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Hate Speech and the Demos

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It is sometimes said that the statist and aristocratic traditions of Europe render its political institutions less democratic than those of the United States. Richard Posner writes of "the less democratic cast of European politics, as a result of which elite opinion is more likely to override public opinion than it is in the United States."[1] If that is true, then there are obvious ways in which it figures into debates over the wisdom of hate-speech regulation. The standard European argument in favor of such regulation may easily be characterized as antidemocratic: Restrictions on hate speech protect unpopular minority groups from democracy run amok. The Nazi example states the paradigm case, even if the paradigm no longer describes the usual targets of such regulation.[2] By contrast, the American argument against hate-speech regulation is typically framed in democratic terms: Informed deliberation requires that all sides have an opportunity to be heard, with the most able policies emerging through a form of intellectual competition.[3] Or, more interestingly, full participation in a democratic community requires that self-expression not be limited to what others have deemed orthodox.[4]

There is another way, however, in which the relatively democratic character of American politics influences – or rather, should influence – the debate over

[1] Richard A. Posner, "The Supreme Court, 2004 Term – Foreword: A Political Court," 119 *Harv. L. Rev.* 31, 86 (2005); *see* Robert Post, "Hate Speech," in *Extreme Speech and Democracy* 123, 137 (Ivan Hare & James Weinstein eds., Oxford University Press 2009) (arguing that "democratic legitimation is a less pressing issue in Europe").

[2] *See* Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," Chapter 13 herein ("Whereas in Nazi Germany hate speech was perpetrated by the government as part of its official ideology and policy, in contemporary democracies it is by and large opponents of the government and, in a wide majority of cases, members of marginalized groups with no realistic hopes of achieving political power who engage in hate speech.").

[3] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[4] *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943); C. Edwin Baker, "Autonomy and Hate Speech," in *Extreme Speech and Democracy*, *supra* note 1, at 139, 142–6.

regulation of offensive speech. Scholars of U.S. constitutional law have increasingly recognized that constitutional argument must not simply appeal to democratic norms but must also attend to democratic conditions. Constitutional law is not fashioned through Socratic argument among scholars and judges, nor does it follow merely from the currents of elite opinion, but it results rather from a dialogue between political institutions – including the Supreme Court – and social and political movements, against a background of often exogenous cultural conditions. Thus, we should understand *Brown v. Board of Education* not as an epiphany inspired by the force of Earl Warren's charisma or Felix Frankfurter's intellect but as a piece of a movement strategy led by the National Association for the Advancement of Colored People (NAACP) and enabled, in part, by antipathy toward fascism and Stalin's Soviet Union.[5] Changes in U.S. sex-equality law in the 1970s can be tied directly to the sexual revolution of the 1960s and the political forces behind the Equal Rights Amendment.[6] The difficulty of formal constitutional amendment through Article V requires that judges and other constitutional actors retain a degree of receptivity to popular preferences expressed through movement politics and occasioned by social change. As Robert Post and Reva Siegel write, "if the Court's interpretation of the Constitution seems wholly unresponsive, the American people will in time come to regard it as illegitimate and oppressive."[7]

The lessons of what Post and Siegel have called "democratic constitutionalism" have seldom been applied to the debate over regulation of hate speech. A ban on hate speech is a decision of constitutional dimension, and yet arguments for or against it typically rely wholly on the force of their reasoning, with little or no attention given to what more will be required for those arguments to be accepted and to acquire constitutional status. In the free-speech area no less than in other realms of constitutional law, a brilliant argument is neither sufficient nor even necessary to effect constitutional change in the United States.[8] Such arguments must engage the American people in the right way, and at the right time. This chapter, then, explores some of the positive conditions relevant to reform of hate-speech regulation. Although I glean some insight through comparison with Europe, I focus primarily on the United States, where empirical data are most complete and where the idea of democratic constitutionalism has been most fully developed.

The affluents of constitutional change in the United States include, on the one hand, political and social movements, and on the other, cultural changes that may be exogenous to those movements. Sections I and II of this chapter consider each

5 Brown v. Board of Education, 347 U.S. 483 (1954); *see* Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press 2000).

6 *See* Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA," 94 *Calif. L. Rev.* 1323 (2006).

7 Robert C. Post and Reva B. Siegel, "Democratic Constitutionalism," in *The Constitution in 2020*, at 25, 28 (Jack M. Balkin & Reva B. Siegel eds., Oxford University Press 2009).

8 *See* Daniel A. Farber, "The Case Against Brilliance," 70 *Minn. L. Rev.* 917 (1986).

dimension in turn. Section I discusses the role that movement politics has played in developing and retaining a strong speech-protective norm in the United States. As Samuel Walker and others have persuasively argued, hate-speech regulation has been generally unsuccessful in the United States over the last half century in large measure because of opposition within the civil rights community.[9] Those who have organized in favor of antidiscrimination laws of other sorts have viewed speech codes as either counterproductive or outright contrary to their aims. Europe has not, by and large, seen comparable opposition to hate-speech regulation by its putative beneficiaries.

Section II addresses the cultural conditions that must attend any successful movement for reform of hate-speech laws. I begin by discussing public opinion on regulation of offensive speech. The reader will not be surprised to learn that Americans today appear to support hate-speech regulation far less than Europeans. The reader may be surprised to learn, however, that Americans support such regulation far less today than they did a decade ago. Indeed, survey data suggest that, with respect to the desirability of legal restrictions on racially offensive speech, the views of the American people of 1997 approximate those of Europeans of 2002. The relative receptivity of Americans just ten years ago to regulation of offensive speech suggests that a set of mutable conditions influences public opinion in this area. I offer and evaluate three possible considerations that might account for these changes: trust of government; sensitivity to international opinion; and opportunity for exit from prevailing community norms.

Section III discusses strategies for altering the current U.S. consensus on regulation of hate speech. Federalism's preference for piecemeal legislation may frustrate any reform movement but may at the same time allow for the trial and error needed for well-targeted intervention. Reforms might aim either at actively altering the background conditions I have identified or merely tailoring energy to opportunity. Whether or not public attitudes permit a norm in favor of hate-speech regulation to calcify may ultimately be beyond the control of reformers, but greater attention to public attitudes can at least tell them whether the iron is hot.

I

The cleavage between the restrictive European and the permissive American legal postures toward hate speech has generated extensive discussion, including in this volume. In brief, although laws and prosecutorial practices vary from state to state, virtually every European country has enacted content-based restrictions on racially insulting or inciting speech that would be patently unconstitutional in the United

9 Samuel Walker, *Hate Speech: The History of an American Controversy* (University of Nebraska Press 1994).

States.[10] As interpreted by the Supreme Court, the U.S. Constitution forbids states or the federal government from adopting laws required by Article 4 of the International Convention on the Elimination of All forms of Racial Discrimination (ICERD) and by Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), and the Senate has accordingly attached reservations to the United States' ratifications of those treaties.[11] Both the federal government and many state and local governments provide enhanced criminal penalties for violent crimes motivated by racial or religious animus,[12] but over the last half century, the Supreme Court has repeatedly ruled against content-based restrictions on offensive speech, and few jurisdictions have sought to test those decisions.[13]

Although it is tempting to ascribe the American position on hate speech to a kind of libertarian cultural DNA, it was not inevitable that differences with the rest of the western world would develop in this area. Consider the state of the United States in 1952. Proposed legislation outlawing group libel had been cropping up at all levels of American government; a bill introduced in Congress in 1943 by New York Congressman Walter Lynch that would have prohibited the mailing of writings expressing racial or religious hatred received three days of hearings before the Committee on Post Offices and Post Roads.[14] *New York ex rel. Bryant v. Zimmerman*, in which the Supreme Court upheld a New York requirement that the Ku Klux Klan provide membership lists, was good law, as was *Chaplinsky v. New Hampshire*, which exempted "fighting words" from First Amendment protection.[15] The Court had just decided *Dennis v. United States*, in which it upheld a conviction for conspiracy to advocate overthrow of the government; *Feiner v. New York*, in which it allowed the state to prosecute Irving Feiner for arousing public anger from a soapbox; and *Beauharnais v. Illinois*, upholding the conviction of a white supremacist who had violated the state's group libel law.[16]

[10] *See* Frederick Schauer, "The Exceptional First Amendment," in *American Exceptionalism and Human Rights* 29, 34–8 (Michael Ignatieff ed., Princeton University Press 2005).

[11] Article 4 of the ICERD requires States Parties to criminalize "all dissemination of ideas based on racial superiority or hatred," and to prohibit any organizations or propaganda "which promote and incite racial discrimination." Article 20(2) of the ICCPR requires prohibition of "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

[12] *See* 18 U.S.C. § 245; Wisconsin v. Mitchell, 508 U.S. 476 (1993).

[13] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also* Collin v. Smith (*The Skokie case*), 578 F.2d 1197 (7th Cir. 1977), *cert. denied*, 439 U.S. 916 (1978). *Cf.* Virginia v. Black, 538 U.S. 343 (2003).

[14] *See* Joseph Tanenhaus, "Group Libel," 35 *Cornell L.Q.* 261, 294 (1950); Joseph Tanenhaus, "Group Libel and Free Speech," 13 *Phylon* 219 (1952).

[15] New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[16] Dennis v. United States, 341 U.S. 494 (1951); Feiner v. New York, 340 U.S. 315 (1951); Beauharnais v. Illinois, 343 U.S. 250 (1952). Notably, three years before the Court's decision in *Beauharnais*, the Truman Administration helped draft and endorsed the German Basic Law, which expressly grounds

It was also in 1952 that the Supreme Court first set *Brown v. Board of Education* for argument.[17] That case, and the movement that agitated for it, bears crucially on the doctrine that would follow. The anti–hate speech laws that swept across Europe in the 1960s, 1970s, and 1980s were born of the same human rights impulse that facilitated the American civil rights movement. And it is easy to see how a Court primed to open the nation's racially segregated schools to black students would have sympathies for the law it allowed Illinois to apply to Joseph Beauharnais, who had distributed a leaflet calling for the mayor of Chicago to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro."[18]

But civil rights groups were at best ambivalent toward legislation aimed at curbing offensive speech, and the NAACP actively opposed the Lynch bill.[19] An example will show why. In 1966, the Congress of Racial Equality (CORE) led a march into the all-white Chicago suburb of Cicero, Illinois, to demand open housing. Cicero, which sits 13 miles due south of Skokie, had been the site of a notorious riot in 1951 in which thousands of angry white residents had burned and looted an apartment building to prevent a black family from moving in. A year before the CORE demonstration, a black teenager looking for a summer job in Cicero had been beaten to death by a white gang.[20] The CORE marchers were met by several hundred hecklers who hurled bottles, rocks, eggs, and small explosives and had to be restrained by National Guard troops and local police.[21]

Civil rights activism required protection against a heckler's veto.[22] It required subversive organizing. It required fighting words. Indeed, during the Jim Crow era, otherwise pacific words – "No!" comes readily to mind – could, when uttered by members of particular communities, lead immediately and predictably to violence. Feiner had been made to get off his soapbox because he had given "the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights."[23] The sanction given in *Bryant* for states to require membership lists of subversive organizations had been used against the NAACP and leftist groups in the South in the 1950s, until the Supreme Court

limitations on its guarantee of freedom of expression in the competing "right to personal honor." Art. 5(2). The Basic Law also outlaws associations "that are directed against the constitutional order or the concept of international understanding." Art. 9(2).

17 Brown v. Board of Education, 344 U.S. 1 (1952).

18 *Beauharnais*, 343 U.S. at 252.

19 Walker, *supra* note 9, at 85.

20 *See* Paul L. Street, *Racial Oppression in the Global Metropolis: A Living Black Chicago History* 103–4 (Rowman & Littlefield 2007).

21 *See* Donald Janson, "Guards Bayonet Hecklers in Cicero's Rights March," *N.Y. Times*, Sept. 5, 1966, at 1.

22 I refer here to restrictions on speech imposed because of the anticipated (or actual) incivility of offended listeners.

23 *Feiner*, 340 U.S. at 317.

declared such practices unconstitutional in *NAACP v. Alabama ex rel. Patterson*.[24] When the Court gave First Amendment protection to libelous statements in 1964, it was in the service of protecting the ability of civil rights groups to mobilize public opinion in their favor.[25]

It is not just that any speech regulation aimed at maintaining civility in public life may disproportionately affect out-groups.[26] Hate-speech restrictions in particular have a history of missing their originally intended marks. New Jersey's 1935 race-hate statute, born of violent confrontations between Nazi sympathizers and their antagonists, was used only against a group of Jehovah's Witnesses before the New Jersey Supreme Court declared the law unconstitutional in 1941.[27] In Great Britain, the Public Order Act 1936, enacted in response to the fascist threat, was used against Bertrand Russell and other antinuclear protesters in 1961. High-profile prosecutions under Britain's Race Relations Act 1965 included that of Black Power leader Michael Abdul Malik, who received a one-year prison sentence for alleged incitement of hatred against whites, and four members of the Universal Coloured People's Association, three of whom were convicted and fined a total of £270 for the same.[28] Laws aimed at protecting civil society from groups seeking to disrupt the social and political order may be a form of "militant democracy," but they may not gain the unqualified support of those who wish to dismantle a majoritarian regime marked by apartheid or other indicia of fundamental injustice. "In the absence of real political power," writes Walker, "words – extreme, emotionally loaded words – are one of the few devices available to the powerless for capturing attention, dramatizing an issue, and motivating people for change."[29]

All of which is to say that the pronounced American trend away from hate-speech restrictions when much of the world was heading the opposite way was not for lack of an argument but for lack of an arguer. The ACLU fervently opposed such laws. Civil rights groups were disapproving or, at best, conflicted. Racists – no small constituency – were understandably self-interested. Other Americans were ambivalent or did not much care. That is no formula for a constitutional moment. Jack Balkin has written that "[e]ach generation makes the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time."[30] Mobilized groups in the United States in the 1950s and 1960s decided

[24] 357 U.S. 449 (1958).
[25] New York Times v. Sullivan, 376 U.S. 254 (1964).
[26] *See* Kent Greenawalt, *Speech, Crime, and the Uses of Language* 298 (Oxford University Press 1992).
[27] Walker, *supra* note 9, at 55–6; *see* State v. Klapprott, 22 A.2d 877 (N.J. 1941).
[28] *See* Richard P. Longaker, "The Race Relations Act of 1965: An Evaluation of the Incitement Provision," 11 *Race & Class* 125, 129 (1969); R. v. Malik, 52 Crim. App. 140 (1968) (Eng.); "Sentences Today on Four Coloured Men," *The Times* (London), Nov. 29, 1967, at 3; "Race Speeches: £270 Fines," *The Times* (London), Nov. 30, 1967, at 20.
[29] Walker, *supra* note 9, at 111–12.
[30] Jack M. Balkin, "Abortion and Original Meaning," 24 *Const. Commentary* 291, 302 (2007).

that cases like *West Virginia State Board of Education v. Barnette*,[31] *Terminiello v. Chicago*,[32] *NAACP v. Alabama ex rel. Patterson*,[33] and *Cohen v. California*[34] better expressed the meaning of the free-speech guarantee in their time and for their purposes than cases like *Bryant*,[35] *Chaplinsky*,[36] *Feiner*,[37] and *Beauharnais*.[38]

No serious domestic movement to challenge the American position on hate speech emerged until the 1980s, during controversies over campus speech codes. In part because of affirmative-action programs, once marginalized minorities were reaching critical mass on college campuses. A series of racist incidents across a surprisingly wide range of schools prompted many universities to adopt restrictions on certain racially offensive or intimidating speech and conduct. Minority groups and white sympathizers, many born well after the peak of the civil rights movement, viewed such restrictions in the same self-evident terms that many Europeans do today, and organized to promote them.[39]

The courts saw matters differently. Federal district courts invalidated the codes at the University of Michigan and the University of Wisconsin.[40] The Supreme Court struck down state and federal laws outlawing the burning of the American flag and a city ordinance criminalizing the display of symbols likely to arouse racial or religious hatred.[41] The doctrinal carapace against content-based regulation of offensive speech was too thick for speech-code activists to penetrate. Some measure of organization was present, but it was not sufficient to animate the population or move the courts. The activists failed to make their issue, and their pain, the nation's. Understanding why the movement failed is critical to assessing the prospects for bridging the present hate-speech divide between the United States and the rest of the western world. The episode illustrates, not for the first time, that while an argument and an arguer are necessary to produce constitutional change, they are not sufficient. Constitutional argument also needs the right audience.

[31] 319 U.S. 624 (1943) (holding that the First Amendment forbids compelling students to salute the American flag).

[32] 337 U.S. 1 (1949) (striking down a Chicago ordinance criminalizing speech that "stirs the public to anger, invites dispute [or] brings about a condition of unrest").

[33] 357 U.S. 449 (1957) (holding that a state law requiring the Alabama NAACP affiliate to submit membership lists violated the group members' associational rights).

[34] 403 U.S. 15 (1971) (invalidating the conviction of a man arrested for wearing a jacket with the words "Fuck the Draft" in a Los Angeles courthouse).

[35] 278 U.S. 63 (1928).

[36] 315 U.S. 568 (1942).

[37] 340 U.S. 315 (1951).

[38] 343 U.S. 250 (1952).

[39] *See* Walker, *supra* note 9, at 129–30. On campus speech codes generally, see Arthur Jacobson and Bernhard Schlink, "Hate Speech and Self-Restraint," Chapter 12 herein.

[40] Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); UWM Post v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163 (E.D. Wisc. 1991).

[41] Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

II

Those who promoted campus speech codes in the 1980s might have had a significant audience in the 1940s, and perhaps in the 1950s, but did not have enough of one in their own time. At least two possible lessons emanate from their experience. It might be that the American people are inalterably libertarian on speech issues, our collective consciousness permanently fixed by the Warren Court rulings and their progeny. But it is more plausible, and more true to our constitutional heritage, to conclude that the American people are inalterably dynamic, viewing arguments in the different lights of changing circumstance. In light of that condition, it would be useful to know what it takes to move public attitudes on hate-speech regulation, whether or not one supports reforming the American posture in this area. The literature on hate speech contains surprisingly little, however, even on what those attitudes might be.

The space of this chapter is too short for a comprehensive treatment, but it is possible to report some data and to critically evaluate some hypotheses. In brief, and as discussed in Subsection A, the American public today is far less enthusiastic about hate-speech regulation than its European counterpart, and, significantly, has become increasingly opposed to such regulation over the last decade. Subsection B proposes and assesses three possible explanations: a relative lack of trust in government; a frosty disposition toward international and transnational norms; and increasing opportunities for "exit" from community life.

A

Two U.S. studies are most relevant for our purposes. Each year since 1997 (with the exception of 1998), the First Amendment Center (FAC) has commissioned a survey in which it asked American adults whether they strongly agree, mildly agree, mildly disagree, or strongly disagree with the following proposition: "People should be allowed to say things in public that might be offensive to racial groups." FAC has asked the same question with respect to religious groups each year since 2000 (with the exception of 2004). I report the FAC results in Table 5.1.

I supplement the FAC results with original data from a July 2009 Massachusetts Institute of Technology (MIT) survey of Americans' constitutional perceptions and political values.[42] The MIT survey asked 1,677 American adults the same two hate-speech questions as the FAC survey.[43] The results of the MIT survey are reported in Table 5.2. These results are of interest both as a snapshot and longitudinally. First, Americans are divided on whether people should be allowed to say things in public

[42] The MIT survey was commissioned by Stephen Ansolabehere with the collaboration of Nathaniel Persily and me.

[43] The MIT survey was an Internet-based survey and did not include a "don't know" option. The FAC survey comprised in-person interviews.

TABLE 5.1. *First Amendment Center survey, 1997–2008*

People should be allowed to say things in public that might be offensive to racial groups.

	1997	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Strongly agree	8%	8%	15%	16%	14%	18%	17%	21%	22%	21%	24%
Mildly agree	15%	13%	17%	18%	20%	20%	18%	22%	20%	21%	19%
Mildly disagree	14%	16%	15%	15%	16%	14%	14%	14%	13%	12%	12%
Strongly disagree	61%	62%	52%	49%	48%	47%	49%	39%	42%	44%	42%
DK/Ref.	2%	1%	1%	2%	1%	1%	1%	3%	2%	2%	2%

People should be allowed to say things in public that might be offensive to religious groups.

	2000	2001	2002	2003	2005	2006	2007	2008
Strongly agree	22%	25%	29%	26%	23%	31%	32%	32%
Mildly agree	24%	22%	28%	23%	25%	24%	28%	23%
Mildly disagree	15%	16%	14%	14%	15%	16%	12%	12%
Strongly disagree	38%	35%	28%	36%	35%	27%	26%	30%
DK/Ref.	1%	3%	2%	1%	4%	2%	2%	2%

Source: The First Amendment Center, 1997–2008, State of the First Amendment 1997–2008 [computer files] (Storrs, CT, Center for Survey Research and Analysis, University of Connecticut [producer and distributor]).

that might be racially or religiously offensive. Forty-eight percent of MIT survey respondents said that people should be permitted to make racially offensive comments, and 56 percent said the same of religiously offensive comments. Affirmative responses in the MIT survey are slightly higher in each category than in the most recent FAC survey, in which 43 percent said yes as to racially offensive speech and 55 percent said yes as to religiously offensive speech. There are also marginal differences in intensity of viewpoint. Only 20 percent of MIT respondents, compared

TABLE 5.2. *MIT survey, 2009*

	People should be allowed to say things in public that might be offensive to racial groups	People should be allowed to say things in public that might be offensive to religious groups
Strongly agree	20%	26%
Mildly agree	28%	30%
Mildly disagree	23%	21%
Strongly disagree	29%	24%

Source: Massachusetts Institute of Technology, 2009, *Attitudes & Perceptions About the Constitution* (Menlo Park, CA: Knowledge Networks).

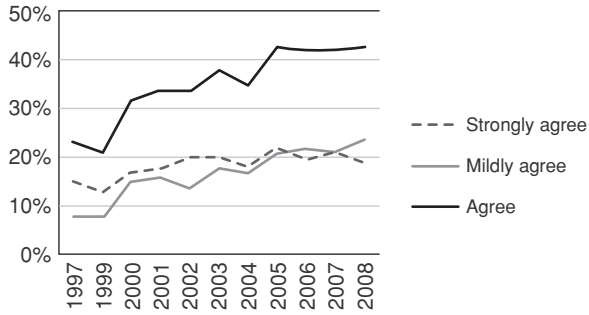

CHART 5.1. Allow Racially Offensive Speech

to 24 percent of FAC respondents, "strongly" agreed that racially offensive speech should be permitted, and 26 percent of MIT respondents said the same of religiously offensive speech, compared to 32 percent in the FAC survey. There is sense in the observed distinction between race and religion. Certain strongly held religious views may be impossible to disaggregate from disparagement of the religious views of others. As Ivan Hare writes, "[R]eligions inevitably make competing and often incompatible claims about the nature of the true god, the origins of the universe, the path to enlightenment, and how to live a good life and so on."[44] Religious offense is therefore, categorically, a more problematic candidate for hate-speech regulation than racial offense.[45]

The most striking survey result is the trend over time, particularly on race. As Chart 5.1 illustrates, the proportion of Americans who believe that racially offensive speech should be permitted nearly doubled from 1997 to 2008; the proportion holding that view "strongly" nearly tripled. The proportion of Americans who strongly disagree that racially offensive speech should be permitted – that is, those espousing a more stereotypically European view – decreased by nearly a third. The MIT survey, although reflecting a different distribution in intensity of viewpoint, is consistent with the overall picture: Americans are far more permissive of hate speech today than they were in the mid-to-late 1990s.

The upward trend in acceptance slices clean through demographics. As one might expect, tolerance of hate speech is more prevalent among whites than blacks and Hispanics, and among the college educated. Minorities are usually the intended beneficiaries of hate-speech restrictions, and educated people are more likely to be familiar with the First Amendment. But the sharp upward slope in tolerance for offensive speech persists across racial groups and regardless of education level.

[44] Ivan Hare, "Blasphemy and Incitement to Religious Hatred," in *Extreme Speech and Democracy*, *supra* note 1, at 289, 308.

[45] Witness, for example, the controversy in the United Kingdom over the Racial and Religious Hatred Act 2006, which some feared would outlaw certain passages in the Bible and the Koran. *See* "The Tongue Twisters," *The Economist*, Oct. 13, 2007.

People with postgraduate degrees were nearly twice as likely to agree that racially offensive speech should be permitted in 2006 than they were in 1999. Those with only high-school educations were slightly more than twice as likely.[46] Black Americans are roughly two-thirds as likely as whites to take a permissive attitude toward racially offensive speech, but both groups are just about two and a half times as likely to hold that view today compared to a decade ago.

These results should alarm advocates for reform of the American position. Without an explanation for so dramatic a trend and a strategy for reversing it, the best arguments for reform will fall on deaf ears. At the same time, it may hearten reformers to know that Justice Jackson was only partly right: Rejecting government prescription of political orthodoxy is surely a star in the American constitutional constellation, but it is by no means fixed.[47] I have already discussed the crossroads of 1952. There is little evidence that Americans before that period were unusually tolerant of offensive speech. In the 1930s, numerous state and local governments banned either pro-Nazi or pro-Communist propaganda and made life generally difficult for fascist groups.[48] In 1946, at the height of the proliferation of group libel bills, six in ten Americans told Gallup that it should be illegal to join the Ku Klux Klan,[49] even as a former Klansman – Hugo Black – sat on the Supreme Court. As of 1952, the United States might easily have taken a different direction on hate-speech restrictions.

Was 1999 also a crossroads? Was 2009 a crossroads, with some Americans beginning to moderate their absolutism? If so, then why? The next subsection takes up that question, but first it is useful to consider whether American opinion is in fact an outlier compared to Europe. We lack comprehensive comparative data on European attitudes toward hate-speech regulation during the period for which U.S. data are available. The best available data may be from the European Social Survey (ESS), which in 2002 asked respondents in twenty-one European countries and Israel to rate on a scale of 0 to 10 whether a law against promoting racial hatred was a good or a bad thing for a country. More than three in ten respondents (31 percent) gave a response of "10," indicating that such a law was "extremely good" for a country. Nearly six

[46] I do not have sufficient data to compile these numbers for 2007 and 2008, but it may be useful to report that the educational distribution in the 2009 MIT survey differs in important ways from the most recently available FAC survey. Namely, less educated people seem relatively less inclined to favor speech restrictions in the 2009 survey. Approximately half of all high school graduates in the MIT survey agreed that offensive speech should be allowed, compared to one-third in the 2006 FAC survey. Conversely, slightly more than half of MIT survey respondents with postgraduate degrees agreed that offensive speech should be permitted, compared to more than 60 percent in the 2006 FAC survey.

[47] *Cf. Barnette*, 319 U.S. at 642 (Jackson, J.) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.").

[48] Walker, *supra* note 9, at 40; *see* Joel H. Spring, *Images in American Life: A History of Ideological Management in Schools, Movies, Radio, and Television* 52, 92–3 (SUNY Press 1992).

[49] Roper Center for Public Opinion Research, Gallup Poll (Aug. 16–21, 1946).

in ten (59 percent) gave a response of "8" or higher, and nearly three-quarters (73 percent) answered "6" or higher.[50]

Drawing reliable comparisons between the ESS data and the FAC and MIT surveys is perilous given the differences in question wording, which cannot be regarded as trivial. The best we can say, perhaps, is that nearly three out of four Europeans in 2002 would at least mildly disagree that racially offensive speech should be permitted. That figure meaningfully exceeds the number of Americans holding similar views in 2002, vastly exceeds the number holding such views in 2009, and approximates the number holding such views in the late 1990s.

We can draw a more direct comparison from the 2004 International Social Survey Programme (ISSP), which asked respondents in thirty-nine countries around the world various questions related to citizenship, one of which was "Should people prejudiced against any racial group be allowed to hold public meetings?" Respondents were asked whether such groups should definitely, probably, probably not, or definitely not be permitted to hold such meetings.[51] Of the countries surveyed, which included much of Europe, no country had a greater proportion of respondents answer "definitely" or "probably" than the United States (39 percent). As Chart 5.2 shows, within Europe, only Norway (37 percent) was comparably tolerant of meetings of racist groups. Notably, only 9 percent of respondents in Hungary answered this question in the affirmative, even though Hungary may be Europe's most speech-protective country.[52] In a large majority of countries surveyed, the proportion of respondents who answered "definitely" or "probably" was less than half the proportion in the United States.

B

Explaining the differences between Europe and the United States on hate speech has engaged some of the brightest minds in the world of international and comparative public law.[53] Far less attention has been paid to the differences within the United States over time. Yet understanding these internal differences is vitally important for those who wish to moderate the American posture. Dramatic evolution in American public attitudes, even over relatively brief periods, suggests that events short of catastrophic genocide may indeed be capable of changing the minds of the American people. We lack sufficient data to draw firm conclusions as to what those events might be, but some possibilities recommend themselves. I propose three considerations that

[50] European Social Survey Round 1 Data (2002/2003), Data file edition 6.1. Norwegian Social Science Data Services, Norway (Data Archive and distributor of ESS data).

[51] International Social Survey Programme 2004: Citizenship (ISSP 2004). For ease of comparison over time, the ISSP separately samples East German and West German respondents.

[52] *See* Peter Molnar, "Towards Improved Law and Policy on 'Hate Speech' – The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech and Democracy*, *supra* note 1, at 237.

[53] *See*, *e.g.*, Rosenfeld, *supra* note 2. *See also* Post, *supra* note 1; Schauer, *supra* note 10.

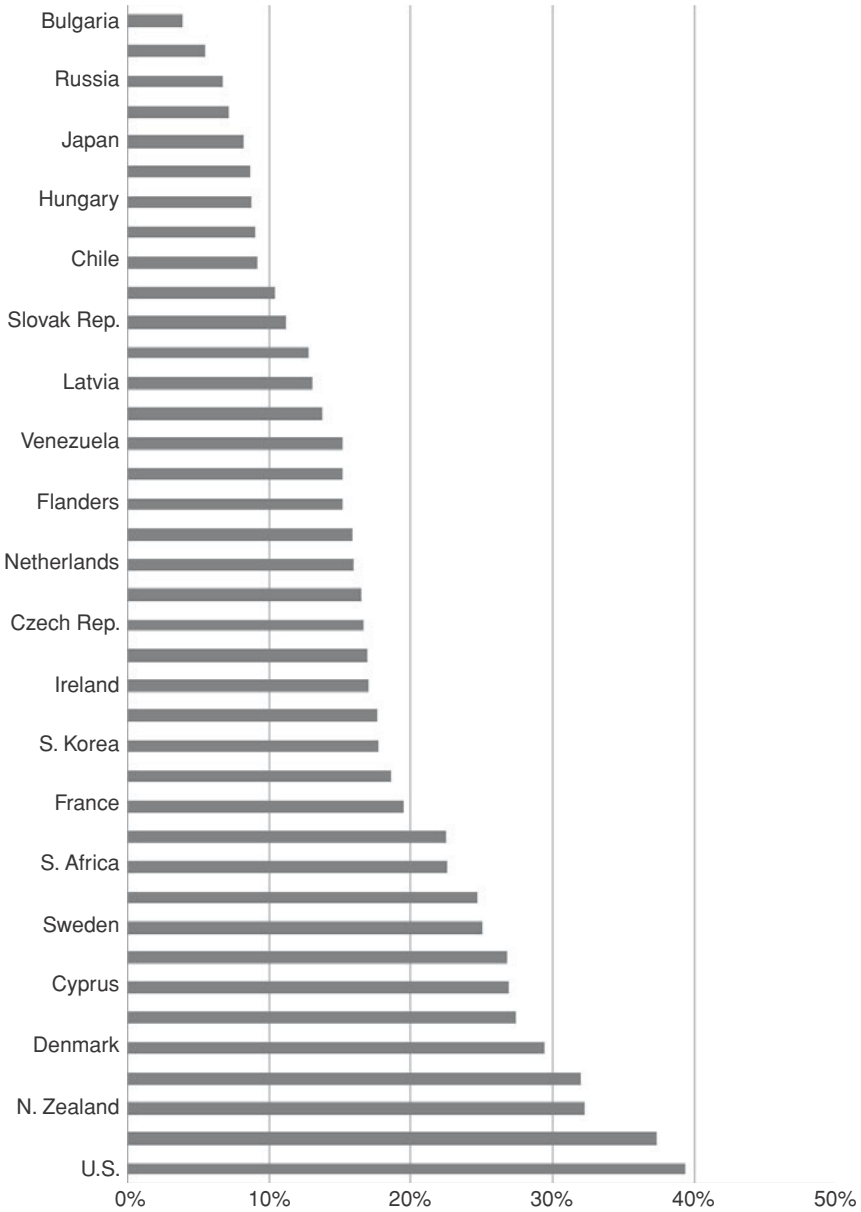

CHART 5.2. Racist Meetings Should Definitely or Probably Be Permitted

may affect whether the American people of a particular time are relatively receptive to laws restricting hate speech: trust in government; sensitivity to international norms; and opportunities for exit.

1. Trust in Government

The Rasmussen polling organization asked in a 2008 survey of American adults whether it would be "a good idea for the United States to ban hate speech." Twenty-eight percent of respondents answered yes, 53 percent said no, and 19 percent were unsure.[54] Those numbers are loosely consistent with the numbers reported in the FAC and MIT surveys.[55] The same Rasmussen survey followed up, however, with the following question: "Which is better – allowing free speech without government interference or letting government decide what types of hate speech should be banned?" Only 11 percent of respondents said that it is better to let government decide; 74 percent said it was preferable to allow unfettered free speech. Even for many of those who were not bothered by restrictions on hate speech, the specter of government deciding which speech would be permitted and which would not was unacceptable.

One need only sit in on a grade-school social studies class to glean that mistrust of government is part of the national operating instructions for the United States. Suspicion of top-down political authority is evident in the bill of particulars detailed in the Declaration of Independence and in the system of checks and balances embedded in the Constitution and celebrated by *The Federalist*. "If angels were to govern men," Madison says in Federalist No. 51, "neither external nor internal controls on government would be necessary."[56]

Significantly, however, Americans today trust government far less than they used to. Various polls over the last half century have measured trust in government by asking Americans the following question: "How much of the time do you think you can trust the government in Washington to do what is right? Just about always, most of the time, or only some of the time?"[57] The number of Americans saying they can trust the federal government all or most of the time stood at 73 percent in 1958; it was 17 percent in October 2008. Of course, October 2008 was just before

54 Toplines – Free Speech, June 12, 2008, Rasmussen Reports (2008).

55 It is not entirely clear how "yes" or "no" in the Rasmussen survey best correspond to the scale of agreement reported in the FAC and MIT surveys. It should also be noted that Rasmussen primed respondents by noting that "[m]any European countries and Canada do not have full freedom of speech, but instead have laws to prevent hate speech." There is reason to believe that this kind of priming is likely to depress the number of respondents in favor of such laws. See *infra* Section II.B.2.

56 *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter ed., New American Library 1961).

57 The data from 1958 to 1996 come from the American National Election Studies. *See Deconstructing Distrust: How Americans View Government* 87 (Pew Center for People & the Press 1998). Subsequent data comes from surveys conducted by the Pew Center for People & the Press (1998), ABC News/*Washington Post* (2000), and CBS News/*New York Times* (2002–2008).

CHART 5.3. Trust Government to Do Right Thing

an unpopular President, George W. Bush, was replaced by Barack Obama. But as Chart 5.3 demonstrates, the downward secular trend in Americans' trust in their government extends beyond any one administration. The last time a majority of Americans said they trusted government all or most of the time was in 1972, just before the Watergate scandal ended Richard Nixon's presidency.

A people who believe that government usually cannot be trusted will not lightly task that same government with prosecuting citizens for offensive speech.[58] Both *Brandenburg v. Ohio*, which states the modern American standard for criminalizing incitement,[59] and *Cohen v. California*, which allowed clothing bearing a profane message to be worn in a courthouse,[60] were handed down amid a precipitous decline in Americans' faith in their government. Indeed, Henry Louis Gates Jr. has argued that the campus speech-code movement resulted in part from the newfound trust of minority groups for authority figures on campus. "The contemporary aim is not to resist power," wrote Gates, "but to enlist power."[61] If some minorities have been feeling increasingly close to power within collegiate gates, other Americans have

[58] *See* Frederick Schauer, *Free Speech: A Philosophical Inquiry* 86 (Cambridge University Press 1982) ("Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.").

[59] 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[60] 403 U.S. 15 (1971).

[61] Henry Louis Gates Jr., "Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights," *New Republic*, Sep. 20 & 27, 1993, at 44.

been feeling increasingly alienated from political institutions more generally. And those who distrust government appear less likely to favor hate-speech restrictions. The MIT survey asked respondents to indicate which of the following statements they agreed with: "The less government, the better," or "There are more things that government should be doing." Even controlling for whether people generally identify as liberal or conservative, opponents of hate-speech restrictions are somewhat more likely to oppose big government.[62]

It is not clear whether Europeans, for their part, in fact trust the state any more than Americans do. A 1998 survey commissioned by Pew found that only 45 percent of respondents in the United Kingdom, France, Germany, Italy, and Spain said "no" when asked whether they "basically trust the state," compared to 56 percent of Americans. But the most recent ESS, in 2006, found that in rating trust of their parliaments on a scale of 0–10 – from "no trust at all" to "complete trust" – 54 percent of Europeans registered 4 or lower.[63] And in the 2002 ESS survey, neither trust in parliament nor trust of politicians was significantly correlated with whether respondents believe a hate-speech law is desirable. The 2004 ISSP asked a similar question to the one that has been most frequently asked in the United States: whether and to what extent respondents agree that "[m]ost of the time we can trust people in government to do what is right." The United States is no particular outlier on this question, nor are responses to the trust question significantly correlated with responses to the racist public meeting question.[64]

All told, we lack both the data and a sufficiently persuasive story to establish trust in government as any more than a partial explanation for the recent surge in American tolerance for hate speech. It is true that in the years since 2002, Americans' distrust in government has correlated quite nicely – on the order of 0.8 – with permissive attitudes toward racial hate speech. But from 1997 to 2001, the correlation was insignificant, indeed marginally negative. Results from the FAC survey indicate that American tolerance for certain other kinds of speech regulation – for example, restrictions on religious hate speech and flag burning – have correlated significantly with Americans' trust in government over the last decade. But attitudes toward restrictions on offensive song lyrics are largely unchanged over the same period.[65] It may be that, at least in the United States, trust in government is a precondition for an anti–hate speech constitutional norm, but is not sufficient without more.

[62] *See* MIT Survey, *supra* note 42.

[63] The Pew results and the ESS results are not necessarily inconsistent. Each of the four Western European countries surveyed in the Pew study that were included in the 2006 ESS – Italy did not participate – had a proportion of "5 or lower" responses on the ESS scale of relative trust in parliament that was below the Europe-wide average.

[64] *See* ISSP 2004, *supra* note 51.

[65] *See* FAC Survey, *supra* Table 5.1.

2. Sensitivity to International Norms

Shame is an essential weapon in the arsenal of the international human rights advocate.[66] Louis Henkin writes of enforcement of human rights norms: "Intergovernmental as well as governmental policies and actions combine with those of NGOs and the public media, and in many countries also public opinion, to mobilize and maximize public shame. The effectiveness of such inducements to comply is subtle but demonstrable."[67] The notion that shame can provoke nations to act against their own interest may come across as naively anthropomorphic, and the internal dynamics of the process are indeed more complicated than the invocation of raw human emotion suggests.[68] It is difficult to dispute, however, that a people's basic sensitivity to world opinion is nearly indispensable in encouraging them to internalize international norms.

It is a familiar complaint within the international human rights community that, as Frederick Schauer has written, "American courts, American lawyers, and the American constitutional culture have been stubbornly anti-international, far too often treating foreign influence as a one-way process, in which Americans influenced others but were little influenced in return."[69] Jed Rubenfeld suggests quite plausibly that while the Second World War's principal lesson for Europe was that nationalism is dangerous, the take-home across the Atlantic was that Americans are exceptional.[70] Within American domestic politics, the fact that the United States stands alone on some question of international law has long been an argument both for and against compliance. This at-best ambivalent posture poses particular challenges for those who wish to elevate hate-speech restrictions to the status of customary international law.

Domestic enthusiasm for American exceptionalism appears to have become particularly pronounced since September 11, 2001.[71] A foreign-planned attack on domestic soil is bound to provoke nationalism, but international criticism of the U.S. intervention in Iraq seemed to exacerbate the usual jingoism that accompanies military retaliation. The reaction by some to occasional citation of foreign or transnational law in U.S. court decisions provides a microcosmic window into the new nationalism. Three months after the U.S.-led invasion of Iraq, the Supreme Court decided *Lawrence v. Texas*, in which it invalidated the state's prohibition on

66 *See* Robert F. Drinan, *The Mobilization of Shame: A World View of Human Rights* (Yale University Press 2002).

67 Louis Henkin, "Human Rights: Ideology and Aspiration, Reality and Prospect," in *Realizing Human Rights: Moving from Inspiration to Impact* 3, 24 (Samantha Power & Graham Allison eds., Palgrave Macmillan 2000).

68 *See, e.g.*, Harold Hongju Koh, "Why Do Nations Obey International Law?," 106 *Yale L.J.* 2599 (1997).

69 Schauer, *supra* note 10, at 51.

70 Jed Rubenfeld, "Unilateralism and Constitutionalism," 79 *N.Y.U. L. Rev.* 1971 (2004).

71 *See* Harold Hongju Koh, "American Exceptionalism," 55 *Stan. L. Rev.* 1479, 1496 (2003).

same-sex sodomy.[72] In the course of his majority opinion, Justice Kennedy cited four decisions of the European Court of Human Rights, most prominently *Dudgeon v. United Kingdom*, and referred to a brief filed by former U.N. High Commissioner for Human Rights Mary Robinson, which discussed the laws of other nations.[73] Within one year of the *Lawrence* decision, several interest groups had called for the impeachment of any federal judge who cites foreign law while interpreting the U.S. Constitution.[74] Both the House and the Senate introduced measures that would forbid any federal court from relying on any law or precedent of any foreign adjudicator in interpreting the Constitution.[75] Steven Calabresi, a cofounder of the Federalist Society, is characteristically direct. "Those of us concerned about citation of foreign law . . . believe in something called American exceptionalism, which holds that the United States is a beacon of liberty, democracy and equality of opportunity to the rest of the world," he writes. "The country that saved Europe from tyranny and destruction in the 20th century and that is now saving it again from the threat of terrorist extremism and Russian tyranny needs no lessons from the socialist constitutional courts of Europe on what liberty consists of."[76]

For all this chest-thumping, it is not clear that Americans identify much less with the international community than Europeans or others. Over a four-year period from 2005 to 2008, the World Values Survey asked respondents in forty-five countries whether and to what extent they "see [themselves] as a world citizen."[77] As Chart 5.4 indicates, only ten countries registered less agreement with that statement than the United States (69 percent), but eight of those ten were European countries: Bulgaria (46 percent), Georgia (48 percent), Germany (53 percent), Romania (54 percent), Ukraine (60 percent), Italy (62 percent), Moldova (65 percent), and Finland (65 percent). Including Turkey, nine European countries registered greater agreement with the sentiment of world citizenship than did the United States: Poland (74 percent), Cyprus (74 percent), Slovenia (74 percent), Switzerland (78 percent), Serbia (78 percent), Spain (79 percent), Sweden (84 percent), Turkey (85 percent), and Andorra (87 percent). If there is a leitmotif here, it is hardly obvious.

One's regard for international opinion may be unrelated to one's tolerance for hate speech. Or it may be that between-group differences between the United States and Europe record separate phenomena than within-group differences between the United States of 1997 and the United States of 2009. It may be that, as with

72 Lawrence v. Texas, 539 U.S. 558 (2003).

73 *See id.* at 576 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 52 (1981); P.G. & J.H. v. United Kingdom, App. No. 00044787/98, 56 (Eur. Ct. H.R., Sept. 25, 2001); Modinos v. Cyprus, 259 Eur. Ct. H.R. (1993); Norris v. Ireland, 142 Eur. Ct. H.R. (1988); Brief of Mary Robinson et al. as Amici Curiae at 11–12).

74 *See* Dana Milbank, "And the Verdict on Justice Kennedy Is: Guilty," *Wash. Post*, Apr. 9, 2005, at A3.

75 Constitution Restoration Act of 2004, S. 2323, H.R. 3799, 108th Cong. 2d Sess. (2004).

76 Steven G. Calabresi, Letter to the Editor, N.Y. *Times*, Sept. 18, 2008, at A18.

77 World Values Survey 2005–2008.

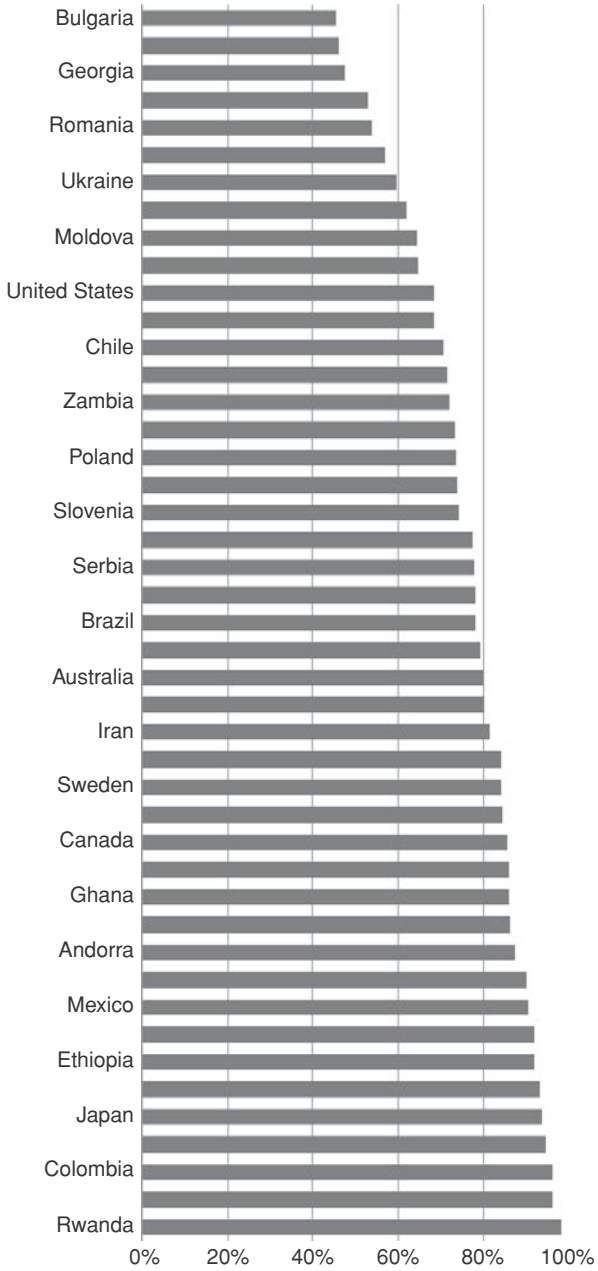

CHART 5.4. Consider Self a World Citizen

government distrust, rising scorn for international opinion is a hurdle to Americans' tolerating hate-speech regulation but does not, without much more, explain American attitudes. Additional data would help answer these important questions.

3. Opportunities for Exit

In his classic treatment of competition between firms or organizations, the economist Albert Hirschman counterposed two possible consumer or member responses to a decline in product or organizational quality. A person may stop buying the firm's products or leave the organization, that is, choose the "exit" option, or the person may complain to management, that is, choose the "voice" option.[78] Hirschman and others have usefully extrapolated his observations to the realms of political and social decision making. Referring to the country's origins as a settler nation, Hirschman writes that "[t]he United States owes its very existence and growth to millions of decisions favoring exit over voice."[79] The frontier, which then became the suburb and the exurb, has been a powerful symbol more available in the expansive United States than in the traditionally denser populations of Europe. Hirschman writes:

> Even after the closing of the frontier, the very vastness of the country combined with easy transportation make it far more possible for Americans than for most other people to think about solving their problems through "physical flight" than either through resignation or through ameliorating and fighting *in situ* the particular conditions into which one has been "thrown."[80]

Hirschman suggests that Americans are more apt than Europeans to vote with their feet rather than to engage in a contest of words or ideas.

This contestable macro account of social behavior and of American psychology, if true, should be of great interest to the discourse on hate-speech regulation. If material conditions or social expectations require that voice is preferred to exit, then a people may well be inclined to call on the state to moderate the terms of discourse. If we must stand and fight, let us at least be civilized about it. Whether or not the macro account is true, however, Hirschman's theoretical insight still offers lessons at the micro level. There is plenty of reason to believe that a permissive norm toward hate speech is likely to flourish where various forms of exit are readily available. As I have suggested, the American suburb was the twentieth-century embodiment of exit.[81] And to the extent we seek an account that tells us what happened to hate-speech regulation circa 1952, it is tempting to ascribe a role to the rapid, subsidized

[78] Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 4 (Harvard University Press 1970).
[79] *Id.* at 106.
[80] *Id.* at 107.
[81] Although this might be changing. *See* Nicole Stelle Garnett, "Suburbs as Exit, Suburbs as Entrance," 106 *Mich. L. Rev.* 277 (2007).

suburbanization of the United States. The pushback in the form of college speech codes then provides a compelling counterpoint, wherein the gates of university campuses become a powerful metaphor for the absence of exit, the classroom a stylized arena for voice.

This story may also be helpful in explaining the more recent surge in Americans' tolerance for offensive speech. Although U.S. growth in metropolitan areas in recent years has exceeded that outside of such areas since 2000, the growth rate of outlying counties within metropolitan areas grew 67 percent faster than central counties from 2000 to 2007.[82] Moreover, a greater proportion of U.S. population growth from 2000 to 2004 resulted from domestic migration (as opposed to immigration or natural growth) than in the 1990s.[83]

Geography is not the only space across which individuals seeking to escape unwanted intimacy either isolate themselves or form communities of interest. As Robert Putnam has famously detailed, traditional forms of civic engagement have vanished from the American social landscape in recent decades.[84] Others have replaced them – Facebook, Twitter, and MySpace, to name three – but the communities these exponentially multiplying forms of social networking create are voluntary associations devoted to predetermined common interests. They are designed, almost willfully, to defeat the need for the face-to-face interactions characteristic of voice-based communities. Rather, like suburbs, they permit socialization and exit to coexist.[85]

The viral proliferation of such communities over the past several years is self-evident. For those still in need of convincing, consider that as of December 2008, 35 percent of American adults had a profile on a social networking site, and one in five used such sites on any given day. In February 2005, less than four years earlier, those numbers were, respectively, 8 percent and one in fifty.[86] It is also self-evident, I think, that, as P. M. Forni writes, "online communication has unleashed a new magnitude of rudeness."[87] Online discourse promises not only anonymity but minimal barriers to community entry and exit, with predictable results. First, individuals may feel more liberated to engage in offensive speech and therefore become acculturated to, even solicitous of, uncivil discourse. Second, and relatedly, our default conception of the public sphere might gradually shift from the physical to the cyber world.

[82] U.S. Census Bureau, *Population Change in Central and Outlying Counties of Metropolitan Statistical Areas: 2000 to 2007* (2009).

[83] U.S. Census Bureau, *Domestic Net Migration in the United States: 2000–2004* (2006).

[84] Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

[85] *See The Internet in Public Life* 90–1 (Verna V. Gehring ed., Rowman & Littlefield 2004); *cf.* Laura E. Buffardi and W. Keith Campbell, "Narcissism and Social Networking Web Sites," 34 *Personality & Social Psychol. Bull.* 1303 (2008).

[86] *See* Pew Internet & American Life Project, *Adults and Social Network Websites* 3–4 (2009).

[87] Pier M. Forni, *The Civility Solution: What To Do When People Are Rude* 149 (St. Martin's Griffin 2008).

Asked whether racially offensive speech should be permitted "in public," we might understand the metes and bounds of that "location" – and therefore its rules of discourse – far differently than our children do.

If this explanation is valid and adequate, we might expect a like dynamic elsewhere in the world. Online communication is not unique to the United States, nor should we imagine it to be uniquely effective at altering *American* norms of civility. It may be that similar forces are at play in Europe and elsewhere; we lack the data to assess changes over time in world attitudes toward hate-speech restrictions. It may also be, however, that the Supreme Court's First Amendment decisions over the last decades, and the social and political movements that inspired them, helped create the space within which a norm of hate-speech tolerance can flourish.[88] This story again suggests the possibility that one or the other – the effects of online discourse or the Court's handiwork – is necessary but not sufficient to produce the American attitude on hate-speech regulation.

III

That attitude is influenced by an additional consideration that will be crucial to any efforts at reform. Lawmaking in the United States is not, of course, the exclusive province of the national government. Rather, the great majority of laws, ordinances, and regulations occur at the state and local levels. Any constitutional change requires a mixture of movement energy and cultural change, but federalism is the straw that stirs the drink. And in most cases it stirs ever so slowly. Whereas the Supreme Court may invalidate a law with the requisite five signatures, making the free-speech norm less permissive of offensive speech would require state-by-state action slow enough to delay premature Supreme Court review but massive enough to push national public opinion.

[88] Political scientists have long questioned the notion, popularized by Eugene Rostow and Alexander Bickel, that the Supreme Court is an effective educative body. *See* Eugene V. Rostow, "The Democratic Character of Judicial Review," 66 *Harv. L. Rev.* 193, 208 (1952) (calling the Justices "teachers in a vital national seminar"); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 26 (Yale University Press 1962) (calling the courts "a great and highly effective educational institution"). The principal objection is that the public is generally ignorant of a large majority of the Court's business. *See, e.g.*, Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes," 2 *Law & Soc'y Rev.* 357 (1968); Stephen M. Griffin, "What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition," 62 *S. Calif. L. Rev.* 493, 522 (1989) ("In the absence of adequate public knowledge about its activities, the Court cannot be said to educate or to have the power to legitimize government policies."). *But see* James L. Gibson and Gregory A. Caldeira, "Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court," 71 *Journal of Politics* 429 (2009). Even accepting low levels of public knowledge of the Court's ordinary workload, it is difficult to dispute the Court's role in reinforcing, if not creating, thick constitutional norms. *See* Robert Post and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," 92 *Calif. L. Rev.* 1027, 1038 (2004).

Thus, when a wave of anti-Nazi laws was sweeping across Europe in the 1930s, the only race-hate law the United States could muster during the period at the state level was New Jersey's law of 1935. Massachusetts and Indiana passed group libel laws in the 1940s, but the rest of the states were silent.[89] Congress was constitutionally forbidden from enacting a general race-hate law without a commerce hook, and the bills that were proposed were blocked by veto gates. The presence of multiple fora for lawmaking tends to disperse the energies of a popular movement. It also enables time for reflection and evaluation of the effectiveness of measures in sister jurisdictions. The feebleness of the National Socialist Party of America march in Chicago's Marquette Park – where the neo-Nazi group relocated from Skokie in 1978 – was a national object lesson in the efficacy of the American position. Hate speech can be remarkably self-refuting.

This chapter's aim, then, has not been to suggest an easy time for reformers. Rather, it has been to suggest, in Barry Friedman's delightful phrase, the importance of being positive.[90] American public opinion on hate-speech regulation appears to have trended dramatically in one direction over the last several years. That trend may be reversible through directed action. If my hypotheses as to causes are correct, then it will be useful to promote the effectiveness of government regulation and international institutions more generally. Perhaps, as Putnam argues, civics education, a renewed focus on public service, and innovations in urban planning can alter Americans' conception of community and encourage us to internalize a sense of mutual obligation.[91]

This will all sound Pollyanna-ish to some, but public opinion offers lessons even for cynics. I have several times referred to the conditions that foster a norm for or against hate-speech regulation as potentially exogenous. It may be that those conditions resist directed action, or else are too complex to alter proactively. Even so, it is useful for reformers to have the tools to recognize the moment to strike. If Americans have a low opinion of government and international institutions, and are becoming increasingly insular and self-regarding in our social relations, it is anything but an obvious opportunity to import new, heretofore unconstitutional restrictions on offensive speech. More modest proposals – changes in the definition of hate crime or workplace harassment, for example – are better uses of reformers' energies.[92] In this regard, federalism may act as both sickness and cure. The opportunity for localized experimentation means that constitutional norms may be chipped at rather than detonated.

[89] Walker, *supra* note 9, at 82–3.

[90] Barry Friedman, "The Importance of Being Positive: The Nature and Function of Judicial Review," 72 *U. Cincinnati L. Rev.* 1257 (2004).

[91] Putnam, *supra* note 84, at 404–8.

[92] *See, e.g.*, H.R. 1913, 111th Cong., 1st Sess. (proposing to add sexual orientation-motivated violence to the federal hate crimes law).

My hypotheses as to causes are defeasible. But they must be evaluated both theoretically and empirically and, if necessary, supplemented or replaced. The posture I wish to discourage is the one that views the differences between the United States and much of the democratized world on hate-speech regulation as engrained, inalterably, within our cultural DNA. It may be true that Americans have certain instincts that predispose us to oppose content-based restrictions on speech. We are typically suspicious of government, fond of our own perceived exceptionalism, and able and willing to migrate, both physically and psychosocially. But to speak of genetic predisposition as destiny is a too-common fallacy. "[E]ven when a trait has been built and set, environmental intervention may still modify inherited defects," writes Stephen Jay Gould. "Millions of Americans see normally through lenses that correct innate deficiencies of vision."[93] Adjusting the American – or, if one prefers, the European – attitude toward hate speech calls for neither philosophizing nor despair, but rather careful surgery.

93 Stephen Jay Gould, *The Mismeasure of Man* 186 (W.W. Norton 1996).