# *American Family Association v. City and County of San Francisco:* Constitutional Government Responses to the Harms of Religious Speech Advancing Anti-Homosexual Messages

**By: Marie Saraceni***

[1] The need to eradicate violence against homosexuals in America is a concern of paramount importance—one as compelling as protecting the First Amendment freedoms of individuals who wish to advocate religious viewpoints against homosexuality. Particularly in a legal and political culture wherein homosexuals are afforded limited constitutional protection,[1] the modern debate regarding the constitutionality of laws regulating hate speech[2] demands a re-visitation of the meaning of First Amendment freedoms. These freedoms are crucial within the

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[1] *See, e.g.*, R.A.V. v. City of Paul, Minn., 505 U.S. 377 (1992) (finding ordinance that prohibits hateful expressive activity against individuals on the basis of race, color, creed, religion, or gender, while permitting other sorts of harassing activity, facially invalid under the First Amendment because it constituted unconstitutional viewpoint discrimination); Romer v. Evans, 517 U.S. 620 (1996) (holding that homosexuals' right to equal protection under the law is subject only to rational basis scrutiny); Boy Scouts of America v. Dale, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting) (stating of the majority's holding that forced membership of a homosexual in an organization promulgating anti-homosexual values would infringe upon the organization's right of expressive association under the First Amendment: "Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.") Nevertheless, the constitutional tides have begun to change significantly. *See* Lawrence v. Texas, 123 S. Ct. 2472 (2003), the recent landmark United States Supreme Court decision recognizing that homosexuals have a substantive due process right to engage in consensual sexual activity in the home, free from government intervention or intrusion.

[2] By "hate speech," I specifically refer to any kind of speech characterized by anti-homosexual animus, although the term certainly encompasses expressed animus directed toward other targeted groups of individuals as well.

framework of a representative democracy in which public officials and legislators struggle to respond to the problem of hate speech and crimes in order to best promote public safety and welfare; safeguard the free exercise of civil and political rights; foster equality; and reconcile the often conflicting political, social, and cultural wills of their pluralistic constituents without resorting to unconstitutional, content-based viewpoint discrimination against particular groups of individuals.[3] A potentially pernicious constitutional problem arises when perpetrators of hate speech and hate crimes justify their behavior[4] on religious grounds and claim a certain degree of immunity under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment[5] from critical governmental responses, including public speech. If granted, such immunity would effectively relegate oppositional discourses exclusively to the individual and

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[3] *See* FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT (1993), for an overview of this ongoing debate.

[4] For the purposes of this note, my use of the word "behavior" encompasses both speech and conduct. While some scholars and theorists argue for the deconstruction of speech and conduct into distinct categorical concepts, maintaining that speech is essentially a type of conduct, or conversely, that conduct is a mode of speech or expression, I distinguish speech and conduct as separate modes of behavior. The two concepts, while sharing certain common characteristics, nonetheless differ in many respects, including form, modalities of execution, effect, and so forth. I further maintain that to collapse the distinction between speech and conduct entirely could effectively serve to undermine the liberties protected under the First Amendment, and is thus legally undesirable and untenable under our constitutional framework. For a vigorous debate on these issues, *see generally*, HARRY M. BRACKEN, FREEDOM OF SPEECH: WORDS ARE NOT DEEDS (1994); GROUP DEFAMATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND VIOLENCE (Monroe H. Freedman & Eric M. Freedman, eds., 1995) [hereinafter GROUP DEFAMATION]; KATHARINE GELBER, SPEAKING BACK: THE FREE SPEECH VERSUS HATE SPEECH DEBATE (2002); FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT (1993); CATHARINE A. MACKINNON, ONLY WORDS (1993). *See also* Lawrence Douglas, *The Force of Words: Fish, Matsuda, MacKinnon, and the Theory of Discursive Violence*, 29 LAW & SOC'Y REV. 169 (1995); Judith Butler, *Constitutions and 'Survivor Stories': Burning Acts: Injurious Speech*, 3 U. CHI. L. SCH. ROUNDTABLE 199 (1996).

[5] The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

private sphere, thereby removing the potential and actual development of solutions to hate crimes and the harms of violent speech from the realm of law and public policy. If one accepts, as I do, that hateful speech[6] *qua* speech can function at both individual and systematic levels to inflict direct harm (such as psychological or "discursive" harm) or to incite harmful conduct (such as physical violence) rendered especially insidious if justified by religious mandate,[7] the need for creative official responses to hate speech becomes compelling. This is especially so in light of the structural limitations imposed on the government by the Supreme Court's conservative application of First Amendment principles.[8]

[2] Mindful of the constitutional implications of outright, content-based legislative regulation of hate speech, legal scholars have proposed numerous solutions to the problem, including (1) re-characterizing hate speech so as to exclude it from the protections of the First Amendment[9] or (2) "balancing" competing constitutional values (for example, liberty and equality) when

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[6] In this note, my use of the term "hateful speech" narrowly refers to either verbally expressed bigotry or animus (both spoken and written) toward groups of individuals targeted on the basis of fundamental aspects of their identity, including, among others not expressly enumerated here, sexual and religious orientation.

[7] See ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS (2002), for an analysis of the particularly virulent nature of hate speech promulgated via a religious teleology.

[8] Such official responses are necessary as both remedial and preventative means of addressing the deeply entrenched, persistent effects of past violence and discrimination against traditionally disfavored groups, and eradicating the potential recurrence or reemergence of harmful social movements.

[9] *See, e.g.,* Ronald Turner, *Regulating Hate Speech and the First Amendment: The Attractions of, and Objections to, an Explicit Harms-Based Analysis*, 29 IND. L. REV. 257 (1995) (discussing arguments, both pro and con, adopting a harms-based approach to regulating hate speech under the First Amendment).

interpreting constitutional provisions in order to maximize the goals and protections thereof.[10] Such proposals would, if adopted by legislators and courts, require the Constitution to be read and interpreted in unprecedented ways that could undesirably curtail the freedoms of speech and religious belief that are foundational and essential in our democratic polity, despite advancing other compelling objectives in the interests of public safety, welfare, and equality.

[3] Finding such proposals inadequate for reasons I will discuss further below, I will argue in this note that by enabling what scholar Katharine Gelber refers to as a "policy of speaking back"[11] in deciding *American Family Association v. City and County of San Francisco*,[12] the Ninth Circuit's adherence to a traditional, qualified "absolutist"[13] notion of free speech fosters

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[10] *See, e.g.*, Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power? An Essay for Kenneth Karst*, 47 UCLA L. REV. 1253, 1261 (June 2000) (arguing that "[f]reedom of speech that undermines equality neglects the way that equality is itself a central principle of the First Amendment"); *see also* Kevin Boyle, *Hate Speech: The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 502 (2001) (arguing that "[d]emocracy is both about the struggle for political equality as well as the celebration of free speech"); Scott J. Catlin, Note, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights*, 69 NOTRE DAME L. REV. 771 (1994) (urging the adoption of a "balancing of rights" approach in regulating hate speech).

[11] GELBER, *supra* note 4, at 1.

[12] American Family Ass'n v. City and County of San Francisco, 277 F.3d 1114, 1125 (9th Cir. 2002) (holding that city and county officials' public disapproval of an anti-homosexual advertising campaign sponsored by religious groups did not violate either the First Amendment of the United States Constitution or the No Preference Clause of the California Constitution), *cert. denied*, 537 U.S. 886 (2002).

[13] *See* Kenneth Lasson, *To Stimulate, Provoke, or Incite?: Hate Speech and the First Amendment, in* GROUP DEFAMATION, *supra* note 4, at 268 ("A persistent shibboleth in First Amendment jurisprudence is that the Constitution guarantees absolute freedom of self-expression, and that any law restricting this right is the first step on the road to tyranny."). I note that such an absolutist notion of free speech is qualified, recognizing that "the First Amendment does not protect all speech" and "the very existence of widely held exceptions to the rule (fighting words, security breaches, obscenities, etc.), as well as the established constitutionality of time, place, and manner restrictions, serve to belie this popular [absolutist] understanding of the law." *Id.*

the possibility of progressive, non-legislative state responses to hate speech[14] against homosexuals by religious organizations in the face of otherwise formidable structural constraints on governmental power to directly regulate hate speech through legislation or other official

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[14] At least one scholar has questioned the adequacy of the current level of protection judicially afforded to religious speech:

> When terroristic speech is also religious speech[,] as is often the case with violent anti-choice speech, . . . further constitutional concerns are implicated. Given the dual protection afforded to religious speech by the Free Speech and Free Exercise Clauses, one must ask whether the current level of protection given to religious speech by the Supreme Court is appropriate.

*See* Holly Coates Keehn, *Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses*, 28 SETON HALL L. REV. 1230, 1257 (1998). Coates Keehn notes that "under any interpretation of the current status of the law, religious speech receives only that protection afforded to secular speech," and claims that religious speech is given "preferred" status by the First Amendment because it is "doubly protected" under the religion and free speech clauses, and thereby entitled to "a higher level of judicial deference." *Id.* at 1257-60. Coates Keehn correctly admonishes that:

> Certain religious speech today is viewed as threatening to the secular order . . . . It is important to remember that most mainstream religions can point to leaders who were once considered radicals threatening the secular authority. Given the fluctuations of religious beliefs, 'devils' . . . must be given the benefit of the law so that the rest of us will have refuge from the storms of changing political and religious norms to pursue and testify to our own particular beliefs.

*Id.* at 1261. Nonetheless, it is important to remember that, while certain religious beliefs, speech, and practices historically have been subject to official oppression, religion has also been used historically as a tool of oppression. *See* TSESIS, *supra* note 7. Therefore, it is important that state officials not be deprived of their constitutional liberty to criticize the *effects* of certain kinds of socially harmful speech in order to promote the neutral aims of peace, social order, safety, equality, and liberty, particularly considering government officials' lack of constitutional authority to directly regulate the content of *speech* deemed hateful or harmful.

Government regulation of hate *crimes*, however, may be less constitutionally problematic. *See infra* note 48.

enactments. Indeed, in our current constitutional landscape,[15] it is unlikely that the Supreme Court would extend increased protection to homosexuals and other victims of hate speech under the First Amendment by adopting either of the two proposals outlined above. Although the discourse approach essentially espoused by the Ninth Circuit in *American Family Association*[16] is only a small and slow step toward the achievement of equality for homosexuals, it nonetheless empowers government officials to combat, in their role as public representatives, anti-homosexual animus on the very terrain where it often operates and is most insidiously reinforced as a mode of oppression: the arena of public discourse. Thus, official proponents of discourses against anti-homosexual animus are free to assume key roles in the process of public education, without resorting to solutions, such as enacting hate speech laws, that would unconstitutionally trammel individuals' fundamental freedom to exercise and profess their religion without state interference or discrimination.

[4] In Sections I-III below, I analyze in detail the aforementioned three approaches to the problem of anti-homosexual hate speech: (1) the discourse approach, (2) the characterization approach, and (3) the balancing approach. In Part IV, I analyze the interconnection of discourse, identity, and the problem of *kulturkampf*. In Part V, I conclude that a discourse approach for regulating hate speech best promotes the individual rights and liberties safeguarded by the Constitution.

## I. THE DISCOURSE APPROACH TO FREE SPEECH IN *AMERICAN FAMILY*

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[15] *See supra* note 1. There has been a tremendous amount of legal and political debate regarding the appropriateness and constitutionality of regulating hate speech and hate crimes, particularly in light of the United States Supreme Court decision in *R.A.V.*, 505 U.S. 377.

[16] Am. Family Ass'n, 277 F.3d 1114.

### *ASSOCIATION V. CITY AND COUNTY OF SAN FRANCISCO*[17]

[5] *American Family Association v. City and County of San Francisco*[18] arose when the American Family Association, Inc. and other religious groups (hereinafter, "plaintiffs") launched an advertising campaign[19] in 1998[20] to proselytize their religious views, including the belief that homosexuality is sinful.[21] Pursuant to the campaign, the religious groups ran a full-page advertisement in the *San Francisco Chronicle*, expressing views that, while Christians love homosexuals, God abhors sexual sin; that homosexuality is a temptation that can and should be resisted; that celibacy and marriage are proper alternatives to a homosexual lifestyle; that homosexual behavior "accounts for a disproportionate number of sexually transmitted diseases[;]" and that "65% of all reported AIDS cases among males since 1981 have been men engaged in homosexual behavior."[22] In response to the advertisement, a member of the San

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[17] *Id.*

[18] *Id.*

[19] The advertising campaign was entitled "Truth in Love." *Id.* at 1118.

[20] 1998 is the same year that Matthew Shepard's beating and death gained national attention.

[21] Am. Family Ass'n, 277 F.3d at 1119.

[22] *Id.* Notably, the advertisement also stated:

> For years, Christians have taken a stand in the public square against aggressive homosexual activism. We've paid a heavy price, with sound-bite labels like "bigot" and "homophobe." But all along we've had a hand extended, something largely unreported in the media . . . an open hand that offers healing for homosexuals, not harassment. We want reason in this *debate*, not rhetoric. And we want to share the hope we have in Christ, for those who feel acceptance of homosexuality is their only hope.

*Id.* (emphasis added). Here, the religious groups implicitly indicated their belief that harassment of homosexuals is undesirable, and welcomed *debate* with the *public*. Ironically, if the plaintiffs

had prevailed in their lawsuit against the government speakers, they would have stifled, to a certain extent, the very debate they encouraged. Indeed, in a case with facts similar to the one at issue here, the United States District Court for the Eastern District of New York aptly stated:

> "[A]ppellants believe the First Amendment shields their own critique from any form of official criticism. In our view, this approach would stand the Constitution on its head . . . . Having boldly entered the flames of public discussion the First Amendment specifically is designed to kindle, appellants now seek our rescue from the sparks of controversy they ignited."

Okwedy v. Molinari, 150 F. Supp. 2d 508, 515 (E.D.N.Y. 2001). In *Okwedy*, a non-profit religious organization and its pastor brought a section 1983 action against a borough president who wrote a critical letter to a billboard company for advertising the anti-homosexual message of the religious organization. *Id.* at 510-12. Plaintiffs alleged, *inter alia*, violations of their rights under the Free Speech, Establishment, and Free Exercise Clauses of the First Amendment, in that they were "discriminated against on the basis of their religious beliefs and viewpoint against homosexuality and that the official statements and actions of public officials violated the First Amendment's requirement of neutrality in matters pertaining to religion." *Id.* at 510. The United States District Court for the Eastern District of New York held in favor of the defendant public official on all claims. *Id.* at 518-20.

In *American Family Association*, plaintiffs may have erroneously assumed that only private individuals are free to debate publicly. To the contrary, as the Second Circuit noted in *X-Men Security, Inc. v. Pataki*,

> The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment . . . is that "*debate on public issues should be uninhibited, robust, and wide-open.*" . . . *The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators*.

196 F.3d 56, 69-70 (2d Cir. 1999) (internal citations omitted). Analogously, no lesser protection extends to city and county officials. *See, e.g.*, *Am. Family Ass'n*, 277 F.3d at 1125 ("We agree with the host of other circuits that recognize that public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction.").

Francisco Board of Supervisors sent a letter to the American Family Association "denounc[ing their] hateful rhetoric against gays, lesbians and transgendered people."[23] Specifically, the letter stated:

> What happened to Matthew Shepard is in part due to the message being espoused by your groups that gays and lesbians are not worthy of the most basic equal rights and treatment.
> It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians.[24]

Additionally, the city and county adopted two public resolutions in their efforts to combat hate crimes.[25] The first, which urged Alabama legislators to expand the scope of their hate crime legislation to protect offenses related to sexual orientation, "call[ed] for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes . . . ."[26] The second resolution, which addressed anti-gay television advertising, expressed concern over a "marked increase in anti-gay violence that coincided with defamatory and erroneous campaigns" against homosexuals, and alluded to, without expressly identifying, plaintiffs' print advertising campaign.[27]

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[23] *Am. Family Ass'n*, 277 F.3d at 1119.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1119-20.

[6] Thereafter, plaintiffs brought a Section 1983[28] action against the city, county, and the supervisory board member, alleging, *inter alia*, that the public officials' formal disapproval of the campaign represented unconstitutional disapproval of a particular religion in violation of the Establishment Clause.[29] Plaintiffs also advanced a "hybrid claim,"[30] alleging that the city and

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[28] 42 U.S.C. § 1983 (2003).

[29] *Am. Family Ass'n*, 277 F.3d at 1118. The Ninth Circuit affirmed the United States District Court for the Northern District of California's rejection of plaintiffs' additional allegation that defendants' actions violated the No Preference Clause of the California Constitution. *Id.* at 1125-26.

[30] *Id.* at 1120. The Ninth Circuit defined a hybrid claim thus: "the Supreme Court noted that free exercise claims implicating other constitutional protections, such as free speech, could qualify for strict scrutiny review even if the challenged law is neutral and generally applicable." *Id.* at 1124 (citing Employment Div., Oregon Dep't of Human Res. v. Smith, 494 U.S. 872, 881-82 (1990)). To state a hybrid claim in the Ninth Circuit, "a 'free exercise plaintiff must make out a colorable claim that a companion right has been violated.'" *Am. Family Ass'n*, 277 F.3d at 1124 (internal citation omitted).

In an earlier Supreme Court case, Justice Scalia, writing for the majority, described the nature of such hybrid claims:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (citations omitted). *See also* Coates Keehn, *supra* note 14 (arguing that religious speech, because of such dual coverage under the First Amendment, is entitled to a more *heightened* constitutional protection than secular speech).

Others argue contrarily that religious speech should be afforded no additional or dual protection under the Free Speech Clause because it is already protected under the Establishment and Free Exercise Clauses. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 284 (1981) (White, J., dissenting) (regarding the proposition that religious speech is afforded dual protection under the First Amendment as "plainly wrong" because it would empty the Religion Clauses "of any independent meaning in circumstances in which religious practice took the form of speech"). *See generally* STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE

county violated their free speech and free exercise rights simultaneously.[31] The Ninth Circuit affirmed the district court's dismissal of plaintiffs' claims.[32]

[7] First, the Ninth Circuit held that under the test established by the United States Supreme Court in *Lemon v. Kurtzman*,[33] defendants' actions did not violate the Establishment Clause because they "had a plausible secular purpose, did not have the primary effect of inhibiting religion and did not create excessive entanglement with religion."[34] The court reasoned that the secular and primary purpose of the defendants' actions was to "promot[e] equality for gays and [to] discourag[e] violence against them," regardless of whether the letter and the resolutions at issue might have contained over-generalizations, misconceptions, or misconstructions of plaintiffs' message and mission."[35] Further, in denying the plaintiffs' claim that the public officials' conduct constituted excessive entanglement with religion by "encourag[ing] political divisiveness along religious lines," the Ninth Circuit stated:

> Although Plaintiffs contend that homosexuality is an "emotionally explosive" issue that engenders political divisiveness, if this were enough to create an Establishment Clause violation on

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SPEECH CLAUSE, AND THE COURTS (2002), for an interesting overview on hybrid claims and recent litigation strategies of the Religious Right.

[31] *Am. Family Ass'n*, 277 F.3d at 1120.

[32] *Id.* at 1125.

[33] Lemon v. Kurtzman, 403 U.S. 602 (1971). In *Lemon*, the Supreme Court held that, to survive an Establishment Clause challenge, the government conduct at issue must (1) have a secular purpose, (2) not have a principal or primary effect of advancing or inhibiting religion, and (3) not foster excessive government entanglement with religion. *Id.* at 612-13.

[34] *Am. Family Ass'n*, 277 F.3d at 1125.

[35] *Id.* at 1122. *Compare X-Men Sec.*, 196 F.3d at 69 (discussing that, in public debate by legislators, "erroneous statements must be protected to give freedom of expression the breathing space it needs to survive").

> entanglement grounds, government bodies would be at risk any time they took an action that affected potentially religious issues, including abortion, alcohol use, [and] other sexual issues . . . .[36]

[8] Finally, the Ninth Circuit affirmed the district court's holding that the plaintiffs failed to state a Free Exercise or Free Speech claim because defendants' conduct was "neither regulatory nor proscriptive"[37] and "did not sanction or threaten to sanction [plaintiffs'] speech."[38] Indeed, the court held that "public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction."[39]

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[36] *Am. Family Ass'n*, 277 F.3d at 1123 (citation omitted).

[37] *Id.* at 1125. In other words, the government conduct at issue was not the enactment of an "actual law." *Id.* at 1124.

[38] *Id* at 1125-26.

[39] *Id.* at 1125. In holding that the public officials' actions in the principal case did not "prescribe[ ] an orthodoxy of belief on the subject of homosexuality," *Am. Family Ass'n*, 277 F.3d at 1124, the court reasoned, significantly:

> [A]lthough the Defendants may have criticized Plaintiffs' speech (or at least the perceived effect of it) and urged television stations not to air it, there was no sanction or threat of sanction if the Plaintiffs continued to urge conversion of homosexuals or if the television stations failed to adhere to the Defendants' request and aired the advertisements.

*Id.* at 1125. *Compare* Okwedy v. Molinari, 150 F. Supp. 2d 508, 513-14 (E.D.N.Y. 2001) ("Public officials have no right to prohibit or restrict plaintiffs' speech because they disagree with its content, no matter how offensive they or their constituents consider the message to be . . . . But plaintiffs' right to free speech . . . does not include a right to be shielded from criticism from others, including public officials, who also have a right to express their views."). *See also* Hammerhead Enters., Inc. v. Brezenoff, 707 F.2d 33, 39 (2d Cir. 1983) (cautioning that in appropriate circumstances, some statements by public officials "will require courts to draw fine lines between permissible expressions of personal opinion and implied threats to employ coercive state power to stifle protected speech").

[9] In so holding, the Ninth Circuit adopted what I refer to as a discourse approach to hate speech, relying on a traditional and qualified "absolutist theory"[40] of free speech. While a pure absolutist theory of free speech is grounded in the notion that speech should never be subject to restriction, a qualified absolutist theory of speech recognizes that freedom of speech can be subject to certain limited exceptions.[41] Underlying absolutist free speech theory is the notion that "it is possible, and even necessary, that discussion of ideas and opinions may result in the acquisition of 'truth' in the sense of dissemination of new information and/or knowledge."[42]

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[40] BRACKEN, *supra* note 4, at 146.

[41] *See* Lasson, *supra* note 13, at 268-70.

[42] GELBER, *supra* note 4, at 29 (internal citations omitted). Gelber correctly notes that regarding pursuit of truth as the "highest good" can operate to exclude other "competing goods" and that "truth" is, at best, an elusive and contested concept. *Id. at 30.* Nonetheless, an absolutist conception of free speech encourages individuals' participation in epistemological and ontological discourses, and would, therefore, support debates regarding what "truth" is and whether such a thing as "truth" even exists.

Interestingly, in his dissent in *American Family Association*, Judge Noonan emphasizes the appellate role of the court as a neutral party and not as a finder of truth:

> This case is a skirmish in the culture wars of the last century. Our culture has been the product, at least in part, of Jewish and Christian religious teaching; and the culture wars have, almost inevitably, brought about challenges to that teaching. The plaintiffs here emphasize the religious roots and religious nature of their message. The defendants focus on secular consequences of a message that they nonetheless maintain comes from a religious group using such a fundamentally religious category as sin.
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> We are not meant to be soldiers in the skirmish. We are asked, as much as it lies within our capabilities, to put aside our own freight of values and to put on the neutrality that our Constitution guarantees government will have in religious controversy. We are not asked to determine the religious or secular truth of the plaintiffs' message or the city's rebuttal. We have no competence to do so.

*Am. Family Ass'n*, 277 F.3d at 1126 (Noonan, J., dissenting).

Indeed, "[t]he dominant theories in defence [sic] of free speech emphasise [sic] the maximisation [sic] of speech *per se* as a central policy goal."[43]

[10] In *American Family Association*, the oppositional discourses on hate speech and homosexuality differentially advanced by plaintiffs and defendants exemplify an absolutist free speech theory at work. Indeed, plaintiffs' and defendants' discourses each proceeded without restriction, ultimately encouraging the public officials to adopt two beneficial and important resolutions to combat hate crimes based on anti-homosexual animus in their locality, and to attempt to persuade other state officials to follow suit.[44]

[11] Such discourses enact what Katharine Gelber refers to as a "participatory model of democracy [that] invokes the right for all citizens to be able to participate in democratic debate and dissent, and to pursue self-determination."[45] By appropriately regarding both plaintiffs' and defendants' respective discourses as constitutionally protected, the Ninth Circuit essentially enabled the public officials to respond constructively to hate crimes, without silencing or

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In the principal case, however, the majority did not so exceed its role; rather, it remained neutral in a constitutionally permissible public debate, allowing both sides to express their viewpoints consistently with the protections of the First Amendment. While the Ninth Circuit found that the government actors did not violate the Establishment Clause because they had a "plausible secular purpose" in speaking and adopting the resolutions as they did, such a finding is not one of "truth" but is, rather, the application of a prong of the legal test established by the Supreme Court in *Lemon*. *Id.* at 1121. Furthermore, the court acknowledged that the city and county's assertions might have contained "overgeneralizations" and "misconstructions" of the message espoused by the Religious Right, without coming to a determination in this matter. *Id.* at 1122. Notwithstanding any potential "disparagement of the Religious Right," the court found that the "primary effect" of the official speech at issue was not to inhibit religion but to denounce hate crimes and to encourage legislative action on this issue. *Id.* at 1122.

[43] GELBER, *supra* note 4, at 88.

[44] *See* Am. Family Ass'n, 277 F.3d at 1119.

[45] GELBER, *supra* note 4, at 35.

prohibiting the speech and religious freedoms of others, in a manner best suited to dismantle the effects of discursive violence against homosexuals: by contesting and redefining the very language used as justification for oppression in the public eye, particularly when, as Gelber argues, hate speech has a tendency to silence or inhibit the speech of its victims.[46]

[12] Moreover, enabling hate speech victims to respond directly to the perpetrators thereof, and similarly allowing public officials to speak on the victims' behalf, constitutes what Gelber refers to as '"institutionalized [sic] argumentation'" that "allow[s] for the development of a *counter speech* response" that "could directly challenge the validity claims raised by the hate speaker, by raising counter validity claims."[47] The most desirable aspect of such a free speech policy, particularly viewed in light of hate speech and hate crimes against homosexuals, is that "counter speech might, over the longer term, change the 'behaviour' [sic] and even the attitudes of the hate speakers whose validity claims are challenged."[48] Even if counter speech, such as the critical letter and the resolutions adopted by the city and county of San Francisco in *American Family Association* would not necessarily result in the plaintiffs' ultimate rejection of their own prior views, it might, nonetheless, encourage other public officials and individuals to enter into the debate, and to adopt similar beneficial initiatives.[49] As the New York District Court emphasized in *Okwedy v. Molinari*:[50]

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[46] Indeed, Gelber argues that such silencing and inhibition occurs "when an utterance is made which raises 'truth' claims of an objective world characterized [sic] by inequality, and where the hate speaker is in a position of power relative to the hearer." *Id.* at 117-18.

[47] *Id.* at 121.

[48] *Id.*

[49] It is extremely important that public officials continuously work to formulate responses, legislative and non-legislative alike, to hate speech and crimes that do not contravene the constitutional principles established by the Supreme Court in *R.A.V. v. City of St. Paul, Minn.*,

> Protected speech under the First Amendment does not become unprotected because it is effective. If . . . public officials who did not have decision making authority in a matter had a right to persuade others not to deal with certain individuals or to participate in disseminating their message because the public officials found the views of those individuals or their associates to be repugnant, they cannot be found to have acted unconstitutionally because their efforts to persuade others were successful.[51]

[13] In *Okwedy*, a religious organization and its ordained minister, who "characterize themselves as 'members of a class of religious persons who engage in conspicuous, sustained, and overt public displays of sacred religious text as evidence of the sinfulness of homosexuality,'" contracted with a billboard company to design, produce, and display two, anti-

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505 U.S. 377 (1992). Passing hate crime legislation can be constitutionally problematic to the extent that it can operate as content or viewpoint discrimination. Indeed, in striking down a Minnesota hate crime ordinance, the Supreme Court noted the importance of finding constitutional solutions to hate crimes and hate speech: "What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred . . . '[I]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear,' but the manner of that confrontation cannot consist of selective limitations upon speech." *Id.* at 392.

[50] 150 F. Supp. 2d 508.

[51] *Id.* at 517-18. I note that the discourse promulgated by the public officials in *American Family Association* was beneficial and effective to the extent that it persuaded the city and county officials to pursue hate crime regulations, and operated as a public counter-discourse to that of the anti-homosexual religious groups. I do not argue that discourse alone is a sufficient response or solution to physical or psychological violence; it is merely a necessary step toward formulating creative solutions to hate speech and crimes that do not unconstitutionally trammel either the expressive and religious freedoms of others or the principles of equal protection. I nonetheless maintain that, under our current constitutional landscape, direct government regulation of hate speech will continue to meet formidable resistance from the lower courts, properly in keeping with Supreme Court precedent and established First Amendment principles. The educative function of alternative discourses, in this regard, is an extremely important means of combating otherwise unregulated hate speech.

homosexual billboard signs.[52] After the billboard incited substantial community protest, the borough president faxed a critical letter to the billboard company on official stationary that read, in part:

> The sponsor for the billboard message is nowhere apparent on the billboard, so I am writing to you with the hope that I can establish a dialogue with both yourself and the sponsor as quickly as possible.
>
> Both you and the sponsor of this message should be aware that many members of the Staten Island community, myself included, find this message unnecessarily confrontational and offensive. As Borough President of Staten Island I want to inform you that this message conveys an atmosphere of intolerance which is not welcome in our Borough.[53]

In response to the letter and the billboard company's subsequent unilateral concealment of the billboard signs, the religious organization and its minister (hereinafter, "plaintiffs") brought a section 1983 action against the borough president, alleging, *inter alia*, Free Speech, Free Exercise, and Establishment Clause violations.[54]

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[52] *Okwedy*, 150 F. Supp. 2d at 510-11. As the district court noted, the billboards signs:

> consisted of four rectangles, each containing in large capital letters a different version of a verse from the Bible, with attribution of the source, *e.g.*, "Thou Shall Not Lie With Mankind As With Womankind: It Is Abomination (King James)." The other versions used the terms "Detestable," "Loathsome" and "Enormous Sin." The Biblical verse is identified across the top of the signs: "Four Ways to Say Leviticus 18:22."

*Id.* at 511. Plaintiffs chose to advertise their anti-homosexual message "in or near neighborhoods containing a significant number of persons who either engaged in or approved of homosexual conduct." *Id.*

[53] *Id.*

[54] *Id.* at 510.

[14] The United States District Court for the District of New York found no free speech violation, since the company's ultimate removal of plaintiffs' message from the billboards was a private action, rather than a direct state action or a result of indirect coercive state action.[55] The court noted that the borough president's letter constituted "permissible expression by public officials" as recognized by the Second Circuit.[56] Likewise, the court emphasized that "[p]laintiffs' efforts to proselytize also enjoy constitutional protection: 'The right to free speech, of course, includes the right to attempt to persuade others to change their views . . . .'"[57]

[15] The district court also held in *Okwedy* that the borough president's letter passed Establishment Clause muster because it did not impermissibly advance or denigrate plaintiffs' religion.[58] Emphasizing that "'it is not unconstitutional to criticize principles that happen to coincide with religious teachings of certain groups,'" the court concluded that the borough president's letter responded only to the anti-homosexual, rather than to the religious, nature of plaintiffs' message.[59] Although the billboards identified the biblical source of the messages, the court ultimately found that defendant's written "reference to that fact cannot reasonably be interpreted as transforming his allowable commentary on plaintiffs' message into an

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[55] *Okwedy*, 150 F. Supp. 2d at 513-14.

[56] *Id.* at 514.

[57] *Id.* at 513. Interestingly, the Eastern District of New York did not regard plaintiffs' claimed "right to proselytize" as a "hybrid right" implicating the free exercise clause. *See id.* at 520 (stating that the "right to proselytize . . . is simply another way of phrasing the Free Speech Clause claim").

[58] *Id.* at 520.

[59] *Id*. at 519-20 (quoting Gheta v. Nassau County Cmty. Coll., 33 F. Supp. 2d 179, 186 (E.D.N.Y. 1999)).

impermissible display of official or . . . anti-religious animus."[60] Like *American Family Association*, *Okwedy* demonstrates the beneficial operation of the discourse approach to hate speech: plaintiffs freely disseminated their anti-homosexual religious message, and the borough president, both in his individual capacity and as a representative of his diverse constituents, likewise freely exercised his First Amendment right to "talk back" persuasively against hate speech, without asserting coercive state authority over plaintiffs or denigrating their religion in violation of the Free Speech and Establishment Clauses.[61] Moreover, the facts of the case indicate that the borough president's letter might have produced, in a constitutional manner, a certain beneficial result: increased community accreditation of the alternative discourse proffered by the public official in response to the message of the billboard advertisements. Indeed, the letter might have been a persuasive factor in the ultimate unilateral refusal of the billboard company to advertise plaintiffs' message.[62] It also might have persuaded other vendors in the area to decline to do the same.[63]

## II. CHARACTERIZING HATE SPEECH AS UNPROTECTED ACTIVITY

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[60] *Okwedy*, 150 F. Supp. 2d at 520.

[61] *Id.* at 520.

[62] *Id.* at 512 ("In response to a letter from plaintiffs' counsel demanding that the signs be re-posted, [the billboard company] returned the full contract price by check.").

[63] *Id.* ("Plaintiffs . . . allege that they have been unable to display their message on other billboards in Staten Island because other vendors either declined to accept it or insisted on a minimum six-month rental, which plaintiffs cannot afford.").

[16] The Supreme Court has been unwilling to exclude hate speech *per se* from the protections of the First Amendment.[64] Some scholars argue, however, that the constitutional problems of regulating hate speech can be avoided if hate speech is characterized as a sort of injurious conduct, or harmful action, because conduct does not categorically fall under the purview of the First Amendment.[65] While Katharine Gelber notes that "[h]istorically in free speech scholarship, a sharp distinction has been made between speech, or expressive activity, on the one hand, and overt acts on the other[,]"[66] she distinguishes among different categories of speech: certain kinds of speech "do something" rather than merely "say something."[67] For example, speech can, by its

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[64] *See R.A.V.*, 505 U.S. at 393. As aforementioned, certain kinds of speech, such as obscenity, fighting words, and defamation, are not protected under the First Amendment. *See id.* at 384-91. Indeed, the Supreme Court stated that "the exclusion of 'fighting words' from the scope of the First Amendment simply means that, for purposes of that Amendment, *the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication*." *Id.* at 386 (emphasis added). The Supreme Court's notion essentially is that fighting words "do something" more than merely convey ideas: "[T]he reason . . . fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.* at 393.

[65] *See generally* Douglas, *supra* note 4.

[66] GELBER, *supra* note 4, at 50. Gelber argues that:

> United States First Amendment jurisprudence . . . has . . . tended to uphold the idea that expressive activity can only be considered to have occasioned harm, and therefore [can] be considered a harmful act, when the expressive activity under consideration invokes a discrete and subsequent danger of 'some imminent, non-rebuttable, and very grave secular harm.

*Id.* at 51.

[67] *Id.* at 55. Gelber distinguishes between "illocutionary" and "perlocutionary" speech:

> When an act is performed *in* the saying of an utterance, a speaker performs an illocutionary act. For example, if someone shouts

very utterance, inflict emotional harm, or can effectively function to "silence" the speech of others.[68]

[17] Recognizing this harmful aspect of speech, some scholars adhere to the view that "the goal of a more egalitarian future can be advanced through state suppression of assaultive discourse."[69] Such a view is often premised upon a "harms-based analysis"[70] that focuses on kinds of speech that "by their very utterance inflict injury or tend to incite an immediate breach of the peace," "are no essential part of any exposition of ideas, and are 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."[71] The actual and potential harms of hate speech are well documented.[72] Nonetheless, while re-characterizing hate speech as conduct in the sense that it is performative or executive might serve to evade certain First Amendment hurdles, and might

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> "fire" and, by making that utterance, warns people in a building that there is in fact a fire and by implication suggests that they exit the building, they have performed an illocutionary act . . . .
> In the perlocutionary instance, an act is performed *by* saying something. For example, if someone shouts "fire" and by that act causes people to exit a building which they believe to be on fire, they have performed the perlocutionary act of convincing other people to exit the building.

*Id.* at 55-56. This section will focus on both such aspects of speech.

[68] *See supra* note 46.

[69] Douglas, *supra* note 4, at 170.

[70] *See* Turner, *supra* note 9, at 302-15.

[71] *Id.* at 274.

[72] *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); Butler, *supra* note 4; TSESIS, *supra* note 7; Turner, *supra* note 9.

effectively remove the verbal expression of anti-homosexual animus from the classical "marketplace of ideas," increased limitation of the protections of the First Amendment might not, as Lawrence Douglas convincingly emphasizes, necessarily ensure a "more egalitarian future" for the targets and the perpetrators of hate speech alike, particularly considering that government regulatory power has been deployed historically both to diminish political inequalities and to deny Americans the very equalities that they now beseech to government to preserve.[73] Such regulation might, in fact, have a contrary result, as history has demonstrated. Although striving for a society free of verbal anti-homosexual animus certainly is a desirable goal, the harms of placing regulatory control over public discourse in the hands of the government are nonetheless well documented.[74] Such power, if ceded to the state, can be used in such capacity as a weapon as well as a shield. Depending on public sentiment at any given historical moment, any kind of discourse essentially can be deemed directly "harmful" conduct unprotected by the First Amendment. Such an outcome would directly flout the very purpose of the First Amendment—to allow free speech and the free exercise of religion a protected co-

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[73] *See* Douglas, *supra* note 4, at 170. Douglas states that while "the system of legal apartheid that existed in areas of this country until the 1960s was largely dismantled by judicial decree[,]. . . the question remains whether the goal of a more egalitarian future can be advanced through the state suppression of assaultive speech." *Id.* at 181. As the Supreme Court emphasized: "If 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 . . . ." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). It must be noted, however, that while the government is prohibited, under the First Amendment from prescribing any official orthodoxies of belief, government officials may nonetheless critique religious views if done to advance a plausible secular purpose. As the Supreme Court re-emphasized in *R.A.V.*: "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." 505 U.S. at 392. Indeed, it has been for quite some time a legal commonplace that majority and minority views alike are constitutionally protected under the First Amendment.

[74] *See* Minow, *supra* note 10, at 1263 (arguing that free speech might operate to curtail or "prevent[ ] the escalation of destructive ideologies").

existence in our democracy, subject only to limited exceptions. This is not to say that anti-homosexual speech could not properly be characterized as "fighting words" depending on the circumstances of its execution; it is only to say that anti-homosexual speech should not, *per se*, fall within such category, for reasons mentioned above.

[18] Indeed, in *American Family Assoc*., the Ninth Circuit was sensitive to the reality that certain kinds of government speech can, in some circumstances, function unconstitutionally to prescribe an orthodoxy of belief, such as when the government expresses a particular viewpoint as (or with) a "sanction or threat of sanction" or involves some other asserted "affirmative consequence associated with a particular viewpoint."[75] But where, as in the principal case, government speech satisfies the requirements of the *Lemon* test and comports with the First Amendment, the liberties of free speech and religious freedom are in equipoise under the First Amendment to the extent that neither form of speech or expression is prioritized above the other.

[19] In so arguing, I do not ignore the fact that certain kinds of speech already have been excluded from the protections of the First Amendment, but rather contend that creating further such exceptions can operate to exclude bona fide religious beliefs that many others may nonetheless regard—often, as in the present matter, rightfully—as essentially and functionally harmful. Such exceptions would allow the government to engage in increased qualitative judgments regarding the social and political value of different categories of speech. Such qualitative governmental judgments are particularly inappropriate where the competing free speech claims involve, on the one hand, government speakers with a primary aim to foster the protection of targeted groups from both physical and "discursive" violence, and on the other

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[75] 277 F.3d at 1125.

hand, the free exercise and profession of religious beliefs.[76] Speech for either purpose is protected under the Constitution; there is no need to foster one at the expense of the other, provided that the government does not, in speaking, exceed its constitutional authority.

## III. BALANCING APPROACH

[20] While proponents of the characterization approach discussed above generally advocate construing hate speech essentially as constitutionally unprotected conduct or speech that has "non-speech" aspects, other scholars urge an approach to hate speech that requires a reconciliation of competing rights each embodied in the First Amendment—particularly, liberty and equality.[77] Proponents of such a balancing approach emphasize that "it is possible to

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[76] Where government speech is not deployed with the purpose of depriving individuals of their constitutionally protected rights and liberties, it is inappropriate for the judiciary to determine quantitatively that otherwise permissible official criticism of speech deemed hateful and harmful to homosexuals is somehow "less" or even "more" protected than the profession of religious beliefs simply because the opposing views are philosophically at odds. I believe, and the Supreme Court has not found otherwise, that religious and secular speech are equally protected under the First Amendment, notwithstanding contrary contentions that religious speech has a "preferred" constitutional status. *See* Coates Keehn, *supra* note 14.

[77] *See* Minow, *supra* note 10, at 1261. Kevin Boyle similarly has argued that hate speech is problematic because it involves a "possible conflict between two rights in a democratic society—freedom of speech and freedom from discrimination." Boyle, *supra* note 10, at 490. Boyle further argues:

> Freedom of speech, including freedom of the press, is fundamental to a democracy . . . . But by the same token, a core element of democracy is the value of political equality. Every one counts as one and no more than one . . . . Political equality is therefore also necessary if society is to be democratic. A society that aims at democracy must both protect the right to freedom of expression and freedom from discrimination. To achieve political equality we need to prohibit discrimination or exclusion on any ground that denies to some the enjoyment of rights including the right to political participation. To achieve freedom of expression, we need to prevent government censorship of speech and the press.

reconcile the freedoms guaranteed in a constitutional democracy with particular restrictions on the expression of hatred because that expression itself can jeopardize those other freedoms."[78] Indeed, some proponents of a balancing approach argue that the right to free speech should be limited to the extent that it threatens or destroys civil and political equality and equal opportunity to participate in the "marketplace of ideas."[79] Martha Minow rightly expresses concern that "[i]n the wake of biased speech, members of disadvantaged groups often have their own speech

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*Id.*

[78] Minow, *supra* note 10, at 1262.

[79] Professor Kevin Boyle urges that the United States adopt a balancing of rights approach essentially espoused by the United Nations International Covenant on Civil and Political Rights, and claims that the Covenant "constitutes a new supplementary Bill of Rights for the United States." Boyle, *supra* note 10, at 493-94. Article 20 of the Covenant declares in part: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." International Covenant on Civil and Political Rights, Mar. 24, 1976, 999 U.N.T.S. 171, 178 [hereinafter ICCPR].

Similarly, Scott J. Catlin urges an approach to hate speech that "[draws] inspiration from the international approach, which protects the rights and needs of the listener in free speech controversies," thereby "promoting [anti-discrimination] principles and specifically recognizing the harm to the victim. Catlin argues:

> [T]he international approach and hate speech legislation should not be dismissed as inconsistent with the First Amendment. The Supreme Court can directly address the negative effects of hate speech by expanding its First Amendment jurisprudence to include the international approach. International jurisprudence provides strong, but less absolutist, protection of speech, especially when the rights of others in the community conflict with that protection.

Catlin, *supra* note 10, at 773-74. To Catlin, the allowance of hate speech in the United States "is . . . incongruous with the United States ratification of the ICCPR" because "[b]y ratifying the [Covenant], the United States has agreed to follow the covenant's substantive ideals and underlying precepts." *Id.* at 774-75. This, even though the United States ratified the treaty with reservation: "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." ICCPR, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (statement of Sen. Moynihan).

chilled" and that "[s]peech absolutists ought . . . to worry about the net reduction, and content distortion, of the speech's marketplace that hate speech can produce."[80] To this effect, Alexander Tsesis argues that the liberal goal of arriving at "truth" through debate in the "marketplace of ideas" is better achieved by a balancing approach to maximize human rights.[81] Notwithstanding such views, longstanding First Amendment protections of free speech—secular and religious alike—combined with recent decisions of the Supreme Court demonstrate a reluctance to adopt such a balancing approach regarding hateful speech.[82]

[21] Moreover, I suspect this reluctance will not diminish under our current, conservative First Amendment constellation. The kind of balancing approach addressed above would essentially require government officials to resort to the very sort of qualitative and quantitative judgments—undesirable at best, and arbitrary at worst—regarding the social and political value of certain kinds of speech. This results in laws and regulations not only proscribed by the First Amendment, but also undesirable in a democratic polity precisely because of the proven potential for tyranny of which the government is surely capable. Because hate speech can also be bona fide religious speech, government restrictions or prohibitions thereof, even to promote equality or an arguably greater public good, would likely violate not only the Free Speech Clause, but also the Free Exercise and Establishment Clauses of the Constitution. It is currently

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[80] Minow, *supra* note 10, at 1261. Minow further stresses that "[a]rguably, even worse than this kind of 'silencing' is what happens to those [victims] who nonetheless persist and speak. They may be heard only through the distorting lens of hate speech . . . coloring the impression of the speaker's ideas." *Id.*

[81] *See* TSESIS, *supra* note 7, at 166. Tsesis emphasizes that "[s]ince persons join societies to protect their fundamental rights and to reap the benefits of basic rights, a better test of truth is the extent to which speech seeks, discovers, and establishes institutions conducive for human rights to thrive." *Id.*

[82] *See, e.g.*, *R.A.V.*, 505 U.S. 377.

unlikely[83] that the Supreme Court would interpret the First Amendment in an unprecedented manner by reading other constitutional values into it when confronted with the problem of hate speech. Thus, the alternative discourse approach fostered by the Ninth Circuit gains increased significance as an important means of addressing the real harms against homosexuals inflicted by, and as a result of, hateful speech.

[22] Moreover, proponents of a "balancing" mode of interpreting the First Amendment fall subject to a certain myopia in failing properly to focus their attention on the *diverse sources* of the very hatred they wish to eradicate. The law, by enabling and thereby perpetuating hate speech, is only one such source. Indeed, as Minow asserts, "the most powerful defect in the push to regulate hate crime and hate speech is that it deflects from other efforts to address the sources and effects of group hatred."[84]

[23] While the First Amendment enables many kinds of speech, it also functions as a *vehicle* of hateful speech without necessarily being the source; it can be a structural means through which divergent discourses flow. I am not convinced that reading the First Amendment differently in order to carve further exceptions into its protections would effectively reduce anti-homosexual animus or violence in our society. Such a practice would merely silence the *expression* of pernicious attitudes and beliefs, doing little, or nothing, to alter or eliminate the *existence* of such attitudes altogether. Silencing undesirable speech might create the illusion that

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[83] As the Supreme Court asserted recently: "The First Amendment protects expression, be it of the popular variety or not . . . . [T]hat an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." Boy Scouts of America v. Dale, 530 U.S. 640, 660 (2000). The Supreme Court was also clear to emphasize that proponents of messages offensive to their recipients are not deprived of constitutional protection. *See* Hill v. Colorado, 530 U.S. 703, 715 (2000).

[84] Minow, *supra* note 10, at 1271.

it no longer exists, and might prevent immediate "discursive" harm to hate speech victims. However, such silencing, in preventing one sort of harm in the present, perhaps would breed other, more virulent, harms in the future. Official repression of religious speech—however offensive some forms of it might be—creates bitter resentment in religious individuals and communities. Such resentment often yields violent reaction, thereby circularly undermining the very goals of political equality and hate speech regulation.

## IV. DISCOURSE, IDENTITY & KULTURKAMPF

[24] That repression can have such effects as noted above stems from the reality that religious belief and behavior is no less fundamental an aspect of human identity[85] than one's sexual orientation or one's physical and psychological integrity.[86] In arguing that "religion and sexual orientation have much in common as identity categories,"[87] Professor William N. Eskridge emphasizes that:

> The value of identity speech is greatest for the minority. The person whose trait is widely shared need not say anything, for her correct identity will be presumed in the absence of rebuttal . . . .
>
> Self-identification for a gay person is particularly important because, left uncorrected, the default assumption of "normalcy" will create a misleading basis for her relations with others, and because disclosing her actual sexual orientation offers the possibility of forging deeper connections with other minority members . . . . Self-identification is also much harder for her,

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[85] For a discussion on identity, see Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993).

[86] See generally William N. Eskridge, *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (June 1997).

[87] *Id.* at 2416.

> because she must then fear the disapproval or ostracism of the majority. This is the dilemma of the closet: The closet is a temptingly safe hiding place, but it forecloses psychological, social, and political opportunities. The closet diminishes not only the integrity of its denizens, but also their mental health. Those bearing socially disapproved identity traits tend to internalize society's disapproval. A wide variety of psychologists have found that internalized homophobia, in particular, obstructs the development of an emotionally healthy life for the gay person, and that the best-adjusted gay individuals have gone through a process of "acceptance and appreciation" of their sexual identity.[88]

The same logic also applies to members of religious minorities.[89] Indeed, Eskridge notes that "antireligious prejudice in American history bears systematic resemblance to the more recent antihomosexual prejudice. Most religious groups that are considered mainstream today have been the objects of intolerance and state-imposed disabilities in the past, including Jews, Roman Catholics, and Baptists."[90]

[25] Importantly, Eskridge stresses that "[p]ersecution and Kulturkampf flow from prejudice when majority culture feels insecure in general and threatened by a minority gaining in social power or public visibility."[91] While the Religious Right, collectively, hardly constitutes an American minority,[92] there is evidence that the Religious Right nonetheless regards its class

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[88] *Id.* at 2442.

[89] *See, e.g.*, *Id.* at 2421-27 (discussing anti-Mormon and anti-homosexual "*kulturkampf*" in the United States).

[90] *Id.* at 2420.

[91] *Id.*. Eskridge defines "Kulturkampf" as "a state struggle to assimilate a threatening minority or to force conformity upon it." *See* Eskridge, *supra* note 86, at 2413.

[92] BROWN, *supra* note 30, at 1-12. Brown notes:

> Geographically, evangelical Protestantism remains strongest in the southeastern United States, but more than one-quarter of all Americans belong to evangelical churches, making that religious

identity as increasingly threatened by other, growing social movements and by the development and application of Establishment Clause doctrine[93]—specifically, that of the "separation of church and state" when it operates to limit or exclude certain kinds of religious activity within a public setting.[94] Such perception of increasingly threatened religious identity, and the ostensible loss of fundamental rights associated therewith, has led the Religious Right to become markedly defensive and litigious.[95] It has also influenced the Religious Rights to resort to "externally directed strategies . . . utilized to directly influence and alter public policies regarding religious liberty."[96]

[26] As primary goals of evangelical Christianity include proselytizing, spreading the Gospel, and converting individuals to the faith, state action primarily intended to obstruct or interfere

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> tradition the largest in the nation with slightly more adherents than either mainline Protestantism or Roman Catholicism. Perhaps more important, in the last thirty years the number of Americans belonging to evangelical Protestant churches has increased while the membership of most other denominations has declined.

*Id.* at 2.

[93] *Id.* at 1-12.

[94] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (finding that school-sponsored, student-led prayer prior to football games violated the Establishment Clause); Lee v. Weisman, 505 U.S. 577 (1992) (prohibiting "nonsectarian prayer" by clergyman selected by public school at graduation ceremony). In *The Culture of Disbelief*, Professor Stephen L. Carter criticizes such decisions for creating a "legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them." *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 3 (1993).

[95] *See* BROWN, *supra* note 30, at 120. Brown argues that "[t]he New Christian Right's embrace of the courts, its adoption of well-established litigation strategies, and its increasing presence in religious liberty cases in the federal courts reflects a deliberate attempt to be actively and anxiously engaged in the often slow process of legal evolution." *Id.*

[96] *Id.* at 121.

with such religious exercise clearly would be unconstitutional. In *American Family Association*, however, no such state interference occurred, as the case did not involve any governmental restraint or disapproval of the religious nature of plaintiffs' speech. Although their anti-homosexual advertising campaign remained intact and uninhibited, plaintiffs nonetheless essentially endeavored to extend the prohibitions of the Establishment Clause to any secular speech by public officials that advances ideas and policies philosophically contrary to their numerous religious beliefs. Indeed, threatened by the growth of gay rights activism[97] and the increased public visibility and acceptance of such movements as a direct impediment to their religious mission, plaintiffs assumed a defensive posture and attempted, via litigation, to persuade the federal judiciary to prohibit *primarily secular speech* of public officials perceived by plaintiffs as subversive to the *validity* of their anti-homosexual campaign.

[27] But the First Amendment does not protect religious speech from the persuasive, discursive force of alternative, secular discourses, even when advanced by public officials, so long as they do so primarily for plausible secular purposes and do not exceed their constitutional authority. While quelling the expression of alternative secular discourses might well indeed simplify the evangelical mission of the Religious Right, the Constitution simply provides no such guarantee of ministerial ease. The American Family Association's ostensible perception that its anti-homosexual mission was threatened by the public officials' speech shows the increased effectiveness of such alternative discourses to operate beyond the legislative or regulatory realm and to confront directly the harmful effects of hate speech in the public sphere.

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[97] Groups such as the American Family Association, the Christian Coalition, and Focus on the Family, respectively consisting of approximately 600,000, 1.5 million, and 2 million members, are strong advocates against homosexual rights. *See id.* at 3.

[28] As another matter, religious groups might believe they are subject to discrimination because government officials are simultaneously: (1) expressly *prohibited* by the Establishment Clause to advance *religious* speech, and (2) expressly *permitted* by the Free Speech Clause to advance *secular* speech that nonetheless might indirectly and secondarily function, in its secular capacity, to undermine the validity claims of religious speech without inhibiting the religious speech itself. But the purpose of the Establishment Clause is not to ensure the longevity, popularity, perceived validity, or ultimate survival of any religion or religious ideology. Instead, the Establishment Clause functions as a safeguard against official government religious or anti-religious tyranny, and to preserve the religious freedom of majority and minority groups alike—including the liberty to refuse to observe any religion. As the Supreme Court has emphasized: "[in] . . . Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."[98] Applying the purpose prong of the *Lemon* test,[99] the Ninth Circuit noted in *American Family Association* that "[a] practice will stumble on the purpose prong 'only if motivated wholly by an impermissible purpose.'"[100] Finding that the city and county officials in *American*

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[98] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993); *see also* Vernon v. City of Los Angeles, 27 F.3d 1385, 1396 (9th Cir. 1994) ("[T]he Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion.").

[99] *See supra* note 33.

[100] *Am. Family Ass'n*, 277 F.3d at 1121 (citations omitted). While, under *American Family Association*, the existence of any "plausible secular purpose" appears to satisfy the purpose prong, the Ninth Circuit nonetheless acknowledged language in an earlier case indicating that the proper Supreme Court purpose test "is really that the 'actual' or 'primary' purpose must be secular." *Id.* (citing *Vernon*, 27 F.3d at 1397).

*Family Association* indeed had a "plausible secular purpose" to protect homosexuals from violence, the Ninth Circuit emphasized its role as a neutral arbiter in the present dispute:

> Our analysis under this prong focuses purely on *purpose*; we do not question the propriety of the means to achieve that purpose or whether the defendants were correct or even reasonable in the assumptions underlying their actions, such as asserting a connection between the Plaintiffs' ads and an increase in violence against gays.[101]

Similarly, the Ninth Circuit also stated: "we recognize that it is not our role to determine the factual correctness of Plaintiffs' assertion that homosexual behavior can be changed."[102]

[29] Moreover, the Ninth Circuit relied on an objective standard to evaluate whether the government action at issue had "the principal or primary effect of advancing or inhibiting religion."[103] Noting a marked deficiency of precedent indicating what constitutes a primary effect of *inhibiting* religion, the Ninth Circuit cited *Vernon v. City of Los Angeles*[104] as "the most instructive case in this circuit."[105]

[30] In *Vernon*, a police officer brought a section 1983[106] action against the city of Los Angeles, alleging, *inter alia*, that the city violated the Establishment Clause by conducting an investigation as to whether the officer's religious views were improperly interfering with his job

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[101] *Id.*

[102] *Id.*

[103] *Am. Family Ass'n*, 277 F.3d at 1122 (citing *Lemon*, 403 U.S. at 612).

[104] 27 F.3d 1385.

[105] *Am. Family Ass'n*, 277 F.3d at 1122.

[106] 42 U.S.C. 1983.

performance.[107] The city launched the investigation shortly after it became aware of an article in *Los Angeles Magazine* criticizing the police officer's involvement in his church. Based on a series of audiotapes made by the plaintiff for the church approximately fifteen years earlier, the article chastised him for "condemn[ing] homosexuality . . . [and] depict[ing] cops as 'ministers of God . . . .'"[108]

[31] The Ninth Circuit first applied the purpose prong of the *Lemon* test, finding that the city's investigation had a "valid secular purpose" to determine "whether the operations and policies of the LAPD were being improperly compromised by [the police officer]."[109] Importantly, the Ninth Circuit emphasized that the principal purpose of the city's investigation was to uncover any potential violations of the Establishment Clause by the police officer, in keeping with the city's policy to *prevent* such violations.[110]

[32] The Ninth Circuit then adopted an objective standard to determine whether the city's investigation had the primary effect of inhibiting religion.[111] The court emphasized that "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their

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[107] *Vernon*, 27 F.3d at 1388-89.

[108] *Id.* at 1388.

[109] *Id.* at 1397-98 (emphasis added).

[110] *Id.* at 1398.

[111] *Id.*

individual religious choices."[112] The Ninth Circuit noted that "the key consideration" in the primary effect prong of the *Lemon* test is "whether the government action 'primarily' disapproves of religious beliefs."[113] While finding it "possible" from the nature of the investigation to infer that the city in fact disapproved of the officer's religious beliefs, the Court nonetheless concluded that such disapproval "cannot objectively be construed as the primary focus or effect of the investigation," particularly in light of facts that indicated the city's commitment to preventing Establishment Clause violations by members of the police force.[114]

[33] In applying this objective standard to the facts in *American Family Association*, the Ninth Circuit found it "fairly easy to conclude" that the resolution adopted by the city did not have the primary effect of inhibiting religion.[115] Although one of the city's resolutions expressly urged the Religious Right to assume accountability for the impact of its rhetoric, the court considered such a stance "an afterthought" and maintained that the primary effect of the resolution was not to disparage the Religious Right, but to denounce hate crimes.[116] The Court found the other resolution and the public officials' direct letter to the plaintiffs more problematic because they "contain[ed] statements from which it may be inferred that the Defendants are hostile toward the religious view that homosexuality is sinful or immoral."[117] However, when the Court considered

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[112] Vernon v. City of Los Angeles, 27 F.3d 1385, 1398 (9th Cir. 1994) (citing School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

[113] *Id.* at 1398-99.

[114] *Id.*

[115] *Am. Family Ass'n*, 277 F.3d at 1122.

[116] *Id.*

[117] *Id.*

the context of the documents as a whole, it concluded that their primary purpose and effect was to promote equality for, and to discourage violence against, homosexuals.[118]

[34] In finding no disparagement of plaintiffs' religion by the city, the Ninth Circuit essentially found the defendants' speech a permissible means of combating hate speech and hate crimes, without expressing any opinion as to the effectiveness, validity, or propriety of such method.[119] Finally, the Ninth Circuit was careful to distinguish between government disapproval of religion and government disapproval of ideas held by many individuals, including members of religious groups; the former would violate the Establishment Clause while the latter would not.[120]

[35] Thus, by its holding, the Ninth Circuit essentially avoided the problem of *kulturkampf,* as defined by Professor Eskridge,[121] by enabling, but declining to comment on the respective validity of, the competing discourses at stake. Arguing that "[t]he First Amendment's protections of free speech, association, and press are the leading constitutional assurances against

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[118] *Id.* The court noted further that many of defendants' statements were "merely rebuttals of medical and psychological evidence cited by the Plaintiffs in their advertisement and not criticisms of the Plaintiffs' underlying religious beliefs." *Id.*

[119] *Am. Family Ass'n*, 277 F.3d at 1122-23.

[120] *See Id.* at 1123. In the principal case, the city and county government officials disapproved of the harmful message of the religious groups' anti-homosexual advertising campaign in an effort to respond to violence against homosexuals. *Id.* The Ninth Circuit refused to find that such a governmental concern constituted "excessive entanglement" with religion, noting that "government bodies would be at risk [of an Establishment Clause violation] any time they took an action that affected potentially religious issues," including secular issues, such as alcohol use. *Id.*

[121] *See* Eskridge, *supra* note 86.

Kulturkampf,"[122] Eskridge finds in the religion clauses of the First Amendment "a more general public law insight:"

> The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others. This is a constitutionalism inspired by the positive value of diversity and by the negative experiences of Kulturkampf, exemplified historically by both gay and religious experience.[123]

[36] Minow rightly concedes, albeit to a different effect, "the government is itself a source of important speech and ideas."[124] The speech and religion clauses of the First Amendment therefore must operate in tandem to safeguard against governmental abuses of power while nonetheless preserving the fundamental liberties of parties that might find themselves in philosophical and discursive antagonism. Protecting the free speech of any given individual, including a public official, secures the constitutionally guaranteed free speech (and arguably for religious speakers, also the free religious exercise) of all individuals. In this regard, the Ninth Circuit's holding in *American Family Association* essentially espoused both goals of the aforementioned balancing approach to First Amendment jurisprudence—liberty and equality—without adopting the balancing approach and its attendant shortcomings. Further, the Ninth Circuit's decision in *American Family Association* enables both victims and opponents of hate speech to dismantle its discursive harms where they begin and operate, perhaps, most insidiously: on the terrain of discourse itself.

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[122] *Id.* at 2414.

[123] *Id.*

[124] Minow, *supra* note 10, at 1263.

[37] Despite a state's lack of authority to directly regulate, via official enactments, speech that it deems deleterious or reprehensible, it need not absolutely acquiesce to such harmful discourses with silence. State actors are free to speak in their official capacity in any manner not prohibited by the Free Speech, Free Exercise, or Establishment Clauses of the Constitution. Such liberty gains a particularly heightened significance when one considers Minow's assertion that "[i]n a society in which hateful incidents are common, the government's response of silence itself conveys powerful messages that such views and conduct are within bounds and evade the official disapproval of the community."[125]

## V. CONCLUSION

[38] Because direct control of hate speech via legislation and other official regulations poses significant constitutional problems, state officials must find creative ways to address, and *redress*, the numerous, actual harms that hate speech inflicts—particularly when such speech is constitutionally protected religious speech. One such source of redress, as the Ninth Circuit recognized in *American Family Association*, is the First Amendment itself. Indeed, the First Amendment protects the rights of victims of anti-homosexual hate speech to challenge, via discourse, harmful speech in any or all of the following ways: individually, collectively, and in a delegated capacity through their public, official representatives. In instances where state officials are not primarily disparaging any given religious speech, practice, or *specifically* religious ideology, they are constitutionally permitted and protected, by the First Amendment, to speak out publicly and officially against the harms inflicted by, and as a consequence of, anti-homosexual hate speech.

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[125] *Id.*

[39] The proverbial value of "fighting fire with fire"—of dismantling the validity claims of hateful speech through the assertion of alternative, affirmative discourses—is a far superior alternative to the "characterization" or "balancing" approaches to First Amendment jurisprudence. Official repression of religious expression in ways expressly forbidden by the Constitution is thus avoided and speech deemed "undesirable" is not forced underground, where it may, as history cautions, fester and transform into further, and more acrimonious, violence destructive to the principles of liberty, equality, and democracy.