DISSENT, FREE SPEECH, AND THE CONTINUING SEARCH FOR THE "CENTRAL MEANING" OF THE FIRST AMENDMENT

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ABSTRACT

Since Holmes and Brandeis began articulating a broad vision of the Free Speech Clause of the First Amendment, scholarly commentators have labored to offer a comprehensive, overarching theory of freedom of expression. In separate books, Professor Steven Shiffrin and Professor Stephen Carter propose a renewed focus on dissent as the central value of the Free Speech Clause. In "Dissent, Free Speech, and the Continuing Search for the 'Central Meaning' of the First Amendment," Professor Ronald Krotoszynski examines and critiques these two dissent based theories. The review essay questions the feasibility of any dissent based theory of free speech in light of significant definitional and operational difficulties associated with applying such a theory to concrete cases. Moreover, Professor Krotoszynski raises specific objections to Professor Shiffrin's iteration of a dissent based theory of free speech. With respect to Professor Carter's proposals, the review essay generally agrees with Professor Carter's view that religiously motivated dissenters should enjoy the same free speech rights as secularly motivated dissenters. At the same time, however, one should question whether, contrary to Professor Carter's assertions, the community owes religiously motivated dissenters any special duty of care. The review essay explores the potential importance of dissent to a viable theory of freedom of speech, and concludes that, although protecting dissent is an important part of the free speech project, the project should not be defined solely in terms of facilitating dissent, in large part because such an approach would prove less effective at protecting dissent than more open-ended theories of free speech, such as those emphasizing democratic deliberation, autonomy, or the marketplace of ideas.

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*Ronald J. Krotoszynski, Jr.**

THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY. By *Stephen L. Carter*. Cambridge: Harvard University Press. 1998. Pp. xi, 167. Cloth, $20.50; paper, $12.95.

DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA. By *Steven H. Shiffrin*. Princeton: Princeton University Press. 1999. Pp. xiv, 204. $29.95.

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[1]

Since the Warren Court's expansive construction of the Free Speech Clause of the First Amendment, there has been no shortage of legal scholarship aimed at justifying the remarkably broad protections afforded the freedom of speech under landmark cases such as *Brandenburg v. Ohio*,[2] *New York Times Co. v. Sullivan*,[3] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[4] At the same time, in recent years, a growing chorus of free speech skeptics have made their voices heard.[5] These legal scholars have

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1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

2. 395 U.S. 444 (1969).

3. 376 U.S. 254 (1964).

4. 425 U.S. 748 (1976).

5. *See*, *e.g.*, RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (1997); STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO (1994); CATHARINE A. MACKINNON, ONLY WORDS (1993); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); 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); Charles R.

questioned why a commitment to freedom of expression should displace other (constitutional) values such as equality, community, or citizenship.

This spirited challenge to the Warren Court's free speech orthodoxy has given rise to a kind of free speech counter-Reformation. Defenders of the free speech tradition have joined the fray, challenging those who question the value of racist, sexist, or homophobic expression.[6]

The debate has taken place against the backdrop of a longstanding controversy about the "central meaning"[7] of the First Amendment's Free Speech Clause. Since Justices Holmes and Brandeis began forcefully applying the Free Speech Clause to provide broad protection to political speech activity,[8] scholars have been deeply divided over the precise rationale for according speech protection when the speech imposes significant social costs on the general community. Classic theories of free speech, such as Alexander Meiklejohn's "democratic deliberation" thesis,[9] have competed with newer rationales for protecting free expression, such as the pursuit of truth, self-realization, or per-

Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

6. *See*, *e.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009 (1996) [hereinafter Volokh, *Freedom of Speech and Appellate Review*]; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

7. *See* Harry Kalven, Jr., *The* New York Times *Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

8. *See* Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting). The Supreme Court formally embraced the Holmes/Brandeis vision of the First Amendment in *Brandenburg* and has not looked back since. Brandenburg v. Ohio, 395 U.S. 444, 446-49 (1969). *But see* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (holding that Title VII permits a cause of action based on a "hostile work environment," an environment that might be created and maintained through speech activity); Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846 (Cal. 1999) (upholding an injunction against manager's use of racist language, free speech objections notwithstanding); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995).

9. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT (1948) (arguing that speech should be protected only insofar as it facilitates democratic deliberation within the community) [hereinafter MEIKLEJOHN, FREE SPEECH]; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 [hereinafter Meiklejohn, *The First Amendment*]. Harry Kalven continued the Meiklejohn project, *see* Kalven, *supra* note 7, and Owen Fiss carries the torch today, articulating forcefully the democratic-deliberation theory of the Free Speech Clause, *see* OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996) [hereinafter FISS, LIBERALISM DIVIDED]; Owen M. Fiss, *Why the State*, 100 HARV. L. REV. 781 (1987).

sonal autonomy.[10] Other scholars have suggested more practical rationales for protecting free expression, such as avoiding social disorder by permitting disgruntled elements of the community to vent their frustrations peacefully.[11]

Two recent books, one by Professor Steven Shiffrin[12] and the other by Professor Stephen Carter,[13] propose a renewed focus on protecting dissent as the central value of the First Amendment. Both works posit that the government's response to dissent should serve as the key to evaluating the overall effectiveness of the Supreme Court's free speech jurisprudence. Professor Shiffrin states his thesis as follows: "[T]he First Amendment spotlights a different metaphor than the marketplace of ideas or the richness of public debate; instead, it supports the American ideal of protecting and supporting dissent by putting dissenters at the center of the First Amendment tradition" (p. 128). Professor Carter sounds a similar theme arguing that "[c]ivic life requires dissent because it requires differences of opinion in order to spark the dialogues from which the community thrives and grows" (p. 16). Carter goes even further, positing that the legitimacy of a government's demand of loyalty from its citizens should be a function of its treatment of those who dissent from its laws and policies: "[T]he justice of a state is not measured merely by its authority's tolerance for dissent, but also by its dissenters' tolerance for authority."[14]

A dissent-based theory of free speech has a great deal of superficial appeal. After all, who could be against dissent in a society ostensibly dedicated to permitting freedom of speech? Moreover, the Supreme Court of the United States has taken great pains to emphasize that facilitating political dissent is a core project of the Free Speech Clause.[15] These observations notwithstanding, there are rea-

10. *See*, *e.g.*, MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11-14 (1984); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 2.03, at 2-24, 2-25 (1994); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1525 (1997) (reviewing FISS, LIBERALISM DIVIDED, *supra* note 9).

11. *See*, *e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970); Steven Shiffrin, *Defamatory Non-Media Speech and the First Amendment Methodology*, 25 UCLA L. REV. 915, 949 (1978).

12. Professor of Law, Cornell Law School.

13. William Nelson Cromwell Professor of Law, Yale Law School.

14. P. 97; *see also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882-84 (1963) (arguing that the First Amendment should facilitate broad-based participation in government decisionmaking and noting that "[o]nce one accepts the premise of the Declaration of Independence — that governments derive 'their just powers from the consent of the governed' — it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment").

15. *See*, *e.g.*, Texas v. Johnson, 491 U.S. 397, 414-20 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-60 (1985) (plurality opinion); Cole v. Richardson, 405 U.S. 676, 680 (1972);

sons for skepticism about the federal courts' ability to devise and enforce a viable dissent-based theory of free speech.

First, and perhaps most importantly, there are serious definitional difficulties associated with determining whether or not speech constitutes "dissent." Speech that is hostile to the actions of one branch of the government might be supportive of the actions of another.[16] To a large degree, "dissent" is in the eyes of the beholder.[17] As Professor Richard Delgado has observed, "[a]lthough 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."[18] If citizens engaged in dissent have cause to fear being marginalized by prosecutors and judges drawn from the majority culture, they would have even more cause to fear being silenced under a regime that makes full First Amendment protection wholly contingent on the goodwill of a state functionary possessing the discretion to apply or withhold a talismanic label.

In addition, the social costs of speech activity do not necessarily track whether speech constitutes "dissent." Indeed, some of the most potentially disruptive speech activity imaginable at least arguably constitutes dissent — activities such as shooting physicians who provide abortion services or bombing federal facilities.[19] Less extreme examples of dissenting expressive conduct include flag burning or the burning of draft cards.[20] One need not even rely on expressive conduct to illustrate the point: Nazis in Skokie represent a kind of dissent, yet the nature and context of this speech activity impose very high social costs on the community.[21] The Supreme Court's rhetoric to

Cohen v. California, 403 U.S. 15, 24-26 (1971); West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943); Cantwell v. Connecticut, 310 U.S. 296, 310-11 (1940).

16. For example, a group of people protesting the Nixon administration's efforts to avoid delivering Oval Office tape recordings to the Special Prosecutor were "dissenting" from the Executive Branch's policies, but arguably, cheering on the federal judiciary. *See generally* United States v. Nixon, 418 U.S. 683 (1974). Whether such speech constitutes dissent depends on whether one views the question from the perspective of the Executive or Judicial Branch of the federal government. *See infra* notes 49-51 and accompanying text.

17. *See infra* notes 47-65 and accompanying text.

18. Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 784 (2000) (reviewing DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA).

19. To his credit, Professor Carter openly acknowledges that wholly unacceptable acts of violence against the community arguably constitute a form of dissent. Pp. 60-61, 73-78, 81-84. Even when government may constitutionally regulate expressive conduct, it may do so *despite* its communicative value and not because of it. *See* United States v. O'Brien, 391 U.S. 367, 376-77, 381-82 (1968).

20. *See Johnson*, 491 U.S. at 406 (flag burning); *O'Brien*, 391 U.S. at 376 (draft card burning).

21. *See* Smith v. Collin, 436 U.S. 953 (1978); Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978), *aff'g* 477 F. Supp. 676 (N.D. Ill.), *cert. denied*, 436 U.S. 953 (1978); *see also* American Booksellers Ass'n, Inc., v. Hudnut, 771 F.2d 323, 327-30 (7th Cir. 1985) (discussing the

the contrary notwithstanding, much contemporary First Amendment case law reflects direct cost/benefit analysis of proposed speech activity.[22] As Justice White once put the proposition,

> it is not rare that a content-based classification of speech has been accepted because it may be more appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.[23]

It seems unlikely that the Justices would abandon such an approach in favor of a more absolute protection for speech activity denominated "dissent" (even if the definitional difficulties could be overcome, which is doubtful).

These objections to a dissent-based theory of the First Amendment do not, however, undermine the utility of Shiffrin's or Carter's efforts. Shiffrin's project constitutes a sustained effort to bring the free speech apostates (generally scholars of the Left) back into full communion with the free speech tradition. This is an important project and should spark debate between the free speech doubters and believers. If the Roman Catholic Church and the Lutheran Church can resolve their theological differences and create the promise of a return to full communion,[24] Shiffrin is right to push for a reconciliation between free speech traditionalists and the free speech critics.

Professor Carter's emphasis on dissent serves a very different project: empowering religious minorities within the larger political community. His work constitutes a sustained plea for more secular citizens and policy makers to take seriously the concerns of religiously motivated dissenters.[25] To the extent he suggests that the community,

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social costs of speech activity), *summarily affirmed*, 1001 U.S. 475 (1986); DELGADO & STEFANCIC, *supra* note 5, at 8-10, 32-37, 49-56, 126-28.

22. *See* Connick v. Myers, 461 U.S. 138, 150-54 (1983) (balancing employee speech on matters of public concern against the cost of disruption in a government workplace); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509-14 (1969) (balancing student speech rights against the risk of "material and substantial" disruptions in the school); *O'Brien*, 391 U.S. at 376-82 (balancing burden on expressive conduct against achievement of "important" or "substantial" government objective via a narrow tailoring requirement); *see also* Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141.

23. New York v. Ferber, 458 U.S. 747, 763-64 (1982); *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 485 (1985) ("Of course, ad hoc balancing has long been an integral feature of first amendment doctrine for many types of disputes.").

24. *See* Gustav Niebuhr, *Vatican Settles A Historic Issue With Lutherans*, N.Y. TIMES, June 26, 1998, at A1; Peter Steinfels, *After Four and a Half Centuries, Lutheran and Catholic Officials Affirm a Consensus On an Issue That Sparked the Protestant Reformation*, N.Y. TIMES, Oct. 30, 1999, at A13; Charles Trueheart, *Faiths Heal Ancient Rifts Over Faith: Catholics, Lutherans End Doctrinal Dispute*, WASH. POST, Nov. 1, 1999, at A1.

25. *See infra* section III.C & Part IV.

always and unfailingly, owes religious extremists a careful and concerned audience, he overstates the case of religiously motivated dissenters. On the other hand, to the extent that religiously motivated dissenters seek breathing room from the civil state in order to honor the dictates of conscience, Professor Carter offers a powerful argument for listening to what the dissenters have to say.

I. DISSENT AS IDEOLOGY: DISSENT, INJUSTICE, AND THE ROLE OF DISSENT IN PROGRESSIVE POLITICS

Professor Shiffrin's work represents an effort to give leftists and progressives — often free speech critics — a reason to rethink their hostility to the free speech project. He offers both practical and philosophical reasons for the doubters to return to the one true church:

(1) "Like it or not, the free speech principle is here to stay" (p. 129).

(2) "[T]here is insufficient reason to suppose that the left acts against its interests in supporting the free speech principle even assuming that the principle were laissez-faire. . . . To the extent that leftist politics depends on social movements and grassroots protests and activities, the free speech principle is vital" (p. 125).

For reasons that I will develop more fully below, it is highly unlikely that the free speech critics will agree to rejoin the free speech congregation. Moreover, free speech traditionalists are likely to balk at the compromises that Shiffrin proposes as an incentive for the free speech critics to renounce their heresies and embrace the free speech principle.

A. *Some Definitional Problems with Shiffrin's Vision of Dissent*

Before one evaluates Shiffrin's larger, and ambitious project, one must first meet and overcome two practical difficulties with Shiffrin's rather unusual definition of "dissent." The first is definitional and the second is operational.[26]

1. *Defining Dissent*

Shiffrin defines dissent, in large part, by reference to the identity of the speaker. "By dissent, I mean speech that criticizes existing customs, habits, traditions, institutions, or authorities" (p. xi). Even Soviet Russia ostensibly embraced constructive self-criticism (*samokritika*);[27] accordingly one would be hard pressed to object strenuously

26. Frankly, these objections would likely apply to *any* dissent-based theory of free speech. In this sense, then, my objections are not unique to Shiffrin's theory.

27. *See* ELLEN PROPPER MICKIEWICZ, MEDIA AND THE RUSSIAN PUBLIC 49, 67-68 (1981).

to this baseline proposition, (i.e., so far so good). Of course definitional issues abound with this definition of "dissent" because the concept is largely relational. Thus, almost immediately storm clouds begin to form on the horizon: "Commercial advertisers, however, are not dissenters" (p. xii). Tobacco advertising, in particular, merits no special solicitude under Shiffrin's dissent-based vision of the First Amendment. Thus, it would seem that, under Shiffrin's theory, large corporate entities, such as tobacco companies, cannot engage in dissent even if they oppose the views of either the government or the general community. Dissent, for Shiffrin, appears to be the exclusive prerogative of disempowered cultural minorities who are victimized by the hierarchy and racism of the contemporary United States. Simply put, corporations need not apply. Corporate speech might have some communicative value, "but it does not deserve the full value that should be afforded to more classic instances of dissent."[28]

2. *Excluding Speakers Based on Viewpoint*

One might think that reactionary groups, like the Ku Klux Klan or John Birch Society, would fit the "more classic" paradigm of dissent. One would be mistaken. Although "[t]he Ku Klux Klan would also claim to be dissenters, social outcasts who challenge the foundations of the system . . . the Klan arguably silences those who would otherwise be dissenters" (p. xii). Accordingly, "a focus on dissent in this context would not offer clear-cut guidance — which perhaps helps to explain why many see the hate speech issue as a difficult problem" (p. xii). Racist dissent "should be not a case for celebrating our glory as a nation but an occasion for shame" (p. xiii).

3. *Dissent in Service of Ideology*

As this preliminary analysis shows, Professor Shiffrin's conception of dissent is rather one-sided. The flag-burning Gregory Johnson presents a paradigm of dissent; he is entitled to the broadest protections afforded under the Free Speech Clause (pp. 10-11). This is so because "[i]f we must have a 'central meaning' of the First Amendment, we

28. P. xii. Professor Shiffrin does not attempt to distinguish between corporations engaged in commercial speech and noncommercial speech: "I think it better to make decisions about the general category without resort to ad hoc decisions within it." P. 41. Theoretically, one could distinguish between corporations attempting to sell a product and corporations attempting to contribute to the process of democratic deliberation. *Compare* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (invalidating a statute that prohibited corporations from making expenditures to influence voters) *with* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (invalidating a regulation that banned a utility from advertising to promote use of electricity). Although the Supreme Court has recognized this distinction, Professor Shiffrin does not place any reliance upon it when developing his dissent-based model of free speech. *See*, *e.g.*, p. 119.

should recognize that the dissenters — those who attack existing customs, habits, traditions, and authorities — stand at the center of the First Amendment and not at its periphery" (p. 10). Once one moves from a disaffected leftist burning a flag to a disaffected rightist preaching race hatred, however, Shiffrin's commitment to dissent seems considerably weaker.

For Professor Shiffrin, dissent serves the ends of progressive politics by empowering cultural and political minorities to challenge "injustice." "The dissent model assumes that in large-scale societies powerful interest groups and self-seeking politicians and bureaucrats are unavoidable" (p. 17). In consequence, "[d]issenters and the dialogue that follows will always be necessary" (p. 17). "The value of dissent, then, in this context is not that it fosters individual development or self-realization, or even that it exposes injustice and brings about change" (p. 18). Rather, it is a kind of "cultural glue" that binds the political community together. This is all well and good until we learn that this "cultural glue" does not provide any adhesive value to right-wingers and corporate entities that are engaged in speech activity opposing official government policies that enjoy broad-based community support.

In the context of commercial speech, Professor Shiffrin submits that "[c]ommercial advertisers are not dissenters" (p. 41). Because commercial advertisers "encourage people to consume products that cause needless death and suffering" (p. 48), they cannot assume the mantle of dissent.[29] Here, we see the strongly content-laden conceptualization of dissent that Professor Shiffrin proposes:

> Tobacco advertising is not an instance of the individual striking out against the current. Instead, it is an example of the powerful influencing the market rather than one of dissent by the less powerful. Tobacco advertising is no part of a social practice that challenges unjust hierarchies with the prospect of promoting progressive change. Thus, it may have some First Amendment value in the dissent mold, but it does not deserve the full value that should be afforded to more classic instances of dissent. [pp. 41-42]

29. Some of these conclusions appear related to Professor Shiffrin's assumption that government enjoys a relatively free hand in regulating commercial speech. Pp. 33-37. For better or worse, Professor Shiffrin's efforts at prognostication have failed. Although it is true that *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), and *Edge Broad. Co. v. FCC*, 509 U.S. 418 (1993), supported some of his assertions about government regulation of commercial speech, more recent cases indicate quite clearly that the tide has turned in favor of affording commercial speech remarkably broad First Amendment protection. *See* Greater New Orleans Broad. Ass'n v. United States, 119 S. Ct. 1923 (1999); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). With each passing term, the Justices seem to be moving closer and closer to the position that commercial speech enjoys the same measure of First Amendment protection as noncommercial speech. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

This is a remarkable limitation on the scope of dissent, not just for commercial or corporate speakers, but for any person or entity whose speech fails to "challenge[] unjust hierarchies with the prospect of promoting progressive social change" (p. 42). This ideologically bound definition of dissent invites legislators and judges alike to pick free speech winners and losers based on both the identity of the speaker and the viewpoint of the speaker.[30]

Unfortunately, this is not an aberrational statement. A few pages later, Shiffrin reports that "[t]he dissent perspective would argue that policies, prescriptions, and privileges of the elite need to be challenged on a regular basis by enough people to make a difference" (p. 45). Again, Shiffrin is openly associating dissent with a particular set of partisan or ideological outcomes. It is difficult to take such a theory very seriously, for it openly invites government censorship of disfavored speakers (i.e., "elites," corporate entities such as tobacco companies, and Neanderthal right-wingers spouting racist messages).[31] Indeed, this model of the dissent perspective has more in common with contemporary free speech jurisprudence in the People's Republic of China[32] than in the United States:

30. Ironically, Professor Shiffrin faults Professor Owen Fiss and other devotees of Professor Alexander Meiklejohn's democratic deliberation model of free speech for inviting judicial personnel to make subjective decisions about whether speech activity encourages or facilitates democratic deliberation. Pp. 19-22. Shiffrin argues that, under the Fiss model, "[j]udges would be deciding on an ad hoc basis which issues need to be discussed on the national agenda and which have been comparatively marginalized." P. 20. Yet, if judges face such difficulties in deciding whether speech enhances or debases democratic deliberation, are they going to have any easier time deciding whether particular speech activity constitutes "dissent"? Moreover, Shiffrin's exclusion of corporate and right-wing speakers from his model of "dissent" embraces the exact sort of judicial subjectivity that he faults Fiss for embracing. Professor Shiffrin cannot have it both ways: either judges are capable of fairly exercising discretion, or they are not.

31. Indeed, if taken to its logical extreme, under Professor Shiffrin's dissent theory, the Republican Party and its candidates might not merit the broadest protections of the First Amendment to the extent that the party's platform fails to "challenge unjust hierarchies" (at least as defined or understood by Professor Shiffrin). After all, the Republican Party platform opposes abortion on demand, supports minimalist government, opposes the welfare state, and generally supports tax relief for corporations and upper-income taxpayers — all policies unlikely to fit Shiffrin's definition of "dissent." Were the federal courts to embrace Professor Shiffrin's dissent theory, to the extent one opposes change, insufficiently advocates "progressive" change, or supports "hierarchy" of "the elite," one could claim only a reduced share in the protections afforded by the First Amendment's Free Speech Clause.

32. *See* XIANFA [Constitution] art. 3 (1982) ("Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."); *id.* art. 51 ("The exercise by citizens . . . of their freedoms . . . may not infringe upon the interests of the state, of society, or of the collective."); *cf.* Erik Eckholm, *A Quiet Roar: China's Leadership Feels Threatened By a Sect Seeking Peace*, N.Y. TIMES, Nov. 4, 1999, at A10; Seth Faison, *Followers of Chinese Sect Defend Its Spiritual Goals*, N.Y. TIMES, July 30, 1999, at A4; Elisabeth Rosenthal, *China Reportedly Detains 2,000 Members of Falun Gong Sect*, N.Y. TIMES, Feb. 11, 2000, at A14; Cindy Sui, *Falun Gong Holds Jail Hunger Strike; Sect Members Resist China's Crackdown*, WASH. POST, Feb. 15, 2000, at A17.

> [w]hen legislatures seek to regulate the speech of the powerful on grounds of political equality, a dissent perspective would not suggest that the courts should pull out a rubber stamp. On the other hand, courts should be generous in assessing such regulations because the legislature seeks to advance important constitutional goals. [p. 47]

Thus, dissent is the exclusive prerogative of a speaker "challenging the insensitive exercise of power by a person she believes is carrying hierarchy to excess," and "not a corporation hawking its wares or seeking to dominate the election process" (p. 48).

This, of course, begs contemporary political reality. Tobacco companies are in full retreat, and smokers are an increasingly marginalized and disfavored subgroup within the community. California has enacted taxes on the sale of tobacco products, with a portion of the revenues generated used to fund advertising campaigns aimed at destroying the market for tobacco products.[33] This principle of "tax and destroy" raises serious general First Amendment problems; if government may tax an entity to subsidize government speech aimed at its ultimate destruction, government essentially can monopolize the marketplace of ideas.[34] A tobacco company engaged in speech activity protesting this arrangement seems squarely in the role of dissent and, moreover, would be defending important generic free speech principles.[35]

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33. *See* CAL. REV. & TAX. CODE §§ 30,121-30,130 (West 1994) (also known as "Proposition 99"); Kennedy Wholesale, Inc. v. State Bd. of Equalization, 806 P.2d 1360, 1362-67 (Cal. 1991) (upholding constitutionality of Proposition 99); *see also* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTES WAR 703-05 (1996); Paul A. LeBel, *"Of Deaths Put On By Cunning and Forced Cause": Reality Bites the Tobacco Industry*, 38 WM. & MARY L. REV. 605, 635-47 (1997) (reviewing STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996), PHILLIP J. HILTS, SMOKESCREEN (1996), and KLUGER, *supra*). Massachusetts and Arizona followed California's lead, enacting schemes taxing tobacco products and using the funds to provide health care services and also advertising campaigns aimed at driving smoking out of existence. *See* ARIZ. REV. STAT. ANN. §§ 42-3251 to -3253 (West 1999); MASS. GEN. LAWS ch. 29, § 2xx (Supp. 1999); ch. 64C, § 7C (1998).

34. *See* EMERSON, *supra* note 11, at 697-716; MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983); John E. Nowak, *Using the Press Clause to Limit Government Speech*, 30 ARIZ. L. REV. 1 (1988); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 589-95 (1980); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530 (1966); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 614-17 (1980); Jay S. Bloom, Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815 (1978); Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980); Mark V. Tushnet, *Talking to Each Other: Reflections on Yudof's* When Government Speaks, 1984 WIS. L. REV. 129 (book review); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). *But cf.* Keller v. State Bar, 496 U.S. 1, 12-13 (1990) (stating that government officials can legitimately be expected to express the views of the majority of their constituents).

35. *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996); *see also* Martin H. Redish & Howard M. Wasserman, *What's Good For*

Turning to racist speech, Professor Shiffrin straightforwardly rejects hate speech as an integral member of the dissent family. "In my view, the argument that First Amendment values (such as truth, autonomy, self-expression, and liberty) dictate that racist speech cannot be regulated is ultimately indefensible" (p. 50). Given the exclusion of commercial speech from the universe of "dissent," this is hardly a surprising move. Shiffrin ultimately questions the utility of hate speech regulation, not because such regulations violate the First Amendment, but rather because "the racist character of our society" probably would make such regulations ineffective at protecting the interests of racial and cultural minorities (pp. 50, 80-86).

In Shiffrin's view, hate speech should not be protected "to safeguard the liberty of the speaker or because it is valuable" (p. 85). Because "dissent" is intrinsically valuable and lies at the heart of the First Amendment, a careful reader must conclude that hate speech, in Shiffrin's view, does not constitute "dissent." The government should not proscribe such speech only because "American society may be so thoroughly racist that nontargeted racist speech regulations would be counterproductive" (p. 85). Shiffrin takes pains to emphasize that if his cost/benefit analysis proves to be wrong, "I would presently support punitive measures against public instances of racial vilification even when not targeted against individuals."[36]

Plainly, Professor Shiffrin's viewpoint-based definition of dissent leads to some deeply counterintuitive results: although both Ward Connerly and Clarence Thomas are members of a historically disempowered racial minority, they arguably are not engaged in "dissent" when they take positions that do not combat "injustice" or "challenge unjust hierarchies" (at least as some would define those terms).[37] Likewise, although David Duke and Matthew Hale espouse racist viewpoints rejected by most citizens,[38] they too are not engaged in dissent because their speech potentially silences disempowered minorities. Presumably, minorities who espouse racist or anti-Semitic viewpoints, such as Louis Farrakhan or Leonard Jeffries, also are not "dissenters."

General Motors: Corporate Speech and the Theory of Free Expression, 66 GEO. WASH. L. REV. 235 (1998).

36. P. 85. In addition, Professor Shiffrin endorses providing tort remedies to the victims of targeted hate speech. Pp. 80-87, 161 n.161.

37. Of course, Mr. Connerly and Justice Thomas undoubtedly would claim that their professional efforts are aimed *precisely* at "challenging unjust hierarchies" and facilitating "progressive" change. Professor Shiffrin's strongly left-leaning definitions of "progress" and "challenging hierarchy" are contestable and undoubtedly would be contested if his dissent theory ever gained any ground in the federal courts.

38. *See infra* notes 68-71 and accompanying text; *see also* Christi Parsons, *White Separatist Denied Law License*, CHI. TRIB., Feb. 9, 1999, § N, at 1 (describing the Illinois Bar Association's decision to refuse admission to Matthew Hale because of his support of racist viewpoints and organizations, including the World Church of the Creator).

Historically, the Supreme Court has placed viewpoint neutrality at the very core of the First Amendment.[39] Government attempts to take sides based on a speaker's position on a given issue of the day are presumptively unconstitutional.[40] Even when speech is otherwise proscribable, government may not pick and choose among speakers based on viewpoint.[41] Shiffrin's vision of the First Amendment does not appear to be viewpoint neutral, because a speaker's ability to claim the full protection of the First Amendment is, at least in some circumstances, contingent on the substance of the speaker's message. Nor is his definition of dissent speaker neutral — a speaker's characteristics might define whether or not she (or it) can lay claim to the strongest protections of the First Amendment. For example, no matter what the issue, commercial enterprises cannot engage in dissent.[42]

This certainly represents a new twist on First Amendment theory. Governments historically have cared less about the identity of a speaker than the content of a speaker's message. Hence, in the early part of the twentieth century, a person advocating the necessity of a proletarian revolution faced official censorship and punishment for advocating such ideas.[43] More recently, those espousing views sympathetic to Soviet-style Marxism-Leninism have faced persecution for their ideological commitments.[44] The identity of the speaker was quite

39. *See* United States v. Eichman, 496 U.S. 310, 317-18 (1990); Texas v. Johnson, 491 U.S. 397, 414-16 (1989); Board of Educ. v. Pico, 457 U.S. 853, 870-71 (1982) (plurality opinion); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959); Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951).

40. *See* Schact v. United States, 398 U.S. 58, 62-63 (1970); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 510-11 (1969); Bond v. Floyd, 385 U.S 116, 132, 136-37 (1966); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 11-13, 167-71, 239-40 (1993).

41. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 n.20 (1996); Board of Educ. v. Pico, 457 U.S. 853, 878-80 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

42. Consider, for example, Benetton's recent and controversial advertising campaign featuring death row inmates. *See* Stuart Elliot, *Benetton Ads Offer Tour of Death Row*, N.Y. TIMES, Dec. 27, 1999, at C8; Hank Stuever, *Radical Chic: Benetton Takes On the Death Penalty*, WASH. POST, Jan. 25, 2000, § C, at 1. Although Benetton undoubtedly wishes to sell clothing, it is difficult to understand why this speech activity should not be deemed "dissent." *Cf.* p. 41 ("There is a serious question whether judges should be asked to make ad hoc decisions about whether particular advertisements are or are not dissenting. I think it better to make decisions about the general category without resort to ad hoc decisions within it.").

43. *See* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schenk v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919). Even celebrated labor leaders fell victim to the government's censorial appetites. *See* Debs v. United States, 249 U.S. 211 (1919).

44. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Barenblatt v. United States, 360 U.S. 109 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Dennis v. United States, 341 U.S. 494 (1951); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

irrelevant to the analysis; membership in a particular social or cultural minority would not affect the outcome of a case. Eleanor Roosevelt stood on the same First Amendment ground as Marcus Garvey or J. Edgar Hoover.

A speaker-based theory of the First Amendment seems deeply problematic. As a practical matter, if the United States is as profoundly racist as Shiffrin suggests (pp. xii-xiii, 76-87), it is difficult to imagine police, prosecutors, courts, and jurors applying a speaker-based vision of the First Amendment in a just fashion (although some might suggest that the task itself is inherently unjust). One might think that, assuming Shiffrin's assertions about the unremittingly racist nature of the contemporary United States are true, the opportunity to make vindication of speech rights contingent on the identity of the speaker would leave minority culture speakers less well off than they are under current First Amendment jurisprudence. Indeed, the project of viewpoint neutrality is meant to ensure that unpopular speakers are not censored simply because the speaker's message offends the dominant forces within the community. Speech regulations must be viewpoint neutral precisely because police, prosecutors, judges, and jurors are highly likely to hold strong preexisting opinions about the proper ordering of the community. To counter this trend, reviewing courts require the government to censor all speakers or censor none. Moreover, with respect to public property, the government may censor speakers only through viewpoint neutral, reasonable time, place, and manner regulations[45] and, with respect to private property, the government may proscribe speech only when the speech raises a clear and present danger of imminent lawlessness.[46]

B. *More General Problems with a Dissent-Based Model of Free Speech*

Even if one were to reject Shiffrin's troubling definition of dissent, a more generalized dissent-based model of the First Amendment would still present serious operational difficulties. Whether speech constitutes dissent is a highly subjective matter. Suppose, for example, that a street protestor supports a national missile defense but opposes the deployment of the Patriot missile? Is such a person engaged in dissent against the government's defense policies, or is such a person effectively supporting the government? Undoubtedly, different people would characterize the speech in divergent ways, depending on

45. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); United States v. Grace, 461 U.S. 171, 177-78 (1983); Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Hague v. CIO, 307 U.S. 496, 515-16 (1939).

46. *See* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969).

whether they viewed the Patriot missile as an essential component of the government's defense program.

It really should not matter whether the speech effectively supports or opposes contemporary government defense policy. If the speech relates to an issue of public concern about which the government must establish and enforce a policy, then the speech should enjoy the most robust protection that the First Amendment can afford.[47] Judges should not attempt to engage in a preliminary characterization of the speech as "dissent" or "non-dissent" to determine the burden on the government in suppressing the speech activity.[48]

The problem of identifying dissent is infinitely more difficult than this preliminary analysis would suggest. The "government" is not a monolithic entity. For example, the Reagan Administration opposed the Supreme Court's ruling in *Roe v. Wade*[49] and consistently urged the Supreme Court to overrule this precedent. On the anniversary of *Roe*, President Reagan regularly spoke, via telephone, at a pro-life rally held in Lafayette Park, directly across the street from the White House.[50] The protestors opposed the Supreme Court's ruling in *Roe*, viewing it as a condonation of murder, a position embraced by the Executive Branch of the federal government (through the Department of Justice and the President himself).[51] Were these pro-life protestors

47. *See* MEIKLEJOHN, FREE SPEECH, *supra* note 9, at 22-27; Emerson, *supra* note 14, at 882-86; Kalven, *supra* note 7, at 205-13.

48. One might suggest that any speech the government seeks to suppress constitutes dissent. Although this definitional fix has some superficial appeal, it really would not solve the problem. Government regulations regarding the use of public property for speech activity are often generic — whether one can use a particular park or street for speech activity is not contingent on the message one seeks to propagate. *See* Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1984). Accordingly, limitations on speech activity might well apply to persons wishing to support some aspect of government policy.

49. 410 U.S. 113 (1973).

50. *See* Ruth Marcus & Victoria Churchville, *Antiabortion March Nears; Protestors Arrive By the Busload*, WASH. POST, Jan. 20, 1985, at A1; Ruth Marcus & Steven Heilbronner, "Reagan to Address Abortion Foes, WASH. POST, Jan. 19, 1985, at A1; Robin Toner, *Rally Against Abortion Hears Pledge of Support By Reagan*, N.Y. TIMES, Jan. 23, 1987, at A10 [hereinafter Toner, *Rally Against Abortion*]; Robin Toner, *Reagan Exhorts Foes of Abortion at Capital Rally*, N.Y. TIMES, Jan. 23, 1986, at D25 [hereinafter Toner, *Reagan Exhorts*]. After succeeding President Reagan, President Bush continued the Reagan Administration's abortion policies. *See* Steven V. Roberts, *"Nominee of Bush's Is Said to Oppose Banning Abortion*, N.Y. TIMES, Jan. 24, 1989, at A1:

> Mr. Bush pleased opponents of abortion today when he spoke by telephone to a rally protesting the Roe v. Wade decision and made one of his strongest statements to date on the highly emotional issue. "I know there are people of good will who disagree, but after years of sober and serious reflection on the issue, this is what I think. . . . I think the Supreme Court's decision in Roe v. Wade was wrong and should be overturned."

51. At various times, President Reagan vowed to "end this national tragedy," Toner, *Rally Against Abortion*, *supra* note 50, and pledged to "continue to work together with members of Congress to overturn the tragedy of Roe v. Wade," Toner, *Reagan Exhorts*, *supra* note 50. Moreover, Reagan emphasized that the Executive Branch had decreased the incidence of abortion by "restrict[ing] the use of Federal funds to perform abortion" and by

engaged in dissent, or merely supporting the position of the federal government? The answer depends on whether or not one views the question from the perspective of the federal judiciary rather than the Oval Office.

Undoubtedly, protecting dissent is an important function of the Free Speech Clause of the First Amendment. The Supreme Court routinely has indicated that this is so.[52] Accordingly, Shiffrin's desire to build a free speech framework on the construct of dissent is perfectly understandable. Given the definitional and operational difficulties, however, dissent is better protected through a project of strict viewpoint neutrality.

Because of the potential for bias in any system of free speech protection contingent on the characterization of speech by government officials, requiring that all speech be treated equally serves as a far better means of effectively protecting dissent than a theory that invites would-be government censors to make the protection of speech to some degree contingent on a label easily withheld because of antipathy toward the message (or the messenger). Prohibiting the government from officially taking sides on questions of the day and then silencing all opposition best ensures that contrary voices are heard.

Take, for example, anti-abortion protestors. It is difficult to imagine a viable dissent-based model of the First Amendment that would not encompass this group. Survey data show that a clear majority of U.S. citizens believe abortion should be legal, at least in some circumstances.[53] At the same time, a substantial plurality of citizens view unborn fetuses as possessing personhood from conception and, therefore, the destruction of a fetus as a form of murder.[54] President Clinton and Congress, unsurprisingly, have sided with the majority, enacting laws that, as applied by some federal and state courts, severely restrict the ability of anti-abortion protestors to engage in peaceful anti-abortion protests outside abortion clinics.[55] The federal

"den[ying] Government funds to organizations overseas that perform or promote abortion." Toner, *Rally Against Abortion*, *supra* note 50.

52. *See supra* note 15 and accompanying text.

53. *See* Carey Goldberg & Janet Elder, *Public Still Backs Abortion But Wants Limits, Poll Says*, N.Y. TIMES, Jan. 16, 1998, at A1; Andrew M. Greeley, *How Do Catholics Vote?: Not As Pawns of the Church*, N.Y. TIMES, Aug. 12, 1984, at E21. Father Greeley reports that even clear majorities of Roman Catholics do not oppose abortion under all circumstances. *See id.*

54. *See* Goldberg & Elder, *supra* note 53; *see also* Pamela Constable & John W. Fountain, *Abortion Foes in Grim Profusion: Protest Marks 25th Anniversary of Roe v. Wade Decision*, WASH. POST, Jan. 23, 1998, at B1.

55. *See*, *e.g.*, Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248 (1994)). Several U.S. Courts of Appeals have sustained the Access Act against First Amendment challenges. *See* American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 55 (1995); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

judiciary generally has blessed this legislation and endorsed the creative use of injunctions to restrain protestors who are communicating messages to women attempting to enter and leave abortion service providers.[56] In short, the full power of the federal government has been brought to bear against pro-life, anti-abortion protestors who wish to demonstrate outside abortion clinics.

Whether or not one agrees with the pro-life movement's assertions about the nature of unborn human fetuses, these protestors are plainly engaged in a form of dissent. Moreover, this dissent is highly unpopular, in part because of the crude methods often utilized by the anti-abortion protestors (e.g., the use of graphic depictions of aborted fetuses and other ghastly props in making their point). Shiffrin never mentions anti-abortion protestors as a model of dissent. Indeed, given his speaker- and viewpoint-based limitations on what constitutes "dissent," it is far from certain that they would even meet his definition.[57]

Of course, one might object that it is also far from certain that the protestors will fare any better under the viewpoint-neutrality project. A law that prohibits all persons from engaging in speech activity within so many feet of an abortion clinic restricts the speech activities of all persons without regard to their viewpoint on abortion. This ignores the reality that pro-life demonstrators are far more likely to engage in protest activity outside abortion clinics than pro-choice activists. The facially neutral restriction cuts more deeply against one side of the debate, and does so quite intentionally in consideration of the rights of those seeking to enter and leave family planning clinics.[58]

This does not demonstrate the failure of the viewpoint-neutrality project so much as the failure of the federal judiciary to apply First Amendment principles to a group of very unpopular protestors who engage in discourse that is highly offensive to many persons within the community. In any event, it does not seem likely that anti-abortion protestors would fare any better under a free speech regime vesting

56. *See* Hill v. Colorado, 120 S. Ct. 2480 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474, 479-88 (1988); Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999); *see also* Lawson v. Murray, 119 S. Ct. 387 (1998) (Scalia, J., concurring in denial of cert.); Williams v. Planned Parenthood of Shasta-Diablo, Inc., 520 U.S. 1133 (1997) (Scalia, J., dissenting from denial of cert.); Lawson v. Murray, 515 U.S. 1110 (1995) (Scalia, J., concurring in denial of cert.).

57. Suppose that the anti-abortion protestors were all heterosexual, upper-middle class, caucasian males, employed by a non-profit corporation whose officers oppose abortion on demand (for example, priests and lay members of the Roman Catholic Church). Given that this group does not suffer the ill effects of the pervasive racism and patriarchy Shiffrin believes to plague the contemporary United States, a district court judge utilizing Shiffrin's dissent theory might well deny the protestors the full protection of the First Amendment.

58. *See generally* Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Use of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-15 (1978) (arguing that subject matter restrictions, although facially neutral, often mask official antipathy toward particular messages and speakers and, therefore, should be viewed skeptically).

judges with the ability to pick and choose speakers based on either the content of their messages or the demographic and economic makeup of their groups.

C. *Shiffrin's Defense and Its Shortcomings*

Shiffrin anticipates the objection that his theory is viewpoint, and perhaps speaker based: "To be sure, some might accuse my analysis of tracking my political preferences too closely, so that left-wing dissenters get protected while people I do not like (corporations and right-wingers) do not" (p. 129). This disclaimer appears on the penultimate page of the book and scarcely recalibrates the preceding 128 pages, in which Shiffrin consistently defines "dissent" in terms of the ideological perspective of the speaker: dissent constitutes speech activity by the less powerful challenging the more powerful to redress "injustice" (rather a value-laden concept, not to put too fine a point on the matter) (pp. xi-xiii, 10-12, 17-18, 20, 41-42, 45, 47-48, 75-76, 80, 85, 91-93, 112, 120). Having consistently defined the free speech project in value-laden, ideological terms, a disclaimer on the next to the last page really does not present much of a counterweight.

Nevertheless, Professor Shiffrin maintains: "In an important sense, however, this accusation is wrongheaded. Rules under my approach are fashioned to protect dissent without regard to the politics of the dissenters" (p. 129). This simply is not so, at least with respect to openly racist speakers like Matthew Hale and the World Church of the Creator:

> Because both aggressors and victims can be characterized, with some accuracy, as dissenters, the dissent story underscores the difficulty of the First Amendment status of racist speech. On the one hand, the dissent perspective seeks to protect those with popularly disdained views and, in an important respect, this includes those who publicly express racist views. On the other hand, the dissent perspective seeks to assure that those who are out of power or lower in a hierarchy have the means to protest their status and to combat the inevitable abuses of power by higher-ups. A regime that is blind to the importance of assuring that disadvantaged groups are not intimidated will contain, as its status quo, substantial corruption and abuse. [p. 77]

Plainly, Shiffrin is saying that Matthew Hale and David Duke are not entitled to the same level of free speech protection as Jesse Jackson or Hillary Rodham Clinton. Just in case there might be doubt about this, Shiffrin later emphasizes that "my contention should be clear. I am not arguing that racist speech should be protected to safeguard the liberty of the speaker or because it is valuable" (p. 85). As to the Ku Klux Klan, for instance, "the Klan says in public what many millions of white individuals think or come close to thinking in private" (p. xii), hence the Klan's message is, at best, a redundancy.

Moreover, the Klan "silences those who would otherwise be dissenters" (p. xii). In consequence, "a focus on dissent in this context would not offer clear-cut guidance" (p. xii), meaning that the Klan's speech activities do not constitute "dissent" for purposes of Professor Shiffrin's theory of the Free Speech Clause.

Nor is Professor Shiffrin's objection to censoring racist speech related to "a chilling effect in the marketplace of ideas (though some marginally valuable speech could be lost); nor . . . the vagueness of working out standards case by case (though vagueness is of course not a virtue)" (p. 85). Thus, dissenters who oppose workplace speech regulations, or affirmative action programs, or equal civil or political rights for racial minorities are *outside* Shiffrin's dissent-based model of the First Amendment — their opposition to the existing status quo may be discounted, because it is offered in support of a political agenda inconsistent with Shiffrin's notions of redressing "injustice." Indeed, such speech can be seen as seeking to increase the frequency of racial injustice in the United States.

Racist dissent merits protection only because efforts to eradicate such speech through government regulation might backfire. Shiffrin tells us that "[i]f I thought such regulation would be effective *on balance* in combating racism, I would presently support punitive measures against public instances of racial vilification even when not targeted against individuals" (p. 85). He limits this proposal only by noting that he would abandon this position if "[p]eople of color . . . think that the tangible benefits of deterrence and the symbolic importance of this legislation outweigh the speculative possibilities of nondeterrence, evasion, and increased racial hostility; that, in short, the advantages of taking a stand outweigh the costs."[59]

Given Shiffrin's absolute exclusion of racist speech from his concept of "dissent," one must conclude that, his assertion to the contrary notwithstanding, his theory of free speech *is* viewpoint-based. A viewpoint-neutral, dissent-based theory of the First Amendment

59. P. 85. One wonders how a federal district court judge would go about ascertaining the answer to this question. After all, it seems doubtful that all members of a given racial minority group would share identical views on the desirability of hate speech regulation — such a proposition is highly essentialist. *See* Carter, p. 69 ("Now, you might have noticed my use of the term 'black community.' Let me make clear that I do not claim — and I do not believe — that there exists an identifiable set of black 'meanings,' as there often is, for example, in a religious community; that is, I do not believe in the existence of such a thing as the 'black point of view.' "). Moreover, it also seems likely that different racial minority groups might have different attitudes about hate speech regulation. Does Shiffrin mean that, if a bare majority of a given racial group supported hate speech regulation, it should be deemed both constitutional and desirable? What about those who dissent from this point of view *within the minority group*? The problem seems hopelessly complex and, therefore, the suggestion that government simply should defer to the wishes of racial minorities is not particularly helpful. *Cf.* Carter, p. 69 ("So I am not in that sense an essentialist, and I quiver whenever smart professors who should know better assert that there is a unique 'black perspective' (which they, of course, are uniquely able to identify).").

would extend the strongest protections of the Free Speech Clause to all speech in opposition to existing government programs and policies — even if the opposition seems terribly wrongheaded, misguided, or hate-inspired. Such dissent merits protection not because the general community derives substantial benefits from these proposals, but because a government empowered to silence racist dissenters is equally empowered to silence progressive dissenters.[60]

Indeed, given Shiffrin's repeated assertion that "American society may be so thoroughly racist that nontargeted racist speech regulations would be counterproductive" (p. 85), not to mention his earlier assertion that "our country is racist to the core" (p. xiii), one wonders why he would trust the presumably racist government to enforce hate speech codes in a fair and even-handed fashion. Professor Nadine Strossen has reported that Canada's experiment in regulating "degrading" erotic speech has not stopped the flow of "mainstream" heterosexual pornography into the country, but *has* led to the censorship of gay and lesbian erotica.[61] Simply put, the average male, heterosex-

60. Shiffrin's doctrinal defense of hate-speech regulation also merits a brief mention. Professor Shiffrin mounts an extended attack on both Justice Scalia's majority opinion and Justice White's concurring opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Pp. 51-76. His basic objection rests on the idea that existing free speech jurisprudence already makes a number of important distinctions based on the content of speech activity. Pp. 57-58. Citing to commercial speech cases, Shiffrin argues that "point-of-view" discrimination is a permissible feature of government speech regulation in some circumstances and, given this state of affairs, regulations subjecting racist points of view to civil or criminal liability should be sustained against First Amendment objections. P. 57-63. Later on, Shiffrin shifts his ground and characterizes Justice Scalia's objection to the St. Paul ordinance as a problem involving content discrimination. *See* pp. 57-67. Essentially, Shiffrin uses the concepts of "point-of-view" discrimination and "content discrimination" interchangeably. Of course, viewpoint-based discrimination and content-based discrimination are not the same thing.

A local ordinance permitting candidates for public office — but not commercial advertisers — to place signs on utility polls owned by the city would constitute content discrimination. Contemporary free speech jurisprudence generally permits government to regulate different kinds of speech activity differently, although this is not universally the case. *See*, *e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419-21, 430-31 (1993) (striking down a ban on commercial news racks, noting blurred distinction between commercial and other speech); William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1638-48 (1996) (noting a recent trend to treat commercial speech like any other speech). Viewpoint-based discrimination, on the other hand, picks and chooses free speech winners and losers within a particular kind of speech activity. For example, a municipal ordinance permitting Proposition 200 supporters to place signs on city-owned utility polls but denying the same permission to Proposition 200 opponents would constitute viewpoint-based discrimination. The government would be picking a preferred point of view from within the marketplace of ideas and advancing this viewpoint through its sovereign powers. *R.A.V.* involved an ordinance that mandated both viewpoint-based discrimination and content discrimination. *See R.A.V.*, 505 U.S. at 391-95. This makes all the difference in the world for purposes of free speech analysis.

61. *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 234-44 (1995); *see also* Mary Williams Walsh, *Chill Hits Canada's Porn Law*, L.A. TIMES, Sept. 6, 1993, at A1 (describing government raid of a lesbian bookstore).

ual Canadian customs agent does not find *Penthouse* or *Hustler* unduly offensive (or "degrading") but does find Robert Mapplethorpe's photographs sufficiently "degrading" to justify official government suppression.

Shiffrin never comes to terms with the inherent contradiction of positing a society that devalues and disrespects cultural and political minorities with a free speech doctrine that invites the state to pick free speech winners and losers. To be fair, his defense of free speech against postmodern critics rests on the idea that marginalized political groups obtain needed breathing room through the exercise of free speech rights. "To the extent that leftist politics depends on social movements and grassroots protests and activities, the free speech principle is vital" (p. 125). In the absence of the free speech principle, "government could squelch antiwar protestors and civil rights protestors."[62] The problem is that Shiffrin's refusal to credit right-wing and corporate speech activity as dissent opens up the very real possibility of government censorship of liberal or progressive speech activity.[63]

Professor Shiffrin undoubtedly recognizes these seeds of contradiction in his argument. His project is not so much to convert the free speech absolutists, but the free speech critics coming from the New Left.[64] By attempting to marginalize the free speech prerogatives of reactionaries and corporations, he makes the free speech principle potentially more attractive to the postmodern critics. This is, of course, a difficult tightrope to walk.[65]

62. P. 125; *see also* Schact v. United States, 398 U.S. 58 (1970); Watts v. United States, 394 U.S. 705 (1969); Bond v. Flogel, 385 U.S. 116 (1966); NAACP v. Button, 371 U.S. 415 (1963); Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

63. *See* STROSSEN, *supra* note 61, at 222-24 (describing the widespread use of hate speech regulations to silence racial minorities and women for speech critical of the dominant culture). Professor Strossen reports that, under the University of Michigan speech code, "there were more than twenty cases of whites charging blacks with racist speech." *Id.* at 223. Moreover, "the only two instances in which the rule was invoked to sanction racist speech (as opposed to other forms of hate speech) involved punishment of speech by or on behalf of black students." *Id.*; *see also* Strossen, *supra* note 6, at 506-07, 556-59 ("The general lesson that rules banning hate speech will be used to punish minority group members has proven true in the specific context of campus hate speech regulations."); Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 987 (1995) ("Using the state to change culture before power in an unequal world can often backfire, for example, if speech codes are applied to students of color, or antipornography laws to gay erotica."). *But cf.* Lawrence, *supra* note 5, at 450 n.82 (arguing that hate speech regulations should not be applied to protect members of the "dominant majority groups").

64. *See infra* notes 82-99 and accompanying text.

65. Evidently, at least one member of the Critical Race Theory movement has been enticed by Professor Shiffrin's efforts to vest a greater share of the First Amendment's stock with cultural minorities favoring progressive causes. *See* Delgado, *supra* note 18, at 779 ("Steven Shriffin's *Dissent, Injustice, and the Meanings of America* is a welcome addition to this emerging 'First Amendment legal realism' vein of scholarship.").

D. *The Social Costs of Speech Activity Do Not Necessarily Track Viewpoint or Content*

Even if the considerable definitional difficulties could be overcome successfully, a dissent-based model of the First Amendment would still not work. To put the matter plainly, the social costs of speech activity do not necessarily correlate with whether the speech constitutes "dissent" (however defined). Indeed, the bombing of the Oklahoma City federal building arguably constituted the most powerful statement of dissent in the last decade. To that, one might add Theodore Kaczynski's mail bomb letters to the purveyors of technology and the anti-abortion zealots' murders of abortion clinic personnel.[66]

Shiffrin might respond that acts of violence do not constitute speech activity, but rather criminal conduct, and therefore do not constitute dissent.[67] Fair enough. The point still remains that the groups most likely to engage in dissent also impose some of the highest costs on the community.

Consider, for example, Matthew Hale and the World Church of the Creator. Hale and his church preach a brand of white supremacy that is highly destructive of building and maintaining a viable pluralistic community.[68] Indeed, his racist tracts motivated Benjamin Smith to go on a multi-state rampage, murdering two minorities and wounding nine others in the process.[69]

The official policy of the United States government is to promote and secure the full civil rights of all persons. The policy appears in myriad federal laws and regulations and enjoys the support of all ma-

66. For a list of the physicians and staff members murdered and wounded since 1993, see Michael A. Fletcher, *Sniper Kills Abortion Doctor Near Buffalo*, WASH. POST, Oct. 25, 1998, at A1. Since Dr. David Gunn's murder on March 10, 1993, in Pensacola, Florida, anti-abortion protestors have killed five additional clinic personnel and wounded yet another five. *See id.* "Since 1977, there have been over 1,700 attacks against abortion providers, according to the National Abortion Federation." *Id.*

67. *See* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993); United States v. O'Brien, 391 U.S. 367, 376 (1968).

68. *See* Rosemary Radford Ruether, *How Did the Creator Become A White Racist?*, CHI. TRIB., July 18, 1999, at C17; Kirsten Scharnberg, *A Gospel of Hatred*, CHI. TRIB., July 11, 1999, at C1. Professor Ruether believes that, rather than affording racist churches a respectful hearing, Christians of good will

> need to take responsibility for more mainstream patterns of thought that feed racist extremism: namely belief in a God who ordered creation as a hierarchy that sacralizes the power of dominant groups over others, who favors some nations and religions against others and who mandates war and violence as a way to establish God's reign on Earth.

69. *See* Edward Walsh, *Midwest Gun Spree Suspect Is Dead*, WASH. POST, July 5, 1999, at A1; Edward Walsh, *Racial Slayer Killed Himself in Struggle*, WASH. POST, July 6, 1999, at A1; *see also* Eric Bailey, *2 Brothers Indicted in Synagogue Fires*, L.A. TIMES, Mar. 18, 2000, at A19 (describing the various acts of terror James Tyler Williams and Benjamin Matthew Williams have committed against Jews, racial minorities, and homosexuals, including arson and murder, all in the name of maintaining and enforcing "biblical law").

jor political parties. No serious mainstream person in contemporary American politics advocates conditioning the civil rights or liberties of citizens on race. Consequently, Hale and his followers have placed themselves in opposition to the official position of the government; they are engaged in dissent.

Whether or not courts openly admit the practice, they routinely engage in utilitarian cost/benefit analyses when deciding free speech claims.[70] Hence, indecent erotic speech enjoys less First Amendment protection than a candidate's stump speech under the theory that the community reaps greater benefits from the latter than the former and, accordingly, the government enjoys less of an ability to restrict political speech than non-obscene erotica.[71]

Some of the most costly speech activity constitutes dissent.[72] This does not necessarily mean that government should enjoy a relatively free hand in censoring the speech of unpopular political minorities, but it does suggest that the problem of hate speech requires more than simply determining whether or not the speaker is engaged in dissent and, if so, letting the speaker have his say.

In fact, Shiffrin largely abandons his focus on dissent when discussing the problem of hate speech. In rather direct terms, he advocates a kind of utilitarian calculus in determining whether or not to tax the costs of such speech activity against the community in order to facilitate the speech activities of hate mongers: "The basic problem with the autonomy argument [in favor of protecting hate speech] is that it cannot show that the value of individual autonomy outweighs the harm caused by racist speech" (p. 79). Shiffrin also questions whether "the idea of respect for persons demands any particular weighing of the competing values in this context," and concludes that "[a]ny confidence that the value of free speech in this context outweighs the harm requires placing a thumb on the scales" (p. 79).

70. *See*, *e.g.*, New York v. Ferber, 458 U.S. 747, 763-64 (1982) (carving out an exception to the *Miller* obscenity test in order to allow regulation of child pornography). *But cf.* Blasi, *supra* note 23, at 485 ("The realistic goal must be to contain such balancing, not eliminate it; even Justice Black recognized in disputes over the timing and location of demonstrations an appropriate sphere for a case-by-case judicial comparison of communicative and regulatory interests.").

71. *Compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), *and* City of Ladue v. Gilleo, 512 U.S. 43 (1994), *with* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), *and* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

72. *See* Smith v. Collin, 436 U.S. 916, 916-19 (1978) (Blackmun, J., dissenting from denial of cert.) (giving the history of the Skokie case, which involved a Nazi march through a Jewish community); *see also* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1165 (2000); Lee C. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617 (1982) (reviewing ARYEH NEIER, DEFENDING MY ENEMY (1979)).

This practical cost/benefit analysis makes a great deal more sense than application of a reflexive "dissent = protected speech" calculus. Because the social costs of hate speech are so great, courts should weigh carefully whether the benefit to the project of democratic deliberation justifies absorbing the corrosive effects of hate speech.[73] As Professor Richard Delgado has put the matter, "A realist approach would regard *both* individual and social costs and benefits as daily weighing in the balance."[74] In consequence, such a theory "would deal with both the effects of hate speech on the life of a single individual as well as its impact across large groups."[75]

In this regard, it bears noting that virtually all Western democracies have adopted hate speech codes — including Canada, France, and Germany. Those nations have performed the cost/benefit analysis and concluded that the potential harm associated with hate speech outweighs its potential social value. Thus, in Canada, a candidate calling for a race war would find himself in jail, not on the ballot.[76]

Given the consensus in other industrial democracies, that hate speech constitutes a social harm worthy of proscription, Shiffrin's utilitarian approach has much to recommend it. He also reaches a defensible result: hate speech should be protected not because it is intrinsically socially valuable, but rather, because government is incapable of fairly administering a speech code. Rather than using the rhetorical shell of "dissent," Shiffrin would have advanced his case more convincingly if he simply had made a direct argument for social cost/benefit analysis in contemporary free speech jurisprudence.[77]

II. DISSENTING FROM SHIFFRIN'S VISION OF DISSENT

Even a sympathetic reader will find it difficult to overlook a fundamental objection to Professor Shiffrin's theory of the First Amend-

73. *See* Kunz v. New York, 340 U.S. 290, 307-08 (1951) (Jackson, J., dissenting) ("The vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests."); *see also* Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding a criminal conviction based on Beauharnais distributing racist leaflets on the streets of Chicago, Illinois, under an Illinois statute prohibiting group libel).

74. Delgado, *supra* note 18, at 789.

75. *Id.*

76. *See* Criminal Code, R.S.C., ch. C-46, § 319 (1985); Canadian Human Rights Act, R.S.C., ch. H-6, § 13 (1985); Regina v. Zundel, [1992] 2 S.C.R. 731; *In re* Keegstra, [1990] 3 S.C.R. 697, 744-49; *WF Party v. Canada, Report of the Human Rights Committee*, UN GAOR, 38th Sess., Supp. 40, at 231, U.N. Doc. No. A/38/40 (1983); *see also* Kathleen E. Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77 (1992); Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 792 n.17, 804-05.

77. *See* Delgado, *supra* note 18, at 785-91.

ment: Shiffrin's unrelentingly ideological definition of the dissent-based free speech project. For Shiffrin, dissent is not about democratic deliberation, or personal autonomy, or any of several other well-established theories of free speech. Instead, "dissent" constitutes criticism of the existing social structures by select members of disgruntled cultural minorities seeking to slay "hierarchy" and "injustice" in a quest to achieve fundamental social change (of a sort consistent with progressive/radical ideals of government):

> Dissent attacks existing customs, habits, traditions, institutions, and authorities. It spies injustice and brings it to light. This does not mean that dissent is always effective; indeed, much dissent does little to bring about effective change. Nor is dissent always fair. It may often be distorted by envy of those higher up in a particular hierarchy. . . . For all its occasional faults, dissent is indispensable. Without it, unjust hierarchies would surely flourish with little possibility of constructive change. If the truth about the presence of injustice is to be spread, social institutions must be constructed in a way that nurtures critical speech. [p. 93]

This conceptualization of dissent, although undoubtedly welcome by those who question the importance of speech relative to equality or community,[78] runs strongly against the grain of prevailing free speech norms.

A. *Dissent Comes from Across the Ideological Spectrum*

The problem, obviously enough, is that much contemporary dissent involves what "progressives" may view as implicitly encouraging or embracing racist, sexist, anti-Semitic, or homophobic attitudes and behaviors; even more dissent explicitly seeks to *preserve* "existing customs, habits, traditions, institutions, or authorities" (p. 93) in the face of powerful erosive forces. Simply put, there is no reason to suppose that dissent, as a social phenomenon, unfailingly redounds to the support of liberal or radical candidates, policies, or causes. Shiffrin's conceptualization of dissent is, at best, highly romanticized and, at worst, hopelessly naïve. It is probably true that "we are a long way off from a society that is committed to encouraging dissent in an effort to combat injustice" (p. 112). That said, it seems far from clear that more dissent necessarily will advance the cause of social justice. It is just as conceivable that reactionary forces might carry the day.[79]

78. *See* Delgado, *supra* note 18, at 782-95.

79. Certainly, the recent trend in favor of state initiatives banning or prohibiting voluntary affirmative action efforts would suggest that dissent from existing government policies does not always redound in favor of positions supported by liberals or progressives. It also would be a mistake to assume that state governments support the passage of such anti-affirmative action initiatives. This was certainly not the case in Washington State, where virtually every state-wide elected officer from the Governor on down actively campaigned against the passage of Initiative 200. *See* Sam Howe Verhouek, *In a Battle Over Preferences, Race and Gender Are at Odds*, N.Y. TIMES, Oct. 20, 1998, at A1. Thus, supporters of Initia-

For persons who subscribe to Holmes's marketplace of ideas metaphor or to Meiklejohn's conception of free speech[80] as a necessary incident of the project of democratic self-government, who wins or loses the debate is far less important than the fact of the debate itself.[81] Shiffrin comes dangerously close to suggesting that freedom of speech is the exclusive prerogative of one segment of the community — liberals, progressives, and radicals. Given the lack of electoral success of such persons in recent times, one might well ask whether a theory of the First Amendment that invites viewpoint or speaker-based government censorship will redound to the benefit of Shiffrin's preferred class of speakers.[82]

Of course, Professor Shiffrin does not absolutely condition First Amendment protection on speech constituting dissent. Vague references to the protection of "political speech" and "commercial speech" exist in the text — although the reader is left at sea as to precisely what these protections should be (p. xii). Shiffrin's enthusiasm for free speech is plainly focused on a particular subset of speech that advances a specific ideological vision for the community; those who fail to advance that agenda, such as tobacco companies or the purveyors of alcohol, appear to be left at the gate (pp. 41-42).

When tobacco companies espouse radically unpopular opinions at substantial variance from the existing policies of the government, it is difficult to understand why a federal court concerned for dissent should withhold the full protection of the First Amendment. After all, most theories of dissent are positional: one defines dissent in relation to the existing policies and practices of the community. Hence, in a state like California with fairly draconian public smoking statutes, a tobacco company or restaurant owner seeking the repeal of such laws to permit customers to smoke on the restaurant's premises would be *dissenting* from the official policies of the government, policies that enjoy the support of a contemporary majority of California voters.

tive 200 were positioned in opposition to the established political hierarchy in Washington State (i.e., they were dissenters).

80. *See supra* note 9 and accompanying text.

81. As Justice Holmes explained, "[e]very idea is an incitement," and "[e]loquence may set fire to reason." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Accordingly, the process of democratic deliberation does not guarantee any particular ideological outcome: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Id.*

82. As Shiffrin himself notes, pp. 121-22, many scholars of the Left have abandoned both free speech and rights talk, more generally, as social structures that tend to reify rather than challenge existing social, economic, and political conditions. *See*, *e.g.*, Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984); Robert A. Williams Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, 5 LAW & INEQ. 103 (1987).

Similarly, during the Prohibition years,[83] the liquor industry found itself in the position of dissenting from the official policies of the federal and state governments (an effort that finally bore fruit with the adoption of the Twenty-first Amendment).[84]

"The dissent perspective would argue that the policies, prescriptions, and privileges of the elite need to be challenged on a regular basis by enough people to make a difference" (p. 45). It is difficult to fathom precisely what this means, or how a federal district judge would go about implementing this mandate. "Elite" positions on questions of the day are far from self-evident. Do elites favor or oppose abortion on demand? How about school vouchers that may be used at pervasively sectarian primary and secondary schools? Should federal courts commission polling data or appoint the Gallup Organization as a special master to determine which viewpoints merit robust First Amendment protection and which do not? It is difficult to disagree with Shiffrin that "[p]rotection for dissent is a necessary feature of any respectable democracy" (p. 45), but I am not at all sure that any respectable democracy could embrace Shiffrin's definition of dissent while claiming to maintain more than a mere theoretical commitment to the freedom of political speech.

Professor Shiffrin seems to recognize that problems might inhere in implementing his dissent-based vision of the First Amendment. Nevertheless, he suggests that courts should accord progressive speech regulations broad deference. "[C]ourts should be generous in assessing such regulations because the legislature seeks to advance important constitutional goals" (p. 47). If a particular regulation represents an imperfect solution to the problem of empowering the marginalized voices within the community or silencing the voices of corporations, so be it. "Regulations designed to secure justice in the polity need not be perfect. Justice should not be delayed because non-viable alternatives are conceivable" (p. 47). Shiffrin admonishes that "[a] dissent-based approach proceeds from a moral condemnation of unjust hierarchies wherever they may be inside or outside of government — whether or not they relate to 'public issues' " (p. 48).

An unsympathetic reader might ask precisely *who* will identify the "unjust hierarchies" in order to sustain otherwise impermissible viewpoint or speaker-based speech regulations. Presumably, this task will fall upon some official within the government, perhaps a judge or prosecutor. If one accepted Shiffrin's suggestion that the United States "is racist to the core" (p. xiii), and dominated by "elite" perspectives, it is difficult to understand how his theory of free speech could be successfully implemented absent an intervening revolution.

83. *See* U.S. CONST. amend. XVIII.

84. U.S. CONST. amend. XXI.

Because persons holding significant positions of power undoubtedly would be selected with great care and sophistication by the evil elites calling all of the shots, is there really any reason to believe that these officials would embrace more than superficially a theory of free speech that privileges their mortal enemies while silencing their dearest friends? There is, thus, a certain amount of inconsistency in the theory between the continued state supervision of speech, the guidelines supposedly directing such supervision, and the underlying assumptions about authority's willingness to obey such guidelines — assumptions that created the need for progressive dissent in the first place.

In this regard, consider the case of Missouri Supreme Court Justice Ronnie White. The United States Senate refused to give its consent to Justice White's appointment to the U.S. federal district court in St. Louis, Missouri, allegedly because he was "pro-criminal" and "activist."[85] The evidence supporting this characterization largely consisted of Justice White's voting record in death penalty cases — he had the temerity to vote to reverse death sentences in approximately thirty percent of the cases that had come before him.[86] For this perceived failure of judgment, the Senate voted to reject his nomination on a straight party line vote of fifty-four Republicans voting against the nomination versus forty-five Democrats voting in favor of the nomination. Justice White's story is but a single part of a larger phenomenon: women and racial minorities have greater difficulty obtaining confirmation in the contemporary Senate than do heterosexual white men.[87]

If a majority of the Senate is prepared to reject a nominee for registering dissent from his colleagues on ultimate matters of life and death, it seems unlikely that the Senators will prove more willing to embrace judicial nominees who register political dissent on other controversial issues, such as drug policy. The implications for a dissent-based theory of free speech should be clear: If Justice Ronnie White cannot engage in principled dissent when matters of life and death are at stake without rendering himself unfit for federal judicial office, is it really plausible to think that the "system" would tolerate officials who consistently reach out to protect highly unpopular, marginalized dissenters, thereby affording them the broadest protections of the First Amendment's free speech guarantee? If contemporary American so-

85. *See* Charles Babington & Joan Biskupic, *Senate Rejects Judicial Nominee*, WASH. POST, Oct. 6, 1999, at A1 (describing the circumstances surrounding the Senate's rejection of the nomination and quoting Missouri GOP Senator John Ashcroft as describing Justice White as "pro-criminal" and "activist").

86. *See id*.

87. *See* Ben White, *Deepening Rift over Judge Vote*, WASH. POST, Oct. 7, 1999, at A3 (describing the Senate's higher rejection rate for minority judicial nominees than for nonminority nominees during the Clinton administration).

ciety suffers from as many racial, gender, and class biases as Professor Shiffrin suggests and elected officials fairly and accurately implement the wishes of their constituents, there is not much cause to be optimistic about these questions. Indeed, Justice White's experience suggests that the price of registering dissent can be staggeringly high, even when the underlying policy position at issue enjoys broad support within a plurality of the community.

The abject failure of campaign finance reform provides another cautionary note for any dissent-based account of free speech. In *Buckley v. Valeo*,[88] the Supreme Court accepted the proposition that money equals speech and protected unlimited direct spending to elect or defeat a particular candidate.[89] Moreover, the *Buckley* Court also embraced a financing scheme for presidential elections that effectively institutionalizes the Democratic and Republican parties, a system that, moreover, hobbles independent and third-party presidential candidates.[90] Despite widespread alienation and cynicism about the contemporary electoral process, there appears to be little hope for securing meaningful campaign finance reform anytime soon. Even if the Supreme Court were to rethink its "speech equals money" logic, it is doubtful that incumbent members of Congress would act against their own collective self-interests by enacting meaningful campaign finance reform in order to empower political dissenters. In this fashion, then, candidates who wish to bring nontraditional programs or platforms before the American public systematically are disfavored (and thereby silenced).[91]

Professor Shiffrin undoubtedly would agree with this description of the current state of electoral affairs, but probably would argue that the proper response is swift adoption of meaningful campaign finance reform legislation (pp. 111-12). This begs the fact that we have not arrived in our present situation by mere happenstance. The system marginalizes and silences dissent not by accident, but by design.[92] Neither the Democratic nor Republican parties are likely to embrace any

88. 424 U.S. 1 (1976).

89. *See* Buckley v. Valeo, 424 U.S. at 12-23, 39-59; *see also* Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1055-62, 1071-73 (1999) (critiquing the *Buckley* decision and offering up rationales for sustaining comprehensive campaign finance reform legislation).

90. *See Buckley*, 424 U.S. at 85-108; *cf. id*. at 290, 291-94 (Rehnquist, J., concurring in part and dissenting in part) (arguing that the public funding provisions "enshrined the Republican and Democratic Parties in a permanently preferred position, and has established requirements for funding minor-party and independent candidates to which the two major parties are not subject").

91. *See* Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2478-82 (1997).

92. For an extended discussion of the relationship between wealth and free speech, see *Free Speech and Economic Power: A Symposium*, 93 NW. U. L. REV. 1053 (1999).

program of reform that disserves their short and long term institutional interests.[93]

To the extent that dissent presently does not seem to enjoy any special call on executive, legislative, or judicial consciences, making all speech claims contingent on a subjective label bids fair to legitimate greater, not less, suppression of politically marginal speakers. Thus, absent some revolutionary change in government (which seems, at best, highly unlikely), a system of free speech protection focused primarily on dissent likely would have the perverse effect of further stifling meaningful opposition to existing governmental and economic policies and institutions.

The related problem of ascertaining precisely what constitutes "injustice" also exists. Throughout his work, Professor Shiffrin emphasizes the importance of dissent to combating successfully "injustice." Describing the proper mission of the public schools, he argues that

> our educational system must educate not only autonomous thinkers prepared to reject the habits, customs, and traditions of the larger society but also citizens who generally regard dissent against injustice as virtuous behavior. . . . For example, students in large and small groups could be assigned projects of challenging injustices they collectively perceive within their local communities. [pp. 113-14]

Such activity should be encouraged because "[t]he practice of challenging injustice should not only instruct them in the present but also encourage them to do so in the future" (p. 114). This is all well and good, so long as one leaves undefined the scope and content of "injustice." Once a teacher, principal, administrator, or school board member begins attempting to identify "injustices" within the community, things are likely to get very complicated very quickly.

Shiffrin is undoubtedly correct to suggest that injustices exist within our society at the national, state, local, and neighborhood level. The problem, of course, is that in a diverse and pluralistic society with myriad ideological, religious, and social traditions and commitments, one person's injustice is another person's tradition.[94] It is not at all clear that having the government attempt to identify and define "injustice" for purposes of applying the First Amendment's Free Speech

93. *See* JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 44-47, 86-105 (1997) (describing public choice theory, the idea that legislators, given a free choice, systematically will make decisions that advance their own perceived self-interest, with particular attention to the problem of federal campaign finance reform).

94. *See*, *e.g.*, Lawrence M. Friedman, *The War of the Worlds: A Few Comments on Law, Culture, and Rights*, 47 CASE W. RES. L. REV. 379, 379-83 (1997); Leslye Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 278-79, 332-45, 371-78 (1997).

Clause represents a sound jurisprudential approach to vindicating free speech claims.[95]

B. *The Measure of Dissent*

Professor Shiffrin has undertaken an incredibly difficult task: he is attempting to square postmodern free speech critiques with a revised and renewed liberal free speech tradition. Rather than simply admitting defeat for the liberal conception of free speech and ceding the field to the CLS, Critical Race Theory, Feminist Jurisprudence, and Law & Sexuality critics, he attempts to construct a multi-cultural and postmodern theory of free speech that relocates free speech as a bulwark for the protection of oppressed and marginalized cultural minorities. Instead of entrenching the position of existing elites, Shiffrin's vision of the First Amendment would make the Free Speech Clause a powerful weapon for dispossessed political and cultural minorities to challenge what they perceive to be "injustice."

His definition of dissent demonstrates his commitment to this project: it is viewpoint and speaker-based precisely because a viewpoint and speaker-based approach is essential to meeting and refuting the critique of the Left. By vesting the strongest protections the Free Speech Clause has to offer with the strongest critics of the post-*Brandenburg* tradition, he hopes to create a free speech paradigm that is acceptable to all. Shiffrin's project is incredibly ambitious, and he deserves a great deal of credit for the strength and power of his arguments. One also should note that he self-consciously embraces the role of agent provocateur: "I am trying to open a dialogue rather than provide the last word" (p. 112). His effort at reconciling the free speech tradition with the critique of the New Left is terribly important if the social consensus in favor of free speech as a preferred value is to be maintained. In other liberal democracies, when these values come into conflict, the social commitment to free speech has given way in the face of demands that adequately securing values associated with equality and community be given a higher priority than protecting free speech.

Professor Shiffrin argues that "there is insufficient reason to suppose that the left acts against its interests in supporting the free speech

95. For example, the government of South Carolina does not seem to view the continued display of the Confederate battle flag over the state capitol building "unjust," even though many African-American South Carolinians seem to so view the matter. *See* David Firestone, *46,000 March on South Carolina Capitol to Bring Down Confederate Flag*, N.Y. TIMES, Jan. 18, 2000, at A14; Bob Herbert, *In America: Of Flags and Slurs*, N.Y. TIMES, Jan. 20, 2000, at A19. If minorities in South Carolina cannot convince the state government to remove an emblem long-associated with racist causes from the seat of state government, should they have any confidence that state functionaries would credit their efforts to engage in dissent combating other forms of injustice?

principle even assuming that the principle were laissez-faire" (p. 125). Free speech facilitates grass-roots organizing and protest, which challenges the status quo and facilitates reform; accordingly, liberals, progressives, and radicals should embrace free speech (pp. 124-27). Viewed through this prism, the free speech principle "has a strong political tilt against the unjust exercise of power" (p. 128). Moreover, "[l]ike it or not, the free speech principle is here to stay" (p. 129). As a matter of political pragmatism, progressives and radicals should acknowledge that "[it] is better political strategy to claim it than to hold out oneself as an enemy of a cherished right" (p. 129). Thus, if arguments based on principle do not convince, a frank appeal to practical political considerations might get the job done. If neither approach succeeds, try to scare the free speech apostates back into the fold with the prospect of damnation: a sustained attack on free speech "promises to guide the left into outer darkness" (p. 130).

The New Left is badly divided on the value and importance of free speech to the progressive cause. A growing number of critics reject rights talk in general[96] and the value of free speech in particular.[97] Thus, Shiffrin's project represents a sustained and cogent effort to bring the free speech schismatics back into the fold.

Ultimately, however, even Justice Brennan, the great conciliator, would not have been able to reconcile these contending factions. Free speech traditionalists are certain to object to Shiffrin's effort to make the identity of the speaker — not to mention the content of the speaker's message — an important component in determining the First Amendment status of speech activity. This aspect of the program rends asunder the viewpoint-neutrality project, an essential tenet of the traditional First Amendment faith.

Free speech critics also are unlikely to be convinced.[98] Shiffrin has attempted to give them a greater stake in the First Amendment by vesting disempowered cultural minorities with enhanced claims to free speech protection. So long as the instrumentalities of government remain in the majoritarian hands, however, the critics will not be satisfied.[99] After all, even if cultural minorities enjoyed some greater call

96. *See* Gabel, *supra* note 82; Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 707 (1992); Robert Williams, *supra* note 82, at 114-21. *But cf.* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404-06 (1987); Williams, *supra* note 82, at 121-34.

97. *See* Delgado, *supra* note 5, at 140-41; Andrea Dworkin, *Pornography Is a Civil Rights Issue for Women*, 21 U. MICH. J.L. REFORM 55 (1987/88); Mari Matsuda, Lecture, *in* Alan Borovoy et al., *The James McCormick Mitchell Lecture: Language as Violence vs. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337, 360 (1988/89).

98. *But see* Delgado, *supra* note 18, at 782-87, 795-98, 802.

99. *See* E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES.

on the Free Speech Clause, the contingency of this claim on courts staffed overwhelmingly by members of the majority would breed intense skepticism (with some good cause).[100]

C. *Enhancing Democratic Deliberation in the Name of Dissent*

It would be a mistake, however, to disregard Shiffrin's call for a renewed dialogue about the centrality of dissent to the free speech project. Even if one contests his definition of "dissent" and his insistence that "dissent" consistently seeks to overcome "injustice," his proposals for facilitating improved public deliberation have great merit and deserve serious consideration.

Shiffrin is surely correct to suppose that the Free Speech Clause should facilitate dissent from disaffected individuals and groups within the society. Moreover, many of his proposals for enhancing the role and visibility of dissent within the body politic are quite sensible. Professor Shiffrin suggests four broad reform projects that might improve the quality and quantity of public deliberation:

> Any society that encouraged dissent would have to meet four conditions: (1) its system of public education would need to promote attitudes and to teach skills that would assist in creating a substantial body of citizens with the talent and the will to challenge injustice in appropriate circumstances; (2) channels of communication for expressing dissent would need to be open; (3) legal barriers to dissent would need to be held to a minimum; an (4) social and governmental institutions would need to be designed to make information available to those who wish to dissent. [pp. 112-13]

L. REV. 275, 286-90 (1999) [hereinafter Spitko, *Gone But Not Conforming*]; E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 81-89 (1997); E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1067-69, 1072, 1075-77 (1999) [hereinafter Spitko, *Judge Not*]. Professor Spitko's utter distrust of majoritarian adjudication of the legal rights of cultural minorities in the public courts has led him to call upon cultural minorities to establish their own, quasi-private courts through voluntary arbitration. *See id.* at 1077-83; Spitko, *Gone But Not Conforming*, *supra*. Although he has never written on First Amendment doctrine, I strongly suspect that he — and others like him — would object strongly to any free speech theory that potentially vests judges and juries with more, rather than less, discretion because, in his view, such discretion inevitably will come to be exercised consistently in a fashion that marginalizes cultural minorities. To the extent that data on the question exist, it does seem to support such fears. *See* Spitko, *Gone But Not Conforming*, *supra*, at 278-86.

100. *See* Spitko, *Gone But Not Conforming*, *supra* note 99; Spitko, *Judge Not*, *supra* note 99. As Dean Kathleen M. Sullivan has explained:

> Thus, I believe that a number of the new arguments for speech regulation with a postmodern twist have a massive non sequitur at their core. Why trust the state — the very source of some of the bad, old social structures — to get the new ideology right? There might be strong reasons to distrust the state in reordering our ideological preferences, even if we trust it to solve other problems in our collective life.

Sullivan, *supra* note 63, at 987.

Each of these proposals not only would advance a dissent-based vision of the Free Speech Clause, but also would advance the project of democratic deliberation more generally. In this sense, then, one wedded to a different operational paradigm for the Free Speech Clause might still agree with the substance of Professor Shiffrin's program of reform.

It would be difficult to disagree with Professor Shiffrin's assertion that the public schools should prepare students for active participation in the life of the community. Given the apathy and lack of participation by young people in contemporary electoral politics,[101] it would appear that the schools are failing to foster in the nation's youth a spirit of civic duty and a corresponding obligation of participation in the project of democratic self-government. To be sure, the task of preparing young Americans for participation in our democracy does not fall solely on the shoulders of teachers and school administrators. Nevertheless, the apathy of younger citizens toward the electoral process at all levels of government is a problem[102] that the schools should address. As Professor Shiffrin puts it, "an educational system committed to producing active citizens with a sense of justice can produce a more active citizenry" (p. 113). Undoubtedly, "in educating for democracy in public and private realms, our schools could do more to encourage dissent."[103] Were they to do so, perhaps young citizens would be less apathetic about actively participating in the project of self-governance.

101. *See* LINDA J. SAX ET AL., AMERICAN FRESHMAN: NATIONAL NORMS FOR FALL 1997, at 2-4 (1997); Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1433-35 (1999); *see also* Richard Harrington, *Giving a Rap About Voting*, WASH. POST, Apr. 15, 1992, at F7 ("Since 1971, young people's voting participation has declined with each presidential election (36 percent in 1988)."); Rene Sanchez, *College Freshmen Have the Blahs, Survey Indicates; Academic, Civic Apathy Reach Record Levels*, WASH. POST, Jan. 12, 1998, at A1 (reporting on minimal interest of entering college freshmen in civic participation, with "[o]nly about 17%" expressing interest in " 'influencing the political structure' " and a mere 21% indicating that they regularly vote in student elections); Rene Sanchez & Audrey Gillan, *Outnumbered, Outvoted, Out of Clout on the Hill*, WASH. POST, Aug. 1, 1997, at A1 ("Some analysts say the percentage of young adults who vote in presidential elections, which has never been high but showed new signs of growth in 1992, tumbled below 30% last year.").

102. *See Panel Discussion: Civic Education*, 62 ALB. L. REV. 1451, 1459, 1462 (1999) (reporting that only 20% of young adults voted in the last federal election and warning that "[t]he participation of young people in voting and other forms of civic association appears to be in a free-fall. We can expect the lowest voting turnout yet among 18-to-25-year-olds in the next presidential election."); Steven A. Holmes, *The Melting Pot Politics of 2000 Are Truly Soupy*, N.Y. TIMES, Feb. 13, 2000, § 4, at 1 ("Despite efforts like MTV's 'Rock the Vote,' young people continue to be among the most politically apathetic groups in the country.").

103. P. 114. Ironically, students currently enjoy very limited free speech rights on campus and, therefore, their opportunity to engage in dissent is more apparent than real. *See* S. Elizabeth Wilborn, *Teaching the New Three Rs — Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 120-21 (1995) (noting that "core political speech is no more protected in the public schools than a dirty limerick scrawled in a bathroom stall").

Professor Shiffrin's second reform proposal deals with access to the media (pp. 115-17). He criticizes broadcasters for caring too much about maximizing profits and too little about facilitating democratic deliberation (including, of course, dissent) (pp. 115-17). His suggestions for improving the mass media's contribution to public discourse include increasing candidate access to the media, creating opportunities for the public to access media outlets to communicate their ideas with the larger community, and a renewed commitment to noncommercial broadcasting (pp. 116-17). All of these proposals would materially improve the process of democratic deliberation in this country and should receive serious consideration.[104]

Professor Shiffrin's failure to address the Internet as a potential platform for dissent is puzzling. Although television broadcasters and cable system operators presently deliver programming to mass audiences on a more reliable basis than the Internet, technological changes will chip away at the existing broadcast media's monopoly on mass audiences. Accordingly, the need to ensure accountability from broadcasters and cable system operators may be reduced as the Internet makes programming content-on-demand a reality.[105] This is not to say that established media cannot or should not do a better job of facilitating democratic deliberation. Rather, their continuing failure to take action may be less important over the long term than Shiffrin suggests.

Professor Shiffrin also proposes reforms aimed at reducing the opportunity costs (pp. 117-18) and transaction costs (pp. 118-20) associated with engaging in dissent. Again, even if one were to dispute or reject Professor Shiffrin's definition of "dissent" as unduly limited, his proposals for reducing the potential liabilities associated with speech activity on matters of public concern would enhance the ability of average citizens to participate in the project of democratic deliberation. In other words, limiting the liability associated with engaging in public debate and enhancing the access of average citizens to the means of participating in public debate would be wise policies under any plausi-

104. Having previously endorsed many of the same proposals, I hardly can be heard to object to Shiffrin's call for a renewed commitment by the mass media to facilitating the project of participatory democracy. *See* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1236-48 (1996); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2134-38 (1997) (book review) [hereinafter Krotoszynski, *The Inevitable Wasteland*].

105. There might still be a need for government-subsidized educational programming in the age of the Internet. Although the Internet will provide a platform for delivering programming content to a mass audience, one must still hire writers, producers, and actors to create the content. The history of public access cable stations suggests that providing a platform for the delivery of programming content will not ensure a reliable supply of high quality programming. *See* Krotoszynski, *The Inevitable Wasteland*, *supra* note 104, at 2128-29.

ble conception of free speech in a democratic society.[106] As with the proposals associated with broadcasting, one wonders why Professor Shiffrin does not explore the possibilities of the Internet for facilitating democratic deliberation and dissent. Although broadcast media remain critically important to the process of elections and public debate, new media are going to play an increasingly important role in democratic deliberation. A reform program aimed at securing regulations that promote the dissent-enhancing possibilities of the Internet, a relatively new medium for mass communication, might possess greater potential for success.[107]

Professor Shiffrin is right to challenge the legal community to think creatively about ways in which to secure greater and more representative public participation in the project of democratic deliberation. In the end, Professor Shiffrin undoubtedly is correct to assert that with respect to encouraging public participation in self-government: "[w]e can do better. We cannot do enough" (p. 120).

III. DISSENT IN THE SERVICE OF THE LORD: RELIGIOUSLY MOTIVATED DISSENT AND THE SECULAR STATE

Professor Stephen Carter, like Professor Shiffrin, presents a dissent-based model for conceptualizing the freedom of speech. And, like Shiffrin, Carter has a particular set of speakers in mind when arguing that dissent should play a greater role in contemporary political debate. "Mainstream politics, with its arrogant rejection of religious argument and traditional religious values, has alienated tens of millions of voters, and by no means are all of them hard-line conservatives" (p. 9). Carter's thesis is an elaborate argument in favor of taking religiously motivated dissent more seriously.

Invoking traditional Enlightenment conceptions of the state, Carter argues that a government retains its legitimate claim to the allegiance of its people only so long as it remains responsive to their needs, wants, and desires (pp. 7-19). Traditionally, these ideas are expressed in the maxim that just governments derive their legitimacy from the consent of the governed, a consent that is ongoing and freely given.[108] Professor Carter suggests modifying the maxim by placing greater emphasis on the government's responsiveness to the *dissent* of the governed (pp. 4-7). Invoking language in the Declaration of Inde-

106. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 860-65, 876-83 (2000).

107. *See id.* at 892-904, 944-46.

108. *See* JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES ON GOVERNMENT ¶¶ 89-94, 95-99, 123-31, 134-42, 211-43 (Peter Laslett ed., 1960) (1690); JEAN JACQUES ROSSEAU, *Of the Social Contract*, *in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 48-54 (Victor Gourevitch ed. & trans. 1997) (1762).

pendence complaining that "[o]ur repeated Petitions have been answered only by repeated Injury,"[109] Carter argues that legitimacy should be as much a function of how a government responds to dissent as it is about creating and sustaining programs that enjoy broad majoritarian support:

> Perhaps governments — good and fair ones anyway — do not after all derive their powers from the *consent* of the governed. Perhaps they derive their powers instead from the *dissent* of the governed. For the fairness and decency of any state should be assessed not alone through a study of whether its majorities examine it and find it good, but through a study of whether its minorities examine it and find it good. Another way to look at the matter is this: the justice of a state is not measured merely by its authority's tolerance for dissent, but also by its dissenters' tolerance for authority. [p. 97]

Carter, like Shiffrin, sees dissent as essential to the construction of a just polity. "Civic life requires dissent because it requires differences of opinion in order to spark the dialogues from which the community thrives and grows."[110] Yet, "[i]n contemporary America . . . the nation is all too full of people and groups who insist that the political sovereign does not hear their voices" (p. 18). If something is not done to correct this state of affairs, Carter warns that "disaffection may turn to disallegiance" (p. 18).

A. *Community, Power, and the Importance of Dissent*

Majorities naturally attempt to inculcate a common set of values as part of an ongoing effort to maintain community identity. Sometimes these efforts are benign, and sometimes they are not. Carter provides a historical sketch of the use of the public schools as a tool in forging a single, Protestant concept of American citizenship (pp. 19-45). In many respects, this effort was less about ensuring universal education and civic participation than about destroying pre-existing ties to Old World institutions, such as the Roman Catholic Church.

> One study of textbooks concluded that the aim of the public schools by the turn of the century was to replace the love of what was viewed as a foreign God with a love of America as a country — very much the Know-Nothing program, long after the party itself vanished from the scene. [pp. 44-45; footnote omitted]

Carter believes that a project of using the public schools to inculcate Protestant values has now evolved into a project of teaching purely secular values, including open disrespect for religion and religious institutions (pp. 44-49). He warns that the government sows the "seeds of disallegiance" when "our 'free' society counts among the powers of

109. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

110. P. 16; *see also* Emerson, *supra* note 14, at 883-84.

government the power to use education as the lever to eradicate unwanted religious traditions" (p. 47).

Unlike Shiffrin, Carter's vision of dissent is completely viewpoint- and speaker-neutral. "It is very much in the nature of the tools of democratic dissent that they may be used by the bad guys as well as the good guys" (p. 120). Carter recognizes and embraces the idea that robust protection of dissent undoubtedly will mean that some parents inculcate immoral and unjust ideas in their children. "The freedom of the family to make religious choices — a freedom that is essential if religious communities are to be able to survive by projecting their narratives over time — must include the freedom to make choices other than the best" (p. 48). Freedom necessarily encompasses "the privilege of making mistakes" (p. 48). If the state attempts to replace parental values with the government's values, parents will respond first with dissent and, if this proves unavailing, with disallegiance.

Professor Carter pursues this idea to its logical conclusion: a right of revolution in the face of an unresponsive government (pp. 53-99). In his view, we increasingly run the risk of forcing loyal, but dissenting, citizens to consider this alternative because of the community's refusal to take seriously their objections to a number of current social policies (most notably including legalized abortion). Pointing to the Supreme Court's contemporary free exercise jurisprudence as a case in point, Carter suggests that the government's effective message to religious minorities is "it doesn't matter if the secular sovereign makes it difficult for you to practice your religion, because there are lots of other religions out there, and you can choose one of the others instead" (p. 57). Returning to his theme of dissent, Carter posits that although "[i]t is, of course, vital to the notion of witness that the witnesses can be seen and heard" the secular authorities nevertheless have sanctioned the "remov[al] of pro-life protestors from defined zones in front of clinics where abortions are performed" (p. 60).

Properly understood and implemented, a meaningful commitment to free speech values, at one time or another, will prove vexing to all constituencies within the community. "This is perhaps the principal glory of our First Amendment tradition: properly understood, it frustrates *everybody* — or at least everybody possessing the will to censor debate and the political power with which to do it" (p. 65). The problem, as Carter sees it, is that religiously motivated dissent is no longer taken seriously by either the government or the secular cultural majority. This then forces religiously motivated dissenters to consider resorting to political crimes in order to bring their concerns to the attention of the community and provoke some kind of response (pp. 67-78).

Thus, if a government meets repeated petitions with "repeated Injuries," the government loses its right to command the allegiance of the dissenters (pp. 9-13). At the same time, problems arise because governments and dominant community groups often equate dissent

with disallegiance or disloyalty (pp. 16-19). The problem is exacerbated when religious communities attempt to establish themselves as separate communities within the larger whole (pp. 67-86). Carter acknowledges that some self-constituted groups engage in grossly antisocial behaviors, like murdering physicians who perform abortions or bombing federal buildings. Nevertheless, "[o]ne must not make the mistake of assuming that the violence and perhaps paranoia of these groups is an argument against the ideal of self-constituted communities; it is simply evidence, were any needed, that there is wickedness everywhere" (p. 83).

B. *Reaffirming the National Commitment to Dissent*

Significantly, Carter's arguments are aimed far less at fringe groups than traditional liberals, whose commitment to free speech principles has been wavering of late.[111] "[I]f we are to preach more tolerance, it is not sufficient to preach it to intolerant, divisive religionists, of which there are many; we must preach it as well to intolerant, divisive secular liberals, many of whom seem to value diversity across every spectrum except the religious" (p. 85). He further posits that the success of the liberal agenda has created ambivalence about the use of state power to squelch dissent. "This is a greater problem for liberalism in the 1990s than it was in the 1960s because liberalism has won so many political battles in the intervening decades that it has developed a troubling moral complacency, particularly with respect to the tough questioning of authority that was once its glory" (pp. 85-86). This "complacency" has led to free speech backsliding:

> It is indeed a bit embarrassing, given the 1960s, but when today's liberals talk about, say, protests at abortion clinics, one can hear, echoing down time's corridors, the terrifying logic of the silencing slogan of the silent majority days: "America — Love it or Leave It!" Which means, of course, "*Our* America — do it our way or go to jail!" [p. 86]

How then, should free speech theory attempt to address the phenomenon of religiously motivated dissent? Professor Carter argues for a "dialogue" based model in which dissent is not ignored or deval-

111. To the extent Professor Carter's intended audience encompasses leftists and radicals, his proposals are likely to receive a decidedly frostier reception than Professor Shriffrin's dissent thesis. This is because Professor Carter's paradigmatic dissenters — religiously motivated opponents of abortion rights — are a group potentially silenced (or at least muzzled) under Professor Shriffin's dissent theory of free speech. Although one should not overgeneralize, most leftists and radicals within the legal academy support efforts to reduce gender subordination and enhance feminist agency, and therefore, would view women's potential loss of control over reproduction as a serious setback to the cause. In this way, Professor Carter's model of dissenters illustrates a potential objection to Professor Shiffrin's theory, at least if one believes (as most liberals do) that the viewpoint of a speaker generally should not prefigure whether particular speech activity merits or enjoys constitutional protection.

ued merely because the speaker happens to possess religious motivations, or uses overtly religious arguments, for advancing her position. Such an approach would "mean that there is nothing about the *religious* source of their convictions that should bar them from public dialogue — a terrible rule, and one which, as I have mentioned, would have destroyed or severely disabled the moral arguments of both the Abolitionist movement and the civil rights movement" (p. 93).

Professor Carter lodges his complaint not so much against Congress and the Executive Branch of the federal government, but rather against the federal judiciary, which, in his view, has been insufficiently protective of religiously motivated dissenters within the community. He believes the federal courts are overconfident of their analytical capabilities; the project of judicial review (or judicial supremacy) "rests on the foundational point that the courts are far wiser than anybody else (sovereign or citizens) and thus must be obeyed, always and everywhere and by everyone. Period" (p. 110).

In a move reminiscent of Abraham Lincoln's scathing critique of the then-recent *Dred Scott*[112] decision during the Lincoln-Douglas debates,[113] Professor Carter questions whether judicial decisions should be obeyed if they reject or betray the fundamental moral commitments of the community. "[I]t is not obvious that people will obey judicial opinions that are wrongheaded, and even less obvious that they should" (p. 114). Contemporary liberal reverence for the courts, suggests Carter, is a lingering shadow of the civil rights movement.

> But that history is of use only if we suppose it to prove that judges will usually be wiser than politicians. At times they are — but over the long run, the human beings who judge are every bit as capable of error and wickedness as the human beings who legislate or carry the laws into execution. [p. 131]

Professor Carter is undoubtedly correct. The same Supreme Court that gave us *Brown v. Board of Education*[114] also gave us *Dred Scott v. Sandford*[115] and *Plessy v. Ferguson*[116] (not to mention *Korematsu*[117] and *Bowers v. Hardwick*[118]). Simply put, there is no reason to believe that

112. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

113. *See* The First Joint Debate at Ottawa (Aug. 21, 1858), *in* THE LINCOLN-DOUGLAS DEBATES 40, 74-77 (Harold Holzer ed., 1993); The Third Joint Debate at Jonesboro (Sept. 15, 1858), *in* THE LINCOLN-DOUGLAS DEBATES, *supra*, at 136, 168-72; The Fifth Joint Debate at Gatesburg (Oct. 7, 1858), *in* THE LINCOLN-DOUGLAS DEBATES, *supra*, at 234, 262-64; The Seventh Joint Debate at Alton (Oct. 15, 1858), *in* THE LINCOLN-DOUGLAS DEBATES, *supra*, at 321, 360-62.

114. 347 U.S. 483 (1954).

115. 60 U.S. (19 How.) 393 (1856).

116. 163 U.S. 537 (1896).

117. Korematsu v. United States, 323 U.S. 214 (1944).

118. 478 U.S. 186 (1986).

the courts alone possess the ability to engage in virtuous or just policymaking, or that they will do so on a consistent basis.[119] Of course, judges, unlike members of Congress or the President, do not face regular democratic accountability (i.e., the need to seek and obtain reelection to office). Institutionally, at least, they are better positioned to interpose themselves between the wishes of the majority and the rights of an unpopular minority.[120] Although Professor Carter rightly questions whether the federal judiciary's decisions routinely promote justice, in some respects he fails to credit the judiciary for its moral victories.

For example, Professor Carter makes much of the fact that the Supreme Court upheld "breach of the peace" convictions against Martin Luther King, Jr. and other members of the Southern Christian Leadership Conference for marching in Birmingham, Alabama on Easter Sunday without a permit.[121] He does not mention that the pivotal moment of the civil rights movement — the Selma-to-Montgomery March — took place under the protection of a federal court order issued by district judge Frank M. Johnson, Jr.[122] Given the scope, scale, and duration of this mass protest activity, it is rather difficult to imagine how it could have taken place without the formal sanction of law.

The Selma March ignited the conscience of the national community and led to the passage of the landmark Voting Rights Act of 1965.[123] More than any other mass-protest action, it changed the face of the nation. Federal judicial intervention sustained the march against the entrenched opposition of every element of the state government.[124] Professor Carter's unqualified slashing attacks on the federal judiciary give insufficient credit to the personal and professional sacrifices of judges like Frank M. Johnson, Jr., J. Skelly Wright, Elbert P. Tuttle, John R. Brown, John Minor Wisdom, and Richard T. Rives.[125]

119. *See* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 49-60 (1998); *cf.* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3-13, 123-50, 232-70 (1994).

120. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

121. Pp. 105-10. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

122. *See* Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965); *see also* Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411 (1995).

123. *See* Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 (1994)); Krotoszynski, *supra* note 122, at 1412, 1427-28.

124. *See Williams*, 240 F. Supp. at 105-09.

125. *See* JACK BASS, UNLIKELY HEROES (1981).

Professor Carter's attack on the judiciary is really in the service of a subsidiary point, however. Given that the judiciary is not infallible, it is entirely reasonable to suppose that citizens might profoundly disagree with a particular decision of the federal courts. In his view, *Roe v. Wade*[126] presents a good example of this phenomenon. Carter argues that *Roe* rests not on constitutional principle, but rather on the "moral instincts" of the Justices composing the Supreme Court's majority in favor of the result (p. 136). Given this state of affairs, he asks: "Would it be so unreasonable for an aroused citizen — or an aroused majority of citizens — to wonder why the judges' moral instincts are a better extra-constitutional source than the moral instincts of the people themselves?" (p. 136). His answer: "Clearly not; nor can the judges themselves provide a persuasive response, unless the response indicates a willingness to engage in that conversation — not monologue — of which Bickel wrote."[127]

Only by taking seriously the dissent of cultural, racial, or religious minorities can the nation lay a valid claim to respecting democratic pluralism. "In all of this, my concern has been for the autonomy of the many communities — particularly, but not exclusively, religious communities — into which democratic citizens organize themselves" (p. 142). Respect for democratic pluralism means respecting opinions that may seem wrongheaded, or even evil: "That the mores of some communities may seem to be morally objectionable or simply bizarre only fortifies the point, for it is only through the willingness to accept these differences that we become truly democratic" (p. 142). Rather than using law to disperse and destroy these self-constituted communities, government "should more properly serve as a means to preserve the diversity among our communities of meaning" (p. 142).

C. *Making the Case for According Religiously Motivated Dissent Greater Solicitude: Mixed Motives and the Need to Recognize the Difference Between Jihad and Community Survival*

One would be hard-pressed to disagree with Professor Carter's plea that we take the opinions of religiously motivated dissenters seriously. Undoubtedly, such speakers often fail to secure a meaningful hearing because many object to the idea of imposing public policies on the general community based on a particular set of religious commitments. Indeed, when John Kennedy ran for president in 1960, many commentators worried about whether Kennedy would make inde-

126. 410 U.S. 113 (1973).

127. P. 136. *See* BICKEL, *supra* note 120, at 26, 65-72, 117, 127-33, 205-06, 235-43, 261; ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 110-11 (1975); *see also* Barry Friendman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586-90, 653-80 (1993); Krotoszynski, *supra* note 119, at 46.

pendent policy determinations free and clear of Vatican influence.[128] More recently, New York governor Mario Cuomo wrestled with the problem of squaring his official duties with his Catholic faith, particularly with regard to the abortion issue.[129]

At the same time, there is something disturbing about a particular religious sect's attempting to use the levers of secular power to achieve sectarian aims. For example, the recent controversy in Kansas over the teaching of evolution strongly suggests that religious dissenters do not merely want a hearing, they want to win the debate and implement their policy views on the entire political community.[130] The Kansas state school board's decision to remove evolution from the state-mandated science curriculum was not an isolated event — across the nation, religious fundamentalists are working daily to take over local and state school boards, often with tremendous success.[131]

128. *See* LAWRENCE H. FUCHS, JOHN F. KENNEDY AND AMERICAN CATHOLICISM 172 (1967); THEODORE H. WHITE, THE MAKING OF THE PRESIDENT, 1960, at 259-62 (1961); John F. Kennedy, Jr., *Remarks on Church and State*, N.Y. TIMES, Sept. 13, 1960, § 1, at 22, *reprinted in* CHURCH AND STATE IN AMERICAN HISTORY 190 (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1987); *see also* Paul J. Weithman, *John Courtney Murray — Do His Ideas Still Matter?*, AMERICA, Oct. 29, 1994, at 17; *Catholicism and the Campaign*, 72 COMMONWEAL 507-08 (1960). In an earlier presidential campaign, the election of 1928, New York Governor Al Smith, the Democratic nominee, came under sharp attack because of his membership in the Roman Catholic Church and, like John F. Kennedy, found himself forced to defend his religious associations. *See* Arthur Schlesinger Jr., *O'Connor, Vaughan, Cuomo, Al Smith, J.F.K.*, N.Y. TIMES, Feb. 2, 1990, at A31.

129. *See* Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (1984); *see also* Ari L. Goldman, *New York's Controversial Archbishop*, N.Y. TIMES, Oct. 14, 1984, § 6 (Magazine), at 38; Sam Roberts, *Cuomo to Challenge Archbishop over Criticism of Abortion Stand*, N.Y. TIMES, Aug. 3, 1984, at A1. Catholic scholars have noted the potential difficulties of remaining faithful to the teachings of the Church while discharging a civil function. *See*, *e.g.*, John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998); John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849 (1993).

130. *See* Pam Belluck, *Board for Kansas Deletes Evolution from Curriculum*, N.Y. TIMES, Aug. 12, 1999, at A1; Jacques Steinberg, *Evolution Struggle Shifts to Kansas School Districts*, N.Y. TIMES, Aug. 25, 1999, at A1. The Kansas School Board came under sharp criticism for its decision. Noted Harvard paleontologist, Stephen Jay Gould, described the decision as "like saying '[w]e're going to continue to teach English, but you don't have to teach grammar,' " and predicted that the citizens of Kansas "would be profoundly embarrassed by the stupidity of the ruling" and "would vote that school board out of office the next year." Claudia Dreifus, *Primordial Beasts, Creationists, and Mighty Yankees*, N.Y. TIMES, Dec. 21, 1999, at F3.

131. Hanna Rosin, *Creationism Evolves*, WASH. POST, Aug. 8, 1999, at A1 ("In the last four years, school boards in at least seven states — Arizona, Alabama, Illinois, New Mexico, Texas, Kansas, and Nebraska — have tried to remove evolution from state science standards or water down the concepts, with varying degrees of success."); *see also* Sandra Blakeslee, *In Schools Across the Land, a Group Mounts Counterattacks on "Creation Science*," N.Y. TIMES, Aug. 29, 1999, § 1, at 20; Hanna Rosin, *Creationism, Coming to Life in Suburbia*, WASH. POST, Oct. 5, 1999, at A1. Dr. Stephen Jay Gould blames this state of affairs on apathy toward school board elections:

> The only reason it [the Kansas decision to remove evolution from the state's science curriculum] happened is that nobody votes in school board elections anymore. Thus, determined minorities can take over. It took this fundamentalist group three election cycles to

There is something inherently destructive of political community when one group of citizens attempts to impose theologically grounded public policies on citizens who do not share the same set of theological commitments.[132] It is one thing to say that feeding the hungry makes for good public policy; it is another to say that, because Jesus commands the feeding of the hungry, those who oppose the policy will surely burn in hell.[133] "Competition among religions for position within government must be avoided so that none need fear any other, as each might otherwise seek its own establishment through government or within government."[134]

Indeed, Chief Justice Burger elaborated on these concerns in his landmark opinion in *Lemon v. Kurtzman*.[135] He argued that "[o]rdinarily political debate and division, however vigorous or even

take over in Kansas. They only have a one-vote majority, 6-4. Four are up for election next year.

Dreifus, *supra* note 130.

132. *See* Cuomo, *supra* note 129, at 16-20. As Governor Cuomo puts the matter:

> I protect my right to be a Catholic by preserving your right to believe as a Jew, a Protestant or non-believer, or as anything else you choose. We know that the price of seeking to force our beliefs on others is that they might some day force theirs on us. This freedom is the fundamental strength of our unique experiment in government. In the complex interplay of forces and considerations that go into the making of our laws and policies, its preservation must be a pervasive and dominant concern.

Id. at 16; *see also* James Madison, The Memorial and Remonstrance Against Religious Assessments, June 20, 1785, *reprinted in* 8 THE PAPERS OF JAMES MADISON 298, 301-02 (Robert A. Rutland et al. eds., 1973) (warning against the infusion of sectarian argumentation in public policy debates "[b]ecause it will have a . . . tendency to banish our Citizens" (i.e., utterly alienate them from the project of democratic discourse on the basis of religion.)). *But cf.* Ronald Reagan, *Politics and Morality Are Inseparable*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7 (1984) (arguing in favor of active efforts by people of faith to seek legislative reforms incorporating their faith-based policy preferences).

133. *See* Cuomo, *supra* note 129, at 19-20. As Justice Jackson stated the matter:

> This freedom [freedom from "establishments" of religion] was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.

Everson v. Board of Educ., 330 U.S. 1, 26-27 (1947) (Jackson, J., dissenting). Justice Jackson plainly believed that overt efforts to inject questions of faith into public policy debates might bring about highly divisive church/state relationships that would undermine confidence in the civil state and risk the autonomy of communities of faith. Of course, Professor Carter is not arguing for the creation of John Calvin's Geneva, but he is arguing that those who advocate such arrangements receive a full and fair hearing from the general community. At least arguably, encouraging overt efforts to give greater weight to those who generally reject a strict separation of church doctrine and matters of state risks the advent of irreconcilable divisions within the community. One need look no further than modern day Northern Ireland to see the potential negative effects of overtly evangelized politics.

134. William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 777-78.

135. 403 U.S. 602 (1971).

partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[136] In Burger's view, "[t]he potential divisiveness of such conflict is a threat to the normal political process."[137] This does not mean, of course, that religiously motivated dissent should not enjoy First Amendment protection. Rather, it suggests that, in a pluralistic community, constituted by individuals possessing myriad racial, cultural, and religious identities, overt efforts to impose public policies based on faith-based understandings of appropriate human behavior might not represent the best course of action for the community. In public policy terms, efforts to inject facially theological arguments into policy debates (i.e., "God commands that abortion be treated as murder") run a serious risk of ending, rather than facilitating, the conversation. Moreover, it is far from clear that a law passed solely in order to satisfy religious scruples (or primarily for that purpose) would pass muster under Establishment Clause analysis.[138]

Professor Carter makes strong arguments for the benefits of religiously motivated dissent, and posits some rather nasty consequences of completely ignoring such speakers, but he never really attempts to present or consider the other side of the question. Is self-consciously religiously motivated public policy sustainable in a pluralistic democracy? This is a question that Carter never asks, much less answers.

Consider, for example, anti-abortion protestors. Professor Carter consistently uses anti-abortion protestors as his paradigm of ignored, slighted, and legally marginalized religiously motivated dissenters. He argues strongly that the general community must engage such dissenters on the merits of their position in an ongoing "dialogue" about community values (pp. 20, 60-61, 74-81, 90-95, 134-36). The problem, of course, is that the most committed anti-abortion protestors view abortion as murder — no different than randomly shooting a passerby on the street. Carter seems to be aware of this faction of the pro-life movement:

> After all, if a pro-life protester is persuaded by his religious understanding that fetuses are human, that abortion is murder, and that physicians

136. *Id*. at 622; *see also* Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) ("While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall.").

137. *Lemon*, 403 U.S. at 622.

138. *See id.* at 612-13 (holding that a "statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion' " (citations omitted)). A law passed in order to satisfy the religious convictions of a particular religious sect arguably lacks a secular purpose and, moreover, directly advances a particular religion's social objectives.

> who perform abortions are thus, literally, baby-killers, why (other than moral cowardice, a fear to face the judgment of the society) should he not kill the doctors? [p. 74]

The question that begs to be asked is: How can one sustain a meaningful dialogue with such a person? Although Carter faults secular liberals for dismissing, out-of-hand, the viewpoints of religious dissenters, he fails to acknowledge the unwillingness of many religious dissenters to compromise. Compromise, of course, is the mortar of democratic self-government.

Thus, a careful reader might lodge a rather basic objection to Professor Carter's theory of free speech: he seeks a dialogue with persons unwilling to compromise what they believe to be divinely ordered resolutions to hotly contested questions of public policy. A person who believes that God has commanded a particular result is unlikely to strike a deal that involves anything short of total victory.

As the existential philosopher, Soren Kierkegaard, explained so eloquently, faith ceases to be faith when one has reasons for holding a particular belief.[139] In Kierkegaard's view, real faith requires the crucifixion of reason and the embrace of the "absurd" — strongly held, entirely intuitive convictions that one simply cannot justify through rational explication.[140] Thus, the very idea of rational dialogue about matters of faith confronts a difficulty: faith does not subsist on reason,

139. *See* SOREN KIERKEGAARD, *Concluding Unscientific Postscript to the "Philosophical Fragments": An Existential Contribution by Johannes Climacus*, *reprinted in* A KIERKEGAARD ANTHOLOGY 190, 214-216 (Robert Bretall ed., 1946) (1843) [hereinafter Kierkegaard, *Postscript*]; SOREN KIERKEGAARD, *Fear and Trembling: A Dialectical Lyric*, *reprinted in* A KIERKEGAARD ANTHOLOGY, *supra*, at 116, 130-34 [hereinafter Kierkegaard, *Fear and Trembling*]. As Kierkegaard puts the matter:

> Without risk there is no faith. Faith is precisely the contradiction between the infinite passion of the individual's inwardness and the objective uncertainty. If I am capable of grasping God objectively, I do not believe, but precisely because I cannot do this I must believe. If I wish to preserve myself in faith I must constantly be intent upon holding fast to objective uncertainty, so that in the objective uncertainty I am out "upon the seven fathoms of water" and yet believe.

KIERKEGAARD, *Postscript*, *supra*, at 215.

140. *See* KIERKEGAARD, *Postscript*, *supra* note 139, at 255 ("Faith is the objective uncertainty along with the repulsion of the absurd held fast in the passion of inwardness, which precisely is inwardness potentiated to the highest degree."). In this regard, it bears noting that Abraham serves as Kierkegaard's archetype of faith because Abraham was prepared to violate all universalist ethical prescriptions by murdering his son, Isaac. *See* KIERKEGAARD, *Fear and Trembling*, *supra* note 139, at 130-34. Abraham possessed such faith that he was willing to murder his own son because he believed that God required him to do so. *See id.* Of course, one longs to ask the question: "What if Abraham was wrong about God's will?" As Kierkegaard aptly notes, "[t]herefore, although Abraham arouses my admiration, he at the same time appalls me." *Id.* at 133. Abraham's story represents an individual transcending traditional notions of morality because faith requires him to do so. "The story of Abraham contains therefore a teleological suspension of the ethical." *Id.* at 134. Abraham transcends the universal — "[i]f such is not the position of Abraham, then he is not even a tragic hero but a murderer." *Id.* Accordingly, "[f]aith is a miracle, and yet man is not excluded from it; for that in which all human life is unified is passion, and faith is a passion." *Id.*

but belief. There is little cause to suppose that a dialogue challenging someone's most fundamental teleological commitments will prove fruitful: "to him who follows the narrow way of faith, no one can give counsel, him no one can understand."[141]

In light of the bitter disagreements associated with knowing "God's will," the history of theocratic states has not been particularly happy, and the admixture of religion and politics has led to a great deal of bloodshed throughout human history.[142] As Professor William Van Alstyne has explained, "The idea of a civil nation of free people, diverse in their thoughts, equal in their citizenship, and with none to feel alien, outcast, or stranger in relation to civil authority, remains powerful and compelling."[143] The problem boils down to this: How does one maintain a meaningful dialogue with a person who, by divine ordinance, cannot compromise her demands of the secular state? Professor Carter does not offer much help on this aspect of the problem.

Moreover, given that the secular state permits citizens to organize into separate "communities within the community," the state's tolerance for a particular behavior does not effectively mean that all citizens must engage in the behavior. If a particular religious community rejects homosexual sodomy as an abomination in the sight of God, it is quite free to maintain that belief and its members are free to conduct their sexual lives in accordance with it. The group's members may teach this value to their children and remove them from the public schools in order to ensure that secular authorities do not inculcate contrary values.[144] Beyond this, however, I am not sure what claim of right the self-constituted religious community should have over the rest of the community.

That is to say, if a majority of citizens embrace sexual autonomy as an official state policy, I do not think that a religious dissenter has a right to demand the reenactment of the proscription against sodomy. I do not disagree with Carter that a person seeking such a legislative change ought to be permitted to speak in favor of a return to traditional morals,[145] but a failure on the part of the community to act on that suggestion, or even to afford the religiously motivated dissenter a polite audience, would not justify acts of terrorism against the state by the religious dissenter.

141. KIERKEGAARD, *Fear and Trembling*, *supra* note 139, at 134.

142. The Thirty Years' War is one example; the present dysfunctions in Northern Ireland provide yet another. When religionists attempt to use the secular state as a tool of indoctrination (whether voluntary or not), those who are not co-religionists are likely to respond negatively (not to put too fine a point on the matter).

143. Van Alstyne, *supra* note 134, at 787.

144. The Constitution certainly would privilege such a decision. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

145. *See* Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951); Cantwell v. Connecticut, 310 U.S. 296, 308-10 (1940).

Thus, if the community affords greater opportunities for religious dissent, but nevertheless rejects the positions advanced by the religious dissenters, I am not at all convinced that the religious dissenters will let the matter go. To put the matter in Carter's nomenclature, after the "repeated petitions" of the anti-sodomy religious dissenters fail to achieve meaningful social and legal reforms, are they then free to proclaim their "disallegiance" from the community and take up armed resistance?[146] Portions of Professor Carter's book suggest that this result is not untenable (pp. 19-27, 73-89).

At bottom, Professor Carter offers up a consequentialist vision of free speech: take seriously dissent from disaffected members of the community, be prepared to defend the existing social ordering on the merits, or face the growing possibility of dissenters renouncing their loyalty to the government and seeking change through an inherent right of revolution. At the same time, he emphasizes that "I am not insisting that the ability of a community to define itself must be without limits" (p. 89). Nevertheless, Carter concludes that:

> in a society founded on a Declaration of Independence that warns against the rejection of repeated petitions of the citizenry, those limits should be few, and we must avoid the totalizing tendency to treat all of our deeply held values as principles by which not only the national sovereign but every community, no matter how constituted, must be bound. [p. 89]

The problem, of course, is that religious dissenters not only want to be self-regulating (to a large extent they already are), but rather that they wish to impose a theocratically inspired set of health, safety, and morals regulations on everybody else!

Again, I do not disagree with Professor Carter's suggestion that religious dissenters bent on imposing "totalizing" theocratic visions on the body politic should have their say; the First Amendment should, at a minimum, debar government from picking and choosing free speech winners and free speech losers.[147] Religiously motivated speakers

146. Actually, Mr. Eric Robert Rudolph appears to have jumped the gun. In the last three years, he allegedly has bombed the Atlanta Olympic festivities, a lesbian bar, and several abortion clinics. *See* Thomas B. Edsall, *Clinic Bombing Probed For Link to Rudolph*, WASH. POST, Mar. 14, 1999, at A20; Sue Anne Pressley, *Carolinians Doubt Rudolph Is Hiding In Their Mountains*, WASH. POST, Mar. 31, 1999, at A3. No serious person could argue that Mr. Rudolph's actions are justified because the general community decided to hold an international athletic competition that celebrates international cooperation, tolerates bars catering to a predominantly lesbian clientele, and permits abortion services. *But see* Carolyn Tuft & Joe Holleman, *Inside the Christian Identity Movement*, ST. LOUIS POST-DISPATCH, Mar. 5, 2000, at A8 (describing the rise of the Christian Identity movement and the penchant of some adherents to use violence when less drastic approaches fail to achieve social change).

147. *See* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940); *see also* Kunz v. New York, 340 U.S. 290 (1951). *But cf.* Hill v. Colorado, 120 S. Ct. 2480 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Womens' Health Ctrs, Inc., 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474 (1988).

should (and do) enjoy the same free speech rights as those engaged in nonreligiously motivated speech activities.[148] That said, I worry about the implications of Professor Carter's theory when the religious dissenters fail to convince the general public to embrace their vision for a virtuous community. Perhaps he seriously believes that a polite audience will satisfy religious dissenters, even if they inevitably fail to secure meaningful reforms. One would have reason to believe, however, that Jehovah might demand something more than democratic discourse, if democratic discourse fails to get the job done.

With respect to homosexuality, Professor Carter suggests that meeting religious objections would be a relatively simple task:

> So, even though, for reasons I have already noted, it is foolish and historically naive to meet religious objections to homosexuality by asserting that religionists cannot impose their moral judgments on anybody else, it strikes me as fairly easy to meet the objections on the merits, that is, to defend the privacy right that covers sexual conduct. [p. 91]

It might be easy to make logical arguments about the benefits of living in a society that respects sexual autonomy as an integral aspect of personal autonomy, or personal privacy. It is quite another thing to believe that such arguments would prove persuasive to someone who takes Leviticus literally, and believes Leviticus to be the divine word of God made known to man. Indeed, if the argument were so self-evident and easy to make convincingly, one might ask Professor Carter to explain the seeming anomaly of *Bowers v. Hardwick*,[149] a case in which the Chief Justice of the United States invokes the "Judeao-Christian" proscription against homosexual sodomy as a sufficient reason for sustaining a Georgia law prohibiting it.[150]

The fact of the matter is that reasoned discourse stands little chance against the divine word of God. Thus, it seems hopelessly naïve to suggest that

> [o]ne triumphs, in other words, by doing that which I have stressed elsewhere is the only democratic way to meet religious claims of morality in the public square: to argue against them on the merits, by presenting the case for defeating them in terms independent of the religious source of the values in question. [p. 91]

But why is there any reason to believe that reasoned discourse will be at all convincing to a person who sincerely believes she is attempting to do God's will? Indeed, a person who devoutly believes that, by ob-

148. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-95 (1993) (prohibiting viewpoint discrimination against religiously motivated speakers wishing to use school facilities after-hours for a film series); *see also* Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Niemotko v. Maryland, 340 U.S. 268 (1951).

149. 478 U.S. 186 (1986).

150. *See id.* at 196 (Burger, C.J., concurring).

taining (or, as is often the case preserving) a proscription against a particular sexual activity, she will be "saving" potential sinners from their own base appetites is unlikely to be moved by policy arguments, no matter how artfully constructed. It is more than ironic that Professor Carter would call for respect and tolerance of people who, in many instances, do not accord similar respect and tolerance to sexual minorities. How does the Christian so-called "formerly gay" movement fit into Professor Carter's moral universe? Why should a gay man or lesbian take seriously someone who views their most basic life choices as an abomination, something to be "fixed," whether voluntarily or not?

Perhaps anticipating these criticisms, Professor Carter notes that "[a]s a scholar and citizen who is a Christian, I worry about the obsession of some members of my faith with rules to govern sexuality" (p. 91). With all due respect, tell that to the parents of Matthew Shepard. Moreover, please explain to them why the anti-gay protestors at Matthew's funeral merit careful and solicitous consideration, as these zealots chant that their son burns in hell because "God hates fags."[151] The remarkable cruelty of some "religious dissenters" toward sexual minorities has become so extreme[152] that even religious leaders long

151. Associated Press, *Protest Greets Meeting on Antigay Violence*, N.Y. TIMES, Oct. 24, 1999, at A30. Among the anti-gay protests were signs reading "Matt is in hell and God hates fags," Scott Simon & Mark Roberts, *Matthew Shepard Funeral*, NPR Weekend Saturday, Transcript No. 98101703-214 (Oct. 17, 1998), "No Fags in Heaven" and "No Tears for Queers," Tom Kenworthy, *A Gentle Spirit Mourned*, THE RECORD, Oct. 17, 1999, at A1. In a circus-like atmosphere, anti-gay protestors screamed that "fags, if you don't repent, he will burn in hell right now," "it's the word of God," Simon & Roberts, *supra*, "God don't live by Sodom and Gomorra," "He lived in shame, he died in shame," Dennis Shepard et al., ABC Nightline, Transcript # 98101601-j07 (Oct. 16, 1998), and "Matthew was wicked!," Registers Wire Service, *Nation Grieves for Shepard*, DES MOINES REGISTER, Oct. 17, 1999, at 1. Just in case, the protestors also "blanketed the local media with profane leaflets to make sure that they were noticed." Shepard et al., *supra*. Surely National Public Radio commentator, Scott Simon, got it exactly right when, in opening a report on Matthew Shepard's funeral, he began by noting that "[t]he greatest tragedy that life can call upon a parent to experience is to bury a child." Simon & Roberts, *supra*. To expose Mr. and Mrs. Shepard to homophobic taunts and jeers at the funeral of their murdered son represents an almost unimaginable capacity for cruelty.

152. Religiously motivated bigots regularly picket political meetings of gay and lesbian organizations, *see* Peter Baker, *Clinton Equates Gay Rights, Civil Rights*, WASH. POST, Nov. 9, 1997, at A18 (reporting that during a Human Rights Campaign fundraiser featuring President Clinton, a "small cluster of people holding signs saying 'God Hates Fags' " stood outside the hotel); at religious celebrations of gays and lesbians, *see* Rene Sanchez, *At Gay Wedding, Methodists Take A Vow Against Church Ban*, WASH. POST, Jan. 17, 1999, at A3 (reporting that outside a convention center where two lesbians were being married by a Methodist minister, "the mood was tense. Under the close watch of police officers on horseback, about a dozen protesters who were kept across the street railed against homosexuality, waving signs such as 'God Hates Fags' "); and even, sadly, at the funerals of gay men who die of AIDS or at the hands of bigots, *see* Associated Press, *Protest Greets Meeting on Antigay Violence*, N.Y. TIMES, Oct. 24, 1999, at A30 (noting that Rev. Fred Phelps and other Christian protesters "taunted gays at the funeral of Matthew Shepard"); Annie Gowen, *Holy Hell*, WASH. POST, Nov. 12, 1995, at F1 ("Phelps pickets funerals of AIDS victims."). Given the utter incivility of these religiously motivated speakers, it is difficult to un-

associated with anti-gay speech activities have taken great pains, of late, to show that they hate the sin but love the sinner.[153]

The infamous Reverend Fred Phelps, of Topeka, Kansas, provides a useful illustration. Rev. Phelps regularly pickets churches in Topeka (and elsewhere) that he deems insufficiently committed to eradicating homosexuality, welcoming worshippers with greetings such as "Sodom! That's a *sodomite* church!," and "It's a leper colony. Unclean! Unclean!"[154] Phelps and his supporters told a local Episcopal minister that he "drink[s] anal blood at the altar of the sphincter" and chanted "Rectum Bob, smells like his name."[155] Then, there are the good old standbys on signs, placards, and t-shirts: "Thank God for AIDS," "Fags Burn in Hell," and "God Hates Fags."[156] Phelps is an apostle of hate, who nevertheless claims that his mission has divine sanction because "God hates them [homosexuals] too."[157] Professor Carter cites Reverend Martin Luther King, Jr. as a paradigm of the religiously motivated dissenter. The problem, of course, is that not all religious dissenters will pursue a more just ordering of the community — witness Rev. Phelps.

At an even more extreme position from Rev. Phelps, consider Benjamin Matthew Williams, another deeply committed person of faith who, in July 1999, shot and killed a gay couple in Sacramento, California. In an interview with a reporter from a local newspaper, Williams explained that "I'm not guilty of murder." Why? "I'm guilty of obeying the laws of the Creator . . . . So many people claim to be Christians and complain about all these things their religion says are a sin, but they're not willing to do anything about it."[158] Obviously, it would be grossly unfair to characterize all religious dissenters as having a common cause with persons like Rev. Phelps or Mr. Williams. Nevertheless, people like Phelps and Williams are engaged in relig-

derstand why Professor Carter believes that the general community owes them anything more than a polite hearing on the merits of their positions.

153. *See* Frank Rich, *Has Jerry Falwell Seen the Light?*, N.Y. TIMES, Nov. 6, 1999, at A17. As Rev. Falwell recently put the matter, "Many of us pastors like to talk about loving the sinner but hating the sin . . . [but] unfortunately, that statement has often become a meaningless cliche . . . [because] we too often fall short of the mark of . . . truly loving the sinner." *Id*. (last omission in original). Rev. Falwell explained that "[a]dmittedly, evangelicals have not exhibited an ability to build a bond of friendship to the gay and lesbian community. We've said to go somewhere else, we don't need you here [at] our churches." *Id*. (alteration in original).

154. Gowen, *supra* note 152.

155. *Id*.

156. *Id*.

157. *Id*.

158. Rich, *supra* note 153; *see also* Bailey, *supra* note 69 ("Benjamin Williams said the slaying of the gay couple was justified as an execution because they had violated biblical law. He said his defense in the murder case will be based on his belief that the Bible condemns homosexuality as a crime punishable by death.").

iously motivated dissent.[159] To the extent that Professor Carter could be understood to seek a careful hearing of the views expressed by such folk and their ilk, he asks far too much of the community in general and sexual minorities in particular.[160] The First Amendment might require that people who cheerfully assert that "Fag is a good Bible word, don't forget,"[161] be free of direct government censorship.[162] It does not require that the community take them or their views seriously.

Professor Carter makes frequent reference to anti-abortion protestors as models of those engaged in religiously motivated dissent (pp. 19-21, 60-61, 80-81, 89-95, 134-36). As with anti-gay protestors, the tactics of some in the pro-life movement breach even the most minimalist expectations of civility. Although "[p]eaceful picketing has routinely occurred outside clinics, with demonstrators carrying signs or placards expressing their viewpoint that abortion is murder," anti-abortion protest activities have gone well beyond relatively passive picketing efforts "to [include the] disruptive use of bullhorns, the forming of a 'gauntlet' through which patients must pass, the photographing of patients, and the taunting of clinic personnel."[163] Some pro-life activists engage in "sidewalk counseling," which can involve anything from attempts to engage a patient in a conversation about her abortion decision to threats and physical intimidation. "Over the years and recently with greater frequency, clinic protest has escalated

159. The Supreme Court has made clear that expressive conduct constitutes speech, even if it is not constitutionally protected under all circumstances. *See* Texas v. Johnson, 491 U.S. 397, 402-06 (1989); United States v. O'Brien, 391 U.S. 367, 376-78 (1968).

160. In this regard, it is difficult to find much moral fault with the "angry mob" that pelted Phelps and his disciples "with eggs and excrement" as they attempted to protest at the funeral of gay writer Randy Shilts, who died of AIDS. *See* Gowen, *supra* note 152. As a legal matter, Reverend Phelps is, of course, entitled to the fullest protection that the First Amendment has to offer. *See* Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951); *see also* Board of Educ. v. Pico, 457 U.S. 853, 875, 878-80 (1982) (Blackmun, J., concurring in part and concurring in the judgment). As Justice Frankfurter succinctly put the matter, "The State cannot of course forbid public proselytizing or religious argument merely because public officials disapprove the speaker's views." *Niemotko*, 340 U.S. at 282 (Frankfurter, J., concurring).

161. Gowen, *supra* note 152 (quoting Rev. Phelps).

162. *See* Cantwell v. Connecticut, 310 U.S. 296, 306-11 (1940); *see also* Niemotoko v. Maryland, 340 U.S. 268, 271-73 (1951); *id*. at 273, 282-89 (Frankfurter, J., concurring). As Justice Blackmun explained in *Pico*, "our precedents command the conclusion that the state may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons." Board of Educ. v. Pico, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

163. Laurence J. Eisenstein & Steven Semeraro, *Abortion Clinic Protest and the First Amendment*, 13 ST. LOUIS U. PUB. L. REV. 221, 222-23 (1993); *see* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 171 (1990) (reporting that the pro-life movement's tactics "have included picketing clinics and the homes of clinic staffs, shouting at women who seek abortions, pelting pregnant teenagers with plastic replicas of fetuses, harassing clinic employees, chaining themselves to doors, and lying motionless in streets and driveways").

in scale and intensity."[164] "For many women and teenage girls, Operation Rescue's blockades have turned the experience of seeking an abortion into a nightmare of jeering demonstrators, a spectacle that in turn attracts the added horror of media coverage of this intensely personal decision."[165] Moreover, speech activity has given way to violent expressive conduct: "More violent methods of protest, such as firebombing and arson, are not uncommon occurrences at clinics that provide abortion and family planning and referral services."[166]

In light of the increased passion of pro-life protestors, state and federal courts have proved willing to limit pro-life protestors' speech activities, issuing injunctions that limit not only attempts to impede physical access to clinics, but also prohibiting sidewalk counseling and requiring "that protestors act in a non-threatening manner (e.g., no more than two protestors may approach a patient), remain reasonably quiet, and cease their counseling if the patient expresses a desire not to hear it."[167] To be sure, behavior sufficient to constitute an assault, even if engaged in for the purpose of registering opposition to legalized abortion, should not enjoy constitutional protection. That said, it is difficult to square basic free speech theory with restrictions that require protestors to cease speaking when asked to stop or that require protestors to remain "reasonably quiet." It is unthinkable that such restrictions would be sustained against protestors objecting to racial discrimination.[168] Although courts have responded to the fact of ongoing clinic violence with increasingly broad injunctive relief, fringe pro-life groups have pledged to continue using force to stop the provision of abortion services, up to and including murdering physicians providing abortions and their staff members.[169]

164. Eisenstein & Semeraro, *supra* note 163, at 225.

165. TRIBE, *supra* note 163, at 172.

166. Eisenstein & Semeraro, *supra* note 163, at 225; *see also* FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994, S. REP. NO. 636, at 6-10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 699, 703-707 (describing the growing problem of violence at abortion clinics).

167. Eisenstein & Semeraro, *supra* note 163, at 231.

168. *See*, *e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

169. *See* Arianne K. Tepper, Comment, *In Your F.A.C.E.: Federal Enforcement of the Freedom of Access to Clinic Entrances Act of 1993*, 17 PACE L. REV. 489, 492-95, 535-40 (1997). Roy McMillan, a member of the Mississippi Abortion Abolition Society, frames the issue in very plain language:

> It is justifiable to shoot abortionists. It would be immoral *not* to do so when all else has failed. The tide's been turning for the past year and a half. People are realizing that violence, violent tactics and shootings are becoming more effective. I have no problem predicting that more doctors will be killed. It's the biblical mandate to protect the innocent unborn.

Marc Cooper, *The Changing Landscape of Abortion*, GLAMOUR, Aug. 1995, at 251 (inset box). A Mobile, Alabama Roman Catholic priest, Rev. David Trosch, has gone so far as to predict that politicians who support abortion rights will be assassinated: "Perhaps, even probably, the lives of those politicians who fail to strongly oppose abortion will be at risk." Tepper, *supra*, at 494.

The Reverend David C. Trosch, a defrocked Roman Catholic priest from Mobile, Alabama, teaches that the murder of abortion providers is morally justified: "[W]e will see the beginning of massive killing of abortionists and their staffs" because killing those involved in providing abortions constitutes "justifiable homicide."[170] In his view, "[d]efending innocent human life is not murder,"[171] and "Catholic theology is very clear that the innocent are to be protected. And the death of an assailant, if warranted, is commendable."[172] Another zealot, Don Treshman, argues that "[w]e're in a war" and "[t]he only thing is that until recently the casualties have only been on one side. There are 30 million dead babies and only five people on the other side, so it's really nothing to get all excited about."[173]

Allowing that anti-abortion protestors have fared worse than anti-gay protestors in Congress and in the courts,[174] the same question raised in the context of anti-gay protests applies with full force in this context: how does one engage in a dialogue with someone who sincerely believes that God commands an immediate end to abortion services on demand (and by any means necessary)? The more extreme members of the pro-life movement openly promise to use violence if they fail to achieve political results within a time certain and no amount of dialogue is likely to alter their point of view.

Of course, it might be desirable for members of the community to attempt to engage these angry citizens — just as such an intervention might be useful with Rev. Phelps or Mr. Williams. Undoubtedly, some members of the pro-life movement might be open to compromise or, having been given a respectful audience, might agree to abjure violence in support of the pro-life cause. To this extent then, attempts at dialogue could produce some positive results on a case-by-case basis. It seems hopelessly optimistic to think, however, that Rev. Trosch (and others like him) will agree to accept any outcome other than total victory.[175] Moreover, clinic patients, staff, and physicians — the usual

170. Laurie Goodstein, *Suspended Priest Preaches "New Theology" of Antiabortion Homicide*, WASH. POST, Aug. 5, 1994, at A3; *see also* Gustav Niebuhr, *To Church's Dismay, Priest Talks of "Justifiable Homicide" of Abortion Doctors*, N.Y. TIMES, Aug. 24, 1994, at A12.

171. Niebuhr, *supra* note 170, at A12.

172. Colman McCarthy, *Kennedy, the Church and Dissent*, WASH. POST, Oct. 18, 1994, at B11.

173. Catherine S. Manegold, *Anti-Abortion Killing: The Movement*, N.Y. TIMES, Jan. 1, 1995, at A26.

174. That is to say, no federal statute authorizes injunctive relief against anti-gay protests, nor have courts issued injunctions to limit the antics of Rev. Phelps and his merry band.

175. *See*, *e.g.*, John Kifner, *Finding a Common Foe, Fringe Groups Join Forces*, N.Y. TIMES, Dec. 6, 1998, § 4, at 3 (describing the activities and attitudes of violent anti-abortion protestors, including Neal Horsley, "who maintains an anti-abortion Web site with a logo of dripping blood and a list of doctors who perform abortions — their names are crossed out if

audience for such speech activities — have no moral or civic obligation to attempt such an effort and their failure to attempt a dialogue should not be construed as an excuse for violence.[176]

Neither the criminal activities nor the gross and anti-social behavior of some anti-abortion protestors should lead courts or legislatures to conclude that all anti-abortion speech activities — even disruptive protests at the clinics themselves — should be unprotected. Simply put, anti-abortion protestors should not be subjected to viewpoint-based legislative and judicial limits on their speech activities. That said, one would understand completely if a clinic patient or staff member faced with a fetus-wielding protestor were to abjure any efforts at dialogue and engagement.

In short, Professor Carter is undoubtedly correct to assert that religious dissenters should enjoy the same free speech privileges as those who base their dissent on secular grounds. He also is correct to note that religiously motivated speakers have led important social reform movements, including both the abolition and civil rights movements. At the same time, one should not forget that religiously motivated speakers also led witch hunts, the Inquisition, and the Crusades. So, just as federal judges do not possess perfect moral vision, one should not suppose that religiously motivated dissenters always support justice (or, to use the language of belief, properly understand God's will).

To the extent that one does not share a religious dissenter's theological commitments, and to the extent that the religious dissenter's

they are killed"). Mr. Horsley seems to bear out Professor Carter's dire predictions; he justifies the murder of clinic personnel as follows:

> The Federal government made up its mind to block any nonviolent attempt to stop abortion . . . . The Federal Government literally drove men mad, moved them to execute abortionists. When a Federal monolithic government begins to crush the rights of a minority, if the issues truly matter, fighting men rise up and do the things that fighting men do. In the life and death struggle to stop this unjustified slaughter, Christian men are looking down the barrel of a rifle.

Id. Of course, given Mr. Horsley's description of his intended object — "stopping abortion" — anything short of a total ban or prohibition on abortions would not be acceptable.

176. One should note that Professor Carter never embraces or endorses violence as a consequence of failing to take religiously motivated dissenters seriously — he simply predicts that a failure to maintain a meaningful dialogue increases the probability of a resort to violence, without reaching any definitive conclusions about the moral or legal status of such a response. Pp. 9-13, 73-78, 80-86. In my view, dissatisfaction with the results of the political process in the contemporary United States should almost never serve as an excuse to engage in acts of political terrorism. *See* Judge Frank M. Johnson, Jr., *Civil Disobedience and the Law*, 44 TUL. L. REV. 1, 3-9 (1969) (arguing that "strong moral conviction is not all that is required to turn breaking the law into a service that benefits society," noting that "civil disobedience necessarily involves *violation of the law*, and the law can make no provision for its violation except to hold the offender liable for punishment," rejecting, in unqualified language, the use of violence in aid of any political, social, religious, or economic objective, and concluding that, in the contemporary United States, one should embrace "an almost irrebutable presumption that civil disobedience is not justified"). Although Professor Carter does not embrace violence as a response to marginalizing religious dissent, he does not squarely denounce it. Pp. 75, 77-78.

position rests on these commitments, I disagree with Professor Carter that merely pointing out that fact fails to constitute an adequate response by the community. If a religious dissenter asserts that "God hates fags" and therefore sodomy laws should be strictly enforced, it is more than an adequate response to assert that "my God does not hold such an attitude toward sexual minorities." Religious dissenters do not have a right to force the general community to defend autonomy-enhancing legal norms by merely asserting that "God commands thus." To the extent that Professor Carter suggests otherwise, he makes an unreasonable demand on the general community.[177]

Dissent implies an opportunity to make your case, nothing more and nothing less. Religious dissenters should enjoy the same rights of access as those who offer secular reasons for their dissent. The Supreme Court's recent cases involving protests at anti-abortion clinics represent an important and unfortunate derogation from this general principle.[178] But a right to make your case does not imply a right to win, should your case prove unpersuasive to the community. Moreover, just as the state cannot prescribe the manner in which one presents her case, the state should not attempt to prescribe the manner in which citizens decide to respond to the arguments of religiously motivated dissenters.[179]

Finally, one might question the overall accuracy of Professor Carter's assertion that government ignores the concerns and sensibilities of traditionally religious citizens. During the current election season, both Vice-President Al Gore and Texas Governor George W. Bush have been at great pains to share their personal relationships with Jesus with the general electorate.[180] When asked to name his "fa-

177. *See* Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 401 (1985) ("[T]o demand that other people act in accord with dominant religious beliefs is to promote or impose those beliefs in an impermissible way.").

178. *See*, *e.g.*, Hill v. Colorado, 120 S. Ct. 2480 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474 (1988). Indeed, Justice Scalia has established a pattern of voting against granting certiorari in abortion protest decisions because "experience suggests that seeking to bring the First Amendment to the assistance of abortion protesters is more likely to harm the former than help the latter." Lawson v. Murray, 119 S. Ct. 387, 388 (1998) (Scalia, J., concurring in denial of a writ of certiorari); *see also* Lawson v. Murray, 515 U.S. 1110, 1116 (1995) (Scalia, J., concurring in a denial of a writ of certiorari) ("Last Term's decision in *Madsen* . . . has damaged the First Amendment more quickly and more severely than I feared," but opposing review because "clarification of *Madsen* is . . . unlikely to occur in another case involving the currently disfavored class of antiabortion protesters."). *But see* Williams v. Planned Parenthood of Shasta-Diablo, Inc., 520 U.S. 1133 (1997) (Scalia, J., dissenting from denial of a writ of certiorari).

179. In this regard, a careful reader should note that Professor Carter's arguments are not constitutional in nature, but rather represent policy-based recommendations about how private citizens should respond to the phenomenon of religiously based dissent.

180. *See* Maureen Dowd, *Playing the Jesus Card*, N.Y. TIMES, Dec. 15, 1999, at A23. "About 74 percent of those polled described themselves as religious people." John Herbers, *Religion Enters A Political Revival*, N.Y. TIMES, Aug. 12, 1984, § 4, at 1. With numbers like

vorite political philosopher," Governor Bush responded "Christ, because he changed my heart."[181] Gore, anxious to establish his religious credentials, has proclaimed himself to be a "born-again Christian" on "60 Minutes" and told columnist Sally Quinn that he regularly asks himself "W.W.J.D."[182] This evidence strongly suggests that religiously motivated speakers should have little to fear from Washington. As syndicated columnist Maureen Dowd astutely observed, "When the Kansas board of education removed evolution from the science curriculum testing to make way for creationism, neither Mr. Gore nor Mr. Bush could bring himself to utter a word in defense of scientific truth."[183]

In a recent book examining the increasing political muscle of religious conservatives, Wendy Kaminer argues that complaints about marginalization to the contrary, religiously conscious citizens wield more and more secular power.[184] After all, Congress and state legislatures are busily trying to *post* the Ten Commandments in schools and courthouses, not remove them.[185] In a similar vein, Professor William Van Alstyne has suggested that the problem is not the marginalization of religiously motivated citizens, but rather a creeping risk of theocracy:

> A constitutional neologism has nearly displaced the much different figure of speech, that of a "wall of separation" between church and state, which Thomas Jefferson once used in commemorating the ratification of the first amendment. The neologism is that insofar as most persons are religious, it is altogether natural that government should itself reflect that fact in its own practices. Thus according to this neologism, it is not helpful to regard the First Amendment as having emplaced a wall separating the practices of religion from the practices of government, for it is not walls, but bridges, that the first amendment contemplates.[186]

Van Alstyne's argument is that religiously motivated activists threaten the secular state, rather than vice-versa. Considered from this perspective, Professor Carter's thesis that pious citizens are sys-

that, it seems highly unlikely that members of mainstream religious groups face a serious prospect of being either silenced or ignored.

181. Dowd, *supra* note 180.

182. *Id.* This acronym translates to "What would Jesus do?" *See id.*

183. *Id.*; *see also* Dan K. Thomasson, *Religion and Politics: A Volatile Mix*, SUN HERALD (Biloxi, MS), Dec. 28, 1999, at B2 (quoting the author's father as warning him to "[b]e careful of those who wear their religion on their sleeves or who find the need to certify themselves as true believers. They can be dangerous to the rest of us").

184. *See* WENDY KAMINER, SLEEPING WITH EXTRA-TERRESTRIALS: THE RISE OF IRRATIONALISM AND THE PERILS OF PIETY (1999).

185. *See* Angie Cannon, *Civics or Religion?: Commandments Clash*, U.S. NEWS & WORLD REP., Feb. 28, 2000, at 36 (describing various legislative proposals for posting the Ten Commandments in public schools and other public buildings).

186. Van Alstyne, *supra* note 134, at 771.

temically ignored or disempowered, represents a disconnect from contemporary political realities — at least insofar as traditional (or "mainstream") denominations are concerned.

IV. THE COMPELLING CASE FOR ACCOMMODATING RELIGIOUSLY MOTIVATED DISSENT AIMED AT SECURING GREATER RESPECT FOR CULTURAL PLURALISM

Professor Carter essentially describes two fundamentally different kinds of dissent associated with religious minorities. Religious minorities sometimes enter general public policy debates in an attempt to ensure that the civil code reflects their subjective religious commitments. In many respects, religious minorities engaged in protest against abortion rights or gay rights fit this profile. Throughout much of *The Dissent of the Governed*, Professor Carter expressly embraces this kind of dissent aimed at recreating the general community, comprised of both believers and non-believers, in a religious community's own image (pp. 89-95).

On the other hand, Professor Carter correctly posits that members of religious communities voluntarily submit to an authority wholly independent of the secular state. "[S]elf-constituted communities of meaning, unlike the Constitution-bound political sovereigns, may censor both the words and acts of their members" (p. 87). In creating self-constituted communities of meaning, religious organizations require the ability to make and enforce demands of their adherents. "A community that is unable to adopt and enforce its own vision of harm, based on its own epistemology, quickly ceases to be a community that can engage effectively in acts of self-definition" (p. 89). Here, Carter is not talking about religious minorities imposing their views on the general community, but rather enjoying some measure of self-definition within their own self-constituted communities, communities that exist within the larger, general community. This is a huge distinction.

Professor Carter attempts to claim the same First Amendment status for both kinds of religiously motivated dissent (pp. 89-99). Nevertheless, arguments in favor of creating legal breathing room for religious minorities stand on a very different footing than his pleas for the general community to consider seriously dissent aimed at establishing a theocracy. Dissent in the service of securing legislation accommodating religious practice does not represent an attempt to hijack the institutions of the civil state in the service of *jihad* or pose any serious threat to the maintenance of a pluralistic democracy (pp. 122-30). Both kinds of dissent register disagreement with the policies of the general community, but it seems to me that the general community ought to treat quite differently offensive and defensive species of religiously motivated dissent.

When a religious minority group complains that a general law unduly burdens the ability of its members to meet their obligations of conscience, the community has an obligation to listen. By stipulation, discrete religious minorities are unlikely to enjoy broad representation within democratically elected state legislatures or in the federal Congress. Accordingly, the effects of general laws on discrete religious communities might well fail to register on the political radar screen when a legislative body enacts a general proscription against a particular behavior or an administrative agency enacts a rule regulating a particular kind of behavior.[187]

The Supreme Court has refused to interpret the Free Exercise Clause as excusing members of religious minorities from compliance with general laws.[188] Thus, the ability of religious minorities to obtain exemptions from highly burdensome laws is entirely contingent on their ability to make their case to the general community in an attempt to build a coalition of support for legislatively modifying the general rule that impedes their ability to practice their faith.[189] In this sense, then, an appeal to the body politic constitutes the only potential route of securing effective relief from general, but highly burdensome, laws affecting the ability of a given religion's adherents to practice their faith in deed as well as word.[190]

187. *See*, *e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *see also* Carolene Prods. Co. v. United States, 304 U.S. 144, 153 n.4 (1938) (noting, but not deciding, that the effect of laws on fundamental liberties, such as freedom of speech and on "discrete and insular minorities" might require a "more searching judicial inquiry" especially if the law at issue might "tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); ELY, *supra* note 120, at 73-88, 93-94, 101-16, 135-79 (arguing that the federal courts should carefully consider the effect of their decisions on racial and cultural minorities and should, to the extent feasible, construe constitutional text to further the process of "representation reinforcement" (i.e., enhance the relative political voice of permanent racial and cultural minorities within the political community)).

188. *See* Employment Div. v. Smith, 494 U.S. 872 (1990); Reynolds v. United States, 98 U.S. 145 (1878); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997).

189. Of course, if a legislative body enacted a facially neutral general law, but harbored animus toward a particular religious group when enacting the law, such that the law's real purpose was to burden the religious community, the Free Exercise Clause would provide a source of relief. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Undoubtedly, some general laws are the product of religiously motivated animus or hatred; most, however, are not. Moreover, there is no reason to believe that the most burdensome laws to a given religion necessarily will be laws enacted in an effort to burden the group. Thus, benign neglect can be just as deadly to religious minorities as intentional discrimination. Indeed, because instances of benign neglect will not support a free exercise claim under the ruling in *Smith*, 494 U.S. at 878-79, they constitute a much more important impediment to the existence of self-defining religious communities.

190. *See generally* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEXAS L. REV. 209, 212-17 (1994); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 7-10, 30-39, 41-59; William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 304-06 (1996); Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1481-89 (1999).

Before the community denies a religious community the ability to observe the dictates of the members' collective consciences, it ought to afford the members a fair hearing. When a religious community seeks to establish a system of voluntary rules for its own governance, the community's rules might well run afoul of existing general laws.[191] Perhaps the best recent example involves the Native American Church's practice of ingesting peyote incident to a sacred rite. Many jurisdictions — not to mention the federal government — classed peyote as an addictive, anti-social drug worthy of complete proscription. The facts are a great deal more complicated: peyote is not particularly addictive; it happens to be a powerful emetic, limiting its intrinsic appeal to a general audience; no general street traffic in peyote exists; and the use of peyote is integral to the religious rites of the Native American Church.[192]

On these facts, the case for prohibiting the Native American Church's members from ingesting peyote is incredibly weak. Applying a general policy against the use of psychotropic drugs for recreational purposes simply does not make sense in these circumstances, unless the general society is committed to enforcing its notions of morality on a discrete and insular religious minority simply because it has the raw power to do so. Over time, most jurisdictions have enacted legislation abandoning their prohibitions against peyote, at least if used incident to religious rites by the Native American Church.[193] A dialogue about the necessity of applying general anti-drug laws and policies to peyote facilitated a reasonable accommodation of a religious minority. This is the First Amendment at its best. Moreover, if Professor Carter is correct to suppose that "repeated injuries" will be met at some point with armed resistance (perhaps justifiably), it is far better to engage in a dialogue in the hopes of reaching an arrangement that meets the needs of both the general community and the religious minority.

191. *See*, *e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding against a free exercise claim, an Air Force regulation prohibiting non-uniform headgear, including yarmulkes); Volokh, *supra* note 190, at 1483-84 (describing how general laws against carrying weapons in public, arguably preclude Sikhs from wearing religiously mandated ceremonial daggers, or *kirpans*, and the potential application of zoning laws to prohibit a religious group from meeting in a private home located in a residential area); Eugene Volokh, *Intermediate Questions of Religious Exemptions — A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 655-56 (1999) (describing the potential effects of ordinary and seemingly reasonable government decisions on persons with nondominant cultural or religious obligations). *But cf.* Cheema v. Thompson, 67 F.3d 883, 885-86 (9th Cir. 1995) (applying the then-valid Religious Freedoms Restoration Act and holding that Sikh school children may wear *kirpans* to school, subject to some elementary safety concerns).

192. *See* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 963, 983 (1998) [hereinafter Epps, *Unknown God*]; Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 579-80 (1998) [hereinafter Epps, *Free Exercise*].

193. *See* Epps, *Unknown God*, *supra* note 192, at 999.

In this sense, then, Professor Carter's call for the general community to respect religious dissenters and engage in dialogue with them makes a great deal of sense. When religious minorities are seeking to preserve their very existence — rather than attempting to impose particular theistic commitments on the general community — they must be heard. Of course, it probably would be asking too much of government to create a First Amendment jurisprudence that drew a line between religious speech seeking accommodation and religious speech seeking to establish theocracy. And, as Professor Carter notes, religious communities engage in speech aimed at both objectives.

The only plausible response is to afford all religious dissent a serious hearing. When the object of the dissent is a heartfelt desire to impose a theocratically inspired rule on the general community, a polite "thanks but no thanks" is all the response that religious minorities can rightly demand. Just as a Jehovah's Witness has no general right to occupy a private individual's living room, religious communities have no general right to hijack the institutions and agencies of the civil state in order to implement a particular version of God's will. As the maxim teaches, the road to hell is paved with good intentions. No matter how well-intentioned, overtly religiously inspired, general community regulations raise very serious problems in a pluralistic society.

On the other hand, when religionists seek an accommodation to preserve their very existence or identity, the community should be put to the task that Professor Carter proposes: in these circumstances, the community should be required to offer reasons in support of the application of the general rule to the religious community. Make no mistake, this is not an argument about some absolute right of the religious community to an exemption from a generally applicable law. Instead, it is an argument that religious communities deserve reasons from their fellow citizens when law severs the ability of a believer to put faith into action.

It is, of course, far easier "to say, simply, Do this — and have it done, like the servants of the centurion in the Gospel parable" (p. 99). As Professor Carter cautions, "[t]hat is the sense in which power tends to corrupt, even in a democracy: when one possesses power for too long, law becomes less the glue that knits us together than the name that we give to the conclusions for which we would rather not offer arguments" (p. 99). Carter rightly denominates as a dangerous form of "fundamentalism" a system in which "law need not be explained as long as it is spelled out (inerrantly) and obeyed (unquestioningly), for we *know* it to be right" (p. 99). Thus, when a law denies conscience the freedom to act and the community refuses to give reasons for maintaining the law, religious minorities have a legitimate objection to the community's insensitive behavior. Given the Supreme Court's unwillingness to balance the claims of religious minorities against the

ability of the general community to write and enforce general rules, it is all the more essential that the body politic take seriously religious dissent.

V. CONCLUSION: HEARING (DIS)HARMONIES IN THE CHORUS OF DISSENT

There is a kind of negative synergy between Professor Shiffrin's and Professor Carter's dissent-based theories of free speech. Professor Shiffrin conceives of a dissent-based theory of free speech as enhancing the relative voice of cultural minorities to achieve a more just state. This project probably does not include laws criminalizing abortion and homosexual sodomy, much less laws imposing other religiously inspired limitations on personal autonomy (particularly when these rules further marginalize already marginalized cultural minorities). Nevertheless, a dissent-based theory of the First Amendment should create as much possibility for reactionary change as it does for progressive change. Thus, free speech critics are probably correct to suppose that the free speech principle is not necessarily conducive to achieving their social agenda.

Professor Shiffrin's effort to translate the free speech principle into a device that empowers minorities fighting for progressive causes seems unlikely to work. To the extent that dissent protects the reactionary or racist speaker as much as the progressive speaker, it conceivably does more harm than good to the project of securing progressive change. Indeed, Professor Carter's vision of dissent would empower those working in direct opposition to many of the causes that Professor Shiffrin appears to hold dear. Thus, if winning is the most important objective, mainland China's approach to dissent seems more likely to prove successful than a serious commitment to free and open debate about matters of public concern.[194]

Similarly, Professor Shiffrin's theory of dissent in the service of progressive change serves as a powerful proof of Professor Carter's basic complaint: religious minorities are being denied their full measure of participation in the project of democratic deliberation. To the extent that religious minorities position themselves in opposition to progressive understandings on issues of race, gender, and sexual orientation, they increasingly face the prospect of being silenced by government officials who have come to embrace the progressives' value structure.

194. *See supra* note 32; *see also* Charles Fried, *Diversity: From Left to Far Left*, WASH. POST, Jan. 3, 2000, at A19 (describing the Association of American Law School's refusal to facilitate joint programs with the Federalist Society, the National Association of Scholars, and the Christian Law Society, all conservative organizations, while cosponsoring events at its annual meeting with the Society of American Law Teachers ("SALT"), a left-leaning organization).

Professor Shiffrin plainly believes that dissent not only creates the possibility of dialogue, but also facilitates change, citing the civil rights movement as an example of how dissent can forge new understandings of justice. If one were to implement fully Professor Carter's vision of dissent, undoubtedly religious dissenters would prevail more often in securing legislative changes that implement their religiously inspired ideals of good governance. That said, Professor Carter's vision is palatable only to the extent that the "dialogue" does not simply exchange one group of oppressed and alienated persons for another (i.e., religious conservatives for women or sexual minorities).

Shiffrin's confidence in the ability of dissent to promote change raises serious questions about the potential effects of fully embracing Carter's proposal for requiring the secular state to justify on the merits every law or policy religious dissenters oppose. Given that dissent provokes change, this sort of "dialogue" undoubtedly would portend mixed results for women, racial minorities, and gays and lesbians, all groups that historically have supported the kinds of "progressive" social policies often opposed by religious fundamentalists.

This, of course, is not an argument for silencing religious fundamentalists. It is, perhaps, an argument that legitimates a response that simply rejects the religious premise of the fundamentalist dissenters; whereas Carter would have the defenders of the secular state justify existing policies on secular grounds in the face of religious opposition, there is no reason that other members of the community (but not the state itself) should not simply reject the religious premises underlying the objections. The state, of course, can itself neither maintain nor suppress particular theological commitments, but all citizens are free to follow the dictates of their conscience, at least with respect to matters of belief. Given the potential effectiveness of dissent in moving public policy, those opposed to one religious tradition should be free to argue against proposed changes in terms that are either secular or religious. Moreover, if religious dissenters lose this debate, it hardly justifies making war against the state.

In sum, a meaningful commitment to dissent is a kind of social wager, an experiment that guarantees a process, but does not prefigure any outcomes.[195] Considering the potential effect of a particular the-

195. In the immortal words of Justice Holmes:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

ory of freedom of expression on dissent provides an excellent means of analyzing the plausibility of the theory; a free speech theory that fails adequately to protect dissent should be highly suspect. Of course, it is one thing to evaluate free speech theories according to how dissent would fare; it is entirely another to posit dissent as the sum and substance of the Free Speech Clause. For the reasons set forth in this Review, a dissent-based theory of free speech presents very serious problems, at least insofar as one wishes to maintain viewpoint neutrality as a central component of the free speech project.

On the other hand, notwithstanding the definitional and operational difficulties, securing the protection of political speech of a "dissenting" cast has to be an important, indeed essential, objective of any plausible theory of free speech. As Professor Vincent Blasi has explained, "the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[196] How best to achieve this objective, both jurisprudentially and doctrinally, remains elusive. Although Blasi may be correct to suppose that "[i]t is doubtful that legal standards could ever be designed with sufficient prescience and precision"[197] to constrain effectively the lower federal courts' discretion when faced with difficult free speech cases, a system that openly invites entirely intuitive or ad hoc decisions about the relative value of speech activity surely presents a greater threat to project of democratic deliberation.[198] Because the threat to free speech principles is likely to be most acute in times when the value of dissent is potentially at its highest,[199] an ideal test

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

196. Blasi, *supra* note 23, at 449-50.

197. *Id*. at 467.

198. Indeed, Professor Blasi seems to recognize this:

> Courts working within a first amendment tradition that authorized judicial inquiry into motivation, impact, and form would be tempted in pathological periods to find *something* distinctive in the speech of the most unpopular dissenters (concerted or surreptitious conduct, indoctrination, nihilistic motivation, coercive or selective impact) that would place it outside the ambit of first amendment protection. An expansive tradition regarding the reach of the first amendment would make it more difficult for judges to invoke such characteristics as a basis for suppressing speech.

Id. at 477-78. Justice Hugo Black, of course, strongly endorsed the utility of strict tests and bright lines, believing such tests essential to prevent judicial backsliding. *See* Barenblatt v. United States, 360 U.S. 109, 140-44 (1959) (Black, J., dissenting); Dennis v. United States, 341 U.S. 494, 579-81 (1951) (Black, J., dissenting); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 866-67, 874-76, 880-81 (1960); *see also* Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 552-55, 557-59 (1962); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 441-53 (1967).

199. *See id*. at 485 ("Any ad hoc assessment of the benefits and costs of speech that is made during pathological times is bound to be tilted in the direction of regulation; that is an

would therefore safeguard dissent even when the social or political consequences of doing so might well be uncertain.[200]

At least arguably, Professor Shiffrin's dissent theory does not take seriously enough the problem of enforcement through personnel selected by majoritarian representatives — personnel who presumably would share the attitudes, values, and prejudices of the dominant groups within the community. Conversely, Professor Carter's basic objection is that cultural elites already ignore or silence the speech of religiously motivated dissenters. Neither Professor Shiffrin nor Professor Carter offers up a comprehensive and potentially effective program of reform — a prescription that would ensure that dissent remains an important component of the process of democratic deliberation. That said, both authors significantly advance the debate and bring a much needed renewed focus on centrality of dissent to the free speech project.

Almost any free speech theory is likely to engender immediate objections — objections that, as often as not, will lead to various "clarifications" or "amendments." The author, thus, gradually refines the theory to include speech that she believes should enjoy constitutional protection (but arguably does not under the initial articulation of the theory).[201] Over three decades ago, Professor Harry Kalven suggested that a commitment to permitting free (even if factually inaccurate) commentary on the government constituted the "central meaning" of the Free Speech Clause.[202] To be sure, this is a plausible theory. On the other hand, myriad alternate theories exist, and it would be difficult — if not impossible — to devise a single animating purpose that adequately would encompass all the reasons why citizens should view free speech as an essential right in a pluralistic, participatory democracy. Accordingly, discovering the "central meaning" of the First Amendment's Free Speech Clause almost certainly will remain a work in progress, and attempts to limit attention to a single aspect of the free speech project are likely to do more harm than good.

inevitable consequence of the shift in attitudes regarding the desirability of free speech that characterizes such periods.").

200. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *but cf.* Blasi, *supra* note 23, at 507-09 (describing the failure of the federal courts to afford strong protection to dissenters in periods of perceived national crisis).

201. *See*, *e.g.*, Meiklejohn, *The First Amendment*, *supra* note 9, at 256-57 (modifying the "democratic deliberation" theory of free speech to reach the arts and literature because an educated population is necessary to sustain self-government). Of course, many would argue that the arts and literature have value independent of the role they play (if any) in facilitating self-government. Moreover, as Professor Robert Post has noted, Meiklejohn's original thesis also fails to incorporate the importance of autonomy values to free speech theory. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 268-76, 282-89 (1995).

202. *See* Kalven, *supra* note 7, at 204-21.

Professors Shiffrin and Carter have provided rich commentaries on the centrality of dissent to free speech theory and jurisprudence — albeit from different ideological perspectives. Their books are important contributions to the ongoing dialogue about the First Amendment. That said, I do not think that either has succeeded in ending the quest for the central meaning of the First Amendment. Nor is this, in any meaningful way, a bad thing. The journey — the search for the ultimate answer — can sometimes be more important than attaining the object of the quest. It seems fitting to conclude with another cautionary note from Justice Jackson's opinion in *Barnette*:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort, from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. . . . It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.[203]

203. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 640-41 (1943).