Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger

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Using insights from poststructuralist literary theories, writings on ideology, and theories of practice, this article develops an interpretive perspective on political tolerance for nonconformity. Viewing Supreme Court expression doctrine as ideology, it suggests that legal discourse, in combination with intersecting social, political, and scientific discourses, socially constructs political difference and constitutes a political spectrum. Research indicating differences in tolerance between elites and the public is interpreted as arising from dual ideological strands within legal discourse that are appropriated depending on one's location in social relations. The theoretical approach is used to situate law and legal institutions in American culture and extend previous work on legal doctrine as ideology emerging from the Critical Legal Studies movement.

A public school's decision in Poland, Maine, to prohibit the recitation of a prayer at graduation ceremonies motivated several community residents to write letters to the local newspaper's editor. Although the tone of the letters varied and a few expressed support for the decision, one in particular seemed to capture the spirit of the opposition. Entitled, "Aliens Are Free To Go Elsewhere" (*Lewiston Sun-Journal*, 26 June 1991:p. 5, col. 1), it voiced outrage that "95 percent of the US population allows the other 5 percent to tell us how to interpret our Constitution and live our lives." The letter proclaims that "this country was established by white, Anglo-Saxon, Protestant Christians as a Christian nation" with a Constitution and Bill of Rights intended "to protect the church from the state" rather than "to protect the state from the church." The author's reading of the Constitution's First Amendment suggests that "the forbidding of prayers, Bible reading and the singing of Christmas carols in the public schools is a violation of the First Amendment." The letter closes by offering advice to those who

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disagree with this reading: "If the aliens in our midst are offended by Christianity, they are free to go elsewhere."

Although perhaps stated in a more extreme and colorful way than most of the letters in opposition to the school's decision, the sentiment that "aliens in our midst" who disagree with majority views should be silenced or "go elsewhere" parallels the findings of a large body of social science attitude research on political tolerance for nonconformity. Beginning with the publication of Stouffer's (1955) study of public attitudes toward communists, socialists, and atheists, this research portrays a large segment of the American polity as unwilling to permit those holding unpopular social and political views to express positions in public or fill various roles in society, especially as educators of the young (Prothro & Grigg 1960; McClosky 1964; Sullivan et al. 1982; McClosky & Brill 1983).

Much of this research also portrays the public's responses to questions about civil liberties, questions that tap what the researchers identify as "fundamental principles of democratic politics" (Prothro & Grigg 1960) as inconsistent and contradictory. The public demonstrates a broad consensus on abstract formulations of democratic principles—such as the desirability of majority rule and the necessity to protect minority rights. But the consensus dissipates when questions are asked applying these abstract notions to specific nonconformist groups or positions (Prothro & Grigg 1960; McClosky 1964; Sullivan et al. 1982; McClosky & Brill 1983). These same studies find that political elites, the most active and involved members of the polity, are better able to apply abstract principles to concrete situations (but see Sullivan et al. 1982; Gibson & Bingham 1985; Shamir 1991). Although some of the research (Davis 1975; Lawrence 1976; Nunn et al. 1978) suggests that the public's tolerance for nonconformity has increased since Stouffer's study, recent research continues to show differences in tolerance between citizens and political elites (McClosky & Brill 1983), with substantial numbers of the non-elite public expressing intolerance toward groups with whom they disagree or dislike (Sullivan et al. 1982).

Appearing at about the same time as Stouffer's study of tolerance, research on the public's level of political knowledge and involvement reported that large segments of the American polity were uninvolved, alarmingly uninformed about politics and public policy, and generally apathetic (e.g., Berelson et al. 1954). Combined with the emerging portrait of an intolerant public, these findings produced efforts by students of American politics to revise classical democratic theory (e.g., Dahl 1961; Key 1961). Reflecting what Bachrach (1967) calls a "disenchantment with the common man," revisionist theory, or "democratic elitism," no longer assumes that a healthy and sta-

ble democracy requires general agreement among the public on fundamental democratic principles and rules of the game. Further, revisionist theory abandons the assumption that an effective democracy requires an active, involved, and engaged citizenry. Indeed, some are reassured by the finding that the segment of the public most likely to hold undemocratic views is the segment least likely to vote or otherwise participate in politics (Prothro & Grigg 1960). As McClosky (1964:376) puts it: "Democratic viability is, to begin with, saved by the fact that those who are most confused about democratic ideas are also likely to be politically apathetic and without significant influence. Their role in the nation's decision process is so small that their 'misguided' opinions or non-opinions have little practical consequence for stability."

According to this view, then, it is "the articulate classes rather than the public who serve as the major repositories of the public conscience and as the carrier of the Creed. Responsibilities for keeping the system going, hence, falls most heavily upon them" (ibid., p. 374). The "irony of democracy," as Dye and Ziegler (1987) refer to it, is that "the subversion of democratic values by an antidemocratic public is prevented by elite control of the government and by the apathy of the people" (Nunn et al. 1978:155).[1]

According to much of the tolerance research, differences between non-elite and elite populations in tolerance are explained by varying life experiences, intellectual capabilities, and skills. The public's cognitive inconsistency—an inability to apply abstract principles to concrete situations—is a function of individual deficiencies, especially in education, socialization, and the capacity to learn libertarian norms. McClosky and Brill (1983:243), for example, apply a "social learning model" to their findings and argue that "however well-intentioned the average citizen may be, it is still necessary to *learn* libertarian principles in order to embrace them. Learning libertarian norms, as they apply to actual (and often puzzling) cases requires not only motivation, but a measure of knowledge, enlightenment, and openness to alternative modes of thought and conduct that are not often found among the mass public." Elites, on the other hand, "are better situated to learn libertarian norms." According to McClosky and Brill, "compared with the mass public," elites "are substantially better equipped. If they have not worked their way through the arguments of the Supreme Court justices and constitutional lawyers on questions of . . .

[1] In a recent study of political tolerance in Israel, Shamir (1991:1018) writes that the "elitist theory of democracy is still the most common frame of reference in the study of political tolerance. . . . Basically the picture obtained from the classical American survey studies in the 1950s and 1960s—the basis on which elitist theory was formulated—is widely accepted, as are the conclusions drawn from it."

speech . . . they have at least been exposed to the conclusions drawn from these arguments. They are, in short, more likely to know what the norms are even if they do not fully understand the route by which the norms are arrived at."

This article develops an interpretive perspective on political tolerance by examining the context of institutions, their practices, and the discourses they develop (e.g., Silbey 1985; Silbey & Sarat 1987; Rabinow & Sullivan 1987; Greenhouse 1988; Harrington & Yngvesson 1990). An interpretive approach differs in several fundamental ways from extant attitude approaches to political tolerance, asking different questions that are guided by different presuppositions. In the most general sense, an interpretive perspective moves from an emphasis on individual "attitudes"—attitudes that tolerance research often views as "preferences" freely chosen—to an examination of the cultural materials that constrain "preferences" and construct expectations (Brigham 1990). Rather than treat the "norms" discussed in "social learning models" of tolerance as given, an interpretive perspective asks where norms originate, how they are inscribed in the categorical distinctions characterizing cultural materials, and if or how they are culturally significant. In particular, this approach interprets the cultural significance of norms embedded in social and linguistic constructions of difference. Further, as Greenhouse (1988:688) explains, "any interpretivist stance implies the importance of what anthropologists call 'difference.' This term refers to the social and cultural processes by which things (genders, races, individuals, nations, and so on) come to be recognizable as differentiable."

My focus is the language employed in the Supreme Court's opinions on political expression in the aftermath of World War I. Employing insights from poststructuralist literary theories, writings on ideology, and theories of practice, I examine how legal discourse regarding political expression, combined with other, overlapping and intersecting discourses, structures perceptions of the American political spectrum. Borrowing from the work of scholars associated with the Critical Legal Studies movement (for example, Kelman 1987; Fitzpatrick & Hunt 1987; Hutchinson 1989; Kairys 1990), my perspective emphasizes contradictions between two strands within First Amendment discourse in Supreme Court opinions. The first strand of legal discourse—manifested in the Supreme Court's "clear and present danger" doctrine and its application in specific cases—distinguishes between the value of individual freedom and a social interest in restricting freedom necessary to protect communal security. The Court seeks to accommodate these fundamentally contradictory values by balancing them, protecting free expression except when speech verges on dangerous action, a circumstance assumed to be rare.

This relatively libertarian approach to free expression is undercut by a second strand of legal discourse in which the Court discusses the attribute of "dangerousness." By defining the limits of protected speech in terms of the speaker's "dangerousness," the Court permits groups, individuals, and categories of expression constructed as "dangerous" in other social, political, and scientific discourses to be considered in a similar manner with respect to speech. Consequently, the intertextual relations between distinctions in legal discourse and similar distinctions emanating from other discourses—discourses circulating simultaneously that sought to define the attributes of an "American"—are interpreted by the Court to construct political difference, constitute a spectrum of political speech, and reinforce intolerance. The political spectrum thus constituted by the Supreme Court after World War I relegated expression that fell outside an "acceptable" mainstream to the status of "foreign" or "un-American," paralleling the view expressed by the writer of the letter with which I began this article that nonconformists are "aliens in our midst" who should be silenced.

To illustrate how this theoretical framework may help us move beyond work in Critical Legal Studies, I theorize why the different strands of free speech doctrine are appropriated by elite and non-elite populations—the key distinction in extant tolerance research. For example, those who are located in close proximity to the means of coercive force—elites—may focus on the libertarian strand in free speech discourse, knowing that they control the resources necessary to eradicate any immediate threats. In contrast, those who are located furthest from the means of coercive force, non-elites, focus on the second strand—the strand portraying threats to community—and are less tolerant of those deemed dangerous. Lacking control of resources, non-elites perceive danger from ideas, individuals, and groups posing an immediate threat to cherished values and ways of life.

Legal Ideology in Practice Theory

In recent years, a growing body of research and writing on law examines the ideological effects of legal practices, institutions, and doctrines.[2] Although the concept of ideology may be understood in various ways (Geertz 1973; Sumner 1979; Hunt

[2] This project has benefited from its interdisciplinary character, with major contributions emerging from the work of historians (e.g., Thompson 1975; Hay et al. 1975; Genovese 1976), social scientists (e.g., Legal Studies Forum 1985; Brigham 1987a, 1987b; Bumiller 1988; Law & Society Review 1988; Merry 1990), legal scholars (e.g., Klare 1978; Hunt 1985; Fitzpatrick & Hunt 1987; Hutchinson 1989; Kairys 1990), and neo-Marxist scholars seeking to position law in broader theories of the state (e.g., Jessop 1980; Beirne & Quinney 1982; Collins 1982; Sugarman 1983).

1985), much of the most useful recent work derives from theories of practice (Bourdieu 1977; Ortner 1984; Coombe 1989).[3] Practice theory focuses attention on relationships between the action and interaction of "agents," "subjects," or "actors" and the systemic or structural forces that disseminate social and cultural material. A crucial assumption of practice theory is that human agents' practices play an important role in producing and reproducing the structural forces that comprise a social system while simultaneously being shaped by these forces.[4] Marxist writings have influenced some strands of practice theory by suggesting that the most significant forms of action and interaction for purposes of study—those that contribute most significantly to understanding a given society in a particular historical moment—occur in asymmetrical social relations (Ortner 1984:147).

Practice theory seeks to avoid the assumption from classical Marxist accounts that ideology is "false consciousness"—a set of ideas imposed by a dominant class and accepted by subordinate classes whose "real" interests are compromised. Ideology as false consciousness separates ideas from practice, whereas practice theory views ideology as an integral part of all social practices (Sumner 1979; Merry 1986). Indeed, ideologies are viewed as constitutive of social relations and practices (e.g., Klare 1979; Gordon 1984; Hunt 1986; Brigham 1987a, 1987b; Harrington & Merry 1988). As Merry (1986:254) argues, "ideology is constitutive in that ideas about an event or relationship define that activity, much as the rules about a game define a move or a victory in the game."[5]

Legal discourse's potential to constitute social practices depends on its ability to distance itself from the social relations

[3] Practice theory developed, in part, as a reaction to the formalism of structuralism in such disciplines as linguistics and anthropology. It seeks to transcend tensions between structural and subjectivist strains in social theory (Giddens 1979; Coombe 1989).

[4] As Ortner (1984:146) suggests, many of those employing practice theory "share a view that the 'system' does in fact have very powerful, even 'determining' effect upon human action and the shape of events. This interest in the study of action and interaction is thus not a matter of denying or minimizing this point, but expresses rather an urgent need to understand where 'the system' comes from—how it is produced and reproduced, and how it may have changed in the past or be changed in the future."

[5] Law is but one of several relatively autonomous "fields" of cultural production (Bourdieu 1977) that, within the constraints of material relations, constitutes social relations and practices while simultaneously being shaped or created by social life. Law is comprised of "structures of knowledges and reasonings" that are "a way of talking about actions and relationships"—a way of talking that emphasizes some meanings and silences others (Burton & Carlen 1979:8; Merry 1990:9). As such, law is a discourse in the sense in which Foucault (1980) uses the term which, among other things, constitutes understandings "about good and bad states of society" (Humphreys 1985). Such discourses emerge from social institutions possessing considerable power, reflecting social relations and the distribution of power. As Bové (1990:58) argues, discourses are "functions of power: they distribute the effects of power. They are power's relays throughout the modern social system."

from which it emerges. Legal decisionmakers accomplish this separation in part by employing in their discourse what Kairys (1990) calls "the myth of legal reasoning." Although legal cases often involve significant social, economic, and political conflicts and decisions are determined, at least in part, by personal, political, and institutional factors, legal outcomes "are expressed and justified and largely perceived by judges themselves, in terms of 'facts' that have been objectively determined and 'law' that has been objectively and rationally 'found' and 'applied' " (ibid., p. 4).

Bourdieu (1987) suggests that legal discourse's power also resides in the way that law codifies, formalizes, and rationalizes social experience. Contingencies of specific situations are treated in legal discourse as prototypes for later decisions, as part of the rules that may be appropriated and appealed to in justifying future results. These processes mystify law's power, transforming the arbitrary and cultural features of social life into that which is considered natural, inevitable, and perhaps most important, universal—"the quintessential carrier of symbolic effectiveness" (p. 845).

It is this transformation of the cultural to the natural and universal that gives law and legal discourse its hegemonic quality. Hegemony, a concept developed by Gramsci (1971), refers to processes by which dominant groups obtain or negotiate the acquiescence of subordinates without the explicit use of force. As Sarat and Silbey (1988:139) explain, the concept of cultural hegemony "emphasizes the notion of imposition and legitimation of particular norms, that is, of political rule." Legal hegemony "implies routine acquiescence with norms and rules in which the threat of organized force remains in the background." Hegemony obtains when "law is embedded in . . . relations and practices so much so that it is virtually invisible to those involved. It is this invisibility, this taken-for-grantedness, that makes legality and legal forms powerful."

Viewing law as discourse directs attention to the language of law, legal reasoning, and the rules and doctrine created by courts. This perspective recognizes that the concepts created, employed, and elaborated by courts are crucial for understanding law's political significance (Brigham 1978; O'Neill 1981; Harris 1982; Goodrich 1986, 1987). Law as discourse emphasizes "how law institutes expectations of what is legitimate and illegitimate behavior, what is acceptable and unacceptable, what is criminal and legal, what is rational and irrational, what is natural and unnatural" (Eisenstein 1988:43). As such, studying legal discourse requires the interpretation of laws and linguistic constructions "as they operate as symbols for what is legal, honorable, natural, objective, and so on" (ibid.). Indeed, courts are appropriately viewed as sites where opposing parties

with competing visions engage in what Connolly (1983) calls "conceptual contests"—contests over the meaning of crucial linguistic constructions. The result of these struggles not only plays a large role in determining the eventual outcome of specific cases but also helps constitute social and political life.[6]

Legal discourse simplifies complex social situations and relationships by focusing on a few of their characteristics and comparing them with governing rules and precedents that may apply (Minow 1990). It tends to cast all problems with which it deals in stark "either/or" or "win/lose" terms. The defendant is guilty or innocent; the law is constitutional or violates the Constitution. In making these determinations, legal discourse inevitably creates classifications, categories, and taxonomies, and seeks to indicate the criteria to be employed (or that criteria are indeed employed) in sorting persons, things, and situations into appropriate groupings.[7]

Categories and the norms to which they are compared do not arise naturally or randomly, but rather reflect social relations and power. Unstated norms, as Bourdieu (1987) suggests, are consistent with the values, interests, and "mode of living" shared by dominant groups. "Law consecrates the established order," according to Bourdieu (1987:838), "by consecrating the vision of that order which is held by the State."[8] Dominant norms—norms that "are produced by those with the power to name and the power to treat themselves as the norm" (Minow

[6] Connolly (1983:180) writes that "the concepts of politics do not simply provide a lens through which to observe a process that is independent of them. . . . [T]hey are themselves part of political life—they help to constitute it, to make it what it is."

[7] Categories in legal discourse distinguish one thing from another—for example, public from private spheres of social life (Taub & Schneider 1990), victims from nonvictims of discrimination (Bumiller 1988), or mentally competent from incompetent persons (Minow 1990). Such classifications in legal discourse, like those in other discourses, "reconstruct the social field, catalyzing two previously latent groupings and . . . establishing a border between them" (Lincoln 1989:10). In other words, classifications and the borders they construct serve to create difference (Minow 1990). Sorting a person, thing, or relationship into one category of a classification suggests that there is an inherent difference between it and those items that are sorted into other categories. Difference typically is described and discussed in legal discourse in terms of the person, thing, or characteristic deemed to be "different," creating and then leaving unwritten and unspoken the norm to which all such cases are compared (ibid., p. 56). Figurative language, such as the metaphor, often plays a significant role in elaborating difference constructed in discourse and structures the process by which agents interpret the world (Geertz 1973; Lakoff & Johnson 1980; Lakoff 1987; McLaughlin 1990).

[8] Bourdieu (1987) suggests that the "juridical field" is relatively autonomous from the state and other fields of cultural production. Judicial elites, like authoritative decisionmakers in other fields, engage in practices that are strongly shaped by "habitus"—a system of internalized dispositions, traditions, and habits that mediate between social structures and practices, while being shaped by structures and practices. Judicial elites, according to Bourdieu (p. 842), have a "closeness of interests" and "parallelism of habitus" with "the holders of worldly power, whether political or economic." The shared habitus, "arising from similar family and educational backgrounds, foster kindred world-views." As a result, "the choices which those in the legal realm must constantly make between differing or antagonistic interests, values, and world views are unlikely to disadvantage the dominant forces."

1990:111)—are made to appear universal and natural by a discourse that seems rational and neutral. Conversely, legal discourse constructs deviance through the implicit comparison of categories signifying difference to the unstated norm. Legal discourse imposes "a representation of normalcy according to which *different* practices tend to appear *deviant*, anomalous, indeed abnormal and pathological" (Bourdieu 1987:847).

This view gains support in the work of deconstructionist theorists, like Derrida (1981), who see in Western thought the proliferation of binary oppositions. Oppositional categories—such as man/woman, good/evil, and self/other—impose a hierarchical ranking, privileging one pole of the opposition over the other.[9] According to Derrida (p. viii), "polar opposites do not . . . stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it." Tracing the origin of the word "category," Bourdieu (1985:729) echoes this theme, noting that "it is no accident that the verb *kategoresthai*, which gives us our 'categories' . . . means to accuse publicly."[10]

"Conceptual contests," then, are enormously important politically. At stake are the terms under which social life is understood and made meaningful. As Bourdieu (ibid.) puts it, "knowledge of the social world and, more precisely, the *categories* that make it possible, are the stakes *par excellence* of political struggle, the inextricably theoretical and practical struggle for the power to conserve or transform the social world by conserving or transforming the categories through which it is perceived."[11]

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[9] On binary oppositions in discourse, also see Peller 1985, Schlag 1988, Crenshaw 1988, and Corlett 1989.

[10] Crenshaw (1988:1373) illustrates the way in which racist ideology is based on a series of ranked oppositions. Law and custom construct "races" from a broad range of possible characteristics. Oppositions such as industrious/lazy, intelligent/ignorant, moral/immoral, law-abiding/criminal, and responsible/shiftless are employed to distinguish between blacks and Caucasians. Discourse simplifies the social world, focuses on a few characteristics that are expressed in oppositional terms, and applies the negative term of the pair to the subordinated group.

[11] Although the construction of difference in legal discourse may constitute social practices by providing categories employed in understanding the social world, there are important limitations on its effectiveness. For one thing, dominant discourses often include multiple contradictory strains (Gramsci 1971; Femia 1975; Abercrombie et al. 1980). And work emerging from the Critical Legal Studies movement suggests that contradictions often characterize legal discourse (e.g., Kelman 1987; Fitzpatrick & Hunt 1987; Hutchinson 1989; Kairys 1990). Therefore, as Gramsci (1971:326) notes, with hegemonic discourses, "various philosophies or conceptions of the world exist and one always makes a choice between them." Since agents interpret and attach meaning to elements of dominant discourses in ways that correspond to material experience, one's location in social relations may affect the strains of dominant discourses that are most salient. Indeed, Abercrombie et al. (1980) suggest that many elements of dominant discourses are most likely to be internalized by dominant groups than by subordinate groups and that these elements are most significant as sources of cohesion among those in positions of power. Further, gaps between material experience and elements of dominant discourses create space for resistance among subordinate groups

Critical study of legal discourse, then, attempts to bring to light the norms implicit in doctrinal classifications and make clear, and at the same time problematic, that which is taken for granted. As important, it seeks to assess the ways in which categories, classifications, and oppositions are used by human agents in making sense of the social world. Legal discourse alone, however, may not consistently possess the visibility and power to constitute social practices. It may operate simultaneously with related and frequently intersecting discourses employing similar classifications built on the same or similar normative foundations. In this way, legal discourse is but one element in discursive formations that constitute social practices and shape political consciousness. With this in mind, the following section discusses the context of Supreme Court decisions in the area of political expression, paying particular attention to relevant social, political, and scientific discourses.

Discourses of Exclusion: The Context of Clear and Present Danger

The United States Supreme Court had few opportunities prior to World War I to discuss the applicability of the First Amendment to political expression. In 1919, the Court issued its first major opinions—opinions that would structure future discussions on speech rights—seeking to define the permissible scope of government restrictions on expression. These initial cases involved defendants who had taken positions, either verbally or in writing, opposing American involvement in the war.

That these cases arose during wartime undoubtedly affected the Court's decisions and perhaps even the rules and doctrine it established. But the potentially hegemonic quality of the Court's discourse can be understood only in the context of other discourses circulating prior to and during the time of the decisions. In general, these discourses sought to define the essential attributes of an "American." While debates over this question had occurred with varying intensity since the beginning of the Republic (Higham 1963; Walzer 1990; Heale 1990), during the late 1800s and lasting through the war years, this question became increasingly salient.

Discourses seeking to define the attributes of an American during this period were fueled most directly by nativist impulses. Nativist feeling at this time had varying sources (Higham 1963), but a major impetus for the exclusionary discourses circulating widely throughout the country came from

(Williams 1977; Scott 1985; Merry 1990; Sarat 1990; MacLeod 1991). The notion that ideologies embedded in cultural texts may be interpreted in various ways by readers is a central tenet of "reader-response" or "reception" approaches in literary theory. For useful discussions, see Eagleton 1983 and Allen 1987.

the continuing struggle of Anglo-Saxon immigrants to the United States—immigrants who viewed themselves as "native Americans"—to maintain their dominant position in American society (Lawrence 1974; Heale 1990). Anglo-Saxon dominance was threatened most seriously by dramatic increases in the numbers of immigrants entering the country at the turn of the century and from changes in the countries of origin of these immigrants in comparison to previous waves. At this time, smaller numbers of immigrants arrived from Germany, the British Isles, Scandinavia, and the Low Countries, and vast numbers arrived from southern and eastern Europe. The new immigrants tended to have an "exotic look" compared to Anglo-Saxons and previous immigrant groups, differing in skin tone and complexion. Such differences, in time, came to be associated with differences in moral development and general character (Higham 1963; Gossett 1965).[12]

The new immigrants, along with many of the previous groups, tended to settle in the growing urban areas of the United States, where they increasingly gained political power. Perhaps of greatest concern for "natives," this power at the local level was translated with increasing frequency into power at the national level, particularly in effective campaigns to block proposed legislation to restrict further immigration and tighten naturalization requirements (Preston 1963; Lawrence 1974; Murphy 1979; Higham 1963).

The growth of the labor movement in the late 1800s and early 1900s added significantly to the concerns and fears of "native" American elites. The industrial violence surrounding the activities of the Molly Maguires in the Pennsylvania coal fields, the burning of boxcars in the railroad strikes of 1877, the nationwide strike for an eight-hour day accompanied by an exploding bomb in Chicago's Haymarket Square in 1886, the armed conflict between steelworkers and private detectives in Homestead, Pennsylvania, in 1892, the violence of the Pullman strike two years later, and the growth and sustained activity of the Industrial Workers of the World in the years leading up to the war presented serious challenges to American capitalism and those benefiting most directly from it.

Further, two political organizations advocating collective property ownership—the national Socialist Party of America (SPA) and the Non-Partisan League in the Midwest—gained considerable strength and support in the early years of the 20th century. Weinstein (1984:93–103) notes, for example, that in 1912 the SPA's presidential candidate, Eugene Debs, polled an

[12] That skin tone and pigment were significant factors in nativist movements at this time is reflected in the statement of Congressman Thomas Abercrombie of Alabama, who warned that "the color of thousands of them differs materially from that of the Anglo-Saxon" (Higham 1963:168).

impressive 6% of the vote, while party members held some 1,200 public offices in 340 municipalities, including 79 mayors in 24 states. And in 1916, the Non-Partisan League, with its platform calling for state ownership of grain elevators, flour mills, and packing houses, won the governorship and lower house elections in North Dakota and made impressive electoral inroads in Minnesota (Goldstein 1978:99).

In the context of these important challenges to the status quo, a variety of discourses raised serious questions about the personality, character, and intentions of recent immigrant groups and some sought to link these groups to radical labor and party organizations. These intersecting discourses of exclusion and intolerance contributed to the social construction of difference along racial, ethnic, class, religious, and political lines. Such discourses built on the long-standing notion that the distinct character of the United States—specifically, its commitment to personal freedom and democracy—was in large measure attributable to the white, Anglo-Saxon, Protestant people who colonized the country. "Native Americans," as Higham (1963:10) documents, believed that the Anglo-Saxon possessed a "gift for political freedom, . . . a unique capacity for self-government, and a special mission to spread its blessings."

During the late 1800s and early 1900s, some xenophobic discourses focused attention on Catholic immigrants. Although Protestant fears of papal schemes to overthrow American institutions had a long history in the United States, in the late 1800s native Americans braced themselves for an imminent revolt (Higham 1963; Heale 1990). In 1893, for example, Detroit's *Patriotic American* published a fraudulent encyclical allegedly addressed to American Catholics by Pope Leo XIII. This document, according to the article, absolved American Catholics from any oaths of loyalty to the United States and urged that they "exterminate all heretics." In a book published in the same year, *The Coming American Civil War*, Burton Ames Huntington suggested that several hundred thousand papal soldiers had organized in American cities, ready to take revolutionary action on command from Rome. In an argument reprinted throughout the nativist press, Huntington urged a counterrevolution as a way of restoring "law and order" (Higham 1963:84–85).[13]

[13] In the early years of the 20th century, a variety of publications echoed these themes. For example, *Watson's Magazine* published an article in 1914 underscoring the imminent danger of a Catholic plot: "there is a foreign foe at our gates and that foe is confidently expecting the spies within to unlock the portals. These domestic traitors are the voracious Trusts, the Roman Catholic priesthood . . . the Knights of Columbus" (Higham, 1963:179–80.) Labeling both Catholics and "the voracious trusts" as "foreign foes" and "domestic traitors" illustrates the Progressive roots of some anti-Catholic sentiment at this time. On the relationship between Progressivism and Nativisim,

At the turn of the century, Anglo-Saxonism also evolved into a form of racial nativism. Developing initially in the South and West, and then spreading throughout the country, racist discourses sounded the alarm that increasing immigration placed the purity of the Anglo-Saxon or "American" race and the way of life long associated with racial purity in serious jeopardy. Political and economic elites throughout the country increasingly expressed anxieties about Japanese immigrants, Jews, Eastern Europeans, and groups arriving from the Mediterranean area. The general claim was that "America was losing its racial superiority by allowing racially inferior immigrant blood to mix with superior native blood" (Lawrence 1974:36). The immigration problem was perceived as so ominous, writes Higham (1963:139), that "everything fixed and sacred was threatened with dissolution."

Scientific discourses emerging simultaneously reinforced and clothed with the legitimacy of objective scientific inquiry many of these general claims. European naturalists in the 17th and 18th centuries had speculated about physical and cultural differences among ethnic and racial groups and many had implied the superiority of white races. But in the early 20th century, American scientists and others employing a "scientific method" wrote explicitly of the inferiority of nonwhite, non–Anglo-Saxon groups (ibid., pp. 131–57, also see Gossett 1965). The geologist Nathaniel S. Shaler, for example, argued that newly arriving "non-Arayan" immigrants "were wholly different from earlier immigrants and innately impossible to Americanize" (ibid., p. 141). Henry Cabot Lodge published a statistical study in 1891, seeking to demonstrate "the enormous predominance of an English racial strain over every other in contributing to the development of the United States" (ibid.). The economist and president of the Massachusetts Institute of Technology, Francis A. Walker, used Darwin's theory of evolution to argue that the new immigrants "are beaten men from beaten races; representing the worst failures in the struggle for existence. . . . They have none of the ideas and aptitudes which . . . belong to those who are descended from the tribes that met under the oak trees of old Germany to make laws and choose chieftains" (ibid., p. 143).

Building on the work of Sir Francis Galton in England, the eugenics movement emerged in the United States in the first years of the 20th century. Devoted to improving the human

see Higham (1963) and Heale (1990). During this time, other publications, such as Wilbur Phelps's *The Menace*, suggested that Rome directed subversive Italian immigrants to settle in America in order to replace the Irish, many of whom had developed American lifestyles and modes of though (Higham 1963:180). The American Catholic hierarchy itself contributed to the xenophobia of the times, raising questions about the divided loyalties of German immigrants who, some believed, resisted efforts at Americanization (ibid., p. 75; also see Heale, 1990).

species by controlling hereditary factors in mating, eugenics supplied much of the scientific and philosophical rationale for those seeking to restrict the immigration of groups constituting a "degenerate breeding stock" (ibid., p. 151). Scientific and political advocacy groups, such as the Immigration Restriction League and the American Breeders Association, also drew on work in anthropology which sought to identify the immutable characteristics of the world's races. One book in particular, Madison Grant's *The Passing of the Great Race* (1916), summarized many of the arguments circulating in scientific communities. The laws of biology and genetics, according to Grant, teach that "different races do not really blend." In this plea for racial purity, Grant argued that the Anglo-Saxon, or "Nordic" race, constituted the "white man *par excellence.*" The waves of Mediterranean, Alpine, and Jewish immigrants, argued Grant, "threaten to extinguish the old stock unless it reasserts its class and racial pride by shutting them out" (Higham 1963:157). These notions circulated widely, as concepts employed in the new racial sciences "were simplified and popularized in newspapers and periodicals so that laymen could understand at least the basic ideas" (Lawrence 1974:36).

Ideas of white supremacy and racial distinctiveness not only were employed in antiforeign, anti-alien, and anti-immigrant discourses but also played an important role in explaining the labor unrest of the period. These discourses built on and reinforced ideas about class that circulated during the initial stages of American industrialization, particularly suggestions that laborers and the poor composed a "dangerous class" and constituted a major threat to social order (Heale 1990:22–23). Labor agitation was portrayed as the product of alien immigrants who lacked the moral and intellectual capacity to understand and accept American institutions and values. For example, an article appearing in *The Age of Steel* shortly after the Haymarket Affair suggested that "anarchy is a blood disease from which the English have never suffered. . . . [I]f the master race of this continent is subordinated to or overrun with the communistic and revolutionary races, it will be in great danger of social disaster" (Higham 1963:138). The *New York Herald*, explaining the violence associated with labor activity, remarked that foreigners "have imported ideas and sentiments which have repeatedly deluged France in blood. . . . The railroad riots . . . were instigated by men incapable of understanding our ideas and principles" (ibid., p. 31). The Reverend Mr. Theodore Munger argued that "anarchism, lawlessness . . . labor strikes," and every kind of labor agitation were "wholly of foreign origin," and, as such, restricting immigration was imperative (ibid., p. 138). In short, by the time of American entry into World War I, "a fateful and erroneous identification of alien and radical was firmly

implanted in the public mind" (Preston 1963:4).[14] These themes appealed to the nativist susceptibilities of some segments of the American working class, who feared the competition and possible displacement represented by the new immigrants (Higham 1963:45–50, 183).

America's entry into the war and the political opposition which this policy engendered provided "native Americans" with the opportunity to move against those threatening their privileged status. The political conflict over war policy, as Lawrence (1974:156) argues, "provided an impetus for the native American—the 'real' American—to reassert himself and rid the country of its foreign threat."

The campaign against the "foreign," "radical" war opponent was fought on a variety of fronts. Congress and the states passed numerous laws, such as the Espionage Act of 1917, the Sedition Act of 1918, and state criminal syndicalism laws, that could be employed against dissenters and nonconformists.[15] And discourses circulating during the war years built on the

[14] The association of "aliens" with subversion may be traced to the Alien and Sedition Acts of 1798. When examined together, as Rogin (1987:57) suggests, these laws imply that "aliens" are responsible for sedition. The continuous pattern in American history of what Rogin (1987) calls "demonization"—the stigmatization and dehumanization of an evil, alien, outsider—had its origins in European settlement of the North American continent, especially in the violent conquest of native peoples. The appropriation of native lands was justified by the construction of native peoples as "uncivilized," "un-Christian," "wild," and "primitive" (Takaki 1979:11–15). According to Rogin (1987:50), "the series of Red Scares that have swept the country since the 1870s have roots in the original red scares. Later contersubversive movements attacked aliens, but the people who originally assaulted reds were themselves aliens in the land."

[15] The Espionage Act permitted federal officials to punish overt expression opposing its war policies or even "individual casual or impulsive utterance" (Murphy 1979:79). This statute also made it a crime to "willfully make or convey false reports or . . . statements with intent to interfere with the operation . . . of the military . . . or to promote the success of its enemies," to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military," or to "willfully obstruct the recruiting or enlistment of the United States" (Murphy 1979:80).

The Sedition Act sought to make more explicit the provisions of the Espionage Act, prohibiting among other things, "uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language intended to cause contempt, scorn, contumely, or disrepute as regards the form of the government of the United States, or the Constitution, or the flag" . . . and "any language intended to promote the cause of its enemies" (ibid., p. 83). Just prior to the end of the war in 1918, Congress passed the Alien Act, a statute aimed at anarchists seeking to enter the country. This statute gave the government authority to deport "any alien who, at any time after entering the United States is found to have been at the time of entry, or to have become thereafter" a member of an anarchist organization (ibid., p. 85).

State governments passed sedition statutes and criminal syndicalism laws, calling for punishment of everything from overt disloyal expression to organizing or simply joining an organization critical of the government or policies of the United States. Such measures tended to be drawn imprecisely, giving local law enforcement officials enormous discretion in their application (Gellhorn 1952; Goldstein 1978; Murphy 1979). According to Goldstein (1978:113), more than 2,100 people were indicted under the Espionage and Sedition acts. Over 1,000 were convicted, with more than 100 sentenced to over 10 years in prison. None were convicted of actual espionage activity. The total number of arrests and convictions under state sedition and criminal syndicalism laws is unknown, but estimates run in the thousands.

foundation provided by those that preceded them. Writers and orators continued to emphasize the moral and intellectual inferiority and inherent dangerousness of aliens, but added disloyalty to the list (Preston 1963; Murphy 1979; Higham 1963). In a series of speeches during the war, President Wilson branded all dissent as indicative of disloyalty, pointing an accusing finger at "hyphenated Americans," particularly those from Germany. Wilson attacked "citizens of the United States . . . born under other flags . . . who have poured the poison of disloyalty into the very arteries of our national life" (Rogin 1987:238). Speechmakers and writers coined the expression "100 percent Americanism" to signify appropriate beliefs and actions of patriotic Americans. Higham (1963:204–12) shows that this notion of patriotism demanded strict and universal conformity with national purposes and policies, a conformity that should be actively expressed with "evangelical fervor."

The Wilson Administration's Committee on Public Information (CPI) carried the president's concerns about hyphenated Americans and war protestors to the nation. Among other things, the CPI wrote and distributed literature throughout the country justifying Wilson's war policies and restrictions on civil liberties. CPI pamphlets had a wide circulation, including extensive use in schools and universities, and many of them echoed the nativist themes of the time. The CPI's *Red, White, and Blue* series, for example, argued that America was being "Germanized" by immigration, that pacifists had German sympathies, and that German agents sought to subvert the American economy by provoking labor strikes prior to the war (Lawrence 1974). In general, as Lawrence (p. 47) notes, "through Committee literature, the great issues of the war became readily understandable to the average man: conflicting interpretations of which country was responsible for beginning the war, explanations for American involvement, and the causes of dissent were all reduced to a conflict between Good and Evil."[16]

[16] A number of voluntary patriotic organizations, such as the American Protective League (APL) and the American Defense Society (ADS), were organized by prominent politicians and business leaders to monitor and take action against suspected "subversives" and contribute to the propaganda effort. Both the APL and the ADS attacked aliens, foreigners, and immigrants as "radicals, reds, and socialists" (Lawrence 1974:50). The ADS, organized and led by Theodore Roosevelt, echoed the theme of "100 percent Americanism" by suggesting that "members of certain groups and adherents to certain beliefs—socialists, pro-Germans, pacifists, IWWs, and generally anyone opposed to America's participation in the war—were not really American" (ibid., p. 54). Roosevelt proposed a military solution to the problem of radical labor activity, arguing that "every district where the I.W.W. starts rioting should be placed under martial law, and cleaned up by military methods. . . . It is time to strike our enemies at home heavily and quickly" (ibid., p. 55). The ADS's pamphlet, *Awake! America*, warned its readers to beware of socialists, anarchists, and "venomous IWWs" (ibid., p. 55).

Discourses emanating from the organized legal profession reinforced these antiradical, antiforeign themes (Auerbach 1976; Lawrence 1974). During the war, the content and tone of speeches given before meetings of the American Bar Association and articles published in the *American Bar Association Journal* harshly critized war protest,

In sum, discourses gaining wide circulation and currency both before and during the war portrayed the immigrant as, among other things, alien, foreign, morally and intellectually inferior, radical, violent, dangerous, unpatriotic, and disloyal.[17] As significant, radical dissent came to be viewed as the product of enemies of America, aliens and foreigners who lacked the intelligence and breeding to appreciate and contribute to the Anglo-Saxon way of life.[18] Oppositional categories in diverse discourses compared recent immigrant groups to an implicit white, Anglo-Saxon, Protestant norm along lines of ethnicity, religion, race, and class. These implicit comparisons contributed in significant ways to the development of an "American" identity. Oppositional categories, in other words, created a set of attributes to be used for comparison, with the attributes of "native Americans" serving as the unstated norm. These categories not only elevated the attributes of "native Americans" to normative status but also constructed an enemy. As Heale (1990:12) puts it, "American political culture seemed to require an enemy without as well as an enemy within, supplying the inverse image of the American character." In a similar way,

raised questions about the loyalty of hyphenated Americans, and railed against the threat of radicals and aliens. As Lawrence (p. 78) documents, "the *Journal* dignified the dogma of 100 percent Americanism, antisocialism, and antiradicalism, antipacifism, and antiforeignism for members of the bench and bar." The American Bar Association at this time was controlled primarily by corporate attorneys of Anglo-Saxon ancestry who were engaged in efforts to "cleanse the bar" of immigrants by passing rules excluding aliens and enforcing admission standards that immigrant attorneys found difficult to meet (Auerbach 1976:103–29).

17 It is important in interpretive studies to examine all of the attributes signifying difference. As Greenhouse (1988:688) suggests, "when an interpretivist looks at difference, it is not at any particular distinction, but at the whole system of values and meanings by which distinctions are drawn, symbolized, defended, reproduced, and modified."

18 These themes dominated public discourse through much of the 1920s and resurfaced in the post–World War II years in discourses about Communism and internal security threats posed by domestic Communists. As Caughey (1958:29) notes, European political movements were defined and constructed ambiguously in the United States so that "their exact meaning was often lost on Americans." Socialism, syndicalism, and anarchism tended to be "lumped together in popular thought and regarded as not for America." In the 1940s and early 1950s, American politicians such as Joseph McCarthy, the Federal Bureau of Investigation, and the House Committee on Un-American Activities used the designation "red" or "Communist" as the "successor to all these terms and a catch-all for their quite diverse meanings." In general, these discourses portrayed those sympathetic to Communism as an external, un-American menace, and "labored to establish a more effective and durable link in the public mind between such individuals and some sort of international conspiracy" (Murphy 1979:272; also see Caughey 1958; Davis 1971; Murphy 1972; Goldstein 1978; Caute 1972; Gibson 1988). Rogin (1987) shows how the specific construction of "radicals" changed during the Cold War from "aliens" with observable physical markings, a primary characteristic during the World War I period, to "invisible, internal Soviet agents" (p. 239) who were indistinguishable from other "Americans." He suggests a shift in emphasis from "the deranged subversive body" of the first quarter of the 20th century to "the calculating alien mind" (p. 68). The relative invisibility of Communists made them even more "dangerous" than previous "subversives" and, as Rogin suggests, encouraged the rapid rise of a national security state that could infiltrate domestic organizations to ferret out those with alien ideas.

Rogin (1987:284) writes that "the alien comes to birth as the American's dark double, the imaginary twin who sustains his (or her) brother's identity."

Legal Discourse and Political Intolerance

The United States Supreme Court delivered its first major opinions on the expression rights of political dissenters in several opinions from 1919 to 1927.[19] During this period, most of the cases heard by the Court centered on the question of whether state and federal governments could prohibit the expression of leaders and members of leftist political and union organizations who spoke or wrote against American involvement in the war. In case after case decided during this period, the Court consistently affirmed convictions of socialists, anarchists, leaders of labor movements, and others opposing the war.[20] However, this relative consistency in decisional outcomes masks the dual ideological strands in the language used in the opinions. In particular, doctrine developed by the Court, its application to specific fact situations, its selection of facts to emphasize and language employed in elaborating facts, and dicta appearing in majority, concurring, and dissenting opinions, project two broad ideological strands that are fundamentally contradictory.

On one hand, running through many of the same decisions that affirm convictions of those expressing political views is the notion that free speech constitutes a crucial component of the American political tradition. The primary doctrine developed by the Court, announced for the first time by Justice Holmes in *Schenck v. United States* (1919), asks "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (p. 52).

[19] The analysis in this text is drawn from a larger study of the role of First Amendment jurisprudence in the development of the American state. The analysis here is based on a close reading of the following decisions: *Schenck v. United States* (1919); *Frohwerk v. United States* (1919); *Debs v. United States* (1919); *Abrams v. United States* (1919); *Schaefer v. United States* (1920); *Pierce v. United States* (1920); *Gilbert v. Minnesota* (1920); *Gitlow v. New York* (1925); *Whitney v. California* (1927); *Fiske v. Kansas* (1927). To develop a detailed interpretation, I have focused in this text on only a few of these decisions.

[20] The major exception is *Fiske v. Kansas* (1927), where the Court ruled that a Kansas criminal syndicalism law was inappropriately applied in punishing an organizer for the Industrial Workers of the World who, through verbal expression and written pamphlets, solicited members for the union. This was the first indication that the Court might find some actions of the IWW that could not be suppressed by the broadly expansive state criminal syndicalism laws. However, the overall significance of the case should be viewed in the context of the IWW's decline by 1927. As Murphy (1972:87) puts it, "such action could now be taken with some degree of judicial equanimity since, with the exception of a few scattered pockets, the effective power of the I.W.W. had been largely shattered and the organization itself largely decimated."

Although the "clear and present danger doctrine," as it came to be known, was used by the Court in *Schenck* to affirm an Espionage Act conviction of the general secretary of the Socialist Party of America for printing and circulating pamphlets opposing American involvement in the war, it may be legitimately read to suggest that expression is so fundamental that *only* dangerous expression may be proscribed by the state.

This interpretation, emphasizing the overwhelming significance of free expression, also is evident in the Court's opinion in *Gitlow v. New York* (1925). While affirming the conviction of a member of the Socialist Party of America for publishing two pamphlets—*The Left Wing Manifesto* and *The Revolutionary Age*—the Court simultaneously incorporated the First Amendment's expression provision and applied it against the actions of states through the Fourteenth Amendment's due process clause. The Court in *Gitlow* wrote that "freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental rights and liberties protected by the due process clause of the 14th Amendment from impairment by the states" (p. 666). The significance of free expression is elaborated further in often mentioned and celebrated dissenting and concurring opinions by Justice Holmes and Brandeis in such cases as *Abrams v. United States* (1919), and *Whitney v. California* (1927). In *Abrams*, for example, Justice Holmes developed the notion that ideas should be free to circulate in a marketplace of sorts, writing in dissent that "when men have realized that time has upset many fighting faiths, they come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out" (p. 630).

Brandeis, seeking in an important concurring opinion in *Whitney* to liberalize the clear and present danger doctrine, wrote that speech may be suppressed only when "the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for full discussion" (p. 377). In stirring prose, Brandeis linked free expression to individual self-fulfillment and suggested that unencumbered debate would prevent ideas threatening individual liberty from gaining popular acceptance. In Brandeis's words, "those who won our independence believed that the final end of the state was to make men free to develop their faculties. . . . They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread

of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the disseminators of noxious doctrine" (p. 375).

While elements of legal discourse in speech opinions written during this period suggest that only the clearest cases of harmful expression will be suppressed, a second ideological strand offers a much wider legitimation of intolerance. This second strand emerges from the implicit distinction embedded in the clear and present danger doctrine between "acceptable" and "unacceptable" expression—a distinction linked in the doctrine to the attributes of safe/dangerous and good/evil. "Acceptable" expression is safe, does not constitute a "danger," and is unrelated to any "evil that Congress has a right to prevent"—it expresses values and ideas that are the antithesis of evil. "Unacceptable" expression, on the other hand, is linked to the attributes of "danger" and "evil."[21]

In determining what speech and which speakers were "unacceptable" by virtue of the "danger" or "evil" posed, the Court relied on and supplemented the cultural construction of difference in other discourses circulating during this period. For example, the Court in *Frohwerk v. United States* (1919), affirmed the conviction of the publisher of the Missouri *Staats Zeitung*, a German-language newspaper publishing articles critical of the war, a war whose purpose, it argued, was to "protect the loans of Wall Street" (p. 207). Writing for a unanimous Court, Holmes strongly implied that the paper's content and those responsible for writing its articles were disloyal and un-American. The paper, Holmes noted disapprovingly, "speaks of the unconquerable spirit and undiminished strength of the German nation" (ibid.). Holmes contrasted the paper's "compliments to Germany" and its position that "the Central Powers are carrying on a defensive war," with the paper's criticism of England—"our sons, our taxes, and our sacrifices are only in the interests of England" (p. 208). Holmes's reasoning placed the expression and its author on the "unacceptable" side of the boundary constructed in doctrine and justified this placement due to the disloyalty of both.

The Court established a more direct association between unacceptable, dangerous, disloyal, evil expression and the "alien" and "foreign" disseminators of the expression in *Abrams v. United States* (1919). In affirming the convictions of

[21] The language and logic of the clear and present danger doctrine has been criticized by liberals for, among other things, permitting only innocuous expression. See, e.g., Meiklejohn 1960, Emerson 1966, and Graber 1991. Its application by the Court is criticized by Mendelson 1952, 1953. Conservatives have criticized the general approach as too permissive. See, e.g., Berns 1965. For a defense of the general approach, see Chafee 1941 and Shapiro 1966.

five Russian Jews for publishing and circulating antiwar pamphlets written in English and Yiddish, the Court raised explicitly questions and concerns about the loyalty of those they described as "defendant alien anarchists" (p. 623). Writing for the majority, Justice Clarke underscored the fact that "all five defendants were born in Russia." It was significant to Clarke that "they had lived in the United States" for periods of time "varying from five to ten years, but none of them had applied for naturalization." Three of the defendants, Clarke wrote, testified that they were "rebels, revolutionists, and anarchists" and that "they did not believe in government in any form . . . and had no interest whatever in the government of the United States," a government they described as "capitalistic." A fourth defendant, wrote Clarke, testified that he was a "socialist" (pp. 617–18). Clarke further sought to support the Court's contention that Abrams and his associates were disloyal by quoting selectively from the pamphlets they produced. As Polenberg (1987:234) shows, "Clarke quoted the most extreme language in the leaflets, ignoring the most cautious statements which were inconsistent with his interpretation. He did not mention, for example, Samuel Lipman's postscript to the English leaflet which began, 'It is absurd to call up pro-German. . . .' "

Justice Holmes offered an important dissent in *Abrams*. Employing a more stringent reading of clear and present danger, he argued that the prosecution failed to present sufficient evidence for conviction. But in his defense of free speech, Holmes contributed to the construction of political difference. He refers to the pamphlets as "silly" (p. 628) and to the authors as "poor and puny anonymities" (p. 629). Holmes's disagreement with the majority is not based on a judgment that dissenters may have something valuable to contribute to national debates, but rather that the "creed of ignorance and immaturity" (ibid.) espoused by the defendants did not "imminently threaten immediate interference with the lawful and pressing purposes of the law." Similarly, Brandeis, in the midst of his impassioned defense of free speech in *Whitney*, portrayed dissident ideas as "evil falsehoods," arguing that "if there be time to expose through discussion the falsehoods and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence" (p. 377).

The majority in *Whitney* upheld the conviction of Charlotte Anita Whitney—a founding member of the Communist Labor Party—under California's Criminal Syndicalism Act for membership in an organization advocating "dangerous" ideas. Whitney had not openly advocated violence and was associated with a faction that sought to channel the party's efforts and activities into established electoral arenas. But the Court argued that membership in an organization whose platform declared

that "it was in full harmony with the revolutionary working parties of all countries," whose purpose it was "to create a unified revolutionary working class movement in America" by "organizing the workers as a class" (p. 363), and which might employ "criminal and unlawful methods" to further its goals, constituted a "criminal conspiracy" (p. 327).[22] Therefore, the conviction of Whitney—a prominent philanthropist and social worker, member of a distinguished California family, and niece of Justice Stephen Field, one of American capitalism's staunchest defenders—was sustained. What the Court's decision seems to signify is that the mere association with an organization espousing "dangerous" ideas that might be implemented using "criminal and unlawful methods" is enough to contaminate otherwise upstanding persons.

In several cases decided during this period, metaphors employed by the Court reinforce the construction of political difference in the clear and present danger doctrine. In *Schenck*, for example, Holmes offered a vivid metaphor to symbolize the attributes of unacceptable expression and those who utter it. "The most stringent protection of free speech." Holmes wrote, "would not protect a man in falsely shouting fire in a theater and causing a panic" (p. 52). In affirming Schenck's conviction, Holmes implied that a socialist publication opposing American involvement in the war is the moral, legal, and political equivalent of a malicious practical joke that may cause a panic and possible injury in a theater.[23] The metaphor also suggests that socialist and antiwar expression are falsehoods, unworthy of constitutional protection. Those who espouse such views, in

[22] Although not using the clear and present danger doctrine, the Court constructed labor unions and activities in similar ways during this period. For example, in an effort to prohibit court injunctions in labor disputes, Congress in section 20 of the Clayton Act of 1914 provided that "no restraining order or injunction shall be granted by any court of the United States in any case between employer and employees . . . unless necessary to prevent irreparable injury to property, or to a property right." Section 20 prohibited injunctions against "peaceful persuasion" of others to strike and against primary boycotts. In *American Steel Foundries v. Tri-City Central Trades Council* (1921), the Court construed this provision narrowly, rejecting claims by a union that an injunction against their peaceful picketing of an industrial plant violated section 20. Chief Justice Taft, writing for the Court, suggested that picketing rarely could be viewed as "peaceful." Discussing the facts of this case, he argued that "the numbers of the pickets . . . constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion. . . . Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful" (p. 205). In *Traux v. Corrigan* (1921), the Court goes further in its construction of unions as "intimidating," potentially violent, and "militant" by overturning an Arizona law modeled on section 20 of the Clayton Act. In this case, the Court decided that picketing at a restaurant constituted "moral coercion by illegal annoyance and obstruction," and concluded that such activity "was plainly a conspiracy" (p. 320). Chief Justice Taft, again writing for the Court, suggests that the phrase "peaceful picketing" is "a contradiction in terms" (p. 340). On the construction of labor in legal discourse, see Avery 1988–89; Forbath 1991.

[23] Dershowitz (1989) has noted the important differences between shouting fire in a theater and expressing a political position.

the context of the doctrine's language and the metaphor employed to illustrate its point, are implicitly labeled as irresponsible, perhaps mentally unstable, and most certainly dangerous.

In *Frohwerk*, Holmes developed and employed another metaphor that connects antiwar articles written by a "foreigner" with dangerous behavior, this time "the counseling of murder." "We venture to believe," Holmes argued, "that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of murder within the jurisdiction of Congress would be an unconstitutional interference with free speech" (p. 206). In upholding the Espionage Act and its application in this case, Holmes equates the nonviolent act of publishing antiwar articles with advising one to take the life of another—the type of behavior one can only expect from a murderous thug.

Finally, in several of its opinions, the Court draws parallels between unacceptable expression and the destructive potential of fire. In *Frohwerk*, for example, Holmes raised the possibility that under certain circumstances, "a little breath" on the publications in question "would be enough to kindle a flame" (p. 209). And in *Gitlow*, the Court colorfully elaborated this metaphor, suggesting that "a single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration" (p. 669).

In announcing the clear and present danger doctrine and then applying it to punish those whose expression has some perceived "bad tendency" (Downs 1989), the Court contributed to the political repression of leftists during the World War I "red scare" (Levin 1971; Goldstein 1978).[24] More significantly, the Court's discourse socially constructs political difference and constitutes a political spectrum. The oppositional categories embedded in the Court's clear and present danger doctrine sorts speech into an "acceptable," protected grouping and an "unacceptable," unprotected grouping. These distinctions between protected and unprotected expression—distinctions embedded in but one of many available approaches to questions of speech rights (Van Alstyne 1982; Graber 1991)—focus on the danger posed by expression, and those who espouse it.[25] The Court applied this doctrine in several cases and suggested, at times explicitly, that antiwar expression, particu-

[24] During other periods, of course, right-wing groups, such as the German-American Bund, suffered similar repression. See, e.g., Goldstein 1978.

[25] Of course, free speech doctrines, with the exception of absolutist approaches, must draw a line between protected and unprotected expression somewhere and in some way. But the two strands of legal discourse examined in this article work together to permit the line to be drawn almost anywhere. Moreover, the emphasis on dangerousness encourages simple prejudice—inscribed in other cultural materials—to justify intolerance rather than providing some measure of the real threat posed to social stability.

larly if associated with aliens, foreigners, socialists, anarchists, and leaders of activist labor unions, was dangerous, false, irresponsible, disloyal, and un-American. Such expression, along with those who espouse it, were implicitly compared to unstated norms of acceptable expression. What constitutes "acceptable" or "normal" expression is "American" in nature, and what is "American"—consistent with the premises of the dominant discourses of the time—is "native," Anglo-Saxon, loyal, responsible, safe, and accepting of the political and economic status quo. The Court's discursive construction of political difference, then, may be interpreted to constitute a political spectrum composed of a norm or "mainstream" and "fringes" considered as deviant, abnormal, and undesirable.[26]

The significance and consequences of the Court's expression doctrine may be fully appreciated only in the context of other overlapping and intersecting discourses. The clear and present danger doctrine responded to different political problems and drew on different philosophical premises than nativist and xenophobic political discourses and scientific discourses based on notions of ethnic and racial superiority. As Graber (1991) shows, the Court's doctrine emerged from principles of pragmatism and sociological jurisprudence, principles advocating that decisionmakers weigh and balance competing

[26] At the height of the post–World War II "red scare," in *Dennis v. United States* (1951), the Court constructed Communists in much the same way that it had constructed political dissenters from 1919 to 1927. In the case, the Court affirms the convictions of several leaders of the Communist Party of the United States of America (CPUSA) for organizing the party and teaching Marxist-Leninist doctrine. Justice Vinson, writing for the Court, loosely interprets the clear and present danger doctrine, arguing that it is unnecessary to show a close relationship between expression and some "evil" action. Throughout the opinion, Vinson focuses on the threat of violence in his reading of "Marxist-Leninist" doctrine. He implies that Dennis and his associates, along with all members of the CPUSA, are themselves prone to violence, closely connected to the Soviet Union's Party apparatus, and, as such, are disloyal and, indeed, constitute dangerous enemies of America. In justifying the convictions in this case, Vinson portrays the CPUSA as a "highly organized conspiracy" with "rigidly disciplined members" and writes that the defendants were "at the very least ideologically attuned" to countries with whom the United States has "touch-and-go relations" (p. 511).

After the hysteria accompanying the McCarthy period subsided, the Supreme Court rendered decisions on political expression that were more consistent with the libertarian discourse in some of its previous decisions. In *Yates v. United States* (1957) and *Brandenburg v. Ohio* (1969), for example, the Court read the doctrine of clear and present danger much more stringently than had any previous majority opinion, requiring that unprotected expression be directly linked to "imminent lawless action." Consequently, as Downs (1989:324) suggests, from the 1960s to the present, "the First Amendment is the most liberal and individualistic of all areas of constitutional law."

These more permissive opinions emerging from the Court's current "liberal and individualistic" approach, however, must be seen in the context of its construction in doctrine of a band of "acceptable" expression. Although its expression decisions since the 1950s have generally become more liberal, the test used by the Court continues to distinguish between acceptable/unacceptable and normal/abnormal political expression. These distinctions should be viewed in the context of American culture, which continuously "demonizes" various individuals, groups, and organizations. In this regard, see Rogin 1987, especially chs. 2 and 8.

social interests in the development of public policies and programs. The clear and present danger doctrine transformed the constitutional defense of free speech from the legal and political principles of what Graber calls "conservative libertarianism"—a philosophy conceiving of speech as an individual right, much like property rights, that could not be violated unless closely linked to criminal activity—to a view that the constitution protected only a social interest in speech that must be balanced against other interests that may conflict. This jurisprudential view was employed by progressive legal scholars in another context to argue against judicial decisions protecting an absolute "liberty of contract" and, more generally, for judicial restraint and deference toward the social and economic policies of legislatures. The Court's expression doctrine, then, may be viewed as part of a philosophical and political movement in the early part of this century that advocated an activist government in social and economic realms unencumbered by an activist judiciary.

The influence of pragmatism and sociological jurisprudence on the Court's expression doctrine illustrates legal discourse's relative autonomy from other fields of cultural production. But focusing on the doctrine's autonomous origins and philosophical sources masks the important ways in which the multiple discourses of the time intersect to construct a political "other."

The social construction of a political spectrum composed of a "mainstream" and "fringes" constitutes an important independent contribution of legal discourse in this process. The individuals and groups who reside on the "fringes," however, are constructed in each of the discourses and, as important, in their intersections. The idea that "fringe" expression espoused by "fringe" individuals and groups is "dangerous," "irresponsible," and "un-American," is inscribed in legal discourse. But the signifers employed in legal discourse that describe the attributes of "fringe" groups may evoke images of the racial, class, ethnic, and religious groups constructed as "other" in nativist, classist, xenophobic, and racist discourses of the time. In other words, when the Court suggests that "socialists" or "anarchists" are "dangerous" or "disloyal," these signifiers may evoke images of other "dangerous" or "disloyal" groups portrayed in other discourses, such as "hyphenated Americans," the urban poor, blacks, Catholics, and Jews.[27] And when

[27] In a few of its decisions, the court protected immigrants and those deemed "alien" from xenophobic persecution. For example, in *Meyer v. Nebraska* (1923), the Court struck down a Nebraska law forbidding the teaching of any subject in public schools in a language other than English. And in *Pierce v. Society of Sisters* (1925), the Court overturned an Oregon law that sought to prohibit children from attending Catholic and other parochial schools. And some of its decisions suppressing expression, such as *Whitney* and *Debs v. United States* (1919), did not involve immigrant defendants

nativist discourses discuss the "danger" presented by "aliens" or "hyphenated Americans," it may evoke the image of groups residing on the political "fringe" constituted in legal discourse.[28] Thus, while each of the multiple discourses circulating at the time contributes independently to the social construction of the "other," it is in the intersection of the signifers embedded in the multiple discourses that the discursive formation has full effect—the marginalization and exclusion of all those constructed as "other."[29]

That connections are drawn between the "fringe" status constituted in legal discourse and the racial, ethnic, and religious groups emphasized in other discourses may be illustrated in a reading of an article written in 1920 by the prominent legal scholar, John Wigmore.[30] Writing in the *Illinois Law Review*, Wigmore provides an elaborate critique of Holmes's dissent in *Abrams*, particularly Holmes's conclusion that the pamphlets written and distributed by Abrams and his associates did not constitute a clear and present danger. Throughout the article, Wigmore develops the theme that Abrams and the other de-

or directly reinforce nativist feelings. My analysis does not suggest that the Court itself sought to directly repress Catholics, "hyphenated Americans," and other marginal groups in specific decisions. Indeed, such decisions may produce damaging criticisms of the Court as acting "politically" to further the xenophobic cause. What I seek to show in this analysis is how xenophobic feelings may be evoked by the Court's clear and present danger doctrine, with the consequence of excluding certain expressions from the political arena. The emphasis is on the intertextual connections between legal doctrine and other discourses, not on the direction or specific fact situations of particular Court decisions.

[28] The clear and present danger doctrine may be viewed as an effort to buffer the Court from nativist, xenophobic, and superpatriotic feelings circulating at the time (see, e.g., Chafee 1941). Had the Court wished to directly and explicitly reinforce such feelings, it could have invoked the traditional law of seditious libel, ruling that the Constitution failed to protect disloyal speech (on seditious libel, see Levy 1960). My argument is not that the clear and present danger doctrine directly expresses nativist, xenophobic, and superpatriotic feelings. Rather, the analysis suggests that intertextual connections between legal doctrine and other discourses may indirectly reinforce and help constitute such feelings through the social construction of a "mainstream" and "fringes," with "dangerous aliens," the subject of many intersecting discourses at the time, residing on an "un-American" fringe. But by refusing to specify in its doctrine the "danger" or "evil" required to suppress speech, the Court creates a distance in its doctrine from the cultural feelings surrounding its birth that permits future courts to use the doctrine to protect marginal groups in specific cases.

[29] The notion that multiple, intersecting discourses constitute social life has parallels in Santos's (1987) postmodern conception of law. Building on work in legal pluralism—work that calls attention to the existence and circulation of networks of formal and informal legal orders—Santos (pp. 297–98) develops the concept of "interlegality," or "the phenomenological counterpart of legal pluralism." Interlegality suggests a "conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as our actions, in occasions of qualitative leaps of sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life." It is through "the intersection of different legal orders, that is, by interlegality," that "our legal life is constituted."

[30] Wigmore, a graduate of Harvard Law School and one of the founders of the *Harvard Law Review*, was a law professor at Northwestern University. He is perhaps best known as the author of the four-volume *Treatise on Evidence*. For a fuller description of his background and views, see Polenberg 1987:248–56.

fendants are "aliens" with "un-American" ideas who, as part of an international conspiracy, pose a serious threat to American institutions. The defendants, referred to by Wigmore as "Abrams and his band of alien parasites" (Wigmore 1920:549), are portrayed as imported revolutionaries whose major intent, despite their having enjoyed the advantages of American life for several years, is to "destroy that which nourished them" (p. 543).

Wigmore repeats the majority opinion's factual presentation that "the five defendants . . . had lived in this country for from five to ten years, without applying for naturalization" and points out that they refer to themselves as "rebels," "revolutionists," and "anarchists" (ibid.). Elaborating on the metaphor employed in *Frohwerk* comparing "fringe" expression to the "counseling of murder," Wigmore portrays the distribution of pamphlets by Abrams and his associates as "organized thuggery." He asks, "does 'free trade in ideas' mean that those who desire to gather and set in action a band of thugs and murderers may freely go about publicly circularizing and orating upon the attractions of loot, proposing a plan of action for organized thuggery, and enlisting their converts, yet not be constitutionally interfered with until the gathered band of thugs actually sets the torch and lifts the rifle?" (p. 552).

Wigmore calls attention to the race and religion of the Russian Jewish defendants by describing them as "alien agents, who relied primarily on an appeal to the thousands of alien-born and alien-parented of their own races earning a livelihood in this country" (p. 543). In making appeals to those "of their own races," Wigmore emphasizes that one set of pamphlets—pamphlets whose content contained "nothing spontaneous, nothing American" (ibid.) and which encouraged "treacherous thuggery" (p. 560)—were written in a language used primarily by immigrant Jews. But Wigmore failed to mention that a second set of pamphlets employed English: "So much for the personality of the men who up to August 27, 1918, published and distributed some 5,000 of these circulars, printed in Yiddish" (p. 543).

Discussion and Conclusions

This analysis of the dual ideological strands in free speech discourse, combined with the examination of other overlapping and intersecting discourses, permits us to see the cultural content that legal norms both constitute and absorb as people seek to live by them. The Court's free speech discourse includes two distinct strands, projecting two vastly inconsistent messages. A libertarian strand emphasizes that free expression is a fundamental component of the American political tradition. Indeed,

speech is so fundamental that it must be protected and permitted to circulate in a "marketplace of ideas," except in the most marginal cases. A second strand suggests that "dangerous" expression may be punished, where "danger" is an extremely malleable category whose content, in important respects, is culturally determined. "Danger" becomes even more malleable because the Supreme Court itself relies on the "otherness" of speakers in determining what is "dangerous." In other words, "danger" is not a narrow or precisely defined category but rather sweeps in a variety of cultural materials defining the "other." That the Court uses the category "danger" as it does legitimates using cultural materials defining "otherness" as the basis for defining "danger."

Although much empirical work remains to be done, social science attitude research on tolerance for nonconformity may be interpreted as reflecting in important ways the inscription in popular consciousness of the multiple discourses examined in this article.[31] For one thing, the finding in much of this work that the public believes in free expression when stated as an abstract principle, but encounters difficulty in applying the abstraction to concrete situations, parallels the Court's practice of discussing free expression's fundamental nature in opinions that restrict it for groups and individuals deemed "dangerous" and "deviant"—for those, that is, who reside on the "fringe." By and large, the "social learning model" of tolerance employed in much prior social science attitude research fails to see or acknowledge the multiple and often contradictory messages or "lessons" (or what this research often calls "system norms") to which people are exposed.[32] An important example is provided by the Supreme Court's speech decisions in the 1920s. The Court developed a test that balanced contradictory values of individual freedom and communal security. The libertarian strands in the Court's discourse were undercut by distinguishing between "acceptable" and "unacceptable" expression in terms of the speaker's or expression's "dangerousness." The

[31] Like many of the interpretive scholars referred to in this article, I believe that there are important limitations on what can be learned from responses to survey questions. Brigham (1991), for example, suggests that surveys measure abstract "feelings" rather than practical knowledge rooted in everyday life experience. However, this does not mean that survey responses are totally without meaning. What I seek to show is how such "feelings" reported in tolerance research may be interpreted differently as a consequence of the discourse analysis presented, combined with a sensitivity to the potential significance of one's location in social relations.

[32] McClosky and Brill (1983:242–43) do recognize that court decisions fail to establish absolute expression rights and "usually involve an intermingling of liberties and restraints." However, they view libertarian norms as overriding others and suggest that the "contingencies and caveats, fine and subtle distinctions, exceptions and limitations" and "specifications of the conditions under which a given liberty is to be protected or prohibited" found in legal decisions simply render libertarian norms "difficult to grasp" for "average individuals." The only explicit recognition of contradictory norms that I have been able to locate in this literature is in Gibson 1988.

Court thus developed limits of free speech that indirectly and unintentionally reinforce other intersecting cultural discourses that silenced certain groups, individuals, and voices. In light of the contradictory nature of legal discourse in this area, of which the Supreme Court's doctrine is an example, it is difficult to imagine how the public could be more "consistent" in their responses to questions about the appropriate level of tolerance toward groups the public deems dangerous.[33]

In the case of political tolerance, the public is exposed to legal and other discourses that legitimate both abstract libertarian norms and repression of those who appear to be dangerous. When confronted by concrete applications of libertarian principles to "radical" groups, the choice by many in the public to employ repressive strands of dominant discourses is consistent with their subordinate position in social relations.[34] Lacking control over the means of coercive force, the public focuses on and responds to the portrayal of "fringe" groups as "evil" and "alien,"[35] fearing that appropriate action may not be taken if "fringe" groups gain support, momentum, or seek to gain power by force.[36]

[33] Gramsci (1971:326–27) suggests that political consciousness is often characterized by contradiction and inconsistency. And empirical studies suggest that such contradictions describe many elements of the public's political worldview (e.g., Hill 1976; Parkin 1972; Mann 1973; Willis 1977). These studies indicate that interpretations of various strains of dominant discourses and contradictions and inconsistencies in beliefs and actions are a function of material experience and one's location in social relations. Femia (1975:46), summarizing much of this work, suggests that a member of a subordinate group "tends to have two levels of normative reference—the abstract and the situational. On the former plane, he expresses a great deal of agreement with the dominant ideology; on the latter, he reveals not outright dissensus but nevertheless a diminished level of commitment to the bourgeois ethos, because it is often inapposite to the exigencies of his class position."

[34] I employ the distinction found in tolerance research between elites and the public (or "the masses," as the non-elite public is often referred to in these texts). This distinction carries with it an impoverished vision of social relations, failing to capture differences based on such things as class, race, gender, ethnicity, sexual orientation, and religion. My purpose is using this distinction is to illustrate how tolerance research may be viewed differently through an interpretive, practice theory lens.

[35] Tolerance research suggests that the social construction of radicals may have had a long-term effect on the public's feelings about leftist groups and organizations. Sullivan et al. (1982), for example, asked respondents to identify their most disliked groups and organizations. Nearly one-third of the respondents, the largest group in the study, felt the greatest animosity toward Communists.

The attributes associated with radical dissent in the discourses discussed in this article also are reflected in the findings of tolerance research. When Stouffer (1955), for example, asked participants in his study to identify characteristics of a Communist, the most frequently mentioned attribute was "foreign" (also see Sullivan et al. 1982:168). Sullivan et al., consistent with others (McClosky & Brill 1983), reported a relationship between the perceived dangerousness of groups and intolerance toward those groups. Communists constituted the group least tolerated by the study's participants. And when asked to rank various groups on a scale of good/evil, safe/dangerous, and loyal/disloyal, participants tended to place Communists toward the evil, dangerous, and disloyal ends of the poles.

[36] The discourse of clear and present danger also has affected groups seeking to resist dominant discourses and practices. Brigham (1987b), for example, argues that part of the feminist case against pornography seeks to persuade that pornography

The dominant position of elites in social relations, on the other hand, makes it more likely that they will apply libertarian strands of dominant discourses to concrete situations, even when those situations include "fringe" groups and organizations. Because elites are by definition located in close proximity to the means of coercive force, they need not fear that challenging groups will gain power without meeting stiff resistance from state apparatuses that they control. Elites, in other words, are able to focus on libertarian strands in dominant discourses and thus respond by being more "consistently" tolerant to "radical" groups, secure in the knowledge that as expression turns to tangible threat, state action will be taken. In other words, this interpretation suggests that elites are not "better equipped" than the public to "learn" libertarian "norms," as McClosky and Brill (1983:243) suggest, but rather are situated differently in social relations. Although elites and non-elites respond to "alien" political expression with different levels of tolerance, they are equally "rational" and equally consistent with a broad set of norms. Recent research suggests that support for free speech among political elites declines substantially as the expression's content becomes more threatening to the existing political-economic system (Gibson & Bingham 1982, 1985; Shamir 1991) and that political repression during the McCarthy era was most likely initiated by and received its most significant support from elites, rather than from the public (Rogin 1967; Goldstein 1978; Gibson 1988). This study raises additional questions about the basic premises of revisionist democratic theory, a theory based on the problematic assumption that the public's intolerance is a function of individual deficiencies in socialization and learning (e.g., McClosky & Brill 1983) and, as a result, that they constitute the most serious threat to fundamental democratic principles.[37]

This study also illustrates how multiple, intersecting discourses of intolerance may contribute to what Schattschneider (1960) calls a "mobilization of bias"—"a set of predominant

causes violence against women, constituting a clear and present danger which mandates suppression. But rather than employ an explicitly legal discourse, feminist discourse rejects law as the product of patriarchy. The practice of opposing law in the antipornography movement, however, is itself constituted in important ways by the "tacit recognition of the hegemony of a free expression ideology in the broader political culture" (p. 321).

[37] Brigham (1991:589) suggests that tolerance research's portrayal of the public as holding "bad attitudes" has had the additional consequence of raising the prestige of institutions, like courts, that are maximally insulated from popular opinion. Because the public cannot be trusted to protect fundamental rights and liberties, courts and the professional elite who staff them—rather than representative institutions—become the preferred source of rights and liberties. Consequently, the meaning of democracy and democratic institutions has shifted in important ways: "Contemporary attitude researchers seem to have redefined the institutional correlates of democracy with the characteristic democratic institutions becoming the courts and the paradigmatic democratic stance becoming resistance to popular will."

values, beliefs, rituals, and institutional procedures . . . that operate systematically and consistently to the benefit of certain persons and groups at the expense of others" (Bachrach & Baratz 1970:43; also see Lukes 1974). The discursive formation surrounding issues of immigration, free expression, and political dissent in the 1920s exclude a variety of concerns and positions from the public agenda—particularly those that challenged the political and economic status quo. Free speech discourse validated the conclusion that such ideas could be considered "alien," incompatible with an "American" perspective, and thus, in legal terms, dangerous. Because the institution from which this discourse emanated, namely, the Supreme Court, was held in such high regard—perceived as objective, neutral, nonpartisan, and authoritative—it legitimated the appropriation of social constructions of "otherness" in other cultural texts to distinguish between "acceptable" and "unacceptable" political expression. The Court thus played an important role in setting the terms of political debate by constructing, in its doctrine and through intertextual relations to other discourses, a political spectrum composed of a "mainstream" and "fringes."[38]

The interpretive perspective developed in this article begins to lay a foundation for a more dynamic, nuanced, and contextualized study of hegemonic legal discourse. The analysis suggests that future work on legal discourse will benefit from a more systematic consideration of its intersections with related discourses. Equally important, the theoretical framework suggests a research agenda that examines the way in which contradictions in dominant discourses are interpreted and employed based on varying locations in social relations, such as those associated with subject positions of class, race, gender, religion, ethnicity, and sexual orientation.[39]

[38] Brigham (1987a:216) emphasizes this type of relationship between courts and the state, arguing that "through the symbols it fashions, the Court makes its greatest contribution to the state, not by the threat of sanctions, but by confining the discourse and action of politics along well-worn paths." In this sense, legal institutions are intimately engaged in the political world in ways that reach far beyond the specific decisions they render.

[39] Previous work on hegemonic legal discourse, much of it associated with the Critical Legal Studies movement, focuses almost exclusively on identifying ideologies embedded in legal doctrine. As critics of this work have suggested, these studies typically assume without much analysis that legal discourse's content is inscribed in popular consciousness, guiding the way in which agents make sense of the world (Trubek 1984; Munger & Seron 1984; Trubek & Esser 1989). By and large, this body of work fails to explore ways in which various strains of dominant discourses are interpreted or the affect of one's location in social relations.

Some important implications of the approach taken in previous work in Critical Legal Studies are developed by Crenshaw (1988) in her critique of critical scholarship as it applies to race. Crenshaw persuasively challenges the assumption in much of the critical literature on antidiscrimination law that dominant beliefs regarding the fairness of American society and institutions are accepted by African Americans and constitute a major constraint on effective mobilization for change. Crenshaw suggests that many

A fuller, richer, and more socially contextualized understanding of legal doctrine as ideology requires a shift in social science research from an emphasis on "attitude" to an examination of "public knowledge" (Brigham 1990:593). Attitude research, relying on structured survey questions for information on "feelings," reduces material life to "preferences" presumed to be freely chosen by individuals. It often fails to consider connections between survey responses, the cultural materials that may constrain choice, and the social and material conditions within which people live. Public knowledge, on the other hand, refers to the ways in which people make sense of the world and is formed through the interaction of cultural materials and material conditions.

With respect to political tolerance, such work might build on the discourse analysis presented in this text by interpreting the categories, norms, attributes of deviance, and varying ideological strands inscribed in other cultural materials, such as education, entertainment television, popular fiction, print and electronic news media, film, pop music, and advertising (Chase 1986; Macaulay 1987). Some suggestive work along these lines already exists. For example, Rogin (1987:236–71) concludes from an examination of films produced during the Cold War that they "depict the Communist threat as an invasive, invisible, deceptive, enslaving conspiracy" (p. 245). Many of the films he analyzed depoliticize radical dissent by equating Communism with crime. Rogin (p. 239) suggests that films during the Cold War, the atomic spy trials of the 1940s, and investigations of domestic subversion by HUAC "joined together as one danger atomic spying, revelations of confidential government proceedings, Communist Party membership, membership in 'Communist front' organizations, manipulation of mass opinion, and subversive ideas." This intertextuality, or what Rogin colorfully refers to as "guilt by free association," implies that "subversive ideas" are "the source of atomic contamination." Putting it in an equally colorful way, Rogin argues that "the Red Scare made un-American ideas radioactive." Rogin's reading of science fiction films produced during the Cold War is particularly pertinent to this text's analysis. Much like the metaphor used by the Court in *Gitlow* of "dangerous" ideas as a rapidly spreading and destructive fire—"a single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration"—he suggests

African Americans recognize that American ideas are at variance with their material conditions and that "the most significant aspect of Black oppression seems to be what is believed *about* Black Americans, not what Black Americans believe" (p. 1358). What is significant to Crenshaw, then, is that members of the dominant racial group internalize aspects of dominant discourses that oppress members of the subordinated group. African Americans, according to Crenshaw, "are boxed in largely because there is a consensus among many whites that the oppression of Blacks is legitimate" (ibid.).

that "aliens" signifying domestic Communists portrayed in such films as *The Thing* (1951) and *Invasion of the Body Snatchers* (1956) "multiply promiscuously" and "spread destruction" (p. 264).[40]

A broader and more systematic examination of American cultural texts should then be joined by efforts to assess any correspondence between the categories and varying ideological strands encoded in cultural materials and the ways in which human agents understand and make sense of their world. Such analyses will require readings and interpretations of public knowledge as it is manifested in ordinary conversation, letters to newspapers, or personal diaries.[41] This research agenda encourages work that assesses more systematically than existing studies the contribution of law to culture. As such, it constitutes part of a movement to redirect the traditional concern in much sociolegal research from examining gaps between law's promise and performance—its ineffectiveness—to an exploration of law's effectiveness in constituting social reality (Sarat 1985). With greater sensitivity to varying strands of ideology inscribed in doctrine, and the potential significance of one's location in social relations, this project promises to improve our understanding of law *in* society and law's relationship to the state—how law and the ideologies it constructs and reflects legitimate, reinforce, and challenge existing relations of domination.

[40] Gitlin (1980), in a study of news coverage of Students for a Democratic Society by the *New York Times* and CBS, argues that the news media played an important role in the "unmaking" of the New Left by ignoring its political program. Journalistic routines and standard operating procedures led to coverage that focused primarily on violence surrounding demonstrations, internal dissension in the movement, and the "abnormal" language, age, dress, and personal appearance of movement activists. Such coverage, according to Gitlin, served to trivialize and marginalize the New Left.

A final example is the work of Schaub (1991) on American fiction during the Cold War. He shows how many prominent liberal writers and literary critics sought to come to terms with their past political sympathies toward socialism, communism, and the Soviet Union by constructing a new "liberal narrative" that disparaged all political ideologies. The retreat from ideology in some literary circles, according to Schaub (p. 23), "was itself an ideology that served to reinforce the dominant Cold War polarities which privileged American democracy, imagined as a fruitful tension of conflicting groups in contrast with the monolithic repressiveness of the Soviet Union."

[41] Ethnographic case studies, such as those conducted by Merry (1990), Sarat (1990), and Ewick and Silbey (1992), provide opportunities to assess interactions between practical knowledge and one's location in social relations. Indeed, ethnographic research encourages a richer, more nuanced conception of social relations than may be obtained from surveys—a conception that takes account of everyday life and knowledge that emerges from subject positions that vary by class, race, religion, gender, ethnicity, sexual orientation, and so on. Such work, then, promises to move the study of political tolerance beyond the rather simple, abstractly categorical, and reductionist distinction between elites and non-elites that is at the core of much tolerance research.

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