

176. *See, e.g.*, Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 537 (2015) (describing the "orthodox contemporary view" of the *Lochner* era as a period in which judges were "committed to laissez-faire economics and to the protection of wealthy interests").

177. 425 U.S. 748 (1976).

178. *Id.* at 765.

179. *Id.* at 763–64.

180. Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 183 (2016).

181. 435 U.S. 765 (1978).

182. *Id.* at 783.

Amendment loses that protection simply because its source is a corporation."[183] In 2010's controversial *Citizens United* decision,[184] the Court followed in *Bellotti*'s footsteps and struck down some limitations on corporate political expenditures, linking content- and speaker-neutrality principles along the way: "Speech restrictions based on the identity of the speaker are all too often simply a means to control content."[185] Going even further, the Court overruled a past precedent that approved similar limits on corporate political expenditures under a rationale that such limits are a narrowly tailored way for the government to achieve its compelling interest in preventing heavily funded corporate speech from distorting the market.[186] Further, the government's egalitarian interest in preventing the "corrosive and distorting effects of immense aggregations of wealth"[187] is no longer a compelling interest[188] because it fundamentally conflicts with a view of the First Amendment that demands content and speaker neutrality.

The practical effect of these libertarian free speech rules is that those with power and privilege often wield the First Amendment in ways inaccessible to or incompatible with those who are less empowered.[189] Sometimes this occurs when persons and companies spend large sums of money to speak over everyone else, and sometimes this occurs when people speak in injurious ways antithetical to a person's dignity and equal social standing.[190] In this way, doctrinal commitments to content and speaker neutrality may effectively favor speech by the powerful at the expense of the less powerful.

A free speech jurisprudence that recognizes and responds to the inequitable results of certain speech—like the uncomfortable truth that hurtful speech directed at members of minority groups imposes barriers and psychological harms not experienced by members of dominant groups targeted with hurtful speech[191]—challenges the formal equality embodied by libertarian speech rules.[192] An

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183. *Id.* at 784.

184. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

185. *Id*. at 340.

186. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990). The *Austin* Court agreed that corporate political expenditures presented a "serious danger" of "undermin[ing] the integrity of the political process." *Id.* at 668.

187. *Id.* at 660.

188. *Citizens United*, 558 U.S. at 351–52.

189. *See, e.g.*, Michael Kent Curtis & Eugene D. Mazo, *Campaign Finance and the Ecology of Democratic Speech*, 103 KY. L.J. 529, 599–600 (2015) (noting that the average American "does not have the financial means to contribute in any significant way to a political candidate").

190. *See* Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227, 1278–82 (2013) (discussing how the money and power of the wealthy affects more than simply the outcome of elections).

191. *Cf.* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2332–33 (1989).

192. *See* RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY 81 (2018) ("[N]eoconservatives take the positions they do on the hate-speech controversy

antisubordination approach to resolving free speech and equality controversies between dominant and historically oppressed groups does not obediently adhere to the libertarian theories that currently hold sway over First Amendment jurisprudence. An antisubordination approach takes history, context, and political power into consideration.

C. Responses to Potential Criticism

Asking courts to apply an antisubordination theory to First Amendment interpretation raises many valid concerns. In addition to basic definitional questions, which I address above,[193] some may object on additional grounds. This Section addresses two strong criticisms of the antisubordination approach: It is not a neutral principle upon which to base constitutional interpretation, and it represents an unrealistic attempt to persuade federal courts to depart from existing jurisprudence.

Debates about appropriate constitutional methods of interpretation are not new. Conservatives tend to favor an approach grounded in history and tradition, looking for what textual terms meant when they were adopted and searching for the Framers' general or specific motivations for including those terms.[194] An appeal of this originalism approach is that it *seems* neutral; it purports to take the Constitution as frozen in time without the taint of subsequent Justices' idiosyncratic beliefs and preferences.[195] Chief Justice John Roberts famously evoked these supposed neutrality virtues in his Senate confirmation hearing when he explained that a Justice's job is akin to an umpire who calls "balls and strikes,"[196] presumably based on objective interpretive rules.[197] As Justice Brennan once persuasively argued, however, a backwards-looking interpretive method is neither objective nor neutral because Justices still must determine which history and traditions matter, when they matter, how to handle contradictory evidence about drafters' intent, and where to

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because vituperative speech aimed at minorities forces them to confront the intuition that slurs directed at people of color are simply more serious than ones directed against whites. This intuition, in turn, threatens a prime conservative tenet, the level playing field."). Delgado uses the word "neoconservative" to describe a group or movement that embraces an ideology rejecting government intervention or "radical politics" to achieve change. Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1808 n.2 (1994).

193. *See supra* Section II.A.

194. Morgan Cloud, *A Conclusion in Search of a History to Support It*, 43 TEXAS TECH L. REV. 29, 44–45 (2010).

195. Neil M. Gorsuch, *Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/ (excerpted from NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019)).

196. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts Jr., J, D.C. Circuit).

197. *See* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 641 (2012) (noting that critics "balked because the metaphor suggests that there is always . . . an objectively correct call").

draw particular lines around modern corollaries to old issues.[198] Legal realists have persuasively argued since at least the 1920s that law is inherently informed by personal judgments, biases, and desired policy outcomes.[199]

The quest for objective and neutral constitutional interpretation is particularly ill-suited for the First Amendment. There is little historical evidence about what the framers of the Bill of Rights meant by guaranteeing free speech. In the 1800s, for example, it was not clear whether the Free Speech Clause did anything more than express some aspiration about national values, or perhaps limited the government's ability to impose prior restraints on speech.[200] Additionally, the Framers seemingly did not anticipate that everyone possessed free speech rights, given that the First Amendment existed alongside constitutionally sanctioned slavery and the formal exclusion of all women and men of color from the right to vote.[201]

How, then, should courts interpret the Free Speech Clause if the consequences of an originalist approach seem untenable? The reality is that Justices of the past and today already import their own values. This is apparent from the Court's inconsistent, and at times incoherent, application of content-neutral rules. For example, the Court has never defined what counts as impermissible viewpoint discrimination, wherein the government acts because it favors or disfavors certain views,[202] and it is unreliable in its analysis of discriminatory intent.[203] Further, the Court sometimes treats laws that facially discriminate with respect to the subject of speech as content neutral if the government offers a plausible content-neutral purpose for regulation.[204]

The Court's subjectivity is also apparent in its departure from content neutrality in its unprotected and less protected speech jurisprudence. Categories of

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198. Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting) (criticizing an interpretative approach reliant on history and tradition as a supposed limit on judicial activism given that tradition is "malleable").

199. *See* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be*, 2005 WIS. L. REV. 365, 370–71 (2005) (summarizing strains of early legal realist thought).

200. JEREMY WALDRON, THE HARM IN HATE SPEECH 19 (2012).

201. DELGADO & STEFANCIC, *supra* note 192, at 65.

202. Chemerinsky, *supra* note 155, at 59.

203. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 723–25 (2000) (upholding an eight-foot zone around the entrances to health care facilities in which individuals shall not approach another person without permission to "pass a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling with that person" as a permissible time, place, and manner speech regulation (internal citations omitted)). The dissent argued, however, that this regulation was enacted in response to anti-abortion protests and is thus discriminatory in its intent. *Id.* at 741–42 (Scalia, J., dissenting).

204. Chemerinsky, *supra* note 155, at 59–61; *see* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54–55 (1986) (upholding an ordinance regulating adult theaters because the city's asserted purpose was to combat the "secondary effects" of adult theaters rather than the erotic messages they conveyed); City of Erie v. Pap's A.M., 529 U.S. 277, 296–97 (2000) (upholding an ordinance regulating live nude dancing because the city's asserted purpose was to combat the "secondary effects" of nude dancing rather than the erotic expression itself).

unprotected and less protected speech are based on both implicit and explicit hierarchical assumptions about the relative worth of different kinds of expression.[205] According to the Court, the Free Speech Clause does not protect obscenity,[206] speech that provokes a hostile audience,[207] speech that incites lawlessness,[208] true threats,[209] child pornography,[210] and fighting words.[211] The Court also seems to provide less protection to sexual speech that is not obscene[212] and to defamation against private parties regarding private matters.[213] Why? In these cases, the Court unilaterally and subjectively decided that these categories of speech are less valuable than others, and it has not been shy about saying as much. For example, the Court explained that obscenity is "utterly without redeeming social importance,"[214] that fighting words comprise "no essential part of any exposition of ideas" and are of "slight social value,"[215] and that erotic speech is "wholly different" and less worthy of protection than political speech.[216] Professor Rebecca Brown calls this line of cases "a hubristic project of assessing relative values of different categories of speech."[217]

Thus, despite the Court's present commitment to content neutrality for *protected speech*, it has also admitted that "the question *whether speech is, or is not, protected* by the First Amendment often depends on the content of the speech."[218] This contradiction undermines the moral weight of the content-neutral imperative given that the Court has not attempted to offer objective or neutral criteria for "explaining the rationale for these exceptions."[219] Reasonable people can disagree about whether these forms of expression have little or no value, thus calling into question the objectivity of the rules. From a constitutional interpretation standpoint, however, the Court's persistent use of carve-outs demonstrates that judges are perfectly free to make informed—yet ultimately subjective—determinations and

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205. *See* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 217 (1991) ("The Court has assigned varying degrees of protection to different types of speech, depending on the purported social value and potential harm of the speech.").

206. Miller v. California, 413 U.S. 15, 36–37 (1973).

207. Feiner v. New York, 340 U.S. 315, 320–21 (1951).

208. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

209. Virginia v. Black, 538 U.S. 343, 358–59 (2003).

210. New York v. Ferber, 458 U.S. 747, 764 (1982).

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

212. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976).

213. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (explaining that speech on "matters of public concern" is "at the heart of the First Amendment's protection," but "not all speech is of equal First Amendment importance").

214. Roth v. United States, 354 U.S. 476, 484 (1957).

215. *Chaplinsky*, 315 U.S. at 572.

216. *Young*, 427 U.S. at 70.

217. Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 956 (2016).

218. *Young*, 427 U.S. at 66 (emphasis added).

219. Stephen J. Heyman, *Spheres of Autonomy: Reforming the Content-Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 651–52 (2002).

may continue down this path to account for the relative worth of hateful and subordinating speech.[220]

The Supreme Court has further demonstrated that it is appropriate for courts to gauge the subjective worth of speech and consider its inequitable results even when that speech is political and protected. As Professor Genevieve Lakier explains, prior to its more conservative turn in the 1970s, the Court often permitted content-based regulations of speech when doing so would lead to the amplification of underrepresented and underfunded voices.[221] Based on her analysis of the Court's free speech jurisprudence in the post-*Lochner* era through the early years of the Burger Court, Lakier argues that "one can discern in the older cases an often significantly different understanding of what it means to guarantee freedom of speech" than formal content and speaker neutrality:[222] "[O]ne much more willing to take into account inequalities in economic and political power and much more sensitive to the disparate effects that formally neutral and well-intentioned laws can have on the ability of the 'little people' to communicate."[223]

Professor Kathleen Sullivan makes a similar argument as she surveys past and current free speech jurisprudence, observing that the Court's "free speech tradition has different strands."[224] Sometimes the Court relies on libertarianism, which "rejects governmental efforts to alter the relative balance of speaking power in the private order,"[225] thereby prohibiting attempts to regulate "expressions of racism and other practices that reinforce social hierarchy."[226] Other times, more frequently in the past,[227] the Court relies on egalitarianism, resolving free speech disputes with an eye towards preventing discrimination against "members of ideological minorities who are likely to be the target of the majority's animus or selective indifference."[228] The Court simply has not been consistent in its approach, and there is no interpretative reason that it could not revive egalitarianism in the future.

It is worth noting one final criticism of an antisubordination approach to the Free Speech Clause rooted in practical, pragmatic concerns about what judges can and will do: that an egalitarian framework to First Amendment claims is idealistic and impractical. This Article shares this concern to some extent, and it admittedly approaches this topic with a mix of optimism for the future and cynicism

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220. *See* Jennifer M. Kinsley, *Therapeutic Expression*, 68 EMORY L.J. 939, 956, 958 (2019) (arguing that "categorical exceptions to the First Amendment . . . arise from the [Court's] recognition that the speech at issue inflicts some form of societal degradation or interpersonal damage").

221. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2139–53 (2018).

222. *Id.* at 2139.

223. *Id.*

224. Sullivan, *supra* note 31, at 176.

225. *Id.* at 158.

226. *Id.*

227. *See id.* at 146 (noting that the "free-speech-as-equality vision has an older pedigree in the Court's First Amendment jurisprudence than does the free-speech-as-liberty view").

228. *Id.* at 144.

for the present. It is true that the Roberts Court has repeatedly demonstrated its commitment to conservative-libertarian principles in disputes between First Amendment liberties and equality.[229] But power is fleeting. As this Article goes to print, the Biden Administration has begun, and Democrats control a slim majority in the Senate—a governing dynamic which creates more possibilities for diverse and ideologically progressive confirmations to the federal bench. Institutional and doctrinal changes take time, and judges and their judicial philosophies are not static.

Antisubordination can be about what is doctrinally possible in the pursuit of a more equitable society, not just what is presently likely. As another critic of the Supreme Court's deregulatory lurch in First Amendment doctrine argues, advocates for democratic goals must "stop ceding the intellectual and moral high ground to free speech libertarians"[230] and instead make bold arguments that challenge existing orthodoxy. The composition of the federal judiciary will change, as will our leaders in the executive and legislative branches. Future state actors may find it necessary and appropriate to reimagine an egalitarian First Amendment—much like the conservative movement in the '70s successfully implemented its libertarian vision of Equal Protection.[231] In the midst of a social upheaval sparked by a pandemic, economic insecurity for the Millennial generation whose adult lives are now sandwiched between two recessions, intense debates about hate speech on college campuses and in political rhetoric, and the overdue reckoning of racism in our justice system, now is the time to reimagine the Constitution under which we want to live.

III. THE FIRST AMENDMENT AND LGBT EQUALITY IN TENSION

Since at least the early 1990s, the LGBT community has steadily been gaining ground in its quest for equal treatment under the law. The Supreme Court has played an outsized role in facilitating that forward progression through a series of landmark decisions striking down governmental policies specifically targeting lesbians, gays, and bisexuals. These cases have garnered significant public attention,[232] and they may mislead people into believing that the war for equality is all but won.

The Supreme Court's role is more complicated than its discrete holdings suggest. Even in the Court's most celebrated pro-LGBT decisions, the tension between equality and liberty is omnipresent. Many of the Justices have long been engaged in the subtle yet important work of laying a foundation for First Amendment carve-outs to antidiscrimination laws. In majority, concurring, and dissenting opinions alike, members of the Court have sometimes gone out of their way to express concern for the religious and conservative objectors who might negatively be affected by a pro-gay outcome. The concerns of conservative Justices

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229. Heyman, *supra* note 34, at 261–78.

230. Kyle Langvardt, *Imagining Change Before and After* Citizens United, 3 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 227, 245 (2012).

231. For a similarly visionary and future-oriented, rather than pragmatic, rethinking of constitutional norms, see Joy Milligan, Spending Clause Civil Rights (unpublished manuscript) (on file with author).

232. *See, e.g.*, Chris Geidner, *The Court Cases That Changed L.G.B.T.Q. Rights*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/legal-history-lgbtq-rights-timeline.html.

who dissented from past gay rights victories are increasingly relevant today given the Court's rightward lurch on social issues in the wake of Justices Kavanaugh's, Gorsuch's, and Amy Coney Barrett's confirmations,[233] and given the real possibility that a newly formed conservative majority will rule against LGBT interests in the future. In several notable cases, the Court's solicitude for the liberty interests of antigay objectors has outweighed the equality interests of sexual and gender minorities.

A. From Bowers v. Hardwick *to* Romer v. Evans

In 1986, in the middle of an already devasting AIDS crisis, the Supreme Court in *Bowers v. Hardwick*[234] dealt another blow to the queer community by upholding laws criminalizing same-sex sexual conduct.[235] In this historic period, most Americans still viewed gays, lesbians, and bisexuals with disgust[236] and animus. The Supreme Court, never straying too far from popular opinion,[237] put its own stamp of approval on this widely held sentiment. The Court first held that liberty does not include "a fundamental right to engage in homosexual sodomy,"[238] and it further reasoned that laws criminalizing such conduct are rational attempts to codify the "belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable."[239] In the mid-1980s, neither society nor the Supreme Court was ready to recognize even the basic equality and liberty interest of lesbians, gays, and bisexuals to privately express a core sexual aspect of individual identity. Subordinating sexual minorities was both a permissible purpose and effect of law.

By the late 1980s and early 1990s, more and more states and localities for a variety of reasons began to view sexual minorities through a newly compassionate lens. One tangible benefit of this perspective shift was the gradual addition of sexual orientation and gender identity as forbidden grounds for discrimination in civil rights laws. In 1990, Denver, Colorado, joined the ranks of predominately liberal and urban areas to enact civil rights measures inclusive of gay, lesbian, and bisexual individuals.[240] The conservative backlash to Denver's ordinance was swift, fierce,

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233. *See generally* Vincent Martin Bonventre, *Supreme Shift: What the 6-3 Conservative Majority Means Going Forward*, N.Y. ST. B. ASS'N (Dec. 16, 2021), https://nysba.org/supreme-shift-ginsburg-to-barrett-and-what-it-means/.

234. 478 U.S. 186 (1986).

235. *Id.* at 190–96.

236. *See* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 7 (2010) (describing the disgust that people feel towards homosexuality, and particularly gay men, as a "widespread Cultural phenomenon in the United States" that conservative activists have subtly deployed).

237. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2010).

238. *Bowers*, 478 U.S. at 191.

239. *Id.* at 196.

240. *See* Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick—Romer v. Evans, 32 HARV. C.R.-C.L. L. REV. 225, 230–31 (1997) (noting the slow rise of LGBT-inclusive antidiscrimination laws and policies from the late 1970s to the early 1990s).

and predominately rural.[241] In 1992, 53% of Colorado voters approved a constitutional amendment ("Amendment 2")[242] that would both repeal all then-existing Colorado laws that prohibited sexual orientation discrimination and prevent any future legislative, executive, and judicial action that would do the same.[243] Conservative locals thus fought hard against the changing tide. Those who opposed equality for sexual minorities sought to make a bold subordinating statement by singling out gays, lesbians, and bisexuals for uniquely unfavorable treatment.

In *Romer v. Evans*,[244] the Supreme Court struck down Amendment 2 as unconstitutional under the Equal Protection Clause.[245] In doing so, it implicitly acknowledged the subordinating purpose of the law: "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[246] Despite the majority's muddled analysis,[247] the result was a resounding vindication of this marginalized group's equality interests. Unlike in *Bowers*, the Court viewed gays, lesbians, and bisexuals as victims in need of protection from a majority determined to keep them in a socially and legally inferior position.[248] Also unlike in *Bowers*, the Court rejected this populist impulse to subordinate a disfavored group as a permissible purpose for lawmaking.

Justice Scalia's dissent in *Romer*—joined by Justices Rehnquist and Thomas—is caustic and alarmist in tone, undoubtedly in part because of the Court's rapid and unexplained analytical departure from *Bowers*.[249] Lurking alongside any doctrinal consistency criticisms, however, were concerns for the liberty interests of those who oppose LGBT rights. Justice Scalia cast proponents of Amendment 2 as "seemingly tolerant Coloradans" who want nothing more than to preserve traditional sexual values.[250] In the dissent's framing, it is these tolerant citizens who are victims, and it is they who need protection from "politically powerful"[251] gays and other members of "the elite class"[252] who have "insult[ed]"[253] and "disparage[ed]"[254] them by denouncing their anti-LGBT views "as bigotry."[255] Conservative and religious

241. *See generally* Luke A. Boso, *Rural Resentment and LGBTQ Equality*, 71 FLA. L. REV. 919, 928–32 (2019).

242. Bruce Finley & Michael Booth, *Amendment 2 War Not Over: City to Sue; Gays to Boycott*, DENVER POST (Nov. 5, 1992), 1992 WLNR 5689927.

243. DENVER, COLO. MUN. CODE art. IV, §§ 28-91 to -116 (1990).

244. 517 U.S. 620, 635 (1996).

245. *Id.* at 635–36.

246. *Id.* at 635.

247. *See, e.g.*, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 9 (1996) (characterizing *Romer* as "puzzling and opaque").

248. *See* Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341, 1346 n.13 (2004) (explaining that civil rights dissidents rely on direct democracy to enact laws like Amendment 2 as a key strategy to "reintroduce subordination").

249. 517 U.S. at 623–36 (the majority never mentions nor even cites to *Bowers*).

250. *Id.* at 636 (Scalia, J., dissenting).

251. *Id.*

252. *Id.*

253. *Id.* at 652.

254. *Id.*

255. *Id.*

dissenters presumably need protection because their liberty is at stake—and not just their liberty "to exhibit even animus toward" homosexuality,[256] but also their liberty to act on those beliefs through exclusionary conduct. Justice Scalia concluded by expressing dismay that, after *Romer*, some employers can no longer deny employment based on an applicant's sexual orientation.[257]

The majority in *Romer v. Evans* favored equality interests over liberty interests. It refused to permit antigay views to define and limit equality's reach, tacitly recognizing that the government must not allow individuals' liberty interests in discriminating to effectively subordinate a minority group. The dissent, by contrast, favored liberty interests over equality interests. In fact, the dissent would defer to populist sentiment when defining and limiting equality's very meaning.[258] Justice Scalia undoubtedly predicted that prohibitions against LGBT discrimination in liberal areas would proliferate.[259] The *Romer* dissent provides an early guide for how religious and conservative opponents of gay and trans rights can use purported injuries to their First Amendment protected speech, associational, and religious rights as mechanisms to blunt the impact of equality measures.

B. Marriage Equality: Windsor *and* Obergefell

In 2003, the Supreme Court in *Lawrence v. Texas*[260] struck down all remaining criminal prohibitions on sodomy[261]—a dramatic reversal from the Court's harsh assessment of queer intimacy in 1986's *Bowers v. Hardwick*. With this victory in hand, the broader LGBT rights movement advanced in earnest towards other goals. Mainstream advocates sought open entry into two high-profile and traditionally conservative institutions: marriage and the military.[262]

These legal pursuits were outwardly framed around formal equal treatment, and they strategically offered a "sanitized narrative as evidence of an ostracized

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256. *Id.* at 644 (internal quotation marks omitted).

257. *Id.* at 653.

258. It is unsurprising that Justice Rehnquist joined Justice Scalia's dissent because the views expressed therein seemingly reflect Rehnquist's past writing as a law clerk to Justice Jackson in favor of upholding the doctrine of separate but equal: "To the argument . . . that a majority may not deprive a minority of its constitutional right," Rehnquist wrote, "the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are." *See* Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535, 554–55 (1996) (refuting Rehnquist's claim that his memo reflected Jackson's views and not his own).

259. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

260. 539 U.S. 558 (2003).

261. *Id.* at 578–79, 585.

262. In 2010, Congress repealed the federal law Don't Ask, Don't Tell ("DADT") barring openly gay and bisexual individuals from serving in the military. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. The bill "allowed DADT to die upon 'certification' by the President, Secretary of Defense and Chairman of the Joint Chiefs of Staff that it would not harm military readiness," and this certification occurred on September 20, 2011 under President Obama. Michelle Benecke, *Turning Points: Challenges and Successes in Ending Don't Ask, Don't Tell*, 18 WM. & MARY J. WOMEN & L. 35, 35 (2011).

minority's maturation"[263] in contrast to the liberationist and overtly sexual nature of the claims at issue in *Bowers* and *Lawrence*. Movement activists sharply disagreed about whether seeking access to conservative institutions would legally backfire, leave behind less privileged and more radical members of the LGBT community, and fortify existing oppressive norms and structures.[264] Ultimately, embracing assimilationist goals and appeals to sameness appears to have worked at the Supreme Court in terms of attaining the goal of entry. In two landmark opinions, the Court effectively ended the national debate over same-sex marriage. In both, however, some of the Justices continued to curate an environment in which anti-LGBT dissenters could feel free to use the First Amendment as a future sword and shield.

In 2013, the Court in *United States v. Windsor*[265] struck down § 3 of the federal Defense of Marriage Act ("DOMA").[266] DOMA excluded married same-sex couples from all federal rights and responsibilities tied to marriage.[267] Based on its legislative history and Congress's unusual substantive interference with otherwise valid state-based family law, the Court reasoned that DOMA's "vowed purpose and practical effect are to impose a disadvantage, a separate status, and so, a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[268] Much like in *Romer*, the majority in *Windsor* rejected the populist impulse to create laws designed to express "moral disapproval"[269] of sexual minorities and keep them in a subordinating "second-class"[270] position.

In his dissent, Chief Justice Roberts displayed his unease about what *Windsor* will mean for opponents of LGBT equality going forward. Roberts rejected the majority's conclusion that DOMA was motivated by animus, instead more charitably viewing the antigay sentiment reflected in the congressional record as about concerns over the history and tradition of marriage as an institution.[271] Roberts then cast religious and conservative opponents of same-sex marriage as victims, accusing the majority of "tar[ring] the political branches with the brush of bigotry."[272] Justice Scalia joined by Justice Thomas also dissented, and they similarly viewed the congressional record through gentler eyes. Scalia pointed to several purportedly benign justifications for DOMA to save its supporters from

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263. Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 6 (2015).

264. *See* Kyle C. Velte, *From the Mattachine Society to Megan Rapinoe, Tracing and Telegraphing the Conformist/Visionary Divide in the LGBT-Rights Movement*, 54 U. RICH. L. REV. 799, 809–14 (2020) (describing and characterizing these "Visionary" versus "Conformist" debates over the pursuit of marriage equality).

265. 570 U.S. 744 (2013).

266. *Id.* at 775.

267. Defense of Marriage Act, Pub L. 104-199, 110 Stat. 2419 (1996).

268. *Windsor*, 570 U.S. at 746.

269. *Id.* at 771 (quoting the stated purpose in the bill passed by the House of Representatives).

270. *Id.*

271. *Id.* at 775–76 (Roberts, J., dissenting).

272. *Id.* at 776.

"accusations"[273] that they have "hateful hearts."[274] Throughout his dissent, Scalia used inflammatory language to sarcastically and defensively portray the majority's opinion as insulting to DOMA's supporters. According to this view, the majority's focus on evidence of antigay animus in the legislative record is tantamount to calling DOMA's supporters "unhinged members of a wild-eyed lynch mob,"[275] "enem[ies] of human decency,"[276] and "monsters."[277]

What the *Windsor* dissents have in common is their implicit characterization of antigay opponents as the true victims. To these Justices, criticism of those who object to LGBT equality is worse than the actual denial of LGBT equality. This rhetorical reframing is a dog whistle to civil rights opponents, and the dissenting Justices' special solicitude for antigay beliefs offers a tantalizing hope that the First Amendment might offer some protection from what pro-gay forces have wrought.

Just two years after *Windsor*, the Supreme Court in *Obergefell v. Hodges*[278] invalidated all remaining state bans on same-sex marriage. The Court heavily relied on antisubordination principles in removing the remaining state-imposed obstacles to marriage equality.[279] As this Article discusses above,[280] *Obergefell* was a watershed moment in the LGBT movement's quest for formal equality, and it ushered in both tangible and symbolic positive changes for same-sex couples in the United States.[281] There is at least one aspect of *Obergefell*, however, that should give pause to LGBT rights proponents. Unlike in *Romer*, *Lawrence*, and *Windsor*, the *majority* acknowledged the liberty-based concerns of religious and conservative gay rights opponents—not just the dissenters. Perhaps anticipating the shifting terrain upon which America's indefinite war over sexual norms will be fought, and likely in response to vigorous dissents from the Court's most conservative Justices, the majority offered assurance that its decision does not denigrate the beliefs of those who oppose same-sex marriage.[282] Importantly, those who object to LGBT equality can take comfort in the shelter that the First Amendment provides:

> The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the

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273. *Id.* at 797 (Scalia, J., dissenting).
274. *Id.* at 795.
275. *Id*. at 796.
276. *Id.* at 800.
277. *Id.* at 802.
278. 576 U.S. 644 (2015).
279. *Id.* at 670–71.
280. *See supra* Section II.A.
281. *See generally* Andrew R. Flores et al., *The Impact of* Obergefell v. Hodges *on the Well-Being of LGBT Adults*, UCLA WILLIAMS INST. (June 2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Happiness-After-Obergefell-Jun-2020.pdf. "After the *Obergefell* decision, more LGBT people were happy (87%) and reported higher-than-average levels of life satisfaction (62%)—reducing disparities between LGBT and non-LGBT adults to non-significant levels." *Id.* at 1.
282. *See also* BALL, *supra* note 3, at 249 (noting that the *Obergefell* majority "spoke directly to religious opponents of same-sex marriage to assure them that their rights to believe, advocate, and teach were in no way 'impaired by the ruling'").

> principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.[283]

Concerningly, the majority suggests that equality dissenters may continue to "teach" their beliefs, but it does not elaborate on whether teaching includes engaging in conduct that contradicts antidiscrimination laws. In his unusually caustic dissent, Justice Roberts made a similar point: "The First Amendment guarantees . . . the freedom to 'exercise' religion. Ominously, that is not a word the majority uses."[284] Roberts then offered several examples of conduct in which gay rights opponents may wish to engage that the First Amendment could protect, such as when a "religious adoption agency declines to place children with same-sex married couples."[285] Roberts concluded by again casting opponents of LGBT equality as the true victims, taking offense that the majority "feels compelled to sully those on the other side of the debate" and paint them as "bigoted."[286] The sympathy that conservatives on the Court repeatedly express for anti-LGBT forces will continue to stoke feelings of victimization and embolden First Amendment based objections to equality principles.

Obergefell signals that the Equal Protection window may be closing for those who seek governmental backing in their efforts to oppose formal equality for gays, lesbians, and bisexuals. But the Court seemingly opened a First Amendment window as a promising escape hatch for equality opponents. How widely open that First Amendment window is may determine the future scope of LGBT equality.

C. Parades, Boy Scouts, and Bakers

In contrast to *Obergefell*, in three key cases, the Supreme Court ruled against LGBT equality claims because of the greater strength of the opposing First Amendment interests at stake. These cases offer insights into how the Court may rule in future cases that pit anti-LGBT liberty interests against pro-LGBT equality interests. *Masterpiece Cakeshop*,[287] the Court's most recent effort at resolving this tension, suggests that the Court at present may be more inclined to pick liberty over equality.

The first case in this trilogy is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[288] There, an Irish LGBT group formed with the specific purpose of marching in Boston's St. Patrick's Day Parade.[289] Each year, a private association of veterans organized and secured the required permits to conduct the

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283. *Obergefell*, 576 U.S. at 679–80.

284. *Id.* at 711 (emphasis omitted).

285. *Id.* This example proved prescient given that the Court heard a case implicating this exact issue with similar facts just this term. *See* Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *petition for cert. granted*, 140 S. Ct. 1104 (2020).

286. *Obergefell*, 576 U.S. at 712.

287. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

288. 515 U.S. 557 (1995).

289. *Id*. at 561.

parade.[290] In 1993, the private veterans' association denied the LGBT group's request to march under its own banner.[291] The LGBT group sued, arguing that their group-based exclusion violated equality principles under state and federal constitutions as well as a Massachusetts public accommodations statute.[292]

The Court unanimously sided with the veterans' association, reasoning that, because parades are inherently expressive,[293] to compel this private association to include an explicitly pro-gay message would effectively compel it to alter its own message (which seemingly did not include pro-gay sentiment) and thus unconstitutionally burden its freedom of association.[294] Notably, the veterans' association did not prohibit anyone from marching in the parade based solely on their individual sexual orientation or gender identity; the association instead denied a request for the inclusion of a banner highlighting group-based queer identity.[295]

Some scholars point to *Hurley* as an early example of the Court favoring an unregulated view of the liberty embodied by the First Amendment over equality principles.[296] Those scholars are correct in arguing that excluding a pro-LGBT message can send a negative message about the equal dignity and humanity of queer people.[297] Professor Carlos Ball, however, makes a compelling argument that *Hurley* was correctly decided due to its unusual facts.[298] Because parades are quintessentially expressive, and because this private group was clear that it did not want its message to be pro-gay, and because this private group excluded only pro-gay messages and not gay and transgender individuals per se, *Hurley* falls more squarely in First Amendment territory with indirect equality implications.[299] As Professor Ball argues:

> [I]t is one thing for the government to demand that certain private entities not discriminate on the basis of sexual orientation . . . . It is another matter altogether for the government, in seeking to attain

290. *Id.* at 560–61.
291. *Id.*
292. *Id.* at 561.
293. *Id.* at 568.
294. *Id.* at 574–75.
295. *Id.* at 572.
296. Professor Darren Hutchinson persuasively argues that the distinction between speech and equality is blurred in *Hurley* given the centrality of "coming out" and other pro-LGBT speech to the formation and recognition of queer identities. Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 124 (1998).
297. *See, e.g.*, Darren Lenard Hutchinson, *"Closet Case":* Boy Scouts of America v. Dale *and the Reinforcement of Gay, Lesbian, Bisexuality, and Transgender Invisibility*, 76 TUL. L. REV. 81, 140–41 (2001) (arguing that "outness" discrimination is akin to discrimination against LGBT status).
298. *See* BALL, *supra* note 3, at 197–205; *see also* Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1190 (1997) (arguing that *Hurley* recognized that the parade organizers "had a vital interest in controlling the public's perception of its identity as an Irishness that is naturally and necessarily heterosexual").
299. BALL, *supra* note 3, at 203–05.

> equality objectives, to attempt to alter the sexuality-related messages that those private entities wish to convey.[300]

Hurley is thus a rare example of a dispute over LGBT rights at the Supreme Court that is more squarely about First Amendment liberties than equality. That said, it is questionable whether permitting openly queer persons to march under their own banner would truly burden or change the parade organizers' message.

The facts of *Boy Scouts of America v. Dale*[301] present quite a different scenario from *Hurley*. This case, unlike *Hurley*, is not about the government requiring a group solely engaged in speech to change the content of that speech. Instead, *Dale* is a case that directly implicates the tension between a First Amendment informed by libertarian ideology and substantive equality, and the Court favored the former.[302]

In *Dale*, the Boy Scouts revoked the adult membership of a scoutmaster after learning that he publicly identifies as gay.[303] According to the Scouts, "homosexual conduct is inconsistent with the values it seeks to instill."[304] The legal problem for the Scouts was that New Jersey's public accommodations law prohibits sexual orientation discrimination,[305] and the Scouts is a qualifying public accommodation.[306] The expelled scoutmaster accordingly sued the Scouts under the New Jersey antidiscrimination law, and the Scouts argued in response that a governmental requirement to admit members regardless of their sexual orientation violates its First Amendment right to free association.[307] The Court agreed that, because it instills certain values in its members, the Boy Scouts can exclude openly gay scoutmasters because it is among those organizations entitled to expressive association rights.[308]

How the Court conducted its analysis of the Scouts' free association claim belied its commitment to a libertarian vision of the First Amendment that can seemingly trump equality principles. The Court explained that it must engage in a two-part inquiry to assess the claim's merits, which in and of itself is noncontroversial.[309] First, it must determine the Scouts' expressive message in relation to homosexuality;[310] second, it must determine whether complying with the antidiscrimination law would significantly burden that message.[311] The concerning aspect of this analysis is that the Court deferred to the Scouts in answering both questions: "As we give deference to an association's assertions regarding the nature

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300. *Id.* at 203.
301. 530 U.S. 640 (2000).
302. *Id.* at 644–49.
303. *Id.* at 644.
304. *Id.*
305. N.J. STAT. ANN. § 10:5-4 (West 2000).
306. *Dale*, 530 U.S. at 646.
307. *Id.*
308. "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Id.* at 650.
309. *Id.* at 648–50.
310. *Id.* at 650.
311. *Id.* at 653.

of its expression, we must also give deference to an association's view of what would impair its expression."[312] It is unusual that—and unclear why—the Court granted the Boy Scouts total deference in both defining its own message and assessing the relative burden that the law imposed on that message. This appears to be a novel development in First Amendment law.

On the first question, the only real evidence of the Scouts' message on homosexuality was the following: (1) an internal policy statement about homosexual conduct circulated to members of the Executive Committee in 1978 but never communicated to individual scouts or the public; and (2) four other policy statements written in the early 1990s in connection with the litigation at issue and other similar lawsuits.[313] As the dissent concluded after reviewing the record, the "Boy Scouts of America is simply silent on homosexuality. There is no shared goal or collective effort to foster a belief about homosexuality at all . . . ."[314]

On the second question, the Court relied on no evidence whatsoever in finding in favor of the Scouts. Instead, the Court simply accepted the Scouts' asserted fear that gay people's "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[315] This conclusion suggests that openly gay people's very existence communicates a political message at seemingly all times and places.

It is unclear why courts should defer to a private organization's bare assertions in analyzing the nature of its message and whether complying with antidiscrimination laws will alter or burden that message. This is a dubious rule of law in light of the Court's repeated holding in other religious liberty and free speech contexts that preventing discrimination is a compelling government interest.[316] For example, in *Burwell v. Hobby Lobby Stores, Inc.*,[317] the Court sought to blunt concerns that granting a religion-based exemption from the Affordable Care Act's contraception requirements could lead to similar religion-based exemptions from antidiscrimination laws: "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[318] Likewise, in *Bob Jones University v. United States*,[319] the Court upheld the IRS's refusal to grant tax-exempt status to a private religious school that discriminated in admissions on the basis of race in part because "[t]he governmental interest" in eradicating race discrimination in education "is compelling."[320] Similar to the federal government's decision to prohibit race discrimination in a variety of federal statutory laws, New Jersey forbade sexual orientation discrimination in its

312. *Id.*
313. *See generally id.* at 666–78 (Stevens, J., dissenting).
314. *Id.* at 684.
315. *Id.* at 653.
316. *Id.* at 648 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984)).
317. 573 U.S. 682 (2014).
318. *Id.* at 733.
319. 461 U.S. 574 (1983).
320. *Id.* at 603–04.

public accommodation law. Preventing sexual orientation discrimination under relevant state civil rights laws is thus presumably a compelling interest.

If courts give near-complete deference to an organization's claims that including persons from some disfavored group will significantly burden whatever it says its message is, this deference will inevitably lead to the organization's desired discriminatory outcome. This is an end run around antidiscrimination law, precisely what the result in *Dale* illustrates. The unspoken explanation for this deference in First Amendment claims seems to be a libertarian view of free speech, free association, and religious freedom claims that permits almost no governmental interference in private affiliations.[321] There is nothing in its text or history that mandates this interpretive First Amendment theory.

In 2018, Justice Scalia's long-held sympathetic take on opponents of LGBT equality as victims of the liberal elite[322] entered mainstream Supreme Court jurisprudence. The analysis in *Masterpiece Cakeshop*[323] offers perhaps the best evidence yet that the modern Court has tipped the scales in favor of First Amendment liberties and against equality. The crux of the dispute in *Masterpiece Cakeshop* concerns what might initially sound trivial. In this case, a same-sex couple asked a bakery owner to design and bake a cake for their upcoming wedding.[324] The owner declined, citing his "religious opposition to same-sex marriage."[325] The couple filed a claim under a Colorado civil rights statute that prohibits sexual orientation discrimination in places of public accommodation.[326]

This case is unlike *Dale* in the sense that the bakery did not wholesale exclude openly gay people from its services. Nevertheless, the Court recognized that declining to bake a wedding cake only for same-sex couples has equality implications; in fact, the Court explicitly framed the dispute around the tension between liberty and equality:

> The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment . . . .[327]

From an equality perspective, the alarming part of the Court's analysis is the way it analyzed the actions of the Colorado Civil Rights Commission (the "Commission") that adjudicated the couple's discrimination claim in prior proceedings. Although the Court declined to directly reconcile First Amendment liberties and antidiscrimination law, it did so indirectly by framing the Commission's concern about religiously motivated opposition to LGBT equality as

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321. *Dale*, 530 U.S. at 701 (Souter, J., dissenting).
322. *See supra* Section II.A.
323. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).
324. *Id.* at 1723.
325. *Id.*
326. COLO. REV. STAT. ANN. § 24-34-601(2)(a) (2018).
327. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

demonstrating religious hostility.[328] The Court focused on the Commission's two public hearings and took special offense to one of the Commissioner's public comments:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[329]

The Court leapt to the conclusion that these comments "disparage" the baker's religion by "describing it as despicable" and "characterizing" it as "insubstantial and even insincere."[330]

For several reasons, it is incredible that the Court in *Masterpiece Cakeshop* relied on evidence of the government's discriminatory religious intent as a basis for sending this case back to the Commission for further review. First, the Court almost never finds evidence of racially discriminatory intent when reviewing race-neutral laws that disparately impact people of color.[331] The Court's unusually earnest search for *religious* discriminatory intent betrays its special solicitude for anti-LGBT religious dissenters.

Second, the Court decided *Masterpiece Cakeshop* in the same term—the same month, to be exact—in which it decided *Trump v. Hawaii*,[332] upholding the President's executive order barring entry into the United States by foreign nationals from eight majority Muslim countries.[333] In *Trump v. Hawaii*, the Court ignored the mountain of public evidence demonstrating that the executive order was motivated by discriminatory animus towards Muslims, explaining that "the issue before us is not whether to denounce the statements" but to assess a facially neutral Presidential directive.[334] The Court seemingly treated executive actions regarding immigration and national security as requiring greater deference to the Executive,[335] but it offers no convincing explanation for why it departed from well-established doctrine holding that religiously discriminatory intent renders even facially religion-neutral governmental policies unconstitutional under the Establishment Clause.[336] A cynical

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328. *Id.* at 1724.
329. *Id.* at 1729.
330. *Id.*
331. *See* Haney-López, *supra* note 148, at 1783; *see also supra* Section II.B.
332. 138 S. Ct. 2392 (2018).
333. *Id.* at 2422–23.
334. *Id.* at 2418.
335. *Id.*
336. *See generally id.* at 2434–45 (Sotomayor, J., dissenting).

> [T]he dispositive and narrow question here is whether a reasonable observer, presented with all 'openly available data,' the text and 'historical context' of the Proclamation, and the 'specific sequence of events' leading

but hard-to-avoid explanation for the analytical differences between *Masterpiece Cakeshop* and *Trump v. Hawaii* is that the Court's special concern for religion may be limited to Christianity.

Finally, and importantly, it is far from clear that the Commission's public comments in *Masterpiece Cakeshop* demonstrated hostility towards religion. From a descriptive standpoint, the Commission seemed to be making a factual observation that people sometimes use religion to justify discrimination or other bad behavior. In *Loving v. Virginia*, for example, a trial court judge invoked "Almighty God" to justify criminal sanctions for individuals who enter into interracial marriages.[337] In striking down anti-miscegenation statutes as unconstitutional because they are "measures designed to maintain White Supremacy" and serve "patently no legitimate overriding purpose,"[338] did the Supreme Court implicitly demonstrate hostility towards the trial court judge's religious belief that interracial marriage is wrong? Perhaps so, but this leads to a normative point: There is a difference between condemning certain religious beliefs as incompatible with social and legal norms, on the one hand, and condemning a person's religion or a religious group writ large, on the other hand. If legal actors cannot make, enforce, or adjudicate laws that reflect society's judgment that certain conduct is harmful or undesirable if doing so would effectively bring certain religious *beliefs* into disrepute, it is hard to see how government can continue to effectively function.

The Supreme Court's steadily increasing concern for those who object to LGBT equality on First Amendment grounds should be a warning sign about the civil rights battles to come. A libertarian approach to free speech and free association claims, and an interpretation of religious liberty that protects majoritarian religious beliefs from secular scorn, are all fundamentally incompatible with equality claims brought by historically oppressed minorities.

IV. FREE SPEECH OBJECTIONS TO LGBT EQUALITY

In June of 2020, the Supreme Court settled a decades-long debate about the meaning of LGBT equality. In *Bostock v. Clayton County*,[339] the Court held that a federal law prohibiting sex discrimination in the workplace encompasses discrimination against gay and transgender employees.[340] After explaining how the plain meaning of the federal statute's terms dictate this result, the Court entertained some potential objections. In response to the worry that complying with the federal law would force employers to "violate their religious convictions,"[341] the Court was sympathetic: "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution . . . ."[342] The Court then teed up coming clashes between liberty and equality by citing both constitutional and

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> to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country.

Id. at 2438 (citing McCreary County v. ACLU, 545 U.S. 844, 862–63 (2005)).

337. 388 U.S. 1, 3 (1967).
338. *Id.* at 11.
339. 140 S. Ct. 1731 (2020).
340. *Id.* at 1754.
341. *Id.* at 1753.
342. *Id.* at 1754.

statutory sources, suggesting that certain objections brought by religious and conservative dissenters might "supersede" LGBT equality mandates "in appropriate cases."[343] While the LGBT movement won this definitional battle for formal equal treatment under federal workplace law, the scope of equality in employment, housing, health care, and myriad other contexts ultimately depends on the constitutional and statutory meanings of free speech and religious liberties.

This Part discusses present and future controversies in which the tension between liberty and equality may manifest in individuals' First Amendment free speech claims to be free from LGBT equality guarantees. Section A presents and discusses the Ninth Circuit's *Harper v. Poway Unified School District*[344] as a concrete, yet all too rare, example of the antisubordination theory at work in direct clashes between liberty and equality. Although the Supreme Court vacated the Ninth Circuit's decision in *Harper* on procedural grounds, the Court did not offer any disagreement with its substance.[345] Part B offers several examples of contemporary cases, and it discusses how an antisubordinating approach to free speech should resolve them.

A. Harper v. Poway *and Antisubordinating Free Speech*

In examining the Ninth Circuit's legal analysis in *Harper v. Poway*, it is important to acknowledge at the outset that the usual content- and speaker-neutrality rules did not apply in this case. The Supreme Court has long reasoned that normal free speech rules are inapplicable in situations where the government is managing its own institutions or programs.[346] These situations encompass speech in prisons,[347] speech in the military,[348] speech by public employees,[349] and student speech in public schools.[350] The Court has departed from its usual speech-protective posture in these situations for a variety of reasons, including the belief that the government

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343. *Id.*

344. 445 F.3d 1166 (9th Cir. 2006), *vacated on procedural grounds*, 549 U.S. 1262 (2007).

345. *See* Kevin W. Saunders, *Hate Speech in the Schools: A Potential Change in Direction*, 64 ME. L. REV. 165, 191 (2011) (arguing that *Harper* still has "intellectual strength").

346. *See* Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1693 (2009).

347. Thornburgh v. Abbott, 490 U.S. 401, 409 (1989) (imposing a deferential reasonableness standard for assessing regulations of prisoners' speech).

348. Parker v. Levy, 417 U.S. 733, 758 (1974) (declaring that the "necessity for obedience, and the consequent necessity for imposition of discipline," warrant lesser free speech protections for military personnel).

349. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that public employees' speech warrants no First Amendment protection when it is made "pursuant to their official duties").

350. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that schools may limits students' speech if the speech poses a threat of substantial disruption to the educational environment).

needs more breathing room to effectively regulate its own institutions and promote its own objectives.[351]

Scholars have critiqued the Court's special treatment of speech in governmental institutions and programs given that robust free speech protection might be essential for promoting democratic self-governance values in these contexts—for example, by facilitating the search for truth and exposing governmental wrongdoing.[352] Further, much like the Court's unprotected speech jurisprudence, these institutional zones of less protected speech underscore the Court's idiosyncratic approach to assigning constitutional value to different kinds of speech and diminishing the importance of free speech in certain contexts. This latter criticism, however, supports this Article's central point: Because the Court can contextualize the value of speech and recalibrate its protection in these contexts, it can do the same when confronting speech that subordinates historically oppressed groups.

The doctrine governing the student speech at issue in *Harper v. Poway* comes from the Court's famous 1969 *Tinker v. Des Moines Independent Community School District*[353] decision. In *Tinker*, the Court held that a school may regulate student speech either if there is a reasonable forecast that the speech "would materially and substantially disrupt the work and discipline of the school"[354] or if the speech would collide "with the rights of other students."[355] Most courts rely on *Tinker*'s "disruption test" when assessing alleged student speech violations.[356] In an

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351. *See* Lee, *supra* note 346, at 1707. For example, in *Tinker v. Des Moines Independent Community School District*, the Court explained that "the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools" justifies more deference to school authorities in regulating student speech. 393 U.S. at 507.

352. *See, e.g.*, C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other 'Special Contexts,'* 56 U. CIN. L. REV. 779, 785 (1988) ("The special exception cases ignore the rationale underlying the protection normally accorded speech subjected to government content controls."); Lee, *supra* note 346, at 1713–14 (arguing that speech in these contexts "has a distinctive and particularly valuable role to play in furthering the First Amendment aims of facilitating the search for truth, promoting self-government, and checking governmental misconduct"); Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1679 (2007) (arguing that the Court's institutional approach for lessening free speech protections is dangerous because it has "curtailed speech massively" for millions).

353. 393 U.S. at 503.

354. *Id.* at 513.

355. *Id.* at 508.

356. *See* Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 836 (2016) (noting that courts typically do not rely on the "interference with the rights of others" test); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) ("The precise scope of *Tinker*'s 'interference with the rights of others' language is unclear.").

unusual move, the *Harper* court relied on the interference with "the rights of others" test in holding that the school did not violate the plaintiff's free speech rights.[357]

The legal dispute in *Harper v. Poway* springs from a contentious history of student conflict over issues relating to sexual orientation and LGBT rights at the public Poway High School in southern California.[358] In 2003 and 2004, some students organized a "Day of Silence," during which they remained silent and wore tape over their mouths to symbolize the "silencing effect of intolerance upon gays and lesbians."[359] In response, other students organized a "Straight-Pride Day" and wore t-shirts with antigay slogans and themes.[360] This cultural clash over LGBT equality led to "a series of incidents and altercations," including a physical fight that required the principal to intervene.[361]

In 2004, one student, Harper, wore a t-shirt with the following messages: "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front, and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.[362] Administrators asked Harper to change his shirt, explaining that it was inflammatory and could lead to a physical fight on school grounds.[363] Harper refused to remove the shirt and requested to be suspended,[364] presumably to become a martyr for his cause.[365] The principal stated that he did not want to suspend or formally discipline Harper; instead, Harper spent the rest of the day in a school conference room doing his homework.[366] Harper filed a lawsuit, arguing among other things that the school had violated his constitutional right to free speech.[367]

Applying the "rights of others" prong of *Tinker*, the *Harper* court first explained that among the rights *Tinker* protects is the right to be free from "psychological injury" inflicted by others.[368] Specifically, "students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses."[369] The court here is tapping into the principles of antidiscrimination law and its attempts to promote egalitarian access and belonging. Indeed, the Supreme Court effectively granted students a similar formal right in its 1999 *Davis v. Monroe County Board of Education*[370] decision, holding that schools

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357. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated on procedural grounds*, 549 U.S. 1262 (2007).

358. *Id.* at 1171.

359. *Id.* at 1171 n.3.

360. *Id.* at 1171.

361. *Id.*

362. *Id.*

363. *Id.* at 1172–73.

364. *Id.* at 1172.

365. *Id.* at 1171–73 (noting how Harper requested to be suspended two times and refused to remove the shirt; he was notified that he could return to class if he changed the shirt but still would not comply).

366. *Id.* at 1172.

367. *Id.* at 1173.

368. *Id.* at 1178.

369. *Id.*

370. 526 U.S. 629 (1999).

can be liable for severe and pervasive peer-on-peer harassment under existing federal law.[371] This similarity to statutory antidiscrimination law further demonstrates the relevance of *Harper*'s analysis for contemporary disputes implicating other statutory rights.

Second, the *Harper* court explained that not all verbal assaults are alike. Some have particularly devastating effects for members of vulnerable groups. Citing interdisciplinary scholarship and empirical evidence, the court explained:

> Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.[372]

This is the language of antisubordination. It is concerned with how speech can effectively enforce status hierarchy.[373] The court recognized that hate speech targeted at minority group members can both intangibly enforce status hierarchies by perpetuating feelings of inferiority and tangibly enforce status hierarchies by interfering with students' education. By rejecting Harper's free speech claim and allowing the school to censor his antigay t-shirt, the court interpreted the government's role under First Amendment principles through an egalitarian lens. Additionally, the court was clear that this approach does not permit schools to censor *any* speech deemed offensive or derogatory—like speech criticizing Republicans, Democrats, or the Iraq War.[374] The court emphatically restated near the end of its analysis: "[O]ur holding is limited to injurious speech that strikes at a core identifying characteristic of students on the basis of their membership in a minority group."[375]

This analysis is antithetical to the Supreme Court's current commitment to content and speaker neutrality. Imagine a situation in which two students—one straight and one gay—both use speech that denigrates each other's sexual orientation. Under an antisubordination approach, the homophobic speech is worthy of less constitutional protection than speech denigrating heterosexuals "because of the differing histories and contexts of subordination faced by these groups."[376] The harm of an antigay slur is greater than the harm of an antistraight slur because of the existing status disparity between these groups and the ways in which homophobic slurs reinforce that disparity.[377] This is a controversial argument because it challenges the prevailing conservative tenet of formal equal treatment undergirding both free speech and equal protection jurisprudence.[378] It does not need to be a controversial argument, however, if the law abandons the pretense that all speech is

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371. *Id.* at 646–47.
372. *Harper*, 445 F.3d at 1178.
373. *See supra* Section II.A.
374. *Harper*, 445 F.3d at 1182.
375. *Id.* at 1182 n.27.
376. Colker, *supra* note 105, at 1009.
377. *Cf.* Matsuda, *supra* note 191, at 2332–33.
378. *See, e.g.*, Massaro, *supra* note 205, at 241–42 (noting that many conservatives and liberals alike will resist an "asymmetrical account of equality").

equally valuable—a principle the Supreme Court has already endorsed in its unprotected speech jurisprudence.[379]

Some may question whether gays, lesbians, and bisexuals remain a vulnerable minority given growing societal acceptance of this group and their attainment of many legal goals rooted in formal equal treatment.[380] Indeed, the wealthy, white, and gender-conforming gay man is a popular foil for those who argue against "special rights" on the basis of sexual orientation.[381] Contemporary advances in both legal protections and social acceptance do not erase a long history of formal and informal discrimination on the basis of sexual orientation,[382] however, nor should these advances occlude the lingering conscious and unconscious biases against sexual minorities that remain particularly prominent in many rural areas and conservative religious communities.[383] The ongoing and fiercely fought debates about what rights LGBT people should have is evidence that sexual and gender minorities continue to sit beneath their straight and cisgender counterparts in the social hierarchy.[384]

In his *Harper* dissent, Judge Kozinski offered several additional concerns about an antisubordination approach to free speech that are worthy of discussion. First, he argued that Harper's t-shirt is core political speech given society's ongoing debate about LGBT rights and homosexual conduct.[385] The problem with this argument is that it is intellectually dishonest to disentangle same-sex conduct from gay, lesbian, and bisexual *status* given that same-sex conduct and same-sex attraction are central to these group-based identities. Scholars have long discussed this illusory distinction between status and conduct in the realm of LGBT rights.[386] So too has the Supreme Court.

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379. *See supra* Section II.B.

380. For a discussion of how courts treat gays, bisexuals, and lesbians when assessing their relative political power under the suspect classification calculus in equal protection claims, see Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1599–605 (2017).

381. Professor Russell Robinson explains that the face of the gay rights movement is overwhelmingly wealthy, white, male, and often "indifferent to the concerns of many black LGBT people." Russel K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1038–39 (2014). This partially explains why the "idea that gay is white" is so ubiquitous. *Id.* at 1040.

382. *See, e.g.*, Delgado, *supra* note 163, at 91 (explaining that "the achievement of high socioeconomic status," for example, does not erase past subordination).

383. *See* Boso, *supra* note 241, at 956–71 (illustrating and explaining the hostilities that many rural areas continue to harbor against out gender and sexual minorities).

384. *See Legislation Affecting LGBT Rights Across the Country*, ACLU, https://www.aclu.org/legislation-affecting-lgbt-rights-across-country (last updated Feb. 26, 2021).

385. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1196 (9th Cir. 2006) (Kozinksi, J., dissenting).

386. *See, e.g.*, Widiss, *supra* note 4, at 2115 (noting that the conduct/status distinction "has been discussed particularly fully in the gay rights context," and finding that courts have by and large blurred any relevant distinction).

When the Court struck down criminal prohibitions on oral and anal sex between consenting adults in *Lawrence v. Texas*,[387] Justice O'Connor in her concurrence explicitly connected conduct and group identity: "The Texas statute makes *homosexuals* unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."[388] Moreover, in *Christian Legal Society v. Martinez*,[389] a student organization at the UC Hastings College of Law sought to exclude any potential member who "engaged in unrepentant homosexual conduct."[390] The student organization argued that its policy did not violate the school's rule prohibiting sexual orientation discrimination because it did not categorically exclude gays and lesbians, but the Court disagreed: "Our decisions have declined to distinguish between status and conduct in this context."[391]

It is likewise difficult to see how gender nonconformity can be disaggregated from a person's *status* as transgender given that this status is fundamentally about rejecting assigned sex and gender designations.[392] Words and expressive conduct that disapprove of or seek to exclude persons based on the attributes central to lesbian, gay, bisexual, or transgender status unavoidably cut deep into the core of these individuals' sense of self and belittle their social standing.

Judge Kozinski offered a second objection to antisubordination analysis that is harder to dismiss. Difficulties may arise when the free speech and equality tension is between two minority groups. Judge Kozinski presented a hypothetical in which a Catholic person speaks out against homosexuality.[393] Given that Catholics were once an oppressed religious minority in the United States,[394] how should the antisubordinating analysis resolve these competing claims to free speech and equality?

As an initial matter, it is important to recognize that attempts by one minority group to subordinate another can be just as harmful as oppression by dominant groups.[395] From an analytical perspective, the legally significant question in all cases should focus on the effect of a successful free speech claim. For the sake of argument, imagine a Catholic businessowner who asserts a free speech interest in opposing same-sex marriage by denying tangible goods or services to only same-sex couples. Assuming for the sake of argument that these business functions

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387. 539 U.S. 558 (2003).

388. *Id.* at 581 (O'Connor, J., concurring) (emphasis added).

389. 561 U.S. 661 (2010).

390. *Id.* at 689 (internal quotation marks omitted).

391. *Id.* (citing *Lawrence*, 539 U.S. at 575 and Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)).

392. Professor Kyle Velte makes a similar point, arguing that "transgender people's public existence and request of equal rights is inherently transgressive and radical." Velte, *supra* note 264, at 827.

393. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1201 (9th Cir. 2006) (Kozinksi, J., dissenting).

394. *See, e.g.*, Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1039 (2005) (describing how anti-Catholic bias and the status of Catholics as religious minorities shaped early Establishment Clause jurisprudence).

395. WALDRON, *supra* note 200, at 50.

implicate free speech principles, favoring speech over equality in this hypothetical would effectively contribute to the second-class status of gay, lesbian, and bisexual persons. Conversely, favoring equality over speech would not subordinate Catholics even though Catholics are a historically oppressed group.

There is a difference between condemning a belief and sending a message of inferiority about group membership. As Professor Jeremy Waldron argues, there is a clear and "basic distinction between an attack on a body of beliefs and an attack on the basic social standing and reputation of a group of people."[396] Waldron goes on: "In every aspect of democratic society, we distinguish between the respect accorded to a citizen and the disagreement we might have concerning his or her social and political convictions."[397] It is easy and often necessary in a society governed by secular laws to isolate harmful individual religious beliefs and actions from an individual's religious status. Condemning homophobic or transphobic expression rooted in religious teachings does not have the effect of subordinating religious groups writ large.

Anti-LGBT speech does more than simply express a difference in political opinion, as Judge Kozinski suggests. When anti-LGBT speech is directed at a gay or transgender person or the LGBT community, it buttresses the historical inferior status of sexual and gender minorities; it supports longstanding dominant ideologies that position sexual and gender minorities as worth less than heterosexual and cisgender persons. This is the lesson of *Harper*. Other courts can and should follow suit.

B. Contemporary Claims

The First Amendment has become sword and shield for religious and conservative objectors in the battle over LGBT equality. Many of their claims are rooted in the Free Exercise Clause or statutes designed to protect religious freedom. Others are rooted in the Free Speech Clause. This Section discusses some of the prominent strains of free speech objections.

Importantly, and hopefully of some comfort to LGBT equality advocates, some anti-LGBT "speech" might not truly count as speech, thus falling outside of the protections of the First Amendment. Many conflicts between free speech and equality involve speech that may rise to the level of a hostile environment under federal statutes, like Title VII, Title IX, and comparable state and local laws. In those cases, courts have reasoned that the speech in question is tantamount to conduct,[398] and this conduct is unlawful precisely because it directly contradicts statutory

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396. *Id.* at 120.

397. *Id.*

398. In *R.A.V. v. City of Saint Paul*, Justice Scalia asserts that there is a difference between governmental efforts to prohibit speech solely because of its content, and efforts to prohibit speech that amounts to conduct because of its harmful secondary effects—like creating a hostile work or educational environment. 505 U.S. 377, 389–90 (1992); *see also* Charles, *supra* note 125, at 594 (explaining that, although Title VII often impacts speech, "Justice Scalia argued that Title VII is not vulnerable to constitutional attack under the First Amendment because the statute is directed at conduct and not speech").

equality demands.[399] The line at which otherwise pure speech becomes unlawful conduct is admittedly murky and somewhat beyond this Article's scope.[400] When that line is crossed, however, a free speech defense is no longer available.[401]

Courts must substantively address free speech claims when the speech at issue is *pure* speech or when the conduct at issue is sufficiently expressive to warrant First Amendment protection.[402] In some of these cases, individuals argue that governmental regulation of anti-LGBT speech is content discrimination. In others, individuals argue that governmental antidiscrimination commands effectively compel speech. This latter argument derives from the famous *West Virginia State Board of Education v. Barnette*[403] case in which the Supreme Court held that schools cannot compel students to recite the Pledge of Allegiance without violating the Free Speech Clause.[404] This Article addresses some of the forms that compelled speech arguments take but does not propose an across-the-board rule for what amounts to compelled speech and whether its prohibition is absolute. Instead, it argues that antisubordination considerations should inform judicial analysis regardless of the specific contours of the free speech claim at issue (e.g., compelled speech or content discrimination), the context in which it arises (e.g., in public schools or in governmental enforcement of antidiscrimination law), or the version of judicial review that applies (e.g., strict scrutiny or intermediate scrutiny).

Kluge v. Brownsburg Community School Corp.[405] offers one modern example of how opponents of LGBT equality might use the Free Speech Clause to override equality principles: arguing for a right to misgender others. John Kluge was a music and orchestra teacher at Brownsville High School, and he described himself as "a professing evangelical Christian who strives to live by his faith on a daily

399. "When plaintiffs in employment discrimination suits have been subjected to racist or sexist verbal harassment in the workplace, courts have recognized that such assaultive speech denies the targeted individual equal access to employment." Lawrence, *supra* note 118, at 798.

400. The Supreme Court has not offered a clear rule for where to draw the legally significant line, nor has it thoroughly explained why harassment solely based on speech does not present First Amendment problems. *See* Juan F. Perea, *Strange Fruit: Harassment and the First Amendment*, 29 U.C. DAVIS L. REV. 875, 877 (1996) ("The Court seems to have tacitly assumed that harassment because of a hostile or abusive environment presents no First Amendment problem."). Professor Perea offers a rationale, arguing that harassing speech should not receive First Amendment protection because of its subordinating effects. *Id.* at 879 ("Harassing speech, the hate speech of the workplace, maintains established relationships of caste and subordination and undermines the core value of equality which lies at the heart of Title VII.").

401. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) ("Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.").

402. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989) (finding that burning a U.S. flag at a political event is "sufficiently imbued with elements of communication . . . to implicate the First Amendment" (internal quotations and citations omitted) (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

403. 319 U.S. 624 (1943).

404. *Id.* at 642.

405. 432 F. Supp. 3d 823 (S.D. Ind. 2020).

basis."[406] As Kluge explained, his faith "govern[ed] the way he thinks about human nature, marriage, gender, sexuality, morality, politics, and social issues," and accordingly, "he believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires."[407] The Brownsville Community School Corporation's ("BCSC") official policy clashed with Kluge's beliefs to the extent that it required teachers to refer to students by the name and pronouns that correspond to their gender identity.[408] Kluge refused to use transgender students' preferred pronouns and first names.[409] Unable to come to an agreement with the BCSC, Kluge resigned in May 2018.[410] He subsequently filed suit, alleging that the BCSC's policy amounted to compelled speech and content discrimination in violation of the Free Speech Clause.[411]

The district court dismissed Kluge's free speech claims for the fact-specific reason that speech regarding students' names and pronouns relates to his job responsibilities as a public employee.[412] This outcome stems from the Supreme Court's decision in *Garcetti v. Ceballos*,[413] holding that the First Amendment does not protect public employees' speech if it is pursuant to official duties.[414] But suppose the facts were slightly different: For example, a public school teacher is disciplined for misgendering other faculty or staff, students' parents, strangers on social media, people living in the community with whom the teacher interacts in non-school settings, and so on. Under these facts, other courts may find that *Garcetti* does not apply. Or imagine other scenarios outside of the public employee context: Maybe a private business owner misgenders employees or customers, a landlord misgenders tenants, or a healthcare provider misgenders patients. Courts must grapple with the contours of free speech in the face of discrimination lawsuits stemming from hypotheticals like these.

In sharp contrast to the *Kluge* holding, a panel of judges on the Sixth Circuit in *Meriwether v. Hartop*[415] validated a professor's free speech claim to misgender students under strikingly similar facts. Nicholas Meriwether is a philosophy professor at the public Shawnee State University in Ohio.[416] As the court described him, Meriwether is a "devout Christian" who holds the following religious belief: "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires."[417] Accordingly, Meriwether declined to strictly follow the university's antidiscrimination policy requiring that faculty refer to

406. *Id.* at 833.
407. *Id.*
408. *Id.*
409. *Id.* at 834.
410. *Id.*
411. *Id.* at 836.
412. *Id.* at 839.
413. 547 U.S. 410 (2006).
414. *Id.* at 421.
415. No. 20-3289, 2021 WL 1149377 (6th Cir. Mar. 26, 2021).
416. *Id.* at *1.
417. *Id.*

students by their preferred pronouns.[418] One semester, Meriwether referred to students by gendered pronouns and honorifics, as he had always done, and was confronted by a female-identified student who objected to his use of masculine identifiers when addressing her.[419] Meriwether proposed an accommodation by which he would continue to use gendered identifiers for all other students but would only refer to this student by her last name[420]—an accommodation that effectively singled out this student and drew attention to her transgender identity in every class session. The student complained to the administration, and a Title IX investigation followed.[421] The university took disciplinary action against Meriwether based on the preliminary investigation's conclusion that he created a hostile educational environment on the basis of sex by refusing to recognize this student's female identity.[422]

In addressing Meriwether's free speech claim, the court first explained that his speech does not qualify as unprotected governmental employee speech because he was engaged in "core academic functions, such as teaching and scholarship,"[423] which the court characterized as an "academic freedom" exception to *Garcetti*.[424] The court then applied the Supreme Court's *Pickering*[425] test, which determines whether the employee's free speech claim should prevail by asking whether the governmental employee is speaking on a matter of public concern, and if so, whether on balance the employee's expressive interests outweigh the governmental employer's interest in "promoting the efficiency of the public services it performs."[426] The court answered both questions in the affirmative.

To the first question, the court reasoned that Meriwether's speech "reflected his conviction that one's sex cannot be changed, a topic which has been in the news on many occasions and has become an issue of contentious political debate."[427] This conclusion effectively renders all speech regarding any transgender person's identity of "public concern," politicizing in perpetuity the very existence of a marginalized group. To the second question, the court reasoned that Meriwether's expressive interests outweigh the university's interests in promoting antidiscrimination principles and complying with federal antidiscrimination law.[428] Meriwether's interests are particularly strong, the court explained, because his speech "relates to his core religious and philosophical beliefs."[429] By contrast, the university's interests are comparatively weak because, as the court concluded, there is no evidence that Meriweather's speech in fact created a hostile educational

418. *Id.* at *1–2.
419. *Id.* at *2–3.
420. *Id.* at *3.
421. *Id.* at *3–4.
422. *Id.* at *4.
423. *Id.* at *7.
424. *Id.* at *9.
425. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
426. *Id.* at 568.
427. *Meriwether*, 2021 WL 1149377, at *9 (internal quotations and ellipses omitted) (quoting Cockrel v. Shelby Cty. Sch. Dist., 270 F.3d 1036, 1051 (6th Cir. 2001)).
428. *Id.* at *11–12.
429. *Id.* at *11.

environment given that the student—despite the repeated humiliation she undoubtedly experienced—academically succeeded in the course.[430] Ignoring that incendiary and offensive speech often serves as the basis for hostile workplace or educational environment discrimination claims, the court stressed that "[p]urportedly neutral non-discrimination policies cannot be used to transform institutions of higher learning into 'enclaves of totalitarianism.'"[431] The court thus elevated a professor's expressive desire to misgender and therefore demean transgender students over transgender students' basic equality interests in being treated as individuals deserving of dignity, respect, and an educational environment free from hostility directed at a central facet of identity.

Under an antisubordination approach, claimants should lose free speech claims to misgender others. Our first names and pronouns are fundamental to who we are. Misgendering either intentionally or effectively erases a core aspect of identity and undermines the very existence of transgender people as a group.[432] Courts in recent years have highlighted the harm in misgendering.[433] For example, the Fourth Circuit noted that misgendering "display[s] hostility."[434] A federal district court in Illinois approvingly quoted a medical expert who explained that misgendering "can be degrading, humiliating, invalidating, and mentally devastating."[435] A federal district court in California noted that misgendering is "often incredibly distressing."[436] And a New York state court concluded that misgendering is "laden with discriminatory intent."[437] Simply put, misgendering denies dignity and subordinates. It not only positions transgender people as inferior to gender conforming people, but it seeks to render them invisible.

Another prominent strain of free speech objection to LGBT equality stems from laws that prohibit discrimination in the provision of certain goods or services. Typically, claimants argue that providing these goods or services amounts to compelled speech. In *Masterpiece Cakeshop*, a religious baker argued that making a wedding cake for a same-sex couple in compliance with Colorado's Anti-Discrimination Act would violate "his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he

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430. *Id.* at *12.

431. *Id.* at *11 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

432. Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 958–59 (2019) (arguing that "intentional misgendering expresses stereotypes about what real 'men' and 'women' are and informs its target that their own gender identity is unworthy of respect," and misgendering "could therefore be part of a pattern of prohibited gender-identity or sex-based harassment").

433. *See* Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 43 (2020).

434. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716 (2016), *vacated on other grounds*, 137 S. Ct. 1239 (2017).

435. Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018).

436. Prescott v. Rady Children's Hosp.-San Diego, 265 F. Supp. 3d 1090, 1096 (S.D. Cal. 2017).

437. Doe v. City of New York, 976 N.Y.S.2d 360, 364 (N.Y. Sup. Ct. 2013).

disagreed."[438] The Court declined to directly address this question, saving its resolution for "some future controversy involving facts similar to these."[439] Other courts are beginning to weigh in.

In *Telescope Media Group v. Lucero*,[440] the Eighth Circuit tipped the scales in favor of liberty over equality. There, Carl and Angel Larsen owned and operated a business in which they, as they described it, used their "unique skill[s] to identify and tell compelling stories through video."[441] They are also devout Christians who wanted to use their business to honor God, and they declined business that would contradict their religious beliefs—including any request that "promote[s] any conception of marriage other than as a lifelong institution between one man and one woman."[442] Further, they wanted to actively promote this religious belief by producing wedding videos of only different-sex couples.[443] The problem for the Larsens is that the Minnesota Human Rights Act ("MHRA") prohibits places of public accommodation from denying "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations" to any person on the basis of sexual orientation.[444] Accordingly, the Larsens sought an injunction against the enforcement of the MHRA, arguing that it would require them to make videos of same-sex weddings and therefore unconstitutionally compel speech with which they disagree.[445]

First, the Eighth Circuit held that the production of wedding videos is protected speech and not conduct[446] because the business seeks to do more than simply provide a service for profit; it also intends to express its own "views about the sanctity of marriage."[447] Next, the court reasoned that applying the MHRA to this business in the provision of video-related wedding services would unconstitutionally compel speech because it would require the business to "speak favorably about same-sex marriage."[448] This analysis suggests that the business's message overrides whatever message its prospective customers intend. The court also worried that compelling positive expression about same-sex marriage would be "demeaning,"[449] casting the business as the victim of liberal intolerance. Further, the court held that compliance with the MHRA would amount to content discrimination since it would penalize the business if it failed to discuss a particular subject: same-sex marriage.[450] Finally, because regulating discriminatory speech—as opposed to

438. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1726 (2018).
439. *Id.* at 1724.
440. 936 F.3d 740 (8th Cir. 2019).
441. *Id.* at 747.
442. *Id.* at 748.
443. *Id.*
444. MINN. STAT. § 363A.11, subdiv. 1(a)(1) (2020).
445. *Telescope Media Grp.*, 936 F.3d at 749.
446. *Id.* at 751.
447. *Id.*
448. *Id.* at 752.
449. *Id.* at 753.
450. *Id.*

discriminatory conduct—is not a compelling governmental interest under a strict scrutiny analysis, the free speech claim prevailed.[451]

There are many potential avenues for criticism of the Eighth Circuit's analysis, including its conflation of a for-profit service with speech. For the purposes of this Article, however, the most troubling aspect of the court's analysis is its unwillingness to even entertain the equality interests at stake.[452] The court fails to appreciate that exempting this business from a generally applicable antidiscrimination law as applied to wedding services effectively enforces homosexual and bisexual status inferiority. As Professor Deborah Widiss argues, "When a business or individual refuses to provide services to a same-sex couple that it would provide to a different-sex couple, the key difference between the two couples is their sexual orientation. . . . [T]he conduct—same-sex marriage—[is] inextricably tied to sexual orientation."[453] In *Lucero*, then, as in all claims like these, the expression at issue is not solely about the sanctity and virtues of different-sex marriage. Protecting "speech" like this sends a devaluing message of moral disapproval about gays, lesbians, and bisexuals as a group, maintaining their status as inferior to heterosexuals in the eyes of the law.

CONCLUSION

Donald Trump's election to the presidency coincided with an increasing sense of victimization in mainstream conservative movements.[454] Seizing on widespread feelings of cultural and economic alienation, President Trump frequently fanned the flames of resentment by complaining about unfair treatment that he and his supporters suffer at the hands of liberal elites.[455] The express or implicit invocation of a powerful liberal elite has long served as a dog whistle for stoking conservative discontent against those who are presumably undeserving in struggles for limited resources and social standing. [456] Today, those who are part of the liberal elite in the shared conservative imagination include feminist-minded women, religious minorities, people of color, and the LGBT community—all of whom have increased their legal and social standing in recent decades.[457]

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451. *Id.* at 755.

452. *Id.* at 760–61.

453. Widiss, *supra* note 4, at 2131.

454. *See* sources cited *supra* note 5.

455. *See, e.g.*, Brooke Seipel, *Trump Blasts Liberal Elites: 'I'm Smarter Than They Are,'* HILL (Mar. 18, 2019), https://thehill.com/homenews/administration/436404-trump-blasts-liberal-elites-im-smarter-than-they-are.

456. *See* Boso, *supra* note 241, at 954–55 (describing feelings of invisibility and victimization that many rural, white, working-class people share, and which Donald Trump successfully tapped into when running for president); *see also* Lisa R. Pruitt, *The Women Feminism Forgot: Rural and Working-Class White Women in the Era of Trump*, 49 U. TOL. L. REV. 537, 548 (2018) (discussing widely shared perceptions among working-class and rural whites that they are "losing ground" and "falling behind" other groups "they perceive to be cutting in line").

457. *See, e.g.*, Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 LAW & INEQ. 117, 122–

In response to a shifting social and legal climate that is less tolerant of bullying, embraces liberal sexual and gender norms, and seeks to institute formal equality for formerly disfavored groups, many in the conservative movement have increasingly turned to the First Amendment to protect the status quo. Those who oppose the creeping embrace of the government's efforts to enact and enforce civil rights laws have sought to cast themselves as victims of the intolerant left. The defensive use of the First Amendment has been particularly effective in thwarting attempts to prohibit sexist and racist hate speech, and in seeking carve-outs and exemptions from LGBT-protective antidiscrimination laws.

The invigorated conservative reliance on the First Amendment reflects just one example of a persistent tension between competing claims to liberty and equality, reflecting a country plagued since its inception by systemic racism of its own making. The Supreme Court has expectedly played a central role in mediating disputes between liberty and equality. Since its modern conservative turn in the 1970s, however, it has imbued both equal protection and free speech jurisprudence with libertarian ideology that reflects a strongly held conservative belief in limited governmental oversight and regulation.

A progressive and pluralistic society must more adequately balance libertarian interests in the exercise of individual rights—like free speech—with the need for government action to promote equitable outcomes. Many scholars, most notably in the field of critical race theory, rely on antisubordination as the guiding principle to resolve disputes between liberty and equality broadly, and between free speech and antidiscrimination law narrowly. The argument is not that equality is more important than liberty. Instead, both equality and liberty should be interpreted through an antisubordinating lens. If the triumph of a free speech claim would enforce a status hierarchy that positions historically oppressed groups as inferior, that free speech claim should fail. In other words, a court should not permit a claimant to use the Free Speech Clause as an affirmative defense for violating a civil rights law, nor should a court grant an exemption from compliance.

An antisubordination theory of free speech stands in opposition to the Supreme Court's current commitment to the libertarian formalism reflected in content- and speaker-neutrality rules. It asks judges to reimagine constitutional norms and theory. The Supreme Court in the liberal Warren Era often interpreted both the Free Speech and Equal Protection Clauses through an egalitarian lens, and no neutral or objective principle of Constitutional interpretation prevents it from doing so again. A Constitution interpreted and infused with libertarian ideology effectively ensures that meaningful liberty and equality exist only for some. Indeed, the exercise of certain rights by those with economic, social, and political power inevitably results in the oppression of others whose freedom is not so robust.

In our current moment of social and economic turmoil wrought by a pandemic and widespread public awareness of systemic racism reflected in police brutality, the time is ripe to reconceptualize what liberty and equality mean. The

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24 (2012) (characterizing the popular misconception that LGBT individuals are "elites" as due in part to 1990s litigation strategies calling on "judges to view sexual minorities as a subset of a White, politically potent, elite class, who 'looked' and 'sounded' like them").

LGBT community and the backlash to its increasingly protected legal status sit at the epicenter of current court battles over the contours of equality and the breadth of the First Amendment, but equity for all marginalized groups is at stake.