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The Restoration of Tolerance

Steven D. Smith†

In this Article, Professor Smith examines the problems that inhere in a value-neutral version of liberalism. He argues that because governing necessarily entails choosing among competing visions of what is good or worthy of protection, neutrality is an empty ideal that is incapable of supporting a liberal community. Professor Smith therefore rejects the assertion that a society must choose between intolerance and neutrality. He argues instead that society's real choice is between tolerance and intolerance. He concludes that tolerance, which attempts to give proper respect and scope to the claims of both political community and individual freedom, is the only reasonable alternative to intolerance. He then uses recent free exercise of religion and free speech cases to show how a theory of tolerance might affect judicial doctrine.

Tolerance is a very dull virtue. It is boring. Unlike love, it has always had a bad press. It is negative. It merely means putting up with people, being able to stand things. No one has ever written an ode to tolerance, or raised a statue to her. Yet this is the quality which will be most needed . . . .

—E.M. Forster

The current crisis in liberal democratic thought has led to a revival of interest in the concept of tolerance. Although it has never wholly disappeared from liberal diction, "tolerance," like "patriotism," "higher

† Professor of Law, University of Colorado. B.A., Brigham Young University, 1976; J.D. Yale University, 1979. I thank Richard Collins, Frederick Gedicks, Kerry MacIntosh, Chris Mueller, Gene Nichol, Pierre Schlag, and the students in my jurisprudence class for their helpful comments on earlier drafts of this article.

1. E.M. FORSTER, Tolerance, in TWO CHEERS FOR DEMOCRACY 45 (1951).
2. The theme of tolerance has been extensively explored in Lee Bollinger's writings about freedom of speech, L. BOLLINGER, THE TOLERANT SOCIETY (1986); Bollinger, Free Speech and Intellectual Values, 92 YALE L.J. 438, 460 (1983), and in critical reactions to those writings, see infra note 202. Other discussions of tolerance in legal literature include M. PERRY, MORALITY, POLITICS, AND LAW 96-97, 102-03 (1988) (discussing tolerance as an alternative to coercive or repressive legislation), and Sherry, An Essay Concerning Tolerance, 71 MINN. L. REV. 963, 985-89 (1987) (extending Bollinger's theory of tolerance to suggest that a combination of societal intolerance and governmental tolerance would best create a virtuous citizenry). See also D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986). Despite its title, however, Richards' book fits much more comfortably into the school of thought devoted to neutrality rather than tolerance as the central liberal ideal. See infra text accompanying notes 26-35. Various discussions of tolerance in nonlegal literature are cited throughout this Article. For my previous effort to develop the idea of tolerance, see Smith, Skepticism, Tolerance, and Truth in the Theory of Free Expression, 60 S. CAL. L. REV. 649 (1987). Steven Gey offers a spirited criticism of various tolerance models, including a position he attributes to me, in Gey, The Apologetics of Suppression:
law,” “religion,” and “obedience,” may evoke ambivalent feelings in the proponents of liberal democracy. Properly speaking, one can “tolerate” only beliefs or practices of which one disapproves. For example, a community may tolerate prostitution or pornography; it does not “tolerate” honesty, compassion, or artistic achievement. But a proponent of liberal democracy is likely to believe that one should not merely “tolerate” those who are different, but should extend to them an “equal concern and respect.”

In contemporary liberalism, tolerance stands as a kind of halfway house, praiseworthy perhaps for what it departs from and leads to, but unsatisfactory as a permanent abode. But that more permanent home—ostensibly “mature” liberalism—is itself currently besieged. In this time of liberal crisis, “tolerance,” despite the ambivalence it generates, is an important resource in the armory of liberal democracy. Indeed, this Article suggests that the viability of modern liberalism requires the restoration of tolerance from its current marginal status to a central position in the thought and practice of liberal democracy.

Part I seeks to clarify the relation of tolerance to other liberal ideals such as neutrality and equality by means of a brief hypothetical history of the development of a liberal political community. This hypothetical his-


3. See Newman, The Idea of Religious Tolerance, 15 Am. Phil. Q. 187, 189 (1978) (asserting that tolerance entails “acceptance of someone’s holding a belief [that] one considers to be significantly inferior to one’s own alternative belief”); see also Halberstam, The Paradox of Tolerance, 14 Phil. F. 190, 191 (1982-83) (“It seems fairly obvious that only if A disagrees with B could he conceivably tolerate B.”). But cf. G. Mensching, Tolerance and Truth in Religion 11-12, 163-66 (augmented ed. 1971) (advocating an “intrinsic” religious tolerance whereby believers, without relinquishing their own faiths, would acknowledge “foreign religion as a genuine and legitimate religious possibility of encounter with the sacred”).

4. “Liberalism” has become a term so protean that it risks becoming useless; the problem is conspicuous when the “liberalism” that critics attack is one that “liberals” themselves purport not to recognize. See, e.g., Ewald, Unger’s Philosophy: A Critical Legal Study, 97 Yale L.J. 665, 682-83 (1988) (arguing that the “liberalism” which Roberto Unger attacks is not a position that liberals have ever held). One critic of liberalism has even argued that “one can only conclude, and conclude nonparadoxically, that liberalism doesn’t exist.” Fish, Liberalism Doesn’t Exist, 1987 Duke L.J. 997, 1001. Despite the disagreement as to the specific content of “liberalism,” there is no obviously preferable replacement for the term as a description of a family of political ideas and practices that emphasize the importance of individual freedom and of preserving space for personal autonomy free from collective control. See Ross, A Real Defense of Tolerance, 22 J. Value Inquiry 127, 127 (1988). In this general sense, “liberalism” includes much of what both political liberals and political conservatives value. In addition, it should be noted that “liberalism” in this general sense is compatible but not synonymous with “democracy”; hence, the term “liberal democracy” is not quite a redundancy.

5. H. Jefferson Powell observes that “[t]he liberal mainstream of academic thought is divided and increasingly unsure of its theoretical underpinnings . . . [and] is beset by strident and sometimes telling criticism from left and right.” Powell, Reviving Republicanism, 97 Yale L.J. 1703, 1703 (1988).
tory also explains the current marginal status of tolerance in liberal thought.

Part II argues that the prevailing conception of liberalism, which is committed to the ideals of neutrality and equality, is incapable of supporting a viable liberal community. Despite the recent proliferation of criticisms of neutrality, the ideal of neutrality is remarkably resilient—especially in particular areas such as freedom of religion and freedom of speech, in which the Supreme Court has reaffirmed that ideal in its most recent Term. Even critics who convincingly demonstrate that neutrality is an illusion often ultimately embrace the ideal, sometimes within the same essay. Thus, although flaying the concept of neutrality may seem like whispering malicious rumors about the deceased at a funeral, any obituary for neutrality is premature.

The persistence of neutrality as a liberal ideal reflects the pervasive assumption that a political community must choose between neutrality and intolerance. In order to dislodge that assumption, Part III considers why neutrality is not an alternative to intolerance and identifies the true alternative—tolerance. Because a policy of intolerance is likely to stand alluringly dressed in the vestments of “democracy,” “community,” “civic virtue,” or even, conceivably, “tolerance,” it is critical to identify, clarify, and revive the concept of tolerance.

Part IV addresses the theoretical and practical objections to tolerance as a liberal ideal. The Part concludes by discussing how tolerance theory might affect judicial doctrine in the areas of free speech and the free exercise of religion.

6. For criticisms of neutrality from what may respectively and respectfully be regarded as the mainstream, the left, and the right, see Perry, *A Critique of the “Liberal” Political-Philosophical Project*, 28 WM. & MARY L. REV. 205 (1987) (outlining the failure of leading liberal philosophers, including Rawls, Ackerman, and Dworkin, to locate truly neutral principles that could guide the “liberal” state); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 40-47 (1984) (a critical legal studies criticism of liberal neutrality for its failure to help resolve fundamental legal contradictions); Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS., Spring 1981, at 3, 14-18, 22 (criticizing liberalism for failing to recognize that allegedly “neutral” decisions are in fact value laden and that governmental attempts to act neutrally have resulted in favoring “nonbelief” over “belief”).


8. See infra notes 69-76 and accompanying text.

9. See infra notes 110-14, 140-60 and accompanying text.
THE STAGES OF LIBERALISM: A HYPOTHETICAL HISTORY

The following “stages” of liberalism represent an approximation of the evolution of the liberal state: the preliberal stage characterized by orthodoxy and repression of dissent; the liberalism of tolerance in which there is an orthodoxy but no repression of dissent; and finally, the liberalism of neutrality and equality in which there is not even an official orthodoxy. As so described, however, the stages are far too idealized to serve as accurate depictions of actual history; although the features of one or another stage may seem to predominate in particular periods, at least some elements of each stage will likely be discernible at any given moment in the development of liberal democracy. Moreover, the ensuing argument does not depend on the historicity of the analysis. Thus, the following discussion should be regarded as a hypothetical history, designed for its illustrative value rather than its historical accuracy.

A. The Preliberal Stage

The preliberal stage is characterized by two essential features: orthodoxy and the repression of dissent. First, the preliberal regime maintains an orthodoxy which takes the form of an officially approved political, religious, or moral ideology. Second, dissenters from that orthodoxy are persecuted, prosecuted, or in other ways officially excluded from full participation in the political community. Together, these two features embody a policy of governmental intolerance.

The paradigmatic example of intolerance is the one-ideology, ruthlessly totalitarian regime that crushes disagreement and opposition. Another familiar example is religious intolerance, in which the regime persecutes heretics and religious dissenters. Although differing in its content and rigor from one regime to another, the apparent logic of this 10.

10. The stages of liberalism that I describe roughly parallel Preston King’s description of the historical arguments against religious intolerance. See P. King, TOLERATION 77 (1976) (identifying criticisms that accept the basic religious creed but oppose the policy of forcing others to accept it, criticisms indifferent to the creed and opposed to forcing others to accept it, and criticisms that reject both the basic creed and the concept of forcing others to accept it).

11. Id. (“[I]n practice [the three positions] will often be found enmeshed in one another ....”). See generally Fallon, What is Republicanism, and is it Worth Reviving?, 102 HARV. L. REV. 1695, 1704-09 (1989) (describing the complexity and diversity of the liberal tradition).

12. Of course, the extent to which any actual government fits such a description is often a source of considerable disagreement.

13. For a useful comparative historical overview of religious tolerance and intolerance, see G. MENSCHING, supra note 3, at 11-82.

14. As Justice Holmes recognized,

Persecution 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 law and sweep away all opposition. To allow opposition by speech seems to indicate that you ... doubt either your power or your premises.
pattern of orthodoxy and repression is clear: If most people, or a dominant group of people, believe that a particular set of ideas is correct, then beliefs or practices incompatible with that set of ideas must be in error; and error, it may seem, is an evil that should be suppressed.  

A policy of intolerance, however, violates core liberal values such as freedom and individual autonomy; hence, proponents of liberalism will criticize and seek to change the intolerant regime. A liberal movement might choose as its target either of the essential features of the preliberal regime—orthodoxy, or the repression of dissent. Because the repression of incompatible beliefs and practices forcefully and immediately violates individual freedom and autonomy, liberals are likely to focus their initial assault on eliminating repression. If the liberal challenge is successful, then the preliberal regime will pass into the second stage: liberal tolerance.

### B. The Liberalism of Tolerance

At the second stage, the newly liberal regime will exhibit only one of the two preliberal features; it will retain a political, religious, or moral orthodoxy, but will refrain from the repression of difference and dissent. Because an orthodoxy persists, dissent and heresy remain possible, but the regime does not persecute or exclude dissenters or heretics. The regime thus adopts a policy of tolerance.

In *A Letter Concerning Toleration*,  

John Locke expressed the conjunction of ideas that constitute liberal tolerance. Against the backdrop of a regime committed to both religious orthodoxy and the repression of dissent, Locke trenchantly criticized the government’s policy of intolerance. Locke did not, however, call for the rejection of the orthodox religion. Instead, he assumed the validity of Christianity and used it as a premise to argue for toleration of religious dissenters. Locke argued that because the purpose of religion is to secure the salvation of souls, and

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15. For example, Peter Nicholson notes that “since the opinion or action is wrong, there is a presumption that it would be right to suppress the one or prevent the other, and stop wrong ideas being communicated or wrong being done.” Nicholson, *Toleration as a Moral Ideal*, in *ASPECTS OF TOLERATION* 158, 163 (1985) (arguing that toleration adds to the freedom of not only the one being tolerated but also the tolerator). Jay Newman similarly acknowledges the rational justifications for intolerance. See Newman *supra* note 3, at 190-92; see also *infra* notes 119-20 and accompanying text.

16. In reality, of course, a political community may adopt a range of attitudes towards dissenters and thus may tolerate dissent in some ways while remaining intolerant in other ways. For a useful discussion of the variety of possible positions, see Kordig, *Concepts of Toleration*, 16 J. VALUE INQUIRY 59 (1982).

because salvation is attained only by means of a genuine, freely chosen faith, any attempt to enforce orthodoxy through repression is futile and perhaps even counterproductive.\textsuperscript{18} Locke's argument leaves the orthodoxy intact, but urges that the repression of dissent be eliminated.

Although Locke's tolerant regime would represent a gain for individual freedom, it may continue to arouse liberal concerns. As long as an official orthodoxy persists, the threat of persecution and repression looms.\textsuperscript{19} A persisting orthodoxy may engender the perception that the state grants freedom to the individual as a favor that it may later withdraw—\textsuperscript{20}a viewpoint contrary to the liberal conception of freedom as an inalienable right. In this spirit Thomas Paine argued that "[t]olerance is not the opposite of intolerance, but is the counterfeit of it. Both are despotisms."\textsuperscript{21}

Furthermore, tolerance suggests condescension.\textsuperscript{22} Even if the regime never resorts to repression, the persistence of orthodoxy may still indicate the regime's disapproval of those who dissent; dissenters' beliefs or way of life, though legally protected, are nonetheless wrong from the orthodox perspective. The symbolic condescension and disapproval implicit in an attitude of tolerance might make dissenters feel that they are not fully accepted as citizens.\textsuperscript{23} This symbolic ostracism might inhibit the realization of an inclusive, harmoniously integrated political community.\textsuperscript{24}

\begin{enumerate}
\item[18.] See \textit{id.} at 25-27.
\item[19.] The fear remains that, as Learned Hand observed, "tolerance ends where faith begins." L. \textsc{Hand}, \textit{Sources of Tolerance}, in \textsc{The Spirit of Liberty} 66, 72 (3d ed. 1960); see also \textsc{Ladd}, \textit{Politics and Religion in America: The Enigma of Pluralism}, in \textsc{Religion, Morality and the Law: Nomos XXX} 263, 264-65, 271-75 (1988) (recognizing the limits of toleration based on religious doctrine).
\item[20.] Cf. P. \textsc{King}, \textit{supra} note 10, at 9 ("For if one concedes or promotes a power to tolerate, one equally concedes or promotes a power not to tolerate.").
\item[21.] Paine, \textit{The Rights of Man}, in \textsc{Reflections on the Revolution in France and The Rights of Man} 267, 324 (1973) (emphasis in original). For a recent pronouncement to the same effect, see \textsc{Littell}, \textit{Religious Liberty, the Free Churches, and Political Action}, in \textsc{Religion and the State: Essays in Honor of Leo Pfeffer} 379, 382 (J. \textsc{Wood} ed. 1985) ("Toleration, however, is not the opposite of persecution; it is the obverse side of the coin.").
\item[22.] Cf. \textsc{Esbeck}, \textit{The Lemon Test: Should It Be Retained, Reformulated or Rejected?}, \textsc{4 Notre Dame J. L. ETHICS & PUB. POL'y} 513, 547 (1990) (noting that "the term 'toleration' suggests that government is patronizing minority religions by choosing to afford them religious freedom").
\item[23.] See, e.g., \textsc{Conkle}, \textit{Toward a General Theory of the Establishment Clause}, 82 \textsc{Nw. U.L. Rev.} 1113, 1166-69, 1176-78 (1988) (arguing that governmental approval of religious belief inhibits the achievement of a "religiously inclusive political community"); \textsc{Kart}, \textit{Paths to Belonging: The Constitution and Cultural Identity}, 64 \textsc{N.C.L. Rev.} 303, 358 (1986) ("The most serious harm of [officially sponsored school prayer] is that it tells schoolchildren who do not share the dominant religious faiths represented by them that they are outsiders, that they do not belong as full members of the community.").
\item[24.] Thus, Justice \textsc{O'Connor} would hold that the establishment clause prohibits government from endorsing or disapproving of religion because such actions "send[ ] a message to nonadherents that they are outsiders, not full members of the political community."). \textsc{Lynch v. Donnelly}, 465 U.S.
THE RESTORATION OF TOLERANCE

For these reasons, proponents of liberal democracy may not be satisfied with the elimination of repression; they may want to abandon official orthodoxy as well.25 If society takes that step, the liberal regime will pass into the third stage of its development: liberal neutrality.

C. The Liberalism of Neutrality and Equality

The third stage of liberalism repudiates both features of the pre-liberal regime: It eschews not only repression but also the very notion of an official orthodoxy. The term “tolerance” no longer applies in this context because, strictly speaking, one can “tolerate” only a belief or practice with which one disagrees. Rather than tolerance, the third stage prescribes an attitude of neutrality; the state is forbidden to take sides or express preferences regarding competing values or conceptions of the good.26 The prevailing principle might also be described as one favoring “equality”: In the eyes of the state, or of the law, all groups and individuals are entitled to “equal concern and respect” regardless of their political ideology, religious faith, or moral commitments.27

The development of religious liberty in Virginia illustrates this evolution from tolerance to neutral equality. George Mason’s original proposal for religious freedom in Virginia’s Declaration of Rights provided that “all men should enjoy the fullest Toleration in the Exercise of Religion according to the Dictates of Conscience.”28 But James Madison offered an amendment “eliminating ‘toleration’ and putting in its place that ‘all men are equally entitled to the full and free exercise of religion, according to the dictates of conscience.’”29 Thus, equality replaced tolerance as the foundation for religious freedom in Virginia.

The ideal of liberal neutrality or equality is also variously but perva-
sively manifest in current legal theory. For example, neutrality is central to Bruce Ackerman's theory of liberal justice: Ackerman's liberal state is forbidden to act upon any reason which assumes or asserts that any citizen's "conception of the good is better than that asserted by any of his fellow citizens."

What Ackerman calls "neutrality," someone else might label "equality"; to be neutral means that all values and viewpoints, and persons holding such values and viewpoints, are regarded as equals. Thus Ackerman argues that respect, initial wealth, opportunity, genetic endowments, and sacrifice should in principle be distributed equally among citizens. Similarly, although Ronald Dworkin posits "equal concern and respect" as the central principle of liberalism, his principle differs little from Ackerman's neutrality principle. "Equal concern and respect" entails the following consequences:

[Government] must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality . . . .

Thus, whether under the banner of "neutrality" or "equality," both Ackerman and Dworkin reject the retention of an official orthodoxy based upon approved substantive values or conceptions of the good. Ackerman's and Dworkin's approaches may be regarded as flip sides of each other. For Ackerman, "neutrality" is primary and "equality" is derivative; for Dworkin, the derivation flows in the opposite direction. But however the logic runs, both theorists endorse neutrality among conceptions of the good as well as equality among citizens. These values constitute the essence of liberalism in its third stage, in which the only orthodoxy is the repudiation of orthodoxy.

30. Richard Fallon notes that although some contemporary liberals do not embrace neutrality, "[t]heirs seems a minority view. The neutrality requirement resonates, however imperfectly, with the paradigmatically liberal writings of Dworkin, Ackerman, and Rawls." Fallon, supra note 11, at 1715 (footnotes omitted).


32. See id. at 15 (respect), 53-59 (initial wealth), 113-24 (genetic endowments), 174-80 (opportunity), 237-39 (sacrifice).


34. Id.; see also R. DWORKIN, A MATTER OF PRINCIPLE 191-92 (1985) (arguing that "liberalism takes, as its constitutive political morality" the view that "government must be neutral on what might be called the question of the good life"); id. at 222 ("Orthodox liberalism holds that no government should rely, to justify its use of public funds, on the assumption that some ways of leading one's life are more worthy than others . . . .").

35. See Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (describing as the "fixed star in our constitutional constellation" the idea that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"). This pronouncement has
II
THE COLLAPSE OF LIBERAL NEUTRALITY

Liberalism today is often said to be in a crisis. This diagnosis is properly directed at the liberalism of neutrality and equality; for all its appeal, this version of liberalism is subject to crippling objections. Although the objections take many forms, two essential and most serious complaints emerge. First, without an accepted set of substantive values—an orthodoxy—the ideals of neutrality and equality are incapable of guiding or constraining public policy. Thus, public neutrality toward substantive values can never be achieved. Second, even if such neutrality could be achieved, a regime committed to value-free neutrality or equality would be incapable of commanding the respect and loyalty of its citizens. In short, substantive neutrality is impossible; and even if it were possible, it would be morally insupportable.

A. Neutrality and the Void

Some liberal theories require across-the-board government neutrality. But, even in a liberal political community, governing inevitably entails making choices among competing values and goods. It seems likely, therefore, that more qualified versions of neutrality—versions, for instance, that insist upon neutrality only in particular spheres, such as religion—would enjoy wider acceptance. The following discussion will argue, however, that these more qualified versions are just as untenable as one that would require across-the-board neutrality.

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become one of the classic texts for judicial rhetoric. See, e.g., Texas v. Johnson, 109 S. Ct. 2533, 2545 (1989) (quoting Barnette) (opinion reversing conviction under Texas flag desecration statute). The flag burning case is discussed at infra notes 184-93 and accompanying text.

36. Criticism of the fundamental premises of liberalism is central, for instance, in the voluminous body of literature produced by the Critical Legal Studies movement. For an overview and analysis, see M. Kelman, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

37. See supra text accompanying notes 30-34.

38. A preliminary distinction may avert misunderstanding. The following discussion is concerned with substantive neutrality, that is, with proposals that call upon government to refrain from adopting or preferring any particular set of substantive values, conceptions of the good, or religious beliefs. Neutrality is sometimes understood to apply only procedurally. That is, although it admittedly acts pursuant to an orthodoxy or set of accepted substantive values, the government acts "neutrally" as long as its actions implement that orthodoxy consistently, without being influenced by considerations extraneous to the orthodoxy. See, e.g., Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1568 (1988) ("[R]epublican neutrality calls for the consistent application of the correct substantive theory, or even the consistent application of the speaker's own substantive theory.") (emphasis added).

In this sense, for example, a judge is neutral if she decides a case according to the applicable law (which admittedly reflects substantive value judgments) without being influenced by such factors as her own financial interest or personal relationships with the parties. Nothing in the following discussion is intended to suggest that such procedural neutrality is a meaningless or improper ideal; the criticism is aimed solely at substantive neutrality. I have argued elsewhere that neutrality is a useful ideal but only when understood in this procedural sense. Smith, supra note 24, at 325-31.
1. *The Requirement of General Neutrality*

The practical difficulty in implementing a policy of general neutrality is clear. At the most basic level, all conduct implicitly requires the exercise of substantive judgment. The point is obvious on the individual level; one's decisions about how to live one's life clearly involve determinations about what is good, valuable, or right. Thus, a person who refused to make or act upon such judgments would be paralyzed. Proponents of neutrality, however, seek to distinguish government policy from individual action. This distinction is critical: The whole point of requiring government to be neutral is to permit individuals to select and pursue their own values.\(^3\)

But this position, which attempts to combine governmental neutrality with individual nonneutrality, encounters serious difficulties. Whether it has an identity distinct from that of its citizens\(^4\) or is only an institution through which individuals secure their political objectives, the state must choose among competing values and beliefs. The people whose desires and needs the state serves will make conflicting claims upon it. Consequently, the government, like an individual, will have to select among competing values and beliefs. Should the state devote scarce public funds to the search for a cure for AIDS, the provision of shelter for the homeless, or the exploration of outer space? Should the nation's wilderness be preserved in its natural state, opened up as recreational areas, or turned over to private developers? Such decisions inevitably require governmental choices among competing conceptions of the good, and it is implausible to suggest that the government can make such choices yet somehow remain neutral.\(^1\)

To respond to this criticism, proponents of across-the-board substantive neutrality must offer a way for government to act upon citizens' competing demands without evaluating the various conceptions of the

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39. For example, Ackerman advocates governmental neutrality precisely in order to allow individuals the freedom to pursue their own values and objectives. See, e.g., B. ACKERMAN, supra note 31, at 231 (liberalism attractive because it "offers each citizen the chance to achieve self-understanding without subordinating himself to the meanings imposed by others").

40. Ronald Dworkin, for example, expressly "assumes that the community can adopt and express and be faithful or unfaithful to principles of its own, distinct from those of any of its officials or citizens as individuals." R. DWORFIN, LAW'S EMPIRE 172 (1986). He describes this notion as "personification"; it is "as if a political community really were some special kind of entity distinct from the actual people who are its citizens." Id. at 168. (The "as if" is important; Dworkin does not "suppose that the ultimate mental component of the universe is some spooky, all-embracing mind that is more real than flesh-and-blood people." Id.)

41. Thus, Francis Canavan states:
A state that acts vigorously on a number of fronts to promote people's welfare must have some idea of what their welfare is. That necessarily implies some conception of what is good for human beings and what is bad for them. Having such a conception, the state cannot pretend to be neutral about it.

good from which those demands arise. But that challenge is much like trying to predict the winner of the World Series without assessing the individual players on the respective teams. The necessity of selecting among competing conceptions of the good can be disguised, but it cannot be avoided.

Proponents of neutrality sometimes suggest that government can remain neutral by declining to promote any conception of the good and instead confining its efforts to the protection and realization of rights. This suggestion need not be understood to endorse the minimal state, in which government merely protects bodily integrity and traditional property rights. Rather, rights could be broadly defined so as to provide for a more activist state. For instance, the rights that the state would protect might include various "positive" rights. "Rights" might even encompass an assortment of more radical "destabilization rights." A government committed to protecting such rights would hardly be relegated to stodgy passivity.

It is unclear, however, what liberals expect to gain by focusing on competing conceptions of rights instead of on competing conceptions of the good. Even if a state that could meaningfully distinguish between rights and goods agreed to make policy that addressed only rights, it would still face factious disagreements about which rights it should value most highly. There is no reason to suppose that a state that rejects some citizens' conceptions about rights will generate less alienation, or be less prone to oppression, than a state that rejects some citizens' conceptions

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42. See, e.g., Mack, Liberalism, Neutralism, and Rights, in RELIGION, MORALITY, AND THE LAW: NOMOS XXX 46, 62 (1988) (arguing that a neutral government prevents impermissible interference with private rights). Michael Sandel describes this common "deontological" version of liberalism, which he attributes to Dworkin and Rawls, as resting on "an ethic that asserts the priority of the right over the good." M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1 (1982).

43. Indeed, many proponents of liberal neutrality would find such a limited conception of the state thoroughly unacceptable. See B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984) (proposing reconstruction of legal discourse based on the reality and necessity of the "activist state").

44. See, e.g., B. ACKERMAN, supra note 31, at 246-50 (advocating various kinds of affirmative action to compensate for genetic disadvantages and other forms of social injustice).

Moreover, competing versions of rights inevitably reflect competing conceptions of the good. For instance, one who believes that the good lies in the life of the mind—thought, expression, dialogue—will likely place such things as freedom of speech high in the hierarchy of rights that merit protection. Conversely, those for whom material satisfaction is especially important may favor certain economic rights. Deciding among competing claims on the basis of rights may disguise, but does not avoid, the need to make judgments about the good.

Suppose, however, that the theorists of neutrality could somehow assemble a set of rights independent of any conception of the good. The critical question would then be whether anyone—or any political community—would have any reason to embrace such rights. We might have a right to turn cartwheels in the Gobi Desert, to drink sea water, or to enter into legally recognized relationships with extraterrestrials—but if no one cares to do any of those things, then such rights are worthless. Conversely, society values rights to freedom of speech and conscience precisely because people regard communication and worship as goods. In short, because rights are valuable only insofar as they are related to our conceptions of what is good, any rights that could be specified independently from these conceptions would be useless.

In sum, the basic challenge to neutrality asserts that government necessarily chooses among values and conceptions of the good. If government is viewed as a collective enterprise for securing citizens' wants and needs, the necessity for these choices is immediately apparent. If government purports merely to protect rights, such choices may be hidden, but they are inevitable nonetheless. Consequently, across-the-board substantive neutrality is simply impossible.

2. Limited Sphere Neutrality

Proponents of neutrality, while conceding that government cannot adhere to across-the-board neutrality, may nonetheless insist that government can and should maintain a position of neutrality toward a narrower category of issues. For example, they often cite religion as a subject upon which governmental neutrality is imperative.\textsuperscript{47} Yet even

\begin{itemize}
  \item \textsuperscript{46} Shifting the focus of disagreement to "rights" might be advisable if there were a better prospect of finding demonstrably correct answers, or at least consensus, about "rights" than about "goods." But nothing in current academic or political discourse gives cause for optimism about that prospect.
  \item \textsuperscript{47} See, e.g., Hernandez v. C.I.R., 109 S. Ct. 2136, 2147 (1989) (noting that tax provision applied to religious organizations was "neutral both in design and purpose"); Texas Monthly v. Bullock, 109 S. Ct. 809, 896 (1989) (plurality opinion) (state tax exemption violated religious neutrality requirement); Larson v. Valente, 456 U.S. 228, 246 (1982) (noting that the "principle of denominational neutrality has been restated on many occasions"); Walz v. Tax Comm'n, 397 U.S.
here the possibility of neutrality turns out to be illusory.

It is often asserted, for example, that official neutrality in matters of religion means that religion is a purely private affair—a matter for the individual conscience. This privatization of religion may or may not be a sound constitutional policy, but it is decidedly not neutral among competing religious beliefs; it flatly rejects the position of those who believe that religion serves an essential public role and therefore cannot be purely private in character. Of course, a contrary policy of treating religion as a public concern would equally depart from neutrality; it would reject the belief that religion should not be a public affair.

Another frequently asserted corollary of neutrality is that government may not support or subsidize religious institutions. But one cannot accurately describe this “no aid” view as “neutral.” Initially, this position clearly rejects the beliefs of those who contend that religious institutions should receive governmental support. And further, in a polity in which all manner of causes and institutions are eligible for public support, the “no aid” view singles out one set of institutions—religious ones—and denies them government assistance.


48. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (“The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice . . . .”).

49. Nancy Fink explains that “Catholicism, Orthodox Judaism, and some other minority religions in America [hold] that religious experience is pervasive. Separation of secular and religious experience is an anathema—a denial of religious teaching at its most essential level.” Fink, The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values, 27 CATH. U.L. REV. 207, 213 (1978); see also Snyder, John Locke and the Freedom of Belief, 30 J. CHURCH & ST. 227, 242-43 (1988) (arguing that secular public institutions which support a view of religion as private are counter to religious tenets that intertwine religion and life); cf. Newman, supra note 3, at 192 (“A truly religious person sees his religious beliefs as relevant to all aspects of his life. The only people who talk about religion as being relevant only in certain contexts are people who do not take religion all that seriously.”).

50. See Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947); Note, Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause, 81 COLUM. L. REV. 1463, 1475 (1981) (“A theory of strict neutrality would mean . . . that no aid should be allowed to flow from the state to religious organizations either indirectly or directly.”).

51. Cf. P. KAUPER, RELIGION AND THE CONSTITUTION 37 (1964) (“[I]f public funds are made available for all educational institutions whether public or private except those that are under the control of a religious body, it is indeed hard to avoid the conclusion that the religious factor is being used as a ground for disqualification from public benefits.”).
Despite the appeal that "limited sphere neutrality" seems to hold for many liberals, therefore, this narrower conception of neutrality proves to be just as untenable as the more general conception—and for exactly the same reasons. Even within the limited sphere, citizens will have different wants, beliefs, and values, each of which will in turn generate conflicting demands regarding how government should behave within that sphere. Some citizens' values and beliefs will generate demands for governmental passivity or inaction; others will lead to requests for more active policies of various sorts. Because even inaction favors some demands and spurns others, government simply cannot avoid choosing among conflicting demands. Hence, government cannot be neutral, even within a limited subject area.\(^5\)

3. Motive Neutrality

Proponents of neutrality may argue that even if the impact of government policy cannot be neutral, government motives must be neutral toward certain subjects.\(^5\) For example, it is widely assumed that government must be neutrally motivated in religious matters.\(^5\) This commitment to religious motive neutrality appears to underlie judicial decisions forbidding public schools either to include scientific creationism or to exclude evolution from the curriculum.\(^5\) Neither course is neutral in its content—creationism may support, while evolution may conflict with, particular religious beliefs. Nevertheless, a state can encourage its schools to teach evolution even though such teaching may undermine some religious beliefs. The courts assume that schools teach evolution because it is the currently accepted scientific view, not because of its effect on students' religious beliefs. But the Supreme Court has concluded that when a state prescribes creationism or proscribes evolution, it does so for the impermissible purpose of advancing religion.\(^5\)

Although motive neutrality may deflect (or at least declare irrele-
vant) the objection based on nonneutral content, it does not obviate the need for a substantive orthodoxy. On the contrary, motive neutrality must refer to accepted substantive criteria in order to determine which motives are permissible and which are not. Although the motive neutrality position shifts the focus from the content or consequences of government action to its motivations, the need for an orthodoxy remains as acute as ever. Why, after all, do we permit the state to require the teaching of a subject if the state’s motives are secular or scientific but not if its motives are religious? Of course, substantive reasons can be offered to justify this policy, but that is precisely the point—any position which holds that some motives are legitimate, but that others are not, reflects substantive judgments about what is true and good. Such a position does not just spring forth from a value-free notion of neutrality. Hence, applying the neutrality requirement to the motivation for public policy, rather than to the content of public policy, does not enhance the plausibility of neutrality as a liberal ideal.

4. “Baselines” and Neutrality

Proponents of neutrality sometimes try to evade the criticism that government inevitably endorses substantive values by shifting the focus of their analysis toward articulating the baseline—the standard against which neutrality must be measured. Supporters of this approach claim that different baselines may be appropriate for legal challenges to different social practices. For example, proponents of religious neutrality sometimes contend that “no advancement or inhibition of religion”

57. It is no answer to observe that the Constitution forbids the teaching of religion in public schools. That assertion merely leads to a reformulation of the question: Why have we chosen to adopt such a constitutional provision, or to interpret a constitutional provision to support such a prohibition?

58. One common rationale asserts that scientific propositions are more reliable or rational or objective; science is a surer guide to truth than revelation or biblical interpretation. A different rationale suggests that regardless of their truth, scientific propositions and secular values are more generally accepted in our society. For a valuable discussion of these contentions, see generally K. Greenawalt, Religious Convictions and Public Choice (1988). For my own critique of Greenawalt’s discussion, see Smith, “Separation and the ‘Secular’: Reconstructing the Disestablishment Decision,” 47 Tex. L. Rev. 955, 1007-15 (1989).

59. Cass Sunstein, for example, argues that neutrality has traditionally been understood against an implicit baseline drawn to preserve common law entitlements and to prevent governmental interference with existing wealth and with market ordering. See Sunstein, Lochner’s Legacy, 87 Colum. L. Rev. 873 (1987). Although this baseline does not fit the “neutrality” advocated by scholars such as Ackerman and Dworkin, Sunstein contends that it explains a number of Supreme Court decisions. Sunstein criticizes the traditional baseline, but he does not favor abandoning neutrality. Instead, he would reconstruct the relevant baselines and thereby transform neutrality into “a requirement of a public-regarding justification for legislation.” Id. at 906. The actual task of formulating appropriate baselines is, he concedes, a formidable one. Id. at 910, 916-18.

60. See id. at 908-09.
describes the standard of neutrality by which establishment clause doctrine is to be measured, and that the most appropriate baseline for determining religious neutrality is governmental behavior toward nonreligious institutions. 61 Although this conception of neutrality may be more congenial to some religious positions than to others, theorists contend that the policy is nevertheless "neutral." Indeed, the policy is neutral by definition: "neutrality" means "no advancement or inhibition." Once neutrality has been so defined, popular objection to a constitutional doctrine or public policy no longer indicates a lack of neutrality on the part of the state: it merely means that some people do not favor neutrality in this stipulated sense. And a "neutral" government must of course reject the views of those people.

Although neutrality can be defined in this way, the observation that neutrality presupposes a baseline does little to deflect the theoretical and practical objections to neutrality as a political ideal. First, the baseline strategy tacitly concedes that government cannot avoid choosing among deeply held and competing views about the meaning and role of religion. The strategy thereby sacrifices much of the appeal of neutrality, which is attractive largely because it seems to offer an escape from those choices. If government adopts a stance of religious "neutrality" to avoid making difficult and potentially alienating choices among competing religious positions, 62 then it gains nothing by smuggling such choices into the definition of a baseline. 63

Second, the baseline strategy also encounters a serious practical obstacle. Suppose we accept "no advancement or inhibition of religion" as the appropriate baseline for measuring neutrality. The fact remains that government programs and decisions inevitably favor some religious

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61. See, e.g., Laycock, supra note 47, at 3 ("[N]eutrality in the sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice . . . requires identification of a base line from which to measure encouragement and discouragement."); McConnell & Posner, supra note 47, at 5-6, 10-14 (defining "neutrality" as the policy of assessing governmental action toward religious institutions and activities by comparison to the baseline of governmental treatment of nonreligious institutions and activities, to determine whether religion has been improperly advanced or inhibited by government action). This notion of neutrality relative to a given baseline is consistent with prevailing establishment clause doctrine, which requires laws to have “a principal or primary effect . . . that neither advances nor inhibits religion.” Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

62. See supra notes 23-24 and accompanying text.

63. The proponent of neutrality might respond that although a definition or baseline that effectively privatizes religion coincides with some religious views and conflicts with others, this fact alone does not reflect acceptance or rejection of anyone’s religious views. Rather, the state adopts a policy of religious privatism for purely secular reasons, not because it believes that policy represents the correct conception of religion. But this response simply assumes the point in issue. Why, after all, should the meaning of “neutrality” be determined on solely secular grounds? Confining the state to wholly secular criteria in the construction of a baseline for “neutrality” already rejects the claims made by more comprehensive conceptions of religion by assuming that secular reasons are legitimate grounds for public decisions and that religious reasons are not.
positions and disfavor others; government cannot avoid advancing—and inhibiting—religion.\textsuperscript{64} This result is particularly evident in the area of public education. Should the schools teach evolution, scientific creationism, both, or neither?\textsuperscript{65} Should the schools teach "secular humanist" ideas that some religious persons find deeply objectionable?\textsuperscript{66} No satisfactory solution can be deduced from—or reconciled with—the notion of "neutrality." Moreover, defining the baseline as "no advancement or inhibition" does nothing to resolve the problem.

Indeed, viewed against this baseline, the problem is manifestly insoluble. Regardless of what teachings the schools choose to include and exclude, their curriculum will not be "neutral" in any meaningful sense. Schools will inevitably teach ideas and values that harmonize with some secular or religious perspectives but not with others. This outcome is not in itself a cause for criticism; it is simply unavoidable. Thus, it may turn out that the constitutional claims of particular fundamentalist Christians, for instance, must ultimately be rejected.\textsuperscript{67} But to deny that the public

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\textsuperscript{64} Thus, although McConnell and Posner admit that their economic approach to neutrality is only "approximately neutral," McConnell & Posner, \textit{supra} note 47, at 12, even this concession understates the difficulty. McConnell and Posner seem to recognize that policies and judicial decisions on issues such as abortion and obscenity cannot even approximate neutrality. See \textit{id.} at 57-59. They are more sanguine about school funding; neutrality will be satisfied, they argue, if the state assists parochial schools to the same extent that it assists public schools. See \textit{id.} at 14-32. This approach creates the appearance of neutrality as between public and parochial schools. But why should the issue be framed in that way? Although some religions sponsor their own religious schools, other religions do not—perhaps because they lack the cultural, organizational, and financial means to do so, or perhaps because they favor forms of child raising and socialization other than formal instruction. See \textit{Wisconsin v. Yoder}, 406 U.S. 205, 211 (1972) (describing the Amish objection to formal schooling beyond the eighth grade level because such instruction "tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success."). Subsidizing parochial schools from tax funds would thus confer on some religions a substantial financial benefit that other religions cannot enjoy. A natural tendency of such benefits would be to advance the religions so benefitted and to inhibit other religions—at least if McConnell's and Posner's assumptions about economic behavior in the realm of religion are correct. See McConnell & Posner, \textit{supra} note 47, at 5 ("Religious believers . . . are not insensitive to considerations of cost. . . . [I]f the state, whether through pecuniary or nonpecuniary exactions, makes it more costly to adhere to one creed than to another (including the creed of nonbelief), this may cause a shift in religious affiliations."). Such an outcome hardly seems "neutral," even under the stipulated baseline of "no advancement or inhibition."

\textsuperscript{65} See \textit{supra} notes 55-58 and accompanying text.

\textsuperscript{66} See, e.g., \textit{Smith v. Board of School Comm'rs}, 655 F. Supp. 939 (S.D. Ala. 1987) (enjoining use of large number of textbooks on the ground that they taught "secular humanism"), rev'd, 827 F.2d 684 (11th Cir. 1987).

\textsuperscript{67} McConnell and Posner describe a rationale for this conclusion that, though it makes no great claims on the level of principle, is probably the most plausible and realistic rationale available:

Since there is not one religious perspective but many, it is difficult and may be impossible to formulate a single public school curriculum that will be acceptable to all. Moreover, distaste for hearing the propagation of others' religion may outweigh the utility of hearing one's own propagated—making a secular public school system the powerful second choice of virtually everyone.

McConnell & Posner, \textit{supra} note 47, at 56.
school curriculum does in fact conflict with and burden the beliefs of these fundamentalist Christians merely manifests a disappointing incapacity to empathize with differing religious viewpoints.

Nonetheless, the notion that a secular school curriculum is somehow “neutral" has a tenacious hold on legal thought in this country. A recent article by Stanley Ingber illustrates the strength of that notion’s hold. Ingber convincingly argues that value neutrality in the public schools is impossible and that even if it could be achieved, such neutrality would itself, paradoxically, not be neutral:

Value neutrality . . . is biased toward those value systems that are self-centered or rest on consensual arrangements. In effect, value neutrality posits individual criticism and moral choice as values unto themselves. Consequently, a “value-neutral" education would oppose perspectives, such as fundamental Christianity, that advocate imposing values.

But Ingber disregards his own conclusion when he addresses particular issues such as whether schools should teach evolution, creation science, or “humanistic" education generally. For that discussion, Ingber assumes that the curriculum must neither favor nor disfavor religion in general or any denomination in particular—an assumption that would essentially require the very neutrality that Ingber has already demonstrated to be unattainable. Accordingly, Ingber proposes that society distinguish between “irreligious" teachings, which would be unacceptable, and “nonreligious” teachings, which would be acceptable. Of course, Ingber’s earlier discussion has already, and correctly, found this distinction untenable, at least from some religious perspectives. The curriculum he prescribes will inevitably conflict with some believers’ religious views and values; from their perspective, a doggedly “nonreligious" and “humanistic” curriculum is “irreligious.” Ingber virtually concedes as much, but argues that unless we indulge this illusory distinction we cannot satisfy the neutrality requirement without abolishing the public


70. Id. at 239.

71. Id. at 310-15.

72. Many believers and religious thinkers forcefully reject the religious/neutrally nonreligious/irreligious trichotomy, and hold instead that the universe of values constitutes a dichotomy—values that are not religious are necessarily irreligious. This either/or theme is repeated throughout the New Testament. See Matthew 12:30; Luke 11:23; 1 John 2:15-17; Rev. 3:15-16. Richard Niebuhr finds such thinking characteristic of the early Christians and of later believers such as the Spiritual Franciscans, George Fox, and Leo Tolstoy. H.R. NIEBUHR, CHRIST AND CULTURE 45-82 (1951). For a more recent expression, see M. MUGGERIDGE, JESUS REDISCOVERED 100-05 (1969) (describing human drama as an “obvious dichotomy" shaped by two opposing forces: “One is the Devil and the other God").
schools altogether.\textsuperscript{73} Thus, "[w]hether we are fully comfortable with it or not, . . . we must accept the distinction between the irreligious and the nonreligious."\textsuperscript{74}

Another alternative, of course, exists: we could simply acknowledge that a neutral curriculum is impossible and abandon the fiction of neutrality. Indeed, if a "humanistic" curriculum will in fact disfavor some religious viewpoints, as Ingber acknowledges, then what is the use of pretending that it will not? Arguably, this deceptive strategy might be defended as a diplomatic maneuver if it served to pacify those whose views are disfavored by the implemented curriculum. It appears, however, that believers whose faiths conflict with school curriculums have not been taken in by that strategy.\textsuperscript{75} Hence, the strategy only serves, it would seem, to induce a comforting self-delusion in those who subscribe to the secular orthodoxy. Ingber's discussion reflects the hold that the ideal of neutrality continues to exercise—even over those who have recognized and admitted its illusory character— but it does not convincingly explain why the illusion deserves to be maintained.

This diagnosis of self-delusion also suggests that the effort to achieve a fully encompassing community through "neutrality," a community from which no one is symbolically or subjectively excluded, is misconceived. The seeming inclusiveness of neutrality is actually an illusion fostered by focusing on only one aspect of the problem. For example, proponents of neutrality have often argued, plausibly enough, that if the City of Pawtucket, Rhode Island, includes a creche in its Christmas display, some non-Christians (as well as some Christians who believe religion should be a purely private affair) may suffer from a sense of alienation.\textsuperscript{77} If one considers only this facet of the problem, then eliminating the creche seems to be an embracing, nonalienating, "neutral" step. But the problem has another aspect. If the creche is eliminated from public displays, Christians who believe that its removal amounts to

\textsuperscript{73} Ingber, supra note 69, at 310-15.
\textsuperscript{74} Id. at 315 (emphasis in original).
\textsuperscript{75} See Reidinger, "If Thy Textbook Offends Thee . . .," A.B.A. J., Jan. 1, 1987, at 78, 78 (describing increasing attempts, in nearly all states, to censor or change public school curriculum); Wood, Religious Fundamentalism and the Public Schools, 29 J. CHURCH & ST. 7 (1987). Although he regards the fundamentalist position as "paranoid," Wood acknowledges that "[d]uring the past two decades, the public schools of America have largely come to be perceived by religious fundamentalists as dominated by 'secular humanism.'" Id. at 7, 16.
\textsuperscript{76} For another example of this phenomenon, see Valauri, The Concept of Neutrality in Establishment Clause Doctrine, 48 U. PITT. L. REV. 83 (1986). Valauri persuasively demonstrates that religious neutrality is unattainable and that the very ideal of neutrality lacks coherence. In the end, however, Valauri cannot abandon this cherished ideal, however illusory or incoherent it may be. Id. at 144. The "compelling nature of the concept itself" makes neutrality irresistible. Id. at 151.
"taking Christ out of Christmas," may feel alienated. The alienation felt by Christians who regard themselves as "outsiders" to a secularized political community is not merely a hypothetical possibility; it is an observable fact of significant dimensions.

Thus, when the problem of alienation is considered in its entirety, it becomes apparent that no "neutral" or nonalienating solution is available. This conclusion does not, of course, validate the perceptions of alienated fundamentalists. Nor does it mean that we should incorporate their views in constitutional doctrine. It merely means that we cannot derive a particular position or constitutional construction from the notion of "neutrality" or from one-sided efforts to avoid alienation.

5. Equality as a Neutral Standard

As discussed above, liberal equality is the alter ego of liberal neutrality. Not surprisingly, therefore, versions of liberalism dedicated to an orthodoxy-free equality have deficiencies much like those inherent in proposals based upon neutrality.

In its most general formulation, equality requires that like things be treated alike and different things be treated differently. But the difficult question remains: Which similarities and which differences should be considered relevant? If one person has white skin and another has black skin, does that difference justify different legal treatment? Conversely, does the fact that both a burglar and a nonburglar are human, United States citizens, male, over six feet tall, and fluent in French mean that if one is sent to jail the other must also be incarcerated? The critical point is that the concept of equality cannot by itself give the answer to these questions; we must refer to independent substantive criteria—to "a standard or rule specifying certain treatment for certain people"—in order to conclude that skin color does not, and that commission of a burglary

78. Mark Tushnet observes that "Lynch was like a slap in the face to many Jews, but surely a holding that a municipal creche was unconstitutional would have been just as much a slap in the face to a segment of the Christian community." Tushnet, Religion and Theories of Constitutional Interpretation, 33 Loy. L. Rev. 221, 238 (1987).

79. For a forceful expression of such alienation, see generally R. Rushdoony, Christianity and the State (1986). Milton Yinger and Stephen Cutler present data suggesting that about one quarter of the American adult population accepts the attitudes and values of the "moral majority" movement, and they observe that this movement "reflects the loss of faith and the powerlessness many feel with reference to the larger society." Yinger & Cutler, The Moral Majority Viewed Sociologically, in New Christian Politics 69, 71, 73 (1984).

80. For my own criticism of one fundamentalist critique, see Smith, Book Review, 6 CONST. COMM. 541, 545-49 (1989) (reviewing R. Rushdoony, supra note 79).

81. See supra note 27 and accompanying text.


83. Id. at 545.
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does, justify different legal treatment.\textsuperscript{84} Thus, the concept of equality survives when society supports it with some independent set of substantive criteria. Without such criteria, the notion of equality is useless. Every set of cases would be similar in certain respects and dissimilar in other respects, and the notion of equality could not explain whether the similarities or the dissimilarities should be dispositive. There is nothing especially startling about this conclusion; it seems obvious enough. But it does demonstrate the impossibility of a political community dedicated solely to the ideal of equality unsupported by an orthodoxy of substantive values. Liberal equality does not obviate, but rather demands, an orthodoxy.\textsuperscript{85} Once again, “neutral” liberalism proves to be an illusion.\textsuperscript{86}

6. An Interim Assessment

The foregoing analysis has shown that a general neutrality position and each of four variations on it contain serious defects. But the ideal of neutrality is extremely elusive prey. For every apparently mortal criticism there is a clarification, a refinement, an additional qualification, a new variation.\textsuperscript{87} Attempts to discredit neutrality are reminiscent of Hercules’ struggle against the Hydra—for every version of neutrality that is successfully criticized, two new variations spring up to replace it—and since Dworkin has already conscripted Hercules for his own cause, one wonders whether the task will ever finally be performed. Rather than pressing the pursuit ad infinitum, however, it may be wiser to reconsider the problem to which the neutrality strategy is addressed.

That problem can be simply described: In every real political community this side of the millennium, different members of the community will have different conceptions of the good, and consequently they will make competing demands upon the community’s government. Because the demands conflict, government cannot grant some of those demands without denying others. Thus, government must make choices. It must decide which among the conflicting demands have greatest merit; and to make that decision, government must make judgments about the conflicting conceptions of the good which generate those demands.

\begin{itemize}
\item \textsuperscript{84} Id. at 545-48. For an interesting recent discussion of the problem, see Schauer, \textit{Equality and Identity}, 33 N.Y.L. SCH. L. REV. 375 (1988).
\item \textsuperscript{85} Cf. Schauer, supra note 84, at 381-82 (arguing that a “normative theory of equality” requires a “substantive theory” that can explain “why some inequalities are to be treated as pernicious while others are benign”).
\item \textsuperscript{86} See Canavan, supra note 41, at 32 (“All doctrines of equality rest upon some philosophy and some conception of the nature of man. No state can promote equality without consciously or unconsciously, explicitly or implicitly, adopting one view or another.”).
\item \textsuperscript{87} Cf. Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (describing neutrality as a “coat of many colors”).
\end{itemize}
But this course is not a pleasant one. Judging between conceptions of the good is not easy, and it is likely that those citizens whose conceptions of the good are not approved will feel disappointed and perhaps alienated. A government that makes such choices risks being perceived as—and actually being—intolerant. Any alternative to making these hard choices would be powerfully attractive. Neutrality holds itself out as such an alternative.

But any theory of neutrality that does not incorporate a method of choosing among competing citizen demands fails to address the initial problem. Conversely, any theory that incorporates such a method fails to deliver what the neutrality strategy promised: a means of avoiding choices that effectively approve some citizens' and disapprove other citizens' values. Thus, despite the ample supply of versions of neutrality that have been offered, the basic challenge to substantive neutrality remains.

B. Community Without Value(s)

The burden of the foregoing analysis is that without some "orthodoxy," that is, some substantive conception of the good or some set of accepted substantive values, a regime committed only to neutrality or equality would be impotent; it would have no way to make decisions or take action where public policy is required. But suppose that a regime could somehow overcome this difficulty; suppose the state finds a way to fashion public policy without ever choosing, even provisionally, among competing values or conceptions of the good. Would this feat produce a laudable political community? Would that community be one toward which its citizens could feel any serious and deep allegiance?

Answers to these questions do not come easily, in part because they require complicated information about human psychology, and in part because it is difficult to imagine what a truly neutral state would be like or how it would formulate its policies. It is doubtful, however, that such a state would inspire respect in its citizens. For instance, suppose our

88. This phenomenon may reveal that "neutrality" serves a useful function precisely because it has no coherent specifiable meaning; it is an example of what Pierre Schlag refers to as a "theoretical unmentionable":

Theoretical unmentionables are another way of containing the recognition of contradiction within manageable proportions. Any theory or mode of thought has certain gaps, holes, and absences that, by virtue of the internal constitution of the theory or mode of thought, cannot be articulated in positive terms. Sometimes these gaps, holes, and absences bear names and thus appear to have integrity and substance, even though, by definition or by theory, nothing positive can be said about them. These, then are theoretical unmentionables; those wonderful theoretical spaces that we are quite sure exist, but that by virtue of the constitution of the theory we cannot say very much about.

regime concludes that the only method for making political choices without invoking substantive values would be one based on chance: coin flips between alternative policies, or decisions randomly generated by a computer. It is difficult to believe that citizens subject to such a system would feel loyal to it, or that they would regard it as a genuine community at all.

On the other hand, suppose our regime makes all decisions by simple majority vote. Such a procedure does not achieve genuine substantive neutrality because it merely ratifies the substantive values favored by a numerical majority. Nonetheless, suppose that pure majoritarianism could somehow qualify as “neutral.” Imagine that after you have carefully considered the arguments of a deeply important public policy question, the issue is decided against you. If the only justification the prevailing side can offer is that “there are more of us than there are of you,” how much respect will you give that decision? And if you consistently find yourself in a minority, how loyal will you feel toward a regime that regularly rules against you with no other explanation than that your side does not have the votes?

The point can be put more generally. Alasdair MacIntyre, paraphrasing Aristotle, maintains that without a shared conception of justice, genuine political community is impossible. In a similar vein, Augustine suggested that without justice, a state is not essentially different from a gang of criminals; it is merely, to use H.L.A. Hart’s phrase, the “gunman situation writ large.” One modern answer to this position emphasizes process and pluralism over a shared conception of substantive justice. But for all their virtues, process and pluralism do not eliminate the need for substantive judgments. “Process” implies more than counting noses or providing a forum where arbitrary demands may be

89. Cf. B. Ackerman, supra note 31, at 285-89 (discussing decision making through use of a “responsive lottery”).
90. Cf. id. at 274-85 (explaining rationale for limited majority rule in second-best liberal regime).
91. Thoreau’s observation is pertinent here: [T]he practical reason why, when the power is once in the hands of the people, a majority are permitted, and for a long period continue, to rule, is not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest. But a government in which the majority rule in all cases cannot be based on justice, even as far as men understand it.
92. See A. MacIntyre, After Virtue 244 (2d ed. 1984).
93. See Augustine, Concerning the City of God Against the Pagans 139 (H. Bettenson trans. 1972) (“Remove justice, and what are kingdoms but gangs of criminals on a large scale?”).
95. This approach is emphasized in the constitutional theorizing of John Hart Ely. See J. Ely, Democracy and Distrust 73-134 (1980).
asserted; in its best sense, "process" suggests a method of making decisions after discussing and deliberating competing views. Similarly, a healthy pluralism does not confine competing individuals and groups to asserting "I want this," or "We want that." Rather, pluralism implies people sharing views and collaborating with those who have contrasting values. But if participants cannot appeal to substantive values, then meaningful discussion and deliberation become impossible, and "process" is a sham. In short, process is meaningful and appealing only if substantive values serve as a foundation for the discussion and deliberation that process is intended to promote.

It seems, ultimately, that a healthy political community must stand for something. If it does not, then it becomes a mere aggregation of jarring individual atoms; politics and government become a battleground, and law, to those who lack the power to dictate its content, will be mere coercion. Just what the political community stands for may be the subject of ongoing debate and frequent revision. A community's values, especially in a pluralistic society, may not constitute a unitary or cohesive philosophy. But a state which asserts that in principle it is simply neutral among competing values, like an individual who denies that he believes in or is committed to anything, is not likely to command anyone's respect. As Alexander Bickel explained: "A valueless politics and valueless institutions are shameful and shameless and, what is more, man's nature is such that he finds them, and life withl and under them, insupportable."  

This conclusion reveals an irony in the liberalism of neutrality. The appeal of liberal neutrality, as opposed to liberal tolerance, lies partly in its promise of a more encompassing community that accords all citizens full membership. The position shuns orthodoxy largely because orthodoxy entails the approval of some substantive values and, consequently, the disapproval of others; thus, citizens whose values are disapproved may feel alienated. Liberal neutrality seeks to avoid such alienation so that all citizens will be fully included, not just legally but also symboli-

96. For example, although Bruce Ackerman's version of liberalism lays heavy emphasis on the importance of "dialogue," and indeed is presented in the form of a series of scripted discussions among liberal citizens, the very requirement of neutrality prevents searching or revealing dialogues. Every time a participant begins to say something interesting or important, it seems, the liberal commander steps in to stop the conversation from transgressing the preestablished constraints of neutrality. See generally B. ACKERMAN, supra note 31.

97. See A. MACINTYRE, supra note 92, at 253 ("Modern politics is civil war carried on by other means . . .").

98. See Feinman, Practical Legal Studies and Critical Legal Studies, 87 MICH. L. REV. 724, 727 (1988) (observing that "a dominant ideology is neither unitary nor capable of precise definition").

cally and subjectively, in the political community. But this greater inclusiveness is achieved only by eschewing any commitment to those substantive values that make a genuine political community (or commonwealth) possible in the first place. Thus, the liberalism of neutrality in fact impoverishes the very community that it promises to enrich.

III

LIBERAL DEMOCRACY AT THE CROSSROADS

An examination of the career of liberal neutrality produces a puzzling diagnosis. The notion of substantive neutrality suffers from serious conceptual and practical defects. Proponents of liberalism who are aware of these defects, and who sometimes offer their own demonstrations of them, nonetheless continue to cling to the ideal of neutrality, particularly in areas such as religion.

To what should this seemingly irresistible attraction be attributed? The discussion has already suggested that because religious, moral, and political ideals differ, a powerful temptation exists to avoid responsibility for choice by escaping into a pretended neutrality. But there is another and perhaps more admirable reason for the appeal of neutrality: Neutrality seems to offer the only alternative to intolerance and, perhaps, authoritarian or totalitarian government. Ackerman voices concern that "with liberal institutions in decay, it is only a matter of time before one or another zealot will seize the chance to impose his private nightmare on the rest of us." If we equate liberalism with governmental neutrality, and if the alternative to liberalism is intolerance, then neutrality, however unattainable or incoherent the ideal may be, should continue to exert a potent influence.

But this depiction of the options is misconceived. Even if neutrality is unattainable, as the preceding discussion suggests, intolerance is not the only remaining option for the political community. Instead, the dissipation of the mirage of neutrality presents another alternative: the community can return to a policy of tolerance in which it strives to respect liberty and individual autonomy yet acknowledges that government cannot be neutral among competing values. The choice, then, is between tolerance and intolerance.

A. The Allure of Intolerance

A return to preliberal intolerance is one possible response to the

100. See supra text accompanying notes 23-24.
101. See supra notes 69-76 and accompanying text.
103. B. ACKERMAN, supra note 31, at 313.
demise of the liberalism of neutrality. If “liberalism” represents an incoherent or exhausted body of thought and practice, and if “liberalism” is equated with notions such as “personal autonomy,” “individual freedom,” and rights, then the rejection of such liberalism might entail the rejection of these notions as well. Thus, intolerance would seem a natural consequence of rejecting the liberal ideal of neutrality. If the evolution of liberalism described in Part I were carried a step further, a totalitarian stage might naturally succeed the final stage of neutrality. Indeed, the neutral regime’s very neutrality—its lack of substantive moral values—may facilitate the move towards totalitarianism. Martin Marty has described this process portended by the absence of a substantive faith or belief:

Fanaticisms, including twentieth-century totalitarianisms, grow on the soil of those who lack conviction, until the worst, filled with passionate intensity, take them over. People who live in a culture of anomie, normlessness, fall victim to the assertions of every kind of norm. Victims of acedia, the inability to affirm in the face of spiritual good, are vacuums ready to be filled by the most potent pourers. To leave a spiritual void by touting weak faith or wan commitment in a pluralist society is to invite the overcoming of pluralism by any demagogue who has a convincing manner and promise.  

Critics from all points on the political spectrum share Marty’s assessment of the dangers posed by this “vacuum” of belief—although, not surprisingly, they perceive the threat of intolerance as coming from different directions. For example, Suzanna Sherry argues that a rights-based regime, which is dependent upon government neutrality on moral choices, creates a “moral vacuum” which is dangerous because “religious fundamentalists and other members of the new right have rushed in to fill the gap.” From a different perspective, Richard Neuhaus perceives that the exclusion of religious values and discourse from the public sphere has caused a “vacuum” that totalitarianism may fill. And opponents of the Critical Legal Studies movement, with its often strident criticism of liberal individualism and rights, sometimes detect in that movement an incipient totalitarianism. Similarly, critics perceive an authoritarian element in the “new republicanism” movement.

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104. See supra notes 10-34 and accompanying text.
106. See Sherry, supra note 2, at 964-65.
107. See R. NEUHAUS, THE NAKED PUBLIC SQUARE 82-93 (1984); see also Smith, Comment on “A Christian Critique of Christian America,” in NOMOS XXX, supra note 42, at 134 (agreeing with Neuhaus’ diagnosis).
108. See, e.g., Johnson, Do You Sincerely Want to be Radical?, 36 STAN. L. REV. 247, 256 & n.29 (1984) (“To the extent that it genuinely rejects any distinction between public and private activity, the CLS movement is literally ‘totalitarian.’”)
109. See, e.g., Macey, The Missing Element in the Republican Revival, 97 YALE L.J. 1673, 1673
Our own century forcefully teaches that intolerance, even when it takes the extreme form of totalitarianism, can couch itself in the liberal language of "democracy," "freedom," and "equality." Thus, the regime of intolerance that would replace liberalism is not likely to adopt the label of "totalitarianism." It might call itself a "democracy," or a "government of the people," using the concept in Rousseau's sense of a regime in which individuals are "forced to be free" by being indoctrinated or coerced to obey the "general will." In such a system, "freedom" means "collective freedom," not individual liberty. "Democracy" on these terms does not promote freedom in the sense valued by liberal democracy but instead represents a form of totalitarianism.

Alternatively, a "communitarian" vocabulary may disguise a tendency to intolerance. Of course, concern for the quality of community is in itself healthy. This concern may even be a necessary check on the tendency of some versions of liberalism toward an excessive individualism that simply ignores or rejects the claims of community. Yet, for those who believe that individual freedom is one important value, there is danger in a "communitarian" impulse that harbors deep hostility to individualism and to rights discourse.

Of course, the advent of an unmitigated totalitarianism hardly seems

(1988) (asserting that "what is missing from the republican revival is an appreciation of the frightening power of man to subvert the offices of government for what can only be described as evil ends").

110. Robert Nisbet observes:

Perhaps only under the camouflage of the rhetoric of freedom is the actual power of the state increased more easily than under the camouflage of the rhetoric of community. The greater despots of history, which is to say twentieth-century history, like Lenin, Mussolini, Hitler, Mao, and Castro, have turned to both rhetorics—of freedom and community.


111. See generally J. ROUSSEAU, THE SOCIAL CONTRACT (C. Frankel ed. 1947). More specifically, see id. at 18 ("W[h]oever refuses to obey the general will shall be compelled to it by the whole body: this in fact only forces him to be free . . . ").

112. Rousseau distinguished between the "will of all," which "regards private interest, and is indeed but the sum of private wills," and the "general will," which "regards only the common interest." Id. at 26. Rousseau's own preference in the matter was emphatic. He declared that "the general will is always right," and that in carrying out the general will "the body politic [has] absolute command over the members of which it is formed." Id. at 26-27. See also id. at 15 (reducing the social contract to "the total alienation of each associate, and all his rights, to the whole community . . . [so that] every individual gives himself up entirely").

113. For a discussion emphasizing the totalitarian aspects of Rousseau's work, see R. NISBET, THE SOCIAL PHILOSOPHERS 145-58 (1973). Nisbet observes that "[w]hat Rousseau calls freedom is at bottom no more than the freedom to do that which the state in its omniscience determines." Id. at 150. See also Simons, The New Republicanism: Generosity of Spirit in Search of Something to Say, 29 WM. & MARY L. REV. 83, 92 (1987) ("All Rousseau's good intentions do not obscure the basic similarities between his philosophy and Hitler's.").

114. This point is elaborated in the later discussion of Suzanna Sherry's argument for tolerance. See infra notes 140-60 and accompanying text.
imminent in this country. Both history and political inertia support liberal traditions here. And the current disillusionment with liberalism is arguably a largely academic phenomenon. Yet it would be naive to expect that liberal traditions and institutions can survive and flourish indefinitely on the strength of inertia alone; prudence suggests the need to supply a reasoned defense for such traditions and institutions. The liberalism of neutrality and equality has proven philosophically inadequate, and intolerance or even totalitarianism are possible substitutes that, at least when cloaked in the rhetoric of "democracy" and "community," may prove attractive. If we are to defend liberalism from these alternatives, we must develop an intellectually defensible version of liberal democracy.

B. The Alternative of Tolerance

Tolerance, it turns out, is the only realistic alternative to intolerance. What seemed to the proponent of liberal neutrality as a halfway house, a transitory phase in the movement toward a mature liberalism, is in fact the only viable form of liberal democracy.

Unlike an atomistic or radically individualistic conception of politics, liberal tolerance permits a realistic appreciation of the importance and the needs of political community. It acknowledges that a political community must act on the basis of substantive values that it regards as true and good. Legislatures and courts must make decisions, and decisions require choices among beliefs and values. Public schools must teach something, and the determination of that something will involve choices among substantive values. Thus, every regime must have its orthodoxy. The orthodoxy might not constitute a cohesive ideology or theology, it might not be read into the official constitution, and it might vary from year to year or even, to some degree, from locale to locale. But a set of substantive beliefs and values upon which public decisions are based must exist. A policy of tolerance obviates the need to indulge in the collective self-deception that the state can be substantively neutral among competing values.

115. See Goldsworthy, God or Mackie? The Dilemma of Secular Moral Philosophy, 30 AM. J. JURIS. 43, 52-53 (1985) (suggesting, in response to the diagnosis of modern liberal culture offered by Alasdair MacIntyre, that in general the people in Western societies have been unaffected by philosophical criticisms).

Of course, the 1988 presidential campaign featured a conspicuous flight from "liberalism" (at least as a label) in ordinary politics as well. But on that level, the term "liberal," insofar as it had any discernible meaning at all, referred not to the general tradition of individual freedom and liberal democracy, but to a family of attitudes and policies associated with one branch of the Democratic Party (and a few other groups like the American Civil Liberties Union).

116. Cf. M. PERRY, supra note 2, at 102 ("Liberalism-as-tolerance is an admirable ideal. Liberalism-as-neutrality is a phantom, a will o' the wisp.") (footnote omitted).

117. Francis Canavan describes the advantage of abandoning the illusion of neutrality:
At the same time, tolerance also respects the value of individual freedom. Although the state must have an orthodoxy, not all citizens need embrace it. Liberal tolerance acknowledges such disagreement and protects the freedom and autonomy of all its citizens by permitting dissent and by affirmatively protecting minorities from private violence or discrimination. In liberal democracies, such protection has typically been achieved by the creation of “individual rights” that seek to create a domain in which individuals can believe, speak, and act free from collective coercion. Thus, liberal tolerance is not antagonistic to “individual rights”; it in fact provides a fertile substrate for grounding and understanding such rights.118

But the tolerant regime does not assure dissenting citizens that it regards their beliefs as equally true or valuable. That kind of assurance would be mere hypocrisy. To note perhaps the starkest example: Some citizens will favor totalitarian government. The tolerant regime can protect the right of those citizens to hold and express their beliefs, but it cannot, without hypocrisy, tell them that their beliefs are presumptively as true and valuable as the beliefs of citizens who believe in liberal government. Although it may permit citizens to believe in and advocate totalitarianism, the tolerant liberal regime must disapprove of that view. If the proponents of totalitarianism consequently feel subjectively or symbolically ostracized, there is simply no remedy available.

In sum, liberal tolerance attempts to give proper respect and scope to the claims of both political community and individual freedom. Such a middle course, though it invites criticism from purists devoted solely to either individual freedom or community, in fact represents the only viable prospect for maintaining meaningful political freedom within a genuine political community.

IV

THE REGIME OF TOLERANCE

The preceding discussion has argued that liberal tolerance is the golden mean that avoids the most serious evils both of pre- or post-liberal
repression and of a vacuous liberal neutrality. But the ideal of tolerance generates its own theoretical and practical questions. First, how does a liberal regime overcome the logic of intolerance—the logic that if certain beliefs are considered false or harmful, then they ought to be suppressed? Second, what are the limits of tolerance? In particular, what conduct and beliefs should be tolerated, and how do we determine how much tolerance is appropriate? And finally, how should a policy of tolerance be implemented? For instance, how would a commitment to tolerance rather than neutrality affect judicial doctrine? The following discussion addresses these questions.

A. Justifying Tolerance

Tolerance may seem to be an unstable and perhaps even internally contradictory attitude. Tolerance entails permitting others to hold and disseminate erroneous beliefs, but since they are necessarily wrong, these beliefs represent an evil that individuals and, it would seem, governments should want to combat.119 If one is convinced that a particular idea is false, practical reason suggests that one should repress that idea. This is the logic of intolerance,120 which a tolerant regime must overcome.

Various responses to the logic of intolerance have been advanced.121 The present analysis will not attempt any comprehensive survey but will instead describe two kinds of arguments that historically have carried the greatest influence. These may be described as the prudential and the positive arguments for tolerance.

1. The Prudential Case for Tolerance

The prudential argument asserts that because the people living in a community are in fact diverse in their beliefs, values, and ways of life, the adoption of an attitude of mutual tolerance will most effectively promote

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119. As Jonathan Harrison observes:

If religion offers us the way to man's final destination, if politics concerns government as a means to man's welfare, and if morality (as utilitarians claim) is a means to the good of mankind, it follows that religious, political and moral error is always harmful, which is a prima facie reason for trying to eradicate it . . . .

Harrison, Utilitarianism and Toleration, 62 PHILOSOPHY 421, 432 (1987); cf. Newton, Divine Sanctuary and Legal Authority: Religion and the Infrastructure of the Law, in NOMOS XXX, supra note 42, at 179, 188-89 ("I am inconsistent if I simultaneously assert both that what I believe is right and that I have no interest in having others agree with me . . . ."); Sykes, The Right to Believe and Believing the Right Thing, 18 RELIGIOUS STUD. 439, 449 (1982) ("[L]ove for another person cannot ground a readiness to allow him to err.").

120. At least one contemporary philosopher believes the logic to be inescapable. Joshua Halberstam argues that "genuine tolerance is in fact impossible for anyone" because "any conviction potentially precludes tolerance toward dissidence from that conviction." Halberstam, supra note 3, at 190.

121. For a useful historical survey, see H. KAMEN, THE RISE OF TOLERATION (1967).
peaceful coexistence.\textsuperscript{122} As E.M. Forster put it, tolerance is “a make-shift, suitable for an overcrowded and overheated planet.”\textsuperscript{123} This general argument can spawn more specific but similarly pragmatic arguments; for example, that the suppression of dissent is difficult, costly, and not worth the gains, or that repression is politically destabilizing.\textsuperscript{124} The pragmatic argument can also be understood in more positive terms: tolerance allows a community to benefit from the skills, resources, and diverse viewpoints of political, religious, or ethnic minorities.\textsuperscript{125}

Historically, the prudential argument has substantially influenced the development of toleration. Colonial observers like Crévecoeur and modern historians like Sidney Mead have attributed the achievement of religious freedom in the United States primarily to the nation’s religious diversity and its need to establish some mutually acceptable modus vivendi.\textsuperscript{126} The prudential argument is no less relevant today. For example, Lee Bollinger’s provocative analysis of tolerance in free speech doctrine accepts the prudential argument and then gives it a novel twist. Bollinger argues that we have only a limited capacity to tolerate,\textsuperscript{127} and tolerance is essential in all aspects of social life.\textsuperscript{128} He therefore suggests that we strengthen that capacity by singling out a particular human activity—speech—and forcing ourselves to practice tolerance beyond what the intrinsic value of the tolerated speech might warrant. The exercise is largely pedagogical; through our approach to speech we will strengthen the general capacity for tolerance that a diverse community requires.\textsuperscript{129}

Despite its historical and continuing importance, the prudential case for tolerance has its limitations. First, its appeal depends upon its context. In some situations, tolerance may indeed be the best way to achieve

\textsuperscript{122} See Newman, supra note 3, at 190-92; cf. Ladd, supra note 19, at 266, 269 (arguing that pluralism and religious diversity are the essential foundation for tolerance).

\textsuperscript{123} E. M. Forster, supra note 1, at 47.

\textsuperscript{124} Thus, while conceding the logic of the prima facie case for intolerance, see supra note 119, Jonathan Harrison offers a series of utilitarian arguments for tolerance. He contends, for instance, that “[p]reventing people from doing what they want almost always arouses resentment,” and that “[p]reventing wrong is always expensive, involving paying policemen and detectives and lawyers and prison warders, and the money may be better spent.” Id. at 425.

\textsuperscript{125} Cf. H. Kamen, supra note 121, at 224-27 (describing economic reasons for tolerance in seventeenth-century Europe).

\textsuperscript{126} See J. Crèvecoeur, \textit{Letters from an American Farmer} 54-57 (Gloucester 1782); S. Mead, \textit{The Lively Experiment: The Shaping of Christianity in America} 35-37 (1963).

\textsuperscript{127} See L. Bollinger, supra note 2, at 189 (describing the “incapacities[ ] of communities to handle the insecurities and doubts attendant to toleration”). Such limits are not entirely lamentable; Bollinger points out that there should be limits to what we are willing to tolerate, and that there is some danger that a society might become too tolerant. Id. at 217-18, 245.

\textsuperscript{128} See id. at 117-19, 168, 228. Yet, Bollinger does not appear to view tolerance solely as an expedient for dealing with social diversity; he also suggests that tolerance is related to intellectual maturity and courage. See id. at 141, 155.

\textsuperscript{129} Id. at 121-24.
a harmonious community. But in other situations it might be easier or more effective simply to silence or eliminate an irritating minority. The prudential argument provides no rationale for practicing tolerance in these circumstances.  

In addition, the prudential argument cannot respond to zealous citizens who are unwilling to relegate matters involving fundamental beliefs and values to the realm of pragmatic calculation. The true believer does not lay down the sword of God just to avoid unpleasant confrontations; indeed, she may relish such confrontations as an opportunity to test and prove her faith. Thus, the defense of tolerance will be bolstered if the prudential argument can be supplemented by a more positive rationale for tolerance—a rationale founded in principle rather than expediency.

2. The Positive Case for Tolerance

John Locke offered a positive justification for tolerance. As noted above, Locke contended that Christianity exists to secure the salvation of souls. But salvation can be attained only by those who voluntarily exercise the requisite faith. Faith cannot be forcibly imposed, and even if it could be, such faith would not secure salvation. Hence, the persecution of heretical religious opinion is futile.

Although Locke focused upon religious belief, the logic of his argument has broader implications. The argument holds that a particular good—for Locke, salvation of the soul—cannot be attained except by voluntary choice or acceptance. But salvation may not be the only good

130. Peter Nicholson recognizes the limits to the prudential justification for tolerating one's religious or political rivals: "[If] one could eliminate the objectionable religion or the communists without the undesirable side-effects, then one would stamp them out. Likewise, one would not have to tolerate the opinions and actions of any minority which was sufficiently easily identified, small, economically inessential and powerless." Nicholson, supra note 15, at 164; see also Weale, Toleration, Individual Differences and Respect for Persons, in ASPECTS OF TOLERATION 16, 23 (1985) (concluding that "consequentialist considerations do not provide generally valid grounds for a policy of toleration . . . although they may on occasion be effective").

131. As Steven Runciman notes:

A broad-minded view of the private belief of others undoubtedly makes for the happiness of society; but it is an attitude impossible for those whose personal religion is strong. For if we know that we have found the key and guiding principle of Life, we cannot allow our friends to flounder blindly in the darkness. . . . Opinions may vary as to the nature of the help that should be given, whether peaceful persuasion and a shining example, or the sword and the auto de fü. But no really religious man can pass the unbeliever by and do nothing.


132. See supra notes 17-18 and accompanying text.

133. Id. Preston King describes this type of argument as "the classical doctrine of tolerance," and "really [the] only . . . argument from principle that the genuine believer can offer." P. KING, supra note 10, at 77 (emphasis in original).
of that kind.\textsuperscript{134} For example, while the logic of intolerance sponsors the suppression of false beliefs in order to promote truth, the "truth" thereby contemplated is surely not "truth" in the abstract, whatever that might mean, but rather a distinctively human good—sincere and voluntary belief in true ideas. Yet that particular good cannot be achieved by methods that undermine the sincerity and voluntariness of human opinions.\textsuperscript{135}

Similar arguments might be made for other kinds of goods—particularly for moral virtues such as chastity. For example, laws forbidding adultery or homosexual activity may be designed to promote a moral virtue that, even in the view of the laws' proponents, can only be attained by voluntary choice.\textsuperscript{136} Hence, even if such laws could effectively control human behavior, the moral good that they contemplate still might not be realized. People conceivably might be forced to abstain from certain forms of sexual activity, but they cannot be compelled to be virtuous or chaste.

The positive argument for tolerance has its limitations. It depends upon an orthodoxy which posits that certain goods are valuable only if voluntarily chosen. Hence, not every orthodoxy will support the positive argument for tolerance,\textsuperscript{137} and the proponent of tolerance may therefore not only need to show how an accepted orthodoxy requires tolerance, but may also need to propose or defend another orthodoxy that incorporates this premise.

In addition, the positive case for tolerance does not support absolute toleration. Even when the desired ends can be achieved only voluntarily, there may be reasons for regulating conduct. For example, while Locke's argument suggests that it is senseless to prosecute atheists out of concern for the salvation of their souls, he believed that atheism might nonetheless properly be outlawed because it undermined the sanctity of promises.\textsuperscript{138} Likewise, a contemporary community might wish to pre-

\textsuperscript{134} Elsewhere I have attempted to extend Locke's argument to provide support for the toleration of nonreligious belief and communication. \textit{See} Smith, \textit{supra} note 2.

\textsuperscript{135} \textit{Id.} at 703-15. For a similar argument, see Kordig, \textit{supra} note 16, at 63-66 (stating that rational argument is the only means to the discovery of truth).

\textsuperscript{136} Along these lines, Augustine consoled Christian women who had been raped during the sack of Rome by explaining that because virtue is a quality of the mind, they could not lose their chastity through anything done to their bodies against their will. \textit{See} AUGUSTINE, \textit{supra} note 93, at 26-27 ("Now purity is a virtue of the mind . . . . But if it is a quality of the mind, it is not lost when the body is violated."). The evident corollary of this logic is that if a person abstains from disapproved forms of sexual intercourse not because of any voluntary "quality of mind" but rather from fear of punishment, the contemplated virtue is not realized.

\textsuperscript{137} \textit{See} Devine, \textit{Relativism, Abortion, and Tolerance}, 48 \textit{PHIL. & PHENOMENOLOGICAL RES.} 131, 137 (1987) ("Tolerance is a virtue in a wide range of moralities, but its meaning will depend a great deal on the particular morality for which it is a virtue. Hence it cannot be a supra-systemic principle governing the relations among moralities . . . .").

\textsuperscript{138} \textit{See} J. LOCKE, \textit{supra} note 17, at 58.
vent Nazis from conducting public demonstrations not because it wants
to shape the beliefs either of the Nazis or of its own residents, but rather
because such demonstrations are likely to cause violence, property dam-
age, or psychic distress. 139

Still, although the positive case does not support absolute toleration,
it does provide a reason for tolerating particular types of conduct. More-
over, the positive rationale examines the very goods or objectives that
many brands of intolerance purport to value—salvation, truth, moral vir-
tue—and shows that those values actually endorse, and even require, a
policy of tolerance. Where applicable, therefore, the positive case turns
the logic of intolerance against itself. As a consequence, the argument
for tolerance strengthens proportionally with the strength or fervor with
which the orthodoxy itself is held. The more devout a predominantly
Christian community is, the more value the community will place on the
attainment of salvation; and the more the community values salvation,
the more forcefully Locke's argument calls for tolerance of religious
opinion as a prerequisite for attaining that good.

3. The Communitarian Case for Tolerance

The prudential and positive arguments for tolerance both call for a
tolerance calculated to protect individual autonomy in matters such as
religion and expression. Both arguments thus support liberalism and
individual rights. Suzanna Sherry has recently suggested, however, that
tolerance is valuable precisely because it favors legal discourse that is not
liberal and does not employ or depend upon notions of individual
rights. 140

Sherry's starting point is similar to that adopted in the preceding
discussion; she argues that the notion of liberal neutrality is vacuous. 141
Thereafter, however, Sherry's analysis moves in a different direction.
Sherry does not distinguish between liberal neutrality and a liberalism of
tolerance, nor does she attempt to defend liberalism and the language of
individual rights. On the contrary, she asserts that rights discourse
"encourages selfishness rather than altruism or community minded-
ness," 142 and that efforts to "revise and reformulate the liberal rights
model" amount to "social suicide." 143 Sherry seeks to replace liberalism
and rights talk, which she believes to be inseparable from the notion of

139. See Collin v. Smith, 578 F.2d 1197, 1205-06 (7th Cir.) (striking down ordinances enacted
140. See Sherry, supra note 2.
141. Id. at 963-66.
142. Id. at 964.
143. Id. at 966.
neutrality,\textsuperscript{144} with a more communitarian form of legal discourse. Sherry's position thus emphasizes the communal nature of individuals and the community's duty to inculcate virtue in its citizens.\textsuperscript{145}

And how does the notion of tolerance fit into this strongly communitarian scenario? The question is an urgent one, particularly since other philosophers of "community" have attacked "tolerance" in the same way Sherry criticizes "neutrality," as a characteristic inherently associated with an outmoded liberalism.\textsuperscript{146} Sherry's own approval of tolerance actually seems grounded more in what tolerance is not, or in what tolerance departs from, than in what tolerance is. Yet Sherry does briefly articulate one or perhaps two rationales for tolerance.\textsuperscript{147} Her principal rationale, like Bollinger's, is based on a pedagogical assumption; she suggests that a combination of governmental tolerance and societal intolerance may be the most effective way to cultivate a virtuous citizenry. Sherry uses the example of pornography to illustrate her point. Because pornography is degrading to women, she contends, a virtuous citizenry would find it reprehensible. But how is that attitude to be inculcated in those citizens who like pornography? Sherry surmises that if society condemns pornography but refrains from suppressing it, citizens who want pornography will more readily develop correct moral attitudes than if it were legally suppressed.\textsuperscript{148}

Sherry's pedagogical assumption, however, is not self-evident; it seems equally plausible that pornography and the pernicious attitudes it communicates could more effectively be overcome by governmental suppression of such materials. In support of her contention, Sherry offers only her impression that even absent legislation restrictive of nonobscene pornography,\textsuperscript{149} "[a]ttitudes toward pornography are changing . . . largely as a result of the educative efforts of feminists and others who

\begin{enumerate}
\item[144.] See id. at 964 n.3 ("Individual rights are clearly dependent upon government neutrality on moral choices.").
\item[145.] See id. at 984-85.
\item[146.] See, e.g., R. Wolff, \textit{The Poverty of Liberalism} 122-61 (1968).
\item[147.] In a footnote Sherry notes several possible rationales for tolerance:
Tolerance may be seen as virtuous in any self-governing society because the demands of good citizenship (making choices on adequate bases) are inconsistent with some forms of intolerance. One might also argue that tolerance is a virtue largely because the American community has defined itself as tolerant. Finally, tolerance is a virtue in Alasdair MacIntyre's sense insofar as it is a prerequisite to the kind of cooperation that marks members of communities.
Sherry, supra note 2, at 985 n.106 (citation omitted). This footnote suggests some promising possibilities for the justification of tolerance. Since Sherry does not elaborate or necessarily even endorse these justifications, however, I will not pursue them here but instead will focus on the rationales she discusses in the text of her essay.
\item[148.] See id. at 988.
\item[149.] Such legislation was adopted in Indianapolis but was invalidated in the courts. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).
\end{enumerate}
have highlighted how pornography degrades women."150 But while this observation might be correct, it hardly follows that such educative efforts would have been less effective had they been coupled with supressive legislation. Hence, Sherry's communitarian position offers at most a highly speculative argument for tolerance. Moreover, her argument may well be overwhelmed by the position's more fundamental contention—that the community has a responsibility to instill virtue and virtuous attitudes in its citizens.151

Observing that "there are obviously some limits to tolerance as a virtue," Sherry then suggests that "[t]olerance is a virtue to be cultivated primarily as an antidote either to ignorant, unexamined prejudices, or to selfishness, because a good citizen avoids such vices."152 These observations, which suggest a slightly different argument for tolerance, surely contain a measure of truth: There are limits to what can be tolerated, and tolerance does serve as an antidote to "ignorant, unexamined prejudices." Unfortunately, this conjunction of ideas seems faintly ominous. Is it wise to instruct government officials to limit their tolerance in accordance with the assumption that tolerance is primarily an antidote to prejudice or selfishness? Such officials might logically conclude that they ought to suppress a disfavored idea if they are satisfied, after introspection, that their own opposition to the idea is not based on mere prejudice or, conversely, if they believe the disfavored idea is itself grounded in "ignorant, unexamined prejudice." This conclusion, which flows logically from Sherry's argument, might leave very little room for the actual practice of tolerance. It seems contrary to human experience that officials would concede, even (or especially) to themselves, that their own views are grounded in mere prejudice. And it is all too easy for one to conclude that someone who adheres to a belief that seems to be obviously or demonstrably incorrect must be acting from unreflective prejudice.

The risks inherent in using tolerance only as an antidote to prejudice or selfishness are manifest in Sherry's brief discussion of public school education. In a footnote, Sherry defends judicial decisions permitting public schools to teach evolution but not creationism because "[t]he former is part of a still ongoing scientific process of searching for truth; the latter is an inherited dogma, unchanging and by definition indisputable."153 Sherry's characterization reflects a common and conspicuous lack of empathy towards the proponents of creationism.154 Creationists

150. Sherry, supra note 2, at 988.
151. Cf. Sunstein, supra note 38, at 1543 ("The most objectionable exercises of governmental power are often associated with approaches that see character formation as an end of politics.").
152. Sherry, supra note 2, at 986.
153. Id. at 986 n.107.
154. See P. KING, supra note 10, at 113 ("The proponents of scientific objectivity are not necessarily any less intolerant than the most fierce of religious bigots."); see also Leedes, Monkeying
plainly do not regard their position as "an inherited dogma, unchanging and by definition indisputable." The proponents of "balanced treatment" in the schools have been emphatic in stressing that their view is supported by scientific evidence, and they advocate only that schools present the scientific evidence for both creationism and evolution. Thus, Sherry's characterization, which forces upon the creationists a position that they themselves firmly disavow, reflects the ease with which one confident of her own views can conclude that persons who disagree with those views are not merely incorrect but are—must be—acting from something like "unexamined prejudice."

In addition, although Sherry purports only to explain why creationism cannot appropriately be taught in public schools, the logic of her position might easily support a broader conclusion. She argues, after all, that the purpose of tolerance is to remedy unexamined prejudice and that the practice of tolerance should be limited accordingly. But if creationism is the product of unreflective dogmatism, as she suggests, then why should that viewpoint be tolerated at all? Sherry might respond that the best way to eliminate the unreflective attitude that produces creationism is to combine governmental tolerance of the idea with societal intolerance—to treat creationism in the same way we treat pornography. But however one assesses the results of that strategy with respect to pornography, it has failed to undermine creationism. Although difficult to measure, support for creationism seems in fact to have become more

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*Around with the Establishment Clause and Bashing Creation-Science, 22 U. RICH. L. REV. 149, 150-51, 168-82 (1988)*. Leedes turns Sherry's pejorative characterization around, arguing that "the twin presumptions that creation-scientists are all irrationally driven by a monolithic Christian fundamentalism, and that all creation-science courses are the same ... are products of stereotypical thinking." *Id.* at 180.

155. Of course, many creationists are biblical literalists. But biblical literalists do not necessarily believe their own opinions are either "unchanging" or "by definition indisputable." See Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 981 n.11 ("Christian fundamentalists ... insist that their faith itself is based on reason ... ."). The biblical literalist may contend (a) that scripture is an infallible source of truth, and (b) that with respect to question X, scripture teaches Y. But the biblicist is not thereby committed to the view that either contention (a) or contention (b) is indisputable. He believes these contentions are correct, but he can also, without any inconsistency, admit that these contentions are debatable and in principle rebuttable.


157. Bruce Ackerman notes that "[i]t is simply self-congratulatory to suppose that the members of our own persuasion have reached their convictions in a deeply reflective way, whereas those espousing opinions we hate are superficial," and he surmises that one "can expect to find an abundance of stereotype-mongers and knee-jerks on all sides of every important issue—as well as many who have struggled their way to more considered judgments." *Ackerman, Beyond* Carolene Products, 98 HARV. L. REV. 713, 739 (1985) (emphasis in original).

widespread and intense over the past decade. A government on Sherry's theory might therefore pursue a more forceful strategy. Were such a government to adopt a less tolerant strategy in order to "remedy" the unreflective dogmatism of creationism, the communitarian rationale offers meager grounds for objecting.

Thus we again see how intolerance can easily be couched in the language of "community" or "civic virtue." Even though communitarian proposals such as Sherry's do not intend to promote intolerance, any position that combines a fondness for community with a hostility to individual rights may inadvertently provide a very fertile ground for the logic of intolerance.

B. The Limits of Tolerance

Even granting the virtues of tolerance, numerous questions remain concerning its practical implementation. Initially, one must articulate the limits of tolerance. Clearly, not all conduct can be tolerated; even the most emphatic plea for tolerance would not imply protection of burglary or rape. And some activity that can be tolerated should not be given absolute protection. For example, although our society should, and does, protect most political speech, including speech the advocates revolution or totalitarian government, it rightly punishes some acts of political expression, such as threatening the life of the President. Defining the limits of tolerance thus entails two distinct questions. First, what kinds of conduct should be tolerated? Second, how much tolerance is appropriate?

The justifications for tolerance developed thus far suggest some answers to the first of these questions. The prudential argument, for example, asserts that tolerance facilitates harmony in a diverse community. Accordingly, government should tolerate acts that deviate from society's norms to the extent that members of the society dispute the norms' validity. For example, if opinions regarding sexual conduct vary widely, then the government should be tolerant of people's differing sexual attitudes. Similarly, if the community is religiously diverse, then

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160. Thus, Jeremy Waldron argues that rights are necessary for "fall-back and security in case other constituent elements of social relations ever come apart" and that communitarians who overlook this possibility are "naive or desperately dangerous, and probably both." Waldron, When Justice Replaces Affection: The Need for Rights, 11 HARV. J.L. & PUB. POL'Y 625, 629 (1988).

161. See Watts v. United States, 394 U.S. 705, 707 (1969) (declaring that statute prohibiting threats to the President is constitutional).

162. Cf. Nagel, Teaching Tolerance (Book Review), 75 CALIF. L. REV. 1571, 1573 (1987) ("We should be intolerant of some tolerance and tolerant of some intolerance.").

163. See supra notes 122-29 and accompanying text.
relational tolerance may be appropriate. Prudential theory, however, allows that community consensus may obviate the need for tolerance. Thus, the prudential argument offers little support for tolerating a few powerless dissenters in a community that largely adheres to a particular religious faith.

The positive case for tolerance also provides some guidance for discerning what kinds of conduct should be tolerated. Its basic premise is that certain ends can be achieved only through the exercise of free choice. Accordingly, toleration of immoral conduct is appropriate if the desired end can be attained only through voluntary effort or acceptance. For example, insofar as religious ends can be achieved only voluntarily, the positive case generally supports religious tolerance. Since the positive argument is not premised upon differences within the community, it supports religious tolerance even if that tolerance is not essential to the maintenance of social peace. Yet the positive case mandates tolerance only if the attainment of the underlying good requires voluntary acceptance. For instance, laws designed to promote health, such as substance abuse laws or motorcycle helmet requirements, may achieve their aims even if citizens obey them only because of state coercion; the positive case does not mandate tolerance in such contexts.

Theoretical justifications for tolerance are less helpful in addressing the question of how much tolerance should be given to particular spheres of activity. Suppose a liberal state decides that it should tolerate a particular activity such as speech. Various practical questions then arise. When protection of speech conflicts with other legitimate public interests, how should the conflicts be resolved? Should all kinds of speech receive the same level of protection? A general theory of tolerance does not readily yield answers to these questions; tolerance theory provides prima facie reasons for protecting particular kinds of activities, but it does not prescribe resolutions when the reasons for tolerance clash with other legitimate state concerns. Indeed, an exhaustive effort to distill practical conclusions from a given philosophy may inadvertently undermine its credibility. Thus, implementing a policy of tolerance requires at least as much sensitivity to pragmatic concerns as to abstract theorizing.

164. See supra notes 132-36 and accompanying text.
165. The prudential argument, by contrast, might conceivably prescribe tolerance in this context if, for instance, the attempt to prohibit the use of drugs would generate inordinate social conflict.
167. Cf. L. Bollinger, supra note 2, at 192 (arguing that the boundaries of tolerance will vary as society changes and thus are not susceptible of precise formulation); id. at 238 (asserting that “the
C. Tolerance and Judicial Doctrine

The theoretical justifications for tolerance considered above do not dictate where the primary responsibility for implementing a commitment to tolerance should lie. For example, general rationales for tolerance do not determine whether the responsibility for protecting dissenters should be entrusted to the judiciary,\(^{168}\) or if so, precisely how the task should be discharged. To the extent that the judiciary does have a role in promoting tolerance, however, the identification of tolerance over neutrality as the central tenet of liberal democracy will be likely to influence the evolution of legal doctrine. The following discussion illustrates how legal doctrine might develop differently under a regime of tolerance in two areas: the regulation of speech, and the accommodation of religious convictions in the form of free exercise exemptions.

1. Regulation of Speech

a. Neutrality or Tolerance?

Protection for freedom of expression is central to both the neutrality and tolerance versions of liberalism, but the specific focus of those versions may differ significantly. Liberal neutrality is primarily concerned with preventing government from passing judgments upon the value or truth of its citizens' ideas. Thus, under liberal neutrality, speech restrictions that reflect such judgments are more objectionable than are regulations that do not do so. A tolerance approach, by contrast, would not be primarily concerned with maintaining governmental neutrality, but with ensuring that all speakers, even those who advocate viewpoints at odds with a prevailing orthodoxy, have an opportunity to express themselves.

The ideal of neutrality currently dominates free speech doctrine.\(^{169}\) Thus, laws that prohibit the expression of particular ideas—even extreme


\(^{169}\) See, e.g., Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 189 (1983) (observing that the requirement of content neutrality "is, today, the most pervasively employed doctrine in the jurisprudence of free expression"); Sunstein, supra note 59, at 914 (asserting that "the central commitment of the first amendment, as currently interpreted, is to neutrality on the basis of content or viewpoint"). As one might expect, the neutrality requirement can also be understood in terms of equality. See, e.g., L. Tribe, AMERICAN CONSTITUTIONAL LAW 940 (2d ed. 1988) (suggesting that free speech doctrine is based on a "presumption of the equality of ideas"); Marshall, The Dilution of the First Amendment and the Equality of Ideas, 38 CASE W. RES. L. REV. 566, 575 (1988) (describing "equality among ideas" as "the central tenet" of free speech doctrine).
or radical ideas such as the advocacy of Nazi propaganda\textsuperscript{170}—or that distinguish among expressive activities on the basis of content, are subject to exacting judicial scrutiny\textsuperscript{171} and are nearly always invalidated.\textsuperscript{172} Conversely, content-neutral restrictions that regulate only the time, place, and manner of communication are subject to less exacting judicial scrutiny\textsuperscript{173} and are frequently upheld.\textsuperscript{174} As a result of this distinction, separating content-based from content-neutral regulations has become a major occupation of free speech doctrine.

Instead of focusing upon content neutrality, a tolerance approach would likely emphasize and develop the "ample alternative channels" requirement, which plays a peripheral role in current free speech doctrine. A tolerance-based doctrine would not assume that all ideas are equally true or valuable, or even that government must act as if all ideas are equally true or valuable. Indeed, from a tolerance perspective, any such assumptions are simply false. In making decisions, and even in formulating a free speech policy, government cannot avoid judging the truth or value of ideas offered in support of competing policies. A tolerance-based system would not maintain a facade of neutrality; it would instead aim to ensure that even when government regards a speaker's message as false or undesirable, it allows her to speak—the system protects the speaker's opportunity to express her views. The "ample alternative


\textsuperscript{171} See, e.g., \textit{Regan v. Time, Inc.}, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").


\textsuperscript{173} See \textit{Clark v. Community for Creative Non-Violence}, 468 U.S. 288, 293 (1984) ("We have often noted that [reasonable time, place or manner restrictions] . . . are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

channels” requirement, if conscientiously employed, seems well suited to achieve that objective. The requirement would uphold speech restrictions only if they leave other meaningful opportunities for the expression of views that might be affected.\footnote{See, e.g., Frisby, 487 U.S. at 483 (asserting that a ban on all residential picketing “permits the more general dissemination of a message . . . [because] the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain”).}

In many instances, the neutrality and tolerance approaches would produce similar results. Both approaches would condemn outright prohibitions of the expression of particular ideas or viewpoints. The neutrality approach would disfavor such prohibitions because they reflect judgments regarding the value or truth of the prohibited expression; the tolerance approach, while conceding the inevitability of such judgments, would nonetheless condemn flat prohibitions because they allow no expression of the disfavored ideas. Similarly, both approaches would, in principle, accept “content-neutral” time, place, and manner restrictions. The neutrality approach would deem such restrictions to be, by definition, “neutral,” and the tolerance approach would find that such restrictions leave other avenues for expression.

The approaches diverge, however, with regard to what Daniel Farber and John Nowak have called “hybrid” restrictions—content-based restrictions on the time, place, and manner of expression.\footnote{See Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 VA. L. REV. 1219, 1225 (1984).} For example, the federal government may seek to prohibit the display of insulting or offensive signs near a foreign embassy.\footnote{See Boos v. Barry, 485 U.S. 312 (1988) (invalidating restriction).} A municipality may seek to ban adult movie theaters from certain areas of the city.\footnote{See City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) (upholding zoning ordinance regulating adult theaters).} A state may attempt to regulate certain kinds of picketing defined by content, but only if such picketing is conducted near a school.\footnote{See Police Dep't v. Mosley, 408 U.S. 92 (1972) (invalidating restriction).} Or a school may adopt a regulation forbidding students to wear armbands protesting United States foreign policy; the regulation impedes student expression only while they are in school.\footnote{See Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (striking down regulation).}

Under current doctrine, the courts tend to treat such regulations as if they were content-based prohibitions, and thus to invalidate them.\footnote{Hybrid restrictions were invalidated in Boos, 485 U.S. 312, Mosley, 408 U.S. 92, and Tinker, 393 U.S. 503. Although the Court upheld a hybrid restriction regulating adult theaters in Renton, it invented a dubious distinction to reach such a result. The Court insisted that the “ordinance is aimed not at the content of the films shown at 'adult motion picture theaters,' but rather at the secondary effects of such theaters on the surrounding community.” Renton, 475 U.S. at 47 (emphasis in original).} This treatment reflects the neutrality ideal. If content neutrality is the
central concern of free speech jurisprudence, then content-based time, place, and manner regulations are similar to flat prohibitions in the most critical respect: both seek to regulate speech on account of the message conveyed. This conclusion is built into the current doctrinal formula, under which a regulation cannot qualify as a time, place, and manner restriction unless it is content neutral.  

If tolerance rather than neutrality were recognized as the central value in liberal democratic theory, the similarities between "hybrid" regulations and flat prohibitions would recede in significance, while the similarities between "hybrid" restrictions and ordinary time, place, and manner restrictions would assume greater prominence. Even if a restriction on the time, place, and manner of expression were content based, outright suppression could be avoided, and the demands of tolerance might be met, through the enforcement of the "ample alternative channels" requirement.

b. The Flag Burning Case

Texas v. Johnson can serve to illustrate the contrast between a neutrality and tolerance approach to first amendment doctrine. The defendant, Gregory Johnson, had poured kerosene on a United States flag and then set it on fire while participating in protest demonstrations during the Republican National Convention in 1984. He was convicted under a Texas statute prohibiting the desecration of a venerated object. Because the Supreme Court applied the content-neutrality requirement, both the majority and the dissenting opinions were led to adopt positions that would otherwise be difficult to explain.

The majority opinion appeared to concede Texas' interest in protecting the flag as a symbol of nationhood and national unity, but concluded that this interest directly related to expression and that the statute departed from content neutrality. "Johnson was not," the Court asserted, "prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." But

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182. See Frisby v. Schultz, 487 U.S. 474, 482 (1988) (ordinance prohibiting picketing before an individual's residence considered content neutral and therefore subject to lesser judicial scrutiny); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("The State may also enforce regulations of the time, place, and manner of expression which are content-neutral . . . .").
183. Wright, The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels, 9 PACE L. REV. 57, 68 (1989) ("Put simply, there does not seem to be any particularly severe danger to free speech if an admittedly content-based restriction, whether or not it is narrowly tailored to affect its purpose, leaves fully available to the speaker the best practical means, from the speaker's standpoint, of promoting the speaker's message . . . .").
185. Id. at 2542, 2546-47.
186. Id. at 2542-43 (emphasis added).
this assertion is ambiguous, if not misleading. Johnson could—and did—express dissatisfaction with this country's policies in numerous ways without subjecting himself to prosecution.\footnote{187} The more plausible conclusion, it would seem, is that Texas prosecuted Johnson not merely because he criticized national policies, but because he did so in an unacceptable manner.\footnote{188}

Why then did the Court loosely equate a content-based but nonetheless very specific and limited restriction on expression with a per se ban on the expression of particular ideas? The Court's seemingly overbroad statement is understandable against the assumption that content neutrality is the principal concern of the free speech clause. On that assumption, the pertinent questions were whether the Texas statute was directed against communicative activity, and whether it was content neutral. With the issue thus framed, the majority needed only to assert, first, that the statute was directed against expression and, second, that the statute's impact was not content neutral. The statement that Johnson was prosecuted for expressing dissatisfaction with the country's policies can thus be understood as an imprecise way of stating these more specific conclusions, which in isolation seem perfectly plausible. If content neutrality is the decisive issue, in other words, then there is no legally relevant difference between prosecuting people for expressing dissent and prosecuting people for expressing dissent in particular and forbidden ways. Either kind of prosecution deviates from content neutrality, and that is all that matters.\footnote{189}

If the content-neutrality standard permitted the majority to make an otherwise implausible equation, it forced the dissenting Justices to draw an untenable distinction. The dissenters initially argued, plausibly enough, that numerous alternative avenues of expression were open to

\footnote{187. As Chief Justice Rehnquist noted:}

\footnote{Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march. . . . For none of these acts was he arrested or prosecuted . . . . \cite{Id. at 2553 (Rehnquist, C.J., dissenting) (citation omitted).}}

\footnote{188. If the case is viewed in this way, to say that Johnson was prosecuted for expressing dissatisfaction with national policies seems just as true—and just as misleading—as to say that a professional burglar was prosecuted for trying to feed his family. Both characterizations focus on something that is true but incidental, while overlooking the essence of the prosecution.}

\footnote{189. The majority does seem to have embraced this conclusion. See Johnson, 109 S.Ct. at 2546 ("The point of our prior decisions: their enduring lesson, that the Government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea."); \cite{Id. at 2546 n.11 (majority citing Spence v. Washington, 418 U.S. 405, 411 n.4 (1974), to reject dissent's belief that Johnson's conduct could be criminally sanctioned because he could have conveyed his expression "just as forcefully in a dozen different ways")}.}
Johnson. But under existing doctrine, this contention was insufficient, as the existence of alternative channels cannot currently sustain a restriction unless the restriction is also content neutral. Thus, the dissenters were forced to push their initially plausible contention, that Johnson had other avenues of expression available to him, to the implausible conclusion that the act for which Johnson was prosecuted had not essentially involved any expression of ideas, and that Johnson had been prosecuted, rather, for causing offense. The state, however, had already conceded that Johnson's burning of the flag was expressive conduct. Moreover, since it was the intended communicative impact of Johnson's act that was likely to cause offense, any suggested distinction between prosecution for the message and prosecution for the message's effects hardly seems viable in this context.

The dissenters' arguments might have been more accurately presented, and more fairly assessed, within a doctrinal framework of tolerance. Under tolerance theory, the majority could not perfunctorily dismiss any regulation that is not content neutral, nor could it offhandedly equate a content-based but very limited regulation of the manner of expression with a per se prohibition on the expression of a particular message. Rather, the Court would have to consider the adequacy of alternative means for conveying the same message. Conversely, the dissenting opinions, instead of denying the essential communicative nature of Johnson's conduct and alleging the statute's neutrality, could have contended that ample alternative channels allowed the state to protect a unique national symbol without seriously impairing the ability of

190. See supra note 187; see also 109 S. Ct. at 2554 (Rehnquist, C.J., dissenting) (observing that Johnson had "a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy"); id. at 2556 (Stevens, J., dissenting) (arguing that the flag desecration statute imposed a "trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag . . . be employed").

191. The Chief Justice's dissenting opinion, in which Justices White and O'Connor joined, argued that "the public burning of the American flag by Johnson was no essential part of any exposition of ideas" and that "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others." Id. at 2553 (Rehnquist, C.J., dissenting).

Justice Stevens similarly drew a distinction between the content of speech and the effects of speech. He concluded that the statute was content neutral because Johnson could have been prosecuted even if he had intended to show support for the flag by burning it. Id. at 2557 (Stevens, J., dissenting). That hypothetical possibility, however, seems far removed both from the actual prosecution and from the likely motives that induced Texas legislators to adopt the flag desecration statute.

192. See id. at 2540.

193. The majority suggested that the symbolic nature of the flag may be such that there are no alternative means for communicating the message at issue in Johnson. See 109 S. Ct. at 2546 n.11. But it is a rare idea that can be expressed in only one way; there is no obvious reason why the alternative means discussed by the dissent could not have conveyed Johnson's message—albeit, perhaps, in a less dramatic way.
persons like Johnson to communicate their views. Instead of fixating on
the issue of content neutrality, the Court could have focused on the
arguably more important questions: How significant is the state's inter-
est in protecting the flag as a symbol? and how adequate are the alterna-
tive means of communication for speakers like Johnson? By reorienting
the Court's attention toward these arguably more fundamental concerns,
a tolerance-based approach could help advance our understanding of the
first amendment.

c. The Skokie Controversy

Similarly, a shift in emphasis from a statute's content neutrality to
the availability of ample alternative channels might be significant in cases
such as the Skokie controversy. In Collin v. Smith, a Nazi group
had selected Skokie, Illinois, as a place to march and demonstrate. The
town's population was heavily Jewish and included several thousand
Holocaust survivors. In response, Skokie adopted regulations that,
although calculated to prevent the Nazis from parading or demonstrat-
ing on public streets and property, did not purport to criminalize the
advocacy of Nazi ideology. In finding these regulations to be invalid, the
Seventh Circuit relied heavily upon the content-neutrality rationale; the
falsity or reprehensibility of the Nazis' views could have no bearing on
the legal issue because "[u]nder the First Amendment there is no such
thing as a false idea."

If Collin illustrates the liberal commitment to neutrality, however, it
also exhibits the evanescent quality of that ideal. The proposition that
"under the First Amendment there is no such thing as a false idea,"
clearly was not meant to be taken at face value. That proposition was
juxtaposed against repeated judicial pronouncements that the views pro-
pounded by the Nazis were, in fact, false and reprehensible ideas.
Moreover, the court's own decision amounted to a pronouncement that a
host of competing arguments (for example, that speech promoting racial
hatred might permissibly be regulated), were—under the first amend-
ment—false ideas. The proposition that "under the First Amendment
there is no such thing as a false idea" was seemingly little more than a
grand slogan, which, if taken literally, would commit the first amend-
ment to an internally unstable epistemological position that no one

194. For a detailed discussion of the factual and legal background in this controversy, see D.
DOWNS, NAZIS IN SKOKIE (1985).
195. 447 F. Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916
(1978).
196. Collin v. Smith, 578 F.2d 1197, 1203 (7th Cir.) (quoting Gertz v. Robert Welch, Inc., 418
197. 578 F.2d at 1200, 1202, 1210.
involved in the case—Nazis, Skokie residents, or judges—seemed to have actually accepted.

If the judiciary replaced its commitment to neutrality with a commitment to tolerance, a more plausible first amendment doctrine might result. While the Skokie ordinances undoubtedly restricted the Nazis' opportunities to communicate their views in the most effective or dramatic way, those ordinances did not purport to prohibit per se either the Nazis' beliefs or their mere expression of those beliefs. Had it focused on the tolerant policy of preserving ample alternative channels of expression, the Collin court might well have supported the city's efforts to prevent the Nazis from marching and demonstrating on public property, while leaving them with numerous alternative avenues for communicating their ideas. Even if a court would have reached the same conclusion with a tolerance-based approach as it did under the neutrality approach, its use of a tolerance analysis would have at least allowed the court to draft an opinion free of implausible or misleading rhetoric.

d. Tolerance and Current Free Speech Jurisprudence

The foregoing analysis should not be understood to suggest that acceptance of tolerance as a central liberal ideal would inexorably lead to a revision of free speech doctrine, or to a different result in cases like Collin. For example, although Lee Bollinger offers a thoughtful tolerance-based defense of the decisions in the Skokie controversy. Bollinger effectively criticizes the justifications articulated by the courts, concluding that the Nazis' expression probably was not intrinsically worthy of protection and that the court's "slippery slope" arguments for protecting extreme and pernicious speech are unpersuasive. He nonetheless contends that toleration of speech, even speech that does not deserve legal protection, will increase our general capacity for tolerance in other areas of social life. However one receives this argument, Bollinger's analysis demonstrates that the ideal of tolerance may lend itself to more than one manner of implementation.

Indeed, one can readily explain much of current first amendment doctrine under a tolerance rationale. The courts' ostensible commitment

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198. For example, advocates of Nazi ideology might still have written books and tracts, engaged in direct mail campaigns, and held meetings and rallies on private property.

199. See L. Bollinger, supra note 2.

200. Id. at 43-103.

201. See supra notes 128-29 and accompanying text.

202. Bollinger's psychological premises and pedagogical approach have been criticized, see, e.g., Strauss, Why Be Tolerant? (Book Review), 53 U. Chi. L. Rev. 1485, 1499-1501 (1986); Schlag, Freedom of Speech as Therapy (Book Review), 34 UCLA L. Rev. 265 (1986); Nagel, supra note 162, and he acknowledges that his premises raise difficult empirical, tactical, and philosophical questions. L. Bollinger, supra note 2, at 228-29, 243-46.
to neutrality is arguably rather feeble, and one could argue that the principal value in retaining content neutrality in free speech jurisprudence has not been that it is coherent in principle, but that it has served in practice as a tactically useful and judicially manageable device for preserving an expansive range for free expression. Any theoretical inconsistencies in the neutrality ideal might thus be regarded as beside the point; the content-neutrality doctrine has worked, and that is what counts. Negative rationales based on distrust of government or "slippery slope" concerns have helped shape and support a content-neutral first amendment doctrine. These negative rationales might support an emphasis upon "neutrality" primarily as a pragmatic device for maintaining ample "breathing space" for free expression. Thus, current doctrine might be understood not as embracing the ideal of neutrality, but rather as using "content neutrality" doctrine merely as a localized device for promoting an expansive policy of tolerance.

Even if current doctrine is tacitly loyal to the notion of tolerance,

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203. For example, the Supreme Court does make value judgments and content distinctions in identifying certain categories of speech (such as obscenity) that receive no first amendment protection. See Miller v. California, 413 U.S. 15 (1973) (holding that obscenity is not protected by the first amendment unless it is of serious artistic or academic worth); see also Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (rationale for denying first amendment protection to certain categories of expression is that such expression is of "slight social value as a step to truth"). The Court makes similar judgments in its occasional differentiation of lower value speech within the protected domain. See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 747 (1978) (although not "obscene," "patently offensive sexual and excretory language need not [receive full first amendment protection] in every context"); Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (plurality opinion) (asserting that "society's interest in protecting this type of expression [adult movies] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

The Supreme Court has also rejected suggestions that the first amendment prevents government from judging among and supporting ideas in positive rather than prohibitory ways. See Regan v. Taxation with Representation, 461 U.S. 540 (1983) (Congress can subsidize lobbying activities of some organizations while denying subsidies to other such organizations); Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (rejecting argument that speech clause limits government's ability to fund political campaigns). Thomas Emerson describes the state of the law: "[T]he first amendment ... has served to prevent the government from prohibiting, harassing, or interfering with speech ... [It] has not been viewed as a significant factor ... to impose limits on governmental participation in the system [of expression]." Emerson, The Affirmative Side of the First Amendment, 15 GA. L. REV. 795, 795 (1981). For arguments that the first amendment should be construed to limit government speech, or government subsidization of speech, see M. YUDOF, WHEN GOVERNMENT SPEAKS (1983); Emerson, supra; Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 CALIF. L. REV. 1104 (1979); Shiffrin, Government Speech, 27 UCLA L. REV. 565 (1980).

204. Cf. Morawetz, supra note 27, at 1031 (considering the possibility of "[n]eutrality ... offered as a prophylactic policy" against government decisions favoring a particular view of the good life).

205. For a valuable discussion, see F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 80-86 (1982).

206. Thus, as noted, Bollinger uses the idea of tolerance to justify the outcome in the Skokie controversy. See supra notes 199-201 and accompanying text. I have elsewhere argued that tolerance better explains some aspects of existing doctrine than the traditional "marketplace of ideas" rationale does. See Smith, supra note 2, at 716-29.
however, its explicit commitment to neutrality impedes candid and deliberate analysis of the issues. Moreover, negative rationales\textsuperscript{207} need not select neutrality as the focal point upon which to construct a protective doctrinal structure; tolerance could be similarly employed to protect speech. Thus, despite the possible consistencies in result between the neutrality and tolerance positions, the current emphasis upon neutrality as the crux of free speech doctrine deserves reconsideration.

2. Free Exercise Exemptions

The problem with a commitment to neutrality appears most conspicuously in the frequently noted tension between the establishment and free exercise clauses.\textsuperscript{208} Judges and theorists friendly to the ideal of neutrality have read that ideal into the establishment clause, concluding that the clause requires government to be neutral in matters of religion.\textsuperscript{209} The problem is that the free exercise clause appears to command government to be more than "neutral" towards religion; the clause confers on religion a special constitutional status that other activities do not enjoy. Thus, under current free exercise doctrine, government must sometimes excuse religious objectors from complying with certain generally applicable laws. For example, a state must exempt Amish school children from attending public schools after the eighth grade.\textsuperscript{210} And states must excuse Adventists and others with sincerely held religious beliefs from complying with conditions for unemployment compensation that would burden the practice of their religion.\textsuperscript{211} Similarly, while not requiring an exemption, the free exercise clause permits government to excuse religious believers and institutions from complying with laws that conflict with their religious practices. The exemption from military service for conscientious objectors\textsuperscript{212} and the provision in Title VII authorizing religious discrimination by religious employers\textsuperscript{213} are examples of such legislatively created dispensations.

Free exercise exemptions illustrate the feasibility of implementing a

\textsuperscript{207} See supra note 205 and accompanying text.

\textsuperscript{208} For a description of the conflict, see Choper, The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments, 27 WM. & MARY L. REV. 943, 947-48 (1986). For my own analysis and proposed resolution of the conflict, see Smith, supra note 58, at 990-93, 1026.

\textsuperscript{209} See supra note 47.

\textsuperscript{210} Wisconsin v. Yoder, 406 U.S. 205 (1972).


policy of liberal tolerance. Such exemptions plainly do not reflect legisla-
tive approval of the specific beliefs or practices accommodated by the
law; their very status as exemptions to more general, and contrary,
policies shows that they are the product of tolerance, not approval.214
Further, since the majority of exemptions—and the most consequential
ones—have been the product of legislation rather than judicial decree,
representative or majoritarian institutions are clearly capable of exercis-
ing and promoting tolerance.

If free exercise exemptions demonstrate the possibility of liberal tol-
erance, however, their problematic status in current doctrine reflects the
tension between tolerance and neutrality as liberal ideals. Free exercise
exemptions confer upon religious believers a privilege that other citizens
cannot claim; they may appear to favor religion, and thus deviate from a
policy of neutrality.215 For example, an Adventist may receive unem-
ployment benefits even though she refuses Saturday employment; but the
person who will not work because she wants to watch college football, or
because she cannot find a babysitter for her children, is denied such bene-
fits.216 Similarly, a person who has no colorably religious objection to
war cannot claim conscientious objector status, even though the burden
of military service may be onerous.217 The ironic consequence is that
free exercise exemptions, which would seem to represent a major
achievement for religious freedom, are threatened by the very neutrality
that many liberals hold out as the preserver of religious freedom.

This neutrality-dependent conflict between the religion clauses arose
in Estate of Thornton v. Caldor, Inc.218 The Connecticut Legislature had
extended the logic of Sherbert v. Verner219 and similar cases by requiring
employers to excuse an employee from work on one day of the week that
the employee might regard as his or her "Sabbath."220 Connecticut evi-
dently intended to ensure that religious minorities who worship on days
other than Saturday or Sunday would enjoy the same privilege of wor-
ship that members of majority religions—Christians and Jews—already

is not the Congress' preferences about war (or about pacifism) which are written into the
conscientious-objector exemption but rather an opinion quite opposite to the dominant
Congressional opinion."); see also Galanter, Religious Freedoms in the United States: A Turning
Point?, 1966 Wis. L. Rev. 217, 290-91 (arguing that free exercise exemptions "give to minorities
what majorities have by virtue of suffrage and representative government").

215. See Note, supra note 50, at 1484-90.


217. See Garvey, Free Exercise and the Values of Religious Liberty, 18 Conn. L. Rev. 779, 793
(1986) ("The question is whether one can say that the suffering from deprivation of religious liberty
is somehow special... A soldier drafted overseas to risk his life in combat may suffer greatly at the
thought of leaving his wife and children.") (emphasis in original).


219. 374 U.S. 398 (1963); see supra text accompanying note 216.

enjoy. Thus, the law seemed to reflect a commendable effort to practice religious tolerance. The Thornton Court, however, invalidated the measure primarily because the required accommodation of religious practice violated the neutrality-based standard that a law must neither advance nor inhibit religion. The Connecticut statute, the Court observed, was not neutral: It "command[ed] that Sabbath religious concerns automatically control over all secular interests at the workplace." In addition, while the statute granted religious believers a privilege, "[o]ther employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off have no rights under the statute." Thus, the requirement of neutrality defeated the state's effort to practice religious tolerance.

In a similar vein, the Court recently held that a Texas statute that exempted religious publications from payment of a general sales tax violated the state's obligation to be neutral in matters of religion. Justice Stevens would extend the logic of neutrality even further in curtailing free exercise exemptions; he has argued that free exercise exemptions should virtually never be constitutionally required so long as the law that imposes the burden on religious exercise is both general and neutral.

The establishment clause threatens free exercise exemptions only because it has been construed to commit government to neutrality in matters of religion. As argued above, however, that construction is misconceived; indeed, it embraces an illusory and unattainable ideal. If a more viable construction of the establishment clause were to replace the neutrality construction, courts and commentators could pursue a more candid and deliberate development of the policy of religious tolerance reflected in free exercise exemptions.

Of course, one cannot define a complete legal doctrine using only tolerance. Numerous specific and practical issues will undoubtedly arise

221. As the Court noted, the law "guarantee[d] every employee, who 'states that a particular day of the week is observed as his Sabbath,' the right not to work on his chosen day." Thornton, 472 U.S. at 708.
222. See id. at 708-11.
223. Id. at 709.
224. Id. at 710 n.9.
225. Texas Monthly v. Bullock, 109 S. Ct. 890 (1989). The plurality opinion, written by Justice Brennan, found the neutrality requirement in the establishment clause. Id. at 898-99, 899 n.3. A concurring opinion by Justice White suggested that the law violated a requirement of content neutrality arising from the press clause. Id. at 905 (White, J., concurring).
226. See United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment) (suggesting with apparent approval "a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability" on free exercise grounds). Justice Stevens' position seems to have been adopted by the Court. See Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990).
227. See supra text accompanying notes 36-100.
228. For my own analysis of how the clause should be construed, see Smith, supra note 58.
in the implementation of a tolerance-based system that cannot be resolved by mere deduction from the principle of tolerance. Thus, this Article has not sought to answer whether existing free exercise exemptions should be expanded or supplemented, and whether the responsibility for developing such exemptions should rest primarily with courts or with legislatures.229 This Article's important conclusion is that a policy of tolerance is constitutionally permissible and should not be frustrated by the invocation of a misconceived requirement of religious neutrality.

CONCLUSION

Although this Article has explored the direction in which a policy of tolerance might push first amendment doctrine, the specific analyses of neutrality versus tolerance under the speech and religion clauses is intended primarily to illustrate the meaning of liberal tolerance and to show how a commitment to that ideal might affect judicial doctrine. Critics who favor tolerance will disagree with my particular doctrinal conclusions.230 The more fundamental point is that once the ideal of liberal neutrality is recognized as empty, the remaining choice is between tolerance and intolerance. Viewed in this light, tolerance is the only viable way of preserving the liberal commitment to individual freedom in a genuine political community. This conclusion suggests the urgency of reviving the defense of tolerance and of exploring strategies for implementing the principle of tolerance in constitutional doctrine.

229. In Chief Justice Rehnquist's view, for example, the Constitution rarely requires free exercise exemptions, but it allows legislatures considerable leeway to create such exemptions if they choose to do so. See Thomas v. Review Bd., 450 U.S. 707, 723-27 (1981) (Rehnquist, J., dissenting).

230. See, e.g., supra notes 199-201 and accompanying text.