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Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act

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I. Introduction

The oldest and perhaps the most basic conception of academic freedom inheres in the notion that educational institutions, acting through their constituent faculties, have the right to determine their own teaching and research agenda.[1] This conception of academic freedom does not deny that society, whether in the guise of alumni, private benefactors, an appointed board of trustees, the state, or some other outside force, exerts considerable influence over institutional choice. Institutional autonomy is never absolute. The denizens of the ivory tower—particularly its administrators—are likely to take many of their cues from their more worldly neighbors as they worry about attracting the best possible students, paying the rent, and gaining prestige. Carrots, whether endowments to establish schools of journalism or veterinary science, grants to discover new methods of petroleum recovery, or expectations of tenure or a Nobel Prize, seldom are refused. Sticks, whether they are wielded by legislatures, private donors, or a critical press, frequently draw blood. Curricula ultimately reflect a variety of outside influences, as do the research priorities of departments and individual faculty members.[2]

A. Academic Freedom and the First Amendment

Even in their most pragmatic moments, virtually everyone currently associated with higher education accepts the proposition that the university and its faculty must make the final decisions about what will be taught in the classroom, investigated in the laboratory, and submitted to scholarly journals. As importantly, educators regard the idea that the

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1. *See* J. SEARLE, THE CAMPUS WAR 184-85 (1971).

2. *See* Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEXAS L. REV. 1363, 1374-78 (1988).

state has the right to preempt the decision-making process or engage in academic censorship not only as a fundamental betrayal of academic freedom, but also as a fundamental denial of the expressive freedoms guaranteed by the first amendment. With roots in the distant past, principles of academic autonomy have ripened and become institutionalized over the last century and now are regarded as virtual prerequisites to serious academic inquiry in a university setting.[3] The idea that individual scholars employed by state universities have a constitutionally protected right to such inquiry followed inexorably from the federal courts' discovery of the first amendment in 1918,[4] its application since 1925 to the actions of state government,[5] including those of the trustees and administrators of public colleges and universities,[6] and the abolition in 1965 of the "right-privilege" distinction,[7] which formerly shielded many official actions from judicial review.

No constitutional principle explicitly protects all the claims for institutional or personal autonomy that are encompassed in the most general elaboration of "academic freedom."[8] There is authority, however, to

3. *See, e.g.*, R. MACIVER, ACADEMIC FREEDOM IN OUR TIME 75-76 (1955):

> Implicit in the [limitation] on the direct activity of the governing board is a broader principle, that of autonomy of the faculty in the area of its own special competence. The mode of instruction, the direction of research, the laying out of the curriculum, the content of courses, the assessment of student performance, and the determination of admission and degree requirements are matters properly belonging to the particular departments, to particular faculties or schools within the institution, and to the teaching body as a whole.

4. "[T]he Court did not begin its remarkable development of first amendment doctrine until it considered the cases . . . arising under the Espionage Act of 1917 (Schenck [v. United States, 249 U.S. 47 (1919)] and Debs [v. United States, 249 U.S. 211 (1919)]) and the more sweeping 1918 amendments to the Act (Abrams [v. United States, 250 U.S. 616 (1919)])." W. LOCKHART, Y. KAMISAR & J. CHOPER, THE AMERICAN CONSTITUTION: CASES AND MATERIALS 385 (5th ed. 1981).

5. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (finding freedom of expression under the first amendment as "among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment").

6. *See* Perry v. Sindermann, 408 U.S. 593, 598 (1972) (allowing a challenge on first amendment grounds of an administrative decision not to renew teacher contracts); Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (same).

7. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

8. It is not clear how one could formulate any constitutional doctrine that would be sufficiently general to afford protection to all academic interests, yet specific enough to aid in the adjudication of claims involving teachers, college administrators, and perhaps even students, all claiming the benefits of academic freedom in a wide range of in-class and out-of-class situations. Nevertheless, the question of whether the Constitution should afford general protection to the statements and acts of those involved in the academic enterprise has been the subject of considerable discussion over the last 35 years. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 610-12 (1970) (suggesting that academic freedom should be recognized as an independent constitutional right); R. KIRK, ACADEMIC FREEDOM: AN ESSAY IN DEFINITION 5 (1955) (asserting that if a professor appeals to the first amendment, she appeals to "statutory freedom"—a national right—and not academic freedom); Boudin, *Academic Freedom: Shall We Look to the Court?*, in REGULATING THE INTELLECTUALS: PERSPECTIVES ON ACADEMIC FREEDOM IN THE 1980'S, at 181, 181-88 (C. Kaplan & E. Schrecker eds. 1983) [hereinafter REGULATING THE INTELLECTUALS] (stating that

support Professor Van Alstyne's contention[9] that the Constitution protects various expressive and associational activities that clearly are related to the university's teaching and research mission.[10] In this limited sense, "academic freedom is itself a distinct and important subset of First Amendment civil liberty."[11]

Under this view of the first amendment, professors, in their hours away from the classroom, the laboratory, and the library, share all the expressive and associational rights that belong to the population as a whole. On their own time, they have the right to read "dirty books" or look at "dirty movies" in the privacy of their own homes,[12] to belong to radical political parties and participate in party activities,[13] and, with some restrictions,[14] to enjoy the rights that other citizens possess to comment on matters of public interest,[15] even if those comments are critical and the professors direct them at their own institutions. Yet the Supreme Court may have indicated a willingness to extend additional protections to academics performing their professional duties. The Court has noted frequently that when government constraints threaten the independence of academic discourse, a strong, though not irrebuttable, presumption arises that such constraints are unconstitutional.[16]

academic freedom should become a judicially created constitutional right like the right to privacy); Murphy, *Academic Freedom—An Emerging Constitutional Right*, in ACADEMIC FREEDOM 17, 17-56 (H. Baade ed. 1964) (discussing academic freedom in the context of teachers' rights to be free from unconstitutional termination of employment); Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 59-85 (E. Pincoffs ed. 1972) (suggesting that courts best defend academic and nonacademic civil liberties by recognizing a difference between academic freedom and the universal civil liberty of political expression).

9. Van Alstyne, *supra* note 8, at 64-65.

10. *See, e.g.*, Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1979) (holding that a professor's dismissal for privately expressed criticism of her school's racially discriminatory policies violated the first amendment); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977) (holding that a borderline candidate for tenure should not have the tenure decision resolved against him because of constitutionally protected conduct); Slochower v. Board of Educ., 350 U.S. 551, 558 (1956) (holding unconstitutional the firing of a professor—an alleged member of the Communist Party—for invoking the privilege against self-incrimination).

11. Van Alstyne, *supra* note 8, at 64.

12. *See* Stanley v. Georgia, 394 U.S. 557, 564-65 (1969) ("[The constitutional right] to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society.").

13. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

14. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 162 (1974) (upholding a federal statute that proscribed public speech by federal employees that "improperly damages and impairs the reputation and efficiency of the employing agency").

15. *See* Pickering v. Board of Educ., 391 U.S. 563, 573 (1968).

16. *See* Van Alstyne, *supra* note 8, at 78. Professor Van Alstyne observes:

> Professionally related efforts directed in good faith precisely to fulfill the social directive of the academic profession, that is, to examine received learning and values critically and to report the results without fear of reprisal, will make the case appropriate for the constitutional protection of academic freedom when the absence of these elements might otherwise spell its failure.

Id.

In a series of cases decided in the 1950s and 1960s,[17] the Court, although not always willing to rule in favor of faculty members seeking first amendment protection, began characterizing the university as a unique forum, a specialized "marketplace of ideas" where "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[18] The Court emphasized that "those who guide and train our youth" play a "vital role in a democracy,"[19] and that teachers must be free to instill the critical habits of mind that are central to the American form of government:

> [I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.[20]

If such dicta are to be believed, the "vivid" protection afforded academic discourse places a heavy burden of justification on the government when it seeks to censor or impose ideological restrictions.[21]

This Article addresses concerns about the institutional autonomy of colleges and universities and examines the relationship of academic freedom to the values underlying the first amendment. Focusing generally on the metaphor of the "marketplace of ideas," the Article assesses the significance and persuasiveness of that metaphor in democratic theory and the extent to which the "marketplace model" of the first amendment supports a legal argument that permits institutions of higher learning and their faculties not only to entertain politically controversial ideas, but also to demand special protection from the courts.

The marketplace metaphor has its limits: a state sometimes can successfully limit the protections that an unrestrained marketplace model would provide. When the state seeks to restrict the expression of politically controversial ideas in the universities, it always advances particular justifications and employs particular governmental powers that result implicitly or explicitly in censorship. Before courts will invalidate such censorship, they always assess arguments for a free or open marketplace of ideas within the context of the particular power the state asserts. Courts invariably frame answers to questions involving claims of institu-

17. This series includes Wieman v. Updegraff, 344 U.S. 183 (1952); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Barenblatt v. United States, 360 U.S. 109 (1959); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

18. *Sweezy*, 354 U.S. at 250.

19. *Id.*

20. *Wieman*, 344 U.S. at 195 (Frankfurter, J., concurring).

21. *See, e.g.*, *Sweezy*, 354 U.S. at 250 (concluding that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation").

tional autonomy, academic freedom, and first amendment protection, whatever their abstract appeal, within a specific policy context; seldom will they base such answers exclusively on philosophical principles. Instead, judicial answers generally reflect the historically conditioned responses of the courts to deeply entrenched legislative and executive practices.

Thus, the real test of the argument for unfettered discourse within universities is its ability to overcome, either as a matter of legal fact or through effective intellectual persuasion, specific arguments favoring particular governmental constraints. I have accepted this challenge and focus on an area in which the federal government has long exercised a special role as academic censor: its promulgation and enforcement of legislation designed to keep aliens with ideologically suspect or subversive ideas from entering the United States. Over the last thirty-five years, the government frequently has used such legislation to bar foreigners from lecturing, teaching, and conducting research in the United States.

I argue that such governmental action against aliens offends two conceptions of academic freedom. The first, which is grounded in traditional liberal argnments for individual liberty and rational choice of the sort favored by John Stuart Mill and Alexander Meiklejohn,[22] holds, as Justice Brandeis once suggested, that the ouly appropriate remedy for dangerous ideas "is more speech, not enforced silence."[23] Colleges and universities, as fornms that are organized to promote speech and free discussion, are presumed to be places where the first amendment applies in force. Thus, to restrict the expression of aliens at public institutions, the government must adhere to the same constitutional standards that apply when it seeks to restrict the speech of United States citizens. The second conception of academic freedom, which presumes that the modern western university plays a unique role in the generation, systematization, and transmission of "knowledge" and requires certain conditions of "free inquiry" to accomplish that role, makes a stronger claim: ordinary constitutional standards, if they permit "balancing" the government's interest in social control against the interests of the individuals or institutions adversely affected, must be liberalized to permit the widest possible range of discourse in the university setting. Such liberalization will require courts to tolerate virtually all speech not directly inciting violence—including "alien" or "un-American" speech.[24]

22. For a discussion of the full dimensions of the Mill-Meiklejohn approach, see *infra* notes 154-63 and accompanying text.

23. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

24. For a discussion of the "special" argument for academic freedom, see *infra* subpart I(B), and for its reformulation, see *infra* subpart V(D).

B. *"Universal Rights," Institutional Autonomy, and the Marketplace of Ideas*

The first conception of academic freedom, which is favored by Professor Van Alstyne, actually fails to resolve many issues concerning the liberty of faculty members to conduct their lives or classes in controversial or unconventional ways.[25] Instead, it concerns itself only with "freedom of speech as a universal civil right irrespective of one's vocation,"[26] although its focus is on free speech in the college or university setting, and hence on " 'academic freedom' as an identifiable First Amendment claim, a special subset readily derived from but not simply fungible with freedom-of-speech doctrine in general, or First Amendment doctrine in respect to public employees at large."[27] Nevertheless, the first conception is comprehensive enough to provide a basis for the admission of alien scholars of suspect political backgrounds or views who are invited to American campuses. Thus, I will argue later that the dominant precept of liberal political thought is that the free, open, and rational exchange of viewpoints about intellectual questions and matters of public policy is the bedrock of consensual self-government.[28] If we accept further that "[t]he classroom is peculiarly the 'marketplace of ideas,' "[29] then we have generated a powerful normative argument for extending the reach of the first amendment to protect foreign scholars and limit the scope of the ideological restrictions that long have been part of American immigration law.[30]

I will suggest that this normative argument stands at the forefront of current legislative and judicial attempts to revamp the controversial provisions of the McCarran-Walter Act.[31] In traditional terms, at issue are alternative visions of social order.

One of these visions uses the metaphor of the fortress as an argu-

25. *See* Van Alstyne, *supra* note 8, at 62-63:

> From the solid and fortified arguments sustaining academic freedom as a logical imperative if academicians were to fulfill the critical functions of their profession, the principle was pressed into the larger field of civil liberties whether or not such liberties were professionally linked. In the absence of any other source of employment security that would protect professors from pursuing conventional political activities off the job and on their own time, or entering into ordinary public assemblies and taking personal positions on social issues simply as private citizens and not as professional scholars or researchers, "academic freedom" offered itself as a possible way out. . . . Far from being helpful to the profession, however, the continued use of academic freedom in this expanded and indiscriminate sense has been damaging to the professor . . . .

26. *Id.* at 60.
27. *Id.* at 67-68.
28. *See infra* subpart IV(B).
29. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
30. *See infra* subpart II(A).
31. 8 U.S.C. §§ 1101-1525 (1982).

ment for restriction. The other invokes the image of the market and a faith in rational discourse as an argument for allowing citizens to encounter virtually any assertion, no matter what its country of origin or how bizarre or threatening to American institutions and values it may seem. Retaining the traditional faith in the possibilities of language, the marketplace metaphor promotes a broad tolerance of unconventional discourse, including many modes of expression that have only the most tangential relationship to politics. It is more comprehensive than Alexander Meiklejohn's argument that the first amendment protects only "public discussion" explicitly or implicitly directed to questions of governance.[32] But the marketplace of ideas conception of society can use Meiklejohn's "traditional American town meeting"[33] to show how the McCarran-Walter Act, with its specific animus against radical political dissent, runs counter to the fundamental presuppositions of "liberal-democratic" political theory. By bringing those presuppositions to the surface, the marketplace model provides an explicit counterargument to the implicit assumptions of entrenched law.

Despite the prevalence and power of this relatively simple linkage of the university with the marketplace of ideas, it still begs a fundamental question: namely, what is there about speech in a college or university that makes it special enough to deserve *enhanced* first amendment protection?[34] The second conception of academic freedom attempts to answer this question by asserting that universities perform—or generally are perceived to perform—a unique function in society as knowledge-enhancing and knowledge-sharing institutions. This conception argues that the special privileges that can be claimed by (or on behalf of) university faculty and academic invitees derive from this unique competence. Such privileges need not be restricted to the right to express controversial ideas in the classroom;[35] yet they clearly include that right.

Thus, the "special theory of academic freedom" advocated most no-

32. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 38-39 (1948) ("So long as . . . words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged.").

33. *See id.* at 22-27.

34. Van Alstyne's argument, if I understand it, seeks first amendment protection "as a specific vocational necessity." Van Alstyne, *supra* note 8, at 68. This necessity is perceived as being different from that of other "public employees" (a questionable comparison, in any event, because many professors are employed by private employers, rather than the government), presumably because the jobs professors perform at the workplace are different from, and hence not "fungible" with, jobs such as those performed by truck drivers, janitors, and accountants. If this were true, then what is special about professors' professional speech needs to be specified.

35. *See* J. SEARLE, *supra* note 1, at 184 (arguing that academic freedom includes the right of professors "to teach, conduct research, and publish their research without interference" and of students "to study and learn").

tably by John Searle starts with the proposition that the rights which those associated with the academy rationally can claim "are not general rights like the right of free speech. They are special rights that derive from particular institutional structures, which are created by quite specific sets of constitutive rules."[36] Their "justification . . . derives from a theory of what the university is and how it can best achieve its objectives."[37]

Implicit in this theory of academic freedom is a belief in relative autonomy that is institutional rather than individual in origin. To Max Weber, Herbert Simon, and the other progenitors of "organization theory,"[38] we owe the insight that independence is a consequence of interdependence. In a world in which various institutions perform highly specialized functions, each of which society regards as integral or necessary, the uninitiated can never fully control those with the specialized knowledge necessary for the performance of such functions. The university's historical claim for more autonomy probably always has depended on a belief that the academic enterprise is, in the broadest sense of the word, useful. Scholars trace this belief back to the earliest days of the western university.[39]

The link between utility and autonomy lies in the generally accepted view of how individuals gain and transmit knowledge. In medieval times, books were relatively scarce, and the universities possessed most of them. University faculties--uniquely skilled in reading and interpreting such texts—were responsible for passing on received truths. Modern universities, however, are not only great repositories of information, but also the principal training grounds for scientific or rational inquiry and the source of new knowledge. Western societies generally have not regarded the intellectual function of the university as something that the state or other outside forces *can* or *should* appropriate by fiat, even if the will to dominate exists.[40]

36. *Id.*

37. *Id.*

38. *See, e.g.*, H. SIMON, ADMINISTRATIVE BEHAVIOR (1947) (analyzing the decision-making processes in administrative organizations); M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947) (developing a sociological scheme to describe organizational authority).

39. According to Richard Hofstadter:

> In . . . the Middle Ages the universities were centers of power and prestige, protected and courted, even deferred to, by emperors and popes. They held this position chiefly because great importance was attached to learning, not only as a necessary part of the whole spiritual enterprise, but also for its own sake.

R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 5-6 (1955).

40. John Searle suggests that

> the theory of the university generally . . . accords a special status to the professor. The university is not a democracy where all have equal rights; it is an aristocracy of the trained

Expertise thus invests professors with power not available to others and with a special normative claim against nominally superior authorities that seek to deprive them of or limit such power. Searle's theory is expressly elitist: it defines the professoriate as the "aristocracy of the trained intellect."[41] As a consequence, it remains open to Professor Van Alstyne's criticism that it "invite[s] . . . alienation and . . . hostility by others."[42] Such hostility may indeed deter courts from fully or expressly recognizing the sort of open-ended academic freedom that Professor Searle's argument implies.[43] Nevertheless, I believe that some version of the special theory of academic freedom is necessary if we are ever going to make a persuasive argument for permitting university faculty to govern themselves, design their own curricula, and invite any scholars they choose to address their own students. More importantly, for reasons that I will elaborate later, I believe that in the current era, with traditional faith in free and rational discourse rapidly eroding, we must recognize the universities' special role in the elaboration, criticism, and institutionalization of contingent "truths" in order to make a convincing argnment for a modest marketplace of ideas and for the introduction of "alien ideas" into that marketplace.

II. Ideological Restriction, Hobbesian Fears, and the Academy

The immediate authority that the government claims for barring aliens it regards as ideologically suspect—including foreign academics—derives from statute. Although Congress recently has suspended for a period of thirteen months some of the ideological provisions for excluding or deporting aliens,[44] the Immigration and Nationality Act (INA or

> intellect. . . . In virtue of his special competence in some area of academic study . . . the professor is given special rights of investigation, of dissemination of knowledge, and of certification of students.

J. SEARLE, *supra* note 1, at 186.

41. *Id.*

42. Van Alstyne, *Reply to Comments*, in THE CONCEPT OF ACADEMIC FREEDOM, *supra* note 8, at 125, 126-27. Actually, Professor Van Alstyne speaks of a "*false* . . . *supererogation* of elite status," "*general* alienation," and "*justified* hostility." *Id.* (emphasis added). Because I think that some measure of justified privilege is implicit under any theory of academic freedom, including Van Alstyne's, I have not chosen to include the italicized words in my quotation.

43. Thus, the heart of Professor Van Alstyne's critique of the "special theory" is that "the ubiquitousness of indiscriminate academic-freedom claims has provided substance to a widespread belief that the professoriate sees itself as an extraordinary elite," and consequently weakens its positions before a public and a judicial system interested in furthering egalitarian goals. Van Alstyne, *supra* note 8, at 63-64.

44. *See* Foreign Relations Authorization Act, Fiscal Years 1988-1989, Pub. L. No. 100-204, § 901(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1331, 1399-1400 (to be codified at 8 U.S.C. § 1182).

> Notwithstanding any other provisions of law, no alien may be denied a visa or excluded from admission into the United States, . . . or subjected to deportation because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United

McCarran-Walter Act)[45] still retains the basic grounds for exclusion and deportation that it largely incorporated from earlier law.[46] The temporarily suspended provisions bar aliens from entry and provide for their expulsion because of their advocacy or exposition of certain political beliefs.[47] Thus, the McCarran-Walter Act bars many who have never actively opposed the government of the United States or any other government, engaged in sabotage or terrorism, or committed any crime. In the absence of the temporary suspension, the INA would continue to permit the government to exclude or deport aliens who had ever belonged to, or been affiliated with, the Communist Party or other "subversive" organizations.[48] Similarly, under this statutory regime the government could exclude aliens who advocate or teach "the economic, international, and governmental doctrines of world communism."[49]

These provisions give the executive branch broad discretion to act against aliens whose views the public regards as marxist, incendiary, or undemocratic. Although there is good reason to believe that the provisions' current suspension will ripen into an amendment removing them from the Act,[50] it is by no means certain that Congress will act quickly,

States citizen in the United States, would be protected under the Constitution of the United States.

Id.

45. 8 U.S.C. §§ 1101-1525 (1982).

46. Few of the national security provisions of the 1952 immigration act were new; most came from the Internal Security Act of 1950, Pub. L. No. 831, ch. 1024, 64 Stat. 987 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., and 50 U.S.C.). The Internal Security Act (ISA) was itself dependent on a series of prior laws, dating back to 1903, which had sought to bar or expel anarchists, subversives, and Communists. Amendments to the ISA and the INA have eased some of the restrictions on the entry of Communists. Youthful and involuntary members are no longer automatically excludable, nor, under some circumstances, are former party members who renounce their former affiliations. *See* 8 U.S.C. § 1182(a)(28)(I)(i) (1982). On the other hand, the category of aliens who are subject to deportation and exclusion has expanded in other areas. The most notable addition proscribes the entry of World War II human rights violators and former Nazis and makes it easier to deport such persons if they already have entered the United States. *See id.* §§ 1182(a)(33), 1251(a)(19).

47. *See* 8 U.S.C. §§ 1182(a), 1253(a).

48. *See id.* §§ 1182(a)(28)(C), 1251(a)(6)(C).

49. *Id.* §§ 1182(a)(28)(F)-(G), 1251(a)(6)(F)-(G). Aliens are excludable when they "write or publish, or cause to be written or published," anything that advocates or teaches doctrines of communism. *Id.* § 1182(a)(28)(G).

Additionally, if in the view of a consular officer or the Attorney General an alien "seek[s] to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, and security of the United States," such an alien may be excluded or deported. *Id.* § 1182(a)(27).

50. Currently, officials are considering two alternatives to the ideological provisions of the McCarran-Walter Act. The first is contained in H.R. 4427, 100th Cong., 2d Sess. (1988). Representative Barney Frank introduced H.R. 4427 as a substitute for the similar H.R. 1119, 100th Cong., 1st Sess. (1987) (also introduced by Rep. Frank). As reported out of the House Judiciary Committee, H.R. 4427 would substantially revise and simplify the current grounds for excluding and deporting aliens from the United States. Under this alternative, in most instances the only statutory basis for barring or removing aliens on security grounds would be actual incitement to violence or other

nor is it clear how much discretion it will grant the executive branch to exclude or deport aliens for the advocacy or teaching of violence, or for unspecified foreign policy reasons. My assumption in writing this Article is that, for the foreseeable future, the government will retain considerable discretionary authority to take ideological considerations into account in determining an alien's immigration status.

criminal or terrorist activity in the United States, or a personal history of espionage, sabotage, or terrorism prior to entry. The current thirty-three highly specific grounds for exclusion would be reduced to six generic grounds, including health-related grounds, criminal and moral grounds, economic grounds, illegal entry and visa violation grounds, ineligibility for citizenship grounds, and security grounds. With two significant exceptions, the bill also would reduce the elaborate security provisions for exclusion contained in 8 U.S.C. § 1182(a)(27)-(28) to considerably narrower grounds. According to the bill, aliens who are ineligible to receive visas and "who shall be excluded" from admission into the United States include

> "[a]ny alien who a cousular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in—
> "(i) any activity which is prohibited by the law of the United States relating to espionage or sabotage,
> "(ii) any other criminal activity,
> "(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unconstitutional means."

H.R. 4427 § 2(a). The bill mandates similar treatment of an alien in the case of any "terrorist activity" that the alien has either "engaged in" or that "a consular officer or the Attorney General knows, or has reason to believe" that the alien "is likely to engage [in] after entry." *Id.*

As is the case under current law, aliens also would be excludable on "security grounds" who, during the Nazi era, had "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." *Id.* The Frank bill as introduced, however, contained one entirely new ground for excluding subversives. It would bar those "whose entry into the United States . . . would imminently endanger the lives or property of citizens of the United States living abroad." *Id.* An amendment opposed by Rep. Frank, but adopted in committee, also provides for "the exclusion, under the terrorism provisions, of any 'officer, official, representative, or spokesman of the Palestine Liberation Organization (PLO).' " *Panel Approves Tighter Limits for the Exclusion of Foreigners*, Congressional Quarterly Weekly 1731 (June 25, 1988). The Frank bill also provides for similar standards in determining the deportability of subversive aliens. H.R. 4427 § 3. With the exception of the PLO clause, and like the temporary provision now in effect, the principal effect of these proposed changes would be to condition the barring or removal of allegedly subversive aliens on a finding of the sort of action or incitement which the Constitution requires before criminal penalties can be imposed.

The State Department recently has proposed an alternative set of recommendations for revising the language of specific sections of the INA. The alternatives are contained in H.R. 3293, 100th Cong., 1st Sess., § 2 (1987), which Representative Rodino introduced on behalf of the Reagan administration in September 1987. It has never been reported out of committee. These recommendations would remove simple membership in the Communist Party, past or present, as an independent ground for exclusion or deportation. They also would narrow current statutory language permitting exclusion or deportation on the grounds of *certain* types of "advocacy" or "teaching," although the recommendation would still permit the government to act against aliens "who advocate or teach, or who have ever advocated or taught, or who have ever been members of, or affiliated with, any organization that advocates or teaches" certain acts of terrorism or violence. *Id.* Thus, they would permit the exclusion or deportation of some aliens whose speech would be coustitutionally protected, if evaluated in the context of a criminal action.

Under the State Department's proposed legislation, the government would also gain a *new* power to exclude those aliens "whose entry could cause potentially serions adverse foreign policy consequences." *Id.*

A. The Historical Antecedents of Current Immigration Law

The federal government has used immigration law in an attempt to stifle dissent and hold unpopular ideas at bay since the earliest days of the Republic. But the explicit nexus between national attitudes toward foreigners, alien ideologies, and limited academic freedom is a more recent phenomenon.[51] The roots of ideological restriction can be traced back to 1798, when Congress enacted the infamous Alien and Sedition Acts.[52] At that time, it made specific provision for deporting alien enemies (the Alien Enemy Act)[53] and other aliens whom the President considered "dangerous to the peace and safety of the United States," or whom the President reasonably suspected of "any treasonable or secret machinations against the government" (the Aliens Act).[54] Two years later, responding to widespread popular opposition, Congress permitted the seldom-used Aliens Act to lapse. Most of the opposition resulted from revulsion toward the way the Federalist Party employed the related sedition acts against its domestic political enemies.[55] But the Alien Enemy Act, which the government did not invoke during that turbulent era, was never repealed. Nearly two hundred years after its passage, it continues to authorize removing "natives, citizens, and subjects" of countries in a "state of declared war" against the United States.[56]

Slightly more than a century after passage of the sedition acts, Congress, reacting to the assassination of President McKinley, enacted permanent legislation permitting exclusion for simple advocacy of, or belief in, "the overthrow by force or violence of the government of this United

51. *See* Scanlan, *Why the McCarran-Walter Act Must Be Amended*, ACADEME, Sept.-Oct. 1987, at 5, 5-13. For an extended discussion of the pertinent legislative history, see T.A. ALIENIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY (1985); E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 (1981).

52. Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801); Act of July 6, 1798, ch. 66, 1 Stat. 577; Aliens Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of June 18, 1798, ch. 54, 1 Stat. 566.

53. Act of July 6, 1798, ch. 66, 1 Stat. 577.

54. Aliens Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1800).

55. *See* C. BOWERS, JEFFERSON AND HAMILTON 374-411 (1925). In an important dissent to a decision upholding a statutory requirement that subversive organizations register with the federal government, Justice Hugo Black lamented the unfortunate effect of the Aliens Act:

> The enforcement of these statutes . . . constitutes one of the greatest blots on our country's record of freedom. Publishers were sent to jail for writing their own views and for publishing the views of others. The slightest criticism of Government or policies of government officials was enough to cause biased federal prosecutors to put the machinery of Government to work to crush and imprison the critic. Rumors which filled the air pointed the finger of suspicion at good men and bad men alike, sometimes causing the social ostracism of people who loved their free country with a deathless devotion. Members of the Jeffersonian Party were picked out as special targets so that they could be illustrious examples of what could happen to people who failed to sing paeans of praise for current federal officials and their policies.

Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 155-56 (1961) (Black, J., dissenting) (footnotes omitted).

56. 50 U.S.C. §§ 21-23 (1982).

States or of all government or of all forms of law."[57] This attack on anarchism was clearly a response to a single act of unusual violence; yet it also reflected broader national concerns about radicals in the labor movement. A growing belief that the "new immigrants" from Eastern and Central Europe held political values that threatened the existing social and political status quo helped fuel the attack on anarchism.[58] The restrictions thus put advoeacy and belief on the same moral and legal plane as a demonstrated intent to assassinate political officials.

During and immediately following the First World War, Congress adopted additional legislation expanding the class of aliens who could be excluded to include those advoeating or teaching unlawful destruction of property and providing for the deportation of subversives for the first time since 1798. This legislation permitted the expulsion of aliens who were believed to favor such destruction.[59] Another statute authorized the deportation of aliens who wrote, published, circulated, or possessed subversive literature.[60] The primary targets of this legislation were anarchists, but it also implicitly recognized the dangers Communist revolutionaries posed to the United States. Yet the bulk of the American electorate in 1917 and 1918 probably directed their concern not at anarchy but at alien enemies and anyone insufficiently patriotic or unduly supportive of the German cause or a premature peace.[61] This concern

57. Act of Mar. 3, 1903, Pub. L. No. 57-162, § 2, 32 Stat. 1213, 1214.

58. Some public leaders regarded the transmission of alien values as something analogous to the spread of an infectious disease.

> Capitalists had long explained labor unrest and class cleavages by insisting that they were imported by foreigners who knew nothing of American ideals. Some trade journals even argued that more selective immigration might discourage militant unionism by barring foreign agitators. Many industry journals began to adopt the New England elite's convenient physiological explanation of the immigrant as troublemaker. "Anarchism is a blood disease," reported a leading business magazine after the Haymarket affair [in 1886]. In 1890, [another] wrote, "We are absorbing the vicious and diseased of the earth into the national body, and coming face to face with the consequences."

K. CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924, at 105-06 (1984) (citations omitted).

59. Aliens who believed in or advocated the overthrow of the United States by force or violence or who opposed organized government or taught the duty, necessity, or propriety of killing officers of the United States or of any other organized government could be expelled under the legislation. Immigration Act of Feb. 5, 1917, Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 889, *repealed by* Act of June 27, 1952, ch. 477 § 403(a)(13), 66 Stat. 163, 279. As enacted, deportation was limited to offenses committed within the five-year period immediately prior to entry. The Act of Oct. 16, 1918, Pub. L. No. 65-221, ch. 186, § 1, 40 Stat. 1012, *repealed by* Act of June 27, 1952, ch. 477, § 403(a)(16), 66 Stat. 163, 279, removed this five-year limit.

60. Act of June 5, 1920, Pub. L. No. 66-262, 41 Stat. 1008, 1008-09.

61. A significant number of American college administrators shared those concerns. For the first time, nativist and chauvinist sentiment translated directly into a major attack on academic freedom. Symbolically led by Columbia University President Nicholas Murray Butler, who "formally withdrew the privilege of academic freedom for the duration of the war," R. HOFSTADTER & W. METZGER, *supra* note 39, at 499, public and private universities across the nation imposed loyalty oaths, censured pro-German or pacifist sentiments, and fired professors who overstepped the ill-

extended directly into the universities, because many believed that scholars, both native and foreign-born, were too sympathetic toward the enemy.

All subsequent immigration legislation barring subversives has focused explicitly on persons affiliated with the Communist Party or other organizations sympathetic to its aims, excluding essentially punitive measures directed at former Nazis. Such legislation has provided specific authority to exclude or deport those who teach or advocate Communist doctrines.[62] Congress has granted additional authority to the immigration service to bar any individual whose expression of political views is regarded as contrary to the public interest.[63]

The notion that communism was a fundamentally alien ideology, staffed by agents who took their orders from Moscow and directed inevitably toward subversion, world revolution, and the destruction of all democratic institutions (including universities), was deeply ingrained in the American psyche.[64] When attitudes toward the Soviet Union and its successes became a political issue in the late 1940s and early 1950s, virtually all Republicans and most Democrats sought to demonstrate their foresight or their purity by ferreting out Communists, their overt sympathizers, and those who failed to be sufficiently critical of Communist philosophy, programs, accomplishments, or leaders. It is not surprising that

defined line of compelled political conformity, *see id.* at 495-506. Although Harvard, threatened with the cancellation of a $10,000,000 bequest, refused to demote an openly pro-German professor, *id.* at 502, and other institutions resisted pressures brought by public opinion, financial contributors, and angry trustees, the profession generally paid more heed to concerns about patriotism than it did to issues of academic freedom.

The American Association of University Professors (AAUP) Committee on Academic Freedom in Wartime concluded that professors of Germanic origin or sympathy had an obligation "to refrain from public discussion of the war; and in their private intercourse with neighbors, colleagues and students, to avoid all hostile or offensive expressions concerning the United States or its Government." *Report of Committee on Academic Freedom in Wartime*, 4 AAUP BULL. 29, 41 (1918). The AAUP committee made it clear that it believed that universities were entitled to dismiss faculty members who failed to comply with this obligation.

62. *See* 8 U.S.C. §§ 1182(a)(28)-(29), 1251(a)(6) (1982).

63. *See id.* § 1182(a)(27).

64. Americans had been deeply distrustful of the Russian revolution from its inception and had supported early attempts to overthrow it militarily. Most had stood behind Attorney General A. Mitchell Palmer in 1919 when he used the immigration laws to imprison thousands of aliens (and to deport over five hundred) whom he identified as "Reds" about " 'to rise up and destroy the Government at one fell swoop.' " J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 229-31 (1955) (quoting L. POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF AN HISTORIC OFFICIAL EXPERIENCE 36-40, 48-49 (1923)); *see* T.A. ALIENIKOFF & D. MARTIN, *supra* note 51, at 352-55. The American people were aware of the Stalinist purges in the 1930s, and, particularly in the era of the Berlin airlift, the first Soviet nuclear explosion, and the Hiss and Rosenberg espionage cases; they could easily believe that the "Cold War" was a short step away from a "shooting war." In the interim, the evidence from Poland, Czechoslovakia, Hungary, and China seemed to show the Soviets gaining an upper hand. *See* S. AMBROSE, THE RISE TO GLOBALISM: AMERICAN FOREIGN POLICY SINCE 1938, at 150-51, 158 (3d ed. 1983).

many called for the purging of the universities as well.[65] Entrusted with public funds or extensive private contributions and subject to the actions of legislatures or boards of trustees, the universities were fully aware that their claims for institutional autonomy were threatened by criticism that they were "soft on communism" or were subjecting the nation's future leaders to the malign influence of "Red-ucators."[66]

The conduct of many university administrators revealed the vulnerability that universities felt, as well as the sympathy that a significant percentage of academics undoubtedly shared with the strong anti-Communist sentiment prevailing in the nation. In hundreds of instances, acting on their own or in response to pressure from alumni, press, students, congressional or state investigators, and organizations such as the National Council for American Education, administrators and university officials threatened, censured, fired, or blacklisted faculty members. The officials took action when faculty members refused to take loyalty oaths or testify before investigating committees, admitted past or present Com-

65. *See* D. RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980, at 93 (1983).

> In the decade after the war, fear of Communist subversion in the schools provoked a flurry of state legislative activity. By 1950, thirty-three states had adopted legislation permitting the ouster of disloyal teachers. In twenty-six states, teachers were required to sign a loyalty oath. Most such oaths consisted of a pledge to support the state and federal constitutions, and to discharge faithfully the duties of a teacher. In fourteen states, embellishments were added: some states required teachers to promote patriotism; or to promise that the teacher was not a member of the Communist Party or any other organization that advocated the forcible overthrow of the government; or to pledge not to teach or advocate the forcible overthrow of the government.
>
> But legislative proscriptions did not always satisfy the search for security. Following the pattern established by the House Committee on Un-American Activities (HCUA), several state legislatures opened investigations designed to expose teachers who were present or past members of the Communist Party or had been involved in Popular Front organizations. The HCUA, in addition to supplying a model for its state counterparts, offered them documentary records and expert witnesses.

Id. See generally E. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1986) (documenting the response of the academy to different federal and state investigations into the political beliefs and activities of individual faculty members).

66. David Caute uses this term without citing its source. D. CAUTE, THE GREAT FEAR (1978) (Chapter 22 is entitled "Purge of the 'Reducators' "). For a discussion of its source and specific application to university teaching, see HARVARD LAW SCHOOL FORUM, CAN WE AFFORD ACADEMIC FREEDOM? 8 (1952) (Professor Robert Braucher implicitly attributes the term to the National Council for American Education (NCAE)). Allen A. Zoll, the executive vice president of the NCAE, stated:

> I feel very definitely that people have a right to know to what communist-front organizations the professors belong . . . . [W]e have the names of every person whosoever belonged to a communist front of any sort. . . . There has been a whole lot less joining of communist-front organizations by the professors since we started publishing those lists.

Id. at 23. Such criticism was commonplace during the late 1940s and early 1950s. As Sheila Slaughter has noted, when "World War II gave way to the Cold War, instances like the Lattimore and Oppenheimer cases made the university, as the home of scientists and intellectuals, a target for national security [concern]. . . . Education became one of the major battlefields in the post-war struggle for control of domestic policy." Slaughter, *The Danger Zone: Academic Freedom and Civil Liberties*, ANNALS, Mar. 1980, at 46, 57-59 (citations omitted).

munist Party membership or affiliation, or otherwise manifested their disloyalty by expressing marxist or socialist ideas or by taking active roles in various organizations labeled as subversive.[67]

Even at the height of the Cold War, however, many inside and outside the academy balked at drafting or using immigration laws to prevent alien Communists or their sympathizers from teaching or lecturing in the United States. In 1952 the American Association of University Professors (AAUP) called for the immediate "removal of legislative and administrative barriers to the visits of foreign students and scholars to this country."[68] President Truman, in the message accompanying his unsuccessful veto of the McCarran-Walter Act, objected strenuously to provisions permitting the Attorney General to deport aliens engaged in "activities prejudicial to the public interest or subversive to the national security."[69] Truman criticized the provisions' lack of definition, calling them "thought control."[70]

Congress nevertheless incorporated nearly standardless language into the McCarran-Walter Act, along with virtually all the antisubversive provisions adopted between 1903 and 1950. Almost all these provisions remain in effect today.[71] They were not used, however, during the 1950s to *deport* alien academics and artists—the Reagan administration initiated that development. The Act was used then to *bar* many aliens from entering the country. By 1955, some estimated that at least one hundred, and probably several hundred, foreign scientists had been denied visas officially and that perhaps three times that number had been denied entry through consular delaying tactics.[72] Scientists were not the only targets; the Polish poet Czeslaw Milosz, the British novelist

67. For a good summary account of the actions taken by universities against professors during an era that stifled even liberal critiques of capitalism, see D. CAUTE, *supra* note 66, at 403-84; Slaughter, *supra* note 66, 67-69. *See generally* E. SCHRECKER, *supra* note 65 (documenting the hundreds of cases in which charges of Communist affiliation, membership, or sympathy destroyed academic careers).

68. *The Thirty-Eighth Annual Meeting*, 38 AAUP BULL. 96, 100 (1952).

69. 98 CONG. REC. H8084 (daily ed. June 25, 1952) (messages of President Truman).

70. *Id.* Truman noted that "[n]o standards or definitions are provided to guide discretion in the exercise of powers so sweeping. To punish undefined 'activities' departs from traditional American insistence on established standards of guilt. To punish an undefined 'purpose' is thought control." *Id.*

71. *See supra* note 46. According to one authority, legislation from 1952 through 1965 "dealt with national security and did not revise the exclusion of subversives contained in the 1952 Act." E.P. HUTCHINSON, *supra* note 51, at 427. In 1977, Congress passed the so-called "McGovern Amendment," 22 U.S.C. § 2691 (1982), which put a greater administrative burden on the executive branch when seeking to exclude aliens for simple membership in, or affiliation with, proscribed Communist organizations. Until the recent moves to suspend the ideological provisions of the McCarran-Walter Act, *see supra* notes 44 & 50, this was the only recent piece of legislation relaxing any of its stringencies.

72. D. CAUTE, *supra* note 66, at 256 (citing E. SHILS, THE TORMENT OF SECRECY 187 (1956)).

Graham Greene, and the French sociologist Georges Friedmann were all early victims of the Act, as were Joseph Krips, Director of the Vienna State Opera, and Maurice Chevalier, the French actor and singer.[73] Predictably, foreign scholars began refusing invitations to attend conferences or assume teaching positions in the United States, either out of sympathy for fellow countrymen or professional colleagues who had been denied visas or out of fear of personal rejection. Some simply may have refused to put up with the hassle of convincing the State Department and Immigration Service that they were not subversives.[74]

Remnants of this attempt to immunize America against alien ideas remained in later immigration practices. Long after American universities began easing harassment of domestic faculty dissidents, the United States government continued to use the immigration laws to insulate the nation from intellectual contagion.[75] The list of those who face immigration difficulties continues to grow, affecting not only the admission of

73. *Id.* at 255-60.

74. *See id.* at 252-60. Caute quotes a member of the French Academy of Sciences writing to his American colleagues in 1952 and explaining that he and many of his compatriots

> are no longer willing to make the request. . . . The applicant has the real feeling of being a suspect who is put off from week to week, the more so because he receives a long interrogation from a police magistrate. . . . I have even seen the expression "Iron Curtain of the West" applied to the United States.

Id. at 257 (quoting Louis Leprince Ringuet in Mather, *Scientists in the Doghouse*, 174 NATION 638, 640 (1952)).

75. The list of those who have been excluded, or have faced serious immigration difficulties because of their political views, includes many famous names: novelists Gabriel Garcia Marquez, Primo Levi, Carlos Fuentes, Alberto Moravia, and Julio Cortazar; poets Dennis Brutus and Mahmoud Darwish; sociologists Ernest Mandel and Tom Bottomore; architect Oscar Niemeyer; naturalist Farley Mowat; and a variety of public or political figures, including Chile's Hortensia de Allende, Northern Ireland's Bernadette Devlin and Ian Paisley, El Salvador's Roberto D'Aubuisson, and former Canadian Prime Minister Pierre Trudeau. Memorandum from Rep. Barney Frank (Feb. 18, 1987) (listing 42 individuals who were either excluded or faced immigration difficulties under the terms of the McCarran-Walter Act).

The list of aliens excluded since 1983 includes Dr. Joyce deWangen-Blau, a professor at the Sorbonne and noted scholar of Kurdish history and literature, denied a visa because of "links to terrorism"; Dr. Trevor Muuroe, a senior lecturer at the University of the West Indies, denied a visa because of his membership in a Marxist-Leninist Party in Jamaica; and two Cuban professors of philosophy, Cosme Cruz-Miranda and Arnaldo Silva-Leon, denied visas after being extended an invitation by the American Philosophical Association to address a conference on "Marxism in Cuba" on the grounds that it is "contrary to [American] foreigu policy interests" to permit officials of the Cuban Communist Party to enter this country for any reason other than official diplomacy. *See* Scanlan, *supra* note 51, at 8-9. In 1986, the Immigration Service arrested Colombian journalist Patricia Lara as she arrived in New York to attend an academic ceremony at Columbia University, and after holding her in prison for several days, deported her without affording her a hearing. N.Y. Times, Oct. 18, 1986, at A9, col. 1. The State Department justified its actions by alleging that she was secretly linked to a Colombian terrorist organization. N.Y. Times, Nov. 19, 1986, at A34, col. 1. Margaret Randall, a poet, essayist, and photographer now teaching at the University of New Mexico, was denied immigration benefits the government admits it otherwise would have granted and was declared deportable on the sole ground that her work—which has expressed admiration of some of the aspects of the Vietnamese, Cuban, and Nicaraguan revolutions—"advocate[s] the economic, international, and governmental doctrines of world communism." Randall v. Meese, No. 85-3415 (D.D.C. Jnne 5, 1987) (LEXIS, Genfed library, Dist file).

particular aliens, but also the more general process of university recruitment. Thus, the McCarran-Walter Act still poses entry problems for various foreign academics and journalists. As importantly, the Act affects their foreign colleagues, who observe the machinations of United States immigration law and are thus frequently unwilling to run its gauntlet. Of course, it also affects the members of American faculties and professional associations, who continue to discover that the government's attempt to screen out undesirable or dangerous foreigners has narrowed the range of permissible discourse.

The McCarran-Walter Act has affected directly and adversely scores of foreign academics, creative writers and artists, and political figures. It is not clear that this result is changing. Although the Reagan administration recently announced its support for legislation liberalizing the statute,[76] it has sought to exclude aliens with suspected ties to the Communist Party or other "leftist" credentials more than any of its recent predecessors.[77] Moreover, the Reagan administration is now trying to expel *resident* aliens solely because of their advocacy and teaching.[78]

76. Abraham Sofaer, the legal advisor to the State Department, expressed qualified support for a revision of the ideological provisions of the McCarran-Walter Act that would reflect "modern reality." His testimony on June 23, 1987, before a House subcommittee indicated that the Reagan administration "ha[d] no objection in principle to eliminating the general exclusion of aliens based solely on their membership or affiliation with proscribed organizations and doctrines" and would support legislative changes removing the authority to exclude or deport solely on those grounds. Sofaer, however, also indicated that the administration would seek to retain the authority to deny visas to those aliens whose entry would pose "potentially serious adverse foreign policy consequences." *See Exclusion and Deportation of Aliens: Hearings on H.R. 1119 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 29-30 (1987) (statement of Abraham Sofaer, Dep't of State).

77. Comparable statistics are hard to come by. But it is clear that the current 600-700 cases a year in which waivers of excludability are denied, *see* Testimony of Abraham Sofaer, *id.* at 35, is a considerably greater number than that which prevailed in the late 1960s and early 1970s, when a total of 43 such waiver requests were denied, *see* Kleindienst v. Mandel, 408 U.S. 753, 768 n.7 (1972) (itemizing waivers requested and denied from 1967 through 1971). Part of the increase is clearly attributable to the increased number of waiver requests that result from the automatic referral provisions of the McGovern Amendment, 22 U.S.C. § 2691 (1982). Yet the increased use of the ideological exclusions also reflects clear policy choices of the Reagan administration to keep prominent marxists and other prominent figures with leftist views out of the United States. According to Alienikoff and Martin:

> After the Reagan administration took office in 1981, it began using paragraphs (27) through (29) of INA § 212(a) on a wider scale. . . . Indeed, paragraph (27) was used in several instances where paragraph (28) might also have been available—leading some critics to charge that the former section was employed in order to avoid the reporting requirements imposed by the McGovern Amendment.

T.A. ALIENIKOFF & D. MARTIN, *supra* note 51, at 204.

The Reagan administration, however, also has used the McCarran-Walter Act to avoid the political embarrassments that might result from giving members of the extreme political right a United States forum. Thus, Roberto D'Aubuisson, the chief opponent of President Duarte of El Salvador (whom the U.S. actively supported), was denied an entry visa after detractors publicly linked his name to death squad activities in that country. N.Y. Times, Dec. 1, 1983, at A16, col. 5.

78. The advocacy issue was raised in the still-pending case of Arab-American Anti-Discrimination Comm. v. Meese, Civ. No. 87-2107-SVW (C.D. Cal. filed June 3, 1987). In *Arab-American*, the

In addition, the Act has deterred others from applying for entry either because they believe their political views will subject them to special restrictions or possibly exclusion, or because they object to revealing private political views to foreign officials.[79] Writing to the AAUP about the effect of visa denials, the General Secretary of the Association of University Teachers described the potency of these philosophical objections:

> The record of actual refusals is small, not because of the liberal attitude of the United States Government, but because many of our members, as a matter of principle, consider it anathema to have to attest to their political views and affiliations; thus, many academics will not apply because they do not wish to place themselves in the position of signing declarations to that effect.[80]

These words, perhaps more than the number of actual refusals, portray the McCarran-Walter Act's genuine chilling effect on academic life in the United States,[81] which results because the Act conditions entry or residency on governmental certification of acceptable political attitudes.

B. The Power of the Sovereign

Even if Congress entirely removed the ideological provisions of the

government originally ordered all the plaintiffs to "show cause" why they should not be deported because of alleged membership in organizations "that cause to be written, circulated, distributed, published, or displayed, written or printed matter advocating or teaching economic, international, and governmental doctrines of world communism." The original orders to show cause since have been amended, although all the plaintiffs still face deportation, and the government is proceeding against two of them under the provisions of INA, 8 U.S.C. § 1251(a)(6)(F) (1982).

Two cases, Randall v. Meese, Civ. No. 85-3415 (D.D.C. June 5, 1987) (LEXIS, Genfed library, Dist file) (pending appeal in the D.C. Circuit), and the related case, *In re* Randall-Davidson, Immigration Judge Decision No. A11-644-208, at 31, 32 (Aug. 28, 1986) (pending appeal in the Board of Immigration Appeals), also raised the advocacy issue in conjunction with the teaching issue. In separate proceedings, an INS district director denied Professor Randall, a professional writer and photographer who teaches at the University of New Mexico, "adjustment of status" under INA § 245, 8 U.S.C. § 1255 (1982), as a matter of discretion. Additionally, an immigration judge denied the adjustment because of statutory ineligibility. In both instances, the sole reason advanced, either implicitly or explicitly, for the denial was that her writings advocated or taught "the economic, international and governmental doctrines of world communism" proscribed by *id.* § 1182(a)(28)(G)(v).

79. *See* D. CAUTE, *supra* note 66, at 256.

80. Letter from Laurie Sapper, General Secretary, Association of University Teachers (Great Britain), to Jonathan Knight, Associate Secretary, AAUP (Mar. 19, 1980) (declining an invitation to attend an AAUP meeting in New York).

81. Occasionally, the effect can extend beyond the nation's borders. For instance, Canadian Professor Jim Harding, after initially being barred from entry, eventually received permission to enter the United States briefly in order to make airline connections to Central America, where he planned to spend his sabbatical researching the current political situation. But the INS, despite his vigorous denials of past or present Communist Party membership, placed a stamp in his passport identifying him as a member of the Communist Party who had been granted a special immigration "waiver." Faced with the hostility and danger that such "official" identification posed in that war-torn and ideologically volatile region, Harding cancelled his trip. Letter from Allan R. Sharp, President, Canadian Association of University Teachers, to Dr. Ernst Benjamin, General Secretary, AAUP (Apr. 7, 1987).

McCarran-Walter Act, it would not assure automatically an open marketplace of ideas accessible to aliens with controversial ideas: a century-old judicial tradition regards both legislative and executive powers over immigration as plenary, inherent in sovereignty, and essentially immune from substantive review by any court of law.[82] The government continues to use arguments for ideological restriction that it used successfully a century ago when it sought summarily to exclude or deport the "heathen Chinese."[83] Its ability to do so rests on the unusual conservatism of the courts in the area of immigration law.[84]

Conceptions of inherent sovereign power, national security, and discretionary privilege, which were first advanced in the 1880s and 1890s to justify ethnically and racially discriminatory immigration laws, continue to stand as substantial barriers to an alien's assertion that she has a right to any substantive constitutional protection. The notion of unlimited governmental power to close the nation's borders in order to protect citizens from dangerous outsiders has continuing appeal to those who argue that nations are like other communities, specially beholden to their own members or citizens and specially obligated to protect their citizens' social and political values as well as their physical safety.[85]

82. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

83. *See* The Chinese Exclusion Case, 130 U.S. 581, 594-96, 603-10 (1889).

84. *See* Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984):

> Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. In a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.

85. The analogy of a nation-state to an organic "community"—although without such a broad endorsement of the state's exclusionary power—lies at the heart of M. WALZER, SPHERES OF JUSTICE (1983). Since its publication, the concept of community and its relevance in determining an alien's legal rights has been the subject of considerable academic speculation and debate. *See, e.g.*, P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT (1985) (arguing for a consensualist reading of the citizenship clause of the fourteenth amendment and the extension of constitutional protection only to children of those legally admitted to permanent residence in the American community); Alienikoff, *Aliens, Due Process, and 'Community Ties': A Response to Martin*, 44 U. PITT. L. REV. 237 (1944) (suggesting that the hands-off policy of the Supreme Court in the area of immigration law has resulted in congressional failure to provide adequate process); Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983) (suggesting a framework for assessing the due process claims of different groups of aliens seeking membership in the national community); Scanlan & Kent, *Arguments for a Just Immigration Policy in a Hobbesian Universe*, in OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES (M. Gibney ed. 1988); Schuck, *supra* note 84 (asserting that a communitarian legal order is replacing the individualistic one in the area of immigration law).

The government's "immigration power" is not specifically mentioned in the Constitution. *See* Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 853-54 (1987); Hunter, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649, 653 (1986); Romig, *Salvadoran Illegal Aliens: A Struggle To Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 301 (1985);

The characteristic structure of the national security argument presumes the existence of what we can identify loosely as a national community and assumes several not necessarily compatible things about how that community is constituted and held together. One assumption is that once a group of people form a nation and establish a sovereign, they necessarily invest that sovereign with unlimited power to deal with threats to the survival of the nation itself. The power over aliens is simply one manifestation of this general self-protective power. Relying on community assumptions, courts assert that admission to and continued residence in the United States are "privileges" and not "rights," and that the power to grant or deny such privileges is inherent in the sovereign and essentially unlimited.[86] As a unanimous Supreme Court stated in *The Chinese Exclusion Case*:[87]

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth . . . .[88]

Under this essentially Hobbesian view of the world,[89] the highest obligation of the sovereign is survival, and the political branches of government, not the courts, determine what threats exist and what immigration

Voigt, *Visa Denials on Ideological Grounds and the First Amendment Right To Receive Information: The Case for Stricter Judicial Scrutiny*, 17 CUMB. L. REV. 139 (1987); Comment, *The Constitutional Rights of Excludable Aliens: History Provides a Refuge*, 61 WASH. L. REV. 1449, 1457 (1986).

86. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707, 711 (1893):

> The right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.
>
> . . . .
>
> The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, . . . [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare . . . .

Since the Court decided *Fong Yue Ting*, it has imposed some procedural limits on the authority of Congress or the executive branch to *deport* aliens without "due process of law." *See infra* note 121. The situation for most entering aliens, however, is different: "[A]n alien on the threshold of initial entry stands on different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' " *Mezei*, 345 U.S. at 212 (quoting *Knauff*, 338 U.S. at 544); *accord* Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892). Furthermore, *deportable* aliens in immigration proceedings have fewer and less comprehensive procedural rights than their American counterparts in similar proceedings, *see infra* note 121, and it is not clear that they have a right to challenge the substantive classification authorizing their deportation, *see infra* note 122.

87. 130 U.S. 581 (1889).

88. *Id.* at 606.

89. *See* Scanlan & Kent, *supra* note 85.

policy is necessary to overcome those threats.[90] Courts commonly conclude in exclusion cases that "[t]he exclusion of aliens is a fundamental act of sovereignty"[91] without advancing any additional justification for the plenary power that Congress or the executive branch claims.

The legislative history of most restrictive immigration legislation, some exclusion cases, and virtually all deportation cases take this national security argument further and identify particular interests that citizens hold in common and which may be threatened if particular aliens or groups of aliens enter or remain within the United States. Those interests range from the protection of wealth to the preservation of democratic forms of government. In *The Chinese Exclusion Case*[92] and *Fong Yue Ting v. United States*,[93] for example, the Court accepted the government's argument that cheap and industrious Asian labor threatened American jobs.[94] Congress later made similar arguments to justify excluding Southern and Eastern Europeans[95] and, in the early 1950s, sought greater authority to bar Communists and their sympathizers in part to protect the unparalleled prosperity of the American people from unproductive socialism.[96] Similarly, Congress consistently has justified restrictive immigration legislation on the grounds that it promotes public order and protects the moral and religious habits and precepts of the American people. For example, restrictionists justified excluding the "pagan" Chinese in the late 1800s largely because of the threat they posed to such fundamental American mores as monogamy and monotheism.[97] The legislative inquiry that eventually led to the adoption of the

90. *See id.*

91. *E.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

92. 130 U.S. 581 (1889).

93. 149 U.S. 698 (1893).

94. *See id.* at 717-18; The Chinese Exclusion Case, 130 U.S. at 595.

95. For example, in the Senate hearings held to consider permanent "national origins" quota legislation, which had the intended effect of cutting off immigration opportunities for most Southern and Eastern Europeans, Senator Reed explicitly analogized restrictive quotas to "protective tariffs," desirable because they would "protect the work people of the United States and American wages and American standards from the direct competition that will follow unrestricted immigration." *Hearings on S. 2365 and S. 2576*, 68th Cong., 1st Sess. 217-18 (1924).

96. *See* S. REP. NO. 1515, 81st Cong., 2d Sess. 781-87, 798-801 (1950).

97. A contemporary commentator criticized as "more manifold than cogent" the following reasons stated in 1882 by Representative Orth for excluding the Chinese:

> First, the great influx will endanger our institutions. Secondly, they do not speak our language. Thirdly, they do not wear our kind of clothes. Fourthly, they are pagans. Fifthly, they take no interest in our government. Sixthly, they take their money back to China and thus impoverish the country. Seventhly, when they die, their bones are taken back to their native country.

T. LI, CONGRESSIONAL POLICY ON CHINESE IMMIGRATION 38 (1916) (quoting 13 CONG. REC. 2187-88 (1882)); *see infra* note 106.

"national origins quota system"[98] characterized Southern and Eastern Europeans quite generally as "criminals" and "moral delinquents."[99] During the early Cold War era, individuals in and out of government denounced the "godless Communist" threat to theism—Communists whom the Internal Security Act of 1950[100] and the McCarran-Walter Act were designed to exclude.[101]

Traditionally, however, the government has regarded the greatest and most fundamental threat as one to democracy itself. Congressman Albert Johnson, the principal author of the national origins quota system, voiced a classic version of this concern in 1927. Inveighing against the admission of Eastern European refugees, he said:

> Today, instead of a well-knit homogeneous citizenry, we have a body politic made up of all and every diverse element. Today, instead of a nation descended from generations of freemen bred to a knowledge of the principles and practices of self-government, of liberty under law, we have a heterogeneous population no small proportion of which is sprung from races that, throughout the centuries, have known no liberty at all, and no law save the decrees of overlords and princes. In other words, our capacity to maintain our cherished institutions stands diluted by a stream of alien blood, with all its inherited misconceptions respecting the relationships of the governing power to the governed.[102]

When the Internal Security Act of 1950—the source of many of the ideological restrictions later incorporated into the McCarran-Walter Act[103]—was drafted, the Senate Judiciary Committee expressed similar sentiments, albeit with a more explicitly capitalist bent. The Committee reported:

> Communism is, of necessity, an alien force. It is inconceivable that

98. A summary of the principal features of the acts creating the national origins quota system is provided in T.A. ALIENIKOFF & D. MARTIN, *supra* note 51, at 50-51:

> In 1921, the concept of national origins quotas [was introduced into law]. This act established a ceiling on European immigration and limited the number of immigrants of each nationality to three percent of the number of foreign-born persons of that nationality resident in the United States at the time of the 1910 census.
>
> This first quota act was extended for two more years, but in 1924 came the passage of what was heralded as a permanent solution to U.S. immigration problems . . . . [T]he National Origins Act provided for an annual limit of 150,000 Europeans, a complete prohibition on Japanese immigration, the issuance and counting of visas against quotas abroad rather than on arrival, and the development of quotas based on the contribution of each nationality to the overall U.S. population . . . .

99. *See* S. REP. NO. 283, 66th Cong., 1st Sess. (1919) (The Dillingham Report).

100. Pub. L. No. 81-831, 64 Stat. 987.

101. *See Internal Security Legislation: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 83d Cong., 2d Sess. 133-66 (1954).

102. Johnson, *Foreword* to R. GARIS, IMMIGRATION RESTRICTION at vii (1927).

103. *See supra* notes 45-46. It was not coincidental that Senator McCarran was chiefly responsible for both pieces of legislation because both reflected his obsessive concern about the Communist threat.

> the people of the United States would, of their own violition [*sic*], organize or become part of a conspiracy to destroy the free institutions to which generations of Americans have devoted themselves. The tremendous political freedom and the corollary standard of living of the United States have given the people of this country a national entity and heritage far superior to anything which human society has created elsewhere.[104]

Communism, in other words, is literally "un-American." And some still entertain the possibility that foreign propaganda will overtake native resolve. Under this analysis, subversive aliens pose a danger that does not derive from any acts of espionage, terrorism, or revolution. Instead, the danger lies in their propensity to foment civil disorder through misrepresentations and lies, and in our propensity to be misled.

The provisions of the McCarran-Walter Act, therefore, are ultimately less important than the stubborn traces of a political and legal philosophy that has justified restrictive immigration legislation in the past and may justify it in the future on the ground that aliens, in their persons and in their conception of society, threaten the existing social order. Such a conception of the social order requires that the national government maintain broad restrictionist powers so that it can contain the external threat aliens pose. The alien threat can be either physical, ideological, or both. It can involve the advent of "vast hordes" of people ready to wrest away American wealth and jobs,[105] or the actual or potential dissemination of suspect or dangerous ideas about such matters as marriage, religion, or politics.[106] In either case, those inside have the right to protect themselves from outsiders. This general right of self-protection endows the government with the particular right to restrict

104. S. REP. NO. 1515, *supra* note 96, at 782.

105. *See* The Chinese Exclusion Case, 130 U.S. 581, 606 (1889).

106. Although never explicitly acknowledged by the Supreme Court, two of the factors that contributed to the enactment of the Chinese exclusion laws of the late nineteenth century were concerns about polygamy attributed to the Chinese and the fact that the Chinese were not Christians. Both factors were discussed during the Senate debates on the Naturalization Act of 1870. *See generally* CONG. GLOBE, 41st Cong., 2d Sess. 5155-62 (1870). Since 1891, the immigration laws of the United States have included provisions excluding polygamists from entry. *See* E.P. HUTCHINSON, *supra* note 51, at 102; *see also* 8 U.S.C. § 1182 (a)(11) (1982) (excluding aliens who are polygamists from admission to this country). No religious grounds for exclusion or deportation have ever been specified in federal immigration law, but the constitutional authority to exclude on these grounds has sometimes been presumed.

> But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism, or anti-Catholicism, the responsibility belongs to Congress. . . . [T]he underlying policies . . . are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace.

Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring). *Harisiades*, Turner v. Williams, 194 U.S. 279 (1904), and Galvan v. Press, 347 U.S. 522 (1954), are the three principal Supreme Court cases upholding the constitutionality of immigration statutes directed at those with unpopular political ideas.

the political speech of aliens by barring their entry or enjoining their continued residence.

III. Constitutional Restrictions on the Sovereign's Right To Exclude

Traditional liberal theory cannot summarily refute the Hobbesian perceptions that the state has assumed or been given a general power to act on behalf of its population, and that it identifies its own security with the security of its population and thus possesses wide power to promote national security through immigration control.[107] Yet the tradition of political and constitutional thought deriving from John Locke and his intellectual progeny insists on continuing popular consent to governmental authority. The Lockean model of government does not abolish the fundamental conflict between the goal of individual freedom and the necessity of some authority to preserve that freedom.[108] But as the model has evolved, it has developed a strategy for minimizing that conflict. Under that strategy, the government exercises only institutionally checked authority. Thus, the principal arguments generally given for the virtue (or at least the philosophical legitimacy) of the American system of government are that its choices are the choices of "the people" rather than of some all-powerful tyrant, and that constitutional checks on governmental power protect this principle of democratic choice, while also protecting minorities from the prejudices or self-aggrandizement of the

107. Robert Nozick, for example, acknowledges the government's power to repel foreign threats. *See* R. NOZICK, ANARCHY, STATE AND UTOPIA 26-27, 126-29 (1974) (describing the concept of a "night-watchman" state that "protect[s] all its citizens against violence"). Even Bruce Ackerman concedes that at some point the liberal state may have to wage war or restrict immigration to keep the liberal conversation going. *See* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 88, 93-94 (1980). Ackerman sketches a possible situation that would justify strict immigration restrictions as a "second-best," but intellectually defensible, response. Essentially, that situation involves massive immigration which "strains the capacity of Western institutions to sustain liberal conversation"; the influx of so many aliens "will generate such anxiety in the native population that it will prove impossible to stop a fascist group from seizing political power to assure native control over the immigrant underclass." *Id.*

108. Thus, Peter Laslett suggests that, given Locke's "radical individualism" and his insistence on the general rationality of mankind, the central political questions raised by Locke's *Two Treatises of Government* are: "How then does it come about that there is such a thing as rulership in the world? How is government possible at all?" Laslett, *Introduction* to J. LOCKE, TWO TREATISES OF GOVERNMENT 110 (P. Laslett rev. ed. 1963) (3d ed. 1698); *see also* A. RAPACZYNSKI, NATURE AND POLITICS: LIBERALISM IN THE PHILOSOPHIES OF HOBBES, LOCKE, AND ROUSSEAU 7-8 (1987):

> [A] new way of looking at nature suggested a new way of looking at society. The stress on efficient, as opposed to final, causation made them cautious about assuming that social and political institutions had a fixed purpose, independent of prior arrangements among the individuals who made them up. [The] nominalism [of the new scientific method], which by itself did not necessarily lead to the liberal political outlook, was of great importance for early liberalism, since it no longer allowed for the Aristotelian insistence on the natural priority of society over its individual members. From this time on, the legitimation of even the most authoritarian forms of government had to appeal to individual interests, and it became increasingly difficult to claim that society *as such* constitutes the main benefit of individuals' particiption in it.

democratic majority.[109]

Under traditional theory, we can easily imagine limitations on governmental authority as individual rights, including those specified by the first amendment. Strong arguments also are available for extending those rights to at least some aliens. It is more difficult, however, to argue that either academics or academic institutions have any special rights guaranteed by the Constitution. Thus, the ideological provisions of the McCarran-Walter Act raise issues that tend to invite a general constitutional analysis. The fact that those facing exclusion or deportation are intellectuals coming to speak, write, or conduct research at American universities assumes only marginal importance.

Nevertheless, traditional theory has made only limited inroads, and established tenets of constitutional law provide little comfort to the alien facing exclusion or deportation. Nor, if we look at existing case law, does the first amendment appear to afford much protection to those with an interest in hearing or encountering them. Thus, the controlling law for most "excludable aliens"[110] is clear:

> [A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides.[111]

Excludable aliens, in other words, can make no substantive or procedural claims beyond those authorized by statute or administrative regulation.[112] If they are excluded because of their ideas, they may not seek protection directly from the first amendment.

An alien's American sponsors or advocates are unlikely to fare much better when they raise their own first amendment challenge to the alien's exclusion or expulsion. As the Supreme Court noted in *Klein-*

109. For a good example of this mode of argumentation, which is central to the liberal tradition of "constitutionalism," see G. MADISON, THE LOGIC OF LIBERTY 129-61 (1986).

110. Most aliens who arrive at the border and seek entry are technically "excludable" and are entitled to little or no constitutional protection in their immigration processing. A narrow exception has been carved out by the courts for "permanent resident aliens" *returning* to (or "re-entering") the United States. *See* Landon v. Plasencia, 459 U.S. 21, 32-33 (1982); *cf.* Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963) (holding that a resident alien's brief excursion to Mexico did not remove his resident alien status and that his return trip did not constitute an "entry" into the United States). *But see* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214 (1953) (holding that an absence of 19 months was a "clear break in an alien's continuous residence," thus relegating the alien to entrant status). On the other hand, "entry" is a term of art, and the category of "non-entrants" who are subject to exclusion includes some who are physically present within our borders, such as Haitian and Cuban boat people who were apprehended immediately upon reaching shore and have since spent years in detention. *See* Comment, *supra* note 85, at 1452-53.

111. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

112. *See Mezei*, 345 U.S. at 212.

dienst v. Mandel, even though members of a potential American audience have the first amendment right to receive information and ideas from aliens the government desires to exclude,[113] that right ordinarily will not outweigh "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.' "[114] The *Mandel* Court held that "when the Executive exercises this power . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of [Executive] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant [for admission]."[115]

The authority of the government to expel or deport aliens *after* they have entered the United States, because of their political affiliations, teachings, or views that do not incite imminent lawless action,[116] is more unsettled. The usual legal challenge begins with the notion that constitutional strictures on governmental power create rights in those threatened by any exercise of power beyond those limits. At least to those judges who have taken the implicit Lockean ideology of the Bill of Rights seriously, constitutional protections extend to everyone who is a domiciliary of the United States. Thus, even aliens in deportation proceedings have rights. Justice Brewer stated this principle clearly in his passionate dissent in *Fong Yue Ting v. United States,*[117] the first deportation case to reach the Supreme Court:

> [W]hatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments. . . .
>
> It is said that the power here asserted [to deport alien Chinese without constitutional due process] is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits of such power to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. . . .
>
> . . . [T]he Constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed [in the Constitution]. Even if it be

113. 408 U.S. 753, 762 (1972).
114. *Id.* at 766 (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)).
115. *See id.* at 770.
116. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam).
117. 149 U.S. 698 (1893).

> among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution.[118]

Even scholars writing in the liberal tradition have suggested at times that Justice Brewer's "territorial" argument goes too far. Alexander Alienikoff and David Martin, for example, explicitly disavow Brewer's "location argument" in favor of the argument pressed by Justice Fuller in his *Fong Yue Ting* dissent: namely, aliens facing deportation have gained a stake in remaining in the United States that entitles them to constitutional protection before that stake can be taken away.[119] Neither the location nor the stake argument persuaded the majority in *Fong Yue Ting*. Yet the Court, since it decided that case nearly a century ago, has refined its doctrine and has afforded constitutional protection to any alien who faces possible deportation after she has entered and remained within the United States.[120]

Although the Supreme Court has been reluctant to say so directly, its decisions indicate that aliens who have *formally entered* the United States are entitled to something more than procedural due process. These aliens may expect at least formal protection from entry or expulsion actions that offend specific constitutional guarantees embodied in the Bill of Rights,[121] or more problematically, the equal protection clause of the fourteenth amendment.[122] The Court's decisions establish that the

118. *Id.* at 737-38 (Brewer, J., dissenting).

119. T.A. ALIENIKOFF & D. MARTIN, *supra* note 51, at 35. Others have expressed related views that Alienikoff and Martin have criticized. *See* P. SCHUCK & R. SMITH, *supra* note 85, at 116-29 (asserting that the basis for citizenship should not be birth in American territory or simple long-term residence in the United States, but *consent* to the stipulations of the "social contract" established by the "American political community").

120. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (noting that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"); *see also* Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100-01 (1903) (concluding that executive officers of the United States are not vested with the power to deport an alien arbitrarily without giving the alien an opportunity to be heard).

121. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32-34 (1982) (holding that aliens who once were residents and now are "re-entering" are entitled to procedural due process, even though they face "exclusion" rather than "deportation"); The Japanese Immigrant Case, 189 U.S. at 100-01 (holding that deportation proceedings must be conducted so as to provide "due process of law"); Wong Wing v. United States, 163 U.S. 228, 237 (1896) (holding that enforcement of immigration laws through "punishment by imprisonment" without a trial violates the Constitution). *But see* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) ("[T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak."); *cf.* INS v. Lopez-Mendoza, 468 U.S. 1032, 1042 (1984) (noting that aliens facing deportation are entitled only to limited fourth amendment protection).

122. It is clear that aliens not involved in immigration proceedings are protected by the equal protection clause of the fourteenth amendment, *see* Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886), and by the implied equal protection component of the fifth amendment, *see* Mathews v. Diaz, 426 U.S. 67, 77 (1976), although in the latter instance, Congress can "make rules that would be unacceptable if applied to citizens," *id.* at 80. In immigration proceedings, however, the tradi-

first amendment is available to a deportable alien, but they provide little evidence that the Court is willing to interpret the first amendment in a manner that would give such aliens more than nominal freedom of speech or association.

The Court has made some limited progress. Resident aliens lacked assurance before 1945 that they possessed such freedoms even nominally. The only Supreme Court decision on point, *United States ex rel. Turner v. Williams*,[123] summarily rejected the argument that the deportation provisions of the Anarchist Act of 1903 violated the first amendment rights of aliens. The issue did not reach the Court again until 1945, when Harry Bridges, a union leader with strong leftist sympathies, raised statutory and constitutional objections to the government's attempt to deport him.[124] Justice Murphy, in a concurring opinion, adopted Justice Brewer's territorial argument and used it to support the conclusion that the first amendment fully protects resident aliens.[125]

Seven years later, in *Harisiades v. Shaughnessy*,[126] the Court considered a challenge to another statute that provided for the deportation of aliens who had ever belonged to the Communist Party,[127] no matter how

tional position taken by the federal courts was to employ extreme deference toward the Congress in upholding statutory classifications. *See* Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (upholding a gender classification); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (upholding a racial classification); Dunn v. INS, 499 F.2d 856, 859 (9th Cir. 1974) (upholding a classification based on nationality), *cert. denied*, 419 U.S. 1106 (1975). Recently, the Court ignored an opportunity to clarify the continuing authority of these precedents. *See* Jean v. Nelson, 472 U.S. 846 (1985).

123. 194 U.S. 279, 291 (1904).

124. The government based its deportation action on the ground that Bridges' public positions proved that he was affiliated with the Communist Party. The majority opinion in Bridges v. Wixon, 326 U.S. 135, 141-49 (1945), skirted the constitutional issue by interpreting the term "affiliation" narrowly.

125. *See id.* at 161, 166 (Murphy, J., concurring). Justice Murphy noted that Congress may not ignore the constitutional rights of resident aliens in the exercise of its plenary power of deportation:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those by the First and the Fifth Amendments and the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority. . . .
>
> . . . .
>
> Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature. Thus the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom. The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him. I cannot agree that the framers of the Constitution meant to make such an empty mockery of human freedom.

Id. at 161-62.

126. 342 U.S. 580 (1952).

127. Alien Registration Act of 1940, Pub. L. No. 670, ch. 439, § 23(b), 54 Stat. 670, 673.

short the time or how far in the past.[128] The Court heard and rejected the petitioners' claims that the statute was unconstitutional ex post facto legislation. But the majority did consider the petitioners' first amendment arguments. Justice Jackson, writing for the Court, made it clear that the Constitution obligated the Court to determine whether the petitioners' political associations with the Communist Party fell within the rubric of protected speech.[129]

Despite allusions to the contrary, Justice Jackson did not find this obligation at all difficult. He devoted less than two pages to explaining why the first amendment did not protect the petitioners' membership in the Communist Party when two of the three petitioners had never personally advocated violence or violent action. His basic argument was that speech is bipolar: either it *incites* violence, or it is tied to the "lawful elective process."[130] Relying on the Court's decision in *Dennis v. United States*,[131] Justice Jackson concluded that "the First Amendment does not prevent the deportation of these aliens."[132]

The Supreme Court did not clarify which aliens have constitutional protection when it decided *Galvan v. Press*,[133] another deportation case raising potential first amendment questions. In *Galvan* the Supreme Court heard a challenge to the constitutionality of the deportation provisions of the Subversive Activities Control Act,[134] which authorized the deportation of any alien who became a member of the Communist Party any time after entry. In his decision upholding the constitutionality of the Act, Justice Frankfurter focused exclusively on the petitioner's claim that he had been denied substantive due process as a result of the Act's ex post facto operation.[135] The Court did not reach the petitioner's im-

128. S. REP. NO. 1796, 76th Cong., 3d Sess. 3 (1940).

129. Justice Jackson described the difficulty of determining whether "ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence," but concluded that "the Constitution enjoins upon us the duty, however difficult, of distinguishing between the two." *Harisiades*, 342 U.S. at 592.

130. Justice Jackson averred that the Constitution provides a legal alternative to violent attack on the status quo: "To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by press, speech and assembly. This means freedom to advocate or promote Communism by means of the ballot box, but it does not include the practice or incitement of violence." *Id.*

131. 341 U.S. 494 (1951) (upholding the constitutionality of a statute that proscribed the advocacy of overthrowing the government by force or violence).

132. *Harisiades*, 342 U.S. at 592.

133. 347 U.S. 522 (1954).

134. Ch. 1824, 64 Stat. 987, 1006 (1950).

135. *Galvan*, 347 U.S. at 531. The intrinsic consequences of deportation—strikingly similar to the punishment for a crime—warrant application of the ex post facto clause, even though it is usually applied only to punitive legislation. Justice Frankfurter argued that he was not free to change existing precedent: "[T]he slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' but a whole volume." *Id.* (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

plicit first amendment claim at all, and since that decision thirty-three years ago, it has never directly addressed the first amendment question in the deportation context.[136]

The Supreme Court, therefore, has invested resident aliens with some substantive rights under the first amendment.[137] But determining how far those rights extend or what standards limit the use of the deportation power to stifle dissent is impossible. Certainly the result in *Harisiades*[138]—permitting deportation of resident aliens because they were members of the Communist Party—suggests that those standards are remarkably deferential to the government's national security concerns.

IV. Democracy, Dissent, and the Marketplace of Ideas

A. The First Amendment and the Liberal Tradition

Neither the decision in *Dennis* nor the one in *Harisiades* can be justified under traditional liberal theory. Nor are they consistent with the classic renditions of that theory in cases that elaborate on the central or core purpose of the first amendment.

Dissenting in *Abrams v. United States*,[139] in probably the most notable and enduring assessment of expressive freedoms, Justice Holmes characterized the object of the first amendment as the promotion of "free trade in ideas."[140] He believed that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and urged eternal vigilance against attempts to check loathsome opinions "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[141] Since Holmes's *Abrams* dissent nearly seventy years ago, the Court has continued to rely, both explicitly and implicitly, on the metaphor of the marketplace of ideas, particularly when the speech at issue is overtly political. It also has emphasized periodically that government action can permissibly restrict political speech

136. *But cf.* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (concluding that "if any alien is a lawful permanent resident of the United States and remains physically present here, he is a person within the protection of the Fifth Amendment"). By quoting Justice Murphy's concurring opinion in *Bridges* and offering it as the primary citation for this well-established law, *see id.* at 596 n.5, the Court in *Kwong Hai Chew* made it clear that the constitutional rights of resident aliens in deportation proceedings are broad, and include those afforded by the first amendment.

137. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952); Bridges v. Wixon, 326 U.S. 135, 148 (1945).

138. Although *Harisiades* was decided in 1952, it is the Supreme Court's most recent pronouncement on the issue.

139. 250 U.S. 616 (1919).

140. *Id.* at 630 (Holmes, J., dissenting).

141. *Id.*

only to avert some "imminent danger." In *New York Times Co. v. Sullivan*,[142] for example, the Court implicitly embraced the metaphor of the marketplace when it introduced the actual malice standard into libel law on first amendment grounds. The Court decided the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[143] Similarly, in *Schenck v. United States*,[144] Justice Holmes articulated the classic formulation of the limits of the first amendment:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is 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.[145]

Since the Supreme Court decided *Schenck* in 1919, courts have used an "imminence" test of sorts to assess the dangers of specific expression. The officially accepted definition of "imminence," however, has undergone several transformations over the last seventy years. The majority decision in *Whitney v. California*,[146] for instance, upheld a state criminal syndicalism statute but did not explicate what a clear and present danger might be. In an influential concurring opinion (which Justice Holmes joined), Justice Brandeis, while finding for the state on the facts, provided a strong liberal argument for tolerance except under emergency circumstances:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is

142. 376 U.S. 254 (1964).

143. *Id.* at 270. The Court similarly acknowledged that "constitutional protection [of speech] does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *Id.* (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)). Two years later, in *Bond v. Floyd*, a unanimous Supreme Court extended the holding of *New York Times* beyond defamation law to protect public discussion from direct governmental sanctions:

> The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times Co. v. Sullivan*, is that "debate on public issues should be uninhibited, robust, and wide-open." . . . Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.

385 U.S. 116, 136 (1966) (citation omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

144. 249 U.S. 47 (1919).

145. *Id.* at 52 (citations omitted) (emphasis added).

146. 274 U.S. 357 (1927).

> the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. . . .
>
> . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[147]

"Imminence" in its current canonical form, as stipulated in *Brandenburg v. Ohio*,[148] owes more to Justice Brandeis's *Whitney* opinion than to Justice Holmes's clear and present danger test. According to the *Brandenburg* formulation, a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[149] The Court noted that the " 'mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' "[150]

These cases, with their emphasis on the free exchange of ideas, their implicit distinction between speech and overt physical conduct, and their recognition that the law must permit expressive activity up to the threshold of physical violence or physical resistance to governmental authority, fit squarely within liberal-democratic political theory. Emerging out of the same intellectual tradition that informed the work of John Locke, John Stuart Mill, and Alexander Meiklejohn, this doctrine is grounded in the liberal tradition's fundamental presuppositions about language, ra-

147. *Id.* at 376-77 (Brandeis, J., concurring). Justice Brandeis laid the foundation for this limitation by emphasizing the importance of free speech guarantees:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . 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 and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law . . . . Recoguizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375-76 (footnote omitted).

148. 395 U.S. 444 (1969).

149. *Id.* at 447.

150. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

tionality, individual freedom and authority, and the constitutional-political order.

B. The Institutional and Epistemological Bases of Free Speech

As John Searle expounds it, the traditional concept of academic freedom rests on several assumptions, including axiomatic beliefs that "knowledge is of value and the university is an institution for the furtherance of that value."[151] But Searle maintains that these two axioms are inadequate to derive the rights of academic freedom: "[W]e need also a theory about how knowledge can be attained and validated; we need an epistemology, a theory of knowledge."[152] Searle further observes that although the university may be an essentially medieval institution, "its contemporary ideology and methodology come from . . . the enlightenment."[153] The theory of the modern state, from which we derive the classic rights of free speech, also has an institutional and epistemological base that is essentially a product of the Enlightenment.

The institutional base for limiting the government's authority to censor speech or other forms of expression is a belief in, or an acceptance of, a Constitution that guarantees rights by explicitly or implicitly restraining governmental power. Liberal theorists all argue that free speech is not only guaranteed by the Constitution, but is the paramount constitutional right because it has a unique instrumental value. They sometimes disagree, however, about the nature of that instrumental value. Thus, Alexander Meiklejohn argued that free speech is important because it keeps the constitutional machinery running smoothly. Under this view, constitutional government is essentially "process," an ongoing "town meeting" in which "the people of the community assemble to discuss and to act upon matters of public interest—roads, schools, poorhouses, health, external defense, and the like."[154] Although Justice Brandeis noted that the first amendment allows the "development of faculties,"[155] and some of the more recent theorists of the first amendment assert that it facilitates expressive freedom,[156] at the town meeting the common ends of the citizenry are of paramount importance. For those theorists who espouse the town meeting metaphor, free speech thus precludes a "free-for-all" without rules and requires a moderator who can

151. J. SEARLE, *supra* note 1, at 185.
152. *Id.*
153. *Id.* at 186.
154. A. MEIKLEJOHN, *supra* note 32, at 22.
155. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
156. *See* Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1153-56 (1983).

guide it toward some useful end.[157] Meiklejohn emphasizes the functional utility of speech in "the common enterprise" of governance and thus comes close to denying the relevance of the individual perspective of the speaker.[158]

Alternatively, one can regard the instrumental value of speech as something that promotes the happiness of the speaker by reconciling her to the will of the larger community. Under this view, consequentialist arguments about the value of particular speech in promoting particular community ends are necessarily secondary to the question of whether speech promotes an individual's own willingness to participate in the formation, and live within the terms, of the social contract.[159]

Despite their differing emphases, both visions of instrumental value assume that in the end legitimate government is the product of individual, rational choices. Meiklejohn, for example, argues that "free men do . . . not bargain. They reason."[160] Thus, he believes that the metaphorical town meeting requires full access to all relevant facts[161] and views, including those "thought to be false or dangerous."[162] Only this access will avoid "the mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed."[163]

We cannot talk about "the thinking process of the community" or the rational choices of the individual, however, without assuming an epistemology. Liberal defenders of free speech in the nineteenth and twentieth centuries have widely shared the basic epistemological presuppositions of classical political theory, which date back at least to John

157. *See* A. MEIKLEJOHN, *supra* note 32, at 23 ("The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done.").

158. *See id.* at 24-25 ("[T]he point of ultimate interest is not the words of the speakers, but the minds of the hearers.").

159. Geoffrey Brennan and James Buchanan, two noted exponents of the social contract state and individualism, assert:

> The critical normative presupposition on which the whole contractarian construction stands or falls is the location of value exclusively in the individual human being. The individual is the unique unit of consciousness from which all evaluation begins . . . .
>
> . . . Which individuals are to be considered sources of value? There is no apparent means of discriminating among persons in the relevant community, and there would seem to be no logical reason to seek to establish such discrimination if it were possible. Consistency requires that all persons be treated as moral equivalents, as individuals equally capable of expressing evaluations among relevant options.
>
> From these presuppositions, and these alone, it becomes possible to derive a contractarian "explanation" of collective order. Individuals will be led, by their own evaluation of alternative prospects, to establish by unanimous agreement a collectivity, or polity, charged with the performance of specific functions . . . .

G. BRENNAN & J. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 21-22 (1985).

160. A. MEIKLEJOHN, *supra* note 32, at 10.

161. *Id.* at 25.

162. *Id.* at 26.

163. *Id.* (emphasis omitted).

Locke. These assumptions include the notion that humans are rational beings, that their rationality largely inheres in the natural languages they use, and that natural languages are inherently transitive because they involve both a speaker and a listener or a writer and a reader. The liberal theorists further assume that natural languages, which reflect the world without directly altering it, are the most powerful mode of symbolic expression describing the physical universe, social relationships, and the logical consequences of any particular course of action that might alter those relationships. Finally, liberal theory assumes that each natural language is completely understandable to everyone speaking that language; that the logical inferences language conveys are universally true (although not necessarily complete or valid) and understandable to a rational audience; and that the reciprocal use of rational language, through a free exchange of ideas, rational discourse, or "liberal conversation,"[164] can reconcile the differing perceptions and interpretations of various individuals, thus permitting broad consensus about political matters.

The last point converts faith in "rational discourse" from a general epistemological principle into a fundamental premise of political theory. Under the Hobbesian model, rational beings, aware of their own inherent selfishness and its potential for violence, enter into a social contract with one another that creates the Leviathan—the sovereign—and deprives them of autonomy.[165] Under the Lockean model, the social contract is dynamic rather than static. It is an agreement among similarly inclined people that can be abrogated, at least theoretically, and that requires constant renegotiation as the members of the community insist on maintaining their individual prerogatives while demanding the maintenance of minimal public order from the state.[166] In the marketplace of ideas, such renegotiation takes place in a specifically political context. Like any marketplace metaphor, it springs from a belief in uncoerced and relatively unconstrained exchange. Within a Lockean framework, politics involves the set of rational decisions surrendering individual conceptions of the "good," and the right to act on those conceptions, in return for the promise of a better social order.

164. *See* B. ACKERMAN, *supra* note 107, at 6 ("Rather than linking liberalism to ideas of natural right or imaginary contract, we must learn to think of liberalism as a way of talking about power, a form of political culture." (emphasis omitted)).

165. *See* T. HOBBES, LEVIATHAN 109-13 (M. Oakeshott ed. 1962) (1651).

166. Peter Laslett offers a similar interpretation of Locke's THE SECOND TREATISE OF GOVERNMENT, in J. LOCKE, *supra* note 108. *See* Laslett, *supra* note 108, at 110-17 (emphasizing that government functions as a "trustee" for the interests of the citizenry, and that a "continuing understanding" defines the relationship "between governed and governors"). *But see* R. GRANT, JOHN LOCKE'S LIBERALISM 101-36 (1987) (arguing that "obligation" in Locke is determined largely by free consent to the "original understanding").

Such an epistemology is necessary if we are to assume, as the marketplace metaphor demands, that citizens generally communicate rationally with one another about social goods or goals and that this communication of individually reached but collectively shared conclusions facilitates concerted action.[167] Because that epistemology supports the conclusion that there is a meaningful distinction between speech (or other expressive activity) and completed physical action, it permits even dangerous or subversive speech, but proscribes the physical activities that such speech may advocate. For although speech may promote various actions that seem antithetical to established public order, in the ordinary course of events it is not the linguistic message that leads to violence or anarchy.[168] Instead, the apprehension and processing of that message by human beings and the *rational* choices that they make on the basis of what they read or hear promote social changes.[169] Thus, although other procedural distinctions may be defensible, substantive restrictions on expression that interfere with the rational communication of anything falling within the realm of political choice are impermissible.[170]

167. *See* Perry, *supra* note 156, at 1153-60. Clearly, liberal theory attempts to reconcile values associated with individual freedom and those associated with the development of a collective and evolutionary social order.

168. "Falsely shouting fire in a theatre and causing a panic," Schenck v. United States, 249 U.S. 47, 52 (1919), is the classical example of a situation in which the linguistic message is inseparable from an immediate emotional reaction and direct social consequences. As such, it defined the paradigmatic limit of the liberal argument, which depends on rationality and free choice.

169. Thomas Scanlon has provided the clearest and most concise account of the "rationalistic" and "intersubjective" dimensions of the liberal argument against excessive restrictions on the liberty of citizens. That argument, he states, "is a consequence of the view, coming down to us from Kant and others, that a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, and rational agents." Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972). The cornerstone of this argument is a principle derived from John Stuart Mill's *On Liberty*. As Scanlon states it:

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on those acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.

Id. at 213.

Common to both of these "harms" is the fact that they necessarily occur in two stages, and involve two actors. Thus, the generation of "false beliefs" cannot occur without advocacy by one person and some sort of processing and acceptance by another. Actions based on false beliefs, when not directed or orchestrated by their advocate, culminate only when the new believer independently employs his own intelligence and will. As Scanlon puts it:

> A person who acts on reasons he has acquired from another's act of expression acts on what *he* has come to believe and has judged to be a sufficient basis for action. The contribution to the genesis of his action made by the act of expression is, so to speak, superseded by the agent's own judgment.

Id. at 212.

170. *See id.* at 222 ("[T]he authority of governments to restrict the liberty of citizens in order to

C. *Discord Between Liberal Assumptions and the Ideological Provisions*

The ideological provisions of the McCarran-Walter Act clearly limit the dissemination or discussion of any Communist or other unconventional political views for radically restructuring the American political system. For the reasons Justice Black enunciated in *Subversive Activities Control Board*, a jurisprudence based on the assumptions of liberal theory is incompatible with such restrictions:

> The question . . . is whether Congress has power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country. In my judgment, neither of these factors justifies an invasion of rights protected by the First Amendment. Talk about the desirability of revolution has a long and honorable history, not only in other parts of the world, but also in our own country. This kind of talk, like any other, can be used at the wrong time and for the wrong purpose. But, under our system of Government, the remedy for this danger must be the same remedy that is applied to the danger that comes from any other erroneous talk—education and contrary argument. If that remedy is not sufficient, the only meaning of free speech must be that revolutionary ideas will be allowed to prevail.[171]

The national security argument for the ideological provisions masks their true purpose: protection of particular social and economic values that are promoted by the American political system. Thus, the threat particular Communists posed in *Harisiades* and *Dennis* was not to America's nuclear secrets, but to the prevailing American political ideology. Nor were the Communists going to make good that threat with guns or rigged elections; instead, as in *Dennis*, they would simply "raise consciousness" by the reading, discussion, and advocacy of the ideas contained in four Communist works.[172] By the Court's own account, two of the three petitioners in *Harisiades* were involved with the Communist Party only by their attendance at an occasional meeting.[173] In these two cases, and perhaps in the third, there was no ground for concluding that their involvement had ever approached the level of advocacy, much less incitement. Margaret Randall, who now faces possible deportation, has advocated changes in American foreign policy, as well as the adoption of

prevent certain harms does not include authority to prevent these harms by controlling people's sources of information to insure that they will maintain certain beliefs.").

171. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 147-48 (1961) (Black, J., dissenting) (footnote omitted).

172. *See* Dennis v. United States, 341 U.S. 494, 582 (1951) (Douglas, J., dissenting).

173. Harisiades v. Shaughnessy, 342 U.S. 580, 581-83 (1952).

different national attitudes toward race and sex. Her essays, photographs, and lectures at the University of New Mexico have been critical of some things she has seen in the United States. Yet they fit squarely within the range of discourse that liberal theory and the bulk of nonimmigration first amendment doctrine protect.

The difficulties the ideological provisions present do not disappear simply because an alien is excludable rather than deportable. Theory and the dicta of dozens of nonimmigration first amendment cases support the contention that American citizens have a constitutionally recognized interest in receiving information.[174] The marketplace of ideas is of paramount value to all those already in the United States. Decisions such as *Kleindienst v. Mandel*, however, dispose of citizen claims by postulating an unlimited and inherent governmental power, not only to define the membership of the national community, but to define it according to any standard that it chooses.[175] But under traditional liberal theory, legitimate government can make only those choices that a rational citizenry would make on its own. In the marketplace of ideas, assuming the general conceptions of language and rationality implicit in liberal epistemology, the citizenry cannot rationally establish a grounds for exclusion or deportation that is based solely on the ideas an alien advocates. In 1948, Alexander Meiklejohn put this theory into practice and challenged an order of the Attorney General restricting the freedom of speech of temporary foreign visitors except by special permission:

> Why may we not hear what these men from other countries, other systems of government, have to say? For what purpose does the Attorney General impose limits upon their speaking, upon our hearing? The plain truth is that he is seeking to protect the minds of the citizens of this free nation of ours from the influence of assertions, of doubts, of questions, of plans, of principles which the government judges to be too "dangerous" for us to hear. He is afraid that we, whose agent he is, will be led astray by opinions which are alien and subversive. Do We, the People of the United States, wish to be thus mentally "protected"? To say that would seem to be an admission that we are intellectually and morally unfit to play our part in what Justice Holmes called the "experiment" of self-government.[176]

Self-government is inseparable from the liberal theory of government, which begins with the conception of the free and isolated individual and

174. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 8 (1986); Board of Educ. v. Pico, 457 U.S. 853, 866-67 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

175. *See* 408 U.S. 753, 765-69 (1972).

176. A. MEIKLEJOHN, *supra* note 32, at xiii-xiv.

justifies political choices in the same manner as it justifies self-expression and self-fulfillment. Thus, liberal tradition supports a generous interpretation of the first amendment. That tradition provides strong reasous for permitting *all* American citizens, whether they are associated with the academy or not, to encounter alien ideas and the foreigners who express them.

V. Beyond Traditional Liberal Theory: Aliens, the Academy, and the Marketplace of Ideas in a Relativistic Era

A. The Place of the Academy

The Mill-Meiklejohn tradition is committed to expressive freedom within the context of political discourse. It faces considerable difficulty, however, when it attempts to justify the proposition that in particular social contexts—such as in the university classroom or at the meeting of a professional association—those present have a more persuasive claim to free speech rights than they would have in another setting. It provides no explicit theoretical justification, in other words, for regarding the denial of a visa to an alien professor as a particularly egregious offense against the principles informing the first amendment.

The basic liberal argument for opening up the marketplace of ideas to those with alien ideas does apply with speeial force in a university setting. In a society that places great value on choice and the free exchange of ideas, academic forums—organized to promote the broadest exchange of ideas with the least disruption of ongoing social and political life—deserve rigorous legal protection.

In general terms, the Supreme Court has agreed with this proposition and frequently has asserted that the university constitutes a unique forum, staffed by "intellectual leaders" who play a "vital role in [our] democracy" by "guid[ing] and train[ing] our youth" in an environment that must remain open to new ideas if "scholarship [is to] flourish."[177] Commentators have criticized the courts for refusing to flesh out this generous rhetoric with a body of case law "constitutionalizing" academic

177. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). Under the Court's view, "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). As a consequence, "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Sweezy*, 354 U.S. at 250. Academic freedom, therefore, as a "transcendent value to all of us," is a "special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603.

freedom[178] and sometimes have faulted the courts for identifying academic freedom, not as a concern specific to the "community of scholars engaged in research and education,"[179] but instead "with the freedom of the administration of a university to set the intellectual agenda for that community."[180] Others are more supportive of the Court's approach. Even Meiklejohn's emphasis on "process"—meetings directed to producing decisions about governance—necessarily implies a theory of discourse that will countenance, and possibly demand, significant limitations on the time, place, and manner of all types of speech, including academic speech.[181] Those limitations become more restrictive when we realize that to some Meiklejohn followers the apparent object of speech is truth, and that certain types of false speech, such as libel, are not constitutionally protected.[182]

178. *See, e.g.*, Katz, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U.C. DAVIS L. REV. 857 (1983).

> The eloquent rhetoric on "academic freedom" found in the opinions of the United States Supreme Court creates the impression that the university classroom provides the professor with a higher order and greater quantum of first amendment protection than is available to those who follow less exalted callings in less sacrosanct workplaces. This impression, however, does not conform to the reality of the Court's first amendment jurisprudence. . . .
>
> . . . The truth is that classroom speech enjoys less protection than more ordinary speech. Professors are not immune from suffering the unfavorable consequences of their speech. Indeed, they are more vulnerable than the average citizen to being penalized for speech, even outside the classroom. Rather than providing a sanctuary for the robust, freewheeling expression of views, some of which may be unpopular, or even "dangerous," the classroom, even in a university, provides a forum in which speech may be sharply curtailed.

Id. at 858-59.

179. Levinson, *Princeton versus Free Speech: A Post Mortem*, in REGULATING THE INTELLECTUALS, *supra* note 8, at 195 (quoting Brief for Princeton University at 7, Princeton University v. Schmid, 455 U.S. 100 (1982) (No. 80-1576)).

180. *Id.* Levinson discusses this position, which Princeton University took, in depth. *See id.* at 189-207.

181. For Meiklejohn, free speech, at least in the political arena, is an absolute: "The phrase, 'Congress shall make no law . . . abridging the freedom of speech,' is unqualified. It admits of no exceptions. To say that no laws of a given type shall be made means that no laws of that type shall, under any circumstances, be made. That prohibition holds good in war as in peace, in danger as in security." A. MEIKLEJOHN, *supra* note 32, at 17.

In elaborating his image of the town meeting, Meiklejohn provides a concrete form for his version of the marketplace of ideas. His metaphor conveys not only a process, an exchange of views about matters of public importance, but also a setting, a courthouse or public square jammed with loquacious citizens, their conversation strictly channeled by a chairman or moderator who insures that all facts and interests relevant to the problem they have joined to consider are "fully and fairly presented to the meeting." *Id.* at 22-25. But the moderator also insures that nothing extraneous, irrelevant, or repetitious is said. Thus, as the hour grows late and the town malcontent rises for the seventh time to question the expenditures for a domed football stadium or to propose the establishment of a soviet form of government for central Indiana, we can imagine the chairman refusing to recognize him or ruling him out of order. Meiklejohn so describes the moderator's job: "His business on its negative side is to abridge speech"; otherwise "the town meeting . . . would be wholly ineffectual." *Id.* at 23. His image, in other words, is not only of channeled conversation, but also of directed decision making.

182. Thus, under Meiklejohn's own formulation, certain forms of political speech are impermissible per se because they threaten the integrity of the forum. Falsely shouting fire when a vote is

Nevertheless, many have used the traditional view of the university marketplace of ideas as a particularly active arena of exchange to justify protecting some expressive and associational rights of faculty members and also to support the rights of students to express themselves in a university setting. Barring faculty members from teaching because of simple membership in proscribed organizations (including the Communist Party)[183] and imposing most required loyalty oaths[184] are now unconstitutional. Faculty members need not conform their speech to the common expectations that "the austere surroundings of a faculty meeting" apparently impose, nor must they always treat their superiors with obsequious respect. Despite upsetting the legislature or faculty "because of the contents of his views, and . . . the depth of his social criticism," an academic cannot be penalized constitutionally for ordinary expression.[185] Dismissal of faculty members because of the content of their speech ordinarily is an unconstitutional deprivation of a protected liberty interest under the fifth and fourteenth amendments, even if that faculty member is untenured.[186] Similarly, university students are entitled to broad constitutional protection when confronted with disciplinary action for the content of their speech, unless it is "materially disruptive."[187]

In enunciating and applying the metaphor of the marketplace to

about to be taken is the clearest, though not the only, example. As Justice Brennan has noted, "civil or criminal libel actions for false criticism of the official conduct of a public official [is compatible with Meiklejohn's formulation] if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or true." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18 (1965) (citing his decisions for the Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Garrison v. Louisiana, 379 U.S. 64 (1964)).

183. *See* Keyishian v. Board of Regents, 385 U.S. 589, 606, 608 (1967); *see also* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 847-48 (counting this right of association among the "better settled propositions" of academicians' constitutional rights).

184. *Compare Keyishian*, 385 U.S. at 592-93 (rendering unconstitutional a New York law requiring faculty members at a state university to sign a statement that they were not and never had been members of the Communist Party) *with* Cole v. Richardson, 405 U.S. 676, 677-79 (1972) (upholding the requirement of a general commitment to "uphold and defend" the Constitution on the grounds that such an oath promised only to "oppose the overthrow of the government . . . by force, violence, or by any illegal or unconstitutional method").

185. Starsky v. Williams, 353 F. Supp. 900, 920 (D. Ariz. 1972), *aff'd in part*, 512 F.2d 109 (9th Cir. 1975).

186. *See* Perry v. Sindermann, 408 U.S. 593, 597-98 (1972) (asserting that the "lack of a contractual or 'tenure' right to re-employment . . . is immaterial to [the] free speech claim").

187. *See* Healy v. James, 408 U.S. 169, 180 (1972). The Court noted:

> [T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the " 'marketplace of ideas,' " and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

Id. (quoting *Keyishian*, 385 U.S. at 603; Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

universities, courts have failed to generate a large or coherent body of law. Moreover, even when precedent suggests application of the marketplace metaphor, courts have not honored the academy with special or preferential treatment as a general rule.[188] In areas that have a significant impact on university education—as immigration law surely does—the courts have applied the marketplace metaphor sporadically and with little effect. Thus, the exclusion under the McCarran-Walter Act of many intellectuals invited to teach, lecture, or conduct research at American institutions of higher learning has not yet produced *any* decisions scrutinizing the government's actions under the first amendment.[189]

Yet under traditional liberal theory it is an unjustifiable exercise of governmental power to exclude from the marketplace of ideas *anyone* who is not about to engage in lawless conduct or incite violence. The argument that universities have extended invitations to foreign scholars so that they may participate in an organized (and presumably orderly) intellectual exchange is a powerful one. The rest of this Article addresses this question: How powerful is such an argument in a universe in which converging tendencies of thought from many intellectual disciplines have undercut the epistemological ground for universal rational discourse and deprived many of their faith in a perfect marketplace in which individuals may freely and openly exchange ideas on the basis of adequate information? In such a universe, is it possible to reconceptualize the mission of the universities and the nature of the intellectual marketplace itself and thus to derive a new argument for academic freedom that would condemn the ideological provisions of the McCarran-Walter Act?

B. Attacking the Traditional Marketplace

The first question is important because it is impossible to write adequately about the marketplace of ideas without acknowledging that the fundamental liberal argument recently has come under significant, sus-

188. Although it is possible that professors "are more vulnerable than the average citizen to being penalized for speech," *see* Katz, *supra* note 178, at 859, I do not necessarily agree with Katheryn Katz's conclusion that the *law*, taken as a whole, provides those professors with *less* protection, *see id.* at 859, 931-32. Their special vulnerability is probably due to the fact that unlike most members of society, they are hired talkers. Without the limited protections the courts have enunciated, their situation probably would be worse.

In many circumstances, of course, conditions on the time, place, or manner of speech undercut broad first amendment principles, especially in a school setting. *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415 n.4 (1979); Clark v. Holmes, 474 F.2d 928, 931-32 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973). Additional limitations on formally recognized rights also emerge when the courts begin to balance a teacher's interest in free speech against educational or organizational efficiency. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

189. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972) (acknowledging petitioner's right to receive information under the first amendment, but ultimately refusing to balance that right against the interests of the government in pursuing its general immigration policy).

tained, and quite telling attack. That attack generally rejects the possibility of a truly rational discourse (at least as measured according to some invariant and universal standard) and asserts that the marketplace is rigged to favor the views of a rich and powerful elite.

Of these critiques, the attack on an assumed rationality deserves serious attention. C. Edwin Baker and Stanley Ingber have led the attack, although scholars of less extreme political and philosophical persuasions have helped them discredit blind faith in transcendent reason. Baker, for instance, has argued that "[t]he assumptions on which the classic marketplace of ideas theory rests are almost universally rejected today"—including the assumption that truth is objective.[190] Ingber similarly disparages the assumption that "truth is discovered through competition with falsehood . . . ."[191] He contends that "current and historical trends have not vindicated the marketplace model's faith in the human mind . . . ."[192] Instead, it has become increasingly clear that "the marketplace assumption of objective truth is implausible and that truth and understanding are actually no more than preconditioned choice."[193] Thus, conflicts in the marketplace

> are not likely to lead to conclusive agreement on what is "true" or "best." Rather, the marketplace serves as a forum where cultural groups with differing needs, interests, and experiences battle to defend or establish their disparate senses of what is "true" or "best." Official adoption and support of one group's position, allegedly due to its success in the marketplace, merely enhances through legal mechanisms the stature of that group's subculture; it does not represent a universal acceptance of that group's perspective.[194]

Frederick Schauer also rejects a naive view of reason and the faith in the marketplace of ideas it supports, although he is less antifoundational in approach than either Baker or Ingber. He observes that "the natuivett'e of the Enlightenment has since been largely discredited by history and by contemporary insights of psychology. People are not nearly so rational as the Enlightenment assumed, and without this assumption the empirical support for the argument from truth evapo-

190. *See* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978) ("Even in the sciences, the presumed sanctuary of objectively verifiable truth, often only those values to which the scientists personally give allegiance provide criteria for judging between competing theories."). Baker asserts that "[t]he first aspect of rationality required by the marketplace model, that people can use reason to comprehend a set reality, is undermined once one rejeets the assumption of objective truth, for no set reality exists for people to understand." *Id.* at 976.

191. Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6.

192. *Id.* at 7.

193. *Id.* at 31. To similar effect, Ingber also claims that "almost no one believes in objective truth today." *Id.* at 25.

194. *Id.* at 27.

rates."[195] A closely related argument attacks the faith in human reason that is central to the traditional conception of the marketplace of ideas. It rejects the notion that people can set aside their emotions and ignore "irrational" appeals and focus on "the core of relevant information or argument."[196]

None of these assertions can be dismissed out of hand; all point to genuine weaknesses in the traditional approach. They undermine the assumptions of the prevailing epistemology and reveal the anomalies in the positivistic and rationalistic vision of the world. One result of this criticism has been a loss of "faith in the ability of reason to solve problems and distingnish truth from falsehood."[197] Confidence in the "reasoning power of *all* people,"[198] long a hallmark of liberal thought, has slipped.

It was once not only possible but commonplace to imagine the world as an observable, unified, and essentially unchanging whole. Under such a view, individuals through their senses apprehend and understand the various material elements of reality, according to the fixed principles of a universal logic communicable through language.[199] The marketplace of ideas thus was conceived as a process of conversation. Loss of faith in the idea of objective truth, however, raises doubts about the central tenet of the liberal conversation—that people can reach common conclusions about the best course of conduct in a particular situation.

A characteristic of much of modern thought extending across a broad spectrum of disciplines is to deny that we all experience the same things, speak a common language, or employ a single coherent logic in addressing our various concerns. Baker, for instance, derives many of his views about objective truth and rationality from the work of Karl Mannheim, Thomas Kuhn, and—with less particularity—Roberto Unger.[200] Indeed, an army of influential figures in philosophy, mathematics, the history of science, and recent critical and literary theory have reached identical conclusions. For example, to Godel we owe the insight that every mathematical system contains "undecidable arithmetic propositions" and is thus incapable of demonstrating its own "consistency."[201]

195. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 26 (1982).

196. Baker, *supra* note 190, at 976.

197. F. SCHAUER, *supra* note 195, at 26.

198. *Id.*

199. For a good summary account of the fundamental premises or axioms of Western epistemology since the Enlightenment, see 1 S. TOULMIN, HUMAN UNDERSTANDING 13-44 (1972).

200. *See* Baker, *supra* note 190, at 974.

201. Godel, *On Formally Undecidable Propositions of Principia Mathematica and Related Systems*, in 1 G. FREGE & K. GODEL: TWO FUNDAMENTAL TEXTS IN MATHEMATICAL LOGIC 107 (J. Van Heijenoort ed. 1970).

Similarly, Tarski has demonstrated that however internally coherent a system of mathematical logic might be, its utility generally is limited to determining the "truth" of statements made in an explicitly and rigorously "formalized language" and not in "everyday" or conventional speech.[202] Together, these proofs, now nearly sixty years old, effectively put to rest the dream of a universal logical language based on mathematical principles.

More recently, Thomas Kuhn,[203] Stephen Toulmin,[204] and Stephen Gould[205] have questioned the traditional conceptions of the physical and biological sciences as relatively straightforward pursuits for truths about the universe or the invariant laws of nature. Under this recent conception, scientists develop new and superior methodologies and elaborate more sophisticated and powerful theories to account for phenomena. Michel Foucault has initiated a similar reevaluation of the methods and scientific aspirations of the social sciences,[206] and an even more radical process of deconstructive criticism, with roots in the work of Jacques Derrida[207] and Paul DeMan,[208] has deprived literary texts of the clear definition and objective meaning they were long believed to have. From J.L. Austin and John Searle, we learn that distinctions between expressions of fact and expressions of opinion or evaluation are impossible to retain.[209] Hans Georg Gadamer, Richard Rorty, and Stanley Fish tell us

202. A. TARSKI, *The Concept of Truth in Formalized Languages*, in LOGIC, SEMANTICS, METAMATHEMATICS: PAPERS FROM 1923 TO 1938, at 152, 164-65 (2d ed. 1983). Tarski defines a "formal language" as one "artificially constructed" so that "the sense of every expression is uniquely determined by its form." *Id.* at 165-66.

203. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10-22 (2d ed. 1970) (arguing that scientists merely create changing operative rules—paradigms—that allow them to work from a common basis).

204. *See generally* 1 S. TOULMIN, *supra* note 199, at 1-29 (presenting an overview of epistemological development).

205. *See, e.g.*, Gould, *Pussycats and the Owl*, N.Y. Rev. Books, Mar. 3, 1988, at 7-10 (noting the intertwining of science and social relations). A similar theme is expounded in Gould's earlier collection of essays, S. GOULD, THE PANDA'S THUMB: MORE REFLECTIONS IN NATURAL HISTORY (1982).

206. *See* M. FOUCAULT, *The Statement and the Archive*, in THE ARCHAEOLOGY OF KNOWLEDGE 77, 77-131 (A. Smith trans. 1972) [hereinafter ARCHAEOLOGY OF KNOWLEDGE]. *See generally* M. FOUCAULT, THE ORDER OF THINGS (1970) [hereinafter THE ORDER OF THINGS] (tracing the early development and interrelationship of a variety of "disciplines," including biology and linguistics).

207. The master text, immensely influential in contemporary literary disciplines, is J. DERRIDA, OF GRAMMATOLOGY (1976).

208. *See* P. DEMAN, ALLEGORIES OF READING (1979). For a good synopsis of the method employed by Derrida and DeMan, see J. CULLER, ON DECONSTRUCTION (1982).

209. Stanley Fish summarizes this point when he characterizes Anstin and Searle's argument, arising out of "speech act" theory, that all utterances are "situated":

> In this theory, utterances are regarded as instances of purposeful human behavior; that is to say, they refer not to a state of affairs in the real world but to the commitments and attitudes of those who produce them in the context of specific situations. The strongest contention of the theory is that all utterances are to be so regarded, and the importance of

that our characteristic modes of discourse are local in place and time, that the various languages we speak are to some degree incommensurable,[210] and that we live within, and communicate with each other as members of, numerous overlapping "communities of interpretation,"[211] rather than as members of a world-community who all speak some sort of glorified Esperanto.

Put simply, these ways of looking at the world are devastating to any version of the liberal conversation that presupposes an objective universe, a transparent language, and a straightforward, universal method of making rational choices. It is no longer possible to ignore the basic epistemological changes that have occurred since the Enlightenment, at least for someone familiar with and sympathetic to these various arguments. Stephen Toulmin, who has chronicled these changes, suggests that they have begun to alter our fundamental attitudes about the way that we apprehend and understand the universe and the way that we believe that we can communicate our apprehensions and understandings to other people.

According to Toulmin, the perception of the world that until recently was dominant can be reduced to three axioms, each of which emerged full-blown in the seventeenth century. These axioms held:

> (1) The Order of Nature is fixed and stable, and the Mind of Man acquires intellectual mastery over it by reasoning in accordance with Principles of Understanding that are equally fixed and universal.

> this contention is nicely illustrated by the argument of [J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962)]. . . . [T]he conclusion of the book is the discovery that constatives are also speech acts, and that "what we have to study is not the sentence" in its pure or unattached form but "the issuing of an utterance in a situation" by a human being. [*Id.* at] 138. . . . [The consequence,] as Searle has explained, is a "language everywhere permeated with the facts of commitments undertaken and obligations assumed," [J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 197 (1969)], and it follows then that description of that language will be inseparable from a description of those commitments and obligations.

S. FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 107-08 (1980) (footnote omitted).

210. *See* H. GADAMER, PHILOSOPHICAL HERMENEUTICS 9 (Linge trans. 1976):

> It is not so much our judgments as it is our prejudices that constitute our being. . . . Prejudices are not necessarily unjustified and erroneous, so that they inevitably distort the truth. In fact, the historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience.

See also Fish, *Interpretation and Pluralist Vision*, 60 TEXAS L. REV. 495, 497 (1982) ("[F]acts can only be known by persons, and persons are always situated in some institutional context; therefore facts are always context relative and do not have a form independent of the structure of interest within which they emerge into noticeability."). *See generally* R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 315-24 (1979) (arguing that epistemology illegitimately assumes that a neutral set of rules theoretically may analyze all communication and rationally resolve conflicts).

211. The very title of Stanley Fish's influential text suggests as much. *See* S. FISH, *supra* note 209.

> (2) Matter is essentially inert, and the active source or inner seat of rational, self-motivated activity is a completely distinct Mind, or Consciousness, within which all the highest mental functions are localized.
> (3) Geometrical knowledge provides a comprehensive standard of incorrigible certainty, against which all other claims to knowledge must be judged.[212]

Modern habits of thought, Toulmin argues, have undermined faith in each of these axioms. It is no longer possible for those familiar with scientific discourse to believe that there are any universal and static "laws of nature."[213] Nor is it possible to contend that the human mind can stand completely outside its changing environment.[214] Our awareness of the contingency of knowledge—and the provisionality of our attempts to channel it into neat mathematical or logical systems—has been growing slowly but steadily for two centuries, even in the pure realm of mathematics.[215]

The trend Toulmin traces to the late eighteenth century has continued and accelerated into this century. Kuhn has argued convincingly that significant change in theoretical science is the result of "paradigm shifts," which lead the scientific community, for a variety of cultural reasons, generally to accept one theory over another, even though both theories are scientifically supportable.[216] Toulmin's vision of continuity, influence, and change is somewhat more complicated. But like Kuhn's, it rejects the notion that there is a single unchanging language of science—or indeed, of any other sort of rational discourse—that will permit individuals of radically different historical and cultural circumstance to speak to one another in the same terms, much less reach agreement about universal laws.[217] Today's intellectual commonplaces—the variability of

212. 1 S. TOULMIN, *supra* note 199, at 13-14 (footnotes omitted).
213. *See id.* at 20-21.
214. *Id.* at 21.
215. *Id.* at 22.
216. *See* T. KUHN, *supra* note 203, at 4:

> [T]he early developmental stages of most sciences have been characterized by continual competition between a number of distinct views of nature, each partially derived from, and all roughly compatible with, the dictates of scientific observation and method. What differentiated these various schools was not one or another failure of method—they were all "scientific"—but what we shall come to call their incommensurable ways of seeing the world and of practicing science in it. Observation and experience can and must drastically restrict the range of admissible scientific belief, else there would be no science. But they cannot alone determine a particular body of such belief. An apparently arbitrary element, compounded of personal and historical accident, is always a formative ingredient of the beliefs espoused by a given scientific community at a given time.

217. Toulmin, however, does not argue that every aspect of rationality or intellectualization is a matter of acculturation:

> We acquire our grasp of language and conceptual thought . . . in the course of education and development; and the particular sets of concepts we pick up reflect forms of life and thought, understanding and expression current in our society. In certain respects, the

truth and the academic disciplines that proclaim it, and the existence of various, not entirely compatible, interpretive communities, each with its own reasonably consistent version of reality—are part of the "epistemological mutation of history," which, according to Foucault, has been unfolding with great rapidity since Karl Marx began to assert his intellectual influence.[218]

This avalanche of "antifoundational" criticism raises two clear choices: either to reject much modernist and postmodernist thought as "nihilistic cant"[219] or to abandon the marketplace metaphor entirely, deriding it as a "legitimizing myth"[220] or a means for elites to cloak their power in the guise of rational persuasion.[221] For those willing to live with less philosophical certainty, however, there is a third alternative: to accept and indeed to insist upon the viability and utility of a more modest version of the marketplace of ideas. Such a marketplace does not

> patterns so developed are—demonstrably—products of cultural history and prehistory. They differ from country to country, they may change quite strikingly within a few years, and any normal human readily learns or relearns them in their characteristic local forms. . . . In other respects, of course, these very forms of life and thought are merely cultural expressions of capacities and sensitivities common to all men, or even to all higher animals: features "built into" the human brain and body, during the organic evolution of our species from its progenitors.

1 S. TOULMIN, *supra* note 199, at 38-39. For the view that no universally useful "algorithms for choice" exist that would permit us to make some objectively best decision about reality, see R. RORTY, *supra* note 210, at 322-33.

218. THE ORDER OF THINGS, *supra* note 206, at 250-63.

219. To the extent that legal realism and Critical Legal Studies have been associated with antifoundational thought, they have been criticized occasionally as "cynical" or "nihilistic" approaches. Fiss and Moore used the term "nihilism" pejoratively to decry the extreme relativism they saw as concomitants of much "new" legal scholarship. *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741 (1982); Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1063-64. Paul Carrington fired one of the more famous early salvoes:

> The professionalism and intellectual courage of lawyers does not require the rejection of Legal Realism and its lesson that who decides also matters. What it cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic. Persons espousing the latter view, however honestly held, have a substantial ethical problem of professional law students. The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgments as they may have acquired. . . . The nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.

Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

Joseph Singer has attempted to refute the view offered by "[t]he custodians of traditional legal theory" that Critical Legal Studies "embraces nihilism." *See* Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6, 8-9 (1984). The most sustained scholarly attack on Singer's position, which repeats the charge that most of those associated with Critical Legal Studies are "nihilists," is John Stick's recent article, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

220. *See* Ingber, *supra* note 191, at 77-85, 90.

221. *See* Baker, *supra* note 190, at 979-81. Baker suggests, however, that a society which "protect[s] a broader range of expressive conduct" could rehabilitate the metaphor of the marketplace. *Id.* at 1026. As the whole tenor of this Article should indicate, greater openness *is* a salutary goal and some concept of the marketplace is necessary if there is to be any realistic hope of reaching that goal.

exist outside of history and admittedly is not free from all the influences of the moment. It does not depend entirely on disentangling truth from persuasion. Although it does not deny that the marketplace metaphor can be used to support the values of elites, it does insist that the metaphor serves more than a single legitimating role. The more modest marketplace depends on a theory of conditioned argumentation about value (*e.g.*, "I will submit to your rule, because based on my education and your presentation of the facts, I believe that the benefits I will receive are worth more than the freedom I will surrender"), rather than on a theory of economic necessity that postulates an unchanging value which determines the course of the transaction.

It may seem that characterizing the marketplace of ideas as an ongoing debate about changing values and disputed facts, which the circumstances and power relationships of the moment inevitably condition, trivializes the process of intellectual exchange and devalues the special arena in which that debate customarily occurs. In fact, the opposite conclusion follows precisely because there can be no absolute certainty or unconditioned choices. In a universe of "constructed" and changeable certainties, society must heed the academy's demand for academic inquiry without overt governmental interference.

C. Speech in Context: History, Culture, and the Limits of Criticism

At the root of the traditional conception of the marketplace of ideas lies a particular conception of truth. Thus, the individual and rational consent that I have argued liberal theory demands is predicated ultimately on the belief that people speaking to one another openly and freely, sharing a common language, a common store of information, and a common innate or universal logic will reach the same conclusion most of the time (at least about things that matter). The modernist attack on this conception of the truth described in the last subpart is most powerful when it questions the presumed commonalities. By suggesting that different people at different places or times know different things, that they speak differently and argue differently, and that these differences always can be explained by different historical and cultural influences, the modernist attack relativizes the idea of truth. No longer can one claim that communication leads ineluctably toward some universal or timeless certainty. Speech, even when most critical of the status quo, remains contingent, its conclusions directed and somewhat limited by prevailing customs, institutions, and conventions of logic and discourse.

The historical dimension of the idea of truth is not new and actually was recognized by John Stuart Mill, one of the principal progenitors of

classical marketplace theory. Mill and his followers, however, by pinning their faith to a critical method designed to overcome the contingencies of the present, largely could ignore the more radical implications of this insight. Thus, even at a time when there was general faith in a universal logic, when it was widely accepted that noncontroversial "algorithms of choice" provided an adequate method for resolving all disputes rationally and according to the same basic norms, some advocates of a free exchange of ideas recognized that the terms of that exchange were variable. But they sought to overcome the contingencies of history with a mode of critical inquiry that they believed timeless and universal. This approach was particularly true of Mill, who advocated the use of a dialectical method that would reveal the narrowness of "received ideas," and thus would grant access to a higher truth.[222] Thus, the critical version of the liberal conversation begins with a faith in the universality of logic or reasoning. But it also accepts the proposition that the world, at least in some important respects (such as in the shape of its social or political institutions), is not fixed and unchanging, but is a socially constructed and historically determined entity. Men and women thus use rationality as a tool to question systematically, and even to contradict, received truths.

> [Men] usually repose, with implicit trust, on the infallibility of 'the world' in general. And the world, to each individual, means the part to which he comes in contact; his party, his sect, his church, his class of society: the man may be called, by comparison, almost liberal and large-minded to whom it means anything so comprehensive as his own country or his own age. Nor is his faith in this collective authority at all shaken by his being aware that other ages, countries, sects, churches, classes, and parties have thought, and even now think, the exact reverse. He devolves upon his own world the responsibility of being in the right against the dissentient worlds of other people; and it never troubles him that mere accident has decided which of these worlds is the object of his reliance . . . . [I]t is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals—every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present.[223]

Mill describes the process of contradiction that rationality requires in terms of "[t]he Socratic dialectics, so magnificently exemplified in the dialogues of Plato."[224] These dialectics essentially required

222. *See* J.S. MILL, ON LIBERTY 18 (E. Rapaport ed. 1978) (1859).
223. *Id.* at 17.
224. *Id.* at 42.

> a negative discussion of the great questions of philosophy and life, directed with consummate skill to the purpose of convincing anyone who had merely adopted the commonplaces of received opinion that he did not understand the subject—that he as yet attached no definite meaning to the doctrines he professed . . . .[225]

Mill was clearly uncomfortable, however, with the nihilistic implications of a critical method that questioned every conclusion justifying political action. He argued that the person who employed the critical method was likely to attain "a stable belief."[226] In other words, Mill believed that if we assumed a certain paradigm of reason,[227] the critical technique was invaluable in moving beyond prejudice to truth.[228] Rooted in the Hegelian premises of the Frankfurt School,[229] similar defenses of the critical method continue today. Herbert Marcuse provided a fairly recent example during the debate over student activism and the Vietnam War. Marcuse's argument owed a great deal to Mill[230] and the idea that the end, or "telos," "of tolerance is truth."[231] Thus, he defended the principle of free speech on the following ground:

> Tolerance of free speech is the way of improvement, of progress in liberation, *not* because there is no objective truth, and improve-

225. *Id.*

226. *Id.*

227. Mill apparently was willing to make that assumption, believing that some sort of "natural" reason is common to humanity and permits it to "learn from its mistakes":

> Why is it . . . that there is on the whole a preponderance among mankind of rational opinions and rational conduct? If there really is this preponderance—which there must be unless human affairs are, and have always been, in an almost desperate state—*it is owing to a quality of the human mind*, the source of everything respectable in man either as an intellectual or as a moral being, namely, that his errors are corrigible. He is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument; but facts and arguments, to produce any effect on the mind, must be brought before it. Very few facts are able to tell their own story, without comments to bring out their meaning.

Id. at 19 (emphasis added).

228. Thus, Mill stated:

> It is the fashion of the present time to disparage negative logic—that which points out weaknesses in theory or errors in practice, without establishing positive truths. Such negative criticism would indeed be poor enough as an ultimate result, but as a means to attaining any positive knowledge or conviction worthy the name it cannot be valued too highly; and until people are again systematically trained to it, there will be few great thinkers . . . .

Id. at 43.

229. The transcendental claims of "critical theory" are characteristic of the "Frankfurt School," which flourished during the 1920s and 1930s, continued in Diaspora to produce work over the next several decades and still exerts an influence on critical scholarship in Europe and—much less significantly—in the United States. For a rigorous critique of some of the transcendental claims of Jurgen Habermas, who has inherited the mantle of the Frankfurt School, see R. RORTY, *supra* note 210, at 380-82.

230. *See* Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81, 86 (1965) (noting Mill's belief that liberty should be guaranteed only to those capable of aiding the quest for truth).

231. *Id.* at 90.

> ment must necessarily be a compromise between a variety of opinions, but because there *is* an objective truth which can be discovered, ascertained only in learning and comprehending that which is and that which can be and ought to be done for the sake of improving the lot of mankind.[232]

This asserted ability to move toward truth necessarily involves a process of negation, a surmounting of the "existing positive" in order to approach "the true positive [that] is the society of the future."[233]

Clearly, the critical method, to the extent it employs a mode of reasoning and a vocabulary which are common to the critic and the defender of the ideas that she is criticizing, can be used to uncover contradictions in a system of belief. Thus, it can function analogously to attempts in traditional science to disprove a set of hypotheses by emphasizing facts that support an inconsistent conclusion.[234] Once this process starts, it is difficult to stop; probing a tiny crack in a theoretical edifice to its ends can reveal the rift that threatens to bring down the whole structure. In other words, critical inquiry always threatens present certainties and has the potential of "destabilizing" the implicit intellectual order upon which they depend.

Nevertheless, no matter how radical the attack on conventional knowledge or values may seem, it must be expressed in terms that are familiar to the age and that have some potential for influencing the intended audience. Moving beyond or transcending the conventions of the present is always problematic. Even Marx, who pushed dialectical reasoning to its limits and pursued the most thorough-going of revolutionary agendas, was aware of the difficulty. As he stated at the beginning of *The Eighteenth Brumaire of Louis Bonaparte*:

> Men make their own history, but they do not make it just as they

232. *Id.* at 89.

233. *Id.* at 87.

234. Christopher Wonnell, after adopting the concept of "falsification" from Karl Popper, argues that what remains after we demonstrate that particular "theories of interrelationships between phenomena are false" is a residuum of approximate truth:

> Science certainly has assisted the pursuit of truth by demonstrating (although admittedly not conclusively since any observation can be given an *ad hoc* explanation) that certain theories of interrelationships between phenomena are false. Indeed, it has been demonstrated with the same degree of accuracy that so many theories are false that we can construct all our technology in confidence that deviations between currently believed scientific laws and objective truth generally will be too small to observe. That is substantial progress toward truth even if it cannot be said that science has taught (or ever will teach) any certain truths.

Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 714 (1986) (footnote omitted) (citing K. POPPER, CONJECTURES AND REFUTATIONS 228-33, 255 (2d ed. 1965)).

How we can "observe objective truth" under *any* circumstances is a question Wonnell cannot answer. The statistically "impossible" meltdowns at the nuclear reactors at Three Mile Island and Chernobyl suggest that even if the deviation could be measured, it would be greater (and more momentous) than Wonnell postulates.

> please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. . . . [W]hen they seem engaged . . . in creating something that has never yet existed . . . they anxiously conjure up the spirits of the past to their service and borrow from them names, battle cries and costumes in order to present the new scene of world history in this time-honored disguise and this borrowed language.[235]

It is at least conceivable that there are moments in the history of a nation or—on a less exalted level—of an academic discipline when the old disguises and vocabulary will no longer serve, when the time is ripe for some sort of "revolution in consciousness" or, in the words of Thomas Kuhn, "paradigm shift."[236] Yet Kuhn's treatment of "normal science" suggests that once we establish paradigms, they are remarkably resistant to change.[237] Furthermore, paradigms may change surreptitiously by incorporating inconsistencies into the original structure through the elaboration of a variety of "supportive theories" that "explain away anomalous observations."[238]

Thus, the likely effect of proving contradictions is the elaboration of new defensive arguments and a more complicated (and not entirely consistent) rendition of the original canonical view. These contradictions, however, are not likely to lead to the immediate overthrow of that view. As a result, systems of belief usually display significant short-term stability. For a variety of social, psychological, and practical reasons, paradigms do not give ground easily. Their persistence owes something to the relative ease of following established habits of thought. More importantly, however, it seems due to the institutionalization of those habits of thought. The organs of government, business, labor unions, churches, schools, and universities—to name only a few of the more prominent institutions—all exert influence over us. At its most direct, that influence is explicit, telling us precisely what we ought to think about particular issues. More subtly, however, institutions manipulate the forms of acceptable discourse by defining the problems that appear meaningful to *them*, and the methods and vocabularies that will further *their* particular interests. Thus, the apparent stability of established paradigms, whether they relate to the appropriate structures of politics, the rational norms of social conduct, or the accepted parameters of study in an academic disci-

235. K. MARX, *The Eighteenth Brumaire of Louis Bonaparte*, in 11 COLLECTED WORKS OF KARL MARX AND FRIEDRICH ENGELS 103-04 (1978) [hereinafter COLLECTED WORKS].

236. *See* T. KUHN, *supra* note 203, at 92-94. For a detailed critique of paradigm shifts, see 1 S. TOULMIN, *supra* note 199, at 112-30.

237. *See* T. KUHN, *supra* note 203, at 18-20.

238. Wonnell, *supra* note 234, at 712 (citing I. LATAKOS & A. MUSGRAVE, CRITICISM AND THE GROWTH OF KNOWLEDGE 19 (1970)).

pline, always acts to limit discourse. Foucault's first supposition in his *Discourse on Language* seems intuitively correct:

> [I]n every society the production of discourse is at once controlled, selected, organised and redistributed according to a certain number of procedures, whose role is to avert its powers and its dangers, to cope with chance events, to evade its ponderous, awesome materiality.[239]

Knowing that words are powerful, that they can incite and often do lead to action, society consciously and unconsciously has organized itself to control rigorously what is said, thought, or believed.[240]

Achieving "final truth" or transcendence through the critical method would require us to imagine the unimaginable. The relevant intellectual history makes clear the implausibility of that goal. Even if excluding the rich and powerful from the debate (for which Marcuse polemically argued) magically would remove their systemic biases and influence, we still would encounter other personal, local, and institutional influences predisposing the members of particular communities to accept and integrate certain versions of the truth into their lives. The persistence of entrenched attitudes actually renders uncertain the critical method's immediate power to undercut bodies of received truth, including political ideologies, by using their own logic against them. If established opinions are to be displaced, simple appeals to a transcendent truth or method will not suffice. Instead, new versions of truth and new methods of analysis must be incorporated into the "share[d] system of rules"[241] governing particular forms of discourse. In the absence of a revolution establishing a new system of hegemony, such alternative truths and methods must persuade those with intellectual or political power that they serve the purposes of the prevailing social order or reinforce its most important values.

D. Academic Speech and American Political Culture

As I have described it, the traditional model of the marketplace of ideas yokes a process—the free and open exchange of ideas—with a predicted result—the mutual discovery of truth among those engaged in conversation. Such a model is nearly homologous with Meiklejohn's

239. THE ARCHAEOLOGY OF KNOWLEDGE, *supra* note 206, app. at 215-37.

240. As Foucault puts it:

> Within its own limits, every discipline recognizes true and false propositions, but it repulses a whole teratology of learning. . . . In short, a proposition must fulfill some onerous and complex conditions before it can be admitted within a discipline; before it can be pronounced true or false it must be . . . "within the true."

Id. at 223-24.

241. *See* S. FISH, *supra* note 209, at 44-45, 242-43.

model of government, which postulates a similar process—open and relatively free exchange of views at a "town meeting"—and a similar, although not necessarily identical result—general agreement that the conclusions of that meeting, because they were threshed out in full public debate, are rational and deserving of general consent. Free speech in the academy is thus defensible because, under conditions like the ideal town meeting, it helps create the informed citizenry necessary if the "experiment in self-government" is to succeed. Yet antifoundational thought, by emphasizing the relativity of knowledge and the historical and cultural dimensions of intellectual and political discourse, denies that the order derived from academic discussion or the electoral process can ever reflect more than the contingent certainties of a particular time and place. Furthermore, by arguing that social and institutional influences help shape individual choice, that those influences are usually at the service of established elites, and that they often operate at the level of emotion rather than reason, antifoundationalists call into question the rationalistic and consensual presuppositions of both models. In the face of this critique, how can we defend the metaphor of the marketplace? More particularly, how can we assert that political or constitutional theory demands that speech which is integral to the operation of institutions of higher learning be afforded special protection? In this concluding subpart, I will give provisional answers to both of these questions.

I begin by assuming that the social and historical influences limiting individual choice are at least as powerful as antifoundational and neomarxist critics have asserted and that those influences reach deeply into the operations of the state and the academy. The thought of the last 130 years has sharpened our awareness that elites exercise power, not primarily through physical coercion, but instead through a variety of social, economic, and psychological pressures that tend to limit and direct our discourse—and hence, our customary actions—more definitively than raw force ever could. Taking its principal guidance from Marx and Gramsci, and relying heavily on the vocabularies of "ideology" and "hegemony" that they elaborated,[242] the political and intellectual left has argued consistently that structures of authority—including the legal and educational systems—condition citizens to respond to issues in particular ways.[243] Although often committed to libertarian values,[244] the political

242. *See* A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (1971); K. MARX & F. ENGELS, *The German Ideology*, in 5 COLLECTED WORKS, *supra* note 235.

243. *See, e.g.*, C. SUMNER, READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW 9 (1979) ("Law is linked in reality with other ideological forms and apparatuses as a mechanism of domination by consent."); Marcuse, *supra* note 230, at 95-96 ("[W]ith the concentration of economic and political power and the integration of opposites in a

and intellectual right has sometimes accepted the notion that schools *can* and *should* foster "correct" political and social attitudes, even if that sometimes means disparaging the work of those who advocate unconventional or dangerous ideas or even excluding them from the curriculum or forum.[245]

Analysis of both the ties that bind universities and their faculties to governmental policy makers and outside funding sources and the influence that these ties have on research and teaching agendas fill the education literature.[246] By most accounts, the university and government relationship has somewhat narrowed the focus of research and discouraged certain lines of inquiry. Charles Lindblom, for example, has argued persuasively that universities are a part of the system that controls and distributes power, which traditionally has been dominated by the business elite.[247] Much of Lindblom's book *Politics and Markets* examines the ways in which the elite achieves hegemony. Far from sanguine about the actual openness of the intellectual marketplace in a corporation-dominated America,[248] Lindblom asserts that academics are as easily coopted as other opinion-shaping groups in society.[249] He contends that many leading academics invariably take up the beliefs of the favored

society which uses technology as an instrument of domination, effective dissent is blocked where it could freely emerge: in the formation of opinion, in information and communication, in speech and assembly . . . ."); *see also* Baker, *supra* note 190, at 978 ("The marketplace of ideas appears improperly biased in favor of presently dominant groups, both because these groups have greater access to the marketplace and because these dominant groups may legally restrict the opportunities for dissident groups to develop patterns of conduct in which new ideas would appear plausible.").

244. *See, e.g.*, J. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN (1975); G. MADISON, *supra* note 109; R. NOZICK, *supra* note 107.

245. *See, e.g.*, J. TUSSMAN, GOVERNMENT AND THE MIND 13, 54 (1977) (describing the proposition that government has no business in the realm of mind as unfounded dogma, and concluding that "[t]he natural right of self-preservation lies behind not only the traditionally asserted powers of war or defense, but also the universally claimed right of the community to shape its children"); Buckley & Bozell, *McCarthy and His Enemies*, in CLEAR AND PRESENT DANGER 76, 81-82, 90 (N. Capaldi ed. 1969) ("It is one thing for society to give a hearing to new ideas, and quite another thing for it to feel impelled to put new ideas—simply because they are new or unorthodox—on a plane of equality with cherished ideas that have met the test of time.").

246. *See, e.g.*, Kaplan, *Introduction* to REGULATING THE INTELLECTUALS, *supra* note 8, at 1, 4-5 (noting the increased federal role in higher education); Metzger, *Academic Freedom in Delocalized Academic Institutions*, in DIMENSIONS OF ACADEMIC FREEDOM 1, 15-28 (1969) (discussing the increased outside influences on universities, particularly those emanating from the federal government); *see also* Eisenberg, *supra* note 2, at 1378-84 (discussing the inability of the traditional conception of academic freedom to shield research from outside influences).

247. *See, e.g.*, C. LINDBLOM, POLITICS AND MARKETS 227 (1977) (asserting that governmental and corporate leaders make allies of administrators and faculty in the universities who then join in disseminating the "beliefs, attitudes and volitions" of such leaders).

248. *See id.* at 206 (criticizing the suggestion that despite the "torrent of corporate communication addressed to the citizen on grand issues," the citizen somehow fails to succumb to the indoctrination).

249. *Id.* at 227 (suggesting that newspapers, broadcasting systems, research institutions, journals, foundations, and universities are under strong incentives to become allies of the favored class because they need the funds that persons of wealth, power, and influence can provide).

class and suggests that the incentives "working on other, especially younger, members of the group are immediate and powerful, not because distant government or corporate leaders can grant or withhold benefits but because immediate colleagues do so by denying promotion to 'rash' young scholars."[250] Lindblom thus concludes that in "polyarchal systems" like the United States,[251] "core beliefs are the product of a rigged, lopsided competition of ideas"—a model inconsistent with the democratic theory or ideology often invoked to justify these systems.[252]

Lindblom's argument, however, much like the one employed by Critical Legal Studies, calls into question not only the independence of the universities and their faculties, but also the democratic presuppositions of traditional liberal theory. Thus, Lindblom distinguishes social control from the operations of the market system and argues that "authority" is the hallmark of government.[253] Democratic theory justifies authority in terms of consent, which is generated through the operations of a "free" marketplace of ideas. Lindblom does not reject the desirability of a "free competition of ideas," nor does he claim that it is completely absent in "liberal democratic" states. Yet he suggests that it always must contend with "ideological instruction and propaganda" promulgated as "a major method of elite control of [the] masses."[254] The marketplace, in other words, can never be totally free because "persuasion is central and fundamental to all social systems" and exists as "a ubiquitous form of social control."[255]

As his work and the work of Robert Dahl, his sometime collaborator, make clear, the direction of contemporary American society and of the government itself is largely in the hands of a select elite, dominated by business interests.[256] The elite exercise immense persuasive power through their network of relationships with key institutions and their pervasive use of advertising and the media.[257] That power is sufficient, Lindblom argues, largely to control the political agenda. Thus, businessmen often try to influence public choice on particular policy matters that

250. *Id.*

251. According to Lindblom, in a "polyarchy," authority is assigned in elections in which any citizen's vote is equal to any other's. *Id.* at 133. He identifies the United States and the nations of Western Europe as polyarchies and refrains from calling them "democracies" to avoid "begging the question by calling them what they may not be." *Id.* at 132.

252. *Id.* at 211-12.

253. *See id.* at 13 ("[T]he authority relationship is the bedrock on which government is erected.").

254. *Id.*

255. *Id.*

256. *See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY 145-51 (1957); C. LINDBLOM, *supra* note 247, at 137-42, 170-88.

257. C. LINDBLOM, *supra* note 247, at 206-07.

have a direct effect on their operations.[258] They also seek "to legitimize the controls they exercise through their privileged position by persuading citizens that the controls are part of polyarchal politics."[259] Finally, in a move that almost completely "short-circuits popular control," they "use their disproportionate influence to try to create a dominant opinion that will remove grand issues"—such as the desirability of massive redistribution of wealth—"from politics" and thus secure protection of the status quo through governmental inertia.[260] Lindblom's vision of the way elites exercise hegemony and tend to dominate the political process is remarkably similar to that of the more radical Crits,[261] although Lindblom, writing from an extreme liberal perspective, displays more faith than Crits do in the persistence of some substratum of uncoerced choice.

If the universities are subject to outside influences, including the influence of the business community and the state, and if the government itself is influenced heavily by elites who direct rather than follow "democratic choice," what remains of the marketplace models we have been discussing and the special claims that universities might make relying on that model? Several responses are possible.

The first and perhaps the most cynical response is to suggest that the marketplace, for all of the reasons advanced by Baker and Ingber,[262] is a charade. Yet for the purpose of exercising social control, it is necessary to maintain the model. Thus, hegemony in a liberal democracy is secured by assuring the citizenry that authority is the product of general consent and that political decisions are based on free and open discussion followed by electoral and representative action that models policy on the collective volitions of the people. According to this view, we might expect to see those actually in power manipulate the concept of the marketplace of ideas to conform the boundaries between speech and action to their interests.[263] Yet this way of dealing with the market quickly poses a conundrum. If the manipulation is too apparent, then the myth of the marketplace no longer does its job. Thus, following a line of reasoning advanced by E.P. Thompson,[264] we could argue that legitimating myths, once advanced, have a life of their own and do impose controls on governmental action. Under this approach, it is possible to discount the ac-

258. *Id.* at 203.
259. *Id.*
260. *Id.* at 204-05.
261. *See, e.g.*, Abel, *Torts*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 185, 187-88 (D. Kairys ed. 1982) [hereinafter POLITICS OF LAW]; Gabel & Feinman, *Contract Law as Ideology*, in POLITICS OF LAW, *supra*, at 172, 178-79.
262. *See supra* subpart V(B).
263. *See* Kairys, *Freedom of Speech*, in POLITICS OF LAW, *supra* note 261, at 140, 166.
264. *See* E. THOMPSON, WHIGS AND HUNTERS 258-69 (1975).

tual freedom of choice that is possible either in political life or in the academy and still conclude that the market metaphor must be reinforced vigorously through judicial interpretations of the first amendment. Courts should either conform to the Meiklejohn vision of the marketplace or provide persuasive reasons for deviating from it.

The second response would allow us to ignore the issue of freedom altogether and still insist that the market metaphor is useful because of the process it represents. Under this view, the American political system, to the extent that it is predicated on reason and consent, is committed to a process of decision making that valorizes persuasion over force. In a world dependent on shared beliefs, yet unable to provide an absolute justification for any belief, it is essential that society generally acquiesce in some decisions and that the decisions meet some formal criterion of rational choice. No compelling argument suggests that meaningful or valuable communicative exchanges cannot occur within the actual political communities in which we reside simply because the currency of those exchanges is not immutable truth and because a socially encouraged predisposition influences us to choose one commodity over another. Scholars and philosophers designed liberal theory primarily to resolve questions of what constitutes acceptable political authority. Generally, they have concluded that government cannot exercise authority beyond the consent of the governed, or in John Rawls's version, beyond the consent that human beings would give if they were rational.[265] The desirability of consent has not faded in the three centuries since Locke recognized its virtue. Totalitarianism in this century has made it as apparent as ever that majorities have the power and often the will to impose their judgments on the weak and voiceless with unbounded brutality. In the political realm, it is precisely this historical realization that validates Stephen Toulmin's observation that although "we can no longer afford to assume that our rational procedures, however impartial, find a guarantee in *unchanging principles* mandatory on all rational thinkers,"[266] we still must find some method of avoiding arbitrary judgments and action. Thus Toulmin may be correct in arguing that "[t]he choice is still one between the exercise of superior power and respect for even-handed discussion, between the authoritarian imposition of opinions and the intrinsic authority of well-founded arguments."[267]

Of course, providing a substantive universal definition of "well-

265. *See generally* J. RAWLS, A THEORY OF JUSTICE 118-92 (1971) (asserting that in the "just society" a hypothetical group of unbiased, rational persons formulate principles for governance).

266. 1 S. TOULMIN, *supra* note 199, at 51.

267. *Id.*

founded arguments" is difficult. But, if our focus is still on process, the universities—perhaps even more than the courts—are uniquely capable of entertaining dialogue that meets our society's formal definition of honest or dispassionate discourse. Those primarily engaged in that discourse—students and faculty—are removed, at least during classroom and research hours, from the immediate influences of the outside world. The faculty has undergone extensive training that has exposed it to a variety of information and critical points of view. It is engaged in passing on that training to another generation. Different faculty members with different educational backgrounds and personalities approach their disciplines in very different ways. Traditions of tolerance within the academy are reinforced by the formal protections of academic freedom, which have been institutionalized over the course of the centuries. None of these university characteristics guarantees that absolute tolerance or open-mindedness actually will emerge. Yet the training and pluralism of the academy at least serve to maximize the variety of argument while keeping the whole process within the bounds of civility.

The thrust of the "process" argument is to encourage the sort of discussion that occurs at the universities because the alternative is likely to be social and political discourse unbounded by the polite and scholarly conventions of the academy. The extent of such encouragement remains problematic. But if we acknowledge that such institutionally regulated and far-reaching discussion is a significant value in our polity, then it provides a significant argument for permitting the academy to serve as its own gatekeeper.

Finally, we can approach the metaphor of the marketplace and the university's special claims from a hermeneutic perspective that denies the antithesis between persuasion and truth. I favor this approach. It does not directly contradict either of the earlier perspectives, but proceeds along a radically different tack. It begins with the antifoundational premise, already enunciated, that truth is the derivative of interpretation, and that all interpretation is "situated."[268] The truths generated by the academy and their value can be understood only if we take into account the academy's social and political roles as they are commonly understood. Thus, the academy is like any other market setting. Transactions occur because people who *value* certain things are willing to surrender or exchange them at a given price. But with the possible exception of life itself, there is nothing immutable or intrinsic about the value of the thing

268. *See* H. GADAMER, *supra* note 210, at 28 ("[T]he thing which hermeneutics teaches us is to see through the dogmatism of asserting an opposition between the ongoing, 'natural' tradition and the reflective appropriation of it.").

to be gained or surrendered. The market may set prices, but only after some consensus emerges within a community about what things are worth. As members of "interpretive communities,"[269] the company we keep and the particular relationship we bear toward those with whom we congregate inevitably determine our own notions of value.

This perspective renders any claim to "total" or "unsituated" interpretive freedom untenable.[270] It forces us to look closely at the actual situation and to reexamine the company we keep, the values we hold collectively, and how our membership in *a particular community* has influenced us. For members of the academy, this inquiry into community values suggests that the hegemonic assertion that universities exist to promote the values of a controlling elite is too simple. For one thing, we could easily identify a variety of affinities that affect us. All academics, for example, belong to some or all of the following specialized groups that exert an influence over us and help to shape our decisions: university or research institute faculties, professions, particular academic disciplines, schools of thought to which scholars may owe particular allegiance, academic departments, and circles of colleagues. We also exist as members of political society, a particular social or economic class, nuclear or extended families, neighborhoods, religious congregations, and social clubs. Our individual relationships with these various groups vary in time, commitment, and intensity. We are thus subject to a variety of influences, which we can only imperfectly sort out and understand in evaluating our situation.

The sum of these influences may represent bondage rather than freedom, although from an internal perspective, we often feel free. But the bondage is not unidirectional. It does not emanate from a single political will, nor pull all of us along identical paths. Prevailing ideologies may establish a certain tone, but they usually do not create unanimity about important intellectual or political matters among the members of every group. This lack of unanimity actually makes possible radical progress of the sort signaled by the term "scientific revolution" or "paradigm shift" because it permits contention among those with radically different interpretations of the same phenomena.

Inevitably, those outside the academy cannot experience the particularity of influences that result in academic production. Neither the general public nor government officials can be expected to appreciate fully the nuances of debates within a discipline about subjects as arcane as

269. *See* S. FISH, *supra* note 209, at 14-16, 167-74.

270. *See* Fish, *supra* note 210, at 496-99 (contending that a person adopts a particular belief only because he is persuaded it is correct, not because it is based upon objective fact).

French social history or molecular biology. Their distance from the ongoing work in the universities can make them suspicious and anti-elitist. Yet the general paradigms that inform the disciplines are appreciated, at least to the extent that they filter into the practical life of the larger community, because the models of physical processes, mathematics, and behavior that are expounded there seem to take on importance outside the university. The certainty that informs the disciplines, however provisional it may be and however much it may result from success in argument, is convincing in the short-run because it provides an adequate, or currently useful, account of the universe. The contradictions that plague the disciplines are tolerated because institutional history suggests they lead to new constructions of reality that are likely to produce a fuller and more comprehensive account.

Thus, from the perspective of those outside the university, the claim that university faculties constitute an "intellectual elite," whatever its possible negative moral implications, makes pragmatic sense even in an antifoundational universe. John Searle's description of the classical theory of academic freedom[271] remains intact with only one small modification. Three of the four elements necessary to derive such a theory still exist. These continuing prerequisites include: first, the "value claim" that "knowledge is valuable"; second, "[a] definition of the university" that characterizes it as "an institutional device for the advancement and dissemination of knowledge"; and third, "[a] theory of academic competence" which presumes that "the professionally competent, by virtue of their special knowledge and mastery of techniques, are qualified to advance the aims of research and teaching in ways that amateurs are not."[272]

What may have changed somewhat, however, is the basic epistemological presupposition that Searle asserted was the fourth element necessary to the classical theory. The argument for free speech within a university setting rests, at least in part, on the assumption that "knowledge is best acquired and can only be validated if subject to certain tests based on free inquiry . . . ."[273] From an antifoundational perspective, every test of validity likely will prove fallible in some respect over the long run of history. Furthermore, free inquiry is necessarily bounded. But do either of these insights matter? Because a particular paradigm will inform a discipline at the time of research, we can rest assured that tests of validity do what they are supposed to do—they work. Because

271. *See supra* text accompanying notes 36-41.
272. J. SEARLE, *supra* note 1, at 186-87.
273. *Id.* at 187.

our choices and methods of inquiry are subject to the same social and physical forces that condition every aspect of our behavior, absolutely "free" inquiry is impossible.[274] Yet nothing in our collective experience suggests that we can make use of such freedom even if we could imagine it. Instead, as Stanley Fish has suggested, it is through socially constructed and institutionally given perspectives that we are able to encounter the world at all.[275]

Yet if our vision is attuned to the vision of the community that educates and nurtures us, then we must conclude that the final claim the academy can make goes beyond the special knowledge it is institutionally competent to generate. The respect for rational conversation so dear to liberal theory has defined, over the course of time, the perspective on speech that is central to our vision of political community. Thus, under liberal theory *consent* is not necessarily keyed to the truth—instead, it is keyed to *the version of the truth* that will be acceptable to those governed. This phenomenon results in one of three ways: (1) it is the version they believed from the outset; (2) it is the version others have persuaded them to believe; or (3) it is a version they still do not believe, but with which, nevertheless, they are willing to live because they are accustomed to living with compromise, and having been imbued with the ideology of toleration (pluralism by yet another name), they expect that if they speak, they eventually may either persuade others to their views or "change the climate of public opinion." This last hope is easy to question (though impossible to refute), because politics are not organized to promote the fullest exchange of ideas, nor do they afford every group equal access to influence or power. But the historical situation of those who believe that changing public opinion is at least generally possible locates them within a community of political and legal interpretation that not only has engendered many of their beliefs, but renders them secure in their beliefs and affords them the opportunity to convince others with similar (although not identical) experiences.

As inheritors of the first amendment, we are of course bound, *at some level*, by a set of common political presuppositions that enable us to speak the same political language and engage in the exercise of persuasion. Those presuppositions not only support the employment of persuasion within an academic setting, but also support the introduction of outsiders into that setting who will change the terms of the debate.

274. *See* R. RORTY, *supra* note 210, at 385-86 (asserting that inquiry is both limited and made possible by "the facts about what a given society, or profession, or other group, takes to be good ground for assertions of a certain sort").

275. *See* Fish, *supra* note 210, at 501 (stating that "beyond historical and institutional perspectives . . . no knowledge . . . is recognizable or apprehensibly human").

VI. Conclusion

I have argued that academic freedom is a special case because academic discourse yields particular results that our society values, yet is incapable of generating without affording universities and their faculties considerable expressive leeway. This leeway sometimes may have direct political implications. Thus, I have made an argument for permitting Ernest Mandel to speak in the United States if the academy, in its considered judgment, believes that doing so will foster economic knowledge. But by the same token, I also have made an argument for permitting Archimedes to sit naked and sing songs in a public swimming pool if doing so will promote the discovery of fundamental physical laws.

The Mandel and Randall situations, however, have a specifically political resonance that the special interests of the academy do not define. They implicate values and aspirations[276] that our political community—the United States in the twentieth century—has formally and explicitly claimed. The prohibitory language of the first amendment free speech clause in a real sense both establishes and partially constitutes the contemporary American community's basic political values. Those values make censorship, particularly when explicitly political questions are at issue, the exception rather than the rule.

According to Stanley Fish, "pluralism and liberalism are the same thing, identical in what they oppose—the sectarian, the merely political, the exclusionary, the normative—and in what they valorize—the free marketplace of ideas, the suspension of judgment, the imaginative and sympathetic consideration of points of view other than one's own."[277] Because this description presupposes the possibility of "disinterested inquiry into unsituated and timeless truths,"[278] it implicitly contemplates an ideology that is foolish or pointless or dishonest (or all three). Certainly, when Toulmin argues that "[t]he rational demand for an impartial standpoint remains pressing and legitimate,"[279] his language alerts us to the unextinguished hope for omniscience, if not its plausible presence. But pluralism, as it is lived, is more a hope for agreement and a stipulation of procedures that may generate such agreement than it is a belief in any metaphysical impartiality, the magical "view from nowhere." It is the interested response of people who are very much situated in a particular place and a particular time.

276. I have borrowed the concept of aspirational values from Michael Perry's book *Morality, Politics, and Law: A Bicentennial Essay* (forthcoming 1988).

277. Fish, *supra* note 210, at 505.

278. *Id.*

279. 1 S. TOULMIN, *supra* note 199, at 51.

Thus, the final justification for the marketplace of ideas is not that the marketplace is fair, the exchanges equal, or the merchandise acquired of transcendental value, but that a political marketplace, an arena of discourse, exists when individuals can exchange views and share differing perspectives.

Buttressing the hope that such exchange and sharing can occur is the argument, made by Charles Lindblom, that the hegemonic institutions of our society, while capable of skewing public debate, are not able to control it completely.[280] Yet in the political marketplace we need not assume, as Fish claims that liberal theory demands, that our conversations always will succeed, that we will break into—or out of—the hermeneutic circle that separates our world from the worlds of other people. In an antifoundational universe, other people are always somewhat "alien," their thoughts expressed in a foreign tongue. Nonetheless, we must try to communicate.

280. C. LINDBLOM, *supra* note 247, at 213.