Free Speech Doctrine in American Political Culture: A Critical Legal Geography of Cultural Politics

MARK KESSLER[†]

I. INTRODUCTION

In a letter sent to fellow conservatives in February 1999, Paul Weyrich laments "the collapse of the culture," a culture he describes as "an ever-wider sewer."[1] In a highly pessimistic tone, he suggests that liberal, secular humanist, anti-Christian values have infiltrated and gained dominance over many aspects of American culture.[2] Labeling this constellation of beliefs "Political Correctness," he equates it with "Cultural Marxism" and worries that "the United States is very close to becoming a state totally dominated by an alien ideology, an ideology bitterly hostile to Western culture."[3] This "poisonous" ideology, according to Weyrich, "has so gripped the body politic, has so gripped our institutions, that it is even affecting the Church. It has completely taken over the academic community. It is now pervasive in the entertainment industry, and it threatens to control literally every aspect of our lives."[4] Contemporary cultural institutions, Weyrich concludes, "are controlled by the enemy."[5]

Weyrich is especially concerned that these "enemies" demonize those seeking to defend and promote traditional "American" values.[6] In what appears to be a reference to political and intellectual movements for multiculturalism and cultural diversity, he suggests that these "enemies" have stifled reasoned debate by silencing their opposition.[7] "[F]or the first time in their lives," he argues,

[1] Open letter to conservatives from Paul Weyrich, Free Congress Foundation (Feb. 16, 1999) (on file with author), *available at* http://web.archive.org/web/20010715110456/www.freecongress.org/fcf/s pecials/weyrichopenltr.htm. I learned of the letter in CULTURAL STUDIES & POLITICAL THEORY 7 (Jodi Dean ed., 2000).

[2] WEYRICH, *supra* note 1.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

> people have to be afraid of what they say. . . . [I]f you say
> the "wrong thing," you suddenly have legal problems,
> political problems, you might even lose your job or be
> expelled from college. Certain topics are forbidden. You
> can't approach the truth about a lot of different subjects. If
> you do, you are immediately branded as "racist," "sexist,"
> "homophobic," "insensitive," or "judgmental."[8]

This brief excerpt from Weyrich's letter illustrates some of the general contours of cultural politics in the United States, a form of politics involving intense political struggle over the meaning and significance of fundamental American ideals and principles. The struggle frequently centers on the juxtaposition in opposing arguments of two fundamentally distinct sets of values, symbols, ideals, and principles. One is located "in the mainstream," is labeled "American" or "Western," defining what America means and what it means to be an American. The other is viewed as "foreign," "alien," and "un-American," "out of the mainstream," a divergence from these ideals. Cultural politics, then, involves political struggle over the meaning of important symbols, a struggle for spatial positioning within a discursive political space that we often call "the public sphere." Placement in the "center" or "mainstream" of this space is sought, while positioning on the "margins" is avoided. Participants defend values and principles that, it is argued, properly reside in the "center" against the "margin," argue for different values and principles from the "margins" against the "center," or seek to move preferred values and principles from the "margins" into the "center," while removing and relocating opponents' values and principles from the "center" to the "margins." It is a symbolic territorial war of position[9] that, I argue, has important racial, gender, sexual, class, and religious implications.

This article examines the origins and implications of this form of symbolic politics in the United States. It traces central features of cultural politics, especially conventional views about the contours of a discursive political landscape we call "the public sphere," to constitutive properties of free speech doctrine and multiple strands of American political culture. I situate the approach and analyses presented in contemporary cultural theory and interdisciplinary cultural studies.[10]

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[8] *Id.*

[9] The phrase "war of position" appears in the work of Antonio Gramsci. *See* SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 229-243 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

[10] Useful examples and summaries of this diverse work include BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE (Victoria E. Bonnell & Lynn Hunt eds., 1999); CULTURAL STUDIES (Lawrence Grossberg et al. eds., 1992); CULTURAL STUDIES & POLITICAL THEORY, *supra* note 1; THE CULTURAL STUDIES READER (Simon During ed., 1993); JOHN FROW, CULTURAL STUDIES AND CULTURAL VALUE (1995); LAWRENCE GROSSBERG, BRINGING IT ALL BACK

II. LAW AS (GEO)CULTURAL PRACTICE

Although the concept "culture" may be understood in various ways, much of the most useful recent writing about culture combines a conception of it as a system of symbols with a view of it as practice.[11] Often drawing explicitly on Pierre Bourdieu's theory of practice,[12] scholars employing this conception of culture focus attention on relationships between the action and interaction of "agents," "actors," or "subjects," and the systemic or structural forces that disseminate social and cultural symbols. Seeking to transcend tensions in social theory between structuralist and subjectivist strains, a crucial assumption of this view is that practices of human agents play an important role in producing, reproducing, and transforming the structural forces that comprise a social system while simultaneously being shaped by these forces. Lisa Wedeen's conception of culture as "semiotic practices"[13] concisely captures the view that symbols and practices are mutually constitutive.

William Sewell develops a nuanced and dynamic variant of this conception of culture. Signs and symbols comprising abstract cultural codes comprise what he calls a "cultural schema," a set of conventions-- including assumptions, categories, metaphors, and narratives--that structure practice and, in turn, are shaped by practice.[14] "Culture," according to Sewell,

> should be understood as a dialectic of system and practice, as a dimension of social life autonomous from other such dimensions both in its logic and in its spatial configuration, and as a system of symbols possessing a real but thin coherence that is continually put at risk in

HOME: ESSAYS ON CULTURAL STUDIES (1997); GRAEME TURNER, BRITISH CULTURAL STUDIES: AN INTRODUCTION (1990); and, Toby Miller, *What It Is and What It Isn't: Cultural Studies Meets Graduate-Student Labor*, 13 YALE J.L. & HUMAN. 69 (2001).

[11] On culture as a system of symbols and meaning, see CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973); and CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983). On culture as practice, see PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (Richard Nice trans., 1977). Works describing and analyzing these issues in ways that I have found most useful are WILLIAM H. SEWELL, JR., THE CONCEPT(S) OF CULTURE, *in* BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE (Victoria E. Bonnell & Lynn Hunt eds., 1999) 35, 43 [hereinafter SEWELL, CONCEPT(S) OF CULTURE]; Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69 (1989); Sherry B. Ortner, *Theory in Anthropology Since the Sixties*, 26 COMP. STUD. SOC'Y. & HIST. 126 (1984); William H. Sewell, Jr., *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. 1 (1992) [hereinafter Sewell, *Theory of Structure*]; Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986); and, Lisa Wedeen, *Conceptualizing Culture: Possibilities for Political Science*, 96 AM. POL. SCI. REV. 713 (2002).

[12] BOURDIEU, *supra* note 11.

[13] Wedeen, *supra* note 11, at 713.

[14] Sewell, *Theory of Structure*, *supra* note 11, at 4, 8.

practice and therefore subject to transformation.[15]

Semiotic practices are embedded in social relations, produced by and helping to constitute unequal relations of power. And the "worlds of meaning," as Sewell calls them, emerging from these complex structures are not always unidirectional, but rather are often "contradictory, loosely integrated, contested, mutable, and highly permeable."[16]

Because culture, in this view, is polyphonic, contested, and often contradictory, dominant interests and institutions seek to impose a definitive interpretation on these "worlds of meaning." In particular, according to Sewell, dominant interests and institutions seek to establish normative interpretations by organizing the meaning of difference.[17] This task is carried out in "efforts not only to normalize or homogenize but also to hierarchize, encapsulate, exclude, criminalize, hegemonize, or marginalize practices and populations that diverge from the sanctioned ideal."[18] Sewell focuses on "authoritative actors" whose actions, "launched from the centers of power, ha[ve] the effect of turning what otherwise might be a babble of cultural voices into a semiotically and politically ordered field of differences."[19] Among other things, public officials, judges, and courts employ categories of difference, binary oppositions such as normal/abnormal and legal/illegal, to identify that which is normative, contrasted with its deviating "other."[20]

Increasingly, scholars of culture focus on the geographic dimensions of cultural representations. Influenced by Foucault and work in human geography, this work examines the historical processes producing spatial representations of social and political life and assesses the political implications of such geographical symbolism.[21] A central question in

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[15] SEWELL, CONCEPT(S) OF CULTURE, *supra* note 11, at 52.

[16] *Id.* at 53.

[17] *Id.* at 56.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See, e.g.*, MICHEL FOUCAULT, *Questions on Geography*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 63 (Colin Gordon ed., Colin Gordon et al. trans., 1980); MICHEL FOUCAULT, *The Eye of Power*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 146 (Colin Gordon ed., Colin Gordon et al. trans., 1980). In *The Eye of Power*, Foucault writes:

> A whole history remains to be written of *spaces*—which would at the same time be the history of *powers* . . . from the great strategies of geo-politics to the little tactics of the habitat, institutional architecture from the classroom to the design of hospitals, passing via economic and political installations. . . . Anchorage in a space is an economico-political form which needs to be studied in detail.

FOUCAULT, *The Eye of Power*, *supra* note 21, at 149. On human geography, see HENRI LEFEBVRE, THE PRODUCTION OF SPACE (Donald Nicholson-Smith trans., Blackwell Publishers 1991) (1974); and EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989).

much of this work is how social space is organized, produced, reproduced or maintained, and transformed by and through semiotic practices. Sewell emphasizes that, in particular, "authoritative actions" intended to impose meaning on difference have significant spatio-geographical dimensions.[22] "Such action," he writes, "creates a map of the 'culture' and its variants, one that tells people where they and their practices fit in the official scheme of things."[23] Cultural maps, in other words, position subjects in political space, placements that may be criticized and resisted.

Law forms one crucial element in the "authoritative action" described by Sewell. As Bourdieu suggests, law is one of several relatively autonomous "fields" of cultural production that, within the constraints of material relations, constitutes social relations and practices while simultaneously being shaped and created by social practices.[24] Law is comprised of "structures of knowledges and reasonings"[25] that are "a way of talking about actions and relationships"[26]—a way of talking that emphasizes some meanings and silences others. In these ways, law is a discourse as Foucault uses the term which, among other things, constitutes understandings "about good and bad states of society."[27] These understandings are produced by various means, including the use of legal categories, some offered in the form of metaphors, which distinguish one

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[22] SEWELL, CONCEPT(S) OF CULTURE, *supra* note 11, at 56.

[23] *Id.*

[24] Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 814-17 (Richard Terdiman trans., 1987). Law's constitutive role in culture has been explored in a variety of recent works. *See, e.g.*, BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES (David Theo Goldberg et al. eds., 2001); GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (2000); JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS (1996); KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (1998); PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); LAW AND THE ORDER OF CULTURE (Robert Post ed., 1991); LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1993); LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas J. Kearns eds., 1998); LEGAL STUDIES AS CULTURAL STUDIES: A READER IN (POST)MODERN CRITICAL THEORY (Jerry Leonard ed., 1995); HELLE PORSDAM, LEGALLY SPEAKING: CONTEMPORARY AMERICAN CULTURE AND THE LAW (1999); RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION (Austin Sarat ed., 1997); Christine B. Harrington, *Moving from Integrative to Constitutive Theories of Law: Comment on Itzkowitz*, 22 LAW & SOC'Y REV. 963 (1988); Mark Kessler, *Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger*, 27 LAW & SOC'Y REV. 559 (1993) [hereinafter Kessler, *Legal Discourse*]; Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 LAW & SOC. INQUIRY 39 (1992). On the role of lawyers in social construction, see generally Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 LAW & SOC'Y REV. 769 (1995) (reviewing GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW (1992)); and LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION (Maureen Cain & Christine B. Harrington eds., 1994) .

[25] FRANK BURTON & PAT CARLEN, OFFICIAL DISCOURSE: ON DISCOURSE ANALYSIS, GOVERNMENT PUBLICATIONS, IDEOLOGY AND THE STATE 8 (1979).

[26] SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 9 (1990).

[27] Sally Humphreys, *Law as Discourse*, 1 HIST. & ANTHROPO. 241, 251 (1985).

thing from another, imposing a hierarchical ranking. Foucault refers to these "dividing practices," as a process of "binary branding. . . . The constant division between the normal and the abnormal."[28] In a similar way, Bourdieu notes that "[i]t is no accident that the verb *kategoresthai*, which gives us our 'categories' . . . means to accuse publicly."[29]

In recent years, scholars have advanced our understanding of law as cultural practice by exploring the contribution of law and legal discourse to geographical representations of the social world.[30] "The role of law," David Engel writes, "is particularly apparent in the social construction of space. Law is self-consciously spatial in orientation, and its first concern is to define the boundaries within which it operates."[31] Legal geography recognizes that the legal enterprise is fundamentally about drawing lines, between the acceptable and unacceptable, between the normative and deviant. Such lines drawn by and through law may construct such symbolic edifices as "localities," "neighborhoods," "communities," and "identities." In his study of litigation and social change in Thailand, Engel notes that "law carved space" in ways that constituted "community" and "identity," producing a situation whereby "[w]ho one was could not be separated conceptually from *where* one was."[32] Lines "carving" space create borders and boundaries. Such boundaries mark an "inside" and an "outside," determining who is included, or located inside the border, and those excluded, externally located on the "out" or "other" side of the line.[33]

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[28] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON, 199 (Alan Sheridan, trans., 2d ed. Vintage Books 1995) (1977). In his earlier work, Foucault seeks to displace a focus on state centered power and law, on juridical power, with attention to the "microphysics of power," local non-state strategies, tactics, techniques, and technologies of disciplinary power. Constitutive approaches to law, influenced by Foucault's work on discourse, attempt to "retrieve" law and explore the interpenetration of the discourses of law, discipline and regulation. *See* ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW 267-300 (1993). Foucault examines state power in his later work on "governmentality." *See* Michel Foucault, *Governmentality*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87 (Graham Burchell et al. eds., 1991). In cultural theory, work by Pierre Bourdieu explicitly attends to the role of juridical power in cultural practice. *See* BOURDIEU, *supra* note 11; Bourdieu, *supra* note 24.

[29] Pierre Bourdieu, *The Social Space and the Genesis of Groups*, 14 THEORY & SOC'Y 723, 729 (1985).

[30] *See, e.g.*, NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER (1994); DAVID DELANEY, RACE, PLACE AND THE LAW, 1836-1948 (1998); THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE (Nicholas K. Blomley, et al. eds., 2001), THE PLACE OF LAW (Austin Sarat et al. eds., 2003); John Brigham & Diana R. Gordon, *Law in Politics: Struggles over Property and Public Space on New York City's Lower East Side*, 21 LAW & SOC. INQUIRY 265 (1996); David M. Engel, *Litigation Across Space and Time: Courts, Conflict, and Social Change*, 24 LAW & SOC'Y REV. 333 (1990); Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC'Y 279 (1987).

[31] David M. Engel, *Law in the Domains of Everyday Life: The Construction of Community and Difference*, *in* LAW IN EVERYDAY LIFE, *supra* note 24, at 123, 130.

[32] Engel, *supra* note 30, at 339.

[33] For analyses of spatial constructions in international relations that focus on the distinction between "inside" and "outside," see generally R.B.J. WALKER, INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY (1993).

Studying law as geocultural practice attempts to highlight the contribution of legal discourse to, in Sewell's terms, system and practice. Such work focuses on the way in which categories, binary oppositions, and classifications embedded in law represent, construct, or constitute the social world, and how human agents employ such representations in practice. Law and legal discourse, however, may not independently constitute semiotic practices. Elements in what Sewell calls "cultural schemas," that emanate from diverse practices, discourses, and institutional spheres overlap, intersect, and enrich one another's meanings.[34] Indeed, as Hunt suggests, "legal discourses . . . increasingly incorporate or are themselves incorporated into [and] interpenetrate with a continuum of other discourses and apparatuses (medical, administrative, and so on)."[35] Thus, to study law as geocultural practice is to examine legal discourse as it overlaps, intersects, and interpenetrates with other discourses and practices across cultural spheres or "fields." A critical legal geography, situated in the cultural study of law, seeks to understand how and with what effects often contradictory and contested structural components, some of them derived from law and legal discourse, fit together to form cultural maps that place human subjects in social and political space.

I focus, in this article, on the legal, cultural, and geographical construction of political community and the "public sphere" located within it.[36] Building on the insights of constitutive, cultural, and critical geographical work on law, I examine the role of constitutional doctrine, as it overlaps and intersects with multiple strands of American political culture, in constituting these familiar spatial representations. Reading multiple strands of political culture—liberalism, republicanism, and Protestantism—as constituting both inclusive and exclusionary political communities, and examining these contradictory maps of political community in the context of free speech doctrines' construction of political difference, I illustrate how the intersection of legal doctrine and American political culture(s) contributes to semiotic practices that constitute the way

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[34] Sewell, *Theory of Structure, supra* note 11, at 19.

[35] HUNT, *supra* note 28, at 293.

[36] The "public sphere" has received a great deal of scholarly attention in recent years, much of it responding to the publication of the English translation of JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., 1989). *See, e.g.*, HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1992); NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE 'POSTSOCIALIST' CONDITION (1997); MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS (2002). I use the term to refer to sites of public participation where differentiated social sectors engage in negotiation and contestation over sociopolitical issues and policies. My conception of the public sphere is influenced by critics of Habermas, who focus attention on those excluded from active participation. *See* HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1992). Also, see IRIS MARION YOUNG, INCLUSION AND DEMOCRACY, 167-180 (2000) for a useful discussion of the public sphere in the context of theories of deliberative democracy.

in which the boundaries, borders, and geographical demarcations forming public spaces are represented.

Specifically, I seek to demonstrate how the constitutional doctrine of "clear and present danger" works together with opposing and contradictory strands of American political culture to constitute a public sphere composed of a narrow "center" and "margins." I focus on the intimate relationship, historical contingency, and shifting meanings of the public spaces constructed as "mainstream" and "margin" as a way of demonstrating the political significance of boundaries and borders constructed in and through law. Following Engel, I examine the ways in which multiple strands of political culture and the public sphere's geographical construction constitutes "community," an exclusive community distributing subjects into spatial locations both "inside" it and on its "fringes." [37] In addition, I examine some of the reasons why such spatial distributions are, at least in part, a function of race, class, gender, sexuality, and religion. A major focus of this analysis, then, is on borders constructed by and through intersecting and overlapping elements of law and political culture. As Delaney, Ford, and Blomley write: "Boundaries *mean*. They signify, they differentiate, they unify the insides of the spaces that they mark. *What* they mean refers to constellations of social relational power."[38] I argue that boundaries of community and the public sphere located within it that are formed in law and political culture shape a central feature of contemporary politics in the United States—a cultural politics of spatial location whereby opposing parties in political disputes seek to place themselves in the "center" or "mainstream" and their opponents on the "margins" or "fringes."

The next section examines multiple strands of American political culture, emphasizing how crucial terms overlap and intersect to produce maps of political community that are both liberal, democratic, and illiberal and undemocratic. These dual conceptions form an important component of cultural schemas and a context for understanding law's role as geocultural practice. This section is followed by an analysis of legal doctrines that overlap and intersect with the dual strands of American political culture, helping to constitute a spatially organized public sphere that produces a particular form of cultural politics. The article closes with an assessment of implications for democratic practice of the cultural construction and mode of cultural politics described.

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[37] *See* Engel, *supra* note 30; Engel, *supra* note 31.
[38] THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE, *supra* note 30, at xviii.

III. AMERICAN POLITICAL CULTURE(S): FROM "TRADITIONS" TO CULTURAL PRACTICES

For many years, historians and scholars of American political thought have viewed varying conceptions of American political culture as competing "traditions" of public philosophy—systems of discrete, internally consistent, singular, and unidirectional ideas that influenced political leaders and the general population. Much of this work examines two traditions, liberalism and republicanism, describes the ideas that compose each tradition, and traces the major values and principles of each to specific political documents, tracts, pamphlets, and speeches from colonial and revolutionary times.[39] A third Protestant strand has been most typically viewed as contributing to the two major traditions, although scholars increasingly view it as a distinctive tradition.[40]

Writings on these traditions usefully describe each cultural strand in great detail. The major scholarly debates center on which strand has been historically dominant, which strand is more influential at particular historical moments, or asks at what point in time liberalism became dominant.[41] Most of this work assumed that only one cultural strand influenced politics, political leaders, and political behavior at a particular

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[39] For major works on the liberal tradition, see LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955); SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY (1981). On republicanism, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); and, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

[40] Important works on Protestantism in American political thought include Sydney E. Ahlstrom, *The Puritan Ethic and the Spirit of American Democracy*, *in* CALVINISM AND THE POLITICAL ORDER 88 (George L. Hunt ed., 1965); SACVAN BERCOVITCH, THE AMERICAN JEREMIAD (1978); JOHN PATRICK DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM (1984); NATHAN O. HATCH, THE SACRED CAUSE OF LIBERTY: REPUBLICAN THOUGHT AND THE MILLENNIUM IN REVOLUTIONARY NEW ENGLAND (1977); ALAN HEIMERT, RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION (1966); William G. McLoughlin, *The Role of Religion in the Revolution: Liberty of Conscience and Cultural Cohesion in the New Nation*, *in* ESSAYS ON THE AMERICAN REVOLUTION 197 (Stephen G. Kurtz & James A. Hutson eds., 1973); Perry Miller, *From the Covenant to the Revival*, *in* 1 THE SHAPING OF AMERICAN RELIGION 322 (James Ward Smith & A. Leland Jamison eds., 1961); EDMUND S. MORGAN, *The Puritan Ethic and the American Revolution*, *in* THE CHALLENGE OF THE AMERICAN REVOLUTION 88 (1976); JAMES A. MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY (2003); Richard Schlatter, *The Puritan Strain*, *in* THE RECONSTRUCTION OF AMERICAN HISTORY 25 (John Higham ed., 1962); BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT (1994); RICHARD VETTERLI & GARY BRYNER, IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT (1987); Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967); David D. Hall, *On Common Ground: The Coherence of American Puritan Studies*, 44 WM. & MARY Q. 193 (1987); and, George McKenna, *An Holy and Blessed People: The Puritan Origins of American Patriotism*, 90 YALE REV. 81 (2002).

[41] For a useful discussion of the debate over when liberalism became dominant, see generally 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

moment in time. More recent scholarship, however, suggests a more complex view of several cultural traditions that have circulated simultaneously throughout American history.[42] As Isaac suggests,[43] even strands that may not be dominant at a particular historical moment employ concepts that constitute what cultural theorist Raymond Williams calls a residual idiom, ideas from the distant past that continue to actively circulate in culture.[44]

In perhaps the most significant recent work in this area, Rogers Smith describes "multiple traditions"—liberalism, democratic republicanism, and ascriptive Americanism—that compete for hegemony throughout United States history.[45] Smith suggests that political leaders employ these traditions to craft civic ideologies that help shape conceptions of political community useful in mobilizing public support.[46] He challenges what he views as the "misleading orthodoxy" in much scholarly work that the dominant civic ideology and resulting conception of community have been based on premises most closely associated with liberalism and democratic republicanism. Instead, at various historical moments, values of "ascriptive Americanism"—values based on the belief that "'true' Americans are 'chosen' by God, history, or nature to possess superior moral and intellectual traits associated with their race, ethnicity, religion, gender, and sexual orientation"[47]—have been employed to mobilize political support, creating an exclusive community. Smith argues that the liberal, democratic civic ideology that he favors can not be consistently employed by political leaders because it demands so much of individuals—to be industrious, restrained, self reliant, and civil, among other things—but fails to offer a sense of membership in a larger group.[48] "Ascriptive Americanism," on the other hand, appeals directly to community membership, at least to those included in its definition of that

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[42] *See* RICHARD J. ELLIS, AMERICAN POLITICAL CULTURES (1993); ISAAC KRAMNICK, REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA (1990); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) [hereinafter SMITH, CIVIC IDEALS]; Jeffrey C. Isaac, *Republicanism vs. Liberalism? A Reconsideration*, 9 HIST. POL. THOUGHT 349 (1988); James T. Kloppenburg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992); Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982); Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549 (1993) [Smith, *Beyond Tocqueville*].

[43] Isaac, *supra* note 42, at 376-77.

[44] RAYMOND WILLIAMS, MARXISM AND LITERATURE 122 (1977).

[45] SMITH, CIVIC IDEALS, *supra* note 42, at 6, 8; Smith, *Beyond Tocqueville*, *supra* note 42, at 558.

[46] SMITH, CIVIC IDEALS, *supra* note 42, at 6.

[47] *Id.* at 508 n.5.

[48] *Id.* at 6, 36-37.

community.[49]   Smith's identification of "ascriptive Americanism" as an analytically distinct "tradition" allows him to further his project of critically rethinking civic ideologies, searching for ways to reconstruct liberal, democratic visions of community that have the potential to mobilize political support without the need to emphasize ascriptive characteristics of "true Americans."

Smith's achievement in this work is substantial. His recognition of the central role of ascriptive values and practices sheds important light on aspects of American political culture that have gone relatively unexplored. But his treatment of civic ideologies as distinct, discrete, mutually exclusive, internally consistent, and relatively autonomous is problematic. Smith's conception of American political culture as "tradition" does not analyze the extent to which components of these civic ideologies are polyphonic, are internally contradictory, or the extent to which key concepts among major "traditions" intersect and overlap.[50]

Bonnie Honig elaborates on the latter possibility, raising important questions about Smith's choice to analytically separate "ascriptive Americanism" from liberalism and republicanism.[51] She suggests that his treatment of mutually exclusive traditions "replicates the very mode of thinking that [he] seeks to criticize."[52]   Smith, she argues, sets out to "discredit ascriptive mythologies that can easily become demonologies."[53] But, she writes, "Smith produces an argument that is itself demonological in structure."[54] She interprets Smith to argue:

> [t]he many violent crimes and injustices that mark American national history are not essential to its character as a partly liberal democratic regime. Those violences come from elsewhere, from other parts of the American polity. . . . [L]iberalism is insulated from implication in the unsavory elements of American political history. The real

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[49] *Id.* at 6, 38-39, 471.

[50] See the critique of Smith's conceptual framework in Karen Orren, *Structure, Sequence, and Subordination in American Political Culture: What's Traditions Got to Do With It?*, 8 J. POL'Y HIST. 470 (1996). Orren suggests that Smith "has separated ideas with a long lineage of being linked together." *Id.* at 471. And although he admits that these "traditions" are not merely ideas, but also include institutions and practices that reproduce them, she argues that he does not really analyze institutions or practices. *Id.* Orren sees the ascriptive elements noted by Smith as running throughout American cultural practices: "[W]hat is multiple about American political culture historically is not its 'traditions' but its subordinations." *Id.* at 475. In response, Smith writes that he recognizes that ideas among the "traditions" have been "linked, 'blended' and 'combined'" in practice, but that the links are based on "illogical combinations." Rogers M. Smith, *Response to Karren Orren*, 8 J. POL'Y HIST. 479, 480 (1996).

[51] BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 12 (2001).

[52] *Id.*

[53] *Id.*

[54] *Id.*

> culprits, those other 'traditions,' are . . . scapegoats. Made into the bearers of all that liberalism seeks to disavow, they can now be cast out of the polity, which is then (re-)unified around this purging of its pollutants. [55]

Ascriptive Americanism, she suggests, is "rendered foreign to the would-be, still-hoped-for, liberal democratic body politic."[56] For Honig, Smith's multiple traditions approach is "misguided" because it diverts critical scrutiny away from the liberal values and institutions he defends and encourages a "demonizing attitude" toward the ascriptive Americanism and xenophobic politics that he critiques.[57] But, asks Honig, "[w]hat if such politics are *also* driven by pressures that come from within democracy itself, as it is variously practiced and theorized?"[58]

I seek to build on Smith's important insights of multiple traditions of American political culture, but I avoid viewing political culture as a set of discrete and mutually exclusive ideas, or "traditions." Indeed, my approach to understanding the constitutive role of American political culture is influenced most significantly by the writing of Robert Shalhope, who begins to develop a framework situating "traditions" of American political culture in cultural practice.[59] This framework explicitly suggests that multiple "traditions" employ concepts that overlap and intersect. Key cultural concepts, such as "virtue," "liberty," "vice," and "corruption" are utilized across cultural traditions and, although their meanings differ, may be contested, or may even be difficult to fix definitively at a particular historical moment. Drawing on scholarly works by Kenneth Burke on language[60] and Clifford Geertz on culture,[61] Shalhope hints at a framework for studying the central ideas and concepts of multiple cultural strands,[62] what William Sewell calls "systems of meaning," as significant components of "cultural schemas," or what Lisa Wedeen refers to as "semiotic practices."[63] From this perspective, the "worlds of meaning" described by Sewell as emerging from complex structures may be polyphonic and internally contradictory.

My reading of three major strands of political culture—liberal, republican, and Protestant—suggests that they circulate as "systems of

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *See* Shalhope, *supra* note 42.

[60] KENNETH BURKE, THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION (1941).

[61] Clifford Geertz, *Ideology as a Cultural System*, *in* IDEOLOGY AND DISCONTENT 47 (David E. Apter ed., 1964).

[62] Shalhope, *supra* note 42, at 354-56.

[63] SEWELL, CONCEPT(S) OF CULTURE, *supra* note 11, at 43-44; Wedeen, *supra* note 11, at 713.

meaning" simultaneously throughout American history, employing concepts that overlap and intersect to form two contradictory views of political community, one that is inclusive, liberal and democratic, and a second that is exclusionary, fundamentally illiberal and undemocratic. This latter construction emerges from within each cultural strand and from central concepts shared among the three strands. The illiberal, undemocratic community thus constituted is not a separate, discrete, and relatively autonomous tradition, but rather is formed by elements of the other cultural strands dominant throughout American history.

Table 1 depicts the central themes in each cultural "tradition," the ways in which they overlap and intersect with each other, and central inclusive and exclusionary elements. In general, it shows that each strand in isolation includes concepts and ideas that constitute both inclusive and exclusionary forms of community. Equally important, concepts and ideas across the three major strands—especially notions of "virtue," "vice," and "corruption"—overlap and intersect to constitute a community that excludes the "unworthy."

Table 1

Central Themes in Multiple Strands of American Political Culture

	LIBERALISM (L)	REPUBLICANISM (R)	PROTESTANTISM (P)
Themes	liberty, equal rights, individualism, government by consent	active citizenship, popular sovereignty, public virtue, fear of corruption	industry, hard work (work ethic), Christian virtue (frugality, honest, self-denial), divine mission to ensure triumph of good over evil
Overlaps	L with R and P: virtue acquires personal, individualistic meaning, focus on individual economic activity, industriousness	R with L and P: Virtue, fear of corruption	P with L and R: individualistic work ethic, virtue, fear of corruption expressed in jeremiad
Inclusive Elements	equal rights for individuals, government by consent	active citizenship, popular sovereignty	everyone called to serve God, success to those who work hard and lead simple and frugal life, all have direct, personal relation with God, people themselves interpret divine will
Exclusionary Elements	rights only for those with "properly socialized rationality," liberal absolutism, link between liberal "creed" and national identity	homogeneity requirement, fear of corruption leading to conspiracy views, fear of "invasion," "infiltration," "contamination" by those without virtue	fear of those lacking "Christian virtue" and those with poorly developed work ethic, conspiracy fears, people divinely chosen for mission

IV. MAPS OF COMMUNITY IN MULTIPLE, OVERLAPPING CULTURAL STRANDS

Since its publication in the mid-nineteenth century, Alexis de Tocqueville's classic work, *Democracy in America,* has shaped the way that scholars think and write about American political culture and

practice.[64]   His major thesis was rather simple: political practice in the United States had been shaped by ideas of freedom and equality and by material conditions prevailing at the country's founding. Early settlers arrived to find a vast and relatively unpopulated land, a fact of enormous significance. In Tocqueville's words: "Everything about the Americans, from their social condition to their laws, is extraordinary; but the most extraordinary thing of all is the land that supports them."[65] Able to settle relatively easily on this land and not having to face Old World feudal and clerical oppressions, Americans, according to Tocqueville, "have this great advantage, that they attained democracy without the sufferings of a democratic revolution and that they were born equal instead of becoming so."[66]

Arriving chiefly from England, new immigrants brought with them distinctive ideological commitments, according to Tocqueville.[67] Specifically, they had acquired a highly developed "acquaintance with notions of rights and principles of true liberty."[68]

They came, he argued, with "no idea of any superiority of some over others."[69]   The colonies that they established "seemed destined to let freedom grow, not the aristocratic freedom of their motherland, but a middle-class and democratic freedom of which the world's history had not previously provided a complete example."[70] Thus, Tocqueville suggested, equal and open social and economic conditions, combined with an ideological legacy conducive to liberty and democracy, helped to produce a society that was fundamentally free, egalitarian, and democratic in both theory and practice.

Years later, Louis Hartz used Tocqueville's analyses in support of his argument that political life and culture in the United States have been shaped most profoundly by liberal values and principles.[71] According to Hartz, the social, political, and economic conditions underscored by Tocqueville resulted in citizens with a profound faith in individualism, social mobility, equal rights for all, and government by consent.[72]   The absence of feudal institutions and rigid social classes combined with the presence of "atomistic social freedom"[73] assisted in making the United

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[64] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J. P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1835).

[65] *Id.* at 280.

[66] *Id.* at 509.

[67] *Id.* at 31-33.

[68] *Id.* at 33.

[69] *Id.* at 33.

[70] *Id.* at 34.

[71] *See* HARTZ, *supra* note 39.

[72] *Id.*

[73] *Id.* at 62-64.

States a liberal society.[74] Moreover, throughout American history, citizens demonstrated a consensus about the fundamental nature of liberal values. While conflicts occasionally occurred, they were debated and resolved within boundaries defined by liberalism.[75]

More recently, Huntington extended the work of Hartz and Tocqueville, suggesting that the pursuit of ideals identified as central by these scholars—liberty, individualism, equality, and democracy—have been "central to American political experience."[76] His historical explanation for this phenomenon follows closely the script written by Tocqueville: "Unlike Europe, America lacked both feudalism and socialism. The controversies of American history were all among different varieties of liberalism. Widespread liberalism, in turn, reflected the absence of an aristocracy and of a class-conscious proletariat and the dominance of a middle class."[77] Huntington suggests that the broad consensus over liberal values produced an "American creed," a system of liberal, democratic ideals that, over time, became strongly connected to the meaning of the nation itself.[78] American political ideals and values, he argues, are central components of American national identity.

Although each of these writers—Tocqueville, Hartz, and Huntington—view American political culture as liberal at its core, each also suggests that Americans' strong commitment to these fundamental principles and values may produce certain illiberal, undemocratic consequences. For example, Tocqueville believed that because liberalism in the United States did not develop in opposition to other cultural and political traditions, it could produce what he called a "tyranny of opinion," or a lack of respect and tolerance for alternative social and political forms and principles.[79] Hartz suggested that the lack of alternative ideological systems in American history made individuals so embrace liberalism that any other ideas or ideologies were perceived as a "threat" to be contained, even

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[74] HARTZ, *supra* note 39.

[75] Rogers M. Smith shows how scholars who describe American political culture as fundamentally liberal deal with exclusionary practices based on race, gender, class, and ethnicity. He notes that Tocqueville, for example, relegated Blacks and Native Americans to "tangents" in history and "made America seem much more fully a liberal democracy than it was." Smith, *Beyond Tocqueville*, *supra* note 42, at 553. Hartz downplays southern white supremacist views as part of the "madhouse of Southern thought before the Civil War." *Id*. at 554 (quoting HARTZ, *supra* note 39, at 169). To scholars like Hartz, writes Smith, "American defenses of racial inequality were structured in liberal terms after all. And on liberal premises, Americans could only justify racial inequalities by denying the humanity of blacks." *Id*.

[76] HUNTINGTON, *supra* note 39, at 11.

[77] *Id.* at 7.

[78] *Id.* at 14. The notion of an "American creed" is taken from Gunnar Myrdal's seminal examination of race in America. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

[79] TOCQUEVILLE, *supra* note 64, at 254-61.

perhaps by actions that themselves were illiberal and undemocratic.[80] Writing during the heyday of Cold War anti-communism, Hartz asked, "[I]n a land where Communism is truly 'alien,' what is more sensible than to get rid of it simply by throwing out the men who brought it over?"[81] Hartz cautioned against "liberal absolutism," which he viewed as a grave threat to liberty.[82]   The "redscare mentality," he suggested, "displays American absolutism in its purest form."[83]   In a similar way, Huntington argued that the connection he saw between accepting "the American creed" and national identity—"America" was the equivalent of the values underlying it and one could only be "American" if the creed was accepted—potentially had serious illiberal consequences.[84]   "To reject the central ideas of [liberalism] is to be un-American," according to Huntington.[85]   Further, he notes, a "pre-occupation with 'un-American' political ideas and behavior has been a recurring theme in American life."[86]   Moreover, he argues:

> As a result of this identification of the nation with certain political ideals, the American political experience has been quite limited compared to that of other nations. Political ideas and beliefs that cannot be encompassed in the American Creed remain *on the fringe* of American society and the American consciousness.[87]

This last statement of Huntington shows quite clearly how the liberal cultural tradition not only emphasizes liberal, democratic values but also helps to constitute a view of the American political community that is exclusionary.   Those who accept the values, beliefs, and principles composing an "American Creed" are included inside the lines mapping the borders of that community, while those who embrace alternatives or criticize dominant values are placed "outside" the border, or "on the fringe," by what Hartz refers to as "liberal absolutism."[88]

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[80] HARTZ, *supra* note 39, at 293-302.

[81] *Id.* at 301.

[82] *Id.* at 302.

[83] *Id.* at 301.

[84] HUNTINGTON, *supra* note 39, at 25.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 29 (emphasis added).

[88] In a recent book, Huntington extends his arguments to argue for immigration reform to minimize the numbers of people entering the country who do not accept the "American creed," a creed rooted in an Anglo-Protestant culture. He appears especially concerned with Hispanic immigrants and with contemporary movements for bilingualism and, more generally, multiculturalism. Such movements, he believes, undermine the "American creed" and the Anglo-Protestant culture in which it has flourished. In an important sense, these arguments clearly illustrate the marginalizing practices Huntington described and analyzed in his previous examination of American political culture. *Compare*

The exclusionary aspects of American political community sketched by Huntington and others who see American political culture as fundamentally liberal and democratic are reinforced by critics of this tradition. Uday Mehta, for example, explicitly examines what he calls "liberal strategies of exclusion" in such liberal theorists as John Stuart Mill and John Locke.[89] Mehta shows that, despite the explicit universality and politically inclusionary character of liberalism, it has produced practices that may exclude or marginalize various people. Specifically, liberalism suggests that all humans have the capacity for rationality and fruitful participation in the political community. But, realizing one's potential requires education and specific cultural and psychological conditions that are not shared by all. Those without a "properly socialized rationality" are too "ignorant," too "inscrutable," or too "uncivilized" to deserve equal political rights. According to Mehta: "[B]ehind the capacities ascribed to all human beings, there exist[s] a thicker set of social credentials that constitute the real bases of political inclusion."[90] Ira Katznelson also critiques the liberal tradition illustrated in writings by Locke and Mill.[91] Echoing many of Mehta's themes, he writes: "For John Locke, issues of inclusion and exclusion hinged on the capacity of the human person to be a rational, thinking agent. John Stuart Mill, by contrast, authorized criteria for inclusion based on social and cultural development, thus on what he saw as a contrast between backwardness and civilization."[92] Katznelson goes on to argue that "Locke's focus on rationality and Mill's on unenlightened peoples and places . . . combine to produce new mass underclasses of excluded people" deemed insufficiently rational and enlightened to be given full political rights.[93] Thus, the liberal tradition provides ideological support for political communities that are inclusively liberal and democratic and exclusionary—illiberal and undemocratic.

In the late 1960s and 1970s, a revisionist historical scholarship, focusing primarily on the colonial and revolutionary period, emphasized a republican strand of American political culture, challenging the view of hegemonic liberal, Lockean values. Bernard Bailyn and Gordon Wood traced colonial and revolutionary thought to republican values and principles in English opposition thought,[94] while J.G.A. Pocock emphasized the influence of classical republicanism in work by Aristotle

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Samuel P. Huntington, Who Are We? The Challenges to America's National Identity (2004), *with* Huntington, *supra* note 39.

[89] Uday S. Mehta, *Liberal Strategies of Exclusion*, 18 Pol. & Soc'y 427 (1990).

[90] *Id.* at 429.

[91] Ira Katznelson, *Liberal Maps for Technology's Powers: Six Questions*, 64 Soc. Res. 1333 (1997).

[92] *Id.* at 1334.

[93] *Id.*

[94] Bailyn, *supra* note 39; Wood, *supra* note 39.

and Machiavelli.[95]   Each of these accounts stressed the value placed by early Americans on active participation in civic life.   Freedom, to republicans, meant participation in civic activity, rather than liberal protections for individual rights and liberties. And rather than emphasizing the liberal pursuit of life, liberty, and property, early American leaders focused attention on prerequisites for productive self-government, especially the need for public virtue.   Virtue was, first and foremost, the capacity of individual citizens to sacrifice their own self-interest for the good of the community.[96]   Virtuous republican citizens also were characterized by other traits, such as frugality, industry, temperance, simplicity, courage, self-restraint, and sobriety.[97]

Early American leaders, drawing on republican thought, worried obsessively that public virtue was threatened from various quarters by its opposites, vice and corruption.   "Corruption," as Pocock interpreted it, connotes "a chaos of appetites, productive of dependence and loss of personal autonomy, flourishing in a world of rapid and irrational change."[98]   Corrupt societies, in the words of John Adams, were populated by people with "vicious and luxurious and effeminate Appetites, Passions, and Habits."[99]   In republican ideology, "luxury"—a "dull animal enjoyment" leaving "minds stupefied and bodies enervated"—constituted a crucial attribute to be avoided.[100]   Luxury appealed to the passions and senses, draining individuals of energy and leaving them "effeminate" and "weak."[101]

During the Revolutionary period, colonial leaders suggested in their writings that England was corrupt and its people and government characterized by vice.   Indeed, the Declaration of Independence contains a list of the many charges of corruption levied by colonial leaders.[102] Republican thought during the revolutionary period encouraged an American national identity composed of traits in contrast to England.   Tom Paine, in *Common Sense*, wrote that "If ye wish to preserve your native country uncontaminated by European corruption, ye must in secret wish a separation."[103]   In Pocock's words:

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[95] POCOCK, *supra* note 39.

[96] WOOD, *supra* note 39, at 68.

[97] *Id.* at 69.

[98] POCOCK, *supra* note 39, at 486.

[99] RONALD TAKAKI, IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA 5 (1979).

[100] *Id.*

[101] *Id.*

[102] THE DECLARATION OF INDEPENDENCE paras. 3-29 (U.S. 1776).

[103] TAKAKI, *supra* note 99, at 7.

> If corruption was being attempted from the other side of
> the Atlantic, the government and (it followed) the society
> attempting it must themselves be hopelessly corrupt. The
> virtue and personal integrity of every American were
> therefore threatened by corruption emanating from a
> source now alien, on which Americans had formerly
> believed themselves securely dependent.[104]

Pocock goes on to underscore the fact that this aspect of republican thought relies on views of external threats conspiring against the nascent community:

> The language began to sound that paranoiac note which is
> heard when men are forced by the logic of mental
> restriction to conclude that malign agencies are conspiring
> against the inner citadels of their personalities; only
> diabolical conspiracy could account for actions each one
> of which appeared more blatantly subversive than the
> last.[105]

Republican ideology suggested that all societies, over time, were subject to serious threats to public virtue—to decay, corruption, and vice. Indeed, one central task of virtuous citizens was to remain vigilant against potentially threatening influences, people and ideas that might infiltrate and contaminate republican society. The threats to freedom and virtue came from outside the community, but also could emerge from within the commonwealth. Writing several decades after the Revolution, Mercy Otis Warren wondered whether history would show that Americans were "too selfish and avaricious for a virtuous republic."[106]   She feared that the United States, like ancient republics, would be "corrupted by riches and luxury" and cease to be "a simple, virtuous, and free people."[107]

Thus, the republican strand of American political culture envisioned a community of active citizen participation. That community, however, would necessarily be fairly homogeneous, excluding those without virtue. Ronald Takaki argues that the community constructed in republican thought excluded people based on race.[108] He suggests that notions of vice and virtues were racialized, with Blacks, Native Americans, and other people of color viewed as "savages," wild, primitive, slothful, lacking in

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[104] POCOCK, *supra* note 39, at 507.

[105] *Id.* at 507-08.

[106] Mercy Warren, *History of the Rise, Progress and Terminaiton of the American Revolution*, *in* 6 THE COMPLETE ANTI-FEDERALIST 195, 216 (Herbert Storing ed., 1981).

[107] *Id.* at 230, 233.

[108] *See* TAKAKI, *supra* note 99, at 13.

self-control, "not masters over their natural life."[109] Republican thought, according to Takaki, provided the ideological underpinnings for white supremacy by contrasting the character traits of whites with people of color. He writes:

> The rational part of the self, republican leaders insisted, must be in command. Identifying whites with rationality or mind, they associated peoples of color with the body. Thus mind was raised to authority over the other parts of the self, and whites were raised above blacks and Indians. As republicans in the new American nation, white men felt they had to guard themselves against the needs of the instinctual life which they claimed were ascendant in peoples of color.[110]

In a similar way, white women were viewed as too delicate, too emotional, too passionate, to be permitted to participate actively in the political community.[111] Republican warnings about "luxury" and other signs of "corruption" leading to such "vices" as "effeminacy" seemed to have implications for both gender and sexuality. Hannah Pitkin traces these exclusions to the origin of the word "virtue": "The word derives from the Latin *virtus*, and thus from *vir*, which means 'man.' *Virtù* is thus manliness, those qualities found in a 'real man.'"[112] Thus, republican ideology not only stressed the democratic principle of active citizen participation, but also helped to construct a political community open exclusively to white males and a racialized, gendered, and sexualized national identity closely associated with meanings of "virtue."

In recent years, scholars have described a third important strand of American political culture, derived from Puritan or dissenting Protestant sources.[113] Although David Hall is surely correct that this tradition is "far from being a logical and tightly ordered system but a movement that wore several different faces at any point in time,"[114] and that it "encompassed a

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[109] *Id.*

[110] *Id.* On racial exclusions in early American understandings of political community, see also GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 (1971); REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968).

[111] *See, e.g.*, MARY BETH NORTON, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800 (1980); Ruth H. Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 SIGNS 37 (1987).

[112] HANNAH FENICHEL PITKIN, FORTUNE IS A WOMAN: GENDER AND POLITICS IN THE THOUGHT OF NICCOLÒ MACHIAVELLI 25 (1984).

[113] *See supra* note 40.

[114] David D. Hall, *On Common Ground: The Coherence of American Puritan Studies*, 44 WM. & MARY Q. 193, 195 (1987).

multitude of voices,"[115] it is possible to identify several common and influential ideas that contributed to particular views of political community.

In its depiction of the individual's relationship to God, the dissenting Protestant tradition encouraged an inclusive view of community.[116] Such cultural and theological strands emphasized the idea that everyone was called to serve God and that individuals' had a "direct, personal, experiential relationship" to a divine being.[117] Prior to the Great Awakening, as McLoughlin points out, the king, bishops, judges, and governors interpreted the will of God and lay people deferred to them.[118] After the Great Awakening, however, ordinary people considered themselves better able than any elite to interpret the will of God and expected elected officials to act as their deputies under God.[119] Thus, "[t]he channel of authority no longer flowed from God to the rulers to the people but from God to the people to their elected representatives."[120] Mediators, as McLoughlin suggests, were no longer needed as individuals took responsibility for their relationship with God.[121] Both the church and the state would serve the self-defined needs of people, needs defined in response to individual interpretations of divine will.[122] The collective will of the people increasingly came to be viewed as the will of God.[123] Finally, this strand's emphasis on hard work, Christian virtue, and frugality suggested that success would come to all who worked diligently and led a simple and virtuous life.[124]

This last idea is especially significant, as it helps to map the boundaries of community. Although all were called to serve God and everyone had the capacity to form a direct and personal relationship to God, not all were "worthy." Like republicanism, Protestant views of "virtue" had important exclusionary effects. Indeed, after the Revolution, many Americans believed that God judged them favorably because of their personal traits and relationships.[125] As several scholars have shown, American identity is tied to the widely embraced notion among Americans that the United

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[115] *Id.* at 199.

[116] *See supra* note 40.

[117] McLoughlin, *supra* note 40, at 199.

[118] *Id.* at 200.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] MORGAN, *supra* note 40, at 97-98.

[125] *See* RUTH H. BLOCH, VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT, 1756-1800 (1985); ERNEST LEE TUVESON, REDEEMER NATION: THE IDEA OF AMERICA'S MILLENNIAL ROLE (1968).

States is "God's last best hope for the world," that it is a "shining city on a hill," that it is "God's new Israel," complete with a "chosen people" on a mission to preserve and extend a community where "sacred liberty" flourishes.[126] Anything or anyone that threatens the mission is unwelcome and should be excluded from membership.

During colonial and revolutionary times, clergy sought to contribute to the mission of the "redeemer nation" through sermons that argued that virtuous behavior would be rewarded by the eventual coming of the millennium. To move further to this day, "the chosen people must be on guard, and must take action to destroy without mercy the corruption the Enemy tries to introduce."[127] Special sermons, called jeremiads, warned about a loss of virtue, about infiltration and contamination by forces of corruption, and divine displeasure accompanying both.[128] One typical rhetorical strategy in these jeremiads, as Bloch shows, employed the metaphor of fire as a sign of decline.[129] Speaking of the impending crisis, the apocalypse, as "the coming conflagration," conditions of decline were framed as "blazing stars" or "comets," imagery that "inspired thoughts of the terrors of the approaching conflagration."[130] This rhetoric overlapped republican warnings of corruption and vice and helped shape a national identity and construct a political community based on righteousness and Christian virtue. Hatch writes these "[v]ivid perceptions of an external foe confirmed their sense of identity as God's elect people living in the end times and linked their lives to the cosmic war between good and evil."[131] More recently, Morone suggests that in the "hellfire nation" of the United States, "[v]isions of vice and virtue define the American community. They designate the worthy 'us' . . . and finger the dangerous 'them.'"[132] According to Morone, the stark contrast between a virtuous "us" and a corrupt and dangerous "them" forms a central element in a narrative that runs throughout American history. "The struggle to curb dangerous others," he writes, "shapes American political thought and culture in every era."[133]

Thus, each of three major strands of American political culture—liberalism, republicanism, and Protestantism—constitute dual and contradictory political communities that are both inclusive and exclusionary. The inclusive community reflects liberal, democratic values

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[126] *See, e.g.*, BERCOVITCH, *supra* note 40; BLOCH, *supra* note 125; HATCH, *supra* note 40; Miller, *supra* note 40. *See also* TUVESON, *supra* note 125, at 137-186.

[127] TUVESON, *supra* note 125, at 132.

[128] BLOCH, *supra* note 125, at 64.

[129] *Id.* at 65-66.

[130] *Id.* at 63, 66.

[131] HATCH, *supra* note 40, at 40.

[132] MORONE, *supra* note 40, at 4-5.

[133] *Id.* at 182.

and principles, such as liberty, equal rights, individualism, government by consent, and active and vibrant political participation by all. The exclusive community highlights concerns about "contamination" and "infiltration" by those without a "properly socialized rationality," and those lacking public or Christian virtue. Historically, concerns about "contamination" often surface, as Priscilla Wald suggests, as fears of contagious diseases carried across the border into the territory of the nation by "undesirable" immigrant groups.[134] Keith Fitzgerald puts it like this:

> Disease was not only a public health problem, it was an indication, even a metaphor, for the foreign amorality and impurity that undesirable immigration signified. The impure, the unclean, the idiotic, the brown-skinned, the coerced—these were the signs that emerged from immigration debates that allowed "us" to distinguish Americans from "them."[135]

Moreover, narratives of a purely liberal, democratic society composed of virtuous individuals that must be vigilant against "infiltration" underlie the strong tendency throughout American history to explain undesirable social phenomena and change as a product of conspiracy.[136]

V. FREE SPEECH IN AMERICAN POLITICAL CULTURE(S)

Scholars and jurists writing about the purposes of the free speech guarantee in the Constitution's First Amendment invariably emphasize its connection to the liberal, democratic, inclusive vision of political community.[137] Indeed, free speech, especially when it includes political

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[134] Priscilla Wald, *Imagined Immunities*, *in* CULTURAL STUDIES & POLITICAL THEORY, *supra* note 1, at 189, 189-90. *See also* ALAN M. KRAUT, SILENT TRAVELERS: GERMS, GENES, AND THE "IMMIGRANT MENACE" (1994); Nancy Tomes, THE GOSPEL OF GERMS: MEN, WOMEN AND THE MICROBE IN AMERICAN LIFE (1998).

[135] KEITH FITZGERALD, THE FACE OF THE NATION: IMMIGRATION, THE STATE, AND THE NATIONAL IDENTITY 123 (1996).

[136] Scholarly works on conspiracy in American culture are numerous. The classic work is RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS (1965). *See also* DAVID BRION DAVIS, THE FEAR OF CONSPIRACY: IMAGES OF UN-AMERICAN SUBVERSION FROM THE REVOLUTION TO THE PRESENT (1971); JODI DEAN, ALIENS IN AMERICA: CONSPIRACY CULTURES FROM OUTERSPACE TO CYBERSPACE (1998); MARK FENSTER, CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE (1999); Gordon S. Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 WM. & MARY Q. 401 (1982).

[137] *See, e.g.*, ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988); ALEXANDER MEIKLEJOHN, POLITICAL FREEEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF

content, is seen as a fundamental element in liberal democratic societies. Free expression is considered an individual right, and protecting it from governmental restriction permits individuals to fully develop their intellectual faculties, achieving self-fulfillment and self-actualization. As important for many, free speech serves as a functional requirement of democracy. Free expression is a necessary condition for the electorate to form judgments about policies and politics that are completely informed, for individuals to usefully participate in the public sphere, and for truth to emerge from such participation.

Mark Graber suggests that there are actually two distinct free speech "traditions" that dominate at different historical moments.[138] Prior to World War I, a "conservative libertarian" tradition emphasized free speech as an individual right that, much like property rights, could not be violated unless closely linked to criminal activity.[139] After the War, progressives developed an alternative "civil libertarian" tradition shaped by philosophical pragmatism and sociological jurisprudence, suggesting that the First Amendment protected a social interest in free expression that must be balanced against other interests that may conflict.[140] This view of expression rights, according to Graber, influenced Zachariah Chafee's advocacy of the clear and present danger doctrine, which ultimately influenced Justices Holmes and Brandeis to embrace it.[141]

Graber highlights how progressives like Jane Addams, John Dewey, and Louis Brandeis saw free speech as integrally connected to inclusive visions of political community, promoting cultural pluralism at a time of rapid immigration by stressing a social interest in full, free, and unfettered public debate.[142] Brandeis, for example, wrote that the path of progress lies "in differentiation, not in uniformity."[143] He linked this principle to free speech, arguing that "[d]ifferences in opinions . . . are not only natural but desirable where the question is difficult; for only through such differences do we secure the light and fuller understanding which are necessary to a wise decision."[144] The progressives, according to Graber, did not explicitly discuss expression rights of the foreign born, but "they maintained that communities would benefit from the presence of persons with different cultural attachments."[145] He quotes John Dewey:

AMERICA (1999); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

[138] GRABER, *supra* note 137, at 8.

[139] *Id.*

[140] *Id.* at 9.

[141] *Id.* at 4.

[142] *Id.* at 87-95.

[143] *Id.* at 90.

[144] *Id.*

[145] *Id.* at 95.

"The problem . . . is not to reduce [the foreign born] to an anonymous and drilled homogeneity, but to see to it that all get from one another the best that each strain has to offer from its own tradition and culture."[146]   In a similar way, Jane Addams argued that "democratic government . . . should include the experiences and hopes of all the varied people among us."[147] Graber nicely summarizes the significance of these views: "Implicit in these claims was the premise that immigrants should be permitted and encouraged to express their distinctive political and cultural commitments. Americans, pluralists recognized, would only realize the benefits of heterogeneity if these diverse perspectives were made public."[148]   "[C]ivil libertarians saw immigrant speech," writes Graber, "as a means for revitalizing or strengthening native institutions."[149]

The United States Supreme Court did not hear any cases involving direct restrictions of dissident political speech until 1919, when it considered cases emerging from resistance to World War I.[150]   The Court did hear a case that raised questions about free expression in the context of immigration at the turn of the century, in *United States ex rel. John Turner v. Williams*.[151]   In this case, John Turner, a British citizen, was deported under the authority of the Alien Immigration Act of 1903, after he was found to be an "alien anarchist."[152]   The Act employed to deport him provided for the exclusion of "aliens," including

> [a]ll idiots, insane persons . . . paupers . . . persons afflicted with a loathsome or with a dangerous contagious disease; persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude; polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all governments or of all forms of law, or the assassination of public officials.[153]

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[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at 96-97.

[150] *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919). My analysis is informed by my previous work on free speech doctrine. Specifically, I explored connections between speech doctrine and findings in social science research regarding tolerance for dissent. *See* Kessler, *Legal Discourse*, *supra* note 24. I use some of the analyses from that work in this article to address the issue of how speech doctrine intersects with multiple strands of political culture to help constitute a cultural politics of spatial location.

[151] United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).

[152] *Id.* at 281.

[153] Alien Immigration Act of 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (1903).

Turner argued that the Act, by deporting him for being an "alien" who held certain political beliefs, violated the First Amendment's protection of free expression.[154]   The Court, however, upheld the law, ruling that Congress had the power to exclude aliens, to prescribe the terms and conditions of entry to the country, and to establish regulations for deportation.[155]   Justice Fuller, writing for the Court, made it clear that free expression was valuable, but was not the issue for Turner:

> We are not to be understood as depreciating the vital importance of freedom of speech . . . or as suggesting limitations on the spirit of liberty . . . but this case does not involve those considerations. The flaming brand which guards the realm where no human government is needed still bars the entrance; and as long as human governments endure they cannot be denied the power of self preservation.[156]

Fuller and the Court in this opinion, then, are careful to emphasize free expression's significance in the United States, while simultaneously suggesting that "aliens" and "anarchists" are threats to "self preservation."[157]   The political community, the Court instructs, values diverse peoples and ideas, but both must be "worthy" of membership and not constitute a "threat" to America and American values.

This theme runs through many of the Court's post-World War I decisions involving more direct restrictions on political expression by political dissidents.   In response to war resistance and anti-capitalist expression, Congress passed laws against "sedition" and "espionage."[158] These Acts were then applied against socialists, communists, anarchists, leftist labor organizations, and war resisters in a series of cases decided by the Court between 1919 and 1927.[159]   In these cases, the Court develops the "clear and present danger doctrine" to assess the legality of arrests and convictions for political expression.[160]

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[154] *Turner*, 194 U.S. at 289.

[155] *Id.* at 289-90.

[156] *Id.* at 294.

[157] *Id.*

[158] Espionage Act of 1917, ch. 30, 40 Stat. 217 (repealed by Act of June 25, 1948, ch. 645, 62 Stat. 683, 864); Sedition Act of 1918, ch. 75, 40 Stat. 553 (repealed by Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359, 1360).

[159] Fiske v. Kansas, 274 U.S. 380 (1927); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Gilbert v. Minnesota, 254 U.S. 325 (1920); Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[160] The Court uses this doctrine in some majority and in some dissenting opinions. *See, e.g.*, *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting); *Schenck*, 249 U.S. at 52. Some members of the Court

In the cases decided during this period, the Court consistently affirms convictions of socialists, communists, labor leaders and organizers, and war resisters charged with sedition or espionage. However, the decisions themselves offer dual and contradictory ideological strands, one that celebrates free expression as a central value and practice and the other that emphasizes the need to restrict speech to further a social interest in protection from significant societal threats. As the Court first announced in *Schenck v. United States*, the clear and present danger doctrine 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."[161] Although this doctrine was employed by the Court in this case and several others to restrict expression rights, it may be interpreted to mean that expression is so significant that the state may *only* prohibit the most dangerous ideas and expression.[162] This strand is on display in *Gitlow v. New York*, which views free expression as so important that it is incorporated in the Fourteenth Amendment's due process clause to apply against state action.[163] It is also visible in often cited and celebrated opinions by Holmes and Brandeis. For example, in dissent in *Abrams v. United States*, Holmes employed the metaphor of a "marketplace of ideas" to defend the importance of free expression, suggesting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[164] Brandeis, concurring in *Whitney v. California*, suggested that free and unfettered political debate would prevent ideas threatening individual liberties from gaining popular acceptance:

> 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 to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech . . .

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rely on the "bad tendency" doctrine, which permits regulation and restriction of political speech that has some "bad tendency," an easier standard for the government to meet. *See, e.g., Gitlow*, 268 U.S. at 671; *Debs*, 249 U.S. at 216. The clear and present danger doctrine is developed further in later decades. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951).

[161] *Schenck*, 249 U.S. at 52.

[162] The general approach is defended by CHAFEE, *supra* note 137; KALVEN, *supra* note 137; and MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW (1966). Some liberals criticize the doctrine for permitting only innocuous expression. *See, e.g.*, EMERSON, *supra* note 137; GRABER, *supra* note 137; MEIKLEJOHN, *supra* note 137. Some conservatives criticize the doctrine as too permissive. *See, e.g.*, WALTER BERNS, FREEDOM, VIRTUE & THE FIRST AMENDMENT (1957).

[163] *Gitlow*, 268 U.S. at 666.

[164] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

> discussion would be futile; that with [it], discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.[165]

The second strand in evidence in these opinions intersects and overlaps with the exclusionary strand of American political culture, portraying the "disseminat[ors] of noxious doctrine," as possessing attributes mentioned in the doctrine. In particular, they are "dangerous" and engage in "evil" that Congress may prevent. In *Abrams* and *Frohwerk v. United States*,[166] opinions justifying restrictions on political expression, the Court elaborates and extends the doctrine, highlighting the fact that the defendants and their ideas are "alien," "foreign," and implying that both may be "un-American." In *Abrams*, for example, Justice Clarke emphasizes the fact that defendant alien anarchists had lived in the United States for periods of time "varying from five to ten years, but none of them had applied for naturalization."[167] Clarke went on to write that three of the five defendants testified that they were "'rebels, 'revolutionists,' '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 derisively referred to as "capitalistic."[168] A fourth defendant, wrote Clarke, was a "socialist."[169] In *Whitney v. California*, the Court found that mere membership in an organization with a "dangerous" platform, one that "was in full harmony with the 'revolutionary working parties of all countries'" and whose purpose it was "to create a unified revolutionary working class movement in America," was enough to contaminate otherwise "worthy" people.[170]

The legal construction of dissidents as "dangerous" and "evil threats" to the purity of a liberal, democratic America is furthered through the use throughout these opinions of various metaphors. In *Frohwerk*, Holmes links antiwar articles written by a "foreigner" with "dangerous" behavior, i.e., inciting murder."[171] Holmes writes: "We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[172] In dissent in *Abrams*, Holmes compares "speech that produces or is intended to produce a clear and imminent

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[165] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
[166] Frohwerk v. United States, 249 U.S. 204 (1919).
[167] *Abrams*, 250 U.S. at 617.
[168] *Id.* at 617-18.
[169] *Id.*
[170] *Whitney*, 274 U.S. at 363.
[171] *Frohwerk*, 249 U.S. at 206.
[172] *Id.*

danger" to "persuasion to murder."[173]   In several cases, the Court draws parallels between expression deemed unacceptable and an historical symbol of cultural decline—the destructive potential of fire. In *Frohwerk*, Holmes raised the possibility that under certain circumstances, "a little breath" on the publications under examination "would be enough to kindle a flame."[174]   And in *Gitlow*, the case in which the speech clause is incorporated in the Fourteenth Amendment because expression is so fundamental to the Court, the opinion appears to make reference to the apocalypse, arguing that "[a] single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration."[175]

Thus, one strand of free speech discourse intersects with an exclusionary strand of American political culture and helps constitute a public sphere composed of a "mainstream" and "margins." The "mainstream" is reserved for "acceptable" expression used to elaborate "American" ideas and arguments. The "margins' or "fringes" are reserved for "unworthy" people and ideas, individuals, groups, and ideas that are "foreign," "alien," "dangerous," and "evil." The American "us" are positioned in the "mainstream," in contrast to an un-American, foreign, dangerous "them," located on the fringes.[176] In summarizing many of the Court's early decisions, Justice McKenna, in *Gilbert v. Minnesota*, captures the legal construction of political difference when he comments on "the curious spectacle . . . presented [in these cases] of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States."[177]

Paul Murphy, writing about civil liberties during the progressive era, puts it like this:

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[173] *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

[174] *Frohwerk*, 249 U.S. at 209.

[175] Gitlow v. New York, 268 U.S. 652, 669 (1925).

[176] There is a growing scholarly literature on the legal construction of various minority groups as "other." *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (race); CAROL SMART, FEMINISM AND THE POWER OF LAW (1989) (gender); Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997) (aliens); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997) (Asian-Americans); Rhonda Copelon, *A Crime Not Fit to be Named: Sex, Lies, and the Constitution*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 177, (David Kairys ed., rev. ed. 1990); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999) (sexuality). Concepts from free speech doctrine—"dangerous," "evil," "foreign," and "alien"—overlap and intersect with other cultural discourses to construct a political "other" spatially located on the margins.

[177] Gilbert v. Minnesota, 254 U.S. 325, 332 (1920) (citing Schaefer v. United States, 251 U.S. 466, 477 (1920)).

> Liberty . . . was a condition conferred by the community at its discretion, usually only to "good people" who had earned their prerogatives. Blacks, Indians, Orientals, aliens—particularly those from Eastern Europe—women, or people espousing radical . . . economic and political theories, clearly were not ready for the full utilization of their constitutional liberties.[178]

Murphy goes on to emphasize the significance of class, gender, and ethnic status in determining "worthiness." The recent immigrant," he suggests,

> who had worked hard, saved his money, and acquired a business, property, and status with the society was—assuming he was a WASP male—deemed ready for its [civil liberties]. But those who had not gone this route . . . clearly did not deserve those rewards. Their very impoverishment demonstrated their lack of moral character and sense of responsibility. Civil liberties were a fringe benefit for the successful, gained with the acquisition of power and status.[179]

American political cultures and the dual strands of free speech discourse work together to map two contradictory views of political community—one that is inclusive and one that is exclusionary. Components of the inclusive strand have been employed throughout American history by progressive movements to push for egalitarian social and political reform. The exclusionary strand, on the other hand, provides the conceptual apparatus for exclusionary politics that have taken various forms throughout American history. Movements based on white supremacy, sexism, classism, heteronormativity, anti-Semitism, and xenophobia have used the central terms of "danger," "evil," "foreign," "un-American," and "alien" to normalize their own attributes, placing themselves in the "center" of a public sphere, and to marginalize those deemed "other," those who threaten to infiltrate and contaminate the political community.[180] The same has been true through several periods of hysterical opposition to leftist political movements—socialists, anarchists,

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[178] PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 40-41 (1979).

[179] *Id.* at 44.

[180] *See, e.g.*, ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976 (rev. ed. 2001); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (1963); WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (1963); Thomas A. Lawrence, *Eclipse of Liberty: Civil Liberties in the United States During the First World War*, 21 WAYNE L. REV. 33 (1974).

and communists.[181]   Indeed, the clear and present danger doctrine, as it overlaps and intersects with dual strands of American political culture, includes terms that are so malleable that it can be easily adapted to position on the "fringes" whichever groups are currently feared as "dangerous" threats to America.[182]   Ironically, then, a legal doctrine devised in part to further a social interest in cultural diversity[183] contributes to cultural practices that hinder the achievement of that goal.

VI. DISCUSSION AND CONCLUSIONS

The map of political community constituted by legal doctrine and American political culture that highlights membership for the "worthy" and concerns about "dangerous" threats to the community's integrity has produced a cultural politics of spatial location whereby groups compete for central geographical positions in a public sphere divided into a "mainstream" and "fringes." James Davison Hunter describes the terms employed in such political-cultural struggle as the "discourse of adversaries," a discourse characterized by opposing sides portraying each other as "extremists."[184]   "[E]ach side," he writes, "implicitly maintains that the other is a minority removed from the mainstream of American life and that they, instead, represent the interests of the majority."[185]   Each labels the opposition as "the enemy,"[186] "an extremist faction that is marginal to the mainstream of American life,"[187] and "an exceedingly dangerous force in American public life."[188]   In constructing the opposition as "marginal," according to Davison, "each side struggles to *monopolize the symbols of legitimacy*. This is seen most clearly in the effort of each side to depict themselves as defenders of the institutions and traditions of American life while depicting the opposition as the foes."[189]

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[181] *See*, *e.g.*, JOHN W. CAUGHEY, IN CLEAR AND PRESENT DANGER: THE CRUCIAL STATE OF OUR FREEDOMS (1958); DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); M. J. HEALE, AMERICAN ANTICOMMUNISM: COMBATING THE ENEMY WITHIN, 1830-1970 (1990).

[182] Norberto Bobbio sees a similar malleability in the use of terms "left" and "right" in politics. "The two concepts 'left' and 'right,'" he writes, "are relative, not absolute. . . . They are not intrinsic qualities of the political universe, but are situated in 'political space.'" He suggests that these terms "are not words which designate immutable meanings, but can signify different things in different times and situations." NORBERTO BOBBIO, LEFT AND RIGHT: THE SIGNIFICANCE OF A POLITICAL DISTINCTION 56 (Allan Cameron trans., 1996).

[183] *See* GRABER, *supra* note 137, at 144-47.

[184] JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 135, 146 (1991).

[185] *Id.* at 146.

[186] *Id.* at 144.

[187] *Id.* at 147.

[188] *Id.* at 150.

[189] *Id.* at 147. *See* MICHAEL PAUL ROGIN, RONALD REAGAN, THE MOVIE AND OTHER EPISODES IN POLITICAL DEMONOLOGY (1987) (examining the ways in which the demonization of political

In a similar way, Robin Tolmach Lakoff characterizes cultural political struggle in the United States as a "fight for the center."[190]   The "mainstream," she argues, is associated with moderate, reasonable, rational, and commonsense views.[191]   These views are distinguishable "from the marked periphery."[192]   Therefore, "whoever can gain the rhetorical center is apt to win the most friends and influence the most people."[193]   Winners and losers in this process are not determined randomly, but are a function of political, social, and economic power. "The group that enters the discourse with the power," she writes, "can augment that power invisibly by invoking its presupposed right to create and define terminology and apply it: *their* values become central and 'moderate,' while others are exiled to the periphery as 'extremists.'" [194]

As Lakoff suggests, powerful groups are particularly advantaged in cultural political struggle.   They may easily invoke the dominant discourses highlighted in this study to solidify their identity through the vilification or demonization of difference.   Sewell refers to this as organizing the meaning of difference, a process producing a "map of the 'culture' . . . that tells people where they and their practices fit in the official scheme of things."[195]   The political consequences of such placements in spatial location are significant—some may speak with authority, "others" are ignored or remain silent.   But, geographical positioning may also be criticized and resisted by those positioned on the "fringe."

Judith Butler's work on the politics of the performative provides a point of departure for thinking about ways in which those positioned on the

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opponents runs throughout the history of the United States). *See also* TOM DE LUCA & JOHN BUELL, LIARS! CHEATERS! EVILDOERS!: DEMONIZATION AND THE END OF CIVIL DEBATE IN AMERICAN POLITICS (2005).

[190] ROBIN TOLMACH LAKOFF, THE LANGUAGE WAR 66 (2000).

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.* Sarah Pralle and Michael McCann provide a good recent example of how the cultural politics of spatial location are practiced throughout other parts of the political system in a study of a Washington state property rights initiative providing compensation for property owners for reductions in land values produced by environmental and other land-use regulations. Sarah Pralle & Michael W. McCann, *New Property Rights Debates: The Dialectics of Naming, Blaming, and Claiming*, *in* LAND IN THE AMERICAN WEST: PRIVATE CLAIMS AND THE COMMON GOOD 53 (William G. Robbins & James C. Foster eds., 2000). Closely examining the rhetorical arguments on both sides of this issue, they show that property rights activists and environmentalists "see their struggle as one of good over evil, of public-minded citizens against selfish special interests, and of outcasts against the mainstream." *Id.* at 60. Activists on each side, they demonstrate, "characterize each other as the 'enemy' needing to be destroyed." *Id.* at 59. "The political discussion over property," they argue, "is not unlike other heated political debates in America, where claimants label their opponents as extreme, irrational, and outside the mainstream." *Id.* at 62.

[195] SEWELL, CONCEPT(S) OF CULTURE, *supra* note 11, at 56.

"margins" may contest their spatial location.[196] For Butler, hegemonic cultural constructions are continually enacted and performed, opening up possibilities for "performances" to be altered in ways that modify or subvert the norms governing their production. Hegemonic constructions, in other words, cannot sustain and reproduce themselves, but rather must be "cited" and used in practice. The necessity of repetition and the indeterminacy of language open a space for "citations" or reiterations that subvert norms they were designed to reinforce. To Butler, "a citation will be at once an interpretation of the norm and an occasion to expose the norm itself as a privileged interpretation."[197]

In her analysis of the issue of hate speech and its possible regulation by the state, Butler draws on work by psychoanalysts Jean Laplanche and Jean-Bertrand Pontalis to suggest that hate speech be thought about as "foreclosure."[198] "[L]anguage constitutes the subject," she writes, "in part through foreclosure, a kind of unofficial censorship . . . ."[199] Such censorship, she argues, is not an explicit act of repression, but rather is enacted "from a preemptive operation of a norm."[200] Foreclosure involves a "rejection of that which remains outside of the symbolic universe of the subject."[201] This use of the term "outside," she suggests, "is the defining limit . . . to a given symbolic universe, one which, were it imported into that universe, would destroy its integrity and coherence."[202] Thus, she concludes, "what is set outside or repudiated from the symbolic universe in question is precisely what binds that universe together *through its exclusion.*"[203] In other words, those discursively positioned on the "margins" through hate speech or more subtle "performances" are thought to possess negative and, indeed, "dangerous" attributes that render them "unworthy" for inclusion in the "mainstream," attributes leading to a "foreclosure" expressed or "performed" in and by spatial positioning, an "unofficial censoring" that "binds" or normalizes those positioned in the "center."

Foreclosure not only "constitutes the subject" and "censors," it also "constitutes the possibility of agency in speech."[204] Arguing against state-centered legal strategies to combat the marginalizing effects of hate speech and pornography, Butler suggests that the harmful effects of foreclosure's censorship may be effectively challenged or contested through

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[196] JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993).
[197] *Id.* at 108.
[198] JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 138 (1997).
[199] *Id.* at 41.
[200] *Id.* at 138.
[201] *Id.* at 179, 180 n.17.
[202] *Id.* at 180 n.17.
[203] *Id.*
[204] *Id.* at 41.

development of oppositional discourses. "There is no opposition to the lines drawn by foreclosure," she argues, "except through the redrawing of those very lines."[205] Thus, she favors efforts aimed at a "restaging and resignifying of offensive utterance[s], deployments of linguistic power that seek at once to expose and counter the offensive exercise of speech."[206] Butler offers the example of the word "queer," a word that historically had marginalizing effects, but which, for some, has come to inspire feelings of solidarity and political opposition. "[R]evaluation of terms such as 'queer,'" she argues, "suggest that speech can be 'returned' to its speaker in a different form, that it can be cited against its originary purposes, and perform a reversal of effects."[207] Moreover, those on the periphery who are both "authorized" and "de-authorized" to speak, should, in Butler's terms, "double speak," demonstrating how presumably universal norms in dominant discourses may have exclusionary effects, ultimately exposing "the promising ambivalence of the norm."[208]

Martin Luther King, Jr. was an especially astute practitioner of these strategies and his *Letter from Birmingham City Jail* in 1963 is a compelling example.[209]   In it, King connects the struggle for civil rights to fundamental American values in inclusive strands of political culture:

> We will reach the goal of freedom in Birmingham and all over the nation because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with the destiny of America. . . . We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands."[210]

King defends himself and the movement that he represents against efforts by critics to place them "out of the mainstream." "You spoke of our activity in Birmingham," he writes, "as extreme. At first I was rather disappointed that fellow clergymen would see my nonviolent efforts as those of the extremist."[211] But, he goes on to write:

> as I continued to think about the matter I gradually gained a bit of satisfaction from being considered an extremist. Was not Jesus an extremist in love. . . . Was not Amos an

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[205] *Id.* at 140.
[206] *Id.* at 13.
[207] *Id.* at 14.
[208] *Id.* at 91 (emphasis omitted).
[209] MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289 (James Melvin Washington ed., 1986).
[210] *Id.* at 301.
[211] *Id.* at 296.

> extremist for justice. . . . Was not Abraham Lincoln an extremist—"This nation cannot survive half slave and half free." Was not Thomas Jefferson an extremist—"We hold these truths to be self-evident, that all men are created equal."[212]

Thus, King openly acknowledges efforts by opponents to marginalize civil rights activists, but he effectively "returns" such efforts by associating civil rights advocates and African-Americans with "mainstream" virtues and values and with religious and patriotic heroes:

> One day the South will know that when these disinherited children of God sat down at lunch counters they were in reality standing up for the best in the American dream and the most sacred values in our Judeo-Christian heritage, and thusly, carrying our whole nation back to those great wells of democracy which were dug deep by the Founding Fathers in the formulation of the Constitution and the Declaration of Independence.[213]

Such contestation over spatial location from the "margins" is also evidenced in the quotation from Paul Weyrich beginning this article. Weyrich is distraught because groups that for years have been marginalized through "foreclosure" have been able to resist in recent years, at least to some extent. Those on the "fringes" have effectively "cited" aspects of inclusive strands of political culture and have highlighted the racial and sexual implications of their opponents' normalizing practices. Weyrich responds by drawing parallels between what he labels "political correctness" and a term that has had an active life in processes of cultural marginalization, "Marxism." He goes on to argue that "cultural Marxism," an "alien" ideology, flourishes in contemporary American life, producing the equivalent of "corruption" and "decay," to use republican terms, in major American institutions. Weyrich, in this letter, is clearly seeking to use terms from dominant discourses to reposition the "enemy"—the "politically correct," the "cultural Marxists," and their multicultural allies—back on the "fringe" where they belong.

In the short term, it is clearly useful for groups historically located on the public sphere's periphery to work from the margins to contest their spatial positioning, challenge what is considered as normative, and, in general, seek to further their substantive goals. Women, people of color, the poor, gays and lesbians, and others historically on the periphery have won a measure of inclusion through struggles that often include

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[212] *Id.* at 297-98.
[213] *Id.* at 302.

"performances" of "resignification" and arguments based on "citations" to values and principles from inclusive strands of American political culture.

The problem with relying solely on such strategies, however, is that discursive struggles take place on a political terrain characterized by unequal power and resources. As Orville Lee suggests, capacities to engage in the politics of the performative, to utilize strategies of "resignification" and "citationality," vary widely. "[T]he capacity to realize . . . agency in language," he writes, "is not equally distributed in American society . . ."[214] Nor are the risks of hateful and marginalizing expression distributed equally across society. Thus, Lee, along with several critical race theorists, suggests an important role for law in cultural politics. Critical race theorists argue that racist hate speech should be considered an exception to First Amendment protection and/or that tort actions may be brought seeking damages to harmed parties.[215] Lee extends this logic, suggesting that more subtle expressions that have marginalizing effects are grounds for libel actions.[216] Each of these possibilities has a potential to reposition groups in the public sphere by defining illiberal and undemocratic "performances" as "marginal," protecting those historically on the periphery from further marginalization, and expanding the public sphere to embrace those historically on the margin. In essence, these proposals seek to position overt instances of hate expression, along with more subtle "performances" that serve to marginalize, on the same side of the legally drawn line with expression that constitutes a clear and present danger. Associating such practices as racism, sexism, and homophobia with "dangerous" and "evil" ideas, thus, places into cultural play questions about the acceptability and normative status of exclusionary practices.[217]

While legal strategies hold some promise in the short term to alter spatial positioning in the public sphere, in the longer term it is important to move beyond a cultural politics that relies on a spatially divided public

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[214] Orville Lee, *Legal Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society*, 26 LAW & SOC. INQUIRY 847, 869 (2001).

[215] *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

[216] Lee, *supra* note 214.

[217] Judith Butler raises important questions regarding the limitations and dangers of relying on legal strategies to combat hate speech and harmful effects of pornography. BUTLER, *supra* note 198, at 43-69. Among other things, she suggests that such strategies shift attention from harms done by the state to harm done by citizens and other non-state institutions. *Id.* at 48. In particular, legal strategies shift attention away from the ways in which juridical power itself inflicts pain through language and suggest that legal institutions are neutral instruments of law enforcement. *Id.* All of this, according to Butler, suspends a critical understanding of state power. *Id.* Moreover, emphasizing legal remedies has potentially significant practical, political effects, as "the meaning of political opposition runs the risk of being reduced to the act of prosecution." *Id.* at 50. Butler does acknowledge, however, that using law and legal institutions may be appropriate under certain circumstances: "This is not to say that subjects ought not to be prosecuted for their injurious speech; I think that there are probably occasions when they should." *Id.* But she remains highly skeptical of legal strategies, as they either presume the sovereignty of the speaking subject or are grounded in universalist premises that she rejects. *Id.* at 49.

sphere toward more egalitarian, more inclusive, and more democratic ways to think about political space, public spheres, political community, and cultural politics. Rather than repositioning subjects in a spatially divided public sphere we might expand political spaces for public contestation by reconceiving the specific configuration of lines forming the exclusionary borders. New ways of conceptualizing such matters promise to help constitute new practices that transcend the mainstream/margin construction altogether, that displace the cultural politics of spatial location, and that maximize political inclusion for all.

Iris Marion Young's work on "communicative democracy" seeks to develop deliberative democratic practices that respond to some of the problems of cultural politics described in this article.[218] Young suggests that much contemporary work on deliberative forms of democracy fails to accommodate difference because it assumes that all discussion must be oriented toward a "common good."[219] For Young, "[d]emocratic discussion and decision-making is better theorized as a process in which differentiated social groups should attend to the particular situation of others and be willing to work out just solutions to their conflicts and collective problems from across their situated positions."[220] Including voices of those traditionally on the periphery expressing diverse interests from their "situated positions" moves us closer to a truly democratic politics, one that "can both pluralize and relativize hegemonic discourses" and produce policy results based upon more systematic and comprehensive social knowledges.[221]

Young also criticizes theories of deliberative democracy that are based on norms of rational argument.[222] Such norms, she argues, privilege certain forms of expression and, thus, have exclusionary consequences.[223] Indeed, rationality norms reinforce the mainstream/margin construction in other discourses. Those who are "irrational" are "unworthy," incapable of full political participation. Young puts it like this:

> Ideas of deliberation, reasonableness, or civility are often used to locate some people as temperate and to label as 'extreme' others who use more demonstrative and disruptive means. An opposition between 'moderate' and 'extreme' often appears as a description of views expressed, moreover, and not merely their manner of expression. In this construction, orderly deliberation stays

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[218] YOUNG, *supra* note 36.

[219] *Id.* at 7.

[220] *Id.*

[221] *Id.*

[222] *Id.* at 47.

[223] *Id.*

> within a certain 'moderate' range of assumptions, alternatives, or forms of expression. Those who question those assumptions or the range of alternatives dominant discourse offers . . . are labelled 'extreme.' The label suggests that the people who hold those views are unreasonable, and excludes their views from consideration . . . .[224]

Young thus challenges conventional rationality norms as sources of privilege and suggests alternative, more egalitarian forms of communication to be used in political deliberation.[225]

In general, Young encourages democratic practices that work against processes of normalization that are so much a part of the cultural politics of spatial location, and toward what she calls "engaged struggle" among relatively equal, though differentiated, social groups.[226] A reconstructed democratic practice, she writes, is "aimed at calling attention to the unreasonableness of others—their domination over the terms of debate, their acts of exclusion of some people or issues from consideration, their use of their power to cut off debate, their reliance on stereotypes and mere derision."[227] She quotes Chantal Mouffe, who argues that true democracy

> is based on a distinction between 'enemy' and 'adversary.' It requires that, within the context of the political community, the opponent should be considered not as an enemy to be destroyed, but as an adversary whose existence is legitimate and must be tolerated. We will fight against his ideas but we will not question his right to defend them.[228]

Transforming "enemies" into "adversaries" that participate in "engaged struggle" in an expanded public sphere will require significant modifications in the "cultural maps" described in this article. A public sphere that is spatially divided forces those in the "center" to demonize "others" as "enemies" in order to maintain their position as the normative subjects that they have become. The space "outside" the boundary line has constitutive properties that affect the strategies of those located "inside," while the "inside" space simultaneously constitutes the "outside" as "other," as "enemy," and shapes its strategies and tactics. Working for change within the spatially divided public spaces described in this article

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[224] *Id.*

[225] These forms of communication include greetings, rhetoric, and narrative. *Id.* at 7, 57-77.

[226] *See id.* at 50.

[227] *Id.* at 49.

[228] *Id.* (quoting CHANTAL MOUFFE, THE RETURN OF THE POLITICAL 4 (1993)).

and engaging in a symbolic struggle for spatial positioning, therefore, ultimately will not produce a more democratic politics of "engaged struggle," no matter who is winning the symbolic, territorial war of position. Thus, to move closer to a more egalitarian democratic practice we must struggle against these (geo)cultural constructions, conducting new "performances" that seek to transgress the lines constructing "center" and "periphery," performances that envision expanded, inclusive public spaces where all may participate.[229]

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[229] I employ the term "transgress" here as Foucault does, a use related to his interest in transforming spatial representations. Foucault characterizes "transgression" as "an action which involves the limit, that narrow zone of a line where it displays the flash of its passage, but perhaps also its entire trajectory, even its origin; it is likely that transgression has its entire space in the line it crosses." MICHEL FOUCAULT, *A Preface to Transgression*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 29, 33-34 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977). According to Foucault, "transgression incessantly crosses and recrosses a line which closes up behind it in a wave of extremely short duration, and thus it is made to return once more right to the horizon of the uncrossable." *Id.* at 34. Clifford summarizes Foucault's use of "transgression" as follows: "That which is transgressed is thus always a limit, a line, a boundary which circumscribes, which delimits a space, an order, a mode of thinking, a way of being, and beyond which it is forbidden to go." Michael R. Clifford, *Crossing (out) the Boundary: Foucault and Derrida on Transgressing Transgression*, 31 PHILOS. TODAY 223, 226 (1987).

　　Foucault suggests that transgression and the boundaries it seeks to cross "depend on each other" in ways that help clarify what is subject to criticism and in need of transformation. FOUCAULT, *supra* at 36. He compares transgression at one point to

> a flash of lightning in the night which . . . gives a dense and black intensity to the night it denies, which lights up the night from the inside, from top to bottom, and yet owes to the dark the stark clarity of its manifestation, its harrowing and poised singularity; the flash loses itself in this space it marks with its sovereignty and becomes silent now that is has given a name to obscurity.

Id. at 35. In its efforts to "cross out . . . the line it effaces," *Id.*, transgression seeks "an affirmation of division; but only insofar as division is not understood to mean a cutting gesture, or the establishment of a separation or the measuring of a distance, only retaining that in it which may designate the existence of difference." *Id.* at 36. Thus, for Foucault, transgression is an "affirmation of difference," a "freeing of difference," a "liberation of difference," which "requires thought without contradiction, without dialectics, without negation; thought that accepts divergence; affirmative thought whose instrument is disjunction; thought of the multiple—of the nomadic and dispersed multiplicity that is not limited or confined by the constraints of similarity." MICHEL FOUCAULT, *Theatrum Philosophicum*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 165, 185 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977). Foucault highlights what he refers to as "[t]he most tenacious subjection of difference . . . maintained by categories. . . . They suppress the anarchy of difference, divide differences into zones, delimit their rights, and prescribe their task of specification with respect to individual beings." *Id.* at 186. "Difference can only be liberated," writes Foucault, "through the invention of an acategorical thought." *Id.*