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7-9-2012

### Toward a Legal Realist View of the First Amendment

Richard Delgado

*University of Alabama - School of Law*, [rdelgado@law.ua.edu](mailto:rdelgado@law.ua.edu)

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113 Harv. L. Rev. 778

Harvard Law Review  
January, 2000

Book Review

**\*778** TOWARD A LEGAL REALIST VIEW OF THE FIRST AMENDMENT

Dissent, Injustice, and the Meanings of America. By Steven H. Shiffrin. Princeton, New Jersey: Princeton University Press. 1999. Pp. xiv, 204. \$29.95.

Richard Delgado [\[FN1\]](#)

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LIT -- Literature Reviews & Analyses

INTRODUCTION

Nearly three-quarters of a century ago, legal realism swept aside what Roscoe Pound called "mechanical jurisprudence," [\[FN1\]](#) paving the way for a host of movements--law and society, critical legal studies (CLS), feminist legal theory, and critical race theory, to name a few--that broadened our concept of law, generally for the better. [\[FN2\]](#) The one area that has resisted the legal realist revolution is First Amendment law, in which mechanistic rules (for example, no content-based regulation), special doctrines (for example, the dozens of "exceptions" to the realm of free speech), and thought-ending clichés ("the cure for bad speech is more speech") continue to hold sway. [\[FN3\]](#) Consider, for example, Justice Scalia's opinion in *R.A.V. v. City of St. Paul*, [\[FN4\]](#) which displays the formalism of a 1950s hornbook in its inattention to St. Paul's racial history, the rise of skinheads, the African-American family's reaction to the cross burning, the impact of hate messages in general, or anything else one might have thought relevant to the disposition of the case. [\[FN5\]](#)

**\*779** Under the influence of radical feminism and critical race theory, this last remnant of 1890s mechanical jurisprudence is beginning to give way to a view of speech that is flexible, policy-sensitive, and mindful of communication theory, politics, and setting. [\[FN6\]](#) Steven Shiffrin's *Dissent, Injustice, and the Meanings of America* is a welcome addition to this emerging "First Amendment legal realism" vein of scholarship.

This Review begins in Part I by outlining Shiffrin's book, paying particular attention to its principal themes of flexibility of analysis on the procedural side and encouragement of citizen participation and dissent on the substantive side. As Part II will make plain, an interpretation of First Amendment law that places dissent at its center and protects speech insofar as it takes the form of dissent offers a vital corrective to social apathy and domination by big corporations. Nevertheless, any approach to free speech law that emphasizes (even flexibly) a single variable has overtones of the old formalist approach and is apt to work injustice in certain cases. In particular, Part II, which focuses on Shiffrin's treatment of hate speech (pp. 49-87), shows that, although he comes to the correct general conclusion by way of his dissent-based approach, Shiffrin loses nuance by framing the problem in that fashion. Part III outlines additional features that future realist analysis should consider. Part IV draws on all of the above to posit a number

of practical solutions to the problem of regulating hate speech. The book review concludes with some lessons that realist First Amendment scholars should draw from Shiffrin's book, both from its formidable strengths as well as its occasional lapses.

### I. The Value of Dissent in First Amendment Jurisprudence

In *Dissent, Injustice, and the Meanings of America*, Steven Shiffrin, author of *The First Amendment, Democracy, and Romance*, [FN7] puts forward a dissent-based theory of the First Amendment. [FN8] Although Shiffrin does not believe that a general theory of the First Amendment is possible (pp. xi-xii, 48, 110, 132, 150), he nevertheless urges that dissent\*780 should occupy the center of any appropriate theory of free speech (pp. xi-xii, 10-11, 45-50, 128-29). [FN9] Asserting that combating injustice is the primary purpose of the First Amendment, Shiffrin holds that criticism of existing customs, traditions, institutions, and authorities should receive special protection because of the tendency of entrenched interests to perpetuate unjust hierarchies of power (pp. xii, 92, 107-10, 112-20). Even though much speech is valuable, Shiffrin writes, constitutional protection is especially required for the whistle-blower, iconoclast, or heretic voicing unpopular views (pp. xi, 18, 76, 97-110).

Shiffrin applies his progressive dissent-based approach--a refinement of the Meiklejohn thesis [FN10]--to contemporary First Amendment controversies to demonstrate how dissent theory adds to traditional free speech interest-balancing discourse (pp. xi-xii). For example, under Shiffrin's analysis, flag burners, perhaps the most severe public critics of our society, are quintessential dissenters whose act of protest is worthy of protection even if it causes offense to some (pp. xii, 4-18). Similarly, blasphemous artists who thumb their noses at social convention deserve full constitutional protection when denied grants by the National Endowment for the Arts (pp. 18-27). Both groups of protesters assail orthodoxy, defy convention, and intend to shake settled beliefs. They challenge us to take stock, to ask ourselves whether what we have believed all along is true.

Commercial speech, however, is not dissent, not even the hyperbole of unpopular but wealthy industries such as alcohol and tobacco producers (pp. 33-48). According to Shiffrin, commercial advertisements should enjoy some First Amendment solicitude but not the heightened degree of protection afforded to dissenting speech (pp. xii, 33, 37-41, 48). The products that these ads sell may be stigmatized (p. 41), but the ads do not "strik[e] out against the current" (p. 41). They are efforts by the powerful to control the market and thus to gain for themselves even more power. They do not seek to challenge hierarchy but to consolidate it (pp. 41-42). Shiffrin argues that his theory is tenable under recent Supreme Court decisions, including *44 Liquormart, Inc. v. Rhode Island*, [FN11] in which Justice Souter led some readers to believe that the case heralded increasing free speech protection for commercial speech by signing two opinions, only one of which embraced a stringent, highly speech-protective test (p. 35).

What of racist hate speech? At first glance, a neo-Nazi cross burner has more in common with a flag burner than with Phillip Morris.\*781 Neither has much monetary, political, or popular support, and both offensively burn symbols to achieve social change. Nevertheless, the racist speaker is not truly a dissenter, according to Shiffrin, for he or she merely openly voices views that most citizens hold privately (pp. xii, 77). Moreover, racist speech generally targets the powerless as opposed to the powerful, aims to intimidate and harass as opposed to protest, and promotes governmental illegitimacy as opposed to social justice (pp. xii-xiii, 77-78). Having classified racist speech as falling outside the category of dissent, Shiffrin, in a spectacular and convincing tour de force, paves the way for implementation of his theory by dismantling the Court's opinions in *R.A.V.* (pp. 51-76). In so doing, he also shows that Justice Scalia's doctrinal rigidity and narrow vision of America led to the unrealistic suggestion that a "pure" fighting words statute could serve as a content-neutral alternative to banning racist speech (pp. 63-64, 76), and he exposes the mistakes that led Justice White to conclude that St. Paul's ordinance was overbroad. [FN12]

Even if government can constitutionally criminalize racist speech, however, broad prohibitions may not necessarily be advisable. As this review discusses later, racist elements in

our society might tolerate only a limited ban. [FN13] Shiffrin addresses this possibility with a pragmatic balancing of factors, coming to a surprising and powerful compromise. [FN14]

After demonstrating how a dissent-based approach would influence discourse in several of the most prominent free speech controversies, [FN15] Shiffrin, in the second part of his book, discusses the value of dissent in combating injustice [FN16] and contemporary American society's failure to realize that value (pp. 91-120). We may give lip service to the idea of dissent and the encouragement of differing viewpoints, but in the real world we sit idly by while institutions such as the media, lobbyists, the education system, the entertainment industry, and even the Supreme Court suppress them (pp. 97-120). Shiffrin invites us to consider, for example, the entertainment-media complex: because reporters depend on the establishment for information, while the networks depend\*782 on corporate advertisers for profits, this industry is unlikely to be a source of dissent (pp. 97-109). Of course, broadcasting companies are public trustees of the airwaves and thus prime candidates for governmental and judicial intervention (p. 115). The Supreme Court has refrained from such interventions, however, most notably in *CBS v. Democratic National Committee* [FN17]--which held that CBS could prevent the DNC from buying airtime--just as it has in cases upholding bans on speeches in shopping malls (pp. 111-112). It has also consistently refused to place reasonable limitations on the spending of wealthy persons in electoral campaigns (pp. 111-112). [FN18]

Shiffrin offers some positive suggestions on how to encourage and foster dissent--including public funding of political campaigns, adequate subsidies of public television, liberalized defamation laws, and teaching schoolchildren the value of nonconformity--and he concludes with some political advice (pp. 112-20). He counsels his fellow progressives not to be enemies of the First Amendment, even when it is used to smother dissent or work injustice; the idea of "free country-free speech" is too deeply ingrained in the American conscience, too central to "the meaning of America" (pp. xi, 18, 43, 121-30). Instead, liberals and progressives should work to change the conservative interpretation of the First Amendment, molding it instead into the protector of the powerless and the guardian of justice.

## II. Hate Speech Under the Guise of Dissent: Some Cautions

In a key chapter, Shiffrin turns to an analysis of hate speech and pornography, employing the dissent approach he develops in his opening pages (pp. 49-87). [FN19] After disposing of Justice Scalia's opinion in *R.A.V.*, Shiffrin argues that courts cannot rationally consider hate speech to be a form of dissent and thus should hold that it falls outside the First Amendment's protection. His discussion of *R.A.V.* is exemplary; however, his more affirmative treatment of hate speech, although a promising beginning, needs to go even further.

To implement his dissent theory in the arena of racist speech, Shiffrin first dismantles the most formidable obstacle in his way, namely, Justice Scalia's majority opinion in *R.A.V.* In that case, Justice Scalia found that a St. Paul ordinance that criminalized "fighting words" based on race (among other things) amounted to unconstitutional content\*783 discrimination. [FN20] Shiffrin's main quarrel is that Justice Scalia never justified his use of strict scrutiny as the appropriate standard of review.

The strict scrutiny standard is appropriate for reviewing content discrimination in instances of protected speech, Shiffrin reasons, but "fighting words," like obscenity and defamation, fall outside that category (pp. 52-54, 57-63). [FN21] Within all of those disfavored speech categories, courts resolve cases by a balancing of interests and a host of value judgments that do not come close to strict scrutiny. [FN22] Furthermore, courts even evaluate content discrimination in commercial speech, speech protected--albeit not fully--by the First Amendment, under a less exacting standard (pp. 53-54, 57-66).

Having thus undermined Justice Scalia's basic position, Shiffrin proceeds to expose further flaws in it. He responds to Justice Scalia's concern that the government is "driving ideas from the marketplace" by pointing out that Justice Scalia's own content neutral "pure" fighting words alternative would silence even more ideas, even if one accepts the premise that racial epithets are somehow part of a legitimate marketplace (pp. 63-64). [FN23] Furthermore, he observes that one image or story about the meaning of America drives Justice Scalia's opinion--the tale of the content neutral government that is anti-paternalistic and tolerant of all views, no matter

how hateful (pp. 64-65). Although acknowledging that this national picture is deeply rooted in American culture, Shiffrin points to other stories, ignored by Justice Scalia, that would have produced a quite different opinion, in particular one of an evolving America constantly striving for racial (and gender and religious) equality against a current of hatred, prejudice, and unjust hierarchy\*784 (pp. 64-65). [FN24] In such a narrative, St. Paul's attempt to curb the public disgrace of racial and other insults merely advances our progress on the road to a peaceful and diverse society. If Justice Scalia had taken such a story seriously, according to Shiffrin, he could not have struck down the statute even under a stringent interest balancing test (p. 65). [FN25]

Although Shiffrin's approach to racist speech is both helpful and well-intended, it suffers from a number of weaknesses. First, his dissent-based approach displays vestiges of the same binary rigidity that he criticizes elsewhere. Instead of arguing whether hate speech could and should be proscribed, the new argument will be whether hate speech is dissent [FN26] or whether hate speech regulation violates content neutrality--Scalia's box for it--or merely tracks the fighting words exception--Shiffrin's preferred approach. Although Shiffrin concludes that hate speech has little to do with dissent, others are free to reach different conclusions. One can easily imagine a wide range of objectionable racist speech that appears to have the superficial characteristics of dissent; by the same token, one can conjure up instances and settings of hate speech that are not dissenting or even fighting words, but are nevertheless objectionable. Although Shiffrin, to his great credit, invented the dissent theory, neither he nor someone else comparably progressive will be able to dictate the manner in which courts will apply it. [FN27]

Second, Shiffrin's line-drawing begs further justification. He concludes that the prohibition of nontargeted racist speech would backfire in our racist, libertarian society, so that we should only seek to regulate the targeted variety (pp. 80-87). [FN28] With nontargeted hate speech, no specific victim is on hand to arouse our sympathies, with the result that our racist, libertarian impulses take over. Even though nontargeted\*785 hate speech could be said to have victims--all the members of the reviled class--the harm is so widely diffused that many citizens will not see it in this way.

Shiffrin makes a persuasive argument. Yet he never makes clear what exactly the critical category of "targeted" includes or how a statute might incorporate it. For example, will the words have to be uttered face to face? Will it be enough that the speaker knew of a possibility that his speech would be heard by an individual or group--and how large or small a group?--of minorities, or would he have to intend for this to happen? This flaw shadows his treatment of targeted versus nontargeted racist speech, as it is difficult to assess public reaction to a statute whose reach would be unclear. [FN29]

Finally, Shiffrin assumes that the public blindly supports free speech and will embrace and make martyrs of the racist speakers prosecuted under any broad hate speech ban (p. 83). [FN30] His preoccupation with the dissenter eager to associate himself with a controversial cause is understandable, but it leads him to forget, perhaps, the large majority of Americans who simply obey the laws and prosper in the security that they provide. Many citizens presumably will not feel personally affected by laws against hate speech and would support them, if, for nothing else, to relieve their social conscience at no cost to themselves. [FN31]

Despite these minor omissions, Shiffrin's treatment of hate speech impressively advances thought in a neglected area. The next section will provide a few realist observations to advance the analysis that Shiffrin has begun.

### III. Observations on Hate Speech: Toward a Realist Approach

If dissent cannot serve as the only analytical tool for analyzing a complex free-speech question, what would a more expansive realist treatment look like? As was mentioned, it should, at a minimum, consider context, social science, and the politics of the area in question. [FN32] \*786 The following sections outline how some of these matters might be brought to bear on the controversy over hate-speech regulation.

#### A. The Varieties of Hate Speech

Like much hate speech, the racist form represents a much broader range of expression than comes readily to mind when viewed solely through the prism of the dissenter. Moreover, analysis of it exclusively in terms of dissent inevitably leaves out much that a conscientious policymaker or judge may wish to take into account. For Shiffrin, hate speech either is dissent, or it is not. If it is, then it should presumptively lie beyond regulation; if otherwise, it should not. One problem with this view--although perhaps not inherent in it--is that the category of hate speech encompasses a great many forms of racially demeaning messages, some of which may more plausibly than others qualify as dissent. For example, consider crude, racially offensive words (such as "nigger," "spic," and "kike") spoken directly to a member of an ethnic or racial minority group. Consider the same words spoken one-on-one, in a many-on-one situation, or by an authority figure such as a teacher or employer to a student or worker. Consider refined polysyllabic words or wordless racist logos or team mascots. Consider words spoken in a closed setting, such as a classroom or workplace, from which a captive person of color cannot easily escape. Consider the same words slipped under a dormitory door, or written on a bulletin board attached to the door's outside for the occupant to discover only later. Consider the same words written as graffiti on a bathroom wall, outside of a campus building, or on a dormitory containing students of color. Consider the same words contained in assigned reading for a course, sent anonymously to minority persons via the Internet, repeated on a campus radio station, or spoken in friendly fashion by one person of color to another. Are all of these regulable? Some? None?

Hate speech, then, comes in many guises, each implicating a unique mix of free-speech values, on the one hand, and dignity/personal-security concerns on the other. Surely Shiffrin does not disagree; indeed, elsewhere he calls for sensitivity to speech's function, context, and setting. [\[FN33\]](#) Yet his analysis treats hate speech in an undifferentiated, uniform fashion--a small mistake, perhaps, because he may regard most of the examples of hate speech listed above as lying outside protection. But his preoccupation with just the one value, dissent, **\*787** may predispose him to blur the types of speech that courts and other legal decisionmakers may decide stand on different footing. Shiffrin is surely right to urge the legal system to pay more attention to the value of dissenting speech than it has in the past. And, he is surely right as well to conclude that many forms of hate speech are not entitled to protection under that rubric. Quite the contrary: instead of attacking the government, the Pentagon, or mainstream society--as dissent does--hate speech grinds down persons of lower station and power than the speaker. [\[FN34\]](#) By increasing the distance between the majority and the minority group, hate speech is, in a way, the opposite of dissent. Not aimed at bringing down persons or institutions from on high, hate speech instead maligns and renders the disadvantaged even more so. [\[FN35\]](#) And this is true, to one degree or another, of all forms of hate speech, even the refined, intellectualized variety.

Still, it is speech, and, as such, deserves careful, differentiated treatment. [\[FN36\]](#) Failure to afford it such treatment replicates the formalist error that Justice Scalia committed when he found no room at all for regulation of hate speech, [\[FN37\]](#) but renders hate speech categorically unprotected rather than categorically protected. [\[FN38\]](#) Devising sensible rules regarding racial invective requires understanding what it is, how it works, and what its different manifestations are. This we cannot do if we lump all forms of it together. For First Amendment legal realism, the multifariousness of hate speech highlights how different forms of speech embody various values, policies, and vulnerabilities, and so require different treatment.

## B. Hate Speech as a Concerted Harm

Another realist observation concerns what some call the "social construction of reality" thesis. [\[FN39\]](#) Hate speech never occurs in isolation; it picks as its target individuals who have been exposed to racist hate speech before and are likely to experience its sting again in the future. **\*788** Like salt rubbed into a wound, hate speech digs at its victims' sensibilities, reminding them that they are different and that the source of that difference causes others to regard them as beneath the speaker in standing and human worth. [\[FN40\]](#) Like water dripping on stone, hate speech harms by virtue of its incessancy--victims hear it again and again throughout their entire lives. [\[FN41\]](#) The messages conveyed in hate speech sink in, so that

over time the victims of those damaging messages begin to doubt their self-worth. This aspect of hate speech is what proponents of regulation have in mind when they write that hate speech contributes to a social order that falls far short of our national ideals. [\[FN42\]](#)

But these messages also alter the environment for individuals of the majority race, including those who aspire to be nonracist and would never utter hate speech themselves. They hear others doing so and see images of minorities in demeaning or limited roles on television, in the movies, and in newspapers. [\[FN43\]](#) Who would blame them if, after time, they began secretly to wonder whether the prevailing stereotypes of persons of color did not have a small grain of truth to them? And, an insidious form of reinforcement known as "stereotype threat" validates those suspicions, as test-takers from groups subject to demeaning stereotypes perform poorly precisely because they fear that their performance will confirm the stereotype. [\[FN44\]](#) Claude Steele and a co-investigator coined this term when they found that black test-takers who were told that a fairly difficult paper-and-pencil test would measure their cognitive ability performed poorly compared to a control \*789 group whose members were told that the test was aimed only at helping researchers to understand problem-solving behavior. [\[FN45\]](#) Media and other messages broadcasting the inferiority of minorities may be a prime means of perpetuating stereotype threat.

These broader consequences of hate speech can easily escape scholars. Seeing the harm of hate speech as affecting dignity only, they end up weighing short-term, individual consequences--wounded feelings--against the broad, systemic benefits that we derive as a society from our system of free expression. [\[FN46\]](#) Even Shiffrin succumbs to this temptation at times, yet how fair is it to frame the problem in these terms? Suppose that a supporter of hate speech regulation urged that the legal system weigh the speaker's "momentary discomfort" in reining in his or her thoughts against the massive gains that society reaps from enforcing antidiscrimination norms. A realist approach would regard both individual and social costs and benefits as duly weighing in the balance. It would deal with both the effects of hate speech on the life of a single individual as well as its impact across large groups.

### C. Hate Speech And Interclass Competition: The Who-Benefits Question

A third realist insight, barely touched upon in Shiffrin's book, concerns hate speech's role in promoting the interests of elite groups. Not only does such speech render its victims one-down, it often operates further to advantage its speakers and their class. Hate speech achieves these ends in a number of ways. First, it keeps the playing field uneven--recall the earlier discussion of stereotype threat, for example. [\[FN47\]](#) If a system of pernicious images renders a minority of test-takers and job applicants nervous, fumbling, ill-at-ease--and less competent than they would otherwise be--then those who compete with them for test scores, jobs, and places in law school classes will gain an advantage; part of the competition will have been eliminated. [\[FN48\]](#)

Hate speech also reinforces the class system in other, more straightforward, ways. Elsewhere I have suggested that some university administrators may hesitate to crack down on campus hate speech because\*790 of subtle self-interest. [\[FN49\]](#) Although university officials are generally sympathetic to the plight of minorities, they may know, on some level, that tolerating a small degree of harassment and invective on campus confers benefits. [\[FN50\]](#) I do not mean crude, graphic, glaring forms of racial acting-out like fraternity parties with racially offensive themes or slave auctions that bring press coverage and infamy to the campus, [\[FN51\]](#) but the daily forms of near-invisible comments, double entendres, and slights directed against students of color and women. [\[FN52\]](#) Consider, also, the unpunished defacement of interest groups' bulletin boards or the graffiti written on campus buildings-- events that rarely attract press attention but that students of color, Jews, and women notice and remember. [\[FN53\]](#) Tolerating this level of "micro-aggression" keeps students of color on edge and defensive, prevents them from feeling too secure on campus, and discourages them from making demands--such as for curricular change, more financial aid, or professors of color--that might prove quite costly for the institution. [\[FN54\]](#) Minority students of real spirit--apt to be a thorn in the side of administrators--may well leave or transfer to another institution. [\[FN55\]](#)

Thus, although most campus officials themselves would never utter a racial slur and would disapprove strongly if a member of their social circle did so, they might treat lightly the

occasional racist student, visitor, or lecturer who utters one, recognizing, perhaps unconsciously, that his transgression brings stability to the institution. Campus hate speech may, then, operate like a homeostat, assuring that the system contains just the right amount of racism. Not too much, for that would bring adverse consequences and instigate rebellion; nor too little, \*791 for that would forfeit important advantages that enable the campus to perform its work of reproducing social hierarchy. [FN56]

The system of freedom of expression benefits the powerful in yet another way. A marketplace mechanism like so many others, freedom of expression allows those in control to believe that their positions are deserved. For if our superior ideas and forms of social organization competed with those of others and won fair and square, then the proponents of the weaker ideas have no legitimate complaint. It was a fair fight. If the losers find themselves poor, reviled, and excluded, their remedy is to bring themselves up to our standard. Free speech, then, serves an important after-the-fact, apologetic function. [FN57] But, of course, the fight was not fair. Speech is expensive; not all can afford the cost of a microphone, computer, or television airtime; not all have equal credibility in the eyes of the public. Yet our myth of a free marketplace of ideas enables us to ignore these inequalities, deepening the predicament of those whom it marginalizes.

#### D. Hate Speech and Distributed Credibility

The immediately preceding observation about selective access and credibility dovetails with yet another realist observation, namely, hate speech's falsification of a leading premise of our competitive, merit-driven system--the level playing field, which assumes that in a fair society, all will compete on equal terms for jobs, positions in a law school class, and other scarce commodities. Standardized tests, like the Scholastic Aptitude Test (SAT) or Law School Admissions Test (LSAT), are supposed to be administered under conditions that are the same for all. If a condition of the test required that blaring music bombard half the test-takers (for example, women and minorities) but not the other half, then we would immediately pronounce the competition unfair and the playing field uneven. Stereotype anxiety, a mechanism documented by Steele and Aronson, [FN58] afflicts minorities alone \*792 and is a product of hate speech, belittlement, and other forms of negative social characterization. [FN59]

Hate messages also make the task of the minority speaker harder, because of the toll that they take on the credibility of speakers of color. Women know that often, in the course of a conversation among several people, a woman will make a suggestion and the conversation will continue as though little had happened. Later, a man will raise the same idea, which everyone will praise and then describe as "Bill's idea." The very same message from a woman will register differently from one delivered by a man. Minorities often have the same experience. How can this be? Because the message is the same irrespective of the speaker, the reason for the different reception cannot lie in the words themselves. Unless all women and minorities are inherently unworthy of belief--something no one is likely to maintain--the only possible origin of this differential credibility lies in the system of stories and messages that we choose to tell about, and to, minorities and women--in short, hate speech.

The speech of A, then, deprives B of effective speech, the one value that a First Amendment absolutist cannot deny. Note that this deprivation stems not from a merely contingent connection such as that between money and speech--the Supreme Court has held that this does not rise to constitutional dimensions. [FN60] Instead, credibility stands as a logical precondition for successful communication--no one credits a lunatic or pathological liar; even if he or she speaks the truth on occasion, most auditors would seek independent verification.

Credibility, of course, occupies a vital place in our system of law. Dozens of evidentiary doctrines determine when a witness's lack of credibility may bar him or her from speaking. Rules dealing with conflict of interest, [FN61] child witnesses, [FN62] and those who have earlier testified inconsistently [FN63] aim to weed out testimony that lacks credibility. Cross-examination endeavors to assure the same end. [FN64] In earlier eras we refused to hear the testimony of Chinese or black witnesses against \*793 parties who were white [FN65]--we deemed them unworthy to perform that function.



On a larger scale, the political marketplace of ideas rests on an assumption similar to that of the adversary system; it too assumes that evidence and testimony presented by opposing sides will allow the truth to emerge. [FN66] If our system of freedom of expression exists, in part, to permit a vigorous give-and-take of ideas and contributions on important social subjects, then one must view with concern any mechanism that systematically denies a blameless group its due efficacy and credibility. At one time we straightforwardly excluded women and nonwhite minorities from voting or giving courtroom testimony. Today, we accomplish a milder version of the same exclusion through media-delivered and individual messages that slander and demean. Like lies in court, hate speech subverts a principal premise of democracy. Shiffrin does note the effect of hate speech on minorities, but only to point out that it diminishes participation by silencing them (p. 77). Why not go further to point out that even when minorities are not silenced their speech is often futile? Preoccupied with dissent as a First Amendment value for speakers, Shiffrin may have failed to examine closely what is happening on the other side of the equation.

#### E. "But Free Speech Made America Great"

Some liberals and free speech absolutists deplore hate speech but argue against its regulation on the ground that freedom of expression has been minorities' best friend. [FN67] If they knew their own best interest, the argument goes, they would not be clamoring for its restriction. [FN68] A realist view of history shows, however, that our system of free speech law has not always served as a staunch ally of minority interests. In the sixties, black protesters sat in and were arrested and convicted; marched and were arrested and convicted; picketed and were arrested and convicted. [FN69] True, years later and after the expenditure of thousands of dollars of legal fees and untold hours of gallant lawyering, some of their convictions were reversed on appeal. But not always; courts often concluded that their speech was too muscular--\*794 too intermixed with action--or too disruptive of property rights to risk reversal. [FN70] Speech may have been a vital tool for organizing and for quickening America's conscience; free speech law (at least as then interpreted) was not. [FN71]

Just as that body of law did not play a central role in advancing minorities' struggle for civil rights, it also has not invariably furthered other social goals. Many believe uncritically that free speech and the First Amendment have made America great. [FN72] But consider: the U.S. today unquestionably leads the rest of the world in two principal areas--economic production and military might. Arguably, both flourished not because of freedom of expression but because of exceptions to it, such as patents, copyrights, trade secrets, and official (military) secrets. A truly free press and citizenry, able to speak, learn, and circulate ideas freely in these areas, would have interfered with the development of the prodigious industrial and military base that we now enjoy. [FN73]

At the same time, hate speech and hard-core pornography, which until recently have been virtually unregulated by the legal system, contribute greatly to inequality and social pathology. In contrast to industrial and military production, which the American legal system favors by restrictions on speech, social relations among classes and groups receive less protection. If dominant groups may carelessly revile and disparage weaker ones, then it can hardly be a surprise that America ranks low among western industrialized nations in equality of wealth and income, [FN74] and that the figures for infant mortality, [FN75] life expectancy, \*795 [FN76] and broken families in black and brown communities [FN77] remain abysmal. It seems highly likely that tolerating virulent hate speech and vicious public depiction plays a part in allowing these forms of social misery to develop and persist. [FN78] Free speech, then, did not make America great. [FN79] It would be truer to say that the exceptions to it did, at the same time that the lack of regulation of hate speech contributed to social conditions that are becoming a source of national embarrassment. Legal-realist analysis would question the celebratory manner in which some equate free speech with a vehicle of progress, modernity, and social justice, and would aim instead for a more balanced approach that concedes that unregulated speech may sometimes exact a high cost.

#### F. The Balance Today May Be Tipping: Hate Speech Is No Longer a Social Good

Although hate speech may have abetted the preservation of a system of social stratification that brought at least some benefits to the ruling class--at a considerable cost to the minority class--the equation may be changing. Our society today is much more diverse than before. [FN80] It is also more populous, and channels of communication place us in closer contact with each other than ever before, multiplying opportunities for friction. For all these reasons, society may need to begin imposing some limits on virulently antisocial discourse. Most other areas of law have witnessed healthy (perhaps inevitable) evolution\*796 stemming from these and other social changes--for example, recall how the law of personal jurisdiction has moved from mechanistic reliance on physical presence to a more multifaceted minimum contacts approach, under which a state may assert jurisdiction over defendants who have had certain contacts with it or its citizens. [FN81] To meet the current challenges of global competition, society needs the contributions and enthusiastic participation of all its members. Now that the era of rapid, unrestrained development has passed, controls on hate speech, like the sexual harassment limits developed over the past few years, may begin to seem logical and necessary to all segments of society, irrespective of class or race distinctions. This is not to say that devising sensible rules will be easy. Even now, hate speech comes in a variety of forms, not all of which lend themselves to regulation. [FN82] Moreover, the very idea of what hate speech is may change over time (just as the idea of what constitutes defamation or plagiarism has) and vary from group to group. Realism teaches that no static, across-the-board approach will work for something as complex as language.

#### G. From Realism to Morality and Politics

Restraints may become politically and morally imperative as well. In former times, neorepublican and social-contractarian notions of government assumed that all citizens were capable of deliberating about the good. [FN83] These theories assumed a relatively homogeneous society. In today's more diverse society, no single, simple definition of the common good is attainable. [FN84] Permanent truces and agreements to tolerate divergent opinions could well be the best that society can hope to achieve. One precondition to such a tolerant society could be an agreement not to denigrate other groups needlessly.

Dealing with hate speech may then turn out to be a pre-political normative reckoning necessary before deliberation among equals--the keystone of democracy [FN85]--may occur. Without such a reckoning, genuine dialogue based on equal participation and respect will be \*797 scarce. The costs of a regime that tolerates hate speech will inevitably fall heavily on minorities. To put it in Kantian terms, one cannot will a universal rule tolerating hate speech, any more than one can consider that such practice treats people as ends in themselves. [FN86] History informs the content of hate speech and the context in which a person experiences racial slurs. Thus, words such as "honky," "cracker," and "redneck" are insulting for white individuals, but nonetheless lack the socially and politically laden and corrosively dispiriting quality of words such as "nigger," "wop," "spic," "chink," or "kike." These terms carry a historical message that often multiplies their impact, whereas the derogatory forms for non-minorities, who do not have a history of persecution that used these terms as symbols, often experience slurs on an individual and isolated level. [FN87]

The legal creation of the "suspect class" also demonstrates the importance of pre-political normative reckoning. Courts apply a higher standard of judicial review to laws that disadvantage insular and discrete minorities disadvantaged in the political process. [FN88] This standard, which owes its origin to a famous footnote in *United States v. Carolene Products Co.*, [FN89] buttresses what previous writers have posited: that equality (or equal respect) and free speech presuppose and depend upon each other. [FN90] That is, without some basic level of social respect, free speech will merely compound social inequality, yet without a degree of freedom to speak, minorities will be unable to advocate \*798 for social advancement. [FN91] Both free speech and the protection of equality, then, are linked--we must advance both at the same time, or we will have little of either. [FN92]

The legal recognition and protection of social groups, such as racial minorities, reminds us that some segments of society are disenfranchised, politically isolated, and socially marginalized. Speech that targets them-- indeed, "constructs" them [FN93]--must therefore

stand on different footing from speech that targets, for example, wealthy industrialists who are well-represented in the political process and bear no comparably damaging historic stigma or stereotype. On this point, Shiffrin's insight about the role of dissent in curbing the excesses of the powerful is true and helpful. It enables us to see that we need not tolerate all speech, especially not that which victimizes those who are already marginalized, and, as mentioned earlier, functions as the opposite of dissent.

#### IV. Campus Hate-Speech Regulation: Some Realist Approaches

##### A. Two-Part, Race-Neutral Conduct Codes

Other than offering a devastating critique of *R.A.V. v. City of St. Paul*, the principal doctrinal barrier for hate-speech laws, [FN94] Shiffrin provides little in the way of concrete solutions to the current regulatory impasse. Even while *R.A.V.* remains on the books, however, some solutions seem possible. In particular, one way of controlling hate speech on college campuses would be to enact an across-the-board prohibition of all severe insults and invective. Such a regulation, which would penalize extremely disturbing, intentional, face-to-face revilement and could be patterned on the tort of intentional infliction of emotional distress [FN95] or on the "fighting words" exception of *Chaplinsky v. New Hampshire*, [FN96] would be entirely race-neutral and therefore presumptively constitutional. [FN97] Elsewhere in the code of conduct, the institution could provide for enhanced discipline for any campus offense (whether stealing books, defacing buildings, hacking into computers, or cheating) that was carried out with racial animus or motivation. This regulation would track *Wisconsin v. Mitchell* [FN98] (the penalty-enhancement case) and would also be presumptively constitutional. Operating together, the two provisions would effectively constitute a regulatory scheme capable of punishing and deterring harmful hate speech in an institution such as a college. [FN99]

##### B. Third-Party Standing

A second approach that could be employed in connection with either a one- or two-part hate speech code would be to provide for third party, or "white," standing. [FN100] Much hate speech is uttered in a cowardly, several-on-one fashion or takes the form of anonymous leaflets placed under the student of color's dormitory door or of graffiti scribbled on a campus building or temple. If the defacer knew that anyone observing the event could file charges, not just the intended victim, then he or she might hesitate to carry out the task. Such a provision would capture the doctrinal weight of *Trafficante*, [FN101] a case upholding white citizens' rights to assert standing as injured third parties in challenging discrimination against minorities, and would provide a number of benefits. It would make hate-speech enforcement modestly more effective. At the same time, it would make courts less likely to strike the measures down as violations of the norm of race-neutrality. Finally, third-party enforcement would call attention to whites' stake \*800 in a racism-free environment and highlight the role that regulations play in advancing broad institutional ideals.

##### C. Subsequent-in-Time Maxim to Interpret the First Amendment as Incorporating Equality Concerns

In similar fashion, one might argue for a free-speech principle that incorporates the principle of equal respect for persons. [FN102] A realist might point out that a canon of interpretation ("last in time") holds that later-enacted rules modify earlier ones. Because the Fourteenth Amendment was enacted nearly a century after the First, [FN103] one might plausibly argue that it therefore adds an equality-protecting gloss to the earlier provision, at least in cases in which the two principles collide. [FN104] To the extent that the Framers' intent informs the hate speech controversy, the relevant intent would include that of the Fourteenth Amendment along with that of the First. The Supreme Court has, in fact, held that the Fourteenth Amendment

modifies the states' sovereign immunity, which the eighteenth-century Constitution protected. [\[FN105\]](#) Why should it not, similarly, modify our understanding of the role of speech? [\[FN106\]](#)

#### D. Hostile Environment Law

A final avenue for instituting hate speech controls is "hostile environment" law. Under this approach, concerted, unpunished hate speech that persists over time and deprives a victim of equal educational opportunity would be punishable under Title VI of the Civil Rights Act of 1964. [\[FN107\]](#) In *Monteiro v. Tempe Union High School District*, \*801 [\[FN108\]](#) an African-American student sued her high school district for requiring her class to read literary works that contained racially derogatory terms and for taking no measures to stop racial harassment, which included other students' use of the word "nigger" and insulting graffiti scrawled throughout the school. [\[FN109\]](#) The Ninth Circuit held that the school's assignment of books such as *Huckleberry Finn* did not constitute discrimination, [\[FN110\]](#) but that its knowledge of and failure to act upon racial slurs by other students did. [\[FN111\]](#) The court also declared discriminatory those racist attacks, such as graffiti, that were not directed at the complainant personally. [\[FN112\]](#) The court wrote:

It does not take an educational psychologist to conclude that being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to [learn]. [\[FN113\]](#)

The Ninth Circuit's ruling parallels philosopher Diana Tietjens Meyers's proposal for controlling hate speech on campus by permitting its victims to sue the university--although not the speaker--for damages. [\[FN114\]](#) Her intention was to protect minorities' interest in gaining recompense while at the same time preserving the bigot's free-speech interest. Under her proposal, the minority member would win damages, while the utterer of hate speech would go unpunished. [\[FN115\]](#) Providing remedies against the university would give it an incentive to take measures aimed at reducing its exposure--optimistically modest, education-based ones, coupled with greater care in selecting whom it admits in the first place. Meyers's proposal, like the Ninth Circuit's "hostile environment" case, addresses the possibility, mentioned earlier, that some universities may unconsciously tolerate hate speech in order \*802 to gain certain advantages. [\[FN116\]](#) Monetary awards would encourage the university to internalize the costs those gains from hate speech impose on the speech's targets, and, when possible, to avoid them.

#### CONCLUSION

In *Dissent, Injustice, and the Meanings of America*, Steven H. Shiffrin takes his readers on a rewarding and thought-provoking tour of some of the most difficult First Amendment areas--ones that pit the right of dissent against social interests in order, decency, and racial justice. He also brings a much-needed infusion of legal realism to an area of constitutional doctrine that had hitherto resisted it, remaining content with archaic formulas and platitudes. [\[FN117\]](#) Though his prose style is demanding and his dissent approach ultimately lacks the all-purpose utility he hopes for it, Shiffrin's book is well worth the reader's effort. Its unmasking of pseudoscience in recent Supreme Court opinions is worth the price of admission alone, while his chapters on the need to protect the lonely iconoclast who takes on governmental authority or social convention are often downright inspiring. Dissent's few defects are traceable to vestiges of binary, formalist First Amendment interpretation; its virtues, by contrast, are numerous and impressive. For this reader, at least, *Dissent, Injustice, and the Meanings of America* is one of the more compelling books on constitutional theory to have appeared in many years.

[\[FN1a\]](#). Jean N. Lindsley Professor of Law, University of Colorado School of Law.

[\[FN1\]](#). Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).

[\[FN2\]](#). See, e.g., J. M. Balkin, [Some Realism about Pluralism: Legal Realist Approaches to the First Amendment](#), 1990 *Duke L.J.* 375, 379-94 (tracing the history of the legal realist critique); Richard Delgado, [First Amendment Legal Formalism Is Giving Way to First Amendment Legal](#)

[Realism, 29 Harv. C.R.-C.L. L. Rev. 169, 171 \(1994\)](#) (noting that the legal realists “[led] the way to clinical legal education, perspectivism, critical legal studies (CLS), and elite law reviews”). For a history of these movements and the transition from legal realism to some of its modern incarnations, see [Critical Legal Studies Symposium, 36 Stan. L. Rev. 1 \(1984\)](#).

[FN3]. See Delgado, *supra* note 2, at 172.

[FN4]. [505 U.S. 377 \(1992\)](#).

[FN5]. See [id. at 379](#) (describing the incident of cross-burning that gave rise to the appeal in highly abstract, depersonalized terms). R.A.V. arose when a group of teenagers burned a cross in the yard of an African-American family who lived in a white neighborhood in St. Paul, Minnesota. They were charged under a broad city ordinance that prohibited placing on public or private property objects such as burning crosses or swastikas that are calculated to provoke alarm or resentment based on race, creed, color, religion, or gender. See *id.*

[FN6]. See Delgado, *supra* note 2, at 169-72 (giving examples).

[FN7]. Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (1990).

[FN8]. Other commentators have also suggested a First Amendment theory along these lines. See, e.g., Mari J. Matsuda, Charles R. Lawrence, III, Richard Delgado, and Kimberlè Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 15, 136 (1993) (arguing that an antistatutory principle informs First Amendment law).

[FN9]. Note that Shiffrin does not romanticize dissent; he realizes that it may be silly, pointless, or narcissistic. See Shiffrin, *supra* note 7, at 96.

[FN10]. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 255-56 (proposing unlimited protection for core political speech).

[FN11]. [517 U.S. 484 \(1996\)](#).

[FN12]. For example, Shiffrin argues that the Minnesota Supreme Court had construed the statute narrowly but that Justice White nevertheless read it to cover cases of mere hurt feelings (pp. 67-76).

[FN13]. See Part II, *infra*, explaining that Shiffrin persuasively argues that a prohibition on targeted hate speech has the ability to generate sympathy even from a jaded public, but that untargeted speech does not.

[FN14]. See *infra* notes 28-29 and accompanying text.

[FN15]. In a rare but striking omission, Shiffrin's book is silent on hate speech against gays and lesbians, although they would seem to be subject to at least as virulent a form of hate speech as that faced by ethnic and racial minorities.

[FN16]. For example, Shiffrin proposes the intriguing idea that the dissenter stands in, as a sort of virtual representative, for the many who are too busy, overworked, or simply disinclined to participate in civic or political life (pp. 43, 45, 91-120).

[FN17]. [412 U.S. 94 \(1973\)](#).

[FN18]. Shiffrin devotes particular criticism to [Buckley v. Valeo, 424 U.S. 1 \(1976\)](#), the campaign-reform spending case.

[FN19]. See also Steven H. Shiffrin, [Racist Speech, Outsider Jurisprudence, and the Meaning of America](#), 80 *Cornell L. Rev.* 43, 84-103 (1994) (discussing hate speech regulation and presenting his dissent-based approach to the First Amendment).

[FN20]. See [R.A.V. v. City of St. Paul](#), 505 U.S. 377, 384-91 (1992).

[FN21]. "Justice Scalia maintains that the appropriate test to apply is a form of strict scrutiny, but some doctrinal savagery is required in order to make that conclusion presentable." (p. 53). In particular, "[a] case like *Posadas* [ [Posadas de Puerto Rico Associates v. Tourism Co.](#), 478 U.S. 328 (1986)] raises a difficult question for Justice Scalia's approach: if less than strict standards are employed to deal with subject matter discrimination within a category of protected speech ...how could one justify strict scrutiny to examine subject matter discrimination within a category of unprotected speech?" (p. 53). See also pp. 53-62 (showing that Justice Scalia's efforts to distinguish *Posadas* fail: "Justice Scalia was sharply on the lookout for ... discrimination in *R.A.V.* Regrettably, he was more cavalier when it came to discussing the possibility that the *St. Paul* ordinance fit within one of his own exceptions.").

[FN22]. For example, with obscenity "the Court has forthrightly balanced or deferred to the interests proffered by the state"--interests such as protecting morality and countering the debasement of the human personality (p. 60).

[FN23]. Shiffrin also points out that a broad prohibition, couched in race-neutral terms, would simply invite the jury to make judgments as to which insults were egregious enough to trigger the statute. Presumably, serious racist insults would trigger the statute, but ones directed, for instance, at someone's driving ability ("Stupid student driver, get off the road!") would not trigger it. Juries, then, would do what Justice Scalia holds that the *St. Paul* city council cannot do, yet the end result--punishment of hate speech-- would be the same (p. 59).

[FN24]. Shiffrin also shows how First Amendment values such as truth, autonomy, and self-fulfillment are not advanced by letting hate speech flourish, and how the government has outlawed threats against the President, casino advertisements, and the burning of draft cards--all forms of idea discrimination seemingly comparable in social importance to regulating hate speech (pp. 50, 57-58, 78-79).

[FN25]. In these passages, Shiffrin comes close to suggesting that, with hate speech, other values besides dissent come into play--such as equal dignity, constitutional citizenship, and participation. If so, one wonders whether Shiffrin might not, ultimately, have made a stronger case for regulating hate speech by appealing to these broader values as well as to dissent.

[FN26]. See *infra* notes 33-35 and accompanying text (differentiating hate speech from dissent).

[FN27]. In other words, dissent can be a box, too; and, once the box is created, people of different persuasions are free to argue what goes inside of it.

[FN28]. Note that Shiffrin arrives at this conclusion essentially through pragmatic balancing, rather than through box-checking or categorical reasoning, and that he intimates that he might change his mind if outside scholars and their constituencies felt differently about punishing untargeted hate speech (pp. 50, 83-85). See also *supra* p. 783 (pointing out that Justice Scalia's opinion in *R.A.V.* appears to stem from a one-sided story or narrative about America). Shiffrin wields noncategorical tools with real power and elegance.

[FN29]. Further ambiguity is likely, as well, when social conditions and the nation's demography change. For example, what will happen to the definition of terms such as "targeted" and "hate speech" when the nation reaches, sometime in the middle of the next century, majority-minority

status and people of color begin to outnumber, cumulatively, whites?

[FN30]. See, e.g., p. 83 (warning of the risk of turning bigots into martyrs by prosecuting them).

[FN31]. By the same token, Shiffrin does not deal with apathy of the judicial variety. Although protection of dissent is certainly a laudable ideal (and clearly would not include safeguarding hate speech), how likely is it that the currently conservative judiciary, which embraces textual and historical analyses, will embrace his new model?

[FN32]. See *supra* p. 779.

[FN33]. See Shiffrin, *supra* note 7, at 148, 150; see also Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 *Wm. & Mary Bill of Rights J.* 305, 332-33 (1999) (arguing that much hate speech consists not of content-bearing messages aimed at communicating something to an audience but of performatives--speech acts (such as "I do" or "you're on") that change the world by their very utterance).

[FN34]. Cf. Richard Delgado & Jean Stefancic, [Scorn](#), 35 *Wm. & Mary L. Rev.* 1061, 1062-63 (1994) (arguing that satire and belittlement aimed at persons of lesser stature than the speaker are never warranted, especially from the courts).

[FN35]. See Matsuda, Lawrence, Delgado & Crenshaw, *supra* note 8, at 90-96; cf. Delgado & Stefancic, *supra* note 34, at 1072, 1074 (observing the Supreme Court's tendency to reserve humor and sarcasm for weak parties).

[FN36]. See Richard Delgado & Jean Stefancic, *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment* 39-92, 149-62 (1997) (attempting such an approach).

[FN37]. See *supra* pp. 781, 783.

[FN38]. That is, Justice Scalia would afford hate speech undifferentiated (protected) treatment; failure to attend to its variety (even by a sympathizer like Shiffrin) risks oversimplification of a complex reality and rejection by skeptical courts.

[FN39]. See, e.g., Catharine A. MacKinnon, *Only Words* 72-73 (1993) (suggesting that hate speech constructs social relations such that women and minorities are disadvantaged).

[FN40]. See Richard Delgado, [Campus Antiracism Rules: Constitutional Narratives in Collision](#), 85 *Nw. U. L. Rev.* 343, 373 (1991).

[FN41]. See *id.* at 384. This is not to say that hate speech harms only those who bear its primary brunt. Some recent immigrants from Mexico or Asia do not speak much English and for that reason watch little English-language television. Are they, then, free from the corrosive influence of pernicious television images of themselves and their ethnicity? Arguably, no--they do not realize that they are the targets of insults and stereotypes, so the mocking behind their backs injures them doubly.

[FN42]. See Delgado & Stefancic, *supra* note 36, at 71-84; Charles R. Lawrence, III, [If He Hollers Let Him Go: Regulating Racist Speech on Campus](#), 1990 *Duke L.J.* 431, 436-37; Mari J. Matsuda, [Public Response to Racist Speech: Considering the Victim's Story](#), 87 *Mich. L. Rev.* 2320, 2322 (1989). In one or two passages, Shiffrin appears to recognize the way that hate speech creates social reality at odds with society's deepest commitments. For example, Shiffrin characterizes regulation of hate speech as part of the egalitarian story of America (pp. 64-65).

Shiffrin also notes that prohibition of untargeted hate speech would offer "symbolic" benefits (pp. 83-84). Shiffrin does not otherwise address the social-constructionist issue.

[FN43]. See Delgado & Stefancic, *supra* note 36, at 70-92 (addressing racist images in the media); Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 *Legal Stud. F.* 243, 245-47 (1991).

[FN44]. See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 *Am. Psychol.* 613, 614 (1997); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. Personality & Soc. Psychol.* 797, 798-99 (1995).

[FN45]. See Steele, *supra* note 44, at 618-24; see also Ethan Watters, *Claude Steele Has Scores to Settle*, *N.Y. Times Mag.*, Sept. 17, 1995, at 44 (discussing Steele's research on "stereotype threat").

[FN46]. See Nadine Strossen, [Regulating Racist Speech on Campus: A Modest Proposal? 1990 Duke L.J. 484, 492, 498](#) (explaining that hate speech causes hurt feelings and pain and creates an "unpleasant environment").

[FN47]. See Lawrence, *supra* note 42, at 438-40 (characterizing *Brown v. Board of Education* as regulating the content of racist speech).

[FN48]. Shiffrin notes that persons in power devote part of their resources to maintaining and justifying their position (p. 92).

[FN49]. See Delgado, *supra* note 40, at 380-81 n.319.

[FN50]. See *id.*

[FN51]. See *id.*

[FN52]. An example of such speech is the taunting and harassment of a small group of marginalized white students at Columbine High School, which became front-page news, see, e.g., Julie Cart, Eric Slater & Stephen Braun, *Armed Youths Kill Up to 23 in 4-Hour Siege at High School*, *L.A. Times*, Apr. 21, 1999, at A1, because (1) they were white; and (2) they responded to their belittlement with mass murder.

[FN53]. See Timothy C. Shiell, *Campus Hate Speech on Trial 2*, 17-29 (1998); Delgado, *supra* note 40, at 349-58, 380-81 n.319 (finding hate speech so ubiquitous that if one goes to any American college he or she will in short order encounter hate speech, including graffiti, jokes, defaced bulletin boards, and "spammed" e-mail messages).

[FN54]. See Peggy C. Davis, [Law as Microaggression, 98 Yale L.J. 1559, 1565-66 \(1989\)](#); Delgado, *supra* note 40, at 380-81 n.319 (discussing "micro-aggressions"--those stunning, sudden acts of racial hostility that remind persons of color of their precarious status).

[FN55]. See Delgado, *supra* note 40, at 380-81 n.319. Of course, some will challenge even low-level harassment and slights and demand that the institution address them. But if the micro-aggressions are borderline or small, then minority students may decide to forgo taking action for fear of seeming hypersensitive or of wasting time better devoted to their studies. The decision which offenses to counter and which to let lie saps energy. Students who find themselves in an environment that constantly demands that they make these decisions may finally give up or leave.

[FN56]. See *id.* To his credit, Shiffrin offers a compelling exposition of how relatively raw,



straightforward (if unconscious) racism emanating from conservative institutions stands in the way of hate-speech reform. See pp. 779, 780, 781. Yet as I explain here, resistance to hate-speech reforms (even if unconscious) may spring from the moderate-liberal side as well, as administrators give in to the perfectly ordinary desire to maintain campus peace and not tempt fate by challenging First Amendment orthodoxy.

[FN57]. The system of free speech rationalizes the status quo, validating current arrangements as the result of what seems like fair competition. See Delgado & Stefancic, *supra* note 36, at 89-90 (advancing an earlier version of a similar argument). Shrifin himself hints at such an argument when he explores the way dissenters with limited funds are denied access to the marketplace of ideas (p. 111).

[FN58]. See sources cited *supra* notes 44-45. Might it be argued that Asians' and whites' performance is blighted by the reverse phenomenon--anxiety stemming from fear of failure to meet high expectations? Although the hypothesis has a semblance of plausibility, I have found no evidence to support it, and what little there is seems to cut in the opposite direction. See, e.g., Robert Rosenthal & Lenore Jackson, *Pygmalion in the Classroom* 105-08, 125-26 (1968) (finding artificially induced high teacher expectations actually improved students' performances).

[FN59]. See *supra* pp. 788-89.

[FN60]. See [Buckley v. Valeo, 424 U.S. 1, 48-49 \(1976\)](#). By "contingent connection" I mean one that happens generally (i.e., not necessarily) to be true--here, that money, usually, but not always, helps one to get one's point across. A necessary connection, by contrast, is one that is implied in a concept such as "communication."

[FN61]. See [McCormick on Evidence 52-53 \(John William Strong ed., 4th ed. 1992\)](#) (discussing partiality).

[FN62]. See *id.* at 60-62 (discussing mental infirmity and incapacity).

[FN63]. See *id.* at 60-62 (discussing prior inconsistent statement).

[FN64]. See *id.* at 30-32.

[FN65]. See, e.g., Robert S. Chang, [Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 Cal. L. Rev. 1241, 1291 \(1993\)](#).

[FN66]. See Meiklejohn, *supra* note 10, at 262-63.

[FN67]. See, e.g., Strossen, *supra* note 46, at 567. Shiffrin posits a waste-of-effort argument--that agitating for hate-speech controls offers little benefit and deflects energy from other, more important causes (p. 84).

[FN68]. See, e.g., Strossen, *supra* note 46, at 568-69. But see Richard Delgado & David H. Yun, [Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation, 82 Cal. L. Rev. 871, 881-83 \(1994\)](#) ("In fact, minorities have made the greatest progress when they acted in defiance of the First Amendment.").

[FN69]. See Delgado & Yun, *supra* note 68, at 882; Lawrence, *supra* note 42, at 466-67 & n.130.

[FN70]. See, e.g., Derrick Bell, *Race, Racism, and American Law* 432-45, 437-40 (3d ed. 1992) (summarizing and interpreting Supreme Court decisions on First Amendment challenges to convictions of civil rights protestors).

[FN71]. Is this to argue that minorities would fare better under a regime (like that of the former Soviet Union) in which speech is unfree? Not at all-- the controllers might have minorities' interests at heart, or they might not. Rather, it is to point out that in our regime, under which speech is selectively free, the resulting pattern of regulation and deregulation leaves minorities less well off than many think.

[FN72]. See, e.g., Strossen, *supra* note 46, at 489 (praising the First Amendment as an instrument of progress).

[FN73]. Truly valuable speech, in short, is almost always monopolized, commercialized, or rendered secret or proprietary so that others cannot access or disseminate it. It might be argued that without free expression there would not be much to monopolize in the first place. True, but in our society, information flows more or less freely until it either becomes valuable or begins to collide with the interests of some powerful group, such as consumers (antitrust), inventors (patents), writers (copyright), the wealthy and well-regarded (defamation), corporations (trade secrets), or the military (official secrets). Consider commercial advertising, which is used to create customer demand and markets, for example. It does not take a cynic to realize that in our society, the interests of the powerful play a significant role in dictating what speech is protected and what is not.

[FN74]. See Keith Bradshes, *Widest Gap in Incomes? Research Points to U.S.*, N.Y. Times, Oct. 27, 1995, at D2; see also David Gergen, *To Have and Have Less: Don't Look Now, But the Gap Between Rich and Poor Is Widening*, U.S. News & World Rep., July 26, 1999, at 64.

[FN75]. See Associated Press, *Report Documents Wide Gap in Health Care for Minorities*, Baltimore Sun, May 15, 1999, at 10A.

[FN76]. See *id.*

[FN77]. See Maggie Gallagher, *Black Fathers: Their Day, Too*, N.Y. Post, June 18, 1999, at 29.

[FN78]. Plausibly, hate speech would play a part by demoralizing its victims, including parents of young children; communicating to others that minorities are unworthy of respectful treatment, integrated housing, and upper-level jobs; and immediately and over the long-term injuring the emotional and physical health of its victims. See Richard Delgado, *Words That Wound: How Racist Speech Harms the Victim*, in *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment* 3, 4-10 (Richard Delgado & Jean Stefancic eds., 1997) (summarizing physical, psychological, and social harms from racism and racist speech). "Stereotype threat," which impairs the performance of test-takers of color, is discussed above at pp. 788-89.

[FN79]. Militarily and industrially, that is. It might be argued, of course, that free speech contributed to America's relative political stability, as compared to totalitarian regimes in which speech is controlled even more. Indeed, providing the elite class relatively unfettered access to politics and the press has probably lessened the possibility of serious dissatisfaction and provided them with a greater sense of identification with the country and its fortunes. See Bell, *supra* note 70, at 34-36 (explaining "the principle of the involuntary sacrifice"--the notion that freedoms and democracy for elite whites come at the price of the sacrifices of those very freedoms for blacks); see also *infra* p. 796 (positing that social conditions may be changing so that a regime of unlimited free speech no longer serves as a guarantor of social stability).

[FN80]. See, e.g., Otto Friedrich, *The Changing Face of America*, Time, July 8, 1985, at 26; see also *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* 5-7, 10-11 (Laura J. Lederer & Richard Delgado eds., 1995) (making a similar argument).

[FN81]. Compare *Pennoyer v. Neff*, 95 U.S. 565 (1878) (articulating territorial view of jurisdiction), with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (articulating minimum-contacts view of jurisdiction, which developed in response to changes in the economy, communications, and transportation technology).

[FN82]. See *supra* notes 32-38 and accompanying text.

[FN83]. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689 (1984) (emphasizing the role of deliberation in our system of democratic self-government); Symposium, *The Republican Civic Tradition*, 97 *Yale L.J.* 1493 (1988) (same).

[FN84]. See Shiffrin, *supra* note 7, at 43 (questioning whether this view makes sense today).

[FN85]. See Alexander Meiklejohn, *Free Speech: And Its Relation to Self-Government* (1948) (discussing the connection between speech and dialogue, on the one hand, and democratic self-government, on the other); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L.J.* 877, 878-886 (1963) (highlighting the role that speech plays in self-government); see also Symposium, *supra* note 83.

[FN86]. Kant's categorical imperative that we should accept only those ethical rules that are capable of being willed into universal practice, and his related maxim that we should treat others as ends in themselves, not as means, are widely accepted principles of deontological ethics. See Richard B. Brandt, *Ethical Theory: The Problems of Normative and Critical Ethics* 354, 391-405 (1959) (differentiating teleological from deontological or "formalist" ethics); William K. Frankena, *Ethics* 19, 25-27, 30-33, 113 (2d ed. 1973).

[FN87]. For the view that one's ability to shrug off words of this type is an aspect of white privilege or armoring, see Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in *Critical White Studies: Looking Behind the Mirror* 291 (Richard Delgado & Jean Stefancic eds., 1997). Still, hate speech against whites--even when it lacks the element of threat--is insulting. Thus, both principled and pragmatic/realist reasons may counsel bringing whites under the protection of anti-hate speech rules, in order to garner the broadest possible support for them.

[FN88]. See, e.g., Laurence H. Tribe, *American Constitutional Law* 1465-66, 1521-27, 1544-46 (2d ed. 1988) (explaining this and other features of suspect-class analysis).

[FN89]. 304 U.S. 144, 152 n.4 (1938) ("There may be a narrower scope of operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution .... It is unnecessary to consider now whether ...similar considerations enter into the review of statutes directed at particular religions, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[FN90]. See Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 *Cal. L. Rev.* 851, 854-56 (1994).

[FN91]. See *id.*

[FN92]. See *id.*; see also Shiell, *supra* note 53, at 90, 110 (pointing out that Scalia's disallowance of hate speech controls in *R.A.V.* cuts so broadly that it might invalidate much of the Civil Rights Act) (citing John K. Wilson, *The Myth of Political Correctness* 96, 101 (1995)). Scalia's overbreadth might even immunize such messages as "no Negroes need apply."

[FN93]. Some argue that speech and symbols contribute to the marginal status of groups. See, e.g., supra pp. 788-89 (discussing the social construction of reality theory that society seizes on small and irrelevant physical differences among groups, invests them with usually derogatory meaning, and thus creates races).

[FN94]. See supra pp. 783-84.

[FN95]. See W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts §12 (5th ed. 1984); [Restatement \(Second\) of Torts §46](#) cmt. f (1965).

[FN96]. [315 U.S. 568, 573-74 \(1942\)](#) (holding that words that by their very nature incite a violent response or inflict injury are punishable).

[FN97]. See Shiffrin, supra note 7, at 63-64 (criticizing Justice Scalia's insistence in R.A.V. that statutes curtailing insults be race-neutral).

[FN98]. [508 U.S. 476, 489-90 \(1992\)](#) (upholding sentence enhancement for racially motivated crime).

[FN99]. In actual operation, the enhancement provision would need to be applied to a range of hate-motivated offenses (such as property crimes and campus assaults), not to speech-related ones only; otherwise it would risk constitutional invalidation as a veiled suppression of speech. Cf. [Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 \(1993\)](#) ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."); [Yick Wo. v. Hopkins, 118 U.S. 356, 373-74 \(1886\)](#) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied ...so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

[FN100]. See [Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 205 \(1972\)](#) (holding that tenants in a housing project had standing to complain of racially exclusionary policies and practices that rendered his complex a "white ghetto"). I am grateful to seminar student Erika Birch for this analogy.

[FN101]. See id.

[FN102]. Cf. Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 26 (1975).

[FN103]. The Fourteenth Amendment was enacted in 1868; the First, in 1791.

[FN104]. Would the textual moorings of this argument persuade a cautious, incrementalist judiciary to view free speech and equality issues in a different light--or would it simply avoid and discard the maxim? See Richard Delgado, Understanding Words That Wound (forthcoming 2001).

[FN105]. See [U.S. Const. amend. XI](#) (providing for immunity of states from suits, in law or equity, brought in federal court by citizens of a foreign state or nation). On the somewhat tortured history of the state sovereign immunity doctrine and its relation to antidiscrimination remedies and state versus federal power, see [Fitzpatrick v. Bitzer, 427 U.S. 445, 451-56 \(1976\)](#), and Theodore Eisenberg, Civil Rights Legislation 387-400 (4th ed. 1996).

[FN106]. The modification would not amount to anything very radical. The First Amendment's free-speech clause was essentially formless until well into the twentieth century, when the

Supreme Court first began giving it content. See [Near v. Minnesota ex rel. Olson, 283 U.S. 697, 722-23 \(1931\)](#); [Stromberg v. California, 283 U.S. 359, 366-70 \(1931\)](#). The earliest Supreme Court decision regarding a hate speech issue ruled in favor of a state's power to regulate racist defamation. See [Beauharnais v. Illinois, 343 U.S. 250, 261-67 \(1952\)](#).

[FN107]. See also Racial Incidents and Harassment Against Students at Educational Institutions: [Investigative Guidance, 59 Fed. Reg. 11448 \(1994\)](#) (giving notice that the Department of Education's Office for Civil Rights will regard institutions as violating Title VI if they tolerate known instances of racial harassment and invective, even of the untargeted variety, that are severe and pervasive enough to deny minority students an equal opportunity to secure an education).

Decisions that developed the hostile-environment approach include *Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (1999) (considering harassment in the public schools); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); and *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (addressing workplace harassment).

[FN108]. [158 F.3d 1022 \(9th Cir. 1998\)](#); see also [Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846 \(1999\)](#) (upholding an injunction that prohibited the use of targeted racial slurs against Latino employees as part of the remedy for violation of a state fair-employment act).

[FN109]. See [Monteiro, 158 F.3d at 1024-25](#).

[FN110]. See [id. at 1028](#).

[FN111]. See [id. at 1032-35](#).

[FN112]. See [id. at 1033-34](#).

[FN113]. [Id. at 1034](#).

[FN114]. See Diana Tietjens Meyers, *Rights in Collision: A Non-Punitive, Compensatory Remedy for Abusive Speech*, 14 *Law & Phil.* 203, 224-234 (1995).

[FN115]. See *id.*

[FN116]. See *supra* notes 49-55. These advantages include maintaining control through a regime of low-level terror and demoralization of minority students. Will this demoralization be so complete that no one has the courage to sue the university? This seems unlikely, and in any event, a university may provide for third-party (white) standing, see *supra* p. 799, in order to increase the number of possible complainants. On the possibility of a complaint in tort for intentional or negligent infliction of emotional distress filed against the university or the perpetrator, see Richard Delgado, [Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling](#), 17 *Harv. C.R.-C.L. L. Rev.* 133 (1982) and *supra* p. 799.

[FN117]. To recall: pp. 780-81 (recognizing role of power); p. 781 (describing the role of unconscious racism); p. 782 (suggesting liberals "flip" arguments so as to transform doctrine that has hitherto served regressive ends into a tool for change); pp. 783-84 (highlighting the role of competing stories or narratives that, while unstated, nevertheless guide judicial discourse to one conclusion or another); pp. 784-85 (describing how analysis of untargeted hate speech turns on pragmatic balancing of costs and benefits, not on exaggerated First Amendment values stated in abstract terms). Shiffrin also notes that elites use part of their wealth to control media and to consolidate their advantage (p. 96).

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