Closing the divide between negative and positive conceptions of liberty: How contemporary American speech doctrines reconcile the classical ideal of liberty with the reality of social intolerance

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CLOSING THE DIVIDE BETWEEN NEGATIVE AND POSITIVE CONCEPTIONS
OF LIBERTY: HOW CONTEMPORARY AMERICAN SPEECH DOCTRINES
RECONCILE THE CLASSICAL IDEAL OF LIBERTY WITH THE REALITY OF
SOCIAL INTOLERANCE

by

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Closing the Divide between Negative and Positive Concepts of Liberty: How Contemporary American Speech Doctrines Reconcile the Classical Ideal of Liberty with the Reality of Social Intolerance

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This thesis offers an analysis of two related, though incompatible, visions of how to politically secure the fundamentals of a peaceable human existence within the structure of government. Legal liberals, on one side of the debate, insist on a certain amount of official neutrality in order to safeguard certain liberties, promote certain values, and generally protect the political compromise from trends of social intolerance. Alternatively, Critical Legal Studies advocates argue that real neutrality beneath the liberal conception of the rule of law is impossible, and insist that the claim of neutrality has the affect of further oppressing the disadvantaged by ignoring their collective perspectives and experiences.

Within the United States, the issue of free speech has attracted much attention from both legal liberals and their CLS opponents, and the salient features of both visions of political life are illuminated by these debates over speech. This thesis seeks to analyze CLS criticisms of liberalism and identify how contemporary American speech doctrines have revitalized liberalism's understanding of liberty through a greater appreciation of the associated principle of general tolerance. Tolerant speech law links negative and positive concepts of liberty by licensing the right to speak openly, protecting a zone of negative liberty, while encouraging a social atmosphere of tolerance in which trends of social intolerance can be checked and confined, which, in effect, supports a zone of positive liberty.

The political results of these philosophical debates directly and immediately effect how Americans live their lives and interact with others. Although most people desire the same result from a normative political philosophy – a peaceable human existence within a well ordered society – few Americans agree on how to politically achieve this goal. These debates between legal liberals and CLS over the limits of free speech force the average American to take a stand and defend his or her own value system. This process of defending ones' own views while tolerating the opposing views of others, this thesis will argue, identifies the enduring relevance of liberal political philosophy in the lives of Americans.
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I. Introduction: Liberalism and Critical Legal Studies

The main intellectual transformation of sixteenth century Europe - the Reformation - undermined the shared moral foundation of the political state - the Catholic religion - as a prelude to substantive social/political change that overwhelmed the old structures of power. A new type of secular political philosophy – liberalism - began to confront the problem of religious pluralism with the idea of a limited state. By the eighteenth century, the growing prominence of liberal theory revolutionized political thought by recognizing the power of self-government, casting aside political concepts such as divinely righted rule. The religious, political, and cultural diversity of both European and American societies positioned liberal theory – and the rule of law – as providing attractive theoretical principals on which to erect a governmental structure, principles which could mediate amongst competing conceptions of the “good life” that naturally emerge from within a pluralist society. Liberal theorists began to envision pluralist societies bound by a shared commitment to such values as individual liberty, which would allow citizens to decide the nature of their own interests, and to pursue and protect those interests, within a stable framework of legal norms.¹

By the late twentieth century, however, a group of legal scholars, members of the Critical Legal Studies movement [hereafter CLS], emerged from within the liberal tradition to accuse liberal political practice of using its values to offer only a truncated vision of political life to those less privileged who are often unable to share in the fruits of liberalism. These critics argue, in particular, that liberalism’s ideal of the rule of law is, in practice, incompatible with the liberal political ideals necessary for pluralism. According to these critics, liberal law is sufficiently indeterminate - that it is often
arbitrary in interpretation and enforcement. Liberal claims of liberty, equality, neutrality, and tolerance are judged by these critics as unrealized in practice, masking the systemic oppression under which Western, liberal democracies' disfavored and disempowered citizens live. These critics attempt to expose one of the most cherished liberal political and legal ideals – the rule of law - as one instrument of this oppression, an instrument which is seen as shutting out the less privileged from the legal and therefore the political process under the guise of neutrality. CLS argues that a truly just, normative political philosophy must more honestly address the oppressive effects brought about by liberal claims of legal neutrality in order to more fairly serve the political needs of the less privileged.

This thesis seeks to identify and analyze one important disagreement between traditional liberals and CLS, viz., the disagreement over whether, and to what extent, a liberal state should tolerate intolerant speech. Tolerance is a certain value of liberalism, but the value is of course abstract and difficult to define in specific cases. Reasonable people disagree over what it means to be a tolerant society and how tolerance is best achieved by government. In the American liberal tradition, modern speech doctrines articulate a specific vision of tolerance that has come to play a significant role in American life, especially since the early twentieth century. This unique vision of tolerant speech law, this thesis will argue, has helped to revitalize classical notions of liberty within American society. The institution of free speech, some liberals have argued, has helped Americans internalize the value of tolerance, thus helping society to reflect a more consistent vision of liberal political morality. American speech doctrines, they insist, offer a compelling statement of tolerance that has a direct impact on other areas of social
life. Thus, free speech has come to mean more in American life than simply the licensing of the individual to freely speak his or her own mind, though that is certainly part of its appeal. American speech doctrine’s vision of tolerance on this modern view has, in particular, helped to create a social atmosphere in which trends of intolerance, such as racism, sexism, and other forms of bigotry, can be openly checked and confined, thus providing a zone of positive liberty, while preserving the individual license of negative liberty.

By contrast, some American legal scholars identified with Critical Race Theory [CRT], who share CLS’s principal deconstructive arguments, mount serious challenges to American speech doctrines, offering an alternative vision of what tolerance means and how it should be reflected in the law. While utilizing CLS’s general criticisms of liberal theory, CRT makes more specific, race conscious, criticisms of American speech law, often in preparation for proposals to regulate hate speech. This thesis seeks to defend American speech doctrines by arguing the negative consequences of any regime of hate speech regulations. In doing so, the analysis offered here seeks to show that contemporary American speech doctrines have actually helped American society to more fully realize an inclusive vision of its liberal political ideals by exhibiting an extraordinary level of tolerance in this one domain of human activity supporting both negative and positive aspects of liberty.

This thesis is not intended to provide an exhaustive account of either liberalism or CLS, but is intended to present a framework in which to explore the theoretical appeal and practical value of liberal political and legal philosophy in general, and American speech doctrine in particular, in light of some serious criticisms. The initial analysis in
this thesis of some key differences between liberals and CLS, seeks to establish the general political and legal perspectives of these two related traditions, in preparation for considering two conflicting visions of the tolerance of intolerant speech in American speech doctrine. Dean Lee Bollinger, in *The Tolerant Society*, and Professor Mary J. Matsuda, in *Public Response to Racist Speech: Considering the Victim's Story*, provide these two conflicting visions of what it means to be tolerant and how to achieve the goal of tolerance through speech doctrine.¹ The disagreement between Bollinger's and Matsuda's visions of speech tolerance reflects the general disagreements between legal liberals and CLS. They disagree over whether or not liberal speech doctrines are capable of protecting the politically weak. The analysis here will defend the liberal position presented by Bollinger and point out the deficiencies of the CRT position presented by Matsuda. In sum, this thesis seeks to demonstrate that American political and legal doctrines have been revitalized through the principle of general tolerance. I will argue, in short, that this current balance of liberal values reflected in American speech doctrines does a better job of protecting people from each other and the state than the alternative vision of CRT.

**II. A Generic Vision of Liberalism**

As a normative political philosophy, liberal theory is primarily concerned with analyzing the values that determine the relationships between autonomous individuals, social factions, and the state in order to develop general rules by which people of different beliefs and cultures can live together peacefully. Liberal theory often envisions

a state with limited, enumerated powers, administered by separate co-equal government institutions that are bound by the rule of law as the best way to manage conflicting individual interests while securing a modern vision of liberty for a pluralist society. By reflecting these political ideals in their institutions, liberal states are able regulate individual, social, and governmental relationships with the limited exercise of coercive state power, and are thus usually able to manage social controversy by peaceful, political means. Pluralist societies bound by a vision of liberty, liberals believe, will be prudent in the exercise of state power and will thus protect the prerogatives, and outline the obligations, fundamental to each citizen’s pursuit of the good-life from one generation to the next.

For liberals, then, facilitating each individual’s pursuit of the good-life requires more from a state than rigidly maintaining any present conception of the good. Indeed, any liberal definition of the good-life must allow for change. In Liberalism, Community and Culture, Will Kymlicka describes the pursuit of the good-life as more than freedom to lead the life now believed to be good and indicates that it is important to liberals that individuals retain the option to decide when current pursuits are not good.\textsuperscript{2} Kymlicka asserts that the essence of the good-life is in the freedom of each individual to change his or her own mind about what life to lead.\textsuperscript{3} Accepting the possibility of mistakes and conversions makes a big difference in how people deliberate on the scope of liberty and the limits of government power.


\textsuperscript{3} Ibid.
For Kymlicka, deliberations on the good-life are more than utilitarian determinations on how to maximize the current ends of an individual. The good-life is more abstract and is not necessarily the life an individual now leads, or is able to currently identify as good. For instance, someone may become a successful lawyer and then decide that reading philosophy is more valuable. The chance that an individual becomes a great lawyer is not justification in itself for becoming a lawyer. The chance of failure, however, is a good reason for avoiding that field altogether. For liberals, state and social determinations on the value of the lives of lawyers and philosophers should not impede the decision of the individual to pursue either goal. A person can only lead the good-life according to his or her own beliefs and values, and although liberals assume that anyone may be wrong about beliefs or values, it does not follow that society, or its institutions, can lead an individual’s life by requiring certain beliefs. Human decisions are often temporary, or just flawed, and liberal institutions are seen as protecting each individual’s liberties of conscience against intolerant social tendencies that sometimes endeavor to quiet dissent, or eradicate perceived human error, through the use of state power.

Kymlicka’s explanation of the role of the good-life in liberal theory suggests that this aspect of the self, the self-conscience, should be protected by a liberal government through a civil liberty that licenses certain individual actions and a civil right that should not be infringed upon by others actions. For liberals, then, the political commitment to protecting freedoms of conscience does not simply liberate the individual from external constraints. It also binds each individual to certain shared political values, like equal

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4 Ibid. 11.
5 Ibid.
liberty of conscience. Liberals assume that a plurality of individuals attempting to protect their own liberty will cooperate politically to ensure equal liberty for each other from one generation to the next. Liberals in a pluralist society believe that shared liberty is more conducive to social cooperation and individual flourishing than shared ideology. Liberty and equality are not mutually exclusive values, and liberals believe that these values can be reconciled within an atmosphere that liberates individuals from social conventions while binding them together politically.

To balance the liberties and duties of diverse individuals pursuing their own personal interests, liberal theory articulates social rules to address the fundamental dilemma faced by modern, pluralist states. Every citizen has individual interests while remaining dependent on others for cooperation. This social dilemma can cause tension between individuals. Liberals believe pluralist societies require a workable, though “thin,” notion of political morality as the basis of a constitutional government in order to fairly mediate amongst the various, independent “thick” notions of the good-life that individuals express. Different individuals often have conflicting, sometimes incommensurable, ideologies and life-plans within a pluralist setting. Thus, liberal theory mediates the social tensions of pluralism by developing a set of rules that focus on the merely political values while bracketing other more comprehensive and controversial value systems that reflect personal beliefs and life-style choices.

To respect these political aims, John Rawls argues, in his essay *The Idea of An Overlapping Consensus*, that a thin set of shared values must not rest on a convergence of self-or group-interests, the fortunate outcome of political bargaining, or a general comprehensive religion or philosophy, but must instead rely on an overlapping consensus
of reasonable political conceptions of liberty and justice.\textsuperscript{6} Through this idea of overlapping consensus, Rawls describes generally how it is conceptually possible to fairly manage relationships between individuals with different thick notions of the good. Essentially, the ideal of an overlapping consensus asks what is the least that can be asserted politically by a reasonable plurality with the least philosophical controversy. This agreement is thus not entirely contingent on a particular historical event such as a Constitutional Congress. The agreement instead relies on the general historical and cultural recognition that no arrangement, other than one based on liberal political morality, makes sense.\textsuperscript{7}

The fact of pluralism and the goal of achieving this overlapping consensus thus subordinate, for political purposes, all comprehensive ideologies to a very limited liberal political morality, which protects certain liberties of conscience and other basic civil rights like political equality.\textsuperscript{8} A liberal political consensus, however, need not be indifferent to, or skeptical of, comprehensive ideologies. All comprehensive ideologies that accept liberal political principles are equally acceptable. The principle of an overlapping consensus seeks to reduce political reliance on the details of these ideological controversies as much as possible. For example, the political morality of equal liberty of conscience removes religious truths from the political agenda, and equal political and civil rights also removes serfdom and slavery from the agenda. The precise contours of equality, liberty, and justice remain open for political debate while other controversies remain closed, outside the political process – bracketed, so to speak.

\textsuperscript{7} Ibid. 6.
\textsuperscript{8} Ibid.
An overlapping consensus is not dependent on the distribution of wealth or power, Rawls explains, but is accepted by individuals and groups within society for its own sake.\(^9\) When a consensus is seen as fair and equitable to all parties, regardless of position, then those who agree to the thin political morality will not withdraw support should the relative strength or weakness of their position change in relation to the rest of society. In this sense, Rawls rejects the conception of a liberal state as a mere *modus vivendi*, an unsteady treaty between potentially hostile entities, such as is found in Hobbes’ *Leviathan*.\(^{10}\) Reasonableness, a sense of fairness, and a respect for others, Rawls argues, leads to a social consensus able to identify and resolve the most urgent political issues and maintain cooperation and general tolerance over time.\(^{11}\) Consensus on this thin notion of the good, liberals like Rawls believe, can establish a basis for the constitutional essentials of a pluralist society, and thus politically balance the civil liberties and civil rights crucial to the long-term social stability of a liberal, democratic state.\(^{12}\)

To be effective and just, liberals like Rawls insist, state institutions must, amongst other things, respect the rule of law as an embodiment of this tacit social agreement. A liberal version of the rule of law, in turn, must respect two significant principles: fair notice and legal accountability.\(^{iii}\) The principle of fair notice requires the state to enumerate the rights of citizens, clearly defining the domains of human activity susceptible to government regulation. Fair notice, then, allows people to order their lives with the knowledge of government requirements and prohibitions without the fear of ex

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\(^9\) Ibid. 10.
\(^{10}\) Ibid. 10-17.
\(^{11}\) Ibid.
\(^{12}\) Ibid. 5.
post facto reprisals.\textsuperscript{13} The principle of legal accountability requires that any discharge of
government power be based in a preexisting, legally authoritative norm – a constitution
or a statute\textsuperscript{14} – so that those responsible for the discharge of government power remain
accountable to the system they represent, and not their own individual notions of right
and wrong. The state’s implementation and maintenance of authoritative norms also
requires ideologically neutral and non-controversial methods of reasoning accessible to
the public.

Thus, Rawls argues that an agreement over a thin conception of political justice is
of no effect without a companion agreement on the guidelines of public inquiry and the
rules for assessing evidence.\textsuperscript{14} An agreement over the acceptable content of public
reason is necessary for an informed public, and is also important so as to not reintroduce
controversial issues bracketed by the consensus. The fact of pluralism, Rawls argues,
demands that guidelines and rules be accessible to common sense forms of reasoning, and
by procedures and conclusions of science when uncontroversial.\textsuperscript{15} The esoteric claims
and customs of religion or philosophy are not excluded from the public domain out of
skepticism or indifference, but these claims remain bracketed and beyond the scope of the
institution of public reason.\textsuperscript{16} For instance, the evidence used in criminal trials and
congressional investigations should be based on the shared procedures of science rather
than scripture or superstition.

Additionally, arguments justifying political and legal judgments should not only
be scientifically sound, but should be seen by the public as sound. Laws must not be

\textsuperscript{13} Andrew Altman, Critical Legal Studies: A Liberal Critique, (Princeton: Princeton University Press, 1990;
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
written in dead languages nor may political party platforms remain secretive and known only to members. Rawls cites the maxim that justice must not only be done, but must be seen to be done by the public. Agreement over public reason encourages legal and political institutions to justify the reasoning of their arguments to an informed public who will in turn have a certain amount of influence in the political arena of a free state. This standard of public reason allows citizens to understand and influence the workings of government, and insures social allegiance to a reasonable, transparent state.

Society then agrees to comply with the law and operate within the consensus system, and the state agrees to observe four forms of neutrality that justify the limited exercise of state power over the lives of citizens: rights neutrality, epistemological neutrality, political neutrality, and legal neutrality. These four forms of liberal neutrality authorize government coercion within certain narrow domains of human activity, but not others. Liberal neutrality affirms the necessity of a limited set of enforceable legal obligations within a well-ordered-society. Liberalism, thus, politically licenses government coercion to maintain order and security while tolerating various individual value judgments that do not threaten this order and security. Liberal theory requires, for example, government restraint and toleration in areas of social discourse such as political speech while restricting some conspiratorial speech that would directly undermine the state.

To further limit the power of government institutions and maintain the four forms of neutrality, liberal theory often requires an intra-government relationship of checks and balances. For example, in the U.S. system, liberal theory is manifest in the manner to
which lines are drawn between the executive, judicial, and legislative branches of government. The political process is intended to provide a settlement over disputed social matters that grow from the competing social groups’ normative visions, and the legal process simply interprets and applies the settlement even handedly to individual cases while guaranteeing that the fundamental liberal compromise is secure. Judges interpret the law in reference to specific cases brought before the court. The judiciary does not seek out problems to solve, but, instead, enforces the dictates of the social compromise in response to specific litigants in specific cases. In doing so, the judiciary clarifies the enforceable limits of the law through interpretation and application, but is discouraged from expanding or restricting those legal limits for extra-legal political purposes.

Maintaining the principle of legal neutrality is thus important to a pluralist society bound primarily by a thin political morality. The liberal doctrine of “legal formalism” explains how judicial independence is possible within the contentious political world of a liberal state. Traditional legal formalism claims legal rules form a consistent and complete whole from which the answer to legal questions can be determined by discovering the applicable rule or standard and applying it to the facts of a particular case.18 Liberal theory therefore asserts that a cognizable difference exists between legal and political decisions, and this doctrine of formalism describes how judicial decisions can be effectively insulated from the political process. Liberals who cite legal formalism cannot claim, however, that the structure of legal doctrine is specified with complete exactness. Judges often disagree over the principles that constitute various departments of doctrine — evidenced through dissenting opinions, reversals of lower courts, and the
like—however, disagreement takes place within the context of substantial agreement.  
This substantial agreement over most areas of the law, according to the doctrine of legal 
formalism, provides sufficient guidance to allow judges to develop and maintain a 
relatively consistent body of law that is insulated from the political process by various 
judicial requirements and restraints. vi

All of these formal elements of liberal theory's rule of law are intended to balance 
relationships and limit power. Individuals, groups, and institutions are all bound by 
similar limiting legal principles, binding society with a thin conception of political life. 
Other attempts to bind large, cosmopolitan societies with a comprehensive or thick vision 
of political life have failed and will likely fail in the future.  
Binding large, pluralist 
societies with a general comprehensive conception of life can only be maintained with 
the unfettered exercise of state power, and this strategy is inherently oppressive and 
unstable. Liberal theory thus offers a more flexible template of organization that loosely 
binds society with a thin vision of political life based on consensus and, more recently, 
general tolerance.

A number of problems arise, however, if liberalism's general, theoretical model is 
taken to reflect the daily realities of modern liberal political and legal institutions.  
Most modern liberal political and legal institutions routinely violate the conditions of this 
thoretical model. For example, laws and statutes are often written in vague, open-ended 
language that sometimes encourages authoritative interpretations to take advantage of

18 Altman, Critical Legal Studies: A Liberal Critique, 79.
19 Ibid. 182.
21 Altman, Critical Legal Studies: A Liberal Critique, 27.
controversial conceptions of justice, apparently violating the law/politics distinction.\textsuperscript{22} The courts sometimes independently restructure legal doctrines in areas like tort and contract law based on controversial legal principles, again, apparently violating the doctrine of legal formalism.\textsuperscript{23} The extensive discretion of administrative and regulatory agencies in carrying out these vague, sometimes conflicting, legislative and legal mandates has the effect that these agencies enact rules with the force of law and adjudicate disputes that arise from the application of these rules, apparently violating such fundamental liberal political values such as the principle of due process, legal accountability, and fair notice.\textsuperscript{24}

III. Critical Legal Studies General Criticisms of Liberalism

The Critical Legal Studies movement contends that these and other routine violations of liberalism's generic model render the theory conceptually incoherent, or at least seriously undermine liberalism's claim of the ability, as a normative political philosophy, to effectively protect people from each other and the government. These critics often accuse legal liberals of being unrealistic, and even dishonest, in their assessments of the rule of law. Through the development and interpretation of the law, CLS argues, the social and economic elites of liberal states, like the United States, dominate the political and therefore the legal processes in pursuit of their own, narrow class interests.\textsuperscript{25} Many CLS scholars attempt to establish that liberal law and its ideals are not universal proclamations with broad social benefits, and, instead, argue that liberal

\textsuperscript{22} Ibid. 28.
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid. 7-9.
laws often operate as protectionist, exclusionary doctrines that feign generality, neutrality, and tolerance. CLS thus challenges liberalism's most basic claims of government neutrality in the development and application of the law, and further contends that even if liberal law functioned according to the stipulations of liberal theory, then, still, liberal law is ill-suited to satisfy the demands of liberal political morality in the context of pluralism. CLS provides this alternative analysis of liberal legal theory and pluralism, often in preparation for arguments that call for legal reform. And, although the legal prescriptions vary greatly from scholar to scholar, making generalizations difficult, some thematic generalizations concerning the main CLS criticisms of liberalism's conception of the rule of law are a useful introduction into the generally deconstructive goals of the movement.

According to Andrew Altman in his book *Critical Legal Studies: A Liberal Critique*, CLS offers three main criticisms of liberal legal theory. CLS attacks, initially, the reasoning behind the liberal conception of the rule of law, insisting that the synthesis of liberalism, the rule of law, and pluralism makes the goal of neutrality impossible.\(^\text{26}\) Second, CLS criticizes the rules and doctrines that comprise the laws of countries like the United States, and insist that any body of well developed liberal law will be so riddled with inconsistencies and indeterminacies that it provides those who interpret and apply the law with the means to justify alternative legal decisions, undermining the liberal promise of a determinate legal outcome within a neutral system.\(^\text{27}\) The third attack condemns the social reality created by the liberal conception of the rule of law as inherently oppressive, insisting that liberal states create a legal, and therefore a political,

\(^\text{26}\) Ibid. 13.
\(^\text{27}\) Ibid. 14.
atmosphere which disempowers individuals from accomplishing political changes through the legal system.\textsuperscript{28}

According to Altman, the CLS movement can be divided into two wings that fundamentally disagree over the deconstructive goals of the movement.\textsuperscript{29} In its most radical form, CLS contends that the liberal vision of the rule of law is a “myth,” that has no resemblance to the actual operations of liberal legal systems.\textsuperscript{30} These radical deconstructive arguments deny that any social institution, including the law, can have an objective structure that determines human behavior.\textsuperscript{31} By contrast, the more moderate strand of CLS seeks to show that official decisions within any liberal system are inescapably and inevitably going to reflect the moral and political beliefs of those in power, especially at the margins, effectively disempowering the politically weak.\textsuperscript{32} Moderate CLS thus holds that liberal law does indeed have a structure with imbedded meaning, but this structure is often the function of certain controversial and limited ethical perspectives that truncate the political and legal choices of the politically weak.\textsuperscript{33} The analysis in thesis will focus on the more moderate CLS arguments.

\textbf{A. First Criticism}

CLS’s first main criticism of liberal theory - in essence, the impossibility of combining the theoretical components of liberalism, the rule of law, and pluralism in a neutral governmental system - is itself composed of three connected, though distinct,
deconstructive arguments. The first of these criticisms claims that within a context of cultural, religious, and ethnic pluralism no neutral process can exist for enacting liberal legal rules in the legislative arena. According to this view, those with public power inevitably develop legal rules and doctrines in accordance with their own personal interests, thereby infusing the normative structure of the law with the subjective values of those in power, undercutting liberal neutrality in the creation of the law.

The second strand of this first argument contends that even if laws could be developed in an atmosphere of moral and philosophical neutrality, then, still, the interpretations of those laws, by the judiciary, would inevitably share the extra-legal - moral or political - perspectives of judges. According to this claim, the custodians of judicial authority within a liberal state will inevitably impose their perspective in the interpretation of the law under the auspices of legal neutrality. Within a context of moral and political pluralism, CLS claims, liberal assertions about the independence of legal reasoning from the political and ethical choices of those in power are simply unrealistic and therefore untrue. All law is political, and cannot be otherwise. Although most moderate CLS advocates dismiss the more radical charge that liberal laws are devoid of all determinate meaning, which would render all legal interpretations as arbitrary, many of these same advocates claim that it is impossible to rid legal interpretations, especially at the margins, of the moral and political concerns and perspectives of judges.

34 Ibid. 13.
36 Ibid. 13.
37 Ibid. 14.
One specific variant of these two connected moderate criticisms cited by Altman is drawn from CLS author Robert Unger’s influential works *Knowledge and Politics* and *Law in Modern Society*, which claim that liberal legal theory is unable to provide a consistent account of the connection between legal rules and individual values. If values are subjective, the argument claims, then “values based” rules have no objective meaning beyond the choices of individuals in power. Altman points to two consequences of this “subjectivity of values” claim that Unger attributes to liberalism: the antinomy of legislation and the antimony of rules and values. The first of Unger’s antimonies, according to Altman, concerns the process by which legal rules are enacted, and insists that no process can satisfy the demands of liberal political morality for neutral legislation. The second antimony concerns the process by which legal rules are interpreted, and insists that no process can satisfy the demands of liberal political morality for neutral legal interpretation. Both antinomies reveal that liberal states are incapable of bracketing thick notions of the good because legislators and judges who develop and interpret the law, knowingly or unknowingly, smuggle subjective value judgments into the law, and this state of affairs contradicts liberalism’s promise of political and legal neutrality.

Due to these antinomies, according to Unger’s arguments, no neutral structure can exist to fairly guide the legislative and judicial processes. The subjective value judgments of legislators and judges, who are predominantly lawyers, are embedded in the law. The lawyer/layman distinction shuts the public out of the legislative and judicial

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38 Ibid. 59.
39 Ibid.
40 Ibid.
41 Ibid.
systems with esoteric legal language and the arcane procedures endemic to both liberal institutions. Furthermore, Unger and other CLS critics argue that legislators and judges share similar educational and socio-economic backgrounds, which makes the law only seem as though it has a neutral structure, when, in reality, the law is simply a collection of similar, shared subjective value judgments generated by one class of citizens and then applied to others who have little or no influence.43

The subjectivity of values argument, according to Altman, raises two crucial problems for liberal theory: first, how can order be established and maintained without a neutral set of values to standardize legislative and legal rules, and second, how can the establishment and maintenance of social order, based on a systematic pattern of subjective value judgments, avoid unjustifiably subjugating the rest of society to the values of those in power.44 Liberal legal theory is committed to solving these two problems of order and freedom in a pluralist setting. However, the subjectivity of values indicated by the antimony of legislation and the antinomy of rules and values, Unger believes, undercuts liberalism’s claims of political and legal neutrality, and, thus, undercuts liberalism’s solution to the problems of order and freedom in the context of pluralism.45

Altman suggests, for instance, that proponents of laissez-faire economics and defenders of the welfare state seldom agree on principles of justice because they have different value systems. Similarly, abortion advocates and opponents can never be reconciled through either state action or inaction. One side will always feel as though

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42 Ibid.
43 Ibid.
44 Ibid. 60.
45 Ibid. 61.
their values are unrepresented by the official position on these controversies. Custom and class-based consensus, CLS critics charge, are the basis for liberal institutions rather than any neutral set of rules that could satisfy everyone’s understandings of right and wrong. Some subjective value judgments of the ruling class would have broad support in most pluralist settings, like prohibitions against theft and murder, but other more controversial value judgments on important issues like welfare and abortion will be settled by those who make and interpret the law, most of whom are biased toward specific value judgments, rather than being settled by society at large. The fact of pluralism combined with these kinds of antimonies makes the application of rule of law unavoidably biased. Additionally, Unger claims that the liberal rule of law is in fact a theoretically incoherent concept because the diverse, subjective value judgments of a given population could never realistically reach consensus on what rules should guide political life. This incoherence, according to Unger, destabilizes social order and undermines the notion of freedom defended by Rawls’ understanding of the overlapping consensus, for example.

The third strand of this first CLS criticism adds that the liberal attempt to distinguish between law and politics in a pluralist setting undermines the neutrality principle, or the four forms of neutrality, by endorsing a particular conception of the good life over other competing conceptions. In this view, the maintenance of the neutrality principle is a form of normative protectionism that allows certain moral and political belief systems to maintain hegemony over others, capitalism over other less productive economic systems, for example. This liberal bias, according to the CLS view, places certain normative conceptions of how society should be ordered above others from the

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46 Ibid. 72.
47 Ibid.
beginning and maintains this normative partiality at the expense of real neutrality. Liberal law cannot provide a neutral process for the development and maintenance of the law, and, thus, breaks down beneath the weight of its own claim to neutrality.

All of these related criticisms deny that liberal legal theory can provide any clear distinction between thick and thin conceptions of the good for those who create and those who interpret law. Additionally, these three arguments charge that even if those distinctions do hold, the mere imposition of a legal system is an exercise of political power that discriminates against other possible conceptions of social regulation - concepts that would abolish all law, for instance - making any legal system incompatible with neutrality. Thus, liberalism requires neutrality for the development and interpretation of laws and legal doctrines, and CLS denies that the liberal rule of law can achieve this neutrality. Some individuals and groups possess an inordinate amount of power within any pluralist society. Those individuals concretize power in the law and maintain a social hierarchy reinforced through the legal system. Liberalism masks its inherently oppressive nature, according to these moderate CLS arguments, by claiming distinctions and principles that are, in fact, misleading.

CLS is correct that absolute government neutrality on every issue is impossible. However, liberalism never claims this level of neutrality in theory or practice. Liberal theory unapologetically embraces the idea that modern nation states, faced with pluralism, must rely on a single set of legal rules to deal with society's members in a fair manner. Thus, the establishment and maintenance of any legal system will be a political act lacking absolute neutrality in the sense that it repudiates the idea that law should not regulate society. The standards by which liberal states are structured are liberal
standards, showing a deliberate liberal bias. By design, liberal neutrality protects certain values from conceptions of political life that deny these values.

Liberalism rejects the notion that there is only one way to live while accepting the notion that persons holding a plurality of views can live by a single set of shared legal rules that are fair. Liberalism does not search for some type of "libertine" neutrality that disregards individual responsibilities. Liberals, instead, believe that some things are bad and unjust, murder for example, and further believe that some things are good and just, religious tolerance for example. Liberals believe that a state can legitimately promote religious tolerance while forbidding human sacrifice and still remain neutral toward religious pursuits that are reasonable. The overlapping consensus removes some conceptions of political life from serious debate because some conceptions of political life are inconsistent with the political ideals of liberal theory and the cultural values of a particular society.

Liberalism is not necessarily committed to the doctrine of total moral subjectivity. Many liberals believe that a thin notion of political morality can be developed that places normative constraints on individual choices.48 If by "objective values" CLS critics such as Unger mean a ‘thing’ independent of the historical human condition, then Altman admits that none exists.49 Liberal legal theory only demands that the law have some kind of normative structure embodied in legal rules, which are independent of the way any particular individual conceives them through their own subjective value system.50 Liberalism takes seriously the disagreement and controversies that arise out of this less

48 Ibid. 71.
49 Ibid.
50 Ibid. 81.
than perfect situation.\textsuperscript{51} Modern liberals like Altman and Rawls admit that legal and political institutions do not embody objective ‘truth,’ but insist, rather, that liberal institutions embody a workable and defensible, historically contingent, compromise to which people with different values can agree, despite their own truths independently defined.\textsuperscript{52}

For example, Marxism has been politically unsuccessful in the United States because the liberal tradition allowed for social and economic reform by peaceful, constitutional means.\textsuperscript{53} The abuses and injustice of nineteenth and early twentieth century American capitalism forced a political compromise with Marxist economics without the need for a violent political revolution. Neither laissez-faire capitalists nor Marxists will be completely satisfied with the political outcome of this compromise, just as many pro- and anti-abortion forces are dissatisfied with \textit{Roe v. Wade} and the exceptions that followed this case. It should be clear, however, that the American liberal tradition is capable of dealing with controversial economic and moral issues.

Admittedly, even when the system generally works well, legal convention can break-down at the margins, but even in these situations, Altman points out, legal reasoning must cohere at least substantially with settled law in a way not required of political reasoning.\textsuperscript{54} Legal formalism requires legal reasoning to operate under a “fit” requirement. In most cases, when judicial convention is strong, formalism requires a “maximum fit” with settled law.\textsuperscript{55} In some cases, when judicial convention breaks down

\textsuperscript{51} Ibid. 71.
\textsuperscript{52} Ibid. 72.
\textsuperscript{54} Altman, Critical Legal Studies: A Liberal Critique, 185.
\textsuperscript{55} Ibid. 186.
at the margins, formalism still requires a "substantial fit" with settled law. Political reasoning, on the other hand, is unconstrained by these "fit" requirements, and is free to raise or defend principles outside the bounds of legal reasoning. Thus, according to legal liberals like Altman, even at the margins where the law is less determinate, legal reasoning can be differentiated from political reasoning by this formalist requirement, and this difference in reasoning is all that liberalism claims or requires.

Altman would not assert that it is possible in practice to insulate the legal process entirely from judgments about the relative value of views that compete in the political arena. Liberals concede that the principle of legal neutrality has an imperfect correspondence with practice, and further concede that any system of rules is incapable of promoting and protecting the public and private interests without some interpretation. But, in general, most liberals make two claims concerning the infiltration of politics into the legal process. First, this infiltration is regrettable, but it is an inevitable consequence of the imperfection of the human condition. Second, infiltration can be kept to a minimum by a process that works, for the most part, without reference to such judgments. Thus, although self-conscious of the role of perspective, the liberal theory of judicial responsibility claims to minimize, not eliminate, reliance on any ideology that goes beyond the scope of legal formalism.

Perspective is of course important, and many judges do in fact come from similar socio-economic backgrounds and have similar educations as CLS charges, but this reality does not in principle bar any individual or group from the specialized trade of jurisprudence. Minorities, women, and many other people from poor and working-class

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56 Ibid.
57 Ibid.
backgrounds have entered the legal profession, impacting the structure of legal doctrine with their perspectives, evidenced with the emergence of feminist legal scholarship and critical race theory. Many within the CLS movement are lawyers who come from similar socio-economic backgrounds and share similar educations. If CLS doubts the grass-roots support for elected or appointed judges’ value systems, then surely liberals must doubt the grass-roots support for values claimed by CLS. All people have perspective, and it is unsurprising that elected and appointed judges make judgments reflecting their perspectives, which are sometimes controversial, but Americans hope and expect that judges will try to carry out a liberal agenda when interpreting and applying the law despite specific moral and political predispositions. The principle of legal neutrality does not exist solely within the character of a specific judge, although it should reside there also, but exists primarily within the objective structure of the American legal system that is checked and balanced by other private and public institutions intrinsic to liberalism and American tradition.

B. Second Criticism

The second main criticism of liberalism by CLS claims that liberal laws and doctrines are littered with contradictions and indeterminacies. One variant of this argument contends that liberal states have developed a patchwork of legal doctrines that allows reasoning to justify contradictory legal decisions. This so-called “patchwork thesis” regarding liberal law is a combination of two claims. According to Altman, CLS first claims that “it is impossible to rationally reconstruct a body of liberal legal doctrine

58 Ibid. 27.
by deriving its norms from a complete, consistent set of underlying principles." 59 And, second, CLS claims that "the reason for this impossibility is that to reconstruct certain elements of the doctrine will require principles from a certain ethical viewpoint, while reconstructing other elements will require contradictory principles from an incompatible ethical viewpoint." 60

CLS asserts that the implications of the patchwork thesis challenge liberal theory because different judges choosing different underlying principles in similar legal contexts undermine the possibility of a determinate legal outcome. Furthermore, if this criticism is true, then liberal legal systems allow judges the leeway within their decisions to express, consciously or not, their personal moral and political ideals, weakening legal neutrality. 61 In such a situation, the argument claims, the law lacks any cogent basis to neutrally guide judicial decisions, essentially forcing legal reasoning to draw upon extra-legal concerns to fill the structural void. A legal system with such indeterminacy would, in other words, enable lawyers to represent either side of a legal case with equally convincing, yet contradictory arguments.

The claims of the patchwork thesis, however, are not necessarily inconsistent with liberal theory. While liberal legal theory does claim that the law is conceptually derived from a single, coherent ethical viewpoint contained in an overlapping consensus, it admits of some indeterminacy at the margins. Supposing that different principles do in fact undergird different sections of legal doctrine at the margins, Altman uses the examples of individualism and altruism, it cannot be shown that the acceptance of one

59 Ibid. 117.
60 Ibid.
61 Ibid. 15.
principle logically requires the rejection of the other.\textsuperscript{62} Liberal law is intended to confront the dichotomies and contradictions of pluralist social life, and seeks to balance such ethical dilemmas such as tolerance/intolerance, liberty/equality, and individualism/altruism through the rules and standards of law.\textsuperscript{63} Thus, the rational application of liberal law may indeed require the introduction of coordinating principles at the margins, but it is a mistake for CLS to assume these principles contradictory in more circumstances than they are complementary.

Although liberal law is admittedly indeterminate in some instances, it is an exaggeration to assume that judges are free to pick whatever principle they please when deciding most cases. It cannot be shown that equally forceful legal arguments can be given on both sides in most legal cases.\textsuperscript{64} Generally, one side of a legal argument has a greater logical fit with the law. The appropriate legal argument for a judge in most cases would be the one that fits best with the decisions and norms of the settled law, and not simply the one that the judge prefers for political reasons. However, in other instances, at the margins where the law is less determinate, a judge has more discretion, but not complete discretion. Even if the patchwork thesis is partially true, then the law might be seen as subtly indeterminate at the margins, yet still largely determinant at the core.

Liberals have shown how modern liberal states are able to conform to liberal notions of the rule of law by making room in liberal theory for more indeterminacy than any strict formalism would seem to allow.\textsuperscript{65} Liberals thus contend that liberal theory is generally able to fulfill many political and legal promises to citizens despite operational

\textsuperscript{62} Ibid. 122-123.
\textsuperscript{63} Ibid.
\textsuperscript{64} Ibid. 119.
\textsuperscript{65} Ibid. 29.
imperfections. Liberals concede that, because of the nature of human language, any normative political philosophy must necessarily allow areas of indeterminacy.\textsuperscript{66}

Although the level of legal indeterminacy within any contemporary liberal system of law is significant, liberals contend that indeterminacies are peripheral to the overall structure of the law in most instances.\textsuperscript{67} Some level of indeterminacy and discretion is desirable in practice, liberals believe, because it gives institutions the flexibility needed to deal with social controversy, in the short-term, without destroying core principle of liberty in the long-term. Liberals thus argue that it is a mistake for CLS to expect strict compliance in practice to any formalist model.\textsuperscript{68}

C. Final Criticism

CLS's final criticism is connected in important ways to the first two criticisms of the liberal conception of the rule of law.\textsuperscript{69} Dealing primarily with the nature of social reality, this criticism insists that any claim to a neutral, liberal legal system serves as a "red herring" that allows those with power to retain power and impose their political and moral views on the rest of society, perpetuating relatively fixed relations of power beneath the cover of an illusionary liberal neutrality. CLS claims that it is impossible to satisfy the requirements of the rule of law and the demands of liberal political morality. The belief in the liberal rule of law itself, according to CLS, maintains oppressive power structures that bar disempowered groups from attaining their rightful share of power,

\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid. 149.
thereby stifling immediate political and social change for those who want change. Legal institutions stifle the context-transcending capacity of humans by regarding the terms of life and the context within which it unfolds as part of the natural order, and by embedding this general sense of normalcy into the law, liberalism denies the truly marginalized the opportunity to see the possibility of social change through the law.\(^7^0\)

Contrary to liberal assertions, the rules that make up the law, according to CLS, have no independent authority over individual’s lives, but the law is used as an instrument by those in power to manipulate others into behaving in a certain way.\(^7^1\) The law is simply a tool of the subjective value judgments of those in power. Altman refers to this view as the “instrumentalist view” of social rules.\(^7^2\) With this instrumentalist view, CLS charges that if the law is a tool of manipulation, then liberal legal theory’s insistence that legal rules can protect individuals from each other and the state, in reality, helps to hide the dominant position of those in power and the subordinate position of those without power.\(^7^3\) Thus, CLS critics argue, for example, that the principle of *stare decisis* allows judges to manipulate precedent to legally rationalize decisions reached for other, extra-legal reasons.\(^vii\)

CLS thus adopts a position it calls “rule skepticism.” The moderate CLS position on rule skepticism claims that officials often do not behave in ways called for by legal rules, because, knowingly or unknowingly, those in power use these rules to maintain their particular vision of political life while quashing the political visions of those without

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\(^7^0\) Ibid. 172.
\(^7^1\) Ibid. 151.
\(^7^2\) Ibid.
\(^7^3\) Ibid. 152.
Rules do not explain social behavior, according to CLS, but instead explain how the dominant control the subordinate.

Legal rules thus provide society with the distinctive political vision of those in power, and this truncated political vision stifles political action by those out of power. The law, according to CLS, allows officials to discourage, check, and confine efforts at political action that would equalize power and privilege in society. The law and legal officials hide the political stakes from the public with legal rules, and effectively shut most of society out of the legal process. The idea of an independent judiciary is thus a fraud, in the CLS view, that places undue restraints on the political activity of those individuals and groups who are underrepresented in liberal legal institutions. The relevant population responsible for determining legal doctrine, according to CLS, is small, and occupied by individuals who share similar socio-economic backgrounds, and these individuals in power are likely to share similar subjective values.

These criticisms address two issues: first, whether or not legal decisions can be kept separate from political decisions, and second, whether or not politics is unfairly tilted against certain normative political visions, such as egalitarian visions. Altman contends that even if it is conceded that liberalism is biased against political visions such as egalitarianism, it still does not follow that the law/politics distinction is invalid. Altman claims that as long as judges make no fresh normative assessments when deciding a case, then the law/politics distinction remains valid.

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74 Ibid. 154.
75 Ibid. 171.
76 Ibid. 172.
77 Ibid. 184.
78 Ibid.
79 Ibid.
who accepts legal convention within his or her reasoning about a particular case can thus avoid making any fresh assessments of the merits of the conventions and values that underlie these legal conventions, maintaining the law/politics distinction. Altman argues that the “fit” requirements of legal reasoning ensure that decisions are based on the logical fit with settled law, rather than being based on grounds of the moral or political soundness of the law. Altman concedes that political judgments sometimes infiltrate into legal decisions, and also concedes that liberal legal theory is biased against some political visions such as egalitarianism, but insists that the law/politics distinction holds despite these realities.

While providing a sobering account of structural indeterminacies and operational imperfections within any liberal system, CLS fails to convincingly show that liberalism is theoretically incoherent. Liberal theory is able to maintain neutrality, including the law/politics distinction, reasonably well under CLS scrutiny, and thus theoretical doctrines like legal formalism have been shown by liberals to have real teeth in practice. Theoretical coherence, however, is not the only measure of worth. CLS also questions whether or not liberal law can actually protect people from each other and the state. CLS doubts that liberal law can actually protect the disempowered against entrenched customs and traditions of intolerance and oppression that can become part of liberal law. For example, the United States Constitution, and the liberal institutions it authorized, failed to protect Natives, Africans, and others from slavery, genocide, Jim Crow, and racial

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80 Ibid.
81 Ibid. 185.
82 Ibid. 186.
83 Ibid. 196.
discrimination. These historical examples show that, within a liberal state, oppression may be entirely legal and backed by popular support.

Thus, it would seem that CLS is correct in asserting that liberal law is incapable, on its own, of protecting vulnerable people from deep seated cultural traditions of intolerance. Liberal laws are the construct of society and can be used against those who have little social power under the cloak of legality. Few contemporary liberals argue, however, that liberal law alone can protect the powerless in an intolerant society. In order for a liberal state to accomplish its political and moral aims, liberal legal rules must combined with social norms to reflect and support a general cultural attitude of tolerance, which can, in turn, check and confine undercurrents of intolerance that threaten the modern understanding of equal liberty.84 As we have seen in Part II, John Rawls argues that tolerance, reasonableness, and a sense of fairness are the basis of consensus-based politics, and thus these principles must also be the normative basis of the law for the legal system to effectively protect people.85

This strong sense of tolerance, although implicitly part of liberal theory, has come to play a greater role in the cultural attitudes of many Western, liberal societies, and has thus transformed the legal rules that govern these societies for the better. Within the United States, in particular, racial issues illustrate the disparities between the social aspiration of tolerance and the reality of intolerance. Americans have increasingly rejected ideologies of intolerance, and thus every important piece of contemporary American law has been shaped by a greater sense of tolerance. Desegregation laws, affirmative action laws, and anti-discrimination laws, for example, have all limited

84 Ibid. 199.
85 See p. 9.
individual liberty in support of the value of racial equality. In these areas of the law, Americans have concluded that tolerance is best served by a greater focus on racial classifications. Instances of intolerance, like discrimination on the basis of race for housing and employment are now deemed inconsistent with American political morality, and have become legally prohibited. Like other contentious issues that have shaped American’s social and legal perspectives, capitalism verses Marxism, and the controversies surrounding reproductive rights, discrimination issues require a guarantee of certain fundamental liberties for everyone, as the first step, which can then lead to political compromises critical to a tolerant society.

IV. American Free Speech: A Vision of General Tolerance

Contemporary American speech doctrines contain just such a vision of tolerance that reflects and supports the moral consistency needed for liberal law to protect the politically weak from trends of social intolerance while also protecting individual liberty. Free speech is a well-thought-out legal strategy that preserves the benefits of this “different kind of liberty” while supporting the goal of equal liberty by encouraging an intellectual attitude of general tolerance, thus helping liberal law more effectively protect the politically weak. The firm yet unqualified words of the first amendment — “Congress shall make no law...abridging the freedom of speech, or of the press” — establishes a tone of tolerance for the American principle of free speech, indicating a national character that values the act of speech. Subsequent generations of legal interpretation in the United States flesh out the principle of free speech with a rich set of legal doctrines that essentially prohibit the government from regulating the content of
most speech in order to encourage a social and political atmosphere in which official
pRACTICE more clearly reflects the value of general tolerance.

A. Dean Lee Bollinger’s Defense of the Principle of Free Speech

In The Tolerant Society, Lee Bollinger justifies broad legal protections for the
activity of speech by identifying contemporary American speech doctrine as a primary
promoter of social tolerance. Bollinger contends that the legal protection of most
speech content helps society internalize tolerance as a social value and reinforces the
government’s commitment to a unique vision of liberty. For many Americans free
speech is more than a simple slogan. Many feel that free speech and a free society are
both ultimately privileges and responsibilities that hang precariously in the balance when
faced with undercurrents of social intolerance. Bollinger argues that the institution of
free speech has come to embody and symbolize the cultural, legal, and political
aspirations of an expanded American vision of liberty, which attempts to repudiate the
ideologies of intolerance and exclusion. This particular ideal of free speech has come to
symbolize America’s commitment to its own unique cultural values and political goals,
distinguishing the American ethos form those of other liberal states, which reflect
somewhat different cultural values and political goals.

For instance, American’s have a distinctive understanding of the function of free
speech within a tolerant society when compared with the citizens of every other liberal
nation. No other Western democracy has a similar degree of legal protection for
speech. Subversive, offensive, and potentially dangerous instances of speech are often

86 Bollinger, The Tolerant Society, 3.
87 Ibid.
legally protected from government regulation by the distinctive American principle of free speech. American citizens may lawfully advocate the overthrow of the government, urge others to disobey the law, speak obscenities in public, and voice a host of other unsavory ideas often without civil or criminal penalties. This broad legal protection of speech indicates that something about speech is of particularly high value within American political philosophy. Bollinger's analysis seeks to illuminate the reasons for this uniquely permissive attitude in the realm of speech, and justify the principle of free speech as a complex cultural and legal strategy that fosters, rather than conflicts with, the value of tolerance.

The issue of intolerant speech, however, is rife with controversy and seeming contradiction when considered in a context of tolerant speech law. One such seeming contradiction, as Bollinger indicates, is the curious paradox that emerges when analyzing American attitudes toward social and legal responses to hate speech. Many Americans shrink from any suggestion to legally prohibit most types of speech while simultaneously advocating multiple, non-legal forms of rejection against many types of hateful speech. For example, should a person utter offensive racist or sexist slurs, people would probably demand a swift unofficial response to the speech. However, suggestions of criminal or civil penalties for the same offensive speech are generally rejected as inconsistent with our legal ideals. The degree to which Americans restrain themselves in advocating legal consequence for extreme speech is drastically different from the degree of social restraint. This balance of social intolerance and legal tolerance is central to the operation of the principle of free speech in American life and American law.

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88 Ibid.
89 Ibid. 12.
Although many Americans are often disdainful of speech regulation, and many accept the responsibilities of open discourse as part of their cultural heritage, contemporary American speech law recognizes several, limited exceptions in which the content of certain types of speech can be officially regulated. In these instances, the courts have found it necessary to officially regulate certain types of harmful speech that have been deemed unworthy of first amendment protections. Defamation laws, for example, regulate the content of maliciously false speech that injures someone’s reputation. Laws against conspiratorial speech and laws against child pornography both similarly regulate the content of certain types of expressions that have been deemed uniquely harmful and therefore beyond the limits of first amendment protection. The American principle of free speech has usually been interpreted broadly, but the courts have ruled that the harm of some types of speech and other non-speech expressions, such as defamation, conspiracy, and child pornography, outweigh the benefits of legal tolerance.

Any convincing justification for the protection of intolerant speech must address the problem of the harm such speech causes. Hate speech, like other types of harmful speech, causes difficulties for any theory of tolerance and reveals tensions found beneath the surface of American speech doctrines. Bollinger attempts to provide an account of the free speech debate that deals with the middle ground and the margins fairly to determine the general long-term benefits of free speech for everyone in America. One series of court cases, in particular, offer a glimpse into the social and legal tensions revealed by legally protecting hate speech, and thus occupy a prominent introductory role in Bollinger’s analysis of American free speech.

90 Ibid.
B. Skokie

According to Bollinger, one important aspect of contemporary judicial understanding of free speech was codified by judicial decisions handed down in the landmark cases of the *Village of Skokie v. The National Socialist Party of America* and *Collin v. Smith* (1978). The final state and federal decisions rendered in these two series of cases offer a fairly comprehensive doctrinal overview of intolerant speech and first amendment precedent established over the previous five decades. Bollinger uses the *Skokie* affair to establish the contemporary American legal understanding of the principle of free speech. From this starting point, he moves into a more complex justification of free speech that he believes is crucial to the American vision of liberty, but which is not clearly present in decisions rendered in these two related series of cases.

The *Skokie* cases concerned the ‘right’ of a group of Nazis to march in a Chicago suburb with a large Jewish population. This obscure group, the National Socialist Party of America, initially requested a permit to march in front of the Skokie town hall. After receiving the NSPA’s request, incensed town authorities filed the initial suit in state court gaining an injunction against the march. Litigation continued in the Illinois state courts temporarily stalling the march, providing Skokie authorities the time to enact three ordinances covering all future marches in the town. NSPS’s leader, Frank Collin, then applied for a permit to march in Skokie on another date not covered by the previous injunction. The permit was denied by city authorities reflecting the recently enacted ordinances.

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91 Ibid. 13.
92 Ibid. 31.
The American Civil Liberties Union then filed suit in federal district court on behalf of the NSPA leader, Collin, in response to Skokie’s second denial of the permit to march. In this new federal case, *Collin v. Smith*, the ACLU argued that the Skokie city ordinances were unconstitutional under the first amendment. The city of Skokie later conceded the unconstitutionality of two of the three ordinances in reaction to the ACLU lawsuit filed in federal district court, yet supported one ordinance that prohibited the incitement of hatred “against persons by reasons of race, religion, or national origin.” The city of Skokie also argued to the Illinois Supreme Court, which was the highest state authority to rule on the constitutionality of the original request for an injunction, that it had the ‘right’ to prohibit the proposed march without reference to any particular ordinance. Thus, the city defended the ban against the Nazi’s march in both state and federal court on roughly similar legal grounds.

The city of Skokie built its state and federal cases around first amendment exceptions, any of which, if applicable, could have justified the prohibition of the Nazi’s speech in front of town hall at any time. Skokie argued that the NSPA’s speech would constitute “fighting words,” which was declared unprotected by the Supreme Court in *Chaplinsky v. New Hampshire*. The city also argued that the NSPA’s speech would constitute “false statements of fact,” which, like libel, remains unprotected by the first amendment. Extending this line of argument, the city called the NSPA’s speech “group libel” citing the case *Beaharnais v. Illinois*. Skokie also argued that the NSPA’s speech

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93 Ibid. 24.
94 Ibid. 25.
95 Ibid.
96 Ibid.
97 Ibid. 26.
98 Ibid. 31.
was “obscene” and therefore unprotected. The city further argued that there was a “clear and present danger” of likely social harm that would come from the NSPA’s speech, and that such speech was the psychological equivalent of a physical assault.

Lastly, the city argued that they were not attempting to prohibit speech content, but were only regulating the “time, place, and manner” of the speech, which is held to a less stringent form of first amendment review.

The Illinois State Supreme Court and the United States District Court both ultimately rejected each of these claims for the same reasons, ending both the state and federal cases initially filed on behalf of the town of Skokie and NSPA leader Frank Collin, respectively. The doctrine established in Chaplinsky only applied to face-to-face encounters, both state and federal courts determined, and thus the city’s “fighting words” argument was rejected. The NSPA’s speech, however revolting, was considered by both courts to be political speech, and could be avoided by not showing up at the march. The argument of “libel” was similarly rejected on the basis that the speech did not constitute factual assertions, but instead constituted perverse political ideas, which, in principle, could not be considered as true or untrue by the courts. The “group libel” precedent established in Beauharnais was distinguishable from Skokie in that it applied to instances where violence was likely to erupt from the speech, and the city had by the time of these two final rulings withdrawn the claim that the city was likely

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99 Ibid.
100 Ibid.
101 Ibid.
102 Ibid. 32.
103 Ibid.
104 Ibid.
105 Ibid.
to respond to the march with violence.\textsuperscript{106} The Nazis’ speech could not be considered as “obscene” since it lacked erotic content. The “clear and present danger” argument was invalid in both state and federal cases as it was deemed unlikely that anyone who heard the Nazi’s speech would be immediately persuaded to take part in unlawful behavior.\textsuperscript{107} Finally, the city’s claim that its restrictions regulated only the “time, place, and manner” of the NSPA’s speech went afoul of the firm distinction between regulations meant to limit speech in the pursuit of other concerns and those that seek to limit speech because of content.\textsuperscript{108} Both the Illinois State Supreme Court and the federal court ruled that the city of Skokie sought to limit speech because of its offensive content, and, therefore, the lower court’s injunction and the city’s ordinances were unconstitutional.

Both the federal and state courts’ justifications were based, in part, on their inability to draw a clear line that would eliminate the NSPA’s speech without in some way endangering the broad function of speech within American society.\textsuperscript{109} The courts believed that banning the NSPA’s speech would jeopardize the structure of free speech doctrines and traditions that had been erected over the last two generations. Both state and federal courts acknowledged the offensive nature of the NSPA’s speech, however, due to clear first amendment precedent, neither case was fundamentally about the uniquely offensive and potentially harmful ideas of Nazi propaganda. Both cases were instead about the city of Skokie’s choice of restrictions.\textsuperscript{110}

In both cases, the burden was on the town of Skokie to prove its ordinance to be within well-established first amendment guidelines. Following clear precedent, both

\textsuperscript{106} Ibid. 33.
\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid. 34.
courts rejected Skokie’s arguments and protected the speech, reflecting the ideal of tolerant speech law. The *Skokie* cases attracted much attention and were surrounded by social and political controversy; however, they were not considered as ‘hard cases’ by legal liberals. The Skokie ordinance, although well intentioned, was an attempt to silence the distasteful ideas of a loathed ideological minority and was, therefore, an abuse of official power under settled law.

The courts’ decisions explained why Skokie’s arguments lacked adequate justification, but avoided any explicit affirmative justifications of the doctrines leading to the result. Thus, Bollinger’s analysis seeks to provide a more general justification of speech doctrines by describing the distinctive vision of tolerance found within American speech law. Accordingly, Bollinger moves from the doctrinal details of the free speech debate exemplified by *Skokie*, and provides two complementary justifications that underwrite what Americans say about the aims and goals of free speech: what he calls the classical and fortress models.¹¹¹

Classical arguments embody liberalism’s faith in the reason of average citizens, while fortress arguments embody liberal anxiety about official power. Each model, in its own way, attempts to portray well protected speech activity as a positive exercise with broad social, political, and legal benefits. Bollinger’s arguments draw together what he believes to be the relevant elements of free speech tradition as it has come to play a new and expanded role in twentieth century American life. By analyzing what free speech has meant in the past, and describing what free speech doctrine has come to mean today,

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¹¹⁰ Ibid.
¹¹¹ Ibid. 41.
Bollinger’s two models identify the values Americans protect with contemporary free speech doctrine.

Although both models recognize the appeal of free speech within the liberal tradition, neither model can, alone, justify the extent of free speech protection in American jurisprudence. The tendency of classical liberal arguments, according to Bollinger, to abstract from real-life and avoid discussing particular instances of extreme speech, like racist hate speech, leaves them open to criticisms of naiveté and idealism.¹¹² Fortress model arguments are, to the contrary, more realistic about social realities and address the real harm of extreme speech, but these arguments are sometimes accused by critics of misrepresenting the history, language, and precedent of the first amendment.¹¹³ Both classical and fortress models analyze the underlying principles people defend when asked about free speech, and, despite their individual limitations, both arguments provide familiar justifications for free speech doctrine.

C. Classical Model

Classical free speech arguments, according to Bollinger, were initially formulated during the intellectual revolution of the Enlightenment, when confidence in human reason and skepticism of absolute power flourished, and when the way people envisioned relationships between the individual, society, and the state was reconceived.¹¹⁴ Classical arguments subscribe to two fundamental liberal premises concerning these relationships: first, the state possesses limited political power derived from the citizenry, and second, society is competent collectively to determine its own destiny through self-
These classical liberal arguments have had strong appeal in the United States. From these premises concerning balanced state and social relationships arose the American Revolution, and the structure of government outlined in the oldest working, and most often copied, liberal constitution. For instance, colonial experiences with restrictive speech laws of the British monarchy, such as prior restraint, led to the embedding of certain principles into free speech doctrine, such as the rejection of prior restraint. As American political life moved from colonial to revolutionary to republican, the toleration of inflammatory speech became an integral part of that process. To some degree, free speech and American political life are inextricably linked by history and tradition. Although it is impossible to know the exact original intent of the first amendment, classical arguments attempt to identify the liberal values supported by tolerant speech law, values which are themselves part of American history and tradition.

While the founding documents leave an indelible mark on way Americans envision political life, in order for any rule to govern disputes now and in the future, people must know the specific purposes behind that rule. Bollinger’s classical model seeks to describe the network of interrelated liberal goals and values at the core of American speech doctrine. At different times and under different circumstances, free expression has been justified by referencing other primary values associated with the activity of speech, like the search for truth, the pursuit of the good-life, the maintenance of democratic self-government, and general tolerance. Bollinger’s classical model identifies the benefits of these values and describes how these and other liberal values

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114 Ibid. 44.
115 Ibid. 44-45.
116 Ibid. 240.
117 Ibid. 43.
have come to underwrite a relatively consistent, well-founded body of speech law. For Bollinger, free speech has come to symbolize a unique form of social organization, and speech doctrine has come to protect this American vision of political life, and thus free speech implies more than the protection of speech.

Classical justifications of free speech often cite the acquisition of "truth" as one primary value. To explore the positive benefits of this truth seeking value, Bollinger borrows claims from John Stuart Mill’s liberal treatise, On Liberty, as an instance of the argument that the toleration of error is critical to identifying truth. The legal toleration and social confrontation of error, according to Mill’s arguments, untangles webs of deceit and fortifies truth with the exposure of error. Mill contends that the truth is sometimes incomplete without the corollary of error, and society must endure error at times to discover more compelling truths. Free speech, he argues, intensifies the light of truth in response to error, exposing a livelier notion of truth. Mill argues that silencing error has the effect of pushing truth towards dogma, and this denies a fuller conception of what the truth is, or what may become true through investigation.

In sum, Mill’s classical, truth seeking arguments justify tolerance in the area of speech on three grounds. First, any opinion silenced by intolerant regulations may in fact be a truth we currently do not identify. Second, the silenced opinion may be mostly false, but partially true. Third, even if an opinion is completely false, in silencing it, society and its institutions assume infallibility on the given issue and become dogmatic and potentially oppressive. Thus, Mill’s arguments recognize that truth is always unfinished,

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118 Ibid. 45.
119 Ibid.
120 Ibid. 54-55.
tentative, and subject to new data, experience, and arguments that can only be fully appreciated by tolerating error.\textsuperscript{121}

Mill's arguments imply that within the social context of pluralism and the political context of liberalism, basic protections for the fundamental liberty of speech are critical to the associated value of seeking the truth; and, in effect, basic protections for speech help create a social atmosphere in which to explore the value of tolerance for alternative ideas and life-styles. Thus, Mill believed that the greatest harm of intolerant speech restrictions is not done to the ignorant who express erroneous ideas, but rather the greatest harm is done by creating an atmosphere of intolerance that causes everyone else to be afraid of being wrong.\textsuperscript{122} Intolerant speech regulations infringe on the thought process of citizens and diminish the fundamental value of liberty for everyone. Mill argues that protection against blatant political tyranny in the area of speech is insufficient to protect the activity of speech against intolerant social attitudes. For free speech to survive intolerant social impulses, it must also be protected from the tyranny of the majority, which could use the democratic process to silence error. Mill's arguments suggest that strict legal protections for the activity of speech help to foster the intellectual attitude necessary to maintain this fundamental liberty of conscience, and, in turn, this supports the principle of general tolerance within society.

Although part of a different historical context, Mill's "truth seeking" arguments have helped to form the conceptual basis for contemporary speech doctrine as it began to be reconceived by judges in the early twentieth century.\textsuperscript{123} Oliver Wendell Holms majority opinion in \textit{Schenck v. United States} and his dissenting opinion in \textit{Abrams v.}

\textsuperscript{121} Ebenstein, \textit{Great Political Thinkers}, 543.
\textsuperscript{122} Ibid. 544.
United States highlight this change in judicial philosophy regarding the function of speech doctrine. In both cases, the Supreme Court upheld the prosecution of individuals disseminating communist literature under the Espionage Act.\textsuperscript{124} In *Schenck*, Holmes voted to convict the leader of the American Socialist Party on the grounds that the content of his speech, within the context of a world war, created a “clear and present danger” that Congress has a right to prevent.\textsuperscript{125} For Holmes, *Schenck* was a “question of proximity and degree.”\textsuperscript{126} War and revolution raged overseas and some speech seemed particularly threatening at home. The *Schenck* decision focused on the harm of the political message in question, rather than focusing on the more pervasive harm of this type of speech regulation.

A few years later in *Abrams*, however, Holmes dissented on the conviction of Russian aliens disseminating similar literature on the grounds that speech rights outweigh the harms of particular political messages, even with consideration to the temporal circumstance of world war and domestic discontent. Holmes had come to believe that the harm of this type of political speech was less of a threat to American values in the long-term than was this type of speech prohibition. Free speech, Holmes now believed, must be protected as a constitutional principle, even during difficult times, for the long term health of the “market place of ideas,” and the free consciences that compete there.\textsuperscript{127}

Prosecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in the law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do

\textsuperscript{123} Bollinger, The Tolerant Society, 164.
\textsuperscript{124} Ibid. 16.
\textsuperscript{125} Ibid. 17.
\textsuperscript{126} Ibid.
\textsuperscript{127} Ibid. 18.
not care whole-heartedly for the result, or that you doubt either your power or your premises. But when 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.¹²⁸

Holmes believed he had been incorrect in the earlier *Schenck* decision, and he was attempting to voice his new-found understanding of the free speech ideal, basing his dissent on principle rather than social and political pressures. Holmes identifies the regime of censorship being imposed against communists as logical and predictable, but shortsighted, and, ultimately, counterproductive.¹²⁹ Rather than evaluating the minds of the malcontents who test the limits of speech rights, Holmes’ dissent concentrated on the state of mind present within a society that desires to silence ignorant, offensive, and unheralded acts of speech. ¹³⁰ In this way, Holmes was less moved by an urge for truth than he was by a perceived social deficiency – intolerance toward speech.¹³¹

According to Bollinger, Holmes considered the censorship involved in *Abrams* as a form of communication, a form of speech, and his dissenting opinion seeks to counter its theme of intolerance and, instead, promote an intellectual attitude of tolerance that he now believed was at the core of the first amendment.¹³² With the gaining acceptance of this expanded vision of free speech, Holmes’ dissent in *Abrams* stood as the central organizing vision of the principle of free speech that developed over the next five

¹²⁸ Ibid. 161.
¹²⁹ Ibid. 62.
¹³⁰ Ibid. 145.
¹³¹ Ibid. 172.
¹³² Ibid. 164.
decades, leading, ultimately, to *Skokie.* Holmes' dissent erected a new conceptual shelter for free speech, and the decisions of later cases made his earlier dissent the law. The Holmes' model essentially prohibits legal interference with speech activity, unless it can be shown that an immediate, profound harm will ensue from the speech – the "clear and present danger" test. This new judicial focus indicates a shift in the free speech perspective, and is, in Bollinger's opinion, Holmes' primary legal innovation in the area of speech doctrine.

Holmes' arguments in favor of tolerance in the area of speech are, however, according to Bollinger, unacceptably limited. Tolerance in the area of speech is more complex than Holmes' arguments indicate, and, according to Bollinger, the relativism and self-doubt of Holmes' writings about free speech detract from the force of his legal arguments. Holmes' writings reflect an early, underdeveloped vision of the broader function of free speech within the American polity. The Court needed time and experience to articulate other positive justifications for broadly protecting speech. With the help of Holmes' shift in perspective, though, free speech doctrine had come to set the social, legal, and political agenda of tolerance. The Court has repeatedly affirmed this new and expanded role of speech doctrine through its decisions subsequent to *Abrams.*

For instance, since *Abrams,* political goals have become more prominent within free speech doctrine. The Supreme Court articulated many features of this modern first amendment doctrine by closely linking free speech and self-government in *Sullivan v.*
New York Times. The Sullivan case concerns state defamation laws applied to false statements made about public figures. The Court recognized the link between common law defamation rules and defunct arguments of seditious libel, and determined that some otherwise defamatory statements about public officials must be protected, absent reckless disregard for the truth, to maintain “uninhibited, robust, and wide open” political speech. In Sullivan, the Court stated this additional, affirmative justification for free speech that was only found between the lines in Holmes’ Abrams dissent.

Classical liberal “self-government” arguments, some of which were affirmed in decisions like Sullivan, are important to this analysis, but they cannot alone justify the United States’ principle of free speech. Some critics argue that linking the principle of free speech and self-government too closely misrepresents the realities of democratic political life. Some critics of the American principle of free speech insist that it is undemocratic to deny the possibility of further restrictions on speech. Liberal theory does not specifically stipulate the principle of free speech as it is currently understood in American jurisprudence, and many democratic nations survive with different, more restrictive, laws that govern speech. Free societies, such as the United Kingdom, have taken legislative steps to restrict certain types of hate speech, and remain, to a degree, free societies.

As a society, however, Americans have decided that the principle of free speech is an integral part of their unique vision of liberalism. Other free societies’ visions of speech were developed under different circumstances and often reject the distinctive features of American social, legal, and political life served by the principle of free

\[137\] Ibid. 48.
\[138\] Ibid. 49.
speech. The degree to which democracy and free speech are linked is relative to the society being discussed, but the nexus between the two in American life was clear to Justice Holmes, and was clear to the judges who decided *Sullivan* and *Skokie*. Thus, it is neither a misunderstanding nor misrepresentation to assert that the exceptionally strong principle of free speech is a vital component of the American democratic tradition. Americans could democratically transform the meaning of the principle of free speech and remain a democracy, but it would detract from the distinctive vision of liberty that is now ingrained in American social and political life. Thus, free speech and the character of contemporary American constitutional democracy are inextricably linked.

Some criticisms of classical liberal free speech arguments, however, suggest internal theoretical weaknesses. The classical tendency to abstract and idealize aspects of the human condition draws relevant criticism to these arguments. For instance, in real life instances of hate speech, like the proposed Nazi speech defended in *Skokie*, there was little possibility that any truths would be revealed or affirmed, nor was there any indication that the Skokie ordinance by itself would bring down democratic institutions, which seems to undercut the values so prominent in the classical model. Some critics argue that if government is unable to identify truth, then certainly it can identify the errors of the most offensive creeds, and address these issues through official channels for the protection of targeted individuals and groups. Holmes' insight that identifies speech doctrine as “agenda setting” shows the power of speech, but Holmes, Mill, and other liberals, according to some critics, incorrectly dismiss the potential harms of the most malignant forms of extreme speech. Real-life instances of hate, like in *Skokie*, reveal the

139 Ibid.
real harm of some speech, and this real harm, critics argue, seems too often ignored by
classical justifications of free speech.

D. Fortress Model

Bollinger offers his "fortress model" arguments to address the reality of social
intolerance and to highlight the legal difficulties associated with the regulation of hateful
and offensive speech. The fortress model agrees with and shares the core goals of the
classical model; valuing the broad legal toleration of speech content to restrict
government authority and protect individual autonomy and self-government.140 This
model, however, departs from the optimism of the classical model by rejecting the notion
that all speech content is relevant to the search for social truths, and adds a more
pessimistic vision of the state and society.141 Fortress arguments make free speech also a
barrier between state power and social freedom rather than only a diviner of truth.142
Fortress model arguments describe a legal strategy that protects the goals of the classical
model, but also proposes a social strategy that supports an intellectual attitude of
tolerance in the area of speech. Fortress model arguments reflect the notion that speech
content prohibitions are taboo, and should not even be considered by a fickle public, or a
greedy government, for fear of an irreversible loss of liberty.

This argument demands that the judiciary strike down legislation that narrows the
broad limits of the free speech. Without an uncompromisable judicial understanding of
the boundaries of free speech, this model tells us, intolerant people will erode liberty

140 Ibid. 76-80.
141 Ibid.
through the misuse of government powers in the area of speech. Thus, strict limits must be placed on even the possibility of governmental speech regulations to safeguard the public from a self-imposed authoritarian rule. Fortress arguments, as the name implies, essentially place free speech law in a locked box (a fortress) of strict doctrine that circumscribes the power of the judiciary over certain types of speech regulation. These arguments attempt to enlarge the legal understanding of the free speech principle to protect society from certain intolerant tendencies that lead to the natural desire to silence perceived human error through the use of state power.\textsuperscript{143}

Liberal theory developed as a response to traditions of intolerance and oppression, and fortress arguments are thus consistent with liberalism's wariness of intolerance magnified by official power. America's contemporary interpretation of the principle of free speech reflects this cautious stance. In the past, the principle has lacked the current broad legal protection for speech, and has also been misapplied more recently during times of crisis. Many instances of intolerant speech policies were often crafted in order to silence the "dangerous" speech of perceived political enemies with the support of the general public. American's legal response to intolerance forms the historical basis for fortress arguments, arguments which seek to counter intolerant social impulses by strengthening the principle of tolerance in speech law.

Feelings of crisis similar to those expressed by Holmes in \textit{Schenck} surfaced again in America during the cold war, and the relatively new limits of speech regulation were again tested by fears of communist ideology. American fear of communism as a political and military force came to a peak during the nuclear standoff and perceived missile gap.

\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid. 78.
of the fifties. Senator Joseph McCarthy is the most recognizable government personality of the Red Scare era, and his name has become synonymous with oppression. However, if one were truly committed to a republican, capitalistic form of government, then the fears of the McCarthy era were real - communism seemed to be flourishing domestically and internationally - but the reaction to the perceived threat was misdirected, and jeopardized the core liberal goals of speech doctrine supposedly being defended in the hearings. Much like the misuse of Espionage Act at issue in Abrams, the McCarthy era hearings ignored American ideals of tolerance and undercut the function of free speech by attempting to regulate the ideas, expressions, and associations of citizens based simply on their adherence to what seemed to be a dangerous political ideology.

Bollinger's fortress arguments assume that when faced with real or perceived threats from unheralded, even potentially dangerous groups, like communist revolutionaries and Nazis, the public's fear will incite the government into devising speech regulations that will inevitably jeopardize everyone's liberty by jeopardizing their free speech. Americans attempted to repel communist ideology by generally hating communists, and magnified this hatred by criminalizing their political speech. The McCarthy era hearings remind Americans that the state is an enormous system with the power and resources to silence unwanted messages. Allowing the government to deviate from the principle of tolerance in the area of speech could begin to allow regulation that not only forbids speech perceived to be extreme or dangerous, but, more importantly, intolerant speech doctrine threatens valuable expression in the center. The official repression of controversial ideologies sets a bad precedent for society's general response

144 Ibid. 83.
to dissent, thereby jeopardizing liberal values by trampling the liberties of conscience of any citizen who defies convention.

Despite the lapse in tolerance toward speech and association exemplified by the McCarthy era, the perceived benefits of general tolerance in the face of dissent were again expressed by the Court in *Cohen v. California*. In the Vietnam War era *Cohen* case, the Court decided that California could not prohibit, on the grounds of its offensiveness, a person from wearing in public a garment inscribed with the words: Fuck the Draft.\(^{145}\) In this decision, Justice John Harlan discussed his vision of the expanded role of free speech in American life.

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision of what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premises of individual dignity and choice upon which our political system rests.\(^{146}\)

The ability to express an offensive idea without official sanction, according to Harlan, is an intrinsically positive exercise with benefits that go beyond this instance of speech. Within a pluralist society, as Harlan explains, free speech produces not only a more informed citizenry, but also a more capable citizenry. Harlan suggests that tolerant speech doctrine creates within people certain capacities that are otherwise lacking.\(^{147}\) The process of defending one’s views instills individuals with a greater capacity to deal with the contrary beliefs of others and, thus, encourages a greater tolerance. In this expanded, more modern interpretation of speech law, the value of tolerance is viewed

\(^{145}\) Ibid. 34.

\(^{146}\) Ibid. 96.

\(^{147}\) Ibid.
broadly as an education that ultimately touches all aspects of American’s lives. Although
dissemine of Cohen’s offensive choice of words, word choice was not the central issue
for Harlan. Like the Skokie cases, the central issue in Cohen was whether or not this type
of speech prohibition undercut the more expansive goals of free speech to encourage
general tolerance.\(^{15}\) Allowing the state to prohibit “indecent speech,” Harlan argued,
“would effectively empower a majority to silence dissent simply as a matter of personal
predilections.”\(^{148}\) Harlan believed that such prohibitions would set a bad precedent for
society’s response to dissenting ideas, and, ultimately, encourage the intellectual attitude
of intolerance.

According to Bollinger, like Justice Holmes’ transformative vision of free speech
expressed in Abrams, Harlan’s vision of free speech finds its antecedent in Mill’s
argument that a “livelier” version of the truth comes with the existence of error.\(^{149}\) In
addition to the “truth seeking” value described by Mill’s arguments, though, Holmes and
Harlan focus more carefully on the value of general tolerance. The value of tolerance in
speech doctrine was more important to Holmes and Harlan than the truth-value of speech
at issue in Abrams and Cohen. Both Holmes’ and Harlan’s visions of free speech
indicate that tolerant speech law provides society with broad benefits, while overzealous
regulations for incorrect and offensive ideas detract from the atmosphere of general
tolerance and upset the balance of values that underwrite American political life.

However, despite the specific history of the first amendment, according to
Bollinger, the central focus of the fortress model is less about the force of precedent and
principle, and is, instead, a political strategy in response to a perception of intolerance

\(^{148}\) Ibid.
\(^{149}\) Ibid.
and bias by the politically powerful against the politically weak.\textsuperscript{150} The fortress model thus seeks more than a legal outcome. It attempts to instill an attitude of tolerance through the protection of intolerant speech. The fortress model seeks the benefits of speech activity, identified in the classical model, but also attempts to erect a fortress around speech activity that Americans will be unable to breach during times of public crisis.\textsuperscript{151}

As we have now seen through Bollinger’s analysis, freedom of speech serves a larger function within American society than simply licensing individual choices against official power. It also creates a protective zone in which society can develop and test intellectual attitudes, and where assumptions about undesirable intellectual traits can be offered and remedies proffered – what may be considered as exploring the value of general tolerance.\textsuperscript{152} Bollinger claims that this broader function of free speech forces a different look at Isaiah Berlin’s two concepts of liberty.\textsuperscript{xvi} Bollinger contends that while free speech creates a negative zone of liberty for the individual, limiting government efforts to regulate intolerant ideas, it also provides an atmosphere in which society can identify, confront, and discourage intolerant ideas, and, thus, strives for a zone of positive liberty – an atmosphere of general tolerance. In this sense, Bollinger argues, tolerance in the area of speech links negative and positive concepts of liberty by allowing the existence of intolerant ideas, and then providing the positive means to defeat those ideas.\textsuperscript{153}

\textsuperscript{150} Ibid. 99.
\textsuperscript{151} Ibid. 101.
\textsuperscript{152} Ibid. 173-174.
\textsuperscript{153} Ibid.
Speech covers the depth and breadth of American life, and stands, according to Bollinger, as the symbolic gateway to contemporary social intercourse. Many Americans have genuine fear of most types of speech restrictions and genuine faith in the contemporary regime of free speech. Religious, ethnic, political, and philosophical tolerance is supported by the American system, in part, due to the principle of free speech. As a society, Americans have decided to legally tolerate the offensive, often intolerant, expressions of Nazis and communists, and, in doing so, they powerfully reject the intolerant ideologies that seek to undermine America's unique vision of liberty.

Bollinger concedes that the broad limits of free speech doctrine are, at times, used by the enemies of liberty, whose freedoms are protected by this doctrine. In order to better preserve freedom for everyone, however, it is necessary to protect certain rights for those who may deserve them less. Fortress arguments recognize that society is sometimes put in the awkward position of indirectly defending the hateful, even the potentially dangerous, to maintain America's commitment to tolerance.

Bollinger and other liberals recognize that, within a free society, tolerant people will at times be confronted with the reality of dangerous and intolerant people. The question then arises: at what point does a person's intolerance of others warrant limiting that person's liberties? Justice does not require citizens to stand by while others destroy the basis of their existence. The right of self-protection, John Rawls argues in *A Theory of Justice*, would require tolerant people within a liberal society to limit the intolerance of others when there is a danger that equal liberties are threatened. Given the existence of

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154 Ibid. 238.
155 Ibid. 101.
intolerant groups who are politically inflexible and would subvert the ideals of liberalism if allowed, the extent of liberties enjoyed by these intolerant people is of vital importance for the maintenance of order and security.

Rawls argues that all citizens of a liberal democracy have a responsibility to uphold a just constitution that furthers liberal values, and are not necessarily relieved of this obligation whenever others are intolerant.\textsuperscript{157} When dealing with social intolerance through coercive measures of the state, there must be considerable danger to the over-all constitutional structure. Should an intolerant social sect arise that respects the basic political moralities of a state’s just constitution, Rawls argues, then the state has no right to limit any members of that sects individual liberty.\textsuperscript{158} A more stringent condition is required.\textsuperscript{159} To limit any citizen’s freedoms of conscience, the actions of the intolerant must be recognized as a special case that warrants the use of state power for preserving liberty itself. In other instances of intolerance, when people are negatively impacted but liberty itself is unthreatened, other unofficial social forces are capable of dealing with the intolerant.\textsuperscript{160} Thus, Rawls’ answer to the problem of intolerance and liberty is, then, that while the intolerant may have little reason to complain of social intolerance toward his or her thoughts and actions, certain freedoms of conscience should only be restricted when the tolerant have good reason to believe that liberal institutions are themselves in danger.\textsuperscript{161} This is not to suggest, however, that society should coddle murderers, Nazis, or communist revolutionaries when they defy the rules of social order and security.

Everyone is bound by these kinds of limiting principles.

\textsuperscript{157} Ibid.
\textsuperscript{158} Ibid.
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid. 193.
Some critics charge that the fortress model’s concerns about social intolerance and state over-reaction put these arguments at odds with the optimism of the classical model.\textsuperscript{162} If inherently intolerant people are not to be trusted with deciding speech rights through the democratic process, then why allow unelected judges to protect speech rights that may be undeserved? Rather than contradict the optimism of classical arguments, though, the fortress argument’s concerns are complementary. Fortress arguments do place a greater emphasis on liberal anxieties about the possible misuse of state power over liberal hopes of a reasonable citizenry. A fear of social intolerance and government power, however, is a reasonable fear. Fortress arguments, in effect, offer a justification for the principle of free speech for a tolerant, reasonable society that may have intolerant tendencies.

Other critics argue that it is impossible to know whether or not the Framers intended the current level of speech protection. Some pre-and early American legal writings suggest that the Framers intended something different from current free speech doctrine. Interpretations of original intent vary among legal scholars, but, whatever may be the case at the origins, it is clear that the level of speech actually protected by the first amendment has developed and changed over the generations.\textsuperscript{xvii} It is also clear, however, that the enlargement of speech rights in the twentieth century did not happen in a historical vacuum, nor is it void of historical underpinnings. The phrase “We the people” in the preamble to the Constitution meant something different in 1787 than it did in succeeding generations. As individuals and groups fought to be included in the phrase “We the people” the Constitutional language of the first amendment, the historical legacy

\footnotesize{\textsuperscript{161} Ibid. 193.}  
\footnotesize{\textsuperscript{162} Bollinger, A Tolerant Society, 80.}
of tolerance, and the fresh moral insight in the legal reasoning of conscientious judges all allowed free speech and political inclusion to complement one another. Analogously, the "non-establishment clause" of the first amendment has come mean more than the original wording of the Constitution would seem to specify. Nowhere does the Constitution set forth legal requirements that a "wall" separates church and state, although the "non-establishment clause" has been interpreted to mean that such a wall does indeed exist. To some degree, though, the notion that church and state are separate has always been part of American political heritage.

The American Constitution is brief and much of the language is open-ended and abstract. This permits the overlapping social consensus to subtly adjust, by interpretation, the application of certain core principles, like free speech and religious tolerance, as long as the over-all structure and purpose of liberal government remain protected. The general ideals of the principle of free speech have remained embedded within American law, but it took time and experience to realize the extent to which the ideal of speech tolerance supports other liberal goals so critical to American life. Moreover, few free speech advocates deny the need for exceptions in speech law. Fortress arguments simply suggest limiting the number and scope of these exceptions as much as is reasonable to minimize the chance for misuse. Exceptions must be few and tightly controlled to avoid falling back down the "slippery slope," which had allowed the persecution of political dissidents, civil rights activist, labor activists, and the like due to the controversial content of their speech.

The Skokie decisions were based on this rationale. In Skokie, the various courts acknowledged the validity of first amendment exceptions, but they refused to expand
these exceptions to fit the particulars of these cases. Since Abrams, the courts have generally protected the structure of free speech doctrine erected by Holmes' dissenting opinion in order to avoid this slippery slope of intolerant speech restrictions. American society has now formed a well-articulated and well-founded agreement about the limits of government power regarding speech, and the fortress model's arguments reflect this consensus. And, although admitting exceptions, this consensus stipulates certain kinds of speech regulations should remain absent from the legal and political bargaining table, bracketed, so to speak.\textsuperscript{164}

When rights as vulnerable and important as speech rights have been secured, fortress arguments tell us, they must be fortified within the structure of government itself.\textsuperscript{165} Fortress arguments further the notion that an institution within the government structure, the judiciary, must be charged with the task of guarding free speech against the excesses of the political branches.\textsuperscript{166} Fortress arguments are more than a political strategy protecting the values of the classical model, though. Fortress arguments directly and affirmatively further the value of general tolerance.

In sum, classical arguments recognize that a liberal system of government provides the best possibility for a tolerant, well-ordered-society, and fortress arguments recognize that any system of government provides a possibility for oppressive, intolerant policies that could eventually undermine liberal ideals. Bollinger thus envisions contemporary American speech doctrines as part of a social ethic and not simply as a means of limiting government intervention in the realm of speech. Bollinger's model

\textsuperscript{163} Ibid. 95.
\textsuperscript{164} Ibid. 172.
\textsuperscript{165} Ibid. 77.
\textsuperscript{166} Ibid. 78.
arguments, together, provide a specific vision of free speech, which fits within the general framework of liberal theory. This vision of free speech, however, is not the only vision that fits within the liberal tradition, and many liberals (e.g., in Canada) reject his specific vision. Even within the American liberal tradition, many liberals disagree over the acceptable limits of free speech.

V. An Alternative Vision of Speech Doctrine

As we saw in Part III, many moderate Critical Legal Studies critics agree with liberals like Altman that the law is a practical necessity of modern life. Many of these critics, though, still doubt whether or not speech law is doing all that it ought to do, or could do, to protect minorities from intolerance. Some in the moderate wing of CLS would agree that the law reflects and maintains distinctive patterns of thinking and action that regulate human activity, but they charge that minority groups are often oppressed by the cultures in which they live, and are, thus, ill-served by many social institutions, including certain aspects of the American institution of free speech. According to these critics, claims of legal neutrality and tolerance can allow the majority to oppress minorities under the cover of law.

Critical Race Theory, a moderate subset of CLS, seeks to identify the implicit and explicit racism of the American legal system to justify non-neutral legal strategies that focus on combating racial oppression through official channels. By utilizing alternative methods and standards, these critics believe that it is possible to show how American speech law can be otherwise than it is currently, and thus better reflect their particular
vision of racial equality. Many of these CRT critics have moved beyond general, race-neutral CLS criticisms of liberal law, and have made proposals for changes in legal doctrine that would, they believe, help combat the immediate effects of racism in the everyday lives of racial minorities, and thereby help to defeat the ubiquitous forces of racial oppression entrenched in American society and reflected in its laws.

V.A. Professor Mari J. Matsuda’s Deconstructive Analysis of Free Speech and Her Constructive Legal Proposal of Limited Intolerance

In her article, Public Response To Racist Speech: Considering The Victim’s Story, Mary J. Matsuda offers one such proposal. Matsuda recognizes the limitations of liberal theory pointed out by moderate CLS criticisms, and, as a Critical Race Theorist, she is interested in exploiting those limitations to change speech law to better reflect her vision of racial equality and thus combat the effects of racism through official legal channels. Matsuda does not seek to expose the rule of law as a “myth,” as radical CLS theorists have claimed, but, instead, she seeks to expose the patina of liberal neutrality and its claims of tolerance, which she believes actually support aspects of racial hierarchy. Matsuda, thus, utilizes moderate, deconstructive CLS arguments, and, then, proposes her own constructive model of speech doctrine based on an alternative vision of speech doctrine found in international precedent and existing American speech law exceptions. Matsuda believes that a new, narrow exception for certain types of hate speech would improve the structure of American speech doctrine, without seriously undermining the core liberal values of the first amendment. Matsuda’s article thus rejects

167 Matsuda “Public Response To Racist Speech: Considering The Victim’s Story,” 1.
the “slippery slope” arguments of Bollinger’s fortress model and attempts to draw legal lines that the judges in *Skokie* did not draw.

Matsuda’s vision of American life is centered on race relations characterized by the social dominance of one group and the subordination of others. As she sees it, majority on minority racism typifies the American social structure of dominance and subordination, and this power relation is reflected in the structural realities of American institutions such as the law. Justifications for the principle of free speech presented by liberals like Bollinger are legally contingent, Matsuda argues, and, in her view, they inadvertently perpetuate racism by obscuring the effect of free speech doctrines on racial minorities. Liberal claims of tolerance, neutrality, and individual liberty become tools of power within a context of dominance and subordination, according to Matsuda. Thus, by asserting these liberal principles and ignoring the direct harms of racist speech to minorities, Matsuda charges, non-minority liberals miss the extent of racism in speech law and consequently increase the harm of racist speech for minority communities.

Laws against libel, defamation, conspiratorial speech, and other notable free speech exceptions, all show that certain types of harmful speech are qualitatively different from valuable types of speech that receive first amendment protections. Matsuda believes that not creating a new, *sui generis* category for racist speech, based on the analogy between these existing exceptions and harmful hate speech, reveals the implicit bias and insensitivity of the American system toward the experiences of minorities. Matsuda contends that the protection of some types of racist speech is, thus, selective application of the principles of free speech law that ignores the special status of some minorities and the harms of some types of racist speech. This reality, Matsuda
contends, puts minorities in a position of being twice harmed; first from racist verbal attacks, and, then, from the legal toleration of this type of speech.

Finding no redress with the state, victims of racist speech are further marginalized socially, politically, and legally while overt and covert forms of racism remain legally protected, and thereby remain entrenched in American life. The tolerance of racist speech, Matsuda contends, is not an evenly distributed social burden, but, rather, minorities experience it more harshly. The special protection allowed to children and the public/private distinctions in speech doctrine are both illustrative exceptions for Matsuda. Both of these exceptions show that speech law can and does provide additional legal protections for those who are at a disadvantage, and who may be harmed more by allowing certain types of speech than by prohibiting it. If American law permitted the dissemination of child pornography, the argument goes, then it would be a tacit endorsement of the exploitation of children. Thus, these and other free speech exceptions based on the harm of the speech lead Matsuda to believe that a new, narrow category could be created within speech law to better protect racial minorities without seriously undermining the core values of the first amendment. There are no inevitable results in the law, as CLS argues, especially at the margins. By exploiting the indeterminateness at the margins, Matsuda suggests, American law could combat certain types of racist speech while maintaining the core ideals of the first amendment for the victims of racism.

Matsuda thus acknowledges, in general, the value of many core political principles defended by Rawls and Bollinger, such as individual autonomy, and self-government. She rejects, however, what she believes to be the overextension of these liberal values in specific instances of speech law. By choosing the values of individual
liberty, self-government, truth-seeking, and general tolerance, over the value of racial sensitivity, in the context of hate speech, Matsuda argues, the dominant class harms minority groups by simply ignoring their collective perspectives and experiences. Thus, although Matsuda and Bollinger share the goals of combating racism and protecting society from the misuse of speech law, they disagree over how liberal values are best balanced and implemented in the context of American speech law to accomplish these goals. For Bollinger, the tolerance principle, which allows the existence of intolerant ideologies, defeats those ideologies by establishing a social ethic of tolerance in one area of social life that carries over into other areas of social life. For Matsuda, the tolerance principle helps perpetuate intolerant ideologies by refusing to acknowledge and combat the real social harm caused by their existence. Matsuda claims that America betrays its ideal of racial equality when it protects hate speech, and can help to rectify this betrayal, in part, by expanding government power in the area of hate speech regulation.

Although Matsuda shares the fortress model’s anxiety about the oppressive use of state power, she believes that, because of racism, current speech doctrine is a source of oppression and intolerance rather than a promoter of tolerance and a protector of liberty. Matsuda believes that expanding state power to focus on the voice and conscience of dominance relieves subordinate group members of the oppressive claims of tolerance and neutrality defended by liberals like Bollinger in his fortress model argument. Thus, contrary to Bollinger’s fortress model, Matsuda believes that it is more valuable to combat the effects of racism, via speech law, than it is to protect society from the misuse of state power in the area of speech law.
Liberal theory and free speech doctrine allow for exceptions at the margins, and Matsuda contends that these exceptions reflect the value judgments of a dominant class who refuse to acknowledge the central role of race and racism in American life. Thus, according to Matsuda, although liberalism and most free speech doctrine is basically sound, some free speech doctrine has been decided according to the values and experiences of a monolithic social class that undervalues the importance of issues such as race, gender, and sexual orientation discrimination, preventing subordinate groups from influencing the value choices made at the margins of speech law. American inequality, in her opinion, guarantees that important issues like race are either consciously or unconsciously ignored by the dominant group, who hold the reins of official power, and fail to acknowledge the political nature of the established vision of speech law. The lack of an exception for certain types of intolerant racist speech is itself a special circumstance, according to Matsuda, that can and ought to be addressed by emphasizing alternative values in a more progressive vision of the first amendment.

After all, even John Rawls acknowledges, in A Theory of Justice, that when liberty itself is at stake, then the tolerant have the right to curb the rights of the intolerant, even their freedoms of conscience. Dominant group members who use racist language comprise a social group that threatens the liberty of subordinate group members, and, thus, threatens the liberty of all Americans. This is a special case, Matsuda argues, that justifies curbing the freedoms of conscience of this specific social group, but not others. Matsuda suggests that speech law already allows various exceptions, and the real, pervasive harm of some types of racist speech suggests that a new narrowly tailored

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exception is entirely consistent with existing doctrine and is also consistent with Rawls’
general theory of justice.

To expose the implicit racism hidden by traditional jurisprudence, Matsuda adopts
a methodology she calls “outsider jurisprudence” as an alternative descriptive model and
prescriptive vision of speech law. Taking a “highly contextualized” approach to her
historical and legal analyses, Matsuda attempts to show why the law is a product of racist
social structures and how the law continues to sustain and even promote racism.169
Matsuda’s methodology contrasts with a traditional legal inquiry, but she believes that
this difference highlights the failure of typical free speech inquiries to notice the harms of
racist speech. For instance, Matsuda’s contextualized approach leads her to reject the
notion of liberal neutrality in the belief that the law is essentially political, and her
outsider jurisprudence accepts the notion that the law can and ought to be used by
subordinate groups as pragmatic tool for social change.170 This rejection of liberal
neutrality and acceptance of the notion that the law is and ought to be used in political
ways, allows Matsuda to choose amongst legal and political principles that she favors,
rather than conforming to preexisting standards, which she believes are tainted with
misleading claims of neutrality.

Matsuda identifies speech law’s connection to racism in three doctrinal elements
of first amendment tradition that she believes her alternative approach exposes; one, the
limits of doctrinal imagination in creating first amendment exceptions for racist speech,
two, the refusal to recognize the competing values of liberty and equality at stake in the
case of hate speech; and three, the refusal to view the protection of racist speech as a

170 Ibid. 2324.
form of state action. These limitations of imagination in traditional jurisprudence elicit a kind of a blindness that, she believes, affects majority group lawmakers and legal professionals who are, as a consequence, insensitive to her proposal. Thus, Matsuda believes her alternative perspective, from outside of traditional jurisprudence, illuminates the political stakes and political choices inevitably involved with the issue of racist hate speech.

In the section of her article entitled *Who Sees What*, Matsuda questions why the world looks so different to her than it does to her liberal colleagues who identify with traditional jurisprudence, and she concludes that the identity of the person doing the analysis is generally decisive, at least in regards to their respective responses to racist speech. Matsuda contends that in advocating legal restrictions on racist speech from her alternative vision of the law, she typically finds sympathetic audiences in people who identify with target groups, while non-target group members are typically insensitive to the effects of racist speech, often labeling this type of speech activity as isolated and harmless. For Matsuda, this inability or unwillingness of many non-minority liberals to fully acknowledge the pervasive nature of racism and its harmful effects in American life, leads to their defensive reaction to her proposal, and this defensive reaction often draws on claims of legal neutrality that she and her CLS colleges believe are invalid. The racist structures of subordination are so entrenched in American life that most dominant group members are unable or unwilling to see this social reality.

International law provides Matsuda with examples of speech law that she believes are more in line with her vision of racial equality. The International Convention on the

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171 Ibid. 2326.
172 Ibid. 2326-2327.
Elimination of All Forms of Racial Discrimination devised a treaty in 1966 requiring all states that ratify it to criminalize racial hate messages.\textsuperscript{173} Since its adoption by the United Nations general assembly, many liberal states have taken steps to implement the provisions of the treaty into the language of their speech law. The United Kingdom, Canada, Australia, and New Zealand, for example, have all devised laws restricting racist hate speech. Matsuda believes that this international trend is one that America ought to follow.

The common element between the international treaty and these different countries restrictions on racist speech is that they all recognize a certain form of racist speech as particularly dangerous.\textsuperscript{174} The definitive elements of racist speech according to this international view are discrimination, a connection to violence, expressions of inferiority, hatred, or persecution.\textsuperscript{175} This broad international definition of racist speech leads Matsuda to consider whether a narrower definition of racist speech could accomplish her goal of combating racism while, at the same time, maintaining what she views as legitimate first amendment values. As noted, speech doctrines allow for exceptions in a few categories of speech that are considered doctrinally distinct. Conspiratorial speech, incitement, fraud, obscenity, and defamation are all areas of speech that are considered to be uniquely harmful and thus beyond protection.\textsuperscript{176}

Additionally, the law recognizes certain classes of people who get additional protection from the law. Thus, with the international trend and these existing exceptions in mind, Matsuda proposes a narrow class of racist speech to be considered as a new \textit{sui generis}

\textsuperscript{173} Ibid. 2341.
\textsuperscript{174} Ibid. 2348.
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid. 2351.
category of prohibited speech. Matsuda believes that a new exception, analogous to present exceptions, could maintain the essentials of speech doctrine while combating racism just as child pornography laws, for example, combat the exploitation of children without seriously infringing on valuable speech.\textsuperscript{177}

In order to protect the structure of the first amendment doctrines which often protect subordinate groups, Matsuda narrows the definition of racist speech from her international model, and insists that her description of a qualitatively different form of racist speech deserves a "non-neutral, value-laden approach" that will better preserve free speech for Americans who deserve such rights.\textsuperscript{xxi} The defining characteristics of Matsuda’s definition of racist speech for which restrictions would be permissible are: first, the message is of racial inferiority, second, the message of inferiority is directed against a historically oppressed group, and third, the message is prosecutorial, hateful, and degrading.\textsuperscript{178}

Matsuda’s first element of racist speech is the primary identifier. All messages that portray target group members as all alike and inferior denies the personhood of target group members and is directly harmful. The second element connects racism to social structures of dominance and subordination. With this connection, Matsuda devises the “victim’s privilege” for minority group members in the belief that racial hatred without the position of dominance is impotent. The third element is related to “fighting words” precedent in that the language, by its very utterance, inflicts injury on the hearer.\textsuperscript{179} Recognizing all of these elements as necessary to criminal prosecution not only protects minorities from the harmful effects of racist speech, creating a positive zone of liberty for

\textsuperscript{177} Ibid. 2355.
\textsuperscript{178} Ibid. 2357.
minorities, but it also narrows the field of interference with minorities’ speech. This preserves minorities’ negative liberties and, according to Matsuda, prevents the kind of censorship that many minority liberals fear.\footnote{Ibid. 2358.}

Matsuda recognizes that even narrow speech restrictions could back-fire and be applied disproportionately to vulnerable groups, as they have in some countries that follow the international standard, such as Brittan and Canada, but she believes that an even narrower definition could be developed alongside her more modest race-based category to avoid this possibility. Although Matsuda defers the specifics of her narrower definition for another analysis, throughout the proposal she considers other groups that, she believes, also deserve the victim’s privilege due to additional forms of discrimination inherent to American life. Women, gays, and lesbians, Matsuda contends, should also be allowed claim to the victim’s privilege under certain circumstances, seemingly narrowing the focus of her proposed restrictions.\footnote{Ibid.} This even more narrow definition of racist speech would only limit a fraction of hate speech, but, Matsuda insists, such restrictions would have significant practical and symbolic impacts on American life.

Many types of extreme speech remain protected beneath either of these two narrow criteria. Marxist speech, for example, which encourages religious persecution, the execution of capitalists, and the destruction of the family, would remain protected. Although the various quasi-Marxists regimes that have gained and lost power in world over the previous century - such as those symbolized by figures like Stalin, Mao, Kim Jung III, Pol Pot, and Castro - have murdered more people than Hitler and the Nazis in
the name of ideology, communism is race neutral and not universally condemned as is
Nazism. The overt anti-Semitism of some Nazi speech makes it part of this *sui generis*
category, while Marxism, according to Matsuda, is simply part of the political discussion
that presents alternative views of political origination, distribution of wealth and power,
and the like. Advocating violence in the name of ideology is different from advocating
violence in the name of racism. Some Marxists live and work in the United States and
are respected members of their communities, while the anti-Semitism of Nazism is
universally reviled and undeserving of first amendment protections, according to
Matsuda’s standards.

Many first amendment protections for hate speech would be retained by
subordinate-group members under Matsuda’s proposal. Although expressions of hatred
against dominant-group members by subordinate-groups is disturbing to Matsuda, in
respect for first amendment principles, these expressions, she believes, are best left to the
market place of ideas.181 Hateful expressions by subordinate against dominant-group
members should be expected due to stratified social conditions, and may actually be
therapeutic for the subordinate class. The harm caused by such speech exists, Matsuda
concedes, but it is of a different degree and easily mitigated by the social privilege of
dominant-group members.182 Matsuda uses the distinction between public and private
persons in defamation law to explain her point. Like a public official or celebrity injured
by defamatory comments, the dominant class has greater access to “safe harbor” and
exclusive dominant-group interactions.183 The power, wealth, and prestige of dominant
group members mitigate the effects of verbal attacks by minorities, according to Matsuda,

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181 Ibid.
182 Ibid. 2361.
and, when warranted, unofficial responses should apply to unwanted speech considered as hateful and offensive by the dominant group.

Matsuda suggests that the dominant group can be differentiated from subordinate groups by sifting through social indicators such as wealth, mobility, comfort, health, and survival rate.\textsuperscript{184} In many cases, the statistical status of different groups as a whole would determine who is subordinate and who is not under Matsuda's proposal. The success of individual subordinate group members does not, in Matsuda's estimation, disqualify his or her group from the designation of subordinate. Matsuda claims the luck of a particular subordinate group member in achieving success is not the same as the privilege of dominate group membership. Nor does the relative success of some groups indicate that the cycle of subordination has been broken. Jews and Asians who have achieved economic success are victimized in other ways that go unnoticed by statistics.\textsuperscript{xxii} Thus, "fact finders" could assess the relative subjugation of different racial groups in the way that lawyers find facts in other areas of the law.\textsuperscript{185}

The victim's privilege becomes problematic, however, when considering restrictions on racist speech both within a particular group and between the various groups. Matsuda proposes that particular subordinate group's different standards would combine to determine the level of speech rights granted to each group. Some hateful racial messages would be regulated by various community standards while other forms of "word play" within a particular minority community would be tolerated.\textsuperscript{186} Each minority community would decide what other groups higher on the scale of subordination

\textsuperscript{183} Ibid.  
\textsuperscript{184} Ibid. 2362.  
\textsuperscript{185} Ibid. 2363.  
\textsuperscript{186} Ibid. 2364.
may legally say about their particular community, and what the group may say about itself and other groups higher on the scale of historical subordination. Matsuda contends that over-regulating racist messages generated in subordinate groups would further victimize these groups due to a misunderstanding of their linguistic and cultural norms, and thus careful scrutiny must apply when restricting the speech of subordinate groups.\textsuperscript{187}

Zionist speech provides an example of how the victim’s privilege could be either granted or refused to the same person depending on the pigment in that person’s skin and the content of the speech. Matsuda rejects the notion that Zionist speech is racist in favor of her “highly contextualized” approach that accounts for the historical context of persecution experienced by many Jews. Any hostility within Zionist speech is therefore a reaction to historical persecution rather than a tool of dominance, according to Matsuda’s standards. Thus, stating that gentiles are mud people without souls, for instance, is considered by Matsuda to be a “survivalist expression, arising out of the Jewish experience of persecution and without resort to the generic rhetoric of white supremacy, [and] is [thus] protected under the contextualized approach.”\textsuperscript{188} However, should a white Zionist claim racial dominance over black or brown people, Matsuda cautions, then the victim’s privilege would be refused.

Matsuda contends that within a racist society some racist speech must be allowed to maintain discourse about racism while other forms of literary and or historical racism no longer need to be tolerated by subordinate groups. News reporters may sometimes have to repeat racist messages for the dissemination of news about racist incidents. Law school professors may sometimes use racist language for the development of hypothetical

\textsuperscript{187} Ibid.
\textsuperscript{188} Ibid.
circumstances for educational reasons. Situations such as these would not be actionable because these messages are spread for reasons other than racial persecution.\textsuperscript{189} Public museums and private antique collections, however, that do not weigh the benefit of historical preservation, such as Jim Crow signs or Nazi paraphernalia, against the harm that such artifacts may cause to subordinate group members could be subject to regulation.\textsuperscript{190} Each subordinate group knows, according to Matsuda, which artifacts and historical references cause offense and which do not. Realism in books, film, and theater would also be subject to the various standards of subordinate groups. Although authors such as Mark Twain abhorred racism and used literary realism to expose the hypocrisy of slavery, there is the danger, according to Matsuda, that African-Americans may miss the irony of the message, and Caucasians may “simply enjoy the racist dialogue on its face.”\textsuperscript{191} Subordinate groups are thus seen by Matsuda as best equipped to decide what type of artistic and/or historical expressions, like literature and museum collections, should be legally tolerated.

The question of education is of great importance in American life, and Matsuda views the university setting as a special case within the free speech issue. The next round of Supreme Court decisions in the realm of speech, Matsuda believes, will come from the issue of hate speech on the university campus.\textsuperscript{192} Matsuda recognizes universities as unique places with special responsibilities to students who live in a culture of subordination. Thus, official tolerance of certain types of racist speech on college campuses, according to Matsuda, is more harmful than tolerance in the broader

\textsuperscript{189} Ibid.
\textsuperscript{190} Ibid. 2368.
\textsuperscript{191} Ibid. 2369.
\textsuperscript{192} Ibid. 2370.
community. Matsuda insists that many minority students often go to college already at risk academically, socially, and psychologically. Additionally, Matsuda insists minority faculty members are typically untenured, overburdened, isolated, or non-existent. The marginalized position of minority faculty further marginalizes minority students, Matsuda believes, making these minority students, and other similarly subordinate students, unique. Thus, Matsuda asserts that the victim’s privilege should carry more weight on a college campus than it does in the community at large. There is a legal precedent, according to Matsuda, for considering the race of the speaker and target when considering speech prohibitions on campus. Matsuda again recalls defamation law for guidance. Dominant group students and faculty could be considered as public individuals with implied wealth, power, fame, and ego that make their remarks different and susceptible to heightened scrutiny because of their perceived ability to dish-out and weather racial attacks. Students are analogous to a captive audience, and subordinate students in this position are particularly vulnerable to certain types of hate speech. This extra care on college campuses would act as a training ground in the area of speech. Subordinate group students would feel as though they too are part of the larger community, if certain types of racist speech were vigorously regulated by school authorities, and dominate group students would be taught that they could no longer “get-away-with-it,” and thus learn more quickly what is expected in social discourse.

Matsuda recognizes that speech restrictions set the tone for social discourse, and, like Justice Harlan, she recognizes that the activity of speech has tremendous potential as an educational tool. Like Harlan, Matsuda recognizes that free speech doctrine is itself

\[193\] Ibid. 2371-2372.
\[194\] Ibid.
an education that reflects and communicates certain legal themes and social aspirations. However, contrary to Harlan's conception of free speech as an education in general tolerance, Matsuda's proposal seeks to use speech law as a legal means to purge what she believes are harmful ideas from certain members of society, thus transforming speech doctrine into an education in limited intolerance. Matsuda's proposal communicates the message that if we know nothing else as a society, then at the very least we know that racism is wrong. We know who is responsible for American racism, and, as a liberal society, we have an obligation to combat the harms of racism by criminalizing the messages of some racists. Although Matsuda acknowledges the legitimacy of many traditional first amendment values, like individual autonomy, self-government, and truth-seeking, she believes that these values are undermined by legally tolerating the racist speech of one group of citizens who need to be taught that they can no longer get away with the status-quo of racism.

Thus, Matsuda's proposal, if implemented, would communicate the general message that the elimination of racism is now a government priority that will be prosecuted with all the resources and stamina of the state — a declaration of war on racism, so to speak. Ideally, Matsuda seeks to combat racial dominance with "ratchet like" measures that include taking advantage of existing practices such as desegregation and affirmative action, and also mandating more progressive practices such as her proposal for the criminalization of racist/misogynist propaganda and financial reparation.195 In the event that these types of government programs end the hierarchy of dominance and subordination, then, Matsuda allows, the new narrow category and the victim's privilege could be reviewed and possibly revised to reflect this changing reality.
Until then, however, Matsuda seeks to bring the politics of race to the forefront of speech law.

VI. My Assessment of These Two Visions of Free Speech and Tolerance

We have now seen that legal liberals like Bollinger and critical race theorists like Matsuda have conflicting notions of how to handle intolerant speech. They disagree on whether tolerance is best served by tolerating intolerant speech or by its regulation. For Bollinger, the values that underwrite current speech doctrine reflect both negative and positive concepts of liberty, and thus protect the activity of speech for the individual while creating an atmosphere in which the principle of general tolerance can be experienced, which, in effect, supports the social aspiration of racial equality.

Alternatively, for Matsuda, the values of the classical model and the value of general tolerance are overstated in speech law at the expense of a more progressive understanding of racial equality. With Matsuda’s regime of limited intolerance and her victim’s privilege, however, racial minorities would enjoy the individual license of negative liberty while benefiting from a protective zone of positive liberty. Those without the victim’s privilege, on the other hand, would be denied both the negative and positive concepts of liberty in this area of speech in order to better secure the rights and liberties of racial minorities. Considering these different visions of free speech within the American tradition, the question now becomes: which of these two contrasting legal strategies best preserves the value of tolerance for now and in the future?

193 Ibid. 2375.
I find the legal arguments of liberals like Bollinger to be more convincing. Bollinger's tolerance principle is consistent with the values of the classical model and the principle is antithetical to intolerant ideologies that threaten liberal institutions. I agree with Bollinger's understanding of speech as different from other liberties, and thus requiring greater care and protection to promote the broad value of general social tolerance. Although I agree with Matsuda that racist hate speech causes real and pervasive harms to minorities, I also agree with Bollinger that these harms do not justify legal restrictions on this type of speech. Legal strategies showing tolerance toward the speech of the least of us, who express intolerant and insensitive ideas, maintains the liberties of conscience for us all. I argue that this strategy defeats intolerant ideologies by refusing to instantiate intolerance within the American institution of free speech.

Matsuda's proposal, alternatively, would alter the American approach to intolerant ideas and weaken the well-founded commitment to the general tolerance principle. Admittedly, Matsuda's proposal would have benefits. Such law would shield racial minorities from the immediate personal harms caused by the expression of gratuitously racist ideas, or provide legal recourse should those ideas surface, but these limited, short-term benefits come at too high of a price in the long-term, in my view. Hate speech restrictions show intolerance towards ideas, and thus seek to mandate the manner in which people think. This weakens our commitment to the values identified in the classical model, and, as the fortress model warns, foster a general cultural attitude of intolerance that could erode other liberal constitutional principles critical to the vigorous political life of the American plurality.
Three additional arguments, I suggest, highlight some negative aspects of Matsuda’s proposal of limited intolerance, and buttress Bollinger’s positive justification for general tolerance in the area of speech. First, I believe it is implausible that any type of hate speech restriction would address the deeper problem of racism, and Matsuda’s paternalistic proposal could cause silence on important racial issues, which may actually make matters worse. In essence, hate speech restrictions would probably fail to provide a greater level of protection for minorities in the long-term than does current speech doctrine’s vision of tolerance. Second, hate speech restrictions, no matter how narrow, inevitably venture down the slippery slope, jeopardizing truly valuable speech and thus jeopardizing core liberal values that underwrite our constitution. Third, Matsuda ignores the difficulty of setting out clear standards of exactly what speech is prohibited beneath her prescriptions, and this uncertainty violates the liberal principle of fair notice. Within the larger war on racism described by Matsuda, her focused speech restrictions represent a “nuclear” option, and the fall-out of this option creates more difficulties in the area of speech than it solves.

First, Matsuda’s provides no convincing evidence that her proposal would actually combat racism. The narrow focus of Matsuda’s proposal would only cover the most obvious forms of racist expressions while other more insidious expressions and, the ideas behind them, would still survive. Social problems involving race are better left in the open because it is doubtful that any law could eliminate all forms of racist speech, much less racist thought. No country that has adopted strict speech policies has declared the defeat of racism. If free and open expression cannot expose and defeat the error of racism then why are we to believe that censorship can accomplish this task? Ideological
censorship has never liberated anyone from oppression, tolerance in area of speech, however, has helped many marginalized and disenfranchised people of all descriptions claim their civil rights and civil liberties, helping to close the divide between American ideals and every-day social practice. Thus, I believe Matsuda’s vision of speech law would not achieve its stated goal of combating racism, and would possibly alienate the different races from one another, ultimately making matters worse.

Matsuda’s proposal is also paternalistic toward minority communities, essentially treating these groups as though they are incapable of defending themselves in the “market place of ideas.” This paternalism might add to the silence on these important issues that plague society by attempting to shield racial minorities from offensive ideas that she believes they are ill-equipped to handle. In my estimation, constructive cross racial dialogue is hindered by such policies, policies which might widen the gap of racial misunderstanding and increase the level of racial tension. The prospect of diverse racial groups doing battle in court over every utterance that causes offence does not seem likely to promote the ideals of racial unity or equality. Matsuda’s preoccupation with racial distinctions in speech law could exacerbate racial divisions in society and polarize social factions, rather than reduce the negative effects of racism in the long-term.

Second, even narrow hate speech restrictions, such as Matsuda’s, have unintended negative consequences that cause legitimate concerns for legal liberals. According to Nadine Strossen, in her article *Regulating Racist Speech On Campus: A Modest Proposal*, such legal prescriptions contain three related difficulties that have a negative symbolic impact on constitutional values: first, using the discretion of different racial group standards to impose this type of speech doctrine involves the danger of arbitrary
and discriminatory enforcement; second, regardless of how narrow speech limits are
drawn, there will be a chilling effect beyond their scope; and third, such legal precedent
could be used in the future to restrict other types of speech beyond any current
interpretation.196 Thus, according to Strossen, regulations that directly impact only a
discrete category of speech in fact add to the ambiguity at the margins of speech law
rather than clarifying them.197 Additionally, such regulations arbitrarily limit citizen’s
individual and collective educations, preparing the way for new, future restrictions that
could follow a similar theme of intolerance.198 Proposals such as Matsuda’s are
tantamount to view-point discrimination, in Strossen’s opinion, and they would thus
weaken classical constitutional principles and the moral legitimacy of first amendment by
showing intolerance toward one type of bias, but not others.199

In my view, the specifics of Matsuda’s proposal justify Strossen’s concerns, and
indicate why such hate speech restrictions are considered by legal liberals as the “thin
dge of the wedge” that will inevitably strike at the core of speech doctrine if allowed
entrance. Matsuda’s sui generis category goes beyond low-value racist speech at the
margins and could jeopardize valuable speech in the center of American free speech
dctrine. Matsuda’s discussion of literature and historical preservation indicates that
valuable or not, if certain groups determine that works of art or historical artifacts are
offensive, then artistic or historical concerns could lose. If different community
standards could restrict and edit the words of Twain or Melville, and perhaps Jefferson
and Lincoln, because of an irrational fear that people will not understand, then, I fear, no

197 Ibid. 522.
198 Ibid.
words or ideas will be safe. America’s very reason for being is undermined if bits of art and history can be plucked from our collective conscience by government censorship. Matsuda’s proposal could go beyond the stated goal of restricting white racists’ speech, and seeks restrictions on how Americans are able to consider ideas about race, which is at the core of the free speech ideal. And, with Matsuda’s expanded vision of the victim’s privilege - that in addition to racial and ethnic minorities, includes women, gays, and lesbians - the wedge widens.

Third, for legal liberals, like Strossen and Bollinger, a clear rule that avoids unintentionally jeopardizing valuable speech is essential to the application of speech law in a country as diverse as the United States. The liberal principle of fair notice requires that a law establish a well-defined rule to provide people with clear specifications of what is required of them, thus outlining when and how the state will intervene in their lives. Despite exceptions, contemporary speech law meets the liberal requirement of fair notice and provides substantial clarity in regards to which types of speech are protected and which are prohibited. Matsuda’s proposal, however, violates this important liberal principle of fair notice and would pose significant difficulties at providing clear legal distinctions concerning whose speech is restricted and what force those restrictions carry.

For instance, Matsuda is unclear on how the would-be dominant group would be defined. Matsuda’s highly contextualized approach is careful to analyze the status of subordinate-groups, but she does not indicate whether or not the same careful approach would apply to would-be dominate groups. The so-called dominate group is hardly monolithic, and it is unclear what standard would apply to specific subgroups that might not easily fit into her categories. The Scotts-Irish communities living in the Appalachian

199 Ibid. 521.
region, for example, present a peculiar vision of historical dominance under the highly contextualized approach. White Anglo Saxon Protestants from New England can be differentiated from Acadian and Creole Catholics of South Louisiana by social indicators, statistics, and history. The existence of recognizable sub-groups such as these, and others, seriously complicates the effort to define the victim's privilege; though, a clear rule defining dominate v. subordinate groups would be necessary if Matsuda's goal is truly ending the legacy of historical dominance.

Supposing the dominate-group was denied the careful scrutiny of a highly contextualized approach, independent community standards would prove equally controversial between different minority groups. Surely not every community standard would agree with the standards of every other group. Matsuda's claim that Zionist speech is not a racist expression is controversial, for example. Many Arabs would disagree with this claim. Similarly, some Jews are offended by portions of the New Testament and may press for a ban on certain Christian themes, angering some devout Christians in the African-American or Latino communities. Organizations such as the Nation of Islam often adopt an anti-Semitic tone that is equally offensive to some Jews. Tensions sometimes exist between Japanese and Chinese communities reflecting long histories of atrocity and cultural hatred. Americans of Turkish and Greek ancestry have conflicting views of a shared history, and neither group is likely to come to terms with the intolerant speech of the other. What about people of mixed lineage who don't fit nicely into a single group? Matsuda's proposal ignores these and other potential practical problems. No uncontroversial standard for assessing protected from unprotected speech could exist between many groups. The vagueness and uncertainty of Matsuda's victim's
privilege does not strengthen the margins of speech law, and would fail to provide adequate notice of what particular expressions would be allowed by a particular group and what expressions would be denied, making her proposal potentially overbroad and therefore very difficult to apply consistently. Thus, even if the law could determine a moral and intellectual substance to the distinction of each racial group, the operational barriers in determining a consistent and stable rule that could regulate the speech between each group, without silencing valuable speech, seem to me insurmountable.

Racial equality is of course an important American ideal, but Matsuda has not demonstrated that her proposal would actually combat racism while clearly demonstrating that her narrow category would negatively impact core first amendment principles. Her proposal focuses on the symbols of racism rather than the causes of intolerance, which, I believe, are generally ignorance and a lack of constructive dialogue; and, thus, Matsuda allows the rough veneer of racist language to obscure how effectively free speech has advanced the cause of racial equality. Matsuda’s analysis is so entirely consumed by her fear of certain racist ideas, and the people who express them, that she seeks to eradicate these ideas through the power of government. Thus, I believe, she falls prey to the seductive, though destructive, impulse of intolerance that similarly afflicts other ideologues. Hate speech restrictions, although intuitively appealing, would upset the balance of mutually reinforcing liberal values that Americans have come to support, including the promotion of racial equality, and are thus rejected by many legal liberals of all descriptions.
VII. Conclusion: Closing the Divide

Despite the obvious appeal of the modern liberal concept of liberty, liberal law and free speech are neither intrinsically valuable, nor are they intuitively preferable to other conceptions of political values for which other political traditions argue. By internalizing and reflecting the value of general tolerance, though, Americans have shown that classical liberal ideals can evolve, and now offer a better system of organization than any alternative, given our diverse population, conflicted history, and modern ideals. Throughout this thesis, we have considered whether or not arguments for the protection of certain liberties, as they are embodied in contemporary speech doctrines, promote a plausible and compelling account of liberal political values. This thesis recognizes speech as providing the possibility for the pursuits of modern liberal values, and also recognizes that these political values are of no avail without the social value of tolerance. The liberal notion of liberty (read equal liberty) can be understood as having been realized through contemporary American speech doctrines vision of tolerance. Tolerance has bridged the divide between American political ideals and modern social realities.

Although the hard lessons of history and experience have purged most people of the quaint expectation of complete social harmony that exemplifies some aspects of classical liberal thought, many still have genuine faith in the contemporary American balance of liberal values expressed in speech doctrines. The American system of government has brought the world a vision of political life that is flexible enough to accommodate the challenges of pluralism from one generation to the next while maintaining the fundamental value of liberty for most people. American speech law
provides a valuable example of how a tolerant society can effectively use liberal institutions to check and confine intolerance, and thus indicates how biases of all types are defeated through the force of ideas and dialogue, rather than the force of law. Liberalism remains Western philosophy's most important vision of political life, and United States speech doctrines reflect a unique balance of core liberal values, which have proven to be dynamic enough to maintain the ideal of liberty while encouraging the goal of social tolerance.
NOTES

1 A modern liberal use of the term "liberty" must include the notion of equal basic liberties for everyone regardless of contingent differences, while acknowledging the fact that institutions of liberty have no ability on their own to benefit everyone equally. With this in mind, John Rawls, in A Theory of Justice, uses the term liberty to mean the complex of rights and duties as defined by just institutions. (John Rawls, A Theory of Justice, Cambridge: Harvard University Press, 1971; Fourth Edition Reprint, Cambridge, Belnap Press, 2001, 210). Broadly, liberty is defined by a system of public rules that stipulate what citizens are either free to do, or not do. The concept of liberty and the relative worth of liberal institutions to people of different means is distinguishable, according to Rawls, in the sense that liberty is represented in a complete system that guarantees basic equal rights of citizenship, while the worth of liberty to any person depends upon the individual's capacity to advance their own interests within the framework the system defines (Ibid). An individual citizen's inability to take advantage of opportunities because of a general lack of means is not counted as a constraint on the value of liberty in general, but is instead understood as affecting the worth of liberty to a particular individual. This two part understanding of liberty allows reconciliation between the concepts of liberty and equality. In sum, Rawls' understanding of equal liberty stipulates that basic freedoms are the same for everyone, but the worth of any particular freedom is not the same for everyone. For example, the wealthy, like Ted Turner and Rupert Murdock, are able to take fuller advantage of free speech because they both have the financial resources to get their views broadcast over the public air-waves, but this does not diminish the institution of free speech for the average citizen. Similarly, equal political rights are valued less by the a-political who do not vote, than by the politically active, but this discrepancy does not diminish the value of equal political rights in general. The goal of modern liberal institutions is to protect equal liberty, but this does not indicate an unwillingness to increase the worth of liberty to the least advantaged. A modern, liberal understanding of the term "liberty" acknowledges the controversies between concepts of negative and positive liberty, as described by Isaiah Berlin in his Four Essays on Liberty. Both concepts are deeply rooted in liberal political aspirations, and the need for both types of freedom must be addressed in the structure of social rules. For an equitable political compromise to emerge from controversies over individual and social needs, though, certain basic liberties of conscience must be secured within the governing system of rules, and ought not be sacrificed for visions of political life, such as egalitarianism, that promote the freedom of everyone to participate equally in political affairs. The first component of liberty, the most essential component, is in securing certain freedoms of conscience, like freedom of thought and speech, freedom of religion, freedom of association, and the like, within the structure of government. With these fundamentals of liberty secured equally for everyone, the peaceful political debates may proceed between the demands of negative and positive liberty and the equitable balance of political power (Ibid. 176-180).

ii Ronald Dworkin asserts that personal and external preferences are sometimes so inextricably linked that it is difficult to separate them. Representative democracies are believed by many liberals to be best suited to separate personal and external preference within its political and legal institutions. (Ronald Dworkin, Taking Rights Seriously, Cambridge: Harvard University Press, 1977; Eighteenth Edition Reprint, Cambridge: Harvard University Press, 2001, 276)

iii In his book Critical Legal Studies, Andrew Altman notes: “The ideas of fair notice and legal accountability are logically distinct. It is conceptually possible for an organ of the political community to give citizens fair notice of its intended actions, yet for those actions to be beyond what the organ is legally authorized to do. It is also conceptually possible for an organ of the political community to create ill-defined zones of freedom, thus failing to provide fair notice, yet to act within its legal authority. The generic liberal model of the rule of law insists that both fair notice and legal accountability be satisfied.” (Andrew Altman, Critical Legal Studies: A Liberal Critique, Princeton: Princeton University Press, 1990; Third Edition Reprint, Princeton: Princeton University Press, 1993, 24)

iv Constitution: “the organic law framing the governmental system; the original and fundamental principles of law by which a system of government is created and according to which a country is governed. A constitution represents a mandate to the various branches of government directly from the people acting in
their sovereign capacity. It is distinguished from a law which is a rule of conduct prescribed by legislative agents of the people and subject to the limitations of the constitution" (Barron's Law Dictionary [2003], s.v. "constitution."). A liberal constitution is authorized and legitimized by the people.

**Statute:** “an act of legislature, adopted pursuant to its constitutional authority, by prescribed means and in certain form such that it becomes the law governing conduct within its scope. Statutes are enacted to prescribe conduct, define crimes, create inferior governmental bodies, appropriate public monies, and in general to promote the public good and welfare. Lesser governmental bodies adopt ordinances; administrative agencies adopt regulations.” (Ibid. s.v. “statute.”)

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v Rights neutrality is predicated on the idea that some areas of human activity are beyond the bounds of state deliberation and compromise, creating a conceptual “zone of liberty” around each citizen on which the state may not trespass. (Altman, Critical Legal Studies: A Liberal Critique, 24, 72-73) The assertion that a relatively stable boundary should exist between individual rights and political activity is a revolutionary idea in the history of political thought, though central to liberalism. The right to a free conscience and the right to own private property are archetypal to rights neutrality, while more could be mentioned, and although disagreement exists concerning the details of these rights, liberals all agree that rights must limit government to protect individual autonomy and thus liberty. (Ibid. 73) Epistemological neutrality, as the name suggests, concerns the epistemological basis for arguments that claim individual rights should limit government power. (Ibid. 75) In other words, this form of neutrality concerns the requirements placed on permissible arguments for principles and ideals believed to differentiate between the domain of government authority and the domain of individual rights. This form of liberal neutrality indicates that government ought to be indifferent toward specific epistemologies, but to limit the coercive power of the government and protect individual autonomy, there must be a conception of public reason. (Ibid. 75) The third form of liberal neutrality, political neutrality, is intended to assure an institutional arrangement that will distribute political power evenly throughout society. Political neutrality mandates that liberal systems of government remain neutral to the competing conceptions of the good within a plural society. This levels social/political power by forcing the differing conceptions of the good to negotiate and compromise, accommodating different groups and forestalling one conception of the good from gaining unrivaled dominance and forbidding the others that meet liberal criteria. Political neutrality is subordinate to rights neutrality, according to liberals, and the compromise of the political process must conform to the limits placed on politics by individual rights, which protect and promote individual autonomy. (Ibid. 76) To confine the coercive power of the state and reinforce the aforementioned principles, liberalism also demands legal neutrality, which helps define the process of adjudication. (Ibid. 76) This form of neutrality assures that once the political process has settled the compromise, and has enacted laws in accordance with the previously discussed requirements of liberal theory, those who interpret and apply the law do so according to political decisions. Liberalism insists that laws should be interpreted and applied by judges who disregard the different arguments that went into the compromise, while heeding the spirit and the wording of the compromise. This form of neutrality implies a separation between law and politics.

vi The specifications of Legal formalism are analyzed in greater detail in section III, see pp. 24-26.

vii Stare Decisis – “Lat: to stand by that which was decided; rule by which common law courts ‘are slow to interfere with principles announced in former decisions and often uphold them even though they would decide otherwise were the question a new one.’ 156 P.2d 340, 345. ‘Although [stare decisis] is not invaluable, our judicial system demands that it be overturned only on a show of good cause. Where such a good cause is not shown, it will not be repudiated.’ The doctrine is of particularly limited application in the field of constitutional law. 298 U.S. 38,94.” (Barron’s Law Dictionary [2003], s.v. “stare decisis.”). 

viii Not all legal liberals believe that classifying speech as a different kind of liberty makes much of a difference in the justification of free speech as a right. Ronald Dworkin suggests that although distinguishing free speech from other, lesser liberties sounds plausible, the distinction forces the abandonment of the notion of a right to liberty. Dworkin states, “... we shall see it is not easy to state what that difference in character comes to,[ the difference between lesser and fundamental liberties] or why it argues for a right in some cases and not others. My present point, however, is that if the distinction
between basic liberties and other liberties is defended in this way, then the notion of a general right to liberty as such has been entirely abandoned." (Dworkin, Taking Rights Seriously, 271) The focus of this thesis, however, does not question whether or not we have a 'right' to liberty, but instead questions whether or not liberty as such is worth protecting once gained.

Along side the American regime of free speech law stands a host of possible unofficial responses that groups or individuals could conceivably utilize to combat extreme speech. Society can choose to simply ignore such disturbing speech, and refuse to validate unenlightened expressions with any response. If this proves impossible or ineffective, the content of the disturbing message can be verbally attacked and rejected as utter falsehood, rendering the message indefensible to all but the most hardened irrationalists. Society has the right and the responsibility to challenge unwarranted or unwanted messages through an intellectual investigation of the merits of ideas that comprise the message, or messages; or, castigation may silence or simply defame the intolerant expression. In addition to this option of counter speech, society can choose to shun people who express offensive messages, making a pariah of those who lack good judgment or good taste, labeling people or groups as socially undesirable unworthy of respect. In many instances, vocal extremists risk job security, social standing, and physical well being from a quick-tempered public. By rallying on the forces of indignation and helping society focus its informal power on troubled spots, free speech doctrines often allow extremists the freedom to express themselves into social and political isolation. The possible unofficial responses to unwanted speech implied by the principle of free speech can be overlooked, and are sometimes mere aspirations, but this type of social power is very much reflective of American’s cultural ideals of individual autonomy and self-government.

The first ordinance required insurance with any permit for marches in excess of fifty persons – 300,000 in public liability and 50,000 in property damage – and assurances given that the group will not “portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or religious affiliation.” (Lee Bollinger, The Tolerant Society, New York: Oxford University Press, 1986; Reprint, New York: Oxford University Press, 1988, 24) The second and third ordinances were criminal laws, and violation could be penalized by up to $500 in fines or up to six months imprisonment. (Ibid.) The second ordinance forbade the dissemination of materials within Skokie which promotes and incites hatred against any person by reason of race, national origin, or religion. (Ibid.) Dissemination of materials was defined to include the display of signs, markings, or clothing of symbolic significance. The third ordinance forbade the wearing of military-style uniforms during public demonstrations. (Ibid.)

The “fighting words” doctrine of Chaplin restricts personally insulting epitaphs spoken in face to face encounters (Bollinger, The Tolerant Society, 32).

The Illinois statute in Beauharnais provided: “It is unlawful for any person, firm or corporation to manufacture, sell, offer to sell, advertise or publish, present or exhibit in a public place any lithograph, moving picture, play, drama or sketch that displays depravity, criminality, unchastity, or lack of virtue of a class of citizens, or any race, color, creed or religion, which produces a breach of the peace or riots.” (Bollinger, The Tolerant Society, 251)

In addition to Mill’s arguments that identify the positive benefits of tolerating error, Bollinger borrows the arguments of Lincoln Chafee’s Free Speech in the United States to support the notion that society is benefited by tolerating intolerant speech. (Bollinger, The Tolerant Society, 55) The legal tolerance of speech believed to be false and intolerant, according Chafee’s argument, identifies extremist elements within society, providing a “social thermometer” that notifies the public of dissatisfaction, resentfulness, or ignorance in the community. (Bollinger, The Tolerant Society, 55) An open forum that legally tolerates such extreme speech allows society to gauge the proliferation of malcontents and the scope of their intentions, socially confronting and isolating extremist elements, and discrediting their views without threatening free speech law. (Bollinger, The Tolerant Society, 55) Society and its authorities generally watch closely the actions of those who advertise extremist views in the event that rhetoric turns to action. A liberal society’s indignation toward hateful messages generally prompts loud criticism while often
encouraging authorities to scrutinize the actions of antagonists, effectively placing them beneath the social
and legal microscope.

xiv The hearings focused on communist ideology, when the real threat to national security lay in Soviet
atomic espionage.

xv The federal decision in Collin cites the Cohen decision as precedent.

xvi In his Four Essays on Liberty, Berlin discusses his two conceptions of liberty—positive and negative.
Berlin worried about the positive conception of liberty being used for oppression, but Bollinger indicates
that Berlin missed how these two conceptions are linked through tolerant speech doctrines. (Bollinger, The
Tolerant Society, 173-174)

xvii “Along with other provisions in the Bill of Rights of the United States Constitution, the First
Amendment did not purport to constrain state or local governments, but rather limited only the federal
government. See Baron v. Baltimore, 32 U.S. (7Pet.) 243 (1833). Not until 1931 did the Supreme Court
hold that the fourteenth amendment (ratified in 1868) made the first amendment’s free speech and press
clause binding on the states. See Near v. Minnesota, 283 U.S. 697, 707 (1931).” (Nadine Strossen,

xviii Matsuda’s stories of dominance and subordinance are articulated through particular stories of majority
on minority racism only, which are interwoven with more general claims of social scientists and scholars
that, she believes, support her assessment of what hate speech is, its effects, and from whom it is derived.
The particular stories included in Matsuda’s account undeniably demonstrate that some people suffer from
the moral failing of racism, but her reductive arguments refuse to acknowledge that everyone is susceptible
to the moral failing of bias, in its many incarnations, and bias is the first step toward racism and
discrimination. Some would counter this argument, as Matsuda does, by contending that bias without
economic or political power is impotent, and akin to something other than racism, perhaps justifiable
resentment of an oppressive other. Matsuda’s argument that minorities are allowed token political and
economic power only, negates the possibility of any meaningful form of minority racism because of the
inability to injure others with bias. The argument that identifies power as a necessary component of
discrimination seems correct, intuitively, but to argue that minorities possess insufficient power in American
society to deal with racist speech is dubious. Minority social power is treated with suspicion or simply
overlooked by Matsuda’s assessments because minority power does not suit her premise of a rigid racial
social hierarchy. Despite continual calls for highly contextualized considerations of racial issues, Matsuda
only uses context if it supports her premise of subordination, otherwise, she ignores the evidence. For
instance, the political and economic power of minority groups such as African-Americans, Asian-
Americans, Latinos, and Jews is undeniable. The population increases in minority groups make the sheer
numbers of likely voters a political force that elect an ever-increasing number of minority politicians, while
shaping the policies of politicians of all races. As with population growth, the economic progress of
minority communities is an undeniable reality. Large minority groups, such as African-Americans and
Latinos, have seen steady increases in the sizes of their middle and upper-classes since the civil rights era,
while smaller minority groups, such as Asians and Jews, have a long history of economic success. This
argument does not imply that the political and economic situation of all minorities is perfect, or ever was
perfect; many minorities, as well as many whites, feel left out of the political and economic benefits of
American society, but to deny the progress of minorities in general, and imply group destitution, degrades
the accomplishments of many people. In a further attempt to declare all minority groups as subordinate by
virtue of race, Matsuda claims that distinctions between poor whites and wealthy minorities are
unimportant when deciding whom is oppressed because these counter examples are the lucky and unlucky
flotsam and jetsam of institutionalized racism. Matsuda states: “The rise and fall of group status is
relevant even when an individual is a counter example, because when a group is subordinate, even the
lucky counter example feels the downward tug. Luck is not the same as privilege.” (Mari Matsuda, “Public
87:2320, 2362-2363) Matsuda simply does not convincingly make the case that minorities are always, or
even usually, at the bottom of vertical power relationships. Any person’s relative position on the vertical
scale of social influence is tied to economics and political access, and the economic and political power of minority groups is simply ignored by Matsuda. Matsuda provides no evidence that millions of educated, affluent minorities occupy a lower rung on the ladder of vertical social relations than whites with similar qualifications. Minority business leaders, politicians, and military leaders would have to disagree with such an assessment of social reality in order to continue in their jobs and be effective. Numerically, more whites in America live beneath the poverty line than do African Americans because there are more whites than African-Americans, but, regardless, a significant percentage of whites, the so-called dominant group, occupy low level positions on the vertical scale of social influence and affluence, many below minorities. This argument does not deny the existence of racism, it rejects, however, the notion that every social phenomena associated with a large, varied group of people can be summed up in the word “racism.”

Professor Nadine Strossen rejects Matsuda’s claim that the protection of racist hate speech is a form of state action. Strossen uses the Supreme Court’s understanding of the meaning of the Establishment Clause as instructive precedent for evaluating Matsuda’s claim of state action. The court has repeatedly ruled that the Establishment Clause’s neutrality and protection of private religious expressions does not convey the message that the government endorses a particular religion. Strossen points to the 1990 decision in Board of Education of Westside Community Schools v. Mergens, where the Court expressly reaffirmed the distinction between government and private speech in terms applicable to the racist speech controversy. The Court declared, Strossen notes “[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” Analogously, Strossen contends “[t]here is a crucial difference between government speech endorsing racism, which the Equal Protection Clause forbids, and private speech endorsing racism, which the Free Speech Clause protects.” (Matsuda “Public Response To Racist Speech: Considering The Victim’s Story,” 2375; Strossen, “Regulating Racist Speech On Campus: A Modest Proposal,”545)

Matsuda claims that even majority group members who express consternation over racist propaganda “share a guilty secret: the relief that they are not themselves the target of the racist attack,” insinuating that vocal racists acknowledge their racism and feel no guilt and whites who deny racism vocally, inwardly recognize the racist flaw, and because of that recognition feel guilt; thus, whether or not they realize it, whites are racist. (Matsuda “Public Response To Racist Speech: Considering The Victim’s Story,” 2338) Matsuda elaborates the point: “While they [white people who disavow racism] reject the Ku Klux Klan, they feel ambivalent relief that they are not African-American, Asian or Jewish. Thus they are drawn into willing complacency with the Klan, spared from being the feared and degraded thing.” (Ibid. 2338-2339) It is logically incorrect to move from the premise that all Klansmen are white, to the conclusion that all whites, in some way, are drawn into complacency with the Klan. Just as it is unacceptable to extend the feelings of fanatical hatred that inspired the mass murder of 9/11 to all Muslims because all of the high-jackers were Muslim, as some Christian fundamentalist attempted to do, it is equally unacceptable to make such demeaning statements of general white complicity with the Klan. Such generalizations are offensive and dangerous. Generalizations about race, culture, religion, political affiliation can only go so far in describing a particular group or individual, but Matsuda maintains that her generalizations are adequate. Matsuda does not come out and state explicitly that all whites are Klan members, but she deliberately and consistently describes the white population in terms of their least common denominator – Nazi, fascist, Klansmen – in an implicit strategy of racial indictment. Lest we forget, in addition to racial minorities, the Klan vocalizes hatred for the government, Catholics, atheists, agnostics, Humanitarian Universalists, homosexuals, bisexuals, transsexuals, communists, unionists, anarchists, and all those who agree with or otherwise associate with their political opponents, professing a hatred for whites who reject their narrow, twisted world-view along with every one else. Whites who treat others with fairness and dignity have neither a moral obligation nor any reason to feel guilty for the Klan, slavery, the annexation of Hawaii, or anything else that they had nothing to do with and do not otherwise support. Matsuda seems to deny even the possibility that a white American can avoid racism through a thoughtful consideration of the evidence that proves the equality of human kind, followed by corresponding equitable actions of justice in everyday life.
Matsuda claims that “[t]he alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the ‘fighting words’ doctrine and the ‘content/conduct’ distinction. This stretching of doctrine ultimately weakens the first amendment fabric, thus creating neutral holes that remove protection for many forms of speech.” (Matsuda “Public Response To Racist Speech: Considering The Victim’s Story,” 2357)

“While this article focuses on the phenomenology of racism it includes discussion of the closely associated phenomenology of anti-Semitism. The same groups, using many of the same techniques, and operating from many of the same motivations and dysfunctions typically produce racist and anti-Semitic speech. The serious problem of violent pornography and anti-gay and lesbian hate speech are not discussed in this article. While I believe these forms of hate speech require public restriction, these forms require a separate analysis because of the complex and violent nature of gender subordination, and the different way in which sex operates as a locus of oppression. They are, therefore, beyond the scope of this piece.” (Matsuda “Public Response To Racist Speech: Considering The Victim’s Story,” 2332)

The evidence for many of Matsuda’s serious charges of racism is often flimsy, at best. For example, Matsuda states that Asians who experience economic success remain underemployed relative to their talents, and her citation indicates why this particular claim is misleading (Matsuda “Public Response To Racist Speech: Considering The Victim’s Story,” 2363) The generalization of Asian-American underemployment is attributed, in a footnote, to a single book entitled, Korean Americans and the ‘Success’ Image: A Critique, by Kim Herth, that, obviously, analyzes Korean-American success as a microcosm of a much larger community, but this distinct microcosm is not representative of all Asian-Americans. (Ibid. 2363) Matsuda provides no evidence to justify her sweeping generalizations of current, systemic Asian-American economic oppression, although that is her charge, and like her other evidence for the American racial hierarchy, evidence is either unavailable or inconclusive. Matsuda provides no statistics that match wages, education, or training amongst different racial groups.

There is no convincing evidence that punishment for name calling actually changes deeply held beliefs, and, to the contrary, empirical evidence shows that censorship makes forbidden speech more appealing. (Strossen , “Regulating Racist Speech On Campus: A Modest Proposal,” 554)

Great Brittan adopted hate speech restrictions in 1965. There is no discernable evidence 40 years later that neo-Nazi groups, such as the National Front, have been negatively impacted. Many racist groups, such as the National Front, thrive in Brittan today, and some believe that racism is actually a more pervasive problem in Brittan than it is in the United States. (Strossen , “Regulating Racist Speech On Campus: A Modest Proposal,” 554)
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