To Berkeley readers: Thank you for engaging with this project. What follows are the Introduction (pp. 1-19), Chapter 3 (pp. 20-51), and Chapter 9 (pp. 52-78) of a draft book manuscript on rights adjudication in the United States. The Introduction lays out the overall argument and organization. Chapter 3 is the last of three largely historical chapters, seeking to trace how U.S. judges came to view rights in the way they typically do. Chapter 9 discusses freedom of speech, particularly on campus, as an area where a different way of thinking about rights can be productive. These are true works in progress, so any and all comments are most welcome. You should be aware that the book is for a trade press, so the style is more anecdotal than a typical academic monograph.

The Rights Epidemic:
HOW THE ADDICTION TO ABSOLUTE JUSTICE IS DIVIDING AMERICA, AND WHAT WE CAN DO ABOUT IT

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INTRODUCTION.

You have the right to remain silent. And the right to free speech. You have the right to worship, and the right to doubt. The right against race or sex discrimination. And the right to hate. The right to marry and to have children. The right to divorce and to terminate a pregnancy. The right to be a doctor, and to refuse to perform abortions. The right not to be tortured. The right to die. You might have the right to vote. You surely have the right to stay home. Perhaps you have the right to public education. And to home schooling. The right to health, and to refuse health insurance. The right to food, and to assisted suicide. The right to clean air and water. The right to sell cigarettes. The right to a home. The right to drive. The right to ride a school bus. The right to work. The right to party.

A performance artist named Karen Finley, best known for smearing chocolate over her naked body, claimed a right to NEA funding. (She lost.) A conservative advocacy group called Citizens United claimed the right to use corporate treasury funds to produce a hit piece called “Hillary: The Movie” during Hillary Clinton’s 2008 presidential run. (They won.) Two Orthodox Jewish merchants in Philadelphia claimed the right to keep their stores open on Sundays. (They lost.) Jack Phillips, a Colorado baker-cum-artist, claimed the right to refuse to make an artisanal cake for a same-sex wedding. (He won.) Two Missouri women, Ndioba Niang and Tameka Stigers, claimed the right to braid hair in an African style without completing a 1,500-hour training course and obtaining a cosmetology license. (They lost.) A group of neo-Nazis claimed the right to unite, armed with racist propaganda and semi-automatic rifles, in a public park in Charlottesville, Virginia. (They won.) A Louisiana man named George Sibley claimed that “as one of God’s children he has the right to food, clothing, and shelter.” (He lost.) A Long Island man, James Maloney, claimed the right to use his homemade nunchucks to teach his made-up “Shafan Ha Lavan” karate style to his children. (He won.)

Rights talk has gone viral. We debate policy in the language of rights. We speak solemnly of soldiers heading to battle to defend them. We wave the dog-eared constitutions that enumerate them. We kiss the hems of the robes of judges who recognize and elevate them. The Frenchman Alexis de
Tocqueville wrote in 1835 that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” That was hyperbole in his time, but it rings true in our own. **Rights are the commandments of our civic religion.** This book is about how to get them right, and why it matters.²

Just after 10 a.m. on the morning of Sunday, May 31, 2009, a 51-year-old airport shuttle driver named Scott Roeder rose from a pew at Reformation Lutheran Church in Wichita, rested a .22 caliber handgun against the temple of an usher, Dr. George Tiller, and pulled the trigger. A prominent provider of late-term abortions, Dr. Tiller had survived the bombing of his clinic in 1985. He had survived being shot in both arms in 1993. He did not survive Scott Roeder’s bullet. He died before paramedics arrived. At his murder trial, Roeder admitted that he had killed Dr. Tiller, but he claimed a “necessity” defense. A murder defendant can claim necessity if he killed to prevent a greater harm to others. For Roeder, the “others” whose rights he was protecting were fetuses, or as he called them, “unborn children.”³

Private violence begins where the law runs out. Pimps, hitmen, and mob goons enforce contracts the government refuses to back through its police and courts. Terrorists turn to violence when they see ordinary politics as fruitless or hostile to their agenda. Vigilantes promise security or justice to those the state is unable or unwilling to protect. Roeder believed it was for him to defend those whose rights the law would not recognize.

Roeder’s act was grievously wrong but his premise wasn’t. In *Roe v. Wade*, the Supreme Court said fetuses did not have constitutional rights. Justice Harry Blackmun, *Roe*’s author, thought denying fetal rights was the price of saying women had the right to control their bodies. Either women had constitutional rights, or fetuses did. There was no middle ground, no room for compromise or negotiation. The fight over abortion has since become a war, with people like Scott Roeder styling themselves as its noble guerrillas.⁴

The story of abortion rights is a tragic example of a common but unrecognized problem in American law: **We take rights too seriously.** We believe that holding a right means getting to do whatever the right protects.
A right to speech means we get to spew outlandish conspiracy theories on Facebook or Twitter. A right to bear arms means we get to cheerfully carry our AR-15 across the college green. A right to abortion means a pregnant woman gets to terminate her pregnancy; a fetal right to life means she doesn’t.

This view of rights, which I call rights fetishism, is intuitive to many of us, but it is deeply misguided. The rest of the world treats rights differently, and for most of our history, so did we. For the Constitution’s Framers, rights were not primarily intended to protect minorities or unpopular dissenters from the “tyranny of the majority,” as we so often describe them today, but instead were designed to protect that very majority from factional capture or executive overreach. The statesmen of that generation saw the right to participate in self-government, via the ballot and the jury, as sacrosanct. But, for them, the substantive rights that we today associate with the Supreme Court’s docket — freedom of speech, the right to bear arms, rights of equality, due process of law, and so forth — were best protected by legislatures and juries, not courts. And properly constituted legislatures and juries could choose how to define and limit rights in the public interest.

The Framers’ vision of rights has more in common with modern Canada than it does with the modern United States. The Canadian model, called “proportionality,” dominates courts around the globe. Proportionality is a structured approach to balancing rights against government interests. Courts that adopt proportionality tend to recognize a wide range of rights — wider than in the United States — but the courts’ attention trains on the ways in which government can, or can’t, limit those rights. In these other countries, limiting rights is not just something the government can do in an emergency, when the time bomb is ticking. Rather, rights are inherently limited.

Rights fetishism has surprising, destructive consequences. For one thing, it breaks up the marriage between rights and justice. Take two real cases. In one, an information processing firm called IMS Health wanted to scrape data from pharmacies, including prescription practices of individual doctors, which it could then sell to drug companies wanting to better tailor
their marketing to physicians. Vermont wanted to protect the privacy of doctors and their patients, so it passed a law banning the sale of prescription data. The Supreme Court struck the law down, saying it invaded the free speech rights of drug companies.\(^5\)

In the other case, a black man named Warren McCleskey was sentenced to death for shooting a white police officer in Atlanta. His lawyers presented strong evidence that murder defendants were more than four times as likely to be sentenced to death when their victims were white rather than black. They told the Supreme Court that racial bias infests the death penalty process all the way from prosecutors’ charging decisions to jurors’ assessments of witness credibility to a judge’s sentencing decision. But Justice Lewis Powell worried openly in his majority opinion that a win for McCleskey would require judges to try to excise racism from the entire criminal justice system, and so McCleskey had to lose. Four years later, the state of Georgia electrocuted him.\(^6\)

Rights fetishism can shatter a court’s moral compass. IMS Health’s right to sell prescription data to drug companies is not more important than Warren McCleskey’s right to an unbiased death sentence, and no reasonable person thinks it is. But when judges approach social conflicts as if rights are absolute, they get anxious about recognizing rights. Those rights courts choose to see turn out not to be the ones that fairness or justice demand, but instead the ones judges feel like they can manage from the bench through cold recitations of textual interpretation, original intentions, and precedent.

And so according to the Supreme Court, a wealthy partisan has a right to form a corporation that spends unlimited sums on political campaigns. A public school teacher covered by a collective bargaining agreement has a right to avoid contributing to the union’s negotiation costs. Modern-day Nazis clad in SS uniforms and proudly waving swastika flags have a right to march in an Illinois suburb that thousands of Holocaust survivors call home. But Americans have no federal constitutional right to food, to shelter, to education, or to health care, and Warren McCleskey is dead. As Justice William Brennan wrote in dissent in McCleskey’s case, what the Court is worried about is “too much justice.”\(^7\)
Roeder’s murder of Dr. Tiller tragically highlights a second problem with rights fetishism: it deprives us of the vocabulary to think clearly about rights conflicts. Abortion laws pit the rights of women to sovereignty over their bodies and to equal opportunity to participate in civil society against the rights of fetuses to life. A baker, a florist, or a photographer who refuses, on religious grounds, to participate in a same-sex wedding claims a right to religious freedom that competes with the right of gays and lesbians to be served without discrimination. Both sides in the battles over race-based affirmative action claim to be vindicating the right to an unbiased college admissions process. Conflicting rights can’t both be absolute, and so a conflict of rights paralyzes the rights fetishist. The conflict presents him with a Hobson’s choice: either abandon rights fetishism or insist that one side has no right. A court that takes the latter course, that sees its role as declaring who has rights and who doesn’t, can wreak havoc on ordinary politics. A claim of right is a second bite at the apple for political losers, and it is a bite cloaked in righteousness. The winner in court has no need for policy bargains, and the loser has nothing to offer. Witness our abortion politics, where the Supreme Court’s shadow has helped make the very idea of compromise feel profoundly naïve. Political negotiation has no part in this play.

Worse, rights fetishism in the face of rights conflict degrades our relation to the law, and to each other. By denying the loser any claim of right, the court tells him not just that he has lost but that he does not matter. To him, his interests and projects are important, perhaps even essential, but he is made an outsider to the law. He may become suspicious of political institutions. He may choose to participate in civic life sparsely, or even subversively. Literally an outlaw, he may, like Roeder, decide to take the law into his own hands.

His opponent in the rights conflict is not just a fellow citizen who disagrees with him about policy, but rather is an enemy out to destroy him. When the stakes are that high, polarization should not just be expected but is indeed the only reasonable response. Law becomes reducible to winners and losers, to which side you are on, which tribe you affiliate with. Politics is reduced to a relation of friend and enemy, recalling the dystopian
political vision of the Nazi theorist Carl Schmitt. When, say, affirmative action becomes a question of whether the Constitution cares about the black or the white applicant, or when a case about wedding cakes becomes a case about whether one party is an anti-religious bigot or the other a segregationist, we aim for each other’s jugulars, as we should.

This dark, polarized picture of rights recognition and enforcement once had a place in our collective life. Sometimes your political opponent really is out to destroy you — to preserve your subservience, to deny your citizenship, to enshrine your social and economic inferiority in law. The Civil War and its long-simmering aftermath stand as violent testament to the inadequacy of the Framers’ original vision of rights. The local politics that that generation relied on can threaten rights as much as protect them. Sometimes, as during the Jim Crow era, local governments threaten rights flagrantly and in bad faith, and courts are called upon to respond with courage and resolve. The idea that rights are sacred, to be interfered with in only the most emergent of circumstances, is premised on this kind of pathological government.

Thus, the Supreme Court’s proudest moment, its decision in Brown v. Board of Education ending legalized racial segregation in public schools, models what it means to stand up to that kind of systemized, state-sanctioned bigotry. But it is a mistake to view Brown as a case about the importance of rights: as the eminent legal scholar Herbert Wechsler pointed out in his famous 1959 critique of Brown, the white parents’ rights of association were also at stake, and they lost. Brown, rather, is a case about white supremacy. It was not about the definition of rights; it was about the government’s pathological behavior, illicit motives, and bad faith. Fighting Jim Crow calls for fetishism about the rights of one side. Fighting patient protection laws or campaign finance reform or affirmative action policies or the myriad other government responses to complex social problems in our chaotic cosmopolitan world calls for a language of reconciliation, negotiation, and judgment.

None of which is to say that rights shouldn’t matter. Of course they should. But we must recover the Framers’ ultimate lesson, which is that the indispensable right in a democracy is the right to participate in one’s own
governance. That is the right a state denies when, for example, it keeps blacks from voting or participating equally in civil society; when the government investigates college professors or prosecutes labor organizers for espousing communism; or when a state outlaws birth control, keeping women permanently homebound. The right to self-governance is also denied, though, when the fruit of self-governance — the law — is too easily spoiled by a competing claim of right. A twenty-first century court doesn’t earn its pay by declaring rights, but rather by reconciling them. Until we can turn the language of rights that dominates our politics into a language of reconciliation, the American experiment — the audacious belief that liberalism and pluralism are not just compatible but are mutually constitutive — will be in peril. The last century gave us the constitutional tools to fight political exclusion. In this century, we need the tools to build a politics of pluralism.

This book charts a course for courts to participate in rather than frustrate our collective governance. U.S. courts recognize relatively few rights but strongly. They should instead recognize more rights, but weakly. They should devote less time to the arcane legalisms—the probes of original intentions, pedantic textual analysis, and mechanical application of precedent—that they use to determine whether the Constitution protects a right and more time to the facts of the case before them: What kind of government institution is acting? Is there good cause, grounded in its history, procedures, or professional competence, to trust its judgments? What are its stated reasons? Are those reasons supported by evidence? Are there alternatives that can achieve the same ends at less cost to individual rights? Knowing that courts will ask these kinds of questions makes other government actors ask them too as they craft their own policies and structure their own behavior. It makes rights recognition and enforcement a shared enterprise, one that is of, by, and for all the people and not just the judges.

Chapter 1 starts at the founding. The men who drafted the U.S. Constitution were sharply attuned to rights. Six of the thirty-nine signers of the Constitution had also signed the Declaration of Independence, which speaks grandly of the “unalienable” rights to life, liberty, and the pursuit of
happiness. But the founding Fathers’ rights were not ours. The Framers did not, by and large, think of rights as exemptions from laws and regulations, as we do today. They thought that rights were best vindicated through local political institutions, namely elected officials, juries, churches, and even the militia. Individuals could not generally claim an exception from a local law that was validly enacted and substantively reasonable. The rights that made it into the Constitution were meant to restrain Congress, the President, and federal judges from interfering with local politics.

We tend to think of the Bill of Rights, for example, as the foundation of a culture of judicially enforceable rights against the government. But the more carefully we examine each amendment, the more—like a constitutional stereogram—judges fade from the picture and juries, legislatures, and other local institutions come into view. The First Amendment’s free speech clause was originally understood to address so-called “prior restraints”—licensing schemes that would enable the executive to sanction speakers without fear of jury trials. The Second Amendment aimed to prevent the executive from disbanding state militias, which were a check on federal power. The Third Amendment, which bars the peacetime quartering of troops without consent, ensured the primacy of the local militia and guarded a different kind of local authority—that of a man over his home and family.

The focus on juries, a powerful instrument of local political control, is particularly evident in the various provisions addressing criminal and civil justice at the heart of the Bill of Rights. The Fourth Amendment erects an especially high bar—“probable cause”—to searches and seizures authorized in advance through a judicial warrant. The Fifth, Sixth, and Seventh Amendments guarantee grand and petit juries directly—in indictments, criminal trials, and civil cases alike—and safeguard the integrity of the jury’s verdict by banning double jeopardy. The Eighth Amendment prevents judges from imposing punishments not authorized by the legislature or the jury verdict.

That none of the Bill of Rights originally applied to state and local governments wasn’t some quirky historical footnote. It reflected a considered view that responsive, accountable, democratic governments
grant and preserve rights; they don’t threaten them. Individuals and minority groups using the power of the courts to upset community judgments wasn’t what the Bill of Rights protected—it was what it protected against.

Understanding rights as fundamentally consistent with and indeed specially protective of state and local lawmaking remained the dominant view until the Civil War. Race was its undoing. As Chapter 2 discusses, efforts to integrate former slaves into an unwelcoming political community of white men exposed the fatal limits of relying on local legislatures and juries to protect rights. The Framers had been accustomed to the ways in which a factional minority—King George, the English parliament, and their local enablers—could thwart the will of the People. They saw a remedy not in special substantive entitlements or exemptions, but rather in political membership: no taxation without representation. Their essential blind spot was that they drew the lines of citizenship too narrowly.

The Civil War brought a formal end to chattel slavery, but the War’s violent wake called for a different understanding of rights than what the Framers intended. After slavery was abolished, the former Confederate states immediately instituted so-called Black Codes that prevented former slaves from owning property, making or enforcing contracts, or testifying in court. The Fourteenth Amendment took direct aim at these practices, guaranteeing that the basic rights of citizens would be enjoyed equally by all, even against an otherwise valid state law.

In practice, however, the empowering language of rights did little for black Americans. It was instead repurposed by businesses seeking to avoid health, safety, and labor regulation. The chapter zeroes in on the 1905 New York bakery case, \textit{Lochner v. New York}, in which the Supreme Court struck down a law limiting the number of hours bakers could work. \textit{Lochner} is a well-known case, but the chapter offers new insight into its modern significance. The two dissenting opinions in the case offer two competing visions of rights. The more famous dissent of Oliver Wendell Holmes models the modern approach: either the bakery owners had a right to work, in which case they should probably win, or (more likely) they did not, in which case they should probably lose.
The Holmes dissent has overshadowed the more careful dissenting opinion of John Marshall Harlan. Harlan was willing to concede that bakery owners had rights to enter into contracts of their choosing, but he would subject that right to what he saw as a reasonable health regulation. He saw the bakery case as an invitation to take seriously both the freedom of individuals to set the terms of their labor—a sensible legacy of the Civil War—as well as the right of a people, acting through its legislature, to govern itself. On the Holmes view, ordinary social and economic legislation would be largely impervious to constitutional challenge. On the Harlan view, everything would depend on the facts.

The *Lochner* case has become anticanonical, almost universally panned by mainstream judges, lawyers, and legal scholars and held up to this day as an example of exactly how not to do constitutional law. But as Chapter 3 shows, in following the Holmes dissent, we’ve learned the wrong lesson from the bakery case. The received wisdom is that the bakery owners simply had no right to negotiate longer hours with bakers. That was certainly Holmes’s view. But in fact the problem wasn’t that the bakery owners had no rights of contract but rather that the bakers also had rights, protected through legislation, that the Supreme Court couldn’t see.

The triumph of the Holmes dissent was equal parts personality and politics. Harlan was dead within six years of *Lochner*, but Holmes was just warming up. Over the next two decades, Holmes would become the most famous judge in America, brilliant, acerbic, and unsparing, both a social Darwinist and a society man, chummy with younger public intellectuals like Harold Laski and Felix Frankfurter who could carry on his legacy. Frankfurter, the Harvard intellectual, D.C. operator, and later Supreme Court Justice, was by one account “the most influential single individual in Washington” in the 1930s, and he placed Holmes’s *Lochner* dissent on a singular pedestal. As Roosevelt’s New Deal consigliere, Frankfurter channeled Holmes in championing a highly deferential posture towards what the Supreme Court would call “ordinary” social and economic regulation: minimum wage and maximum hour laws, food safety and consumer protection measures, child labor laws, unemployment insurance, occupational licensing, and so forth.8
Rights fetishism grew out of the tension between that post-New Deal deference to regulators and the civil rights movement’s deep and well-founded suspicion of those same legislators and administrators. A free hand for legislatures to pursue “ordinary” regulation of the economy helped bring about the spectacular rise of the American middle class, but what about the victims of laws that were anything but ordinary? Black life in the Jim Crow South recalled the evils the Fourteenth Amendment had been designed to eradicate, a fact that was not lost on the Justices.

And so the Court found itself identifying two very different kinds of rights claims: on one hand, challenges to the regulatory and welfare state, and on the other, core civil rights violations such as racial discrimination and freedom of speech and religion. Where the Court would outright refuse to entertain the former, it would come to view the latter as unassailable, nearly absolute.

Rights fetishism emerges from the shadow of this artificial two-track regime. We still treat the presence of rights as implying a pathological government on the order of the Jim Crow South and the absence of rights as implying a free hand for the government. The turbulent rights explosion of the 1960s showed that this makes no sense in the modern world. A woman’s right to have an abortion, a struggling family’s right not to be kicked off the welfare rolls arbitrarily, a criminal defendant’s right to a government lawyer, or a white college applicant’s right not to have race used in admissions do not fit neatly into either track. In each case, the government’s behavior in denying the right is not per se illegitimate, as it was during the Jim Crow era, but that doesn’t mean it should escape any serious scrutiny. This, not Jim Crow laws, is what a typical rights conflict looks like in a modern constitutional democracy. Rights are not the emergency brakes we place on a government run amuck; they are the predictable byproduct of ordinary statecraft. Rights are not special. They are all around us.

Part II reveals the tragic consequences of our failure to recognize the rights epidemic. Chapter 4 exposes the gulf between rights and justice that emerges when we fetishize rights. It takes us to Texas in the 1960s, where families in San Antonio’s Edgewood neighborhood sent their kids to
dilapidated schools because they couldn’t raise enough property tax revenue to fund their schools on par with wealthier neighborhoods. The parents claimed a right not to have public school funding turn on the families’ wealth. The Supreme Court rejected their claim. Writing for the majority, Justice Powell seemed to recognize, faintly, that there was injustice in this funding scheme, but he still refused to recognize the parents’ claims. If judges recognized a constitutional right to equal educational funding, he wrote, they would need to recognize a right to food, or housing, or a right for every municipality to have equal funding of police, fire, or public hospitals. Courts have no place, and no capacity, to force states to make the kinds of budgetary tradeoffs needed in a world in which citizens have a right to social goods such as public education.

Powell’s position misunderstands what it means for a court to recognize a right. Take the case of India. India has more children and more poor people than any country in the world, and yet the Indian Supreme Court has declared a constitutional right to education. The Indian government is manifestly unable to provide a sound education to each of the country’s more than 500 million school-aged children. But declaring a right to education has enabled the Court to force incremental change toward enrollment of students and improvements in school infrastructure — what some courts and international treaties call “progressive realization” of a right. The existence of a right to education has also enabled the Indian Supreme Court to address other, related rights such as the right to food. Providing a basic midday meal is integral to school attendance in India. Every U.S. state provides a right to education in its state constitution. As in India, enforcement of those rights has not been absolute but has been incremental, in just the way we should expect when legislatures have competing demands on their fisc.

U.S. courts likewise tolerate a yawning gap between rights and justice in cases confronting the effects of structural inequality. McCleskey lost his case in part because, unlike courts around the world, the U.S. Supreme Court outright refuses to see government acts that exacerbate race or sex disparities as cause for constitutional concern unless the government specifically intends that result. This produces the perverse outcome that
race-conscious remedies for structural inequality draw the Court’s ire, whereas the underlying inequality itself does not.

**Chapter 5** addresses a second problem with rights fetishism: its inability to make sense of conflicts of rights. Nowhere is this more obvious or with a less happy ending than in the abortion area. The chapter weaves together the U.S. experience with abortion regulation with the parallel universe of abortion regulation in Germany. The Supreme Court’s two most interesting pronouncements about abortion came in 1973, in *Roe v. Wade*, and 1992, when the Court reaffirmed *Roe*’s central holding. Germany’s constitutional court heard that country’s own momentous abortion cases at nearly the same time, but coming from a startlingly different perspective. Abortion was illegal in all circumstances until the Social Democrats tried to decriminalize it in 1974. The question for the German court was not whether restrictions on abortion infringed the rights of women but rather whether liberalizing abortion interfered with the rights of fetuses. The Court struck down the law for this reason. But rather than structure an abortion jurisprudence around the rights of either women or fetuses alone, the Court has consistently structured the law around both rights.

What this has meant in practice is a model in which the government is required to take seriously both its constitutional interest in women’s autonomy and its commitment to fetal life. Thus, abortions must be permitted in some instances, including when medically indicated, and the state must provide prenatal care, child care, and employment guarantees that encourage women to choose life rather than termination. Abortion has become, in Germany, a subject of political negotiation among parties proceeding from radically different but nonetheless constitutionally reasonable policy views. Remarkably, abortion politics in Germany are less controversial today than they were in the 1970s, and far less controversial there than here. At the same time, even as the constitutional court started from a premise of fetal rights, it is easier (and often much cheaper) for women to obtain abortions in Germany than in much of the United States. There’s no telling whether the German model could work in the United States, but it does suggest that violent, apocalyptic conflict over abortion
rights isn’t inevitable and can be influenced by the legal regime courts put in place.

Abortion is not, of course, the only area of American law that seems paralyzed by rights conflicts. In recent years, for example, as marriage rights have been extended to same-sex couples, some artisans such as photographers, florists, and bakers have refused to serve same-sex weddings, claiming religious objections. Some religious employers have likewise chafed at Obamacare rules that require them to ensure that their female employees have insurance coverage for birth control. As Chapter 6 illuminates, the framing of these conflicts foregrounds what may be the most tragic consequence of American rights fetishism: how reliably it tears us apart. In the best known of the wedding cases, a Colorado baker, citing his devout Christianity, refused to bake a custom cake for a same-sex wedding. To hear the parties, the pundits, and the amici who submitted briefs to the Supreme Court tell it, the baker was just like Jim Crow-era segregationists who put “Whites Only” signs in their windows and the couple was just like tinpot dictators who force believers to submit to false gods. On this framing, the wedding cake case was a naked clash of rights, a battle for the soul of the country.

Except that it wasn’t. The baker and the couple actually agreed on a surprising amount. They agreed that it would be illegal for the baker to refuse service to a gay couple, whether for religious reasons or not, based on their sexual orientation. They also agreed that a professional baker need not sell his wares to all comers, indeed that he may refuse to sell to customers whose beliefs he disagrees with. The reason you likely didn’t know any of that is because rights fetishism encourages not just the parties but the rest of us as well to tie our opponents’ claims to the most extreme possible position. The more a court ignores the particular facts, motives, and evidence that are actually before it, the more it pays for lawyers to paint the rights their opponents claim as leading to absurd consequences. Chapter 6 uses two same-sex marriage-related cases out of the United Kingdom to show how a different approach can leave room for courts to take a more respectful posture toward the parties, and for the parties to more clearly see the dignity in each other’s claims.
While Part II is diagnostic, Part III turns prescriptive. What might it look like to address the most controversial conflicts of our time without fetishizing rights? Each chapter tracks one of the problems Part II identifies with the American approach to rights and offers a solution. Chapter 7 takes on disability rights. Unlike with race or sex, U.S. courts do not treat disability discrimination with any special scrutiny or care. States, municipalities, and the Feds are constitutionally entitled to discriminate against people with disabilities so long as the government’s behavior is minimally rational. Courts’ refusal to recognize the category is grounded explicitly in the fact that disability discrimination claims are potentially capacious. The logic of treating disability as special seems to apply not just to physical handicaps but also, for example, to mental illness, addiction, and old age.

This stance simply erases disabled people from the Constitution. A typical discrimination claim by a disabled person is not a complaint of invidious, irrational treatment like Jim Crow segregation. It is, rather, a claim for accommodation, a demand to have one’s differences accounted for in providing access to services or opportunities. Accommodation costs money, and so a refusal to accommodate will just about always have a rational justification. What that means is that even the most cold-hearted indifference to disabled employees’ or constituents’ inability to live their lives bucks no constitutional prohibition, while we hold sacred James Maloney’s right to his nunchucks.

This is no one’s idea of justice. It needn’t be the Constitution’s either. Indeed, we have, in the Americans with Disabilities Act, a ready-made, workable (if limited) framework for addressing the needs of disabled Americans. The ADA requires service providers and employers to make accommodations for the disabled unless doing so would be unreasonable. Instead of putting to disabled people the impossible burden of showing that non-accommodation is irrational, the ADA asks the rest of society to show that accommodation is unduly costly or inconvenient. The Supreme Court’s narrow view of rights not only fails to give constitutional weight to the accommodations that justice requires but it in fact jeopardizes the ADA itself by placing Congress’s power to pass that landmark statute on shaky
footing. The Court should constitutionalize a framework similar to the ADA’s.

**Chapter 8** reveals how one of the most controversial issues in constitutional law—race-based affirmative action—is just the kind of conflict of rights that courts in the grips of rights fetishism get egregiously wrong. The Supreme Court views all of affirmative action as “racial discrimination” that therefore warrants the same intense suspicion as a segregated train car or a ban on interracial marriage. The Court has allowed some affirmative action but only in quite narrow circumstances that conceal schools’ actual motives. In fact, the biggest sin of a typical affirmative action plan is not its use of race. Both historical and present structural inequality not only tolerates race-conscious admissions but makes it urgent. Rather, the sin is lack of transparency. A court in a constitutional democracy should not tolerate opacity by public officials about their reasons for action, especially in the sensitive area of race, and yet U.S. courts outright encourage schools to obfuscate when it comes to affirmative action.

A court sensitive to all citizens’ right to fair treatment in admissions to public schools would tolerate some attention to race in order to mitigate the effects of structural racial inequality. But it would at the same time require that schools that use race do so openly, that they be prepared to justify their policies with evidence and reasoned argument. Schools that do so with care should receive significant deference in addressing the complex social problem of minority access to higher education. The University of Michigan, whose undergraduate admissions program is the only university affirmative action plan the Supreme Court has invalidated in more than four decades, is in fact a model for the transparent use of race in college admissions at a large public university. It should have received a fairer shake in the courts.

The final chapter, **Chapter 9**, stays on campus but turns to the issue of student speech. Ideological clashes among college students, particularly around speaker invitations, are among the most visible emblems of the polarized state of American society. Conservatives student groups court professional racists and provocateurs to make a point about freedom of speech, and their opponents deploy increasingly aggressive tactics to deny
a platform to certain speakers. The crude language of rights adds unneeded fuel to these conflicts. Students have argued that public university codes of conduct that interfere with their freedom of speech are worthy of high dudgeon, and courts have believed them. They shouldn’t. The idea that the Constitution’s protection for speech exempts public school students from speech codes is one legacy of the free speech movement that galvanized Berkeley in the 1960s, but it gets academic freedom quite wrong. The freedom the Constitution most strongly protects is that of the university to determine how to educate its students, including just how to curate the information students engage with.

Courts confronted with speech codes at public colleges are too easily seduced by the fact that schools are regulating the content of student speech and even the viewpoints embedded within it. The U.S. approach to rights can’t easily distinguish these practices from Nineteen Eighty-Four-style Thought Police, which leads courts to elevate drunken racial slurs to the tracts of political prisoners. A more sensible jurisprudence would pay less attention to facile questions of whether schools are discriminating among content and viewpoint—which is, after all, what educators do—and more attention to contextual, factual questions of the schools’ motives, methods, sanctions, exemptions, and track record in applying them to actual cases. Creating a civil campus environment is a high calling for a university, no less so than its commitment to academic freedom. The modern information environment calls for institutions that can play the role of curator; schools should be at the front of the line, and they need discretion to do their jobs.

More broadly, treating regulation of “speech” as a talismanic trigger for the most aggressive of rights claims can swallow all of governance. It has gone far—too far—toward doing exactly that. Whether it is in denying a state the power to protect prescription records from professional data miners or treating campaign finance measures as if they were sedition laws or equating paying union dues with coerced speech, figuring out how to characterize regulation as an infringement on “speech” has become a high-stakes game for lobbyists and their lawyers. It’s not that these activities don’t implicate any expressive interests—they do!—but rather that the
presence of expressive interests cannot be a regulatory trump in a modern pluralistic democracy.

The story of speech rights is a familiar one, and it doesn’t end well. Over and again, in areas as diverse as race and education, privacy and free speech, LGBTQ rights and criminal justice, the U.S. Supreme Court has treated rights conflicts as zero-sum games in which awarding rights to one side means denying rights to others. This attitude towards rights distorts our law and debases our politics. While it might be too late to climb out of the hole we’re in, this book tells us how courts can stop digging.

* * *

The proliferation of rights is an ancient problem. You may recall from grade school the core conflict of Sophocles’ *Antigone* between the title character, who wishes to bury her fallen brother Polynices, and her uncle Creon, the ruler of Thebes who refuses an honorable burial to a man who took up arms against the kingdom. *Antigone* was the German philosopher G.W.F. Hegel’s main text when he described a conflict between two diametrically opposed sides, each with a strong justification, as “the essence of tragedy.” Antigone is too wed to “the bonds of kinship” to allow for exceptional cases or the validity of a royal command. Creon is too stubborn about his exercise of public power to respect “the sacred tie of blood.” Antigone ends up hanging herself in prison and Creon loses his wife and his son to suicide.9

We, too, are hurtling toward tragedy. The Framers sought an answer in political institutions that could seek justice through mediation: legislatures and juries, churches and families. But those institutions excluded and marginalized women and people of color. The opposite extreme is one in which unelected judges choose the rights we have and enforce them full-throttle against bad-faith bigots and good-faith legislatures alike, while allowing the government free rein over whatever rights judges happen to leave behind. This, too, courts tragedy.

A Constitution for the modern world asks judges neither to ignore nor to supplant politics, but rather to structure it, to push it, and to police it. For the Constitution isn’t just built for lawyers. It is built for citizens and
aliens, for lovers and haters, for workers and bosses and partiers. It is built for Karen Finley and her chocolate smears, for Jack Phillips and his wedding cakes, for the couples he refuses to serve. It is built for veterans and hippies, for atheists and priests, for George Tiller and even, for all his sins, for Scott Roeder. It is, to paraphrase Madison, for everyone but the angels.
CHAPTER 3: THE RIGHTS OUTBREAK

“[Holmes’s] conception of the Constitution must become part of the political habits of the country, if our constitutional system is to endure; and if we care for our literary treasures, the expression of his views must become part of our national culture.”

—Felix Frankfurter

It can sometimes be tempting to attribute the development of the law over time to ascendant partisan politics, economic conditions, or the sheer power behind an idea. But in law, as in so much of human experience, relationships matter.

John Marshall Harlan succumbed to pneumonia six years after the bakery case was decided. He was more famous than Holmes at the time, and his dissent had received more coverage in the papers than Holmes’s. But Holmes stayed on the Court for another two decades after Harlan’s death. The period extending from that moment in 1911 to Holmes’s own death in 1935 bookends the ascension of the Progressive legal movement. Holmes was not himself a Progressive, but the young intellectuals of that movement who would largely determine the path of American law in the twentieth century viewed Holmes as their patron saint.

No one was more responsible for the ascendancy of Holmes’s thinking than Felix Frankfurter. New Deal consigliere, Supreme Court Justice, operator par excellence, Frankfurter is second to none (save perhaps Holmes) in his influence on twentieth-century American constitutional thinking. That claim may surprise some who know Frankfurter primarily through his somewhat disappointing tenure as a Justice. But the long arm of Frankfurter’s constitutional thought reached far beyond the opinions he authored. In particular, Frankfurter’s adoration of Holmes—and of Holmes’s Lochner dissent above all else—would frame the Court’s response as it struggled to contain a wave of new, unfamiliar rights claims in the 1960s and 1970s.
The Houses of Holmes and Truth

Frankfurter lived the American dream. Born in Vienna, he sailed to the U.S. in the steerage deck of a migrant boat in August of 1894, at the age of 11. The Frankfurters settled on New York’s Lower East Side, where his father, Leopold, sold linens. Felix soon became a star student in City College’s joint high school-college program. He attended Harvard Law School, where he graduated first in his class, then carried the briefcase of Henry Stimson, who was the U.S. Attorney for the Manhattan district. When Stimson became William Taft’s Secretary of War in 1911, he took the 28-year-old Frankfurter with him to D.C. to serve as a legal adviser in the Bureau of Insular Affairs, which was the administrator for the country’s overseas territories in Puerto Rico and the Philippines.¹¹

Frankfurter was that guy. An inveterate sycophant and social climber, Frankfurter craved proximity to power. As the child of working-class Jewish immigrants, he also craved acceptance, and he was prepared to work his tail off to get it. Holmes, the Boston Brahmin, became an early target. Frankfurter lived in a Dupont Circle boarding house with a dozen or so other young bachelors then working in the Taft Administration. The roommates hosted dinners, cocktail parties, and salons, mixing drinks with verve and chatting up the D.C. intelligentsia, among whom Holmes was the ne plus ultra. Holmes was “the gay soldier who can talk of Falstaff and eternity in one breath, and tease the universe with a quip,” recalled the journalist Walter Lippmann, a boarder with Frankfurter at what came to be known as the House of Truth. “A sage with the bearing of a cavalier; . . . [h]e wears wisdom like a gorgeous plume, and likes to tickle the sanctities between the ribs.”¹²

Frankfurter excelled in this environment. Standing just 5’5″ tall but gifted with a quick wit and preternatural self-confidence, he could charm and dominate in equal measure. He would grab firm hold of his listener’s arm, squeezing tightly as he spoke to—or at—him. (Kiss up and kick down,
as they say.) Eventually, Frankfurter became a frequent caller at Holmes’s Northwest D.C. home, and the two became close. Frankfurter wrote a great many letters to Holmes over the years, always fawning, almost nauseatingly obsequious. Holmes was, for Frankfurter, “the King” before whom all others were “creeping worms,” as he said to Holmes in one missive. Though neverwaning in adulation, Frankfurter’s letters to Holmes grew moreintimate in tone with the passage of time. “To know you is to have life authenticated not through you but in my own rich increase of life,” he wrote in March 1921. “The abundant measure of life being at once proof of its worth, I count it as one of my ultimately precious benedictions to have you be—for so I feel—be part of me.” He continued what can only be described as a florid love letter to the old jurist: “When I saw you from the veryfirst I knew it was there—the answer to life that needeth no ‘answer,’ that accepts without fatalism, that questions without humorous arrogance,” Frankfurter wrote. “Above all there is the beauty and the gay valor of you, for me forever. You give me the exhilaration, the life-intoxicated ferment that no other man does—and with you I feel the overtones and undertones which need no speech and have none.”

Holmes was (almost by necessity) more measured in his replies, but he did not object to Frankfurter’s flattery. “It will be many years before you have occasion to know the happiness and encouragement that comes to an old man from the sympathy of the young,” Holmes told his young suitor in 1912, early in Frankfurter’s courtship. “That, perhaps more than anything else, makes one feel as if one had not lived in vain, and counteracts the eternal gravitation toward melancholy and doubt.” Holmes seems to have regarded Frankfurter as the son he never had, fit to protect and enlarge his legacy. He wasn’t wrong.

Felix’s Happy Hot Dogs

In 1914, Frankfurter became, at 31, the first Jewish professor at Harvard Law School. Once there, he set about imprinting Holmes’s
constitutional views (or at least his own interpretation of them) on the hearts and minds of the legions of students who would seek his favor over the years. He told Holmes as much. “Much of our labor these days is bringing bricks to the building of the structures for which you long ago sketched the blue prints,” he wrote to Holmes early in his tenure at Harvard. Within two years of arriving in Cambridge, Frankfurter published a glowing study of Holmes’s constitutional opinions in the Harvard Law Review in which he claimed that Holmes’s dissent in the New York bakery case had decisively turned away a “tide” of natural law thinking at the Supreme Court. This is a bizarre assertion to make of a dissent, particularly one that had never been cited in a federal court opinion. It was also wrong. Holmes’s dissent wouldn’t be vindicated for another two decades.15

Frankfurter was undeterred. In a 1928 treatise on federal jurisdiction, Frankfurter argued that, in Lochner’s wake, “[t]he philosophy behind the constitutional outlook of Mr. Justice Holmes . . . appeared to be vindicated by demonstration in detail.” But the so-called Lochner Era, in which federal courts routinely invalidated state and federal laws for interfering with property and contract rights, remained in full bloom in 1928. Just five years earlier, the Supreme Court had struck down a D.C. law setting a minimum wage for women and children. The opinion, which quoted Lochner at some length, was written by Justice George Sutherland in his first Term on the Court, over Holmes’s dissent. Still, there was Frankfurter, five years later, celebrating the 87-year-old Holmes’s consistently losing views as if they were the law. Ten years later, Frankfurter gave a lecture on Holmes in Cambridge that he would later turn into a hagiographic monograph. “Mr. Justice Holmes’ classic dissent,” he wrote of the Lochner opinion, “will never lose its relevance.” Not if Frankfurter had a say in it, anyway.16

Well, he did have a say. Frankfurter returned to Washington in 1917 to serve as a special assistant to the Secretary of War, Newton Baker, and later as chairman of the War Labor Policies Board, which was designed to prevent labor unrest that could disrupt wartime production. The Board also included the Assistant Secretary of the Navy, a fellow named Franklin
Delano Roosevelt, and the two ambitious men became close professional acquaintances in D.C. Frankfurter rekindled the relationship when Roosevelt became governor of New York in 1929, offering frequent advice via letters, phone calls, and personal calls to “Frank’s” Hyde Park estate. When Roosevelt became President in 1933, Frankfurter became one of his most trusted advisors.17

It is difficult to gauge Frankfurter’s precise influence within the Roosevelt Administration, but it was undoubtedly substantial. He tended to be circumspect about his role, but by reputation, Frankfurter became an operator of nearly supernatural powers. Some newspapers offered unflattering comparisons (tinged with anti-Semitism) to Shakespeare’s Iago or to Rasputin, the Russian mystic and tsar-whisperer. Raymond Moley, the Roosevelt braintruster who coined the term “New Deal,” called Frankfurter a “patriarchal sorcerer” to his “apprentice[s]” within the Brain Trust such as Ben Cohen and Tommy Corcoran. Hugh Johnson, the former head of the National Recovery Administration, called Frankfurter “the most influential single individual in the United States” in the 1930s.18

Frankfurter earned these lofty apppellations not just by doling out his own advice to the president, though he did plenty of that, but by staffing the growing federal bureaucracy with students and friends whom he had mentored and who owed him loyalty. Thus it was that Agricultural Adjustment Administration head George Peek complained of the “plague” of young Washington lawyers who “all claimed to be friends of somebody or other and mostly of Felix Frankfurter.” These disciples, whom Frankfurter called his “boys” and whom others called his “happy hot dogs,” numbered in the hundreds. They would check in regularly with Frankfurter to receive their marching orders on pain of excommunication from his network.19

If Holmes was the patron saint of the progressive legal movement, Frankfurter was its high priest. His fingerprints were everywhere in the federal government during the New Deal era. Corcoran, a former student
whom Frankfurter had placed in a clerkship with Holmes, was a de facto chief of staff to Roosevelt and an important drafter of several key pieces of New Deal legislation, including the Securities Act of 1933 and the Fair Labor Standards Act of 1938. A long career in public service followed, including as a key advisor to President Lyndon Johnson. Cohen, whom Frankfurter had secured a clerkship with the highly respected judge Learned Hand, was Corcoran’s partner in crime atop the federal bureaucracy. Frankfurter’s co-author on that 1928 treatise celebrating Holmes’s Lochner dissent was his former student James Landis, whom Frankfurter had awarded a coveted clerkship with Louis Brandeis. Five years later, Frankfurter brought Landis to Washington to help draft the 1933 Securities Act. Landis then served as an inaugural commissioner and later chair of the SEC. He became dean of Harvard Law School after he left Washington in 1937. Other former students of Frankfurter’s in high administration positions included Charles Wyzanski (Labor Solicitor), David Lilienthal (Tennessee Valley Authority), Nathan Margold (Interior Solicitor), and Nathan Witt and Lee Pressman (Agriculture Department). Before Alger Hiss became notorious for being an alleged Soviet spy, he was a student of Frankfurter’s, a clerk for Holmes (at Frankfurter’s behest), and a lawyer placed by Frankfurter in the Agricultural Adjustment Administration. The future Secretary of State Dean Acheson, who helped create NATO and draft the Marshall Plan, was a Frankfurter protégé who had been placed in a Brandeis clerkship and in Roosevelt’s Treasury Department.20

Frankfurter himself never took a formal administrative position, declining Roosevelt’s offer to serve as his first solicitor general. This enabled him to run a Sunday salon out of his house on Brattle Street, where, Joseph Lash writes, “for men concerned with the intellectual aspects of law and politics, a pilgrimage . . . was obligatory.” From Cambridge, Frankfurter could continue to cultivate apprentices without having to hold a day job arguing cases before the Supreme Court. As the career paths of his happy hot dogs attest, Frankfurter’s good grace could mean a law clerkship with
Holmes, Brandeis, or Hand, perhaps the three most renowned American judges of the twentieth century.

And it wasn’t just the men who would come to dominate the administrative state who were in Frankfurter’s fold. At least as important to the spread of Frankfurter’s thinking were the former students of his who would become the century’s leading academics. Paul Freund, one of the leading constitutional law scholars of his generation, owed his Brandeis clerkship, his government service, and his teaching career to Frankfurter. Henry Hart, godfather of the famed “legal process” school of jurisprudence and co-author of the most influential casebook in all of American law—The Federal Courts and the Federal System, which birthed the field of “federal jurisdiction”—was a Frankfurter disciple who had been given a Brandeis clerkship. The legendary Harvard Law School dean Erwin Griswold, after whom the building housing the dean’s suite today is named, owed his job in the solicitor general’s office in the 1930s to his old professor, Frankfurter. Charles Fairman, who would teach at Harvard and Stanford and who would become perhaps the best-known Fourteenth Amendment scholar of the twentieth century, was firmly in the fold of his former advisor, Frankfurter. The Justice recruited Fairman to write an article tearing down Justice Hugo Black’s theory (and supporting Frankfurter’s) of how to apply the Fourteenth Amendment to the acts of states. The piece became one of the most cited law review articles ever written. Fairman’s 1948 undergraduate casebook, American Constitutional Decisions, devotes substantial attention to Lochner, which was not nearly as famous then as it is now. Astoundingly, eight of Fairman’s ten paragraphs on the case pay tribute to Holmes’s dissenting opinion. “An entire philosophy is compressed into three paragraphs,” Fairman writes, parroting his mentor with uncanny precision. “His point of view has now become a part of the accepted doctrine of the court.”

Roosevelt’s appointment of Frankfurter to the Court didn’t end his tutelage. Frankfurter made it a point to get to know clerks in other Justices’ chambers, grabbing them by the arm and squeezing as he pressed his point.
His own clerks weren’t slouches, of course. Some would go on to become legendary professors at the Nation’s top law schools: Albert Sacks at Harvard, Alexander Bickel at Yale, Louis Henkin at Columbia, and David Currie and Philip Kurland at Chicago. These men, who became the leading law professors of the 1960s and 1970s, would help make Frankfurter feel, to paraphrase Holmes, as if he had not lived in vain.\(^{22}\)

Footnote 4

I noted in Chapter 2 that Holmes’s *Lochner* dissent, taken with the other anticanonical cases, suggests the possibility of two “tracks” for U.S. rights claims. *Lochner* was officially discredited in the late 1930s, during the Great Depression. Existential economic catastrophe made clear the need for some significant political constraints on consumer and labor markets. Judicial scrutiny of redistributive politics also threatened the new, popular social safety net programs the happy hot dogs were shepherding into law, such as unemployment insurance and Social Security. Under the pressure of Roosevelt’s landslide victory over Alf Landon in the 1936 presidential election, the Court in 1937 shifted away from the all-things-considered balancing of rights that *Lochner* represented and towards a more deferential posture towards progressive legislation.\(^{23}\)

The case setting out the basic rule, *United States v. Carolene Products*, was a challenge to the Filled Milk Act, a federal law that prevented the interstate shipment of certain milk substitutes. In upholding the Act, the Court said that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” In other words, most legislation—which typically affects “ordinary commercial transactions”—will be upheld so long as there is any conceivable rational reason to pass it. Congress did not have to hold hearings or prove to a court that milk
substitutes were unhealthy; it was enough that legislators might have rationally believed they were. Likewise, the New York legislature should not have had to produce evidence that bakery work was especially strenuous or dangerous; it was enough that, as Holmes said in his dissent, “[a] reasonable man might think it a proper measure on the score of health.” The “rational basis” standard is the first “track.”

The second “track” is laid out in a footnote to the language I just quoted from the milk case. That footnote (“Footnote 4”) describes three categories in which the rational basis standard might not apply: (1) when the law interferes with a specific constitutional prohibition, (2) when the law restricts the political process itself, or (3) when the law discriminates against particular religious or racial minorities. In other words, the Court committed itself to highly deferential review of laws regulating commercial markets, while reserving a place for stricter review of laws that fell within specific constitutional language, laws that made it more difficult to engage in politics, or laws that discriminated against what the opinion called “discrete and insular minorities.” In Professor John Hart Ely’s later, influential description of this standard, the Court would resort to heightened review when it found that the political process was undeserving of trust, whether because it was trying to limit the channels of political change (think voter suppression laws) or was not inclusive of certain minorities (think Jim Crow).

_Carolene Products_ largely vindicated Holmes’s _Lochner_ dissent. Courts should generally let the political process play out unless the Constitution specifically instructs them not to. The further caveats in Footnote 4 describe situations in which the “outcome of a dominant opinion” that Holmes celebrated was actually _unnatural_ because of inappropriate interference with the political process. Footnote 4 marries a Progressive approach to political economy, one that authorizes political control over economic markets, to a burgeoning understanding of the need to protect African Americans from Jim Crow and to protect Catholics, Jews, and Jehovah’s Witnesses from the kind of religious bigotry that was visceral
in 1938, the year of Kristallnacht. Judicial review was usually to have a light touch but, when authorized, should protect minorities and other political outsiders.

How, exactly, to apply this second track would become the key constitutional question for the Supreme Court that Frankfurter joined in 1939. The Court that decided Carolene Products included just two FDR appointees, Hugo Black and Stanley Reed, each of whom was in his first Term. Roosevelt would put another six Justices on the Court in the next six years: Frankfurter, William O. Douglas, Frank Murphy, James Byrnes, Robert Jackson, and Wiley Rutledge. Six of the eight Roosevelt justices—all save Rutledge and Black—had served as executive branch lawyers under Roosevelt, and all eight had been vocal supporters of the New Deal and of FDR’s broader legislative agenda. All were unwaveringly in the bag for a repudiation of the case-by-case balancing of the right to contract that Lochner represented. Footnote 4 offered a vision for what to do with other cases, but how far did it go?

Hugo Black represented one school. The former country lawyer and Alabama Senator was Roosevelt’s first appointee to the Court. The Senate’s most ardent populist, Black had no appetite for handing victories to big business in its fights against regulation. But Black had a race problem. He had joined the Ku Klux Klan in the 1920s in order to win the Democratic nomination for the Senate, then resigned after he won. It’s easy enough to describe Black’s decision as a matter of sheer political calculation, but the Klan wasn’t some rotary club, even in 1920s Birmingham. You don’t join the KKK if you aren’t more than a little bit racist. Black’s Klan ties dogged him the rest of his life and nearly derailed his Supreme Court appointment. Perhaps it was to overcome this handicap that Black eventually developed a jurisprudence that enabled him to remain true to his populism while becoming one of the most progressive justices of his time on race issues. Today we would call that jurisprudence “originalism.” On Black’s view, it was the task of the Court to apply the text of the Constitution just as it was
written. Where rights applied, they applied absolutely. Where they did not apply, the law should be upheld.\textsuperscript{26}

Frankfurter represented the other school. On a strong view of Holmes’ bakery dissent, the case was less about which rights were or were not listed in the Constitution’s text, as Black would have it, and more about the role of courts in a democracy. The “legal process” school that Frankfurter inspired and that Hart, Sacks, and Freund paid forward from their perches at Harvard Law School emphasized that legal institutions should stick to their core competence: legislatures should follow the democratic will, administrative agencies should gather data and exercise technical expertise, and courts should adhere to the common law and extend precedents using neutral legal principles, consistently applied. On a legal process view, the problem with \textit{Lochner} is that courts can’t uphold and apply a “right to contract” without making political judgments that are properly the province of legislatures. “The 14th Amendment,” as Holmes wrote, “does not enact Mr. Herbert Spencer’s Social Statics.”\textsuperscript{27}

Note that on Frankfurter’s “legal process” view, courts should be cautious in interfering with the democratic will even when rights are fairly well specified in the Constitution. The presence of rights in the text doesn’t make it any easier for judges to figure out how to exercise the restraint that—according to legal process types—their role calls for; indeed, it makes it harder. Frankfurter’s first major opinion for the Court provides a ready example. Two Minersville, Pa. siblings, Lillian and William Gobitis, had refused to salute the flag during the Pledge of Allegiance at their local elementary school. The children were Jehovah’s Witnesses, and they had heard a radio address by the Watch Tower Society head, Judge Joseph Rutherford, denouncing salutes of any secular object, be it Hitler or the U.S. flag. Unimpressed, the school expelled the Gobitis children. The family sued.\textsuperscript{28}

The First Amendment by its terms protects the free exercise of religion, but that doesn’t tell a judge what to do with the Gobitis case. For
one thing, the Bill of Rights had long been interpreted to apply only to federal acts and not to the acts of state or local government officials. At the time the Gobitis case reached the Supreme Court, it was assumed but had never been squarely held that the Free Exercise Clause binds the states. (The Court would so hold a month later in a separate decision that also involved the Witnesses.) Apart from this technical hurdle, the text of the First Amendment doesn’t tell a judge what to do when religious freedom is burdened unintentionally. Presumably, a right to free exercise of religion prohibits the state from targeting religious minorities for persecution. But what if a neutral, generally applicable law, like Minersville’s flag salute mandate, happened to interfere with an unpopular religion? Do religious observers get an exemption from general laws? Wouldn’t such a rule run up against the First Amendment’s other religion provision, its ban on government establishment of religion?29

The Supreme Court ruled against the Gobitis family, 8-1, and Frankfurter implored Chief Justice Charles Evans Hughes to let him handle the majority opinion. This was partly personal. During World War I, part of Frankfurter’s portfolio in the War Department had included designing a policy to handle conscientious objectors. Frankfurter was also a Jewish immigrant, a Zionist, and a Roosevelt friend and loyalist who was eager to enlist the Court in the coming war effort. Finally, as a former national committee member of the ACLU, the Gobitis case presented Frankfurter with the chance to show that he was consistent in his belief in judicial restraint. The ACLU had filed an amicus brief in support of the Gobitis children. With his opinion ruling against them, Frankfurter could claim (with good reason) that his constitutional theory wasn’t anti-business; it was anti-activism.30

Legally, the question for Frankfurter was simply whether the school board had acted reasonably in denying an exemption to the Gobitis children, whether or not he or anyone else disagreed with its policy. That kind of policy disagreement was better suited for a legislature—or, in this case, a democratically accountable school board—than courts: “To fight out
the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena,” Frankfurter wrote, “serves to vindicate the self-confidence of a free people.”\footnote{31}

Frankfurter’s opinion in \textit{Minersville School District v. Gobitis} arguably betrays Footnote 4 of \textit{Carolene Products}. The Witnesses were a paradigmatic example of a religious minority facing discrimination that hampered its ability to participate in the political process. Under footnote 4, it seems, this status should subject laws that burden them to a higher degree of scrutiny than the light-touch review Frankfurter conducted for the majority. It’s for that reason that Footnote 4’s author, then-Justice Harlan Fiske Stone (he would later become Chief Justice), was the lone \textit{Gobitis} dissenter. Calling the Witnesses a “small and helpless minority,” Stone cited his own language in \textit{Carolene Products} and argued that “careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection.”\footnote{32}

Stone had his own personal experiences to draw upon. He had served on the War Department’s Board of Inquiry reviewing claims of conscientious objectors, within an administrative structure that Frankfurter had been instrumental in devising. His Progressive bona fides were no less secure than Frankfurter’s. He was a consistent dissenter from the Supreme Court’s efforts to invalidate major portions of the New Deal. Like Frankfurter, he was a close friend and admirer of Holmes, with whom he served for seven years and with whom he usually agreed. In a celebratory lecture he prepared in 1938 but never gave, Stone praised Holmes’s steady maintenance of the “difference between determining whether the legislative cure of a social ill is wise, and in determining whether legislatures, believing it to be wise, are so unreasonable as to place their action beyond the constitutional power.” This was Holmes’s view in \textit{Lochner} and it was no less Stone’s view than it was Frankfurter’s. The two
men differed less on the theory of Footnote 4 than on its application to the facts.\textsuperscript{33}

Within three years, Stone’s \textit{Gobitis} dissent would become a majority opinion, and Frankfurter’s majority a dissent. In a case out of West Virginia, the Court held that school boards couldn’t force Witnesses to salute the flag. Robert Jackson wrote for a new 6-3 majority that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” Frankfurter dissented in deeply personal terms. He began: “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.” His opinion went on to emphasize the distinction between his personal views and his role as a judge, which does not adjust to “the nature of the challenge to the legislation.” The difference-makers from \textit{Gobitis} to the West Virginia decision, a case called \textit{Barnette}, were the Roosevelt Justices. The only member of the Court to switch his vote was Black. The rest of the majority were Stone and the recent appointees Jackson, Douglas, Murphy, and Routledge.\textsuperscript{34}

Frankfurter had lost, as he often would during his tenure, but the ground he was staking out would be essential in the battles to come. For the disagreement within the Supreme Court wasn’t over the kinds of industry regulation that \textit{Lochner} had jeopardized. Frankfurter had been effective in laying \textit{Lochner} to rest. In case after case in the midcentury years and since, the Court has shown nearly total deference to states and the federal government in cases involving “ordinary social and economic legislation.” In one well-known case, for example, an Oklahoma optician challenged a state law that permitted only optometrists or ophthalmologist to fit lenses to faces, arguing that it was just protectionism for eye doctors. The Court held that it was obligated to uphold the law so long as it could think of any
rational reason for passing the law, *even if it wasn’t the state’s actual reason.* This approach to social and economic legislation simply abdicates the Court’s reviewing function, just as Holmes would have wanted.35

The main disagreement also wasn’t over *Brown v. Board of Education* and Jim Crow. Although some Justices groused behind the scenes, the Supreme Court was unanimous in virtually every case in the 1940s, 1950s, and 1960s that challenged segregation in schools or other public facilities, including *Brown* itself. It’s true that Frankfurter had been instrumental in urging caution in the implementation of *Brown.* Famously, he encouraged the Court to require that states desegregate with “all deliberate speed,” a term he had gotten from Holmes. Holmes first used the term in a 1911 opinion, claiming origins in English equity courts. This was wrong. The best evidence was that he actually took the phrase from an 1893 poem, *The Hound of Heaven,* by Francis Thompson, whom Holmes might well have known personally. Frankfurter, ever the toady, used the term in five of his own opinions prior to the *Brown* decision. In any event, despite this curious remedial phrase, the Court remained unanimous in ordering increasingly aggressive desegregation measures all the way until 1973. Jim Crow was, after all, the heart of Footnote 4.36

Frankfurter’s opinions in *Gobitis* and *Barnette* weren’t about the heart of that footnote but the extremities. That’s where he saw the warning signs. By the middle of the 1960s, the rest of the Court saw them too.

*The Rights Epidemic*

Felix Frankfurter suffered a stroke that forced him to retire at the end of the 1961 Term of the Court. His last significant majority opinion came in a case called *Poe v. Ullman.* The State of Connecticut had banned the use of contraceptives ever since 1879, when it joined a wave of states passing decency laws pushed by the anti-vice advocate Anthony Comstock. Connecticut’s own “Comstock law” was written in part by the circus entrepreneur P.T. Barnum, then a state representative from Bridgeport. The law—enforced but once in the next 86 years—might have been Barnum’s
The plaintiffs in *Poe* were two married couples. In each of their cases, their doctors reported that a pregnancy would likely result in either fatal genetic abnormalities for the fetus or the death of the woman. Though no one had sought or threatened to prosecute them, they argued that the state’s prohibition on contraceptive use violated their right to liberty without due process of law.  

A birth control ban is an unusually invasive law. Its enforcement wedges the state between consenting sexual partners, including married couples such as the carefully selected plaintiffs in *Poe*. In some cases, as in *Poe*, that interference could have devastating physical and psychological consequences. More broadly, the right to make family-planning decisions is deeply personal, and the curtailment of that right seems not to implicate any especially important government interest. Yet the Constitution does not specifically provide a right to use contraception. And Footnote 4, crafted as a guiding light for judges when the constitutional text runs out, isn’t very helpful here. A birth control ban doesn’t curtail the operation of the political process, at least not directly. Those affected by a birth control ban—which in practical terms means women (especially poor ones), more than their male partners—are not “discrete and insular” minorities. Indeed, women are not minorities at all. Holding for the plaintiffs in *Poe* seemed to require either stretching the old categories or creating a new one.  

Faced with this dilemma, Frankfurter decided to punt. His opinion in *Poe* denied the couples’ claims on the ground that they did not have “standing” to challenge the Connecticut law because it was never going to be enforced against them. Birth control devices were openly sold in Connecticut drug stores despite the Comstock law. In fact, the only time a prosecution had been initiated, in 1939, the state’s attorney moved to dismiss the case after winning at the Connecticut Supreme Court. The *Poe* disposition was vintage Frankfurter. The power of federal courts to consider the constitutionality of a statute, he emphasized, was activated only when there is a true “case or controversy” between the parties. Here, with no recorded prosecutions or prospects for any in the future, one had to question whether the Comstock law was even the law at all. Quoting his own words in an opinion written during his first full Term on the Court, he
wrote: “‘Deeply embedded traditional ways of carrying out state policy . . .’ — or not carrying it out — ‘are often tougher and truer law than the dead words of the written text.’” It’s hard not to see in Frankfurter’s last major opinion for the Court a parting shot at Black’s historical adventurism.38

Planned Parenthood of Connecticut, which had been behind the Poe lawsuit, had to regroup. What its executive director Estelle Griswold did next would alter the course of American history. Frankfurter’s opinion in Poe had said that Connecticut doesn’t arrest people for violating its birth control laws, but Griswold would see about that. Soon after the Poe decision came down, Griswold announced that Planned Parenthood would be opening a birth control clinic in New Haven that fall. The clinic opened on November 1, 1962 and held a press conference the following day. When news of the clinic’s opening splashed across the papers, a local grumplump named James Morris called as many police officers as he could find until finally two New Haven detectives agreed to pay a visit to the clinic’s second-floor offices on Trumbull Street. Griswold, thrilled to see them, offered the officers the clinic’s literature and told them that the doctors in the office were busy fitting illegal diaphragms and giving out contraceptive jelly. She even asked the officers to dip their fingers into some Emko Vaginal Foam that she had on hand. She volunteered to provide the detectives with patients who could provide witness statements to assist in her own prosecution. They fell for it. An arrest warrant was issued a few days later, and Griswold had herself the court case she was craving.39

Frankfurter died on February 22, 1965, seven weeks before the Supreme Court heard oral argument in Griswold v. Connecticut. A new era was upon the country, and the Court. The four years between the Court’s punt in Poe and its June 1965 decision in Griswold were among the most consequential and tumultuous in the Nation’s history. Griswold was argued two weeks after Bloody Sunday, when Selma police officers and Alabama state troopers brutally assaulted peaceful civil rights marchers on the Edmund Pettus Bridge, whose namesake headed the Alabama KKK after Reconstruction. Ten days after Bloody Sunday, the Voting Rights Act (VRA) was introduced into Congress. The VRA, which passed in August 1965, would immediately subject the voting rules in six Southern states and
in numerous counties throughout the country to supervision by the Department of Justice and by federal courts. The year before, the Supreme Court had announced the rule of “one man one vote” that would commit federal courts for the first time to overseeing the apportionment of voters into congressional and state legislative districts. Frankfurter’s last opinion for the Court was a dissent from the Court’s declaration that such cases were fit to be resolved by judges.40

At the time Poe was decided, Jim Crow segregation remained the norm in the Deep South. As is well known, southerners fiercely resisted Brown’s desegregation mandate. In 1964, on the eve of the Civil Rights Act and a decade after Brown, 99 percent of black students in the eleven Deep South states attended schools that had no white students. Many southern school boards enacted “freedom of choice” school plans that did not formally discriminate but that inevitably resulted in the same segregation patterns that predated Brown. Although some public facilities were slowly desegregating, privately owned hotels and restaurants still could and often did ban black customers altogether. Moreover, private actions, whether in denying a hotel room or a spot at a lunch counter, didn’t violate the Fourteenth Amendment at all. The sit-in movement that began with North Carolina lunch counters in the 1960s and quickly expanded to theaters, hotels, parks, swimming pools, beaches, and other public sites needed creative courts to gin up reasons to void trespass prosecutions. The Civil Rights Act of 1964, which President Kennedy originally proposed after Birmingham Police Chief Bull Connor used attack dogs and fire hoses on peaceful protesters in the spring of 1963, catalyzed both southern school integration and the demise of Jim Crow in public accommodations such as hotels and restaurants. The Act needed the Court’s blessing to survive.41

Among the most enduring provisions of the Civil Rights Act is its ban on employment discrimination on the basis of not just race but sex as well. The language banning sex discrimination was added to the bill at the eleventh hour by Virginia Representative Howard W. Smith, a dogged opponent of the civil rights bill, possibly to make its passage less likely. But once the Act passed, its sex discrimination provision quickly became one of its most litigated provisions. Betty Friedan’s The Feminine Mystique, which
questioned the culturally dominant assumption that a woman’s well-lived life was as a housewife, had been the bestselling nonfiction book of 1964. The government’s shoddy enforcement of Title VII’s sex discrimination language is what led Friedan and other women to found the National Organization for Women in 1966. At the time of the Civil Rights Act, Hawaii and Wisconsin were the only states that banned sex discrimination in employment. Within a decade, nearly every state had such a ban.42

Up until the 1970s, women consistently lost rights cases brought to the Supreme Court. In 1873, the Court held that the state of Illinois could refuse to admit women lawyers to its state bar. In 1948, Frankfurter wrote a majority opinion holding that Michigan could ban women from working as bartenders. As late as 1961, a unanimous Supreme Court upheld a Florida rule requiring men but not women to serve on juries, on the ground that “woman is still regarded as the center of home and family life.” A creative reading of Footnote 4 could meet the challenge of sex discrimination. Birth control bans, employment discrimination, and — more directly — exclusion from jury service could certainly curtail the ordinary operation of the political process. Women whose lives are artificially constrained by discrimination cannot fully participate in civil society.43

Still, women were then and are now a majority, not a minority. Sex discrimination was so deeply engrained that even the President’s Commission on the Status of Women, headed by Eleanor Roosevelt, issued a report in 1963 that maintained as a “fact of life” that is “not debatable” that that “the care of the home and the children remain [women’s] unique responsibility.” The Equal Employment Opportunity Commission, which was responsible for implementing the Civil Rights Act’s ban on sex discrimination in employment, issued guidance saying that the Act didn’t prohibit employers from advertising jobs for just men or just women. A judge conditioned to avoid “activism” could easily be thrown by the prospect that he should henceforth treat sex discrimination with the same care as race discrimination.44

The first half of the 1960s was also a momentous time for criminal justice rights. Until 1961, the state could use illegally seized evidence against criminal defendants at trial. Until 1963, a felony defendant too poor
to afford a lawyer would simply be tried without one. Until 1964, state and local police officers could refuse a criminal suspect’s request to have a lawyer present for his interrogation. *Miranda* and its famous “right to remain silent” would come two years later. Some of the revolution in constitutional criminal procedure was parasitic on the civil rights movement, as a disproportionate number of criminal suspects were African-American, and black defendants were more likely to see their rights disregarded. Part of it, too, was that mass use of automobiles had forever changed policing. As traffic stops came to be the most common point of contact with law enforcement, and one experienced by whiter, wealthier Americans as well as others, standards for criminal suspicion were recalibrated in revolutionary ways.\(^{45}\)

The civil rights movement also helped deepen the Court’s appreciation for freedom of speech. In March 1960, a group headed by A. Philip Randolph was raising money for Dr. Martin Luther King Jr.’s legal defense against trumped up Alabama perjury charges. The group placed a full-page ad on page 25 of the *New York Times* called “Heed Their Rising Voices.” The ad contained a number of minor factual errors. For example, it referred to Alabama State College students singing “My Country, ’Tis of Thee” on the steps of the State Capitol in Montgomery, when in fact the students sang “The Star-Spangled Banner.” The ad said that school officials padlocked the dining hall in order to encourage students to end their registration boycott; in fact, there was no padlock, though unregistered students were barred from the cafeteria. The ad claimed that King had been arrested seven times when in fact it was four. That sort of thing.\(^{46}\)

Claiming they had been defamed, Montgomery’s public health and public safety commissioner L.B. Sullivan and five other Alabama public officials sued the *Times* and a number of prominent black ministers who were listed on the ad as supporters. Each of the six plaintiffs sought $500,000 in damages. The plaintiffs won their jury trial and the Alabama Supreme Court affirmed the judgment. The *Times* successfully sought U.S. Supreme Court review, arguing that the judgment violated the freedom of the press. The problem with this defense is that, as was well-established at the time, the First Amendment doesn’t protect libelous publications. And
whether the Times ad counted as libel was for a fact question for the jury, not a legal question for the Justices. More broadly, the First Amendment was generally understood to apply to laws passed by legislatures or the actions of executive officials such as licensors or police officers. If successful, the Times argument might invite federal judges to supervise state civil jury verdicts and state court rulings in the legions of ordinary tort or breach of contract cases that implicate someone’s speech interests.

That said, a defamation suit can be a potent tool of harassment. Civil damages actions against unpopular defendants raise the specter of the jury being used as a tool of oppression, upsetting the Framers’ expectations. As a case in point, the minister defendants were prominent within the civil rights movement in Montgomery, but immediately after the verdict, Sullivan was able to ask the sheriff to seize their automobiles and property. Between the time of Sullivan’s initial lawsuit and the Supreme Court’s 1964 decision in New York Times v. Sullivan, newspapers—many of which were from out of state—were on the hook for almost $300 million in libel damages before southern courts. The Supreme Court recognized this subtext when it ruled for the Times, holding that libel or defamation suits brought by public officials had to be premised on “actual malice” by the publisher. This means the paper had to know the defamatory material was false or had to have been recklessly uninterested in finding out.47

The Sullivan Court likened the Alabama jury verdict to the 1798 Sedition Act, but the analogy fails. No one doubts that seditious speech is protected by the First Amendment, whereas defamation has for time immemorial been a tort in every state. What the Court was instead recognizing in Sullivan were the demands of the civil rights movement to have the court pierce the veil of ordinary civil actions and recognize them as forms of resistance to racial progress.

The Supreme Court was doing much the same work when it overturned disorderly conduct charges against the comedian and activist Dick Gregory after he was arrested at an August 1965 march against school segregation in Chicago. Gregory v. City of Chicago is one of several cases that have come to stand for the idea that a speaker can’t be punished just because his speaking inspires others—whether hostile critics or fellow
travelers—to act unlawfully. Freedom of speech in the 1950s was primarily about sedition prosecutions and red-baiting. Within a decade, it would be about far more complex conflicts between expressive interests on the one hand and public order, community standards of decency, and local autonomy on the other.48

The biggest challenge for rights recognition and enforcement in the last fifty years has been accounting for the role the government plays in our lives. The government pays us in the form of Social Security, unemployment compensation, and various federal, state, and local welfare programs. It funds our health care in the form of Medicare and Medicaid. It provides professional and occupational licenses that we need to pursue a livelihood and the driver’s licenses we need to get to and from work, the supermarket, the home of a relative, or to places of worship. It doles out taxi medallions and broadcast licenses, it subsidizes our corn, sorts our mail, charters our businesses, protects us from criminals, educates our children, and employs tens of millions of us directly.

In 1964, the legal scholar Charles Reich wrote a groundbreaking article, *The New Property*, in which he sought to wake Americans up to what the state’s growing presence in our lives means for how we think about rights. Reich’s core observation was this: Our dependence on government isn’t going away, indeed “is the inevitable outgrowth of an interdependent world.” That reality upsets a number of the law’s default assumptions about rights. For example, courts once tried valiantly to distinguish “rights” and “privileges,” the latter of which did not entitle the bearer to due process of law upon deprivation by the state. Holmes himself famously said, in upholding a dismissal of a police officer for soliciting money for a political campaign, that the officer “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” That’s cute, but for Reich this would not do in a modern society. The fact that the state is not required to provide some good, service, or benefit doesn’t mean it can’t be understood as a “right” or that, once offered, it may be retracted on a whim.49

In the decade following Estelle Griswold’s day in front of the Supreme Court, the Court would decide cases in which plaintiffs argued
for a public school teacher’s right to publicly criticize the board of education, for a poor family’s right to tie welfare benefits to family size, for a right to equal funding for public schools regardless of a neighborhood’s property tax base, for a right not to be fired from a public university or kicked off the welfare rolls or to have a driver’s license suspended without a hearing. These were and remain the workaday questions of modern rights adjudication, but bromides about rights and privileges don’t begin to provide answers. Reich foresaw that we’re not in Topeka, Kansas anymore, and he was right.50

By the time the Court heard Griswold v. Connecticut, then, Footnote 4 was starting to feel rather quaint. That Footnote lived in a world of categories. In that universe, the vast majority of laws don’t implicate anyone’s constitutional rights. This was Frankfurter’s work in cementing Holmes’s legacy. Those laws that did implicate rights were tied to specific, readily identifiable, categorical problems: jailing one’s political enemies, segregating public facilities by race, or the like. The Court that entered the 1960s reserved rights enforcement essentially for corrupt public officials who couldn’t be trusted with state power.

But the events of the 1960s would drag the Court into the very different world we live in today. At the time of Carolene Products, less than 10 percent of the Supreme Court’s docket comprised civil rights claims. That number jumped by about 20 percent over the next two decades, then jumped another 20 percent just in the six years before Griswold. This is a world in which claims for racial equality will call not just for an end to intentional discrimination but for structural changes in employment practices, school assignment, time-honored voting and districting procedures, and virtually every aspect of the criminal justice system. Indeed, in this world, charges of intentional racial discrimination will often reach courts as claims of white students or contractors chafing at race-based remedial measures. This is a world in which equality isn’t just about renouncing slavery and Jim Crow but is also about upending traditional family roles and enabling well-lived lives by securing sexual autonomy and reproductive freedom, up to and including the freedom to abort a fetus. Challenges to discrimination aren’t just about genes anymore but are about
a protected set of commitments, values, and preferences. The rights of criminal defendants will extend beyond the bare formalism of a criminal trial and will saddle the state with affirmative duties to provide competent defense lawyers, to share exculpatory evidence, and to inform suspects of their rights. Free speech norms will spread to unfamiliar institutional spaces such as common law courts and public universities, commercial airwaves and strip clubs. Courts will have to entertain not just claims of the right against government abuse but a right to government support in securing the conditions of citizenship.51

We are faced, for a half century and counting, with a rights epidemic. Rights in this world are diverse and unruly, sometimes majoritarian and populist, other times protective of minorities or those on the margins of civil society; often supported by sophisticated lawyers or even government officials, other times living outside the legal mainstream. Rights since the 1960s have been, perhaps above all, competitive. They cannot readily be quarantined, hived off from other rights and interests with which they come into constant, at times adversarial contact. The question for modern courts is not about when government officials can’t be trusted. It’s about how to reconcile a diverse, unpredictable array of competing, important, and deeply felt individual and group interests with the government’s existential interest in governing.

Griswold v. Connecticut

The Griswold Court struck down the Connecticut birth control law, but the Justices held very different views about how and why. With surprising clarity, the range of views expressed in the six opinions written in the case—four to overturn the law and two to retain it—reveal the choices available to courts seeking to contain the rights epidemic.

The nominal majority opinion belonged to William O. Douglas. Douglas was cantankerous and brilliant, too much of both for his own good. He circulated his first draft in 10 days, scribbled on a yellow notepad, amounting to six typed, double-spaced pages. For Douglas, the Connecticut law violated the constitutional freedom of association. Although the First
Amendment does not mention this freedom expressly, the Court had recently recognized it in a case in which Alabama had tried to obtain a list of the NAACP’s members, so as better to harass them. What Douglas called “[t]he association between husband and wife”— others call this “sex,” among other things—seems not to fit in quite the same constitutional category as NAACP membership, but it was good enough for Douglas. Describing the right in First Amendment terms was awkward, but at least that got it into the text of the Constitution. Doing so allayed any need to probe the limits of Footnote Four.52

Douglas circulated the draft privately to Justice William Brennan, who was unconvinced. Brennan had his law clerk Richard Posner draft a memo to Douglas in which Posner suggested that the opinion rest instead on the right to “privacy,” which Douglas had only hinted at. Just as the First Amendment contains a right to association on its periphery, Posner suggested, other Bill of Rights provisions, taken as a whole, “indicate a fundamental concern with the sanctity of the home and the right of the individual to be let alone.” Douglas agreed, and within three days he had sent a revised draft that would become the lead opinion in Griswold.53

According to the Douglas opinion, the right to privacy lives in the shadows of the Bill of Rights. “[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” Thus, the First Amendment contains within its “penumbra” a right of private association. The Third Amendment, prohibiting the quartering of troops without consent, also implicates privacy interests, as does the Fourth Amendment’s ban on unreasonable searches and seizures. Less obviously, the Fifth Amendment’s protection of the right against self-incrimination allows a suspect to keep his inner thoughts private even if they implicate him in a crime. The right to privacy is in the Constitution, Douglas was suggesting, if not in so many words.54

The Douglas opinion reflects a more creative iteration of Hugo Black’s basic approach to rights adjudication. In the face of a rights epidemic, the Court could simply let the constitutional text be its guide. Black himself adhered to this position in Griswold, and he accordingly dissented. “I like my privacy as well as the next one,” he wrote, “but I am
nevertheless compelled to admit that the government has a right to invade it unless prohibited by some specific constitutional prohibition.” Justice Potter Stewart’s separate dissent said much the same thing, calling the Connecticut statute “an uncommonly silly law” but one that didn’t offend the Constitution. Douglas saw more there than Black and Stewart did, and his opinion has widely been ridiculed for it. Penumbras and emanations are meet for Halloween, but they don’t void democratically enacted laws.55

The essential failure of Douglas’s *Griswold* opinion reflects a deeper problem with a textualist-originalist response to the rights epidemic. To reach most modern rights claims, the constitutional text must be read expansively or bent out of shape, thus undermining the very discipline that textualist originalism is supposed to promote. The alternative is Black’s more skeptical version, but there’s no appetite either among the Justices or among the American people for allowing states to ban birth control, to jail people for engaging in oral sex, to sterilize criminals or the mentally retarded, or indeed to browse the membership lists of unpopular organizations, to name just a few of the many topics on which the constitutional text is silent. Americans have the shortest and oldest national constitution in the world. Which rights are important to us today bears little relationship to the Constitution’s vague, sparse language. It touches modern rights only by happenstance. Pretending otherwise turns rights enforcement into a lawyer’s game of textual manipulation and comma parsing rather than the sensitive process of moral or political deliberation that rights claims call for.56

Justice Brennan and Arthur Goldberg, who had taken Frankfurter’s seat, joined the Douglas opinion in *Griswold*, but they also joined a separate opinion, written by Goldberg, that emphasized a very different theory of what was wrong with the Connecticut law. (Chief Justice Earl Warren obliquely signaled his discomfort with the Douglas opinion by only joining the Goldberg opinion, which says it joins the Douglas opinion.) For Goldberg, the rights protected by the Fourteenth Amendment are “not confined to the specific terms of the Bill of Rights.” Noting that the Ninth Amendment says the Bill of Rights should not be construed to exclude unenumerated rights, Goldberg said that judges could extend the
protections of the Constitution to “fundamental” rights, defined as those rooted in “the traditions and (collective) conscience of our people.” Goldberg was satisfied that the right to privacy, especially in relation to the marital bedroom, was so rooted.57

This was Footnote 4 with a twist. The footnote had suggested that there were two categories of rights claims that could be recognized even if they did not implicate the specific text of the Constitution: rights to participation in the political process and rights claims by certain discrete and insular minorities facing prejudice. The Douglas opinion didn’t have to reach these categories because he found the right to privacy in the Constitution’s text. The Goldberg opinion simply leapfrogged the other categories by adding another: privacy. Still more categories of rights might be added if a majority of the Court deemed them “fundamental.” This formulation of so-called “substantive due process” rights is the one law students learn to this day. The sequence of questions they should ask themselves in identifying a right are: (1) is the right in the specific constitutional text; (2) if not, is it “fundamental” in the sense that it is rooted in our traditions and collective conscience. If the answer to either question is “yes,” then the right is a “fundamental” one that is not to be infringed unless the government satisfies the highest level of scrutiny. If the answer to both questions is “no,” then the right is not fundamental and is subject to the lowest level of scrutiny.

Americans continue to debate constitutional rights in the terms drawn by these Griswold opinions. On one side of the field are the textualist-originalists. Most recently these have typically been conservatives such as Antonin Scalia, Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh. They claim to view strict adherence to the Constitution’s text and history as necessary to judicial restraint. In practice, many of these Justices have, like Justice Douglas, applied idiosyncratic glosses to the text and history in order to achieve desired outcomes, as for example in cases involving affirmative action, campaign finance, and gun regulation. Across the pitch are the Goldberg and Brennan acolytes who see it as the Court’s job in rights cases to determine which unenumerated rights—whether to abortion or assisted suicide or same-sex marriage—should be deemed fundamental
and therefore entirely outside the government’s grasp. The Justices who view substantive due process as a living tradition incapable of precise definition are accused of a kind of lawlessness, conforming the Constitution’s meaning to the Justices’ own takes on what rights, interests, and commitments lie within the collective conscience of the American people. Brennan himself famously would tell new law clerks that the most important thing they need to know to start working at the Supreme Court was how to count to five. That’s how many votes it took to change the Constitution.58

Partisans on either side of this modern jurisprudential battle tend to miss their common ground. Hugo Black and Bill Brennan, Antonin Scalia and Ruth Bader Ginsburg all agree that the main question they are called upon to answer in rights cases is whether important rights are implicated or not. It’s a threshold question “originalists” and “living constitutionalists” are constantly fighting about, but it’s the wrong question. The startling diversity of rights claims in the modern world ensures that, unless courts change their focus, the fight will never end. But what Griswold takes away with one hand it gives with the other. Just as we see in the Griswold opinions the seeds of this seemingly existential conflict in judicial method, we also see there, if faintly, a way out.

The Second Justice Harlan

Arthur Goldberg was Frankfurter’s immediate successor, but he was not his heir. Goldberg’s Griswold opinion, the most expansive of the lot, shows how very different philosophically the two men were. The man who took Frankfurter’s seat in spirit was none other than John Marshall Harlan, grandson of the great dissenter. Harlan came to the Court in 1955, elevated by Dwight Eisenhower after a long career at the white-shoe firm of Root, Clark, Buckner, & Howland and a brief stint on the Court of Appeals. He and Frankfurter knew each other well, having first met through Emory Buckner, a friend of Frankfurter’s and partner at Harlan’s firm who took Harlan along when he served as U.S. attorney in New York in the 1920s. When Harlan joined the Court, Frankfurter sensed an ally in his
temperamentally conservative, Republican younger colleague. He immediately began an influence campaign that included seeking to spread his negative opinions of Black and Douglas, both of whom Frankfurter intensely disliked. (Harlan didn’t bite.)

Harlan’s reputation indeed lives in the same family as Frankfurter’s. He is viewed as a conservative speedbump in the path of the Warren Court’s activism, the role Frankfurter would have played had he lived through the 1960s. Nearly half of Harlan’s 613 opinions were dissents, including a mind-boggling average of more than 62 dissents per Term during the Warren Court’s heyday of 1963 to 1967. But there was a crucial difference between Frankfurter and Harlan. Frankfurter had built his jurisprudential legacy around Holmes, and especially Holmes’s pithy dissent in the bakery case. Absent extraordinary reasons later memorialized in Footnote 4, judges should defer to legislatures whenever they act with minimum rationality. By contrast, Harlan’s view of due process wasn’t Holmes’s. It was Harlan’s.

Two sets of cases illustrate the difference. The first are the birth control cases, Poe and Griswold. Harlan dissented from Frankfurter’s opinion dismissing the Poe case for lack of standing, and chose to reach the merits. In Griswold, Harlan refused to join either the Douglas or the Goldberg opinions, instead writing his own concurrence incorporating by reference his Poe dissent. To a remarkable degree, Harlan’s take on the Connecticut birth control statute echoed his grandfather’s approach to the New York bakeshop law. He rejected the argument that the Fourteenth Amendment should be equated with guaranteeing fair government procedures or, contra Black, should apply only to government deprivations specified in the Bill of Rights. “Due process,” Harlan wrote, “has not been reduced to any formula; its content cannot be determined by reference to any code.” Rather, he said, “it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”

Just as the older Harlan accepted a right to contract that had to be balanced, with care, against the need for reasonable regulation, his
grandson recognized a right to privacy that likewise called for temperate balance against government interests. Indeed, far from demonizing *Lochner* as Douglas and Black had, Harlan cited favorably to the case (predating the bakers’ case) in which the Court first recognized a right to contract. For Harlan, that right was one point on a continuum of liberty interests that must be adjudicated with sensitivity to their particular context and the government’s reasons for limiting them. “No formula,” Harlan wrote, “could serve as a substitute, in this area, for judgment and restraint.”

In the specific context of the Connecticut birth control law, Justice Harlan assumed that there was a constitutional right to privacy, but also that the government could regulate private spaces if it had a good enough reason. Here, it didn’t. The space—the marital bedroom—was as private as any in our tradition. Moreover, the fact that the state didn’t enforce the law showed that its police and prosecutors evidently didn’t believe it was especially needed. The law’s novelty also counted against it. Connecticut was the only state that banned the use of contraceptives. So for Harlan, it was unconstitutional. For him, the case did not rise or fall on whether there was a specific right to privacy in the Constitution or on whether the law targeted minorities. What mattered was the law’s justification and its operation on the ground. What mattered were the facts.

In between *Poe* and *Griswold*, the Supreme Court decided a less famous case that shows just how far a departure Harlan is from modern thinking about rights. A Kansas law had said that only attorneys could engage in debt adjustment, whereby a debtor pays an adjuster to negotiate a plan with creditors. Agreeing with the plaintiff that this was unreasonably restrictive, a lower court enjoined the law under the Fourteenth Amendment. Then, as now, this was an easy case. Under the post-New Deal consensus embodied in *Carolene Products*, an ordinary economic licensing scheme that didn’t touch upon any protected classes gives nearly unlimited berth to the state to make distinctions it sees fit. Justice Black’s majority opinion accordingly gave the lower court a lengthy lecture on the rule that courts are not “to draw on their own views as to the morality, legitimacy, and usefulness of a
particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process.” Black cited Lochner and referenced Holmes’s dissent to support this by-then blackletter view: “Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.” The retired Frankfurter probably smiled when he read the opinion.64

Harlan didn’t. He agreed with the outcome but he thought Black’s opinion was overstated. The U.S. Reports indicates a one-sentence hint at Harlan’s reasons: “Mr. Justice HARLAN concurs in the judgment on the ground that this state measure bears a rational relation to a constitutionally permissible objective.” Behind the scenes, one of Harlan’s law clerks had lamented that Black’s opinion “almost does away entirely with the Due Process Clause” and “appears to do away even with the rational basis test.” Harlan appeared to be concerned that the opinion devoted almost no discussion to whether the legislature’s reasons were good ones, which seems to imply that those reasons don’t matter at all. Although Justice Black likely believed just that—the Constitution doesn’t go out of its way to protect debt adjusters—Harlan couldn’t go along. Harlan was a longtime Wall Street lawyer and so his openness to some scrutiny of economic regulation of businesses makes biographical sense. But it also reflected a philosophical position on constitutional rights review. He was a business lawyer, yes, but more importantly, he was a Harlan.65

Harlan’s views have not prevailed. Black’s categorically uncharitable view of so-called economic due process is still taught in law schools. The Court of course invalidated the Connecticut birth control law, but it did so by declaring that there was a “fundamental” right to privacy embedded in the Constitution. The “private” status of the relationship the government was targeting is what shielded it from regulation. Privacy was a new category, a new box, into which Americans could try to fit their conduct to exempt that conduct from the state’s reach. If a law intruded on privacy, it should usually be struck down. If it failed to get into the privacy box, or some other, it would be reviewed with great deference to the government. Holmes had won. His categorical view of constitutional rights
persists to this day, bending awkwardly beneath the weight of facts it cannot accommodate. The limitations of the privacy category became apparent almost immediately, when the Court decided *Roe*. Abortion opponents didn’t see terminating a pregnancy as a private decision. Wasn’t the fetus a person? What then? Unwilling to confront that question, the Court held that the fetus had no rights. And the war came.

These kinds of complexities are present in the mine run of constitutional rights cases that reach the Court, but the Justices continue to treat them as exceptions. They are still trying to put rights into categories, still searching for the right box, the right formula. But both Justice Harlans were right all along. There is no formula. There is only judgment.
CHAPTER 9: SPEECH

“Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”

—Justice John Paul Stevens (1976)

Freedom of speech is the most famous right in the Constitution. The heart of its protection is obvious: The government cannot silence its political opponents. But speech is everywhere. Much conduct, in both personal and commercial life, is accomplished by talking, writing, or otherwise communicating information. Taken literally, restricting the government from abridging the freedom of speech could swallow all regulation. Individuals speak through the plans, reflections, and promises they relate to each other; through the e-mails, tweets, and text messages they send; through the letters they pen, the art they design, the glances they exchange. Companies speak through advertisements, marketing materials, and contracts. To view the First Amendment as protecting all of these activities absolutely, or nearly so, is to court chaos. We’ve gone too far in that direction.

Take an example. In 2009, the Texas Division of the Sons of Confederate Veterans (SCV) proposed that the state DMV make available to drivers a license plate with the rebel flag on it. The DMV said no. The SCV sued, claiming a violation of its freedom of speech, and the case made it all the way to the Supreme Court. This case should have been easy. Texas was once part of the Confederacy, a traitorous nation founded in order to preserve race-based chattel slavery. More than 600,000 American souls were lost in the Civil War, nearly as many as in all other U.S. wars put together. The SCV has every right to embrace the Stars and Bars, but the
people of Texas should have every right to ban a symbol of treason and white supremacy from state-issued license plates. It was a clash of rights, to be sure, but good sense dictated that Texas should win.

A majority of the Justices seemed to agree, but the case put them in a bind. The Supreme Court has long maintained that the government is almost never allowed to burden speech because of the speech’s content or the speaker’s identity or viewpoint. This absolutist posture is what protected the *New York Times* and the *Washington Post* when they published the Pentagon Papers in 1972 over the Nixon Administration’s fierce objection. But it is also what brought us *Citizens United* and its blessing of unlimited corporate spending on elections. Texas drivers express themselves through their specialty license plates no less than corporations through their political spending.

By a 5-4 vote, the Court’s solution was to declare that Texas license plates expressed the opinions of the state of Texas. Because the government needs to be able to promote its favored policies, its own speech need not be neutral as between different viewpoints. In fact, there is no constitutional restriction at all on government speech. And so a state act that restricts expression but fits into the box of “government speech” gets no First Amendment scrutiny by a court. A state act that restricts expression but falls outside the “government speech” box receives maximal scrutiny. It’s all or nothing.

In the Texas case, this solution, though handy, was absurd. As Justice Samuel Alito’s dissent gleefully observed, among the specialty license plates that the state made available were those that said, “Rather Be Golfing,” or that promoted a favored NASCAR driver, or that bore the names of public universities from outside the state, including the Longhorns’ hated rivals the Oklahoma Sooners. The idea that these messages were those of the state rather than of its individual drivers was utter fiction. But the dissenters’ solution was no better. They would have
the Court require Texas to put the Dixie flag on its state-issued plates. By Alito’s logic, the state would have had to permit a swastika as well.

This all-or-nothing approach to speech is the reason the Supreme Court said that Vermont data miners had absolute rights to prescription data. It is the reason the Court said that the state of Maryland could not permit a lawsuit against a group that showed up at the funeral of a Marine killed in Iraq holding signs saying “Thank God for Dead Soldiers.” It is the reason many of the Justices treat burning a cross in front of the house of the African-American family that just moved into the neighborhood just the same as they would treat an Op-Ed on neighborhood gentrification. The problem isn’t that these practices shouldn’t be protected. It’s that they should be evaluated based on their own costs and benefits, their own factual context. We must stop pretending that protecting grieving families from political agitators threatens the Republic.67

These cases just scratch the surface of the free speech problems the next generation of Americans will need to confront. For example, rights to reproductive autonomy and to fetal life were not the only rights bound up with the George Tiller case. Prior to his murder, Dr. Tiller was one of several doctors whose photograph and clinic address had appeared on “Wanted” posters produced by anti-abortion activists. His name had also appeared on the Nuremberg Files, a website that listed abortion doctors—“abortionists,” it called them—and accused them of crimes against humanity. Doctors who had been murdered were listed with strikes through their names. Those merely wounded were shaded in grey. The anti-abortion activists who produce such lists believe their free speech rights extend to political agitation of this sort. Doctors targeted by these efforts believe they have a right to be protected by the state against those who would incite their murders. There are many other examples of opportunists using technology and the umbrella of the First Amendment to invade privacy. Think about sex videos of ex-girlfriends posted on porn sites as revenge. First Amendment absolutists defend these practices as no different from an author writing a memoir about his sexual experiences. Smart phones have
dramatically increased the amount of data available for potential public consumption. No pat formula can draw lines between free expression and privacy.\textsuperscript{58}

Another example. The Constitution protects arms and it protects protest. Does it protect armed protest? In August 2017, a group of white nationalists held a rally in Charlottesville, VA. A man who had driven from Ohio to attend the rally drove his Dodge Challenger into a group of counterprotesters, killing a 32-year-old woman named Heather Heyer. Videos circulated at the time of the rally and thereafter showed that many of the white nationalist marchers were armed with assault rifles and other firearms. The First Amendment protects the right of peaceful assembly. The Second Amendment protects the right of individuals to possess loaded weapons, at a minimum in their homes. Virginia is an open-carry state, meaning that it is legal to openly carry a handgun, and anyone with a concealed-carry permit can openly carry rifles with large-capacity magazines.

On one hand, there is a certain arithmetic logic to the idea that the Constitution protects the right to protest while armed. One plus two equals three, not zero. On the other hand, the presence of firearms can disturb the peaceful nature of a protest even if the guns remain holstered. It can intimidate counterprotesters, thereby reducing rather than increasing the overall volume of speech. Gun rights and speech rights are both on the march through much of the country. Whether they march together or apart will be a defining civil liberties question of our time. The question will stump a Court, and a people, paralyzed in the face of competing rights.

Another example. According to a recent survey, more than 60 percent of millennials rely on Facebook as their primary news source. But Facebook censors its users, removing content based on an opaque internal policy, using a combination of algorithms and human monitors. Facebook, like Twitter or Reddit, is a private company and so its policies do not fit into any of the Court’s boxes: it can do whatever it wants. But the line between
public and private action is not nearly as bright as the Court pretends. Were a Facebook user whose post was deleted to sue the company for breach of contract, a court deciding the issue would be an arm of the state. Likewise, a private university that receives millions of dollars in research funding from the NIH might be as reliant on the government as a public college that receives much less, but public schools are held to strict constitutional standards that do not bind private schools. Constitutional law turns on the category the Court chooses—public versus private—rather than on the facts of individual cases and the weight of interests involved. That approach is increasingly arbitrary.

*Academic Freedom*

Nowhere is that more obvious than on America’s college campuses. If eleven o’clock on Sunday morning remains the most segregated hour in America, class registration has become the most polarized day. It is polarized precisely because it is *not* segregated, but instead forces teenagers, whose capacities for nuanced thinking, independent living, and tolerance remain raw, into close intellectual, social, physical, and sexual contact with each other. The stakes of these interactions are high. For college students, speaking on campus, assembling with others of like mind, and hearing from those who inspire and challenge them is an essential part of their self-discovery and their evolution into adulthood.⁶⁹

But the debate over campus speech suffers from serious, debilitating confusion over the proper relationship of colleges and universities to the First Amendment. Colleges and universities enjoy robust academic freedom that the First Amendment protects, and they should. Students and invited campus speakers also enjoy robust academic freedom, at least at public schools, but they shouldn’t. Indeed, the academic freedom of the university *requires* that students not have the same degree of freedom. In their roles as educators, a university’s faculty and administrators quite properly control what speech their students are exposed to. Good teachers
do not shoot information at students from a fire hose. They edit, they curate, they discriminate.

Auburn University is a public school. In April 2017, a man named Cameron Padgett rented out the auditorium at Foy Hall, a campus building. Padgett, a graduate student at Georgia State and a segregationist, describes himself as a white “identitarian.” Padgett was booking the space for a speech by Richard Spencer, the neo-Nazi propagandist and fellow “identitarian” who coined the term “alt-right.” The university initially agreed to allow Spencer to speak but then cancelled the event following protests. The school claimed that it was doing so in response to a security threat. Padgett sued and won.70

As noted, the Supreme Court interprets the First Amendment to require government neutrality as between different speech content and especially as between different viewpoints. The judge in Padgett’s case dutifully recited the case law and noted, correctly, that relying on the reaction of a hostile audience is not a content-neutral reason to regulate speech. Here, Auburn wasn’t acting neutrally. Surely, the school would not have canceled a speech promoting racial equality based on the objections of racists. According to the judge, then, the school had impermissibly discriminated against Spencer on the basis of his speech, and it would need to let the talk proceed.71

There are many problems with the court’s approach. Begin with the judge’s failure to find even minimally interesting Auburn’s status as a university structuring its own on-campus affairs. Perhaps the least defensible aspect of the Supreme Court’s approach to freedom of speech is its general insensitivity to the nature of the government actor or the action it is performing. Had Auburn been the police, arresting Spencer in anticipation of his racist speech, the judge would likely have been right to prevent that from happening. Surely more nuance is called for when Auburn is not the police but is instead an educational institution and when
it didn’t arrest Spencer but merely denied him a live audience in a 400-seat assembly hall within its community.

The same blindness to obvious contextual differences hamstrung the Court in the Texas license plate case. The dissent analyzed the case in just the same way it would have if Texas were criminally prosecuting the Sons of Confederate Veterans. The majority felt bound to do the same unless it said, indefensibly, that the State of Texas itself was speaking. But Texas was no more speaking for its drivers than Alabama was speaking for Richard Spencer.

What’s more, it’s not just that Auburn is not the police, which has little legitimate reason to discriminate on the basis of speech content, but it is a university, which has a very specific right and obligation to do so. Courts once understood that. The seminal case is Sweezy v. New Hampshire. Paul Sweezy was a University of New Hampshire economics professor who refused to answer certain questions about his associations before a McCarthy Era state subversive activities inquiry. He was held in contempt and jailed. In reversing Sweezy’s contempt conviction, Chief Justice Earl Warren penned a tribute to the academic freedom of universities:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Note that the regulators in Sweezy were the state Attorney General, who had subpoenaed and questioned Sweezy, and the state court that held him in contempt. The regulated entity, the one who the Court said shouldn’t be put in a straitjacket, wasn’t a student or an outside speaker but rather a faculty member, and through him, the university itself. Justice Frankfurter
amplified this point in a separate concurring opinion. “It is the business of a university to provide an atmosphere which is most conducive to speculation, experiment and creation,” he wrote, quoting a statement of South African scholars opposed to the dictates of the apartheid government. “It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

A decade later, the Court invalidated a New York law that required public school teachers, in this case professors at the State University of New York at Buffalo, to sign a pledge stating that they were not Communists. Justice Brennan, who wrote the majority opinion, stressed the “transcendent value” of academic freedom, which he called “a special concern of the First Amendment.” Again, the improperly regulated parties were professors, not students. It is true that Justice Brennan called the classroom “peculiarly the ‘marketplace of ideas,’” and said that “[t]he Nation’s future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” But he did not of course mean that students had a First Amendment right to require public university faculty and administrators to teach them however and whatever they wanted, but rather that the educational needs of students were an important reason why faculty needed to be free from state compulsion.

The Court placed particular emphasis on the university’s autonomy to pursue its academic mission in the Bakke affirmative action case I discussed in Chapter 8. Recall that Justice Powell believed universities had a “compelling” interest in the educational benefits of student body diversity and therefore should be given some leeway to consider the race of applicants in constructing a class. Powell referred both to Frankfurter’s “four essential freedoms” opinion in the Sweezy case and to Justice
Brennan’s emphasis on “the robust exchange of ideas” in the SUNY-Buffalo Communist pledge case.74

None of this is to say that students don’t themselves have some measure of academic freedom. Justice Abe Fortas famously wrote for seven Justices at the height of the Vietnam War protests that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the schoolhouse gate.” That case involved two high schools and a junior high school suspending students for wearing black armbands in silent protest of the Vietnam War, which the Court said violated the students’ free speech rights. The school district had argued that the armbands could lead to disruptions that the principals preferred to avoid in a school setting, but the Court said there was no evidence that the armbands caused or were likely to cause any disruption.75

There’s plenty of reason to think of the armband case, called *Tinker*, differently from a school declining to give a platform to Richard Spencer. Neither Spencer nor Padgett were Auburn students or affiliates, whereas many of the objections came from actual members of the university community. Spencer and Padgett were not, moreover, facing suspension but rather disinvitation. For a court to order a university to allow Spencer to speak over its objection and in its own auditorium in the name of academic freedom takes that concept to a strange and dangerous place.76

Courts’ pivot from associating academic freedom with universities being regulated by the state to associating it with students and others being regulated by the university reflects the confluence of two historical episodes: the Berkeley-led free speech movement of the 1960s and the speech code movement of the 1980s.

*The Free Speech Movement*

University campuses have not always been obvious sites for unfettered expression or protest. Apart from a few bursts of socialist energy that McCarthyism helped spook students away from, student protest had
until the 1960s largely been around bad food, dilapidated housing, and other personal grievances. Movements against perceived hegemony or oppression are of course often led by young people. Younger generations not only tend to be more energetic and less risk-averse than their parents but also have relatively little personal investment in the established order. Prior to the 1960s, however, the vast majority of college-aged people in the United States didn’t go to college. Those who received a college education tended overwhelmingly to be wealthy, with much to lose in upsetting the status quo. Recall from Chapter 8 that many college students before the 1960s got there not by being social justice advocates or even by scrapping their way to good grades but rather by entering into and remaining within the good graces of elite prep school admissions officers. “He wants very little because he has so much and is unwilling to risk what he has,” a 1950s Gallup Report remarked of a typical college student. “He is old before his time; almost middle-aged in his teens.” Universities themselves have long been highly regimented and hierarchical institutions. Classroom curricula and decorum are controlled by largely unaccountable faculty who have the power to reward students who abide by their rules and to punish students who don’t.  

The University of California, Berkeley has become notorious for campus activism, but prior to the 1960s its student body generally played by the rules. An 1893 piece in the Occident, the on-campus student literary journal, needled that the “most prominent feature” of the school’s typical student was his “sleepy, absent-minded manner, devoid of purpose or enthusiasm” and “his utter inability to keep a deep interest in anything.” The “wissy-wishyness” of Berkeley students made them “a hopeless task for the reformer.” Little had changed by the 1950s. Berkeley’s student government (ASUC) was generally more partner than antagonist of the administration. That ended in 1959, when a group of progressive students won the majority of the officer positions in the government. The University responded by barring graduate students from membership and by issuing a set of directives that, among other things, forbade all political action on
campus and barred student organizations from taking positions on off-campus issues. That meant no electoral politics, no protests, no political advocacy of any kind. At Berkeley.\textsuperscript{78}

Notably, the students didn’t respond by suing. Draconian as Berkeley’s actions were—for example, President Clark Kerr threatened to defund the ASUC’s executive committee for publicly objecting to the firing of a University of Illinois biology professor for his condoning of premarital sex—they were legally uncontroversial. \textit{Tinker}, the armband case, had not yet been decided. \textit{Barnette}, which said students couldn’t be suspended for not saluting the flag, involved elementary school children who were subject to compulsory education laws. It also involved a mixture of compelled speech and religious freedom that weren’t present in Berkeley’s case. The idea that student organizations voluntarily enrolled at a university had a constitutional right to on-campus political activism, though pushed by a handful of students, simply wasn’t a mainstream legal position.\textsuperscript{79}

It was indeed the subsequent actions of Berkeley’s own students that helped reshape the legal culture’s view of freedom of speech. In the 1950s and 1960s, Berkeley students became involved in the civil rights movement, including the sit-ins and boycotts that swept the Deep South in the early 1960s. A number of students participated in Freedom Summer in 1964, which also happened to be the year in which the Republican National Convention was held at the Cow Palace in Daly City, just south of San Francisco. The top two contenders were the libertarian conservative Barry Goldwater and the more moderate Pennsylvania Governor William Scranton. Electoral politics was banned on Berkeley’s main campus but the busy intersection along the campus’s southern edge, at the corner of Bancroft Way and Telegraph Avenue, had become a popular site for student activists to make speeches and hand out literature. It turns out, though, that the stretch of sidewalk was technically owned by the university, not the city. The Oakland \textit{Tribune}, which supported Goldwater, made sure to remind the university that the use of Bancroft Way violated the school’s rules. That fall, when a group that included many Berkeley
students protested the newspaper’s lack of diversity in hiring, the paper’s publisher Bill Knowland objected and the school responded by closing the Bancroft strip to political activity without warning to or consultation with students.80

The move backfired spectacularly. A number of student groups banded together to form the United Front, whose members not only retook the Bancroft strip but also set up tables directly outside Sproul Hall, which housed the main campus administrative offices. On October 1, 1964, two Berkeley deans had a police lieutenant drive his squad car onto campus to arrest Jack Weinberg, who had set up a table in front of Sproul in violation of university rules. But after Weinberg was placed in the police car, hundreds of students surrounded the vehicle and sat down, holding it hostage. The crowd soon swelled to thousands. Mario Savio, a philosophy major who had spent the summer registering black voters in Mississippi, was the first of several students to climb on top of the police car and use it as a podium for the two-day long sit-in. The demonstration didn’t end until the next evening, when President Kerr agreed not to press charges against Weinberg.81

Two months later, though, the school announced that the leaders of the protests, including Weinberg and Savio, would be facing administrative discipline. That move launched a full-scale student takeover of Sproul that was broken up in a predawn police raid that resulted in the arrests of 773 people. A three-day strike against the University followed, which concluded with a large majority of faculty endorsing an Academic Senate resolution in support of the demands of the Free Speech Movement and the principle of free speech on campus. By the spring semester, student political activity was routine throughout Berkeley’s campus.

More significantly, the Free Speech Movement became the model for college student activism later in the decade, especially as the Vietnam conflict intensified. As I show below, the origins of the Free Speech
Movement in Berkeley’s fascistic student speech rules makes it difficult to translate its lessons to other, less extreme but more typical contexts.82

Speech Codes

The history of freedom of speech in the United States is inseparable from the struggle for racial equality. An inordinate number of the speakers whose words the Court protected from punishment in the landmark First Amendment cases of the 1950s and 1960s were advocates for racial justice. This included the defendants whose defamation convictions were overturned in New York Times v. Sullivan. It included the Alabama NAACP chapter whose membership list the Court protected from investigation by the state in NAACP v. Alabama. It included Dick Gregory, whose disorderly conduct conviction the Court overturned in 1969. Gregory’s march proceeded a better known Congress of Racial Equality (CORE) demonstration in the city of Cicero, were a black teenager looking for a job had recently been beaten to death by white gang members. Several hundred hecklers threw bottles and rocks at the marchers. What saved CORE members from themselves risking prosecution for incitement is the strong First Amendment presumption against a so-called “heckler’s veto.” The First Amendment requires the government to punish lawless audience members, not the speakers who arouse their ire. Not for nothing, when Jack Weinberg was arrested in front of Stroud Hall, he had been tabling for CORE.83

Understanding this history helps to clarify why the United States takes an extreme position on the regulation of hate speech. In much the world, including throughout Europe and in Canada, speech that calls particular racial groups into disrepute may lawfully be punished by the state. As late as the 1950s, the same was true in the United States. In 1950, a Chicago man named Joseph Beauharnais, president of a militant segregationist group called the White Circle League of America, was convicted under an Illinois law that made a crime of so-called “group libel,” the publication of any picture or performance that “portrays depravity,
criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion” and that exposes those citizens to “contempt, derision, obloquy.” Beauharnais had gotten into trouble by distributing leaflets calling for Chicago’s white population to rise up to prevent their “mongrelization by the negro” and asking Chicago Mayor Martin Kennelly to “halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro.” The Supreme Court upheld Beauharnais’s conviction, a result that would be inconceivable today.84

The Beauharnais case was less than a decade removed from a devastating war that had begun as part of a genocidal project, with charismatic speech as its engine. There was little reason to assume at the time that the post-war human rights revolution that resulted in so much anti-hate speech legislation abroad would pass over the United States. The year before Beauharnais, the Supreme Court upheld the criminal convictions of 11 members of the Communist Party for espousing a revolutionary ideology. A few years earlier, the Court had explicitly exempted “fighting words” from First Amendment protection. The most famous heckler’s veto case at the time of Beauharnais arose out of the arrest of a Syracuse man named Irving Feiner for breach of the peace after his soapbox appeals for racial equality had attracted a hostile crowd. Feiner lost at the Supreme Court.85

It’s not hard to appreciate the NAACP’s general wariness of the kind of laws that led to Feiner’s arrest. Given the tactics of the civil rights movement, laws punishing inciting speech were at least as likely to be used against people of color as on their behalf. The NAACP successfully opposed a congressional bill introduced in 1943 that would have prohibited the mailing of writings expressing racial or religious hatred. Restrictions of this sort can easily miss their mark. Great Britain’s 1965 Race Relations Act, which prohibits incitement of hatred based on race or national origin, was used early on to prosecute a Black Power leader named Michael X (néé Michael de Freitas) for advocating the killing of any white man caught
“laying hands” on a black woman. A member of the Universal Coloured People’s Association was prosecuted under the Act for, among other things, encouraging black nurses to give patients the wrong injections and urging Indian restaurant owners to “put something in the curry” they make for white people.86

If the NAACP wasn’t pushing hate speech laws, they weren’t going to happen, and for a while, they didn’t. Meanwhile, a series of decisions in the 1960s and 1970s strengthened the idea that the First Amendment tolerates a great deal of expressive activity that most people would rather not see or hear. Not only armbands in high schools, but wearing “Fuck the Draft” on a jacket in a courthouse; advocacy of violent or illegal acts (so long as those acts aren’t “imminent”); marching with a Nazi flag in SS uniforms in a town known for its population of Holocaust survivors; and all manner of pornography and sexual exploitation of women. So when some public universities began experimenting with policies designed to address racist campus speech in the 1980s, many reflexively treated the schools just as they would any other government regulator.87

The “speech code” movement was quite ordinary from a certain perspective. Even as increasing numbers of minority students were admitted onto America’s college campuses, they were not always welcome. At the University of Michigan in January 1987, someone anonymously distributed a flier in a residence hall in which black female students were meeting that declared “hunting season” on “saucer lips, porch monkeys, and jigaboos.” A few days later, a student DJ at an on-campus radio station aired a program that included racist jokes. “Who are the two most famous black women in history? Aunt Jemima and motherfucker,” one joke went. “Why do black people smell? So blind people can hate them too,” went another. When demonstrators protested at the radio station, some of their fellow students decided to greet them by hanging a KKK outfit from a dorm window. At Emory in 1990, a black female freshman arrived at her dorm room one night to find her teddy bear slashed, her clothing doused in bleach, and “NIGGER HANG” written in lipstick on the wall. She later
found “DIE NIGGER DIE” written in nail polish on the floor of her room, under her rug. In 1989, at the University of Mississippi, Beta Theta Pi fraternity brothers thought it might be fun to write “KKK” and “WE HATE NIGGERS” on the naked bodies of two white pledges at leave them on the campus of the historically black Rust College, in nearby Holly Springs. Between 1986 and 1990, more than 250 colleges and universities reported similar racist incidents on campus, from swastikas to death threats and physical violence. A 1989 survey found that nearly two-thirds of research university presidents indicated that sexual harassment was a moderate or major problem on their campus, and half said the same about racial intimidation.88

The freedom of students to express themselves is of course important in a university setting, but so, too, is an environment in which all members of the community are welcome on equal terms. Both are human values, both are educational values, and, at a public university, both are constitutional values as well. That shouldn’t need to be said, but courts and others within the debates over campus speech have acted as if free expression is a trump, equally threatened when a student doesn’t get to stump for a political candidate on the college green as when she doesn’t get to call her classmate a nigger. The University of Michigan responded to the incidents on its campus by putting in place a code of conduct that targeted stigmatization, harassment, and intimidation along various protected grounds, including race, religion, sex, and sexual orientation in “educational and academic centers.” The policy varied liability and sanction based on the nature and location of the violation, and it excluded school-sponsored publications from coverage.89

A psychology grad student sued the school and won. He claimed that his discussion of scientific theories implicating racial and sex differences might fall under the code of conduct, or at least that the presence of the code might “chill” his academic speech. The court said a public university is simply forbidden from putting in place “an anti-discrimination policy which had the effect of prohibiting certain speech
because it disagreed with ideas or messages sought to be conveyed.” The court did not acknowledge that a university might have different rights or immunities based on its status as an educational institution. To the contrary, citing the Sweezy case, the judge indicated that a university had a greater obligation than other public institutions to permit “the free and unfettered interplay of competing views,” which the judge said “is essential to the institution’s educational mission.”

A different court invalidated a similar policy at the University of Wisconsin. That school had also endured a rash of overt racism directed at its students, including a fraternity “slave auction” in which pledges performed minstrel shows in blackface. The school put in place a new rule forbidding discriminatory expression that is directed at an individual, is demeaning on the grounds of race, sex, or religion (among other grounds), and creates an intimidating or hostile environment for education or university-related work or activities. The policy did not apply to faculty and it did not apply to comments made about racial groups in general, for example, in a classroom setting.

By the time the case reached court, students had been disciplined under the policy for barging into a black student’s room and calling him “Shaka Zulu;” for calling another student a “fucking bitch” and a “fucking cunt” because she had criticized the athletics department; for telling an Asian-American student that “some day the Whites will take over” and that “people like you” who “don’t belong here” are the reason for the country’s problems; for needling a Turkish-American student by pretending to be an immigration officer asking for documents; for calling a residence hall staff member a “piece of shit nigger;” for sending an electronic message saying “Death to all Arabs!! Die Islamic scumbags” to an Iranian faculty member; for stealing a roommate’s ATM card and withdrawing money from the student’s bank account out of resentment that the roommate was Japanese and didn’t speak English well; for calling a black student a “fat-ass nigger;” and for yelling at a female student in public, “You’ve got nice tits.” In none of the above incidents was the offending student expelled from school, and
in only one was the student even suspended. Typically they were placed on probation and/or made to engage in sensitivity training or counseling for substance abuse or psychological issues.92

In striking down Wisconsin’s code, the judge spent most of the opinion rejecting the notion that the racist and harassing speech the school targeted was subject to an exception from the general rule that the government may not regulate speech on the basis of its content. In response to the school’s argument that the speech it was targeting damages the educational environment, the Court said that, to the contrary, “[b]y establishing content-based restrictions on speech, the rule limits the diversity of ideas by students and thereby prevents the ‘robust exchange of ideas’ which intellectually diverse campuses provide.” The school argued further that it was protecting the constitutional equality rights of its students, an argument the court rejected on the grounds that because the offending students were not state actors, their victims’ constitutional rights were not threatened. Like the Michigan court, the Wisconsin court treated the university in just the same way as it would have treated the state legislature passing a criminal ban on racist speech.93

The Michigan and Wisconsin decisions are profoundly, dangerously wrong. “Nice tits” is not an “idea” whose free traffic the Constitution requires a public educational institution to tolerate. Indeed, if academic freedom means anything, it’s that it isn’t for an agent of the state, including a judge, to dictate to a university what is or is not essential to its educational mission. That, not a university’s regulation of its own students, was what the Sweezy decision was about. The Michigan and Wisconsin courts were indifferent not just to the fact that the schools were in the business of education but also to the fact that the sanction in most cases was probation and sensitivity training. These responses to incivility are precisely what one would expect at an educational institution whose job is, in part, to teach students to express themselves not just with honesty but with care. Further, the courts’ narrow focus on the perpetrator’s speech privileges made them unable to see that the state wasn’t just interfering with rights but protecting
them too. Women and minority students have a right to attend state schools free of discrimination and harassment. At a minimum, a state school has a right to protect the students it is trying to teach from verbal abuse and threats, as an exercise of its own academic freedom. If you must, that right also implicates the victims’ rights to freedom of speech.

These cases are tragic. We solemnly mourn the death of civility in public life. Meanwhile, our courts say the Constitution requires a public school to grin and bear the incivility of the students it is charged with educating. Courts’ unwillingness to assess the serious contextual differences between university codes of conduct and criminal statutes follows directly from the American approach. That approach prioritizes the threshold question of the nature of the right—speech in both cases—and flattens factual differences—the nature of the regulatory institution, its motives, and the severity of the sanction—that speak to whether interference with the right is justified. The code of conduct at Berkeley banning all political advocacy and the code at Wisconsin banning racist barbs and harassment both dealt with speech, and so they were constitutionally indistinguishable.

The Michigan and Wisconsin courts are not alone. Public university codes of conduct (and even the private university code at Stanford) have consistently been deemed violations of the Constitution when they seek to regulate racist or harassing student speech. It happened at Central Michigan and Northern Kentucky, at Shippensburg and Texas Tech, at Temple, Tarrant County College, and the University of the Virgin Islands. A 2007 court case out of San Francisco feels especially poignant. The College Republicans had held a rally at which they stomped on Hezbollah and Hamas flags. Some Muslim students objected, as the flags being trounced contained the word “Allah” on them. The administration put the students’ case before a hearing panel, which cleared them of any violation of the school’s code of conduct. The College Republicans sued anyway. The rule they had been charged with violating said that students “are expected to be good citizens and to engage in responsible behaviors that reflect well upon
their university, to be civil to one another and to others in the campus community, and to contribute positively to student and university life.”

As in the Michigan and Wisconsin cases, the judge noted, correctly, that the school’s policy reached speech that is not itself exempt from the First Amendment’s scope. The judge also noted, again correctly, that prior court cases have held public universities to the same obligation that other state institutions have to respect the First Amendment rights of those it regulates, in this case students. The school’s requirement that students be “civil to one another” therefore couldn’t stand. “A regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason,” the judge wrote. “The First Amendment difficulty with this kind of mandate should be obvious.”

In other words, requiring students to be restrained, moderate, civil, and reasonable is inconsistent with our Constitution. We’re doomed.

*The College as Curator*

My point is not that colleges should have rigorous speech codes. Indeed, as I argue below, I think such codes are often unwise. All regulation may of course be abused, and courts might well have a role to play should speech codes outpace their justification, as at Berkeley in the 1960s. But given the competing demands on educators, I am certainly in no position to say that speech codes are categorically unwise. And I see little sense in precluding all public educators from the judgment that regulating racist or sexist speech, based directly on its content, is important to a school’s educational mission.

We have come to see the university green as the quintessential public square. It is not. The purpose of a university is not to provide a forum for free speech. It is to prepare students for democratic citizenship. Universities do so not by permitting speech but by curating it. Universities discriminate,
pervasively, based on the content and viewpoint of the speech to which students are exposed, consistent with the pedagogical judgments of faculty and administrators. Discrimination is a university’s raison d’etre. Schools hire faculty, for example, based on the content of their written work. They do so in part to ensure that the information conveyed to students is of high quality. Universities both private and public have every right to deny positions or deny tenure to faculty who hold racist, sexist, or other views that the school judges to be of low quality. Racist or sexist faculty members should not be welcome in university communities. Indeed, a faculty member who directs racist or sexist invective at colleagues or students can and should face discipline, including at a public school. Curating the faculty in this way is an exercise of academic freedom. Lord knows it’s imperfect, but freedom always is.96

The same is true of racist or sexist students. We seem to understand that when it comes to admissions. Schools discriminate in whom they admit into their communities. Apart from race-based decisionmaking, the admissions processes of public colleges are largely left to the school’s unaccountable discretion. Colleges do not typically admit students at random. Rather, they make a judgment not just about whether applicants are likely to be well-prepared academically, whether they are athletes, or whether their parents are alums, but also whether they are likely to enhance the overall intellectual and social life of the school. The Supreme Court recognized the constitutional significance of this discretion in the Davis affirmative action case, which emphasized that admissions decisions include an evaluation of the perspective students will bring to class discussion.

And yet once students arrive on campus, we are told, the school must relinquish any subsequent interest in their views, socialization, or style of argument. It’s not just that this posture bypasses a critical moment of intervention in a student’s intellectual and social development by people whose professional training equips them better than most to intervene. It’s
also that styling student speech controversies as matters of fundamental constitutional rights in fact distorts the educational process.

Recent events on the campus at which I teach are instructive. In the fall of 2017, the Columbia College Republicans held a “free speech month” in which, in the span of a three weeks, they hosted speeches by Tommy Robinson and Mike Cernovich. Robinson, a co-founder of the English Defence League, is an Islamophobic football hooligan who has been banned from Facebook, Twitter, Instagram, and Snapchat for violating the platforms’ policies on hate speech, including by calling for “war” against Muslims. Cernovich is a notorious peddler of fake news, including “Pizzagate,” a conspiracy theory whose spread led to a man opening fire on a Washington D.C. pizzeria falsely implicated in a non-existent child sex trafficking ring. Robinson had been invited to discuss immigration, a subject on which he has no expertise. Cernovich is most famous for spreading false information.97

The College Republicans did not invite Robinson and Cernovich to speak in order to promote the robust exchange of ideas. Rather, they invited them to make a point about freedom of speech. Time and resources that could have been spent engaging a conservative with actual knowledge of immigration law and policy or one who is known for saying things that are true were instead spent on provocateurs and carnival barkers. Predictably, the speeches drew large protests; Robinson’s talk had to be cut short due to loud interruptions. The invitations prompted the University’s Black Students’ Organization to call for the College Republicans to be defunded by the University.98

In other words, what “free speech month” accomplished wasn’t the exchange of ideas at all but rather recriminations, increased security costs, and animosity among students and between students and university administrators. Had the university determined in advance that this costly exercise in rights fetishism by its students served little educational purpose, it would have been dead right. Would it not have been in the spirit of
academic freedom for faculty or administrators to determine, just as they are paid to do in the classroom, that invitations to Robinson and Cernovich do not meaningfully contribute to the education of Columbia’s students? Is there not pedagogical value in requiring students to make a case, on the merits, for a speaker’s contribution to the intellectual life of the school? The conspicuous constitutionalization of these conflicts makes the bare exercise of rights something worth fighting for, and about. And so students are encouraged to make a spectacle in the name of rights rather than actually needing to convince, or have their guests convince, their colleagues and teachers of anything.

Of course, part of preparing students for democratic citizenship might include letting them make the mistakes we all make as we learn to be autonomous moral agents and to express ourselves. It might also include teaching students to tolerate views that are different from, even repugnant to, their own. But there are ways to teach these lessons that don’t involve inviting bigots onto campus and passing the popcorn. As law professor Paul Horwitz writes, universities “are laboratories for democracy, not laboratories of democracy: they contribute to democratic discourse, but not by following its rules.” What’s more, universities are not just offering lessons in tolerance. They are also helping students to develop empathy, to live in a community governed by social norms, and to learn how to persuade others through evidence and reason rather than simply to “own” them. A college’s curating of the speakers invited to campus based on the speakers’ demonstrated views and methods isn’t just about making some students in the school’s care feel better or preventing emotional harm (though it’s that too!). It’s just what schools do.99

*Schools as Laboratories*

The world needs curators, now more than ever. It isn’t hard for students either to hear a wide range of ideas or to themselves disseminate ideas to a wide audience. From social media, the World Wide Web, books, and other sources, they have a startling amount of information at their fingertips. The hard part is learning to separate the wheat from the chaff.
This is an existential challenge for the future of global democracy. We are surrounded constantly by information that isn’t just false or ill-informed but that is calculated to distract or mislead us. Colleges and universities are better suited than most institutions to help students learn how to navigate a rich but challenging informational ecosystem.\textsuperscript{100}

A constitutional law that respects both freedom of speech and the demands of governance in a complex world should be able to distinguish a ban on all political discourse from a ban on racial insults and sexual harassment. It should be attentive to codes of conduct that use sanctions as a mode of education from those that use sanctions merely to censor. It should care if the institution regulating speech is a school to which a student has entrusted his or her education rather than a police officer submitting all comers involuntarily to the state’s orthodoxy. Rights live in courts but, as the Framers well knew, they also live in local democratic institutions like public colleges and universities. Courts should give far greater deference to those institutions to exercise the very academic freedom courts have previously recognized as constitutionally meaningful.

This is not to say that rigorous speech codes or micromanagement of student organizations’ entreaties to outside speakers make good sense. But schools’ decisions about how to structure the information environment should generally be made based on the pedagogical judgments of educators rather than the political theories of judges. A school would of course have the professional discretion to determine that it should prioritize tolerance rather than hierarchical management of student speech. To live in a pluralistic society is to be surrounded by and forced to engage with people of opposing views. Students need to learn how to speak to such people, understand their claims, compromise with them, and accept their right to ground policy in divergent beliefs. To the extent college students remain in filter bubbles in which they engage only with like-minded friends and colleagues, there is much to be said for a school deciding to puncture that bubble for learning’s sake.\textsuperscript{101}
Moreover, even if school administrators believe in good faith that they should shield their students from racist or sexist speech, converting that belief into a code of conduct is challenging. The line-drawing problems are legion. Racist or sexist theories can be couched in misleading or pseudo-scientific terms, and well-supported research can have disturbing implications for racial or gender equality. The administrators making these judgments can be ill-informed or biased. Provocateurs can use censorship to generate publicity for themselves, which is just what they seek. And as we’ve seen, ham-handed application of speech codes can make martyrs out of drunken frat boys.102

These very good reasons to approach campus speech restrictions with caution don’t state the full case, however. As noted, a school’s role isn’t just to support student expression and facilitate ideas as it is sometimes caricatured by courts and critics. It is also to develop students’ capacities for civility, critical reasoning, and persuasion. Democracy needs those capacities every bit as much as it needs informational freedom. The practical and strategic justifications for permitting unfettered free expression on campus also cut both ways. A college platform can legitimate a conspiratorial or racist speaker and draw a crowd as much as being turned away can generate headlines.103

Finally, we should not lose sight of the actual harm of racist or sexist speech. Too often, the fact that such speech is constitutionally protected leads us to assume that it is, for that reason, not harmful. But we protect hateful speech not because of its innocence but rather in spite of its harm. Racial and sexual harassment and intimidation are threatening and traumatic to those it targets. Minority students also spend an enormous and disproportionate amount of time and energy defending against and protesting speech that demeans them. It is reasonable for a university to protect the students in its care from harm and to alleviate burdens they bear just for being minorities. They have that right.104

What the costs and benefits of curating speech adds up to is uncertainty. What it calls for is the exercise of judgment by people—let’s call them educators—who are trained and motivated to think carefully about how to construct ideal educational environments. Reasonable people
who believe deeply in the liberal values underlying freedom of speech and who also believe deeply in judicial review and limits on government can and do disagree about whether and how university administrators should deplatform speakers they believe to be racist or sexist or discipline students who violate norms of civility.

We can expect colleges and universities given the discretion to craft their own regulations of campus expressive activity to arrive at a wide range of policies. Schools would cover different specific acts; they would reach different judgments about which acts cross the line; they would develop different suites of exemptions from regulation; they would impose a different range of punishments and other remedies; they would structure their hearing processes differently; they would put in place different screening and approval processes for speakers; and they would implement different policies around funding and insurance arrangements. We tend to celebrate policy experimentation of this sort as one of the main benefits of a federal system of government. The 50 states can act as “laboratories of democracy” that serve as a proving ground for a range of ideas and can motivate best practices amid the uncertainty typical of a complex regulatory environment. There is no reason to see experimentation in speech regulation among America’s 5,000 colleges as less valuable.

The suggestion here isn’t for abdication of judicial review. Courts could still play a role in this space, not by deciding whether they agree with the balance public universities have struck but by assessing whether a particular school has been reasonable in its own striking of that balance. It’s not clear, for example, what values Berkeley was protecting when it banned political advocacy on campus. It is eminently clear, by contrast, that the University of Wisconsin was protecting the rights of its minority and female students, as the university reasonably understood those rights. The school’s attempt to exempt academic discussion from its speech restrictions indicate serious attention to minimizing the burden on academic freedom. Once the school’s degree of care became obvious, the court’s interest in Wisconsin’s code of conduct should have been at an end.

There’s every reason to expect this level of care to be common. Campus speech codes went away not primarily because of court cases but
because of self-regulation by schools. Despite much of the rhetoric around campus speech, academics are in fact unusually predisposed to value freedom of expression. Schools have a politics of their own, with a range of constituencies within faculties, among administrators, and across the student body. They also face pressure from politicians, ordinary citizens, and competitors. Students and faculty can be expected to self-select into or out of schools that censor student speech. Outside the shadow of rights, folks usually just kind of work things out.105

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6 McCleskey v. Kemp.
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8 Leo Weinstein, Not Alien to Government: The Roosevelt-Frankfurter Correspondence, 1 POLITY 250, 250 (1968).
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10 FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 29 (1938).
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14 Hirsch 33.
17 Feldman 11; Hirsch 100; Parrish 200.
18 Parrish 220-21; Raymond Moley, After Seven Years 285 (1939); Feldman 39; Matthew Josephson, Profiles: Jurist-I, New Yorker, Nov. 30, 1940, at 26.
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27 Feldman 232; Lochner, 198 U.S. at 75 (Holmes, J., dissenting).
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31 Gobitis, 310 U.S. at 600.
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38 Garrow 82; State v. Nelson, 11 A.2d 856 (Conn. 1940); Poe, 367 U.S. at 502 (quoting Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1940)).
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50 Pickering v. Board of Education; Dandridge v. Williams; Goldberg v. Kelly; Board of Regents v. Roth; Perry v. Sindermann; Bell v. Burson.


52 Garrow 245; NAACP v. Alabama.

53 Garrow 246-47.


55 Id. at 510 (Black, J., dissenting), 527 (Stewart, J., dissenting).

56 Jeremy Waldron, The Core of the Case Against Judicial Review, Yale L.J.

57 Garrow 252; Griswold, 381 U.S. at 486, 493-95 (Goldberg, J., concurring).


60 Yarbrough viii.

61 Poe (Harlan, J., dissenting).

62 Poe.

63 Poe.


65 YARBROUGH 309-10.

87. Planned Parenthood of the Columbia/Willamette v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).
88. MLK Comments on Meet the Press.
91. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); id. at 263 (Frankfurter, J., concurring).
95. Id. at 506.
98. Hijiya at 45.
99. Id. at 48-51; CAMPUS UNREST REPORT 21; Abrams 360.

Doe at 856.

Id. at 863.

90 UWM Post v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163, 1165-66 (E.D. Wis. 1991)

91 Id. at 1167-68.

92 Id. at 1169-77.


94 Reed, 523 F. Supp. 2d at ___.


97 Huangpu & Hussain.

98 Horwitz, First Amendment Institutions 113.

99 Constitutional Moral Hazard.

100 Christian Legal Soc’y, 561 U.S. at 702 (Stevens, J., concurring) (“As a general matter, courts should respect universities’ judgments and let them manage their own affairs.”); Constitutional Moral Hazard.


102 Goldberg 182.