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SYMPOSIUM ESSAY

REGULATING INTIMIDATING SPEECH

ALEXANDER TESIS*

In 2003, the Supreme Court decided in Virginia v. Black that laws punishing intentionally intimidating cross burning were constitutional. Professor Alexander Tesis argues that the Thirteenth Amendment grants Congress the authority to enact necessary and proper laws that, like Virginia's statute in Black, prohibit intentional public displays of symbols with a "long and pernicious history." He first discusses the effects that follow from the intimidating use of destructive messages. Professor Tesis refutes the absolutist perspective that the First Amendment does not allow hate speech regulation, and he further argues that political speech has been exploited throughout history. Lastly, this Essay examines the ways in which the Court has interpreted section 2 of the Thirteenth Amendment and argues that the Amendment should be used to permit hate speech regulation.

Hate speech that is intentionally used to intimidate others can drastically undermine public safety and social welfare. A federal statute could and should address the potential dangers posed by at least some such speech. Section 2 of the Thirteenth Amendment¹ authorizes Congress to punish the intimidating display of symbols associated with slavery and its incidents, including the display of burning crosses and similar badges of servitude.

The Court's decision in *Virginia v. Black* announced, for the first time, the constitutionality of laws punishing intentionally intimidating cross burning.² The Court determined that Virginia, in making it a felony for citizens to display a burning cross with the intent to intimidate, did not violate the First Amendment.³ Justice O'Connor, writing for the majority, recognized that hate groups often use symbols linked to past destructive

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¹ The Thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

² 538 U.S. 343, 362–63 (2003).

³ *Id.*

events to incite violence and discrimination in the present.⁴ Burning crosses refer to this country's history of involuntary servitude and mark vulnerable targets with a badge of supposed subordination.⁵ This Essay argues that the Thirteenth Amendment grants Congress the authority to enact necessary and proper laws that, like Virginia's statute in *Black*, prohibit intentional public displays of symbols with "a long and pernicious history."⁶

Hate groups adopt intimidating symbols with a historical message linked to slavery or other subordination and oppression.⁷ They target not only individuals, but also entire groups of people. Hate speakers clad their arguments in stereotypes about outgroups, using readily recognizable, but inaccurate, generalizations. Vituperative stereotypes cause various harms. They not only trigger collective prejudices but also diminish the objects' sense of welfare and security, making even mundane tasks, like going to the store, seem perilous.⁸ Whether they are opportunistic or spiteful, destructive messages⁹ directly limit victims' personal autonomy because they force them to avoid traveling in places where graffitied swastikas, burning crosses, or gay-bashing slogans bode danger.¹⁰ When they live in the

⁴ *Id.* at 1546.

⁵ Several authors have followed the same line of reasoning. *See, e.g.*, Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 161 (1992) (suggesting that hate speech regulations are legitimate under the Thirteenth Amendment "to cleanse America of the badges and incidents of slavery, such as burning crosses in the yards of black families in the dead of night"); Daniel W. Homstad, Note, *Of Burning Crosses and Chilled Expression* 15 HAMLINE L. REV. 167, 185 (1991) ("In a historical context the burning cross reminds us of a society openly tolerant of slavery.")

⁶ 538 U.S. at 363.

⁷ *See* Thomas Kleven, *Free Speech and the Struggle for Power*, 9 N.Y.L. SCH. J. HUM. RTS. 315, 350 (1992) (discussing the "historical relationship between hate speech and oppression," and the fact that the burning cross and the Nazi swastika are "widely recognized hate symbols"); Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?*, 6 COMM. L. & POL'Y 287, 292 (2001) (describing Neo-Nazi use of the swastika to refer to Adolf Hitler's Third Reich); Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1467-68 (recounting how the perpetrators of hate speech use messages with a historical link to violence against such groups as Jews and women).

⁸ *See* *Karins v. City of Atlantic City*, 706 A.2d 706, 721 (N.J. 1998) (determining that hate speech "'harms the individual who is the target[;] . . . it perpetuates negative stereotypes [and] promotes discrimination . . . by creating an atmosphere of fear, intimidation, harassment, and discrimination'" (quoting LAURA J. LEDERER & RICHARD DELGADO, *THE PRICE WE PAY* 4-5 (1995))); *see also* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (stating that discriminatory verbal attacks produce "an instinctive, defensive psychological reaction. Fear, rage, shock, and flight all interfere with any reasoned response.").

⁹ I use "hate speech" and "destructive messages" synonymously in this Essay. My meaning, however, is semantically closer to "destructive messages" because I am referring to intentionally intimidating messages uttered against an identifiable group without regard for whether they are spoken out of hate, desire for personal gain, or some other motive.

¹⁰ *Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2337 (1989) (citing *EEOC v. St. Anne's Hosp.*, 664 F.2d 128 (7th Cir. 1981); *Sambos Rest., Inc. v. City of Ann Arbor*, 663 F.2d 686, 703 (6th Cir. 1981)).

very neighborhoods where the symbolic intimidation is perpetrated, victims may even be forced to move from their homes to avoid the foreseeable risk.¹¹ Once a cross has been burnt on its lawn, after all, a black family is likely to be leery about approaching its own house. Finally, the spread of bigotry signals a diminution of egalitarianism because it tends to undermine the ability of minorities to live as coequal citizens of a constitutional republic. While the United States is a country that values dialogue, it is also a nation committed to protecting racial and ethnic equality, which intentional intimidation aims to upset.¹²

I. THE INTIMIDATING USE OF DESTRUCTIVE MESSAGES

Hate groups committed to undermining equal citizenship rely on destructive messages to popularize their agenda.¹³ In *The Nature of Prejudice*, one of the foremost authorities on the psychology of prejudice detailed the sequence of degenerative events: “Although most barking (antilocution) does not lead to biting, yet there is never a bite without previous barking. Fully seventy years of political anti-Semitism of the verbal order antedated the discriminatory Nürnberg [*sic*] Laws passed by the Hitler regime.”¹⁴ Almost immediately following the passage of these laws, the Nazis’ “violent program of extermination” began.¹⁵ Allport describes the typical progression: “antilocution → discrimination → . . . violence.”¹⁶ The more frequently a message is repeated, particularly when reputable and widely available sources broadcast it, the more valid it appears to the public.¹⁷

Destructive propaganda does not merely spark hatred against the targeted group. Hate speakers’ calls to action, which couple derisive ideas with criminal solutions, pose a national threat.¹⁸ Even a fringe group, given

¹¹ See, e.g., Matt Scallan, *Civil Rights Leader Still At It; McGee to Lead MLK Day March*, TIMES-PICAYUNE (New Orleans, La.), Jan. 19, 2004, at 1.

¹² See *United States v. Johnson*, 390 U.S. 563, 566–67 (1968) (determining that criminal penalties against intimidation and violence are aimed at securing equal access to constitutional rights and privileges (citing 18 U.S.C. § 241)); see also Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 67–69, 87 (1994) (explaining that hate speech regulation is part of America’s egalitarian legal commitment that entitles all persons to respect and dignity); Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 60 (1998) (stating that some limits on free expression are necessary where egalitarianism and human dignity are basic norms).

¹³ I have developed this point at greater length at ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 99–117 (2002).

¹⁴ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 57 (3d ed. 1979).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See GEORGE E. SIMPSON & J. MILTON YINGER, *RACIAL AND CULTURAL MINORITIES* 305–07 (4th ed. 1972); TEUN A. VAN DIJK, *COMMUNICATING RACISM* 40, 123 (1989).

¹⁸ See PAUL GILROY, *AGAINST RACE* 247 (2000) (“In many countries, hostile responses to cultural, linguistic, and religious differentiation and fascist enthusiasms for purity lie

enough time to indoctrinate a popular audience with an emotive ideology, can become popular enough to win national elections. The most extreme example of this phenomenon was the way in which the National Socialist Party in Germany used anti-Semitism to develop from a group that was a laughingstock after the 1923 Munich Beer Hall Putsch¹⁹ to a powerful political party: in 1928, the National Socialists received 2.6% of the popular vote; in 1932 they won 37% of the vote; and, in 1933, Adolf Hitler became the German Chancellor.²⁰ The Nazis were not elected in a cultural vacuum.²¹ Years of anti-Semitic propaganda and indoctrination preceded their political successes.²²

The instrumentality of destructive messages in mobilizing a coterie devoted to abusing outgroups raises the question of whether their intimidating communications should be restricted. In assessing the need for a hate speech statute, the freedom to intimidate must be balanced against the reasonable expectation of civic order. Speakers should not have an unlimited license to promote discrimination that infringes on the targeted groups' freedom to choose a profession,²³ to choose a spouse,²⁴ or to raise children.²⁵

Supreme Court precedents indicate the constitutionality of balancing speech against other fundamental rights. In *Schenck v. Pro Choice Network of Western New York*, the Court balanced the right of abortion protesters against the government's interest in public safety, upholding an

dormant within the most benign patriotic rhetoric and the glamour of national sameness it promotes."); G. Legman, *Psychopathology of Comics*, in *BLACK SKIN, WHITE MASKS* 146–47 (Frantz Fanon ed., 4th ed. 1986) (stating that the national conscience can be lulled by popular national prejudices).

¹⁹ See Hanno Scheuch, *Austria 1918–55: From the First To the Second Republic*, 32 *HIST. J.* 177, 184 (1989) (noting the decline of the German Nazi party after the Beer Hall Putsch); Peter D. Stachura, *National Socialism and the German Proletariat, 1925–1935: Old Myths and New Perspectives*, 36 *HIST. J.* 701, 705 (1993) (discussing how little support from workers the Nazis had at the time of the Beer Hall Putsch).

²⁰ WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 118, 185, 187 (1960); see also David Kretzmer, *Freedom of Speech and Racism*, 8 *CARDOZO L. REV.* 445, 464 (1987).

²¹ See Dietrich Orlow, *The Conversion of Myths Into Political Power: The Case of the Nazi Party*, 72 *AM. HIST. REV.* 906 (1967) (discussing the centrality of anti-Semitic myths in the Nazi rise to power).

²² See LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933–1945*, at 34–35 (1975) (discussing the nineteenth-century manifestations of political anti-Semitism); JOHN WEISS, *IDEOLOGY OF DEATH* 84 (1996) (discussing how Otto Glagau developed an anti-Semitic slogan in 1876 that continued to be popular into the Nazi era).

²³ See *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (“[T]his Court has indicated that the liberty component of the Fourteenth Amendment’s Due Process Clause includes some generalized due process right to choose one’s field of private employment . . . which is nevertheless subject to reasonable government regulation.”).

²⁴ See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (determining that marriage is a fundamental civil right); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations”).

²⁵ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that the Due Process Clause of the Fourteenth Amendment includes the right “to marry, establish a home and bring up children”).

injunction against the protestors that burdened no more speech than was necessary to achieve security.²⁶ The Court has also balanced the rights of speakers against the right of the audience to be left alone. In *Frisby v. Schultz*, the Court upheld an ordinance prohibiting picketing in a residential area because the targeted doctor had become figuratively, “and perhaps literally, trapped within the home, and . . . [w]as left with no ready means of avoiding the unwanted speech.”²⁷ In a different context, as W. Bradley Wendel has pointed out, the Illinois Bar Committee balanced the First Amendment rights of Matthew Hale, the leader of the supremacist World Church of the Creator, against the interests in racial equality and human dignity, and chose to deny Hale a license to practice law in Illinois.²⁸ Other countries have also recognized that the constitutional right to be free from intimidation tips the scales against the desires of speakers who aim to use words or signs that rally bigots to commit harmful actions.²⁹ Government has a significant interest in protecting the safety of groups against the cathartic interest of intimidating bigots.

II. ADDRESSING THE ABSOLUTIST PERSPECTIVE

Some free speech absolutists, such as Harvey Silverglate,³⁰ have argued that regulating the spread of destructive messages amounts to an unconstitutional intrusion into speakers’ rights. The most prominent judicial advocate of the absolutist position was Justice Black.³¹ He maintained that laws directly limiting speech were unjustifiable “by a congressional or judicial balancing process.”³² Any limitation on First Amendment freedoms, he

²⁶ See 519 U.S. 357, 374–76 (1997); see also *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 770 (1994).

²⁷ 487 U.S. 474, 487 (1988).

²⁸ W. Bradley Wendel, “*Certain Fundamental Truths*”: A Dialectic on Negative and Positive Liberty in Hate-Speech Cases, 65 LAW & CONTEMP. PROBS. 33, 35 (2002).

²⁹ See Bradley A. Appleman, *Hate Speech: A Comparison of the Approaches Taken by the United States and Germany*, 14 WIS. INT’L L.J. 422, 434 (1996) (giving examples of how the German Constitutional Court has a low tolerance for hate speech when balancing it against equal dignity interests); Kathleen Mahoney, *Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propaganda*, in *THE PRICE WE PAY* 279 (Laura J. Lederer & Richard Delgado eds., 1995) (discussing the Canadian approach of balancing freedom of expression against Canadian Charter of Rights and Freedoms guarantee of equality); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: An Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 774 (2000) (discussing Canadian balancing of hate propaganda and free speech).

³⁰ See Ben Lehrer, *Silverglate ’67 Calls for Repeal of Sexual Harassment Guidelines*, HARV. L. REC., Mar. 5, 1999, at 7, available at <http://www.law.harvard.edu/students/orgs/forum/silver6.pdf> (last visited Mar. 24, 2004) (concerning Silverglate’s self-characterization as a free speech absolutist).

³¹ See, e.g., Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Edmond Cahn, *Justice Black and First Amendment “Absolutes”*: A Public Interview, 37 N.Y.U. L. REV. 549 (1962).

³² *Barenblatt v. United States*, 360 U.S. 109, 141 (1959) (Black, J., dissenting).

went on, not only “violate[s] the genius of our *written* Constitution, but it runs expressly counter to the injunction to Court and Congress made by Madison when he introduced the Bill of Rights.”³³ Black’s absolutism had textualist origins: “I do not subscribe to [the balancing] doctrine for I believe that the First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”³⁴ The majority of the Court never shared Black’s conviction on this point.³⁵

In fact, in *Nebraska Press Ass’n v. Stuart*, the Court explicitly stated that the “Court has frequently denied that First Amendment rights are absolute.”³⁶ While free speech is essential to a robust exchange of ideas in our pluralistic, constitutional republic,³⁷ the Supreme Court has announced that some narrowly tailored exceptions do not violate the First Amendment, as long as they serve a compelling state interest. Contemporary jurisprudence recognizes the constitutionality of laws limiting a variety of speech, including: (1) a zoning limitation aimed at the secondary effects of operating adult theaters,³⁸ (2) a statutory prohibition against threatening the President,³⁹ (3) a restriction forbidding electioneering within 100 feet of a polling place on election day,⁴⁰ (4) a provision prohibiting the deceptive and misleading use of a trade name,⁴¹ (5) a statute punishing the knowing destruction or mutilation of draft cards,⁴² and (6) a prohibition of the dis-

³³ *Id.* at 143 (Black, J., dissenting).

³⁴ *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting).

³⁵ See Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 283 (1995).

³⁶ 427 U.S. 539, 570 (1976).

³⁷ See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986) (“The purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live. Autonomy is protected not because of its intrinsic value . . . but rather as a means or instrument of collective self-determination.”).

³⁸ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54–55 (1986). In *Renton*, the Court held that the adult theater zoning ordinance at issue was content-neutral and subject only to intermediate scrutiny because the law targeted the secondary effects of adult entertainment establishments. *Id.* at 47–48, 54. Both Justice Brennan and Justice Kennedy, however, used subsequent concurring opinions to criticize *Renton*’s “content-neutral” characterization. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (Brennan, J., concurring in part).

³⁹ *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (noting, in dicta, that a statute prohibiting a knowing and willful threat against the President was constitutional on its face, but reversing a conviction under it because the alleged threat was a mere “political hyperbole”).

⁴⁰ *Burson v. Freeman*, 504 U.S. 191, 206, 211 (1992) (finding a Tennessee statute survived strict scrutiny, in part, based on a “widespread and time tested consensus” and “simple common sense”).

⁴¹ *Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (finding that the use of a trade name is a commercial form of speech that the state can regulate).

⁴² *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (reasoning that the government interest in regulating the “non-speech” elements of the conduct warrants the “inci-

tribution of obscene materials appealing to prurient interests in sex and portraying “sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”⁴³

Like obscenity and threats made against the President, hate speech has a very low social and political value.⁴⁴ Indeed, like fighting words, which the First Amendment does not protect, destructive messages should be deemed “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁴⁵

In addition to being at odds with constitutional jurisprudence, absolutists believe that restricting hate speech is as risky to a well-functioning polity, especially to its most disempowered members, as restricting political speech.⁴⁶ This perspective overlooks how vitriol that is actively bent on infringing some citizens’ civil rights undermines the free exchange of political, philosophical, literary, and scientific views.⁴⁷ In fact, hate speech uses the façade of free speech to intimidate speakers from freely exchanging ideas on topics of public interest.

The phrase, “Congress shall make no law abridging freedom of speech,” is not a blanket prohibition against all regulation of communicative acts. Its underlying idea is far more complicated. A court evaluating whether a speech regulation violates the First Amendment must deliberate on whether the regulation restricts more speech than is necessary to prevent foreseeable harms and whether it chills protected speech.⁴⁸ First Amendment issues are decided by considering the competing public and private con-

dental restriction on alleged First Amendment freedoms”).

⁴³ *Miller v. California*, 413 U.S. 15, 23–24 (1973).

⁴⁴ See Charles J. Ogletree, Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 502 (1996) (“Hate speech raises the issue of a conflict between political participation by minorities and speech or action which threatens that participation. Like shouting ‘fire’ in a crowded theater, like child pornography and obscenity, hate speech is of little value to society, yet the consequences for its targets and for society are certainly of ‘constitutional significance.’”).

⁴⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding the prevention of and punishment for “fighting words” to be constitutional).

⁴⁶ For instance, Nadine Strossen, the president of the American Civil Liberties Union, has argued that hate speech restrictions are disproportionately enforced against groups lacking political power. Nadine Strossen, *Incitement to Hatred: Should There Really Be a Limit?*, 25 S. ILL. U. L.J. 243, 266 (2001).

⁴⁷ Along these lines, Steven J. Heyman has pointed out that hate speech does not contribute to democratic self-government because it undermines mutual respect among citizens. Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119, 1185 n.413.

⁴⁸ See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (holding that “the greater ‘objectivity’ of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones . . . and that the greater ‘hardiness’ of commercial speech . . . likely diminishes the chilling effect that may attend its regulation” (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771, n.24 (1976))); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that as long as liability for defamation is based on intentional or reckless falsehood, it does not impermissibly chill protected speech).

cerns involved in a particular case.⁴⁹ Justice Frankfurter explained that “[t]he demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.”⁵⁰

Numerous countries recognize the incongruity of inciteful hate speech with their governments’ obligation to protect fundamental interests.⁵¹ For instance, the German Basic Law, upon which that country’s constitutional system is based, reflects the disjunction between political speech and expressions aimed at undermining democracy. Article 21, section 2, outlaws political parties that threaten democratic order.⁵² Similarly, Canada prohibits hate speech because it subverts the democratic process.⁵³

International conventions also recognize the incongruity. The European Convention on the Protection of Human Rights and Fundamental Freedoms provides that speech can be limited to preserve democratic order.⁵⁴ Likewise, Article 4(5) of the United Nations Convention on the Elimination of All Forms of Racial Discrimination commits signatories to outlawing incitement to engage in racial discrimination.⁵⁵

The United States Supreme Court has similarly recognized that legislatures can restrict inciteful discourse based on defamation and group stereotypes. In *Beauharnais v. Illinois*, the Court upheld the constitutionality of a group libel statute that made it unlawful to portray “depravity, criminality . . . or lack of virtue of a class of citizens, of any race, color, creed, or religion” and to expose those citizens to “contempt, derision, or obloquy.”⁵⁶ The majority found that based on Illinois’s history of racial conflict, the legislature had the power to punish group libel when it threatened “the peace and well-being of the State.”⁵⁷

⁴⁹ See *Barenblatt*, 360 U.S. at 126.

⁵⁰ *Dennis v. United States*, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring).

⁵¹ Many democracies, including Austria, Finland, and Italy, prohibit inciteful hate speech. See § 283 StGB (Aus.); Penal Code ch. 11, § 8 (Fin.); Decree-Law 122 (Apr. 26, 1993), Law 205 (June 25, 2003) (Italy). For a fuller discussion, see TESIS, *supra* note 13, at ch. 12.

⁵² GRUNDGESETZ [GG] [Constitution] art. 21.2, reprinted in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 115 (A. P. Blaustein & G. H. Flanz eds., official trans., 1994).

⁵³ See *Regina v. Keegstra* [1990] 3 S.C.R. 697, 764 (Can.) (finding that hate propaganda argues “for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics”). The Supreme Court of Canada reaffirmed its commitment to this case in *Regina v. Keegstra* [1996] 1 S.C.R. 458 (Can.).

⁵⁴ Art. 10, 312 U.N.T.S. 22, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, & Protocol No. 8, E.T.S. 118.

⁵⁵ UNITED NATIONS DECLARATION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION art. 4(5), available at <http://www.unhcr.ch/html/menu3/b/9.htm> (last visited Apr. 24, 2004).

⁵⁶ 343 U.S. 250, 251 (1952).

⁵⁷ *Id.* at 258–59. Erwin Chemerinsky and Nadine Strossen have argued that *Beauhar-*

III. POLITICAL EXPLOITATION OF INTIMIDATION

Even political speech can exploit stigmatizing stereotypes to advocate restricting the civil liberties of disempowered minorities. An example of this phenomenon is the reliance of Tsar Nicholas II's secret police on anti-Semitism in fabricating the *Protocols of the Elders of Zion* in order to discredit revolutionary groups.⁵⁸ From Imperial Russia through Nazi Germany, the *Protocols* spurred on devoted anti-Semites.⁵⁹ Egypt's and Syria's current governments continue to use the forgery as proof of a Jewish conspiracy to dominate world politics.⁶⁰ The example of the *Protocols* demonstrates how an individual libel of an ethnic group can be used to further political ambitions and incite hate for nearly a century.

In the United States, parts of the Constitution as originally drafted reflected the effectiveness of vociferous pro-slavery demands of Georgia's and South Carolina's representatives to the Constitutional Convention.⁶¹ Until states ratified the Reconstruction Amendments, the First Amendment coexisted harmoniously alongside constitutional provisions that specially protected the institution of slavery. These included the Three-Fifths Clause, the Fugitive Slave Clause, and the Importation Clause.⁶² The First Amendment was, by itself, inadequate to rid the United States

nais probably did not survive *New York Times v. Sullivan*, 376 U.S. 254 (1964), which announced an actual malice requirement for defamations against public figures. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 978 (2d ed. 2002); Nadine Strossen, *Hate Speech and Pornography: Do We Have To Choose Between Freedom of Speech and Equality*, 46 CASE. W. RES. L. REV. 449, 459 n.41 (1996). This skepticism is unfounded because *New York Times* quotes *Beauharnais*, indicating its continuing precedential value. *New York Times*, 376 U.S. at 268. Moreover, even *R.A.V. v. St. Paul*, which was otherwise critical of a hate speech ordinance, quoted *Beauharnais* for the proposition that some categories of speech are "not within the area of constitutionally protected speech." 505 U.S. 377, 383 (1992). *New York Times's* effect on *Beauharnais* extends only to cases where group libels are directed at public personalities. *New York v. Ferber*, 458 U.S. 747, 763 (1982).

⁵⁸ STEPHEN E. BRONNER, *A RUMOR ABOUT THE JEWS: REFLECTIONS ON ANTISEMITISM AND THE PROTOCOLS OF THE LEARNED ELDERS OF ZION* 1, 4, 114 (2000) (concerning the sources of the forgery and its use of traditional myth and modern prejudices).

⁵⁹ BENJAMIN W. SEGEL, *A LIE AND A LIBEL* 22–23, 87–93 (Richard S. Levy ed. & trans., Lincoln: University of Nebraska, 1995) (1926) (early warning about the dangers the pamphlet posed to Jews); Bronner, *supra* note 58, at 4, 114.

⁶⁰ Judea Pearl, *This Tide of Madness*, WALL ST. J., Feb. 20, 2003, at A12 (discussing the recent Egyptian state media's production of a television special based on the Protocols, asserting the "fantasy that Jews are plotting to take over the world"); State Department Press Releases and Documents, *U.S. Will Press OSCE to Adopt New Measures to Fight Anti-Semitism—U.S. Envoy to Israel Previews OSCE Conference in Berlin in April*, 2004 WL 59149725 (stating that in 2003 Syria financed a twenty-nine-part Hizbollah broadcast "which was full of anti-Semitic and demonizing representations of Jews based on the 'Protocols of the Elders of Zion'").

⁶¹ For a thorough discussion of South Carolina's and Georgia's demands, see CALVIN C. JILLSON, *CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787*, at 140–50 (1988).

⁶² See U.S. CONST. art. I, § 2, cl. 3, partly repealed by U.S. CONST. amend. XIV, § 2; *id.* art. IV, § 2 cl. 3, affected by U.S. CONST. amend. XIII; *id.* art. I, § 9, cl. 1.

of slavery. Rather, in the antebellum period, the proponents of slavery often dominated the political discourse.

During that period, Southern politicians used the congressional forum to exact numerous legal compromises aimed at preserving and spreading slavery. The passionate Southern advocacy of race-based slavery led to the Missouri Compromise of 1820 and later the Compromise of 1850, which contained the Fugitive Slave Act. William S. Jenkins, one of the leading historians of pro-slavery thought, has noted how important the Missouri debates were in increasing support for slavery and subduing opposition to the institution.⁶³ These debates were not only legalistic but also accentuated philosophical and moralistic differences about human bondage.⁶⁴ At the end of the Missouri debates, the proponents of slavery were able to extend slavery into Missouri. Proslavery Southerners wanting to prevent slaves from escaping to the North later overcame passionate antislavery opposition and enacted the Fugitive Slave Act of 1850, which required ordinary citizens in the North to participate in the recapture of fugitive slaves.⁶⁵ Legislative successes of slavery's advocates indicate that they were more successful in the antebellum marketplace of ideas than those who opposed slavery.⁶⁶

⁶³ WILLIAM S. JENKINS, *PRO-SLAVERY THOUGHT IN THE OLD SOUTH* 66 (1935).

⁶⁴ During one congressional debate on admitting Missouri into the Union, Rufus King argued that natural law forbade one man to enslave another. *Quoted in id.* at 67–68 n.54. At another point of the Missouri controversy, Senator Jonathan Roberts of Pennsylvania overtly rejected the claim that slavery was a “right . . . I deny that there is any power in a State to make slaves, or to introduce slavery where it has been abolished, or where it never existed . . .” 16 ANNALS CONG. 338 (1820). In light of Congress’s decision to admit Missouri as a slave state, however, King’s and Robert’s views seem to have lost out to the diatribe of proslavery congressmen, such as the influential Senator William Smith of South Carolina. Smith disputed the view of those who lavished “opprobrious epithets . . . upon those who hold slaves; calling the practice cruel, derogatory to the character of the nation, opposed to Christian religion, the law of God, pagain in its principle . . .” *Id.* at 264. Smith claimed that slaves were, in fact, well off because “no class of laboring people in any country upon the globe . . . are better clothed, better fed, or are more cheerful, or labor less, or who are more happy, or, indeed, who have more liberty and indulgence than the slaves of the Southern and Western States.” *Id.* at 268. Smith considerably swayed some senators who understood him to be justifying the moral right of slavery and set the stage for later proponents of slavery. Philip F. Detweiler, *Congressional Debate on Slavery and the Declaration of Independence, 1819–1821*, 63 AM. HIST. REV. 598, 605 (explaining that Senator Smith’s justification of slavery contributed to “a larger pattern of Southern responses to the increasing antislavery sentiment”); JENKINS, *supra* note 63, at 71 (quoting senators who, during the debate on the Missouri Compromise, lauded Smith’s justification of slavery).

⁶⁵ The Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, repealed by Act of June 28, 1864, ch. 166, 13 Stat. 200.

⁶⁶ Anti-slavery activists amongst the Founders included John Jay, who presided over the New York Society for Promoting the Manumission of Slaves, and Benjamin Franklin, who was elected president of the Pennsylvania Society for Promoting the Abolition of Slavery. OSCAR REISS, *BLACKS IN COLONIAL AMERICA* 166 (1997). Leading figures in the revolutionary movement who propounded the anti-slavery position included James Otis, Thomas Paine, and John Adams. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1306 n.150 (2000); R. B. Bernstein, *Rediscovering Thomas Paine*, 39 N.Y.L. SCH. L. REV. 873, 881 (1994); John R. Howe, Jr.,

Some politicians became folk heroes because of their proslavery apologetics. For instance, Senator John Calhoun influenced generations of Southern thought. Calhoun popularized slavery and affected followers who were willing to secede from the Union in order to preserve the South's peculiar institution.⁶⁷

Clearly, not all racist deprecations are benign. When coupled with political power, racist deprecations can become part of a country's basic laws, cause harm for several generations, and disempower millions of people. Slavery did not end because of abolitionist discourse—although the voices of Theodore Weld, William Lloyd Garrison, and Frederick Douglass raised awareness about the hardships of slavery—but through a bloody Civil War.

IV. CONGRESSIONAL AUTHORITY TO REGULATE HATE SPEECH

Following the War, the Radical Republicans designed the Reconstruction Amendments, most conspicuously the enforcement clauses in section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment, to empower Congress to protect civil rights, particularly of formerly disempowered blacks. Akhil Reed Amar has pointed out that the Reconstruction Amendments shifted the constitutional paradigm, including the significance of the First Amendment.⁶⁸ Reconstruction, which for all practical purposes was woefully unsuccessful, constitutionally committed the country to the very pursuit of equality that hate speakers want to undermine.

The First Amendment does not exist in a historical void; evaluations of what speech it protects must be balanced against the anti-oppression principles embodied in the Thirteenth and Fourteenth Amendments.⁶⁹ After the

John Adams's Views on Slavery, 49 J. NEGRO HIST. 201, 201–02 (1964).

⁶⁷ David A. J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law*, 26 N.Y.U. J. INT'L L. & POL. 1, 16 (1993) (asserting that *Dred Scott v. Sandford*, 60 U.S. 393 (1856), embodied Calhoun's constitutionalism). Calhoun argued that the relationship between blacks and whites in the South formed "the most solid and durable foundation on which to rear free and stable political institutions." Speech on the reception of Abolition Petitions (Feb. 6, 1837), in 2 THE WORKS OF JOHN C. CALHOUN 625, 632 (Richard K. Crallé ed., New York: D. Appleton 1883). He combined the fictitious view of biologically distinct races, having varying physical and intellectual abilities, with the self-serving conclusion that it was better for whites and blacks that the latter be enslaved in the United States than free in Africa. See Report on that portion of the President's Message which related to the adoption of efficient measures to prevent the circulation of incendiary Abolition Petitions through the Mail (Feb. 4, 1836), in 5 THE WORKS OF JOHN C. CALHOUN 190, 204 (Richard K. Crallé ed., New York: D. Appleton 1883). Along the same lines, South Carolina Governor James H. Hammond unapologetically argued before the U.S. Senate that white civilization was justified in benefiting from an uncompensated black workforce. CONG. GLOBE, 35th Cong., 1st Sess. Appendix at 71 (Mar. 4, 1858), quoted in JENKINS, *supra* note 63, at 286.

⁶⁸ See Amar, *supra* note 5, at 155–60 (arguing that the second section of the Thirteenth Amendment provides a better constitutional argument for the regulation of hate speech than the First Amendment would on its own).

⁶⁹ I draw my analysis on the Thirteenth Amendment from the works of scholars who

passage of these two amendments, the expression of harmful intentions substantially likely to cause advocated misethnic subordination is no longer protected speech, as it was in the antebellum South.⁷⁰

Of the Reconstruction Amendments, the Thirteenth Amendment is particularly relevant to the regulation of hate symbols and other destructive messages. Under the Thirteenth Amendment, Congress may rationally determine and legitimately pass necessary and proper legislation to eradicate any remaining badges and incidents of servitude.⁷¹ In the landmark case *Jones v. Alfred H. Mayer*, the Supreme Court extended the Thirteenth Amendment's reach well beyond forced labor. *Jones* ruled that with the Civil Rights Act of 1866 Congress prohibiting private and public discrimination in the sale of real estate, and that doing so was "necessary and proper" to enforce the Thirteenth Amendment.⁷² In the cases that followed *Jones*, the Court continued to interpret broadly Congress's section 2 authority to prohibit stigmatizing conduct.⁷³ *Runyon v. McCrary* is representative of the trend—in that case, the Court determined that § 1981, passed pursuant to Congress's Thirteenth Amendment enforcement authority, prevented a private school from refusing to enroll black children.⁷⁴

have argued for balancing First Amendment principles with Fourteenth Amendment values. See, e.g., John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 Ky. L.J. 9, 89–90 (1997) (discussing how to balance First Amendment speech values with Fourteenth Amendment equality values); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 481 ("We must weigh carefully and critically the competing constitutional values expressed in the first and fourteenth amendments.").

⁷⁰ Andrew Taslitz has made a similar point in a different context, in regard to the applicability of the Reconstruction Amendments to the regulation of bias crimes: "The Fourteenth Amendment is best understood as denying constitutional protection to the expressive component of racial violence. First Amendment free 'speech' in a post-Reconstruction world cannot sensibly be understood as including the expression embodied in group-directed violence." Taslitz, *supra* note 66, at 1287.

⁷¹ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

⁷² *Id.* at 439 (the Enabling Clause "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States'" (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883))). The Court read section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1982 (2000), to prohibit private actors from discriminating against real property purchasers: "[T]he fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals." *Jones*, 392 U.S. at 438–39.

⁷³ See, e.g., *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973) (holding that racial membership requirements for neighborhood swimming pools are prohibited); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) (filing with the EEOC did not toll the limitation to file suit under § 1981).

⁷⁴ 427 U.S. 160, 172–73, 179 (1976).

Both *Jones* and *Runyon* give Congress broad discretion to define the incidents of involuntary servitude. Substantive statutes passed under section 2 of the Thirteenth Amendment that protect the enjoyment of freedom can extend well beyond section 1's self-executing protections.⁷⁵ Congress can investigate and determine whether involuntary servitude is linked to modern forms of discrimination. In *Jones*, the Court determined that housing discrimination, which is not literally slavery, falls within congressional section 2 authority. The Court was not saying that Alfred H. Mayer Company's refusal to sell property to the Joneses was slavery. Nor did the Runyons enslave Michael McCrary when they refused to enroll him. Likewise, even though hate speech is not literally slavery, it should be prohibited under the broad protections against racial subordination to which the Thirteenth Amendment applies.

The Supreme Court has established that the Thirteenth Amendment extends to "varieties of private conduct . . . beyond the actual imposition of slavery or involuntary servitude."⁷⁶ The Amendment stands for the proposition that "former slaves and their descendants should be forever free."⁷⁷ Furthermore, freedom is guaranteed wherever the United States has jurisdiction, regardless of whether oppressions are committed against the direct descendants of slavery. Senator Lyman Trumbull, whose Judiciary Committee reported the language of the Thirteenth Amendment, explained Congress's enforcement authority: "If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit the colored man to contract, which will not permit him to testify, which will not permit him to buy and sell, and to go where he pleases, it has the power to do so, and not only the power, but it becomes its duty to do so."⁷⁸ Nor is the Thirteenth Amendment applicable only to discrimination against blacks. On another date, Trumbull explained that the Thirteenth Amendment granted Congress the authority to "pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States."⁷⁹

⁷⁵ See Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822–23 (1999) (describing Congress's broad section 2 power to pass far-reaching, substantive statutes).

⁷⁶ *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

⁷⁷ *Id.*

⁷⁸ CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

⁷⁹ CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). The Court maintained this position in the *Slaughter-House Cases*, in which it found that the Amendment applies to "Mexican peonage and the Chinese coolie labor system." 83 U.S. (16 Wall.) 36, 72 (1873). Contemporary decisions dealing with the Thirteenth Amendment have also understood "race" to include a variety of ethnic groups. In *Shaare Tefila Congregation v. Cobb*, the Court held that § 1982 applies to any group that Congress intended to protect when it enacted that statute in 1866, pursuant to its Thirteenth Amendment section 2 authority. 481 U.S. 615, 617 (1987). The Court held specifically that Jews and Arabs are part of the protected class that can bring a cause of action pursuant to § 1982. *Id.* at 617–18. In another case, the Court determined "Congress intended to protect from discrimination identifiable classes of persons who were subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended

Congress's role is to determine what the rubrics of freedom are and to safeguard their availability through necessary and proper legislation.

The Thirteenth Amendment therefore does far more than simply prohibit institutionalized slavery; it prevents any form of private or government-sponsored racial subordination. And courts should defer to Congress's findings on this point as long as there is any rational basis for those findings. Thus, if Congress finds that hate speech is rationally related to the badges or incidents of servitude, it may use its section 2 power to prohibit it.

For instance, Congress can investigate whether persons who seek to intimidate others with images that are historically linked to oppression are likely to achieve their purpose. Those images may include burning crosses and swastikas. If Congress finds that the risk of intimidation is high, it can legitimately invoke its section 2 authority to prohibit the intentionally intimidating display of those images. A symbol's meaning depends on the context in which it is used. Symbols can connect even disparate elements of people's experiences, filling them with cultural content.⁸⁰ The implication is that images such as burning crosses and swastikas can relay related static, supremacist, and violent messages.⁸¹ It is reasonable to believe that Congress can determine the symbols that are used to terrorize populations perpetuate the badges and incidents of servitude.

Congress's Thirteenth Amendment authority to regulate the private use of destructive symbols is a better source of power than the Fourteenth Amendment. The Thirteenth Amendment grants Congress broader authority than the Fourteenth Amendment, which the Court long ago limited to the regulation of government conduct.⁸²

Further, Congress's power under section 2 of the Thirteenth Amendment might be better suited to enacting a national hate speech law than the Commerce Clause. While Congress's Commerce Clause authority ex-

§ 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory." *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 611 (1987).

⁸⁰ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 958 (1995) (explaining how social meaning is based on contextual associations of fact).

⁸¹ See Matsuda, *supra* note 10, at 2365–66; Robin D. Barnes, *Standing Guard for the P.C. Militia, or, Righting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct & Political Correctness*, 1992 U. ILL. L. REV. 979, 979 n.1 (discussing the resurgence of supremacist groups using Confederate symbols and swastikas "as a reminder of their pledge to uphold racial violence, murder, and mutilation").

⁸² See, e.g., *United States v. Harris*, 106 U.S. 629, 640 (1882). Recently, the Court relied on the state action requirement in striking down the Violence Against Women Act of 1994. *United States v. Morrison*, 529 U.S. 598, 620–21 (2000). Although this is not the right place for an extensive discussion of the differences between Thirteenth Amendment section 2 and Fourteenth Amendment section 5 powers, suffice it to say that the Court's limitation of section 5 power seems artificially narrow in light of the changes the Reconstruction Amendments were meant to effectuate. See Amar, *supra* note 75, at 822–24 (arguing that section 2 and section 5 give Congress a similar breadth of interpretive power); but see Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 493–94 (2002) (arguing that the section 2 and section 5 enforcement powers differ significantly because of the latter's state action requirement).

tends to many forms of private discrimination,⁸³ recently, in *United States v. Morrison* and *United States v. Lopez*, the Court reduced Congress's interpretive power under that clause.⁸⁴ The Court now requires that conduct regulated under the Commerce Clause have a "substantial effect" on interstate commerce,⁸⁵ which has altered the previous inquiry into whether Congress has a rational basis for believing the statute would have a significant effect on commerce.⁸⁶ In the name of federalism, the Court has both diminished Congress's power to act on rational findings that regulated action affects interstate commerce and has increased judicial oversight authority. *Morrison* and *Lopez* have made the Thirteenth Amendment ever more relevant because, since *Jones*, the Court has not deviated from the rational basis scrutiny of laws passed pursuant to the Thirteenth Amendment. Another reason why the Thirteenth Amendment might be preferable is that, unlike the Commerce Clause, the Amendment would allow the federal legislature to prohibit hate speech with either an intrastate or an interstate effect.⁸⁷

A federal anti-intimidation law is preferable to state-by-state legislation. The enactment of a federal law will demonstrate a national commitment to preventing the terrorizing use of subordinating images. A federal, uniform law would provide a remedy for victims in states that lack any law against intimidating hate speech.

Such a federal law against racist incitement may be modeled after the Virginia Cross Burning Statute, which the Court, in *Virginia v. Black*, found partially constitutional in 2003. The statute provided,

⁸³ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

⁸⁴ See *Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."); *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (holding Congress may regulate three areas of commerce: channels, instrumentalities, and those activities having a substantial relation to interstate commerce).

⁸⁵ *Lopez*, 514 U.S. at 561–63.

⁸⁶ In a dissent to *Lopez*, Justice Breyer argued that Commerce Clause cases have not consistently used the "substantial effects" label: "I use the word 'significant' because the word 'substantial' implies a somewhat narrower power than recent precedent suggests. But to speak of 'substantial effect' rather than 'significant effect' would make no difference in this case." *Id.* at 616–17 (Breyer, J., dissenting) (citations omitted).

⁸⁷ The Thirteenth Amendment's prohibition obviously not only prohibits slavery with some substantial effect on the interstate economy, but applies to any form of involuntary servitude, even when its perpetration is completely centered in one state. The Anti-Peonage Act is an important prohibition against intrastate and interstate acts of involuntary servitude. 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. § 1581 (2000)). The Act was enacted pursuant to section 2 of the Thirteenth Amendment. See *Pollock v. Williams*, 322 U.S. 4, 17 (1944). The intrastate uses of the Anti-Peonage Act has long been established. See *Bailey v. State*, 219 U.S. 219, 240–41 (1911); *Clyatt v. United States*, 197 U.S. 207 (1905). Circuit court holdings on the perpetration of peonage continue to hold on to the intrastate reach of the Thirteenth Amendment. See, e.g., *United States v. Harris*, 701 F.2d 1095, 1097–98 (4th Cir. 1983) (concerning involuntary servitude occurring on a migrant farm in Wilson, N.C.).

[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.⁸⁸

Justice O'Connor, writing for the majority, found Virginia's prohibition against intentionally intimidating cross burning to be a legitimate limitation on speech that was of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."⁸⁹ Thus, the Virginia statute constitutionally limited a form of expression that posed an imminent threat of harm.⁹⁰ The Court also determined that the statute did not discriminate on the basis of the communicators' viewpoint because it prohibited any form of cross burning, regardless of whether it targeted the victims' race, religion, or other characteristics.⁹¹ Virginia could selectively punish cross burnings, even though it did not criminalize all other forms of virulent intimidation, "in light of the cross burning's long and pernicious history as a signal of impending violence."⁹² A plurality of the Court, however, found that the statute's prima facie evidence presumption was unconstitutional because it failed to contextualize "factors that are necessary to decide whether a particular cross burning is intended to intimidate" or only to arouse anger.⁹³

⁸⁸ *Virginia v. Black*, 123 S. Ct. 1536, 1541–42 (2003) (quoting VA. CODE ANN. § 18.2-423 (1996)).

⁸⁹ *Black*, 538 U.S. at 358–59 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

⁹⁰ The Court has repeatedly held that the First Amendment does not protect the "incitement of imminent lawless action." *Id.* at 359 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

⁹¹ *Id.* at 362–63.

⁹² *Id.* at 363. This conclusion was an apparent departure from the Court's holding in *R.A.V. v. St. Paul*, wherein the Court found that an ordinance banning fighting words singling out race, gender, color, creed, or religion, instead of altogether banning fighting words, was improper content-based discrimination. 505 U.S. at 391. In *Black*, however, the Court explicitly found its holding to be consistent with *Black*, 538 U.S. at 361–63.

⁹³ *Id.* at 3622. Chief Justice Rehnquist and Justices O'Connor, Stevens, and Breyer made up the plurality, opining that the prima facie element of the offense was unconstitutional. Justice Scalia, who had joined the Court in other parts of the opinion, thought that the prima facie element may have been a legitimate form of rebuttable presumption that the Virginia Court should have been required to construe on remand. *Id.* at 368–80 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part). Scalia was joined on this point by Justice Thomas, who wrote a separate dissent. *Id.* at 388–400 (Thomas, J., dissenting). Justice Souter, concurring in the judgment in part and dissenting in part with Justices Kennedy and Ginsburg, never reached the prima facie issue, writing instead against the constitutionality of the entire statute: "In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct." *Id.* at 387 (Souter, J., concurring in the judgment in part and dissenting in part).

Congress should follow the Court's guidance in *Black*, and, pursuant to its Thirteenth Amendment section 2 power, draft a comparable federal law that prohibits the intimidating use of historically inflammatory symbols. Because cross burning is not the only symbol with an established history that signals impending violence and ethnic subordination, the statute should also cover anything from swastikas (even though they harken back to enslavement in other countries) to some displays of Confederate symbols.⁹⁴ All of these symbols can intimidate persons regardless of their race, ethnicity, or religion. To avoid the charge of viewpoint discrimination, the legislators might refrain from listing these symbols in particular, and instead adopt an inclusive, general provision. The law would then not simply prohibit the use of some listed intimidating symbols; instead, it would prohibit the intimidating use of any symbol whose history is linked to slavery or involuntary servitude. The burden of proving that a particular symbol is intimidating should fall on the government, which may be able to strengthen its case by using the expert testimony of historians.

Such a law should meet all the rigors of any other criminal legislation (that is, it should require proof beyond a reasonable doubt both in the hearing and sentencing phases, the right to a speedy trial, etc.) and grant federal district courts jurisdiction to hear cases. The law should require prosecutors to prove intent as an element of the crime, which would avoid Virginia's error of making intent a *prima facie* presumption. The intent element could be satisfied by proof of purpose, recklessness, or knowledge.

I recognize that my proposal would probably somewhat increase the federal docket. However, such a sacrifice is part of the post-Reconstruction cost of maintaining a free society devoted to the protection of civil rights and civil liberties.

⁹⁴ See Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 *TEMPLE L. REV.* 539, 595–610 (2003); L. Darnell Weeden, *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, 334 *AKRON L. REV.* 521, 542 (2001) (asserting that the "Confederate flag was lost forever as a race-neutral symbol when the forces of racism used it for so many years to continue the violence and intimidation what could not be won on the Civil War battlefield").

