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DECONSTRUCTING PRINCIPLES FOUNDATIONAL TO THE PARADOX OF FREEDOM—A COMPARATIVE STUDY OF UNITED STATES AND GERMAN SUBVERSIVE PARTY DECISIONS

*Eric C. Schneider**

INTRODUCTION

Over half a century ago, the legal realists exposed the subjective and indeterminate nature of traditional legal analysis.[1] Further investigation by contemporary realists[2] has not been a source of comfort to those interested in keeping alive the impression that we are governed by the rule of law rather than by subjective pronouncements.[3] Deductive reasoning has been rejected because the syllogistic logic it requires is based on premises that are created rather than given.[4] Inductive reasoning was found to be inappropriate since legal decisions are not solely the result of observation and are based on "legal rules and personal judicial judgment" rather than on empirical evidence alone.[5] Analogical reasoning was questionable since the finding of similarity between any two fact patterns is more psychological than logical.[6]

In reaction to the realists' view that legal analysis is predicated on subconcious psychological processes, the legal community has attempted to

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1. Legal realism was described by one of its proponents with these remarks:

> Realism introduced a sharp distinction between what courts say and what they actually do. Only the latter counts . . . . Law became the behavior pattern of judges and similar officials. Fortunately, legal realism did not stop at this empiricism. It developed and perfected the functional approach. Realists focused their attention on whether a decision had given due weight to considerations of public policy.

Kessler, *Theoretic Bases of Law,* 7 U. CHI. L. REV. 98, 109 (1941).

2. For a brief history of legal realism, see Van Volkenburg, *Law Teachers, Law Students, and Litigation,* 34 J. LEGAL EDUC. 584, 594-97 (1984). *See, e.g.,* Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809, 821-49 (1935) (contemporary view of functioning of legal realist method).

3. J. ELY, DEMOCRACY AND DISTRUST 71-72 (1980); *see also* Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976) (describing present conflict between traditional objectivist jurisprudence and contemporary policy-making adjudication); Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction,* 36 STAN. L. REV. 623 (1984) (reviewing historical and ongoing discomfort of centrist legal scholars with legal realists and critical theorists); R. UNGER, KNOWLEDGE AND POLITICS 76-100 (1975) (liberal presupposition of individual subjective interests undercuts liberal system of law).

4. H. BERMAN & W. GREINER, THE NATURE AND FUNCTION OF LAW 415 (3d ed. 1972).

5. Hermann, *A Structuralist Approach to Legal Reasoning,* 48 S. CAL. L. REV. 1131, 1137 (1975).

6. *Id.* at 1138-39.

construct "fundamental reasons of principle on which to base men's actions—which should cut across men's uncontrolled instincts and interests."[7] Thus, the same concern about arbitrary ethical choice in decision making that caused the early positivists to stress legislation as the primary source of law[8] has prompted recent efforts in legal scholarship toward finding objectifying principles that will limit the arbitrariness of judicial decision makers when the result is not dictated by statute or clear precedent.[9]

In jurisprudential writing, these efforts have been driven by dissatisfaction with the conclusion that judicial decision making, to the extent that it is subjective, is arbitrary, undemocratic, and, in a sense, even tyrannical.[10] It

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7. A. BICKEL, THE LEAST DANGEROUS BRANCH 82 (1962).

8. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1 (1861 & photo reprint 1970); Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 VAN. L. REV. 117, 119-20 (1960); *see also* T. HOBBES, LEVIATHAN 198 (Collier ed. 1962) (civil law defined as command of the sovereign); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594-95 (1958) (discussing philosophical origins of utilitarianism). For an overview, see D. RICHARDS, THE MORAL CRITICISM OF LAW 22-26 (1977).

Modern positivism has been explained as follows:

> The earlier emphasis on the "command of the sovereign" has given way to the current view that the legal system consists of rules, and perhaps of policies and other standards whose status is determined by purely formal criteria—by their "pedigree" as Dworkin puts it. These formal criteria identify the agencies that can declare that particular rules or other standards are the law.

Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 976-77 (1981). *See* Vetter, *Postwar Legal Scholarship on Judicial Decison Making*, 33 J. LEGAL EDUC. 412 (1983).

9. "Objectifying principles" are sources of conditions or limitations or, for our purposes, legal methods, that restrict reasoning into predictable patterns. Professor Ronald Dworkin is a proponent of objectifying principles in law. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977), in which he argues that, even in the absence of a clearly defined and accepted rule directing a decision in a litigated case, a judge is bound to follow general principles of justice and fairness recognized by the social order which, although not expressed in positive law, impose substantial limits on judicial freedom. *See also* E. BODENHEIMER, JURISPRUDENCE 106 (rev. ed. 1974) (elaborating on Dworkin's views). Another proponent of objectifying principles in law, Judge Robert Bork, supports limits that constrain courts to their narrowest adjudicatory function and sharply limit judicial review. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-6 (1971) (supporting objectifying principles as a guard against a judicial "coup d'etat"). *But see* Kalven, *Robert Bork and the Constitution*, 1983 NATION 262 (critical review of Bork's "neutral principles").

Some criticism of objectifying principles is made among its supporters. *See* Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 984-86 (criticizing Dworkin's assumption that all forms of external pressure on judges are equally harmful to the judiciary). Most criticism, however, has stemmed from the critical theorists. *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) (no defensible criteria exist for limiting judicial review of due process fundamental rights); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205-08 (1981) (legal scholarship stultified because of reluctance to confront reality of subjective choice); see *also* Fletcher, *supra* note 8, at 970 (scholar's choice between support or criticism of objectifying principles depends on implicit assumptions about nature of law).

10. *See* D. SCHAEFER, JUSTICE OR TYRANNY? 97-101 (1979); Schuster, *Die Rolle Des Bundesverfassungsgerichts Beim Abbau Der Burgerlichen Demokratie in Der BRD*, 28 STAAT U. RECHT 35 (1979) (critical analysis of West German Constitutional Court by East German, describing court as "undemocratic" and an "instrument of the ruling classes" because it is "free of the ups and downs (Wechselfallen) of elections and of legislative and executive realities").

has been suggested, however, that our fear of arbitrary judicial decision making should not cause us to lose sight of the more central underlying issue: whether there are general principles that restrain or direct decision makers, whether those decision makers are judicial, legislative or administrative.[11] Certainly Judge Cardozo, faced with Dworkin's Herculean task of deciding an issue for which there was no clear precedent, felt the same restraints and used the same guides as legislators.[12]

In their search for objective principles, recent contributors to legal literature have suggested various objectifying sources for the law. Theories of sociology, economics, history, and psychology[13] have been utilized as well as the more traditional comparative method.[14] Legal scholars are concerned with the subjective or objective nature of law; that is, whether there are transcendent principles on which to base decisions. This concern is, not surprisingly, only one manifestation of a central issue of Western philosophical discussion. Recently, the focus of this discussion has been directed by linguistic philosophers such as Jacques Derrida and Jonathan Culler.[15]

The purpose of this paper is to review some of these recent developments of linguistic theory and to indicate and demonstrate their possible effects on legal analysis through the use of the comparative method. The comparative method, which shows different cultures coming to different solutions for a

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11. Hughes, *The Great American Legal Scholarship Bazaar*, 33 J. LEGAL EDUC. 424, 427 (1983) (self-deception involved in exaggerated monocular view of law in American jurisprudence as judicial decisions has also narrowed the range and weakened the intellectual importance of American legal scholarship).

12. Judge Cardozo said that a judge, facing a decision without precedent, "must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales." Cardozo, *The Nature of The Judicial Powers*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 176 (1947).

13. Crampton, *The Place of Economics in Legal Education*, 33 J. LEGAL EDUC. 183 (1983). For examples of the application of various disciplines to legal criticism, see R. BERGER, GOVERNMENT BY JUDICIARY (1977) (history); M. MOORE, LAW AND PSYCHIATRY 44-49 (1984); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) (history); Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1274 (1981); Leff, *Law And*, 87 YALE L.J. 989 (1978) (anthropology); Michelman, *Norms and Normality in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978); Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CAL. L. REV. 89, 92-93 (1918); Soifer, *Protecting Civil Rights, A Critique of Rauol Berger's History*, 54 N.Y.U. L. REV. 657 (1979).

14. "Comparative method" is a process of comparing and contrasting alternative legal systems to highlight the unique qualities of those systems. The term is used by Professor Rudolf Schlesinger in preference to the standard term "comparative law." R. SCHLESINGER, COMPARATIVE LAW 1 (4th ed. 1980) (describing application of comparative method). *See* E. BODENHEIMER, *supra* note 9, at 95; see *also* DWORKIN, *Spheres of Justice: An Exchange*, N.Y. REV. BOOKS, July 21, 1983, at 45-46 (disagreements as to function and distribution of goods cannot be resolved unless we move outside our own tradition and understandings and appeal to "general principles").

15. *See, e.g.*, J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976); J. CULLER, ON DECONSTRUCTION (1982).

legal problem, will be used to illustrate the implications of recent linguistic theories on the issue of objectifiable law and, thus, on legal analysis. After recent developments in linguistic theory are summarized, three approaches to the regulation of subversive political parties in the United States and the Federal Republic of Germany will be presented. This subject has tested the nature of certain general principles underlying each legal system, and has been analyzed in terms of a paradox of freedom. Put simply, the paradox is whether democracy is justified in denying political rights and privileges to those who, once in power, would be undemocratic.[16] A conventional analysis will be followed by a structuralist analysis. Finally, a deconstructionist approach to the same material will aid in arriving at a fuller understanding of the presuppositions and unspoken premises of decision makers in the American and West German legal systems.[17]

I. The Comparative Method and Linguistic Analysis

The comparative method has been recognized as an appropriate tool in finding general principles and the rules manifesting them. Thus, the comparative method adds to the civilizing effects of law and the pursuit of justice. Nevertheless, there has long been an awareness of its shortcomings. A constant warning given by comparatists is that one cannot simply compare the final results to reach a true understanding of the general principles that motivate decision makers in disparate societies. Traditionally, the warning has been that one must first become aware of differences in language, classification, and practice and then compare those differences.[18] The modern linguistic philosopher would add to this list of warnings that, when trying to understand the full implications of any derivative general principles, one must also compare the underlying, even unconscious view of reality that is determined by language.[19]

16. The paradox of freedom states "that freedom in the sense of absence of any restraining control must lead to very great restraint, since it makes the bully free to enslave the meek." 1 K. Popper, The Open Society and its Enemies 265 n.4 (5th rev. ed. 1966); *see also* 3 Kommentar Zum Bonner Grundgesetz 32 (1976) (contradictory principles of political order's preservation and openness to historical change can be reconciled only through practical political reason, careful progress, and piecemeal change). *Cf.* Tribe, *Toward a Metatheory of Free Speech,* 10 Sw. U.L. Rev. 227, 239 (1978) ("no satisfactory theory of free speech can presuppose or guarantee the permanent existence of any particular social system").

17. Structuralists, using linguistics as a model, "attempt to develop 'grammars'—systematic inventories of elements and their possibilities of combination that would account for the form and meaning of literary works." J. Culler, *supra* note 15, at 22. Deconstructionists, however, "investigate the way in which this project is subverted by the workings of the texts themselves. Structuralists are convinced that systematic knowledge is possible; post structuralists [such as deconstructionists] claim to know only the impossibility of this knowledge." *Id.* These definitions are applicable to legal as well as literary critical theory.

18. *See, e.g.,* R. Schlesinger, *supra* note 14, at 619-20.

19. For other linguistic approaches, *see* W. Bishin & C. Stone, Law, Language and Ethics (1972); R. Schlesinger, *supra* note 14, at 618-37; Stone, *From a Language Perspective,* 90 Yale L. J. 1149 (1981).

Professor George Fletcher uses a traditional comparative approach to show how differences in language can affect legal analysis.[20] In arguing against the positivist position, Professor Fletcher points out that continental European languages employ two words for "law" while English uses only one. That is, in European languages, one word (*gesetz, loi, ley, zakon, torveny*) is used to refer to positive law such as statutes and specific customary law.[21] Another word (*recht, droit, derecho, prava, jog*) is used to refer to unenacted general principles.[22] This concept of law as general principles is not found in contemporary English. Until the seventeenth century, however, this was a meaning given to law in England and was part of the common law. Fletcher argues that law as defined by positivists, which develops in courts and legislatures, has as its guiding "sense" the pursuit of this universal idea of justice.[23] While the positive law is fully knowable, general principles are open ended, transcendental, and cannot be completely known.[24] Fletcher proposes that one should believe that law exists in this universal sense in order to engage in "committed argument" rather than being limited to the mere "detached observation" of the positivists.[25]

Professor Fletcher's arguments raise, but do not fully answer, questions central to contemporary jurisprudence and philosophy:

> 1. Is there an objectifiable concept of justice to which decision makers can refer?
>
> 2. Even if there is not, is there a sufficiently shared concept so that one can act as though there is an objective principle and, thus, predict and limit decision makers?
>
> 3. If we are referring to a culturally shared conclusion as to general principles, is there any way we can avoid the tyranny of our consensus and develop new principles without decision making appearing merely arbitrary?

These questions are part of a philosophical discourse that goes back to the pre-Socratics and involves the search for "certain" knowledge in math-

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20. Fletcher, *supra* note 8, at 987-88.

21. *Id.* at 980.

22. *Id.*

23. *Id.* at 981.

24. Fletcher discusses the indeterminate value of general principles:

> In Dworkin's terminology, rules that apply in "all or nothing" fashion are Gesetze, whereas principles are a matter of Right. That principles have "weight" and that judges must gauge the force of these principles in every case are characteristics of the Right. No one can declare the principles' existence and determine the precise weight they should carry.

Id.

25. *Id.* at 982. Fletcher expounds two aims of legal scholarship. "Committed argument" postulates the existence of a transcendant law, or Right. Scholars pursue and articulate principles that constitute this Right and thereby, stand equally with judges in assessing what the law is. *Id.* at 984. "Detached observation" presumes a scholarly distancing of the commentator from legal practice. The scholar, in this view, observes and reports the work of the legal system. *Id.* at 985. Fletcher traces two examples of committed argument made in legal practice: the extension of statutes in civil law countries to cover new principles, *id.* at 991-95, and the use of cases in common law countries to support particular principles, *id.* at 995-99.

ematics and morality.[26] In the early eighteenth century, David Hume, drawing conclusions from Newton's physics, stated that it was impossible to arrive at any definite, self-validating knowledge of the external world. This radically skeptical position insisted that there was no necessary link between deductive logic and the nature of real life events and experiences.[27] Immanuel Kant answered Hume's skepticism with the theory that man is in a "noumenal" or intelligible world as well as in a sensed world, and that this noumenal world is a basic ground or cause of the empirical world. In essence, Kant held the noumenal world to be the real world—the thing itself; the world of sensed data is thus secondary. Ideas and concepts are the true reality and have an autonomous transcendental existence.[28] It is important in understanding the development of answers to our three questions to be aware that many legal scholars take this Kantian approach to our first question. From that approach, these scholars argue for a link between law and morals; they are driven to connect law to the fundamental principles of other disciplines.[29]

II. STRUCTURALISM

A new approach, structuralist methodology,[30] has recently been developed in various fields of human endeavor, including legal analysis.[31] The development of structuralism has been traced to the works of the linguist Ferdinand de Saussure, whose ideas are basic to the disparate fields of structuralist thought. In lectures given between 1907 and 1911,[32] Saussure observed that

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26. *See, e.g.*, R.E. ALLEN, SOCRATES AND LEGAL OBLIGATION 100-13 (1980); E. BODENHEIMER, *supra* note 9, at 4-6; H. LLOYD-JONES, THE JUSTICE OF ZEUS 83-84 (1971); A. ROSS, ON LAW AND JUSTICE 233-37 (1958); A. WOOLZLEY, LAW AND OBEDIENCE, THE ARGUMENTS OF PLATO'S CRITO 79-103 (1979) (explaining Socrates' equivalent of social contract theory).

27. *See, e.g.*, D. HUME, A TREATISE OF HUMAN NATURE 469 (1878) (justice rests not on reason but on "artifice and human convention").

28. E. BODENHEIMER, *supra* note 9, at 61-64.

29. In the area of statutory interpretation, *compare* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958) (interpreting statutes requires only an appreciation of the ambiguity of language, without resort to general principles supporting the law) *with* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958) (interpretation of law invariably tends towards reliance upon principles of law).

30. The term "structuralism" has had varied uses. *See* J. CULLER, *supra* note 15, at 18-23 (describing various schools of criticism associated with structuralism). This paper develops an understanding of the structuralist movement as a shift in critical thinking from subjects to discourse. That is, to the structuralist meaning is the effect of codes and conventions—its relation to particular structures and processes be they linguistic, psychoanalytical, metaphysical, logical, sociological or rhetorical. Language and structures become the major source of explanation. *Compare* F. ALLPORT, THEORIES OF PERCEPTION AND THE CONCEPT OF STRUCTURE 76-77 (1955) (describing core-context theory of perception, which combines current sensation and past images to create meaning).

31. *See* Leach, *Fundamentals of Structuralist Theory*, in SOCIOLOGICAL APPROACHES TO LAW 19-32 (Podgorecki & Whelan eds. 1981); Harris, *A Structuralist Theory of Law: An Agnostic View*, in SOCIOLOGICAL APPROACHES TO LAW 33-43 (Podgorecki & Whelan eds. 1981); Heller, *Structuralism and Critique*, 36 STAN L. REV. 127 (1984); *see also* Liebersoln, *Interpreting the Interpreter*, N.Y. REV. BOOKS, Mar. 15, 1984, at 39.

32. F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (W. Baskin trans. 1974).

our knowledge of the world is inextricably shaped and conditioned by the language that serves to represent it, and that there is no self-evident, corresponding link between the "signifier" and the "signified", that is, between the word and the concept it serves.[33] Thus, whatever "meaning" we find or assert is tied into a system of relationship and difference that has predetermined our habits of thought and even our perceptions. Our knowledge of the world is pre-structured by our signs, by our codes, and by conventions that we have developed to classify and organize an otherwise chaotic flow of experience.[34] Saussure's statement of the development and place of language, a basic relativity of thought and meaning, is the core of structuralist theory.[35]

Saussure denied the objective existence of justice, answering "No" to our first question, and posited a relativity of meaning as the premise to answering the second question. Since Saussure, however, other philosophers uncomfortable with this conclusion have proposed different and conflicting answers to our second question—solutions to the problem of locating a shared concept of justice. Edmund Husserl thought that philosophy could work back to a logic of meaning and experience that could be derived from the "immediate data of consciousness itself."[36] His phenomenology assumed that there are "structures of experience and judgment" that are beyond question, and he tried to capture these structures by "bracketing or suspending" all other structures as possible delusions.[37] Husserl hoped that he could isolate and describe pure and indubitable structures of experience by examining the

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33. Culler offers this synopsis of Saussure's theory of language:

> Saussure begins by defining language as a system of signs. Noises count as language only when they serve to express or communicate ideas, and thus the central question for him becomes the nature of the sign: what gives it its identity and enables it to function as sign. He argues that signs are arbitrary and conventional and that each is defined not by essential properties but by the differences that distinguish it from other signs. A language is thus conceived as a system of differences, and this leads to the development of the distinctions on which structuralism and semiotics have relied: between a language as a system of differences (*langue*) and the speech events which the system makes possible (*parole*), between the study of the language as a system at any given time (synchronic) and study of the correlations between elements from different historical periods (diachronic), between two types of differences within the system, syntagmatic and paradigmatic relations, and between the two constituents of the sign, signifier and signified. These basic distinctions together constitute the linguistic and semiotic project of accounting for linguistic events by making explicit the system of relations that makes them possible.

J. CULLER, *supra* note 15, at 98. *Accord*, R. COWARD & J. ELLIS, LANGUAGE AND MATERIALISM: DEVELOPMENTS IN SEMIOLOGY AND THE THEORY OF THE SUBJECT 13 (1977).

34. C. NORRIS, DECONSTRUCTION 25 (1982).

35. *Id.* at 4. Derrida argues that Saussure explicitly affirmed a logocentric conception of the sign when Saussure said in his lectures that "the object of linguistic analysis is not defined by the combination of the written word and the spoken word: the spoken word alone constitutes the object." F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 23-24 (1960), *quoted in* J. CULLER, *supra* note 15, at 100. For an account of the development of structuralism in its many forms from Saussure's lectures, see T. HAWKES, STRUCTURALISM AND SEMIOTICS (1977).

36. C. NORRIS, *supra* note 34, at 42-43.

37. *Id.*

content of his conscious experience while suspending or bracketing his belief that his conscious experience referred to the external world.[38]

In the twentieth century, under the influence of Wittgenstein and Heidegger, many structuralist writers have come to believe that there are no transcendent foundations for ethics[39] and that the lack of such foundations does not really matter. Even without a transcendental ground for law and ethics, as Wittgenstein said, "everything is just as it was."[40] According to these writers, the only basic objective foundation necessary to the law is that people are psychologically and socially constituted to use it to "state truths" and "to give and obey orders." Although this answer to our second question has been stated differently by various legal scholars,[41] it is most eloquently put by Noam Chomsky: "linguistic structures are *innately* programmed in the human mind and operate both as a constraint upon language and as a means of shared understanding."[42] Thus, according to Levi-Strauss, analysis in law, as in other areas of human culture, requires that one "grasp the unconscious structure underlying each institution and each custom in order to obtain a principle of interpretation valid for other institutions and other customs."[43]

Professor Donald Hermann, an exponent of a structuralist approach to legal reasoning,[44] accepts the premise of the realists that legal analysis is the result of a subconscious process in which rules play no simple cause and effect role.[45] He rejects, however, the realist assertion that, "because making decisions in 'legal' terms is a rationalization for deeper mental processes, legal reasoning must therefore be irrational."[46] Structuralist theory, argues Professor Hermann, "posits the existence of . . . cognitive ordering elements below the conscious surface."[47] Basing his position on studies by Levi-Strauss, Professor Hermann suggests that legal analysis rests on three theoretical assumptions:

> 1. All patterns of human social behavior are codes, with the characteristics of languages.

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38. *Id.* at 44.

39. Allison & Garver, *Preface* to J. DERRIDA, SPEECH AND PHENOMENA xviii (1973). Placing contemporary theorists into the structuralist or post structuralist camp is difficult. *See* J. CULLER, *supra* note 15, at 22 (recent anthology of post structuralist criticism features writers listed in editor's earlier bibliography of structuralism).

40. Searle, *The World Turned Upside Down*, N.Y. REV. BOOKS, Oct. 27, 1983, at 78.

41. *See, e.g.*, Stone, *From A Language Perspective*, 90 YALE L.J. 1149, 1158 (1981) *See also*, J. CULLER, *supra* note 15, at 130 ("[Wittgenstein's] admirers speak as though the language game were itself a ground—a true presence which determined meaning").

42. R. COWARD & J. ELLIS, *supra* note 33, at 129.

43. C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 21 (1963). For the application of structuralist methodology to legal analysis, see Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469 (1976), Hermann, *supra* note 5 and Robertshaw, *Unreasonableness and Judicial Control of Administrative Discretion*, 1975 PUBLIC LAW 113 (1975).

44. Hermann, *supra* note 5.

45. *Id.* at 1140.

46. *Id.*

47. *Id.* at 1142.

2. Man has an *innate* structuring capacity which determines the limits within which the structure of all types of social phenomena can be formed.

3. Relations can be reduced to binary oppositions.[48]

This last theoretical assumption, that relations are reducible to binary opposites, is essential to the usefulness of structural analysis.[49] Structuralism proposes that deep structures of the unconscious are manifested by our need to put concepts in terms of the concept itself and its opposite. Levi-Strauss believed that the deep structure of the relation between nature and culture leads to conscious binary oppositions such as raw/cooked, fresh/putrid, and even silence/noise.[50] The argument here is not that these binary opposites exist as such in any "real" sense, but merely that they are perceived to exist "within special contexts, by groups who employ the terms in their myths."[51] Hermann concludes that:

> Myths, and, by implication, other statements of belief, such as law, present patterns of behavior expressed through binary opposition, and from these binary oppositions a model can be developed which explains in part what otherwise appears to be a diverse and unintelligible body of material . . . . Evolution or change in institutions . . . is explained by the process of transformation, which operates through regularized laws whereby deep structures are transformed into different structural configurations with different surface expressions . . . . Transformation takes place through a process of mediation, in which tension between binary opposites is periodically resolved by the construction of intermediate third variables.[52]

The construction of third variables is explained by Levi-Strauss on the premise that binary opposites give rise to intermediate concepts due to the tension between them. The binary opposite of life/death is transformed into the binary opposite of agriculture/warfare and then into an intermediate third variable concept of hunting as a mediating experience relieving the tension.[53] Thus, the original binary opposites become triads that must be viewed as whole institutional systems rather than merely as disconnected parts. These triads, in turn, can be explained only "in terms of the interrelationship between the parts."[54]

III. Deconstruction

The structuralist system of legal analysis claims to make intelligible all observed facts to predict "how the model (and, theoretically, the institution or cultural pattern under scrutiny) will react if one or more of its constituent elements are modified."[55] Such a system is seductive. Structural analysis of

48. *Id.* at 1145 (quoting Lane, *Introduction* to INTRODUCTION TO STRUCTURALISM 14 (M. Lane ed. 1970) (emphasis added).
49. Hermann, *supra* note 5, at 1150-51.
50. *Id.* at 1148.
51. Lane, *supra* note 48, at 16.
52. Hermann, *supra* note 5, at 1153, 1159.
53. C. LEVI-STRAUSS, *supra* note 43, at 224.
54. Hermann, *supra* note 5, at 1159.
55. *Id.* at 1160.

the sort espoused by Professor Hermann, however, is based on the idea that "deep structures are either innate categories of human thought or structural processes which exist because of the basic principles by which human intelligence operates."[56]

Deconstruction has emerged as a warning response to these structuralist assumptions. Although, like structuralism, it has its roots in Saussure's analysis of language, proponents of the deconstructive method refuse to accept the aroma of objectivity that insidiously invades structuralism. Deconstruction, as a method, rejects the idea that structure is in any sense objectively there or that structures of meaning correspond to some deeply laid mental set or pattern of mind that determines intelligibility. Roland Barthes, although himself subject to the allures of natural order, reminds us that the dream of total intelligibility, like structure, is a sort of blindness to one's own conceptual metaphors.[57] It is this blindness or blind spot that leads to the tyranny referred to in our third question and to which Derrida has devoted his attentions. He has pointed out that structuralists and empiricists take for granted that "ideas represented by linguistic signs already stand in logical relation to one another before we have signs to represent them."[58] They place logic at the foundation of their theory of meaning. Derrida, to the contrary, regards logic as merely derivative from rhetorical considerations.[59] For Derrida, the deconstructive method is useful in undoing the ruling illusion of western metaphysics: that reason can somehow dispense with language and arrive at a pure, self-authenticating truth or method. In response to Professor Hermann, Derrida would answer that the very notion of "structure" is a metaphor dependent, at its limit, on a willed forgetting of its own rhetorical roots.[60] Structure is at best a product of a metaphorical

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56. *Id.* at 1159.

57. C. NORRIS, *supra* note 34, at 10; *see also* J. CULLER, *supra* note 15, at 22 ("Structuralists are convinced that systematic knowledge is possible; post structuralists claim to know only the impossibility of this knowledge.").

58. Allison & Garver, *supra* note 39, at xi.

> In these traditional terms, the central issue of philosophy of language . . . is the issue about the relation of logic and rhetoric . . . . The very fact that logic and rhetoric both have to do with the use and interpretation of signs leads us immediately into the all important question of their relative priority: Can there be two independent foundations for our theory of meaning? . . . In the history of Western philosophy, the philosophy of language . . . has almost invariably been based on logic rather than rhetoric.

Id.

59. "Derrida falls squarely within a movement which regards the role of utterances in actual discourse as the essence of language and meaning, and which therefore regards logic as derivative from rhetorical considerations." *Id.* at xxii; *see also* J. CULLER, *supra* note 15, at 222-25.

60. Derrida explains the metaphor of "structure":

> [T]he appeal to criteria of clarity and obscurity would be enough to establish . . . that this whole philosophical delimitation of metaphor is already constructed and worked upon by "metaphors." How would a piece of knowledge or language be clear or obscure *properly* speaking? All the concepts which have played a part in the delimitation of metaphor always have an origin and a force which are themselves "metaphorical." The very notions of what in a discourse might be nonmetaphorical are concepts whose force owes much to their figural attractions.

J. CULLER, *supra* note 15, at 147 (quoting Derrida, *White Mythology*, 6 NEW LITERARY HISTORY 54 (1974)).

process, a literal expression whose figurative aspect is easily forgotten.[61] It may be difficult to think without the use of figurative props, but to accept props without deconstructing their effects is to risk "being interested in the figure itself to the detriment of the play going on within it metaphorically."[62] We must be aware of the delusion created when we move metaphorically from image to concept without subjecting that movement to full rhetorical scrutiny.

Deconstructive method starts by dismantling the concept of binary opposition that is central to structural analysis. This deconstructive process does not claim that analysis in terms of binary opposition is useless. The process merely is meant to remind us that the structuralist opposition is based not on an objectifiable reality but, rather, on the rhetorical process of metaphorically structuring the unconscious. The alluring logic that flows from that self-created structure presents the danger of appearing to arrive at an immutable truth, if not about substance, at least about the analytical process. It is to undermine this tendency in structuralism that Derrida deconstructs the binary opposition by examining its rhetorical roots.[63]

Derrida maintains that the basic determining metaphor responsible for binary opposition has been "presence."[64] Derrida writes of the metaphor of presence, a difficult concept requiring an analysis of the place of "self" in the process of analysis. It is very much like trying to see oneself without the use of the manufactured prop of a mirror. To understand the metaphor of presence it is necessary to examine the metaphorical process and its creative role in and through language.

Meaning in language, according to Saussure, is merely a system based on difference in sound between "signs."[65] Derrida reminds us that meaning in language is not only the result of phonic differences necessary to create new signs, but also that the development of language depends on the idea that signs never are completely settled on an absolute meaning. That is, meaning is a product of events and, thus, is always to some extent deferred and in a process of constant development through metaphor.[66]

The construction of metaphor as used here is not merely the trick of composition learned in grade school. What is meant is metaphor as the very constitutive ground of language and reality; that is, metaphor as the device by which one explains or makes "real" a phenomenon that one does not think one fully understands in terms of what one believes one does understand. Thus, without the knowable existence of basic foundations, we develop language and concepts that serve as our reality. Through the development of metaphor we increase our ability to deal with the unknown, and in the

61. C. NORRIS, *supra* note 34, at 19.

62. J. DERRIDA, WRITING AND DIFFERENCE 16 (A. Bass trans. 1978).

63. J. CULLER, *supra* note 15, at 85-86.

64. *Id.* at 95.

65. *See supra* note 33.

66. J. CULLER, *supra* note 15, at 95-97; *see also* J. VINING, LEGAL IDENTITY 172 (1978); Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714 (1984).

process we literally create new realities or concepts. By repetition, metaphors become labels or concepts and, thus, language and general principles are formed. This is language not only as communication but as a tool of perception.[67]

The process of understanding "reality" through metaphors is actually a process that insures us that the unfamiliar or unknown is *like* the familiar. It is a step-by-step process that assures us of the security of familiarity as we come to grips with an infinity of unknowables. We achieve a feeling of familiarity with the unknown by substituting something familiar for the unfamiliar through metaphor.[68]

Examples of this process on a conscious level are most obviously found in the physical sciences. Niels Bohr gathered data about the atom which was an "unknown" (a metaphrand). To understand the atom, Bohr created a model patterned on something familiar: the solar system (a metaphier). Bohr then developed a theory to relate the metaphrand and metaphier. The creation of this theory was the metaphorical process.[69] The theory, after an accumulation of new data, has turned out not to explain adequately the relationship of metaphrand and metaphier. But the model remains. The model is only a model—neither true nor false. What is tested is its similarity to what it is supposed to represent. As successive theories show the model to

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67. The process of connecting or understanding the unknown (foundational) principles through metaphor is evidenced by the early Greek creation of the abstraction of "law" itself. The word or concept derives from the Greek *nomos*, which originally meant the foundations of a building. In linguistic analysis, the abstraction to be understood (law) has been called a "metaphrand" while the thing or relation used to elucidate it (*nomos* or foundation) has been called the "metaphier." *See* J. JAYNES, THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND 48 (1976).

68. One commentator discusses the discomfort attorneys experience with ambiguity:

> It is of course true that we cannot, as lawyers, deal comfortably with anything until we have attached a label to it . . . . [T]he choice of labels is far from trivial. How we describe something is an important part of how we perceive it . . . . Language as a label is an important aspect of law as language.

Peters, *Reality and the Language of Law*, 90 YALE L.J. 1193, 1195 (1981). Judge Peters points out how thinking of a security device as a trust rather than a chattle mortgage facilitated an entirely different attitude towards commercial financing. *Id.* Even our abstract concept of "liability" derives from the Latin *ligare* meaning to be bound by a cord. E. PARTRIDGE, ORIGINS 354 (1983). *See also* J. JAYNES, *supra* note 67, at 52 ("familiarity [of metaphors] is the feeling of understanding").

69. The process of the development of metaphrand is not a conscious one. Concrete metaphiers are transformed through a process of phonic change, transforming metaphiers into words and concepts that thereafter seem to exist in their own right. Language is thus composed of a finite set of terms that by the process of metaphor enables us to expand our understanding of the infinite circumstances that compose our reality. The development of abstract language is not always obvious because the original concrete metaphier gets hidden in phonemic change (that is, a set of language sounds with slight variations are heard as the same sound by native speakers), and the words begin to have their own existence.

An example of the development of a common metaphier is the verb "to be." Originally in Sanskrit *bhu* meant to grow or to make grow and *asmi* meant "to breath." *Bhu* has evolved into "to be" and *asmi* into its irregular conjunctions of "am" and "is." *See* J. JAYNES *supra* note 67, at 51.

be inadequate, the model will be replaced and new theories developed. This has occurred in the development of quantum physics. But again, understanding in science is the "feeling of similarity between complicated data and a familiar model."[70]

IV. The Metaphor of Presence in Analysis

To understand the decision making process, it is important to understand how one decides to accept or reject a newly presented model. The answer to this question depends on our understanding the relationship of one's concept of one's self in the metaphorical world.

When Derrida writes that "presence" is the ruling metaphor of philosophy, he is referring to the metaphorical two-way process whereby we constantly create our concept of consciousness or self and then apply it to the world we perceive in an on-going metaphorical process. This process is based, not on something objectively real, but on our presuppositions about self and presence. Our concept of self and presence is thus merely a function of an operation that works by analogue. That is, we perceive the world and know it through metaphor. We then draw a map or make a model to represent the metaphiers. This is not unlike the scientific model of Bohr's atom; this is a model of all things that we feel we know well. Conscious mind is then an analogue of what we call the real world. Through combining metaphors we *create* the analogue of our selves and make ourselves comfortable in our reality. We expand viscera to the metaphrand of mind-space, our internal world, from the metaphier of space in the world we see. From the physical world of getting and holding we learn to "grasp" and "see" how ideas "fit" together. When we make decisions, we choose versions of reality consistent with our analogue of our selves. As decision makers we carry forward the process of making the unknowable familiar by applying our self-structured consciousness, based on a metaphor of presence, to order our perceptions.[71]

Derrida writes that all names related to fundamentals, to principles, have always designated the constant of a presence.[72] It causes us to presume that

70. J. Jaynes, *supra* note 67, at 53. A theory and a model are not the same: a theory is a relationship of the model to the things the model is supposed to represent. *Id.* Even in the physical sciences, new theories and discarded models do arouse feelings of insecurity. *See* T. Kuhn, The Structure of Scientific Revolutions 64 (2d ed. 1970). In quantum physics, the quantum "was a whole too big to swallow" for a large group of physicists led by one of quantum's creators, Albert Einstein. F. Wolf, Taking the Quantum Leap 61 (1981).

Einstein's skepticism about quantum physics evidences the deep attachments of familiarity we have with metaphiers. Because they are part of what we consider the real world, they have many associations that increase their air of familiarity. These associations are, of course, transferred to the metaphrand to make it familiar. Einstein reacted to discarding a metaphier that had causality. He was not willing to accept that reality was not real, that there was no "out there" out there, and that the model of reality was based on a probability curve and dependent on the observer. He held onto the old model with the famous comment, "God does not play dice with the universe." *Id.* at 151.

71. J. Jaynes, *supra* note 67, at 66.

72. J. Derrida, Writing and Difference 279 (A. Bass trans. 1978).

order or logic underlies meaning and, thus, makes us logocentric. Concepts by their very nature contain logocentric myths of origin, truth, and presence which, when uncovered, show that they are caught up in a rhetoric of figurative props and images that entirely controls their logic. Description or analysis becomes a process of returning to an idealized metaphor of presence of one's self, as what is normal, pure, and standard, in order from there to conceive of derivation and complication.[73] By this process, binary opposition of concepts comes about. This is why we invest them with hierarchical value—self or normal is good, other or derivation is bad.

The metaphorical process here described was perhaps the intuitive basis of Judge Cardozo's warning in *Berkey v. Third Avenue Railway*:[74] "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it."[75] The metaphorical process of model and analogue creation has produced numerous similar analogues of the self based on a premise of logic and order. We have witnessed over time, however, a splintering in our perception of reality and the models that best describe it. As a result different cultures have developed different conclusions about the nature of justice and, thus, different general principles on which cultures base their decisions. These accepted or familiar general principles vary not only from culture to culture and from time to time but, to a lesser extent, within a culture, from person to person, and from issue to issue.[76]

What does the deconstructive method do with this process? To quote Jonathan Culler, "to deconstruct a discourse is to show how it undermines the philosophy it asserts, or the hierarchical oppositions on which it relies, by identifying in the text the rhetorical operations that produced the supposed ground of argument, the key concept or premise."[77] That is, the deconstructive method is designed to remind us of the logocentric nature of our reasoning and of our stated general principles.

Various methods can be used to deconstruct a position:[78]

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73. Derrida, *Limited Inc.*, GLYPH 2, 162, 236 (1977).

74. 244 N.Y. 84, 155 N.E. 58 (1929).

75. *Id.* at 94, 155 N.E. at 61.

76. Leibowitz explains the importance of common language:

> [T]o a people, language brings into play an entire range of experience and an attitude toward life which can be either immensely satisfying and comforting or, if imposed from without, threatening and forbidding. From a central government's standpoint, a common language forges a similarity of attitude and values which can have important unifying aspects, while different languages tend to divide and make direction from the center more difficult.

A. LEIBOWITZ, EDUCATIONAL POLICY AND POLITICAL ACCEPTANCE 1 (1971). *But see* Dworkin, *Book Review*, N.Y. REV. BOOKS, July 21, 1983, at 46:

> Moral traditions are not clubs into which people of the world are distributed so that everyone carries a membership card in one but only one. On the contrary, these traditions can be defined at different levels of abstraction, and people who belong to a common tradition at one level of abstraction will divide at another, more concrete, level.

77. J. CULLER, *supra* note 15, at 88.

78. For a list of strategies see J. CULLER, *supra* note 15, at 213-16.

1. Be aware of the use of any of the traditional binary oppositions in Western intellectual history, e.g., speech/writing, male/female, truth/fiction, literal/metaphoric, signified/signifier, reality/appearance. We must be aware that at the core of logocentrism, with its obsession with rationality and logic, is the concept of hierarchical oppositions that automatically gives the first term superiority over the latter.

2. Look for certain key words in the text that reveal the points at which the *strains* of an attempt to sustain or impose logocentric conclusions make themselves felt in the text. These are points of condensation, "where a single term brings together different lines of argument or sets of values."[79]

3. Pay attention to the marginal features of the text, such as the sorts of metaphor that occur in it, because they are "clues to what is truly important."[80]

V. Conventional Comparative Analysis of the Regulation of Subversive Political Parties

Political parties have existed in some form in all systems of government that claim to be democratic.[81] The philosophy of democracy has always had at its core a belief in the right of the entire community to share in the direction of the state. Political parties have traditionally been the machinery for attaining this diffusion of power in an orderly manner.[82] Occasionally, political parties are formed for the purpose of terminating the democratic system within a society. The right of political parties to work toward the displacement of the prevailing democratic system has tested the very premise and foundational principles of democratic societies. Whether a democratic system can consistently deny access to the democratic process to anti-democratic political parties is the question underlying the paradox of freedom.[83]

Both the United States and the Federal Republic of Germany recognize the right to organize and operate political parties. Both countries have also tried to limit this right. The West German Constitution (Grundgesetz) prescribes that the internal organization of political parties must conform to democratic principles.[84] In the United States, the right to form, organize, and operate political parties is not specifically guaranteed by the Constitution

79. *Id.* at 213.
80. *Id.* at 146, 215.
81. S. Neumann, Modern Political Parties 1 (1956).
82. W. Crotty, D. Freeman & P. Gatlin, Political Parties and Political Behavior 15 (1966).
83. For one articulation of the paradox of controlling dissent in a free society, see *Developments in the Law—The National Security Interest and Civil Liberties,* 84 Harv. L. Rev. 1130, 1135 (1972). *See also* K. Popper, *supra* note 16, at 265 n.4. *Compare* O. Kirchheimer, Political Justice 119 (1961) (history illustrates futility of attempting to suppress subversive groups while maintaining political liberties) *with* Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom,* 49 Cal. L. Rev. 4, 10 (1961) (limiting subversive groups' civil liberties to protect state is national imperative).
84. Grundgesetz [G.G.] art. 21(1) (W. Ger.).

but has been held to be an inherent right.[85] This inherent right is subject to reasonable governmental regulation.[86]

Subversive political parties have been subjected to adverse treatment by legislative and judicial decision makers in both Germany and the United States. In examining legal decisions against such groups, some writers have maintained that the right of access to the ballot provides the "practical extent to which the right to form a political party is subject to qualification and limitation."[87] Analysis of the right of access to the ballot will thus be central to this discussion. However, the manner in which a society's decision makers deal with individuals who form and participate in subversive political parties will also be considered. The right of an association to be on the ballot may be of little value if sanctions imposed upon achieving the association's ends have undermined the incentive of individuals to participate in the political process.

Government sanctions on individuals for membership in subversive political parties have been manifested in numerous subtle ways. Clarity requires that this article deal only with the most direct methods used. Nevertheless, it must be kept in mind that governmental investigations that expose individuals to public harassment and employment disqualifications have also played a major role in discouraging individuals from associating with subversive political parties.

VI. Control of Subversive Political Parties in the United States

The most recent congressional attack on the rights of subversive political parties[88] was the passage in 1954 of the Communist Control Act

85. *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (freedom to associate for the "common advancement of political beliefs" protected by first and fourteenth amendments).

86. For example, political primary elections may not be used to circumvent an individual's right to vote under the fourteenth amendment's equal protection clause, Nixon v. Condon, 286 U.S. 73 (1932), or the fifteenth amendment, Smith v. Allwright, 321 U.S. 649 (1944). The Court held in both cases that Congress had power to regulate these primary elections. *See also* Jennis v. Fortson, 403 U.S. 431 (1971) (describing permissible ballot access regulations).

87. C. Rice, Freedom of Association 101-02 (1962).

88. The Constitution of the United States is silent about political parties. It neither provides for their existence nor creates limitations on their formation or activity in any explicit way. Political parties did not need authorization at the Philadelphia convention because they did not function at the time of the adoption of the Constitution. 1 R. Harlow, Growth of the United States 258, 259 (1943). By 1789, political parties had become an important part of politics in the United States, and with the emerging importance of political parties came regulation. J. Charles, The Origins of The American Party System 9 (1956). The incumbent Federalists were aggressively attacked by the Republicans who, it was thought, were supported by a press controlled mainly by non-citizens. 1 T. Emerson, D. Haber, & N. Dorsen, Political and Civil Rights in the United States 35 (1967). Spurred on by the threat of war with France, Congress enacted legislation known as the Alien and Sedition Acts, which were aimed at limiting political expression and abolishing the popular vote. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798) (expired) (authorizing President to report "dangerous aliens"); An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798) (expired) (allowing for deportation of

(CCA).[89] The CCA represents the culmination of a long struggle that was manifested in two previous statutes known as the Smith Act,[90] passed in 1940, and the Internal Security Act (ISA),[91] passed in 1950. These three pieces of legislation, along with the judicial opinions they have evoked, comprise the present body of law on subversive political association imposed by the United States government.

The Smith Act made criminal those who organized groups with the anti-democratic idea that the United States government should be replaced by violent means rather than by the ballot.[92] The Smith Act was invoked only three times from 1940 to 1950. It was first used against eighteen members of the Socialist Workers Party (SWP) in 1941. The conviction of the SWP members was sustained by the Court of Appeals for the Eighth Circuit[93] under the broad doctrine that a legislature is entitled to extinguish a revolutionary spark before it becomes a conflagration.[94] This test greatly restricted free political expression by allowing the prohibition of any "expression which had a tendency, or which the legislature could reasonably believe had a

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certain aliens); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired) (recognizing opposition to government measures and libel against U.S. government).

The Alien and Sedition Acts did not directly attack the right of political association, but rather the right of individual political expression. The early Federalists attempted more direct suppression of political opposition. As soon as free elections no longer supported the policies of Hamilton's Federalists, they tried to abolish the popular vote. The Federalists were almost successful in their attempts to destroy the Republican opposition. *See* A. JOHNSON, UNION AND DEMOCRACY 119 (1915).

The process that culminated in the Alien and Sedition Acts included a good deal of debate between the Federalists and the Republicans. Those favoring the legislation maintained that the exercise of federal power was derived from the necessary and proper clause of the Constitution and that Congress was not exceeding its powers, since the first amendment prohibited only prior censorship. T. EMERSON, D. HABER, & N. DORSEN, *supra*, at 38. The public was apparently outraged by this legislation. For example, Kentucky passed a resolution in 1789 stating that: "it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights." United States Department of State, HUMAN RIGHTS, UNFOLDING OF THE AMERICAN TRADITION 25 (1949) (quoting from H. COMMANGER, DOCUMENTS OF AMERICAN HISTORY 181 (4th ed. 1948)). As a result, the Republicans were voted into power and the Federalists were destroyed as a political party.

89. 50 U.S.C. §§ 841-44 (1982).

90. 18 U.S.C. § 2385 (1982).

91. 50 U.S.C. §§ 781-94, 811-26 (1982).

92. The relevant provisions of the Smith Act impose penalties against:

> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate or encourage the overthrow or destruction of any such government [government of the United States, or the government of any state, territory, District or Possession thereof, or of any political subdivision therein] by force or violence, or becomes or is a member of, or affiliates with any such society, group, or assembly of persons, knowing the purpose thereof . . . .

18 U.S.C. § 2385 (1982). Penalties were also to be imposed "if two or more persons conspire to commit any offense named in this section . . . ." *Id.*

93. Dunne v. United States, 138 F.2d 137 (8th Cir.), *cert. denied*, 320 U.S. 790 (1943).

94. 138 F.2d at 145. The *Dunne* court relied on Gitlow v. New York, 268 U.S. 652 (1925). *Gitlow* stated that "[a] single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration." *Id.* at 669.

tendency, to lead to substantive evil,"[95] such as violent overthrow of the government.

The third[96] and most important use of the Smith Act occurred in 1948, when the federal government indicted and convicted twelve members of the central committee of the Communist Party of the United States of America (CPUSA) for violating section three of the Smith Act.[97] The convictions were affirmed by the Second Circuit in an opinion by Judge Learned Hand[98] and ultimately by the Supreme Court in a plurality opinion, *Dennis v. United States,*[99] written by Chief Justice Vinson.

The *Dennis* plurality held that the limit of tolerance of a subversive party is to be determined by the clear and present danger test,[100] as explained by Judge Hand in the lower court opinion.[101] Under the clear and present danger test, the question is "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[102] In applying this test to the *Dennis* case, Chief Justice Vinson concluded for the plurality that a sufficient danger existed from a continuing

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95. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 50 (1966). Prior to Schenck v. United States, 249 U.S. 47 (1919), speech advocating an illegal act was punishable as an "attempt" if the natural and reasonable tendency of what was said would be to bring about a forbidden effect. For the development of Holmes' clear and present danger test from *Schenck* through Abrams v. United States, 250 U.S. 616 (1919), Gitlow v. New York, 268 U.S. 652 (1925), and Whitney v. California, 274 U.S. 357 (1927), see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-9, at 608-14 (1978).

96. The second use of the Smith Act was not directly relevant to the control of political parties. It involved the indictment in 1942 of 28 alleged pro-Nazis for conspiracy to violate sections of the Smith Act dealing with impairing the morale of the armed forces. L. TRIBE, *supra* note 95, at 610.

97. United States v. Dennis, 72 F. Supp. 417 (D.D.C. 1948). The indictment in the *Dennis* case charged the defendants with wilfully and knowingly conspiring to organize the CPUSA, a group of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence and to knowingly and wilfully advocate and teach the duty and necessity of overthrowing the government. Dennis v. United States, 183 F.2d 201, 205-06 (2d Cir. 1950).

The prosecution's evidence showed the formation of a disciplined party organization that systematically taught revolutionary doctrines as formulated in standard Communist textbooks. Although there was apparently no immediate attempt to overthrow the existing United States government, the CPUSA was alleged to be ready to act at once to seize power whenever circumstances should become favorable. A jury found that the defendants were in violation of the Smith Act because they were unwilling to work within the "framework of democracy but intended to initiate a violent revolution whenever the propitious occasion appeared." Dennis v. United States, 341 U.S. 494, 497 (1951).

98. Dennis v. United States, 183 F.2d 201 (2d Cir. 1950).

99. 341 U.S. 494 (1951).

100. Justice Holmes first developed the clear and present danger test in Schenck v. United States, 249 U.S. 47 (1919). "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." *Id.* at 52 (quoted in Dennis v. United States, 341 U.S. 494, 503-04 (1951)).

101. 341 U.S. at 510.

102. *Id.* (quoting *Dennis,* 183 F.2d at 212).

conspiracy by the Communist Party that criminal sanctions against its members were justified.[103]

Justices Frankfurter and Jackson concurred separately in the result, although they disagreed with the plurality's use of the clear and present danger test.[104] Like the plurality, however, the concurrence took judicial notice of the conspiratorial nature of the CPUSA.[105] All of the non-dissenting Justices appeared to agree on one essential and novel conclusion—that Congress had the power to strike out at the CPUSA as an association because its goal was the violent overthrow of the government. Justice Frankfurter, for example, stated that the government's right to self-preservation is the most pervasive aspect of sovereignty and that the balance between these principles, though subject to first amendment limitations, should be set by Congress.[106]

By characterizing the Communist Party as illegal, the *Dennis* Court seemed to conclude that present and knowing membership in the CPUSA implied compatability with its illegal aims and methods. The immediate result of the *Dennis* case was to find members of the CPUSA guilty under the Smith Act, but the Court's implication that the CPUSA might be illegal per se had a greater implication for later legislation and judicial decisions.

The Supreme Court handed down its crucial decision in the *Dennis* case in 1951. Before the decision, however, Congress reached the conclusion that the Smith Act was not sufficient to protect national security from what was believed to be a growing Communist threat. Congress therefore enacted, over President Truman's veto,[107] the Internal Security Act (ISA) of 1950, which provided a system of registration for organizations found to be subversive by the Subversive Activities Control Board (SACB).[108]

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103. 341 U.S. at 498. In assessing the danger that the defendants represented, both the court of appeals and the Supreme Court reviewed and adopted the findings of the district court about the nature of the CPUSA:

> that the Communist Party is a highly disciplined organization, adept at infiltrating into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.

Id.

104. *Id* at 548-49 (Frankfurter, J., concurring); *id.* at 568-69 (Jackson, J., concurring).

105. *Id.* at 547 (Frankfurter, J., concurring); *id.* at 562-66 (Jackson, J., concurring).

106. *Id.* at 546-52 (Frankfurter, J., concurring). Of the dissenters, Justice Black argued that first amendment liberties should be given the highest priority, *id.* at 580 (Black, J., dissenting), and Justice Douglas recognized no right in the government to curtail speech until "the provocateurs among us move from speech to action." *Id.* at 591 (Douglas, J. dissenting).

107. 96 CONG. REC. 15629-32 (1950) (text of President's veto message).

108. The ISA incorporated important legislative findings as to the nature of the CPUSA. It said of the CPUSA that:

> although such organizations usually designate themselves as political parties, they are in fact constituted elements of the world wide communist movement and promote the objectives of such movement by conspiratorial and co-ercive tactics, instead of

On November 22, 1950, using his powers under the ISA, the Attorney General filed a petition with the Subversive Activities Control Board for an order compelling the CPUSA to register as a Communist action organization[109] and to give the names and addresses of individuals who had been members in the last twelve months.[110] If the CPUSA failed to register, the ISA provided that individual members must register. After prolonged legal battle, the SACB found the CPUSA to be a Communist action organization and ordered it to register.[111] The SACB's action was taken in 1953 and, ultimately, the matter was submitted to the Supreme Court. Eight years later, the Supreme Court ordered the CPUSA to register in *Communist Party v. Subversive Activities Control Board.*[112] In the eleven years after the passage of the ISA, much had happened both legislatively and judicially to change the practical effect of this decision.

In 1954, national feeling against Communism in the wake of the Korean War found the United States Congress once again anxious to proscribe the activities of the CPUSA. In an attempt to express this national attitude, as well as to assure others that he was not himself a Communist,[113] Senator Hubert Humphrey proposed the outlawing of the CPUSA and the punishment of its members. Critics of this proposal argued that such legislation would make the provision of the ISA ineffective, since parties ordered to register could argue that forced registration would violate their right against self-incrimination.[114] Congress finally determined not to outlaw the CPUSA but passed numerous acts against subversive activities and organizations, including the Communist Control Act.[115] The CCA took its lead from the *Dennis* case, which arguably recognized the power of the Congress to find the CPUSA an illegal organization.[116] Nevertheless, Congress did not outlaw the CPUSA. Although many sections of the CCA are directed specifically against the CPUSA and its members,[117] the legislative history of the CCA indicates that the primary purpose of Congress was to restrict the right of CPUSA candidates to appear on the ballot.[118] The CCA divests the CPUSA,

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> through the democratic process of a free elective system or through the freedom of preserving means employed by a political party which operates as an agency by which people govern themselves.

ISA § 2(6), 50 U.S.C. § 841(b) (1982).

109. New York Times, Nov. 23, 1950, at 1, col. 2.

110. *See* 28 C.F.R. § 11.1-.400 (1950).

111. *See* T. EMERSON, *supra* note 95, at 200.

112. 367 U.S. 1 (1961).

113. 100 CONG. REC. 14,208 (1954) (Sen. Humphrey's *mea culpa).*

114. *Id.* at 14,223.

115. Note, *Federal Anti-Subversive Legislation of 1954,* 55 COLUM. L. REV. 631 (1955).

116. *Dennis,* 341 U.S. at 501.

117. *See* CCA § 2, 50 U.S.C. § 841 (1982) (finding CPUSA a conspiratorial instrumentality for overthrow of United States government); *id.* § 3, 50 U.S.C. § 842 (lifting rights, privileges, and immunities of CPUSA as a legal body); *id.* § 4, 50 U.S.C. § 843 (proscribing membership in CPUSA).

118. Auerbach, *The Communist Control Act of 1959: A Proposed Legal-Political Theory of Free Speech,* 23 U. CHI. L. REV. 173, 175 (1956). Section 2 states, in words similar to those

and any other organization that has the object of overthrowing the government of the United States by force or violence, of its rights under state or federal law.[119]

By 1954, the United States found itself with three major pieces of legislation regarding subversive political organization and membership: the Smith Act, the Internal Security Act and the Communist Control Act. This was the high water mark of federal anti-Communist activity. In 1956, the Supreme Court granted certiorari in various Smith Act convictions.[120] Its decision on the first of these cases, *Yates v. United States*,[121] was rendered the next year.

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used in the *Dennis* case:

> The Congress finds and declares that the Communist Party of the United States, although purportedly a political party is in fact an instrumentality of a conspiracy to overthrow the Government of the United States . . . . The peril inherent in its operation arises not from its numbers, but from its very failure to acknowledge any limitation as to the nature of its activities and its dedication to the proposition that the present constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear and present and continuing danger to the security of the United States . . . . Therefore the Communist Party of the United States should be outlawed.

CCA § 2, 50 U.S.C. § 841 (1982); *see Dennis*, 341 U.S. at 509.

119. Auerbach, *supra* note 118, at 176. In order to carry out this aim, § 3 of the CCA was constructed as follows:

> The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States; or the government of any State, Territory, District or Possession thereof; or the government of any political subdivision therein by force and violence are not entitled to any of the rights, privileges and immunities attendant upon legal bodies . . . and whatever rights, privileges and immunities which have heretofore been granted to said party . . . by reason of the laws of the United States or any political subdivision thereof, are terminated: Provided, however, That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

CCA § 3, 50 U.S.C. § 842 (1982). Section 4 of the CCA applied to individuals who:

> knowingly and willfully become or remain a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure or overthrow of the government of the United States or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization . . . .

CCA § 4, 50 U.S.C. § 843 (1982). *But see* Auerbach, *supra* note 118, at 174-77 (arguing that, because CPUSA was not incorporated, it "never had the rights the [CCA] attempts to take away").

120. Comment, *Communist Control Act of 1954*, 64 YALE L. J. 712, 747 (1955).

121. 354 U.S. 298 (1957). Prior to *Yates*, the Department of Justice commenced a series of prosecutions, mostly of the CPUSA's state leaders and secondary national officials. Fifteen prosecutions involving 121 defendants were brought under conspiracy sections, and eight individual prosecutions were brought under the membership provisions. By June, 1957, the government had secured convictions of 96 defendants in addition to the 11 *Dennis* defendants. 1 N. DORSEN, P. BENDER, & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 114 (4th ed. 1976). In the first two post-*Dennis* prosecutions to reach the Court of Appeals, conspiracy convictions were affirmed. Frankfeld v. United States, 198 F.2d 679 (4th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953); United States v. Flynn, 216 F.2d 354 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955).

The government argued in *Yates* that active membership in the CPUSA implied compatibility with its illegal goals and methods.[122] The Court accepted the argument that active membership in the CPUSA was enough to make an individual inferentially a party to its beliefs, but the Court refused to agree that the CPUSA's goals were necessarily illegal.[123] The Court insisted that evidence must be shown that the CPUSA's actions or goals are illegal. Thus, the Smith Act prohibits advocacy and teaching of forcible overthrow *only* when combined with an effort to instigate action to that end. It does not prohibit advocacy and teaching of forcible overthrow as an abstract principle.[124]

Two weeks before the *Yates* decision the Supreme Court decided *Jencks v. United States.*[125] In *Jencks,* the defendant had been charged with falsely swearing that he was not a member of the Communist Party. *Jencks* held that the defendant had a right to inspect and use on cross-examination reports and statements made by prosecution witnesses to the FBI pertaining to matters about which the witnesses had testified at trial.[126] The *Yates* and *Jencks* decisions had a great effect upon the use of the Smith Act. No further prosecutions were brought, and all cases except *Scales v. United States*[127] were ultimately dismissed by the court or dropped by the government.[128]

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122. *Yates,* 354 U.S. at 313.

123. The *Yates* Court first held that the term "organize" as used in the Smith Act "refers only to acts entering into the creation of a new organization and not to acts thereafter performed in carrying on its activities." The CPUSA was originally founded in 1919. In 1944, it became the Communist Political Association and in 1945, the Association was disbanded and reconstituted as the Communist Party. The organizing count of the indictment was therefore barred by the three-year statute of limitations. *Id.* at 303-12.

In 1962, Congress, in reaction to the *Yates* decision, added to the Smith Act that "the terms 'organizes' and 'organize' . . . include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes and other units . . . ." 18 U.S.C. § 2385 (1982).

124. The *Yates* Court held that, even if the defendants were actively participating in the CPUSA, it must be shown that the CPUSA is engaged in something more than the abstract advocacy and teaching of forceable overthrow in order that the "specific" intent to accomplish such overthrow could be deemed proved by a showing of mere membership or holding office in the Communist party. 354 U.S. at 318-27.

The majority decision also said, in dicta, that attendance by some of the defendants at lawful and orderly meetings of the CPUSA at which unlawful advocacy was undertaken might be a sufficient "overt act" to warrant a conspiracy conviction. In his dissenting opinion, Justice Black raised the problem of freedom of association, noting the apparent contradiction between a ruling that would attach a species of criminal liability to mere attendance at a lawful meeting and the Court's previous rulings on freedom of association. Justice Black referred to the decision of DeJonge v. Oregon, 299 U.S. 353 (1937), which held that the right of the CPUSA to engage in peaceful assembly and lawful discussion could not be abridged despite the fact that the general objective of the CPUSA was to overthrow the government by force. *Yates,* 354 U.S. at 343 (Black, J., concurring and dissenting).

125. 353 U.S. 657 (1957).

126. *Id.* at 658-59, 672.

127. 367 U.S. 203 (1961) (membership of one who has knowledge of organization's specific intent to violently overthrow government constitutes sufficient relationship to organization's criminal activity).

128. 1 T. EMERSON, D. HABER & N. DORSEN, *supra* note 88, at 140.

The Supreme Court found against the defendant in *Scales* under the membership clause of the Smith Act on the same day that it found in favor of the defendant in *Noto v. United States*[129] on a similar charge. These two decisions show the Supreme Court's recognition that political parties might embrace both legal and illegal aims, and that a "blanket prohibition of association with a group having both legal and illegal aims . . . would indeed be a real danger [to] legitimate political expression [and] association."[130] So, when both legal and illegal aims occur simultaneously, the government could proscribe the latter, leaving the former entitled to constitutional protection unless the legal aims were so inseparable from the illegal that they too must fall. The problem of proof in such cases has been properly called "formidable."[131] If it is shown that the party has illegal aims only, or that its illegal aims are inseparable from its legal ones, membership alone can not result in criminal sanctions under the Smith Act. It is still necessary that the government present clear proof that the defendant specifically intended to accomplish the aims of the organization by resorting to violence.

As a result of the judicial decisions flowing from the Smith Act, there is no constitutional freedom of subversive activity. That is, one cannot associate with others to instigate the violent overthrow of the present government of the United States. The Supreme Court, however, has avoided the implication of the *Dennis* case that mere membership in the CPUSA is illegal. The Court has instead decided to grant constitutional protection to certain political parties or groups and not to others, depending on the facts rather than on whether the group is called Communist or merely holds anti-democratic ideas. If the Court decides that the group is acceptable, then its members are protected. Even if the group is unacceptable on the facts, i.e., if it is instigating violent overthrow, only a member with the requisite knowledge and intent is not constitutionally protected.

As previously discussed, the breadth of the Smith Act was cut by the *Yates* and *Jencks* decisions of 1957. The government's anti-subversive arsenal, however, still contained the ISA and the CCA. On December 1, 1961, a federal grand jury indicted the CPUSA for failure to register under the ISA.[132] The CPUSA was convicted and the trial court imposed a fine of $120,000. The court of appeals, however, reversed the trial court on self-incrimination grounds, holding that prosecution under the Smith Act is a sufficient threat of self incrimination such that an individual may not be forced to register as a party member.[133] The government's petition for certiorari was denied.[134]

129. 367 U.S. 290 (1961).

130. Scales v. United States, 367 U.S. 203, 229 (1961).

131. C. RICE, *supra* note 87, at 145.

132. We have covered the events relating to the ISA up to 1953 when the SACB ordered the CPUSA to register. By 1961, the CPUSA's contention that it need not register was heard by the Supreme Court in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961). A decision was rendered in favor of the government, making the SACB order to register effective within 30 days. The CPUSA refused to register, giving as its grounds the fear of self-incrimination. *Id.* at 105-06.

133. Communist Party v. United States, 331 F.2d 807 (D.C. Cir. 1963).

134. 377 U.S. 968 (1964).

The Department of Justice also prosecuted individual officers of the CPUSA for failure to register. All these actions, however, were eventually dismissed on self-incrimination grounds.[135] By 1961, even though the *Yates* and *Jencks* decisions had effectively prevented the Government from using the Smith Act, the possibility of prosecution under the Smith Act was enough to preclude convictions under the ISA.

Because of the restrictive federal legislation reviewed above, as well as state restrictions on access to the ballot, the CPUSA did not run a presidential ticket from 1940 to 1968. The CPUSA, however, appears to have abandoned its commitment to revolution. It has declared that it believes in government coming to power by popular election,[136] but that it is still "a revolutionary party whose aim is the fundamental tranformation of society."[137] Where state restrictions on access to the ballot have been removed, the CPUSA has run a national ticket every four years since 1968. Although estimates vary on the strength of the CPUSA, the actual influence of the party in United States politics is minimal.[138]

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135. T. EMERSON, D. HABER & N. DORSEN, *supra* note 88, at 191.

136. New York Times, Apr. 20, 1968, L 15 at 4 (announcing CPUSA's plan to run national candidates). According to Gus Hall, the CPUSA intended to run candidates in presidential elections after 1968. In anticipation of this move, the CPUSA effected a startling metamorphosis.

137. PROGRAM OF THE COMMUNIST PARTY, U.S.A. (A Draft) 97 (1966). In its platform, the CPUSA appeared to abandon its commitment to revolution.

> We believe that such a government [Communist] can be brought to power by democratic means. More, we believe that democratic means are not only desirable, they are indispensible . . . . [I]t strikes us as folly to think that monopoly can be overcome by a revolutionary transformation of society . . . . We believe this democratic transformation can be effected through the Constitutional powers and Constitutionally established institutions.

Id.

138. The party's peak was in 1932 when it received .03% of the popular vote. In 1968 and 1972 its presidential candidates each received less than .01% of the popular vote. CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS 178 (1976). In 1976, the CPUSA's presidential ticket of Gus Hall and Jarvis Tyner was on the ballot in 19 states and the District of Columbia. It received 59,000 votes. The party's gubernatorial candidate in New York received 11,279 votes. Gus Hall claimed in 1980 that the party had 15,000 to 20,000 members, while a party spokesperson claimed 30,000 to 80,000 members. HOOVER INSTITUTE, Y.B. ON INTERNAT'L COMMUNIST AFFAIRS 393 (1980). Gus Hall and Angela Davis headed the 1980 ticket and received a total of 45,023 votes. At present the CPUSA has no representation either in Congress or in any state legislature. 14 AMERICA VOTES 18 (Scammon & McGillivray eds. 1980).

If the CPUSA should now have its place on the ballot for national elections challenged, could § 3 of the CCA deprive it of this lawful activity? Two approaches are possible. A court may refuse to hear evidence of the CPUSA's change of position, or it may simply not believe the CPUSA's declaration. There is precedent for the latter. At its convention in 1940, the CPUSA resolved "That the Communist Party of the U.S.A. in convention assembled does hereby cancel and dissolve its organizational affiliation to the Communist International . . . for the specific purpose of removing itself from the terms of the so-called Voorhis Act." Internal Security Subcommittee, Senate Committee on the Judiciary Report, The Communist Party of the U.S.A., 2 (84 Cong. 2nd Sess. 1955). The Voorhis Act, 18 U.S.C. § 2386 (1982), requires registration of certain political organizations.

The SACB viewed this as merely a tactic that did not alter the foreign domination of the CPUSA. *Id.* In the same manner, a court might simply not believe that the CPUSA now

In the foregoing analysis, the goals, activities, and ideas of the CPUSA and the legislation and judicial decisions fashioned to regulate them have

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advocates peaceful change and, thus, would not extend first amendment protection. If this occurs, grave implications will be raised about the ability of government to restrict freedom of speech—at least political speech. The government would be saying, in effect, "We know what you really mean and since what you covertly intend is illegal we will deny your right to say anything."

The other approach available to a court is simply to accept the legislative findings in the CCA and not take further evidence. Although the Supreme Court in *Yates* and *Noto* held that facts must be shown of illegal activity by the CPUSA, there is some question whether courts will review the congressional findings and declarations in § 2 of the CCA. The New York Court of Appeals, in reviewing the CCA, referred to the congressional finding that the CPUSA is an instrumentality of a conspiracy to overthrow the government of the United States. The court concluded that "these facts are so well established and known that recognition of them without further proof is a right and duty." *In re* Albertson's Claim, 8 N.Y.2d 77, 85, 168 N.E.2d 242, 244-45 (1960). The court of appeals thereby denied unemployment compensation to an ex-employee of the CPUSA.

The employee appealed to the United States Supreme Court, raising the constitutional issue of whether the CCA was a bill of attainder or ex post facto legislation. The Supreme Court reversed the lower court but avoided constitutional issues by saying only that "rights, privileges and immunities" as used in § 3 of the CCA, although vague, was not meant to require exclusion of the employee from New York's unemployment compensation system. Communist Party, U.S.A. v. Catherwood, 367 U.S. 389, 390 (1961). When the case was returned to the New York Court of Appeals, a motion was granted to amend the remittitur by adding a statement that § 3 of the CCA was constitutional and was not a bill of attainder or ex post facto law. Nor did it violate the first or fourteenth amendments. Moreover, § 3 was within the power of Congress to enact. *In re* Albertson's Claim, 8 N.Y.2d 1001, 1001, 169 N.E.2d 427, 428 (1960).

The constitutional problems purportedly solved by the above case do not sufficiently answer the important constitutional problem of whether the CCA, by citing the CPUSA, is a bill of attainder. The bill of attainder issue is dependent on how the courts interpret Congress's determinations about the nature of the CPUSA. This issue has been raised in the context of the separation of federal and state power over elections. Congress has the authority to regulate election for the offices of Senator and Representative. *See* U.S. Const. art. I, § 4 (states choose time, place and manner of holding elections for members of Congress). But article I, § 4 also empowers Congress to alter such state regulations. *Id.* Section five of the fourteenth amendment confers other powers on Congress to regulate state elections. *See* Oregon v. Mitchell, 400 U.S. 112 (1970) (Congress may ban literacy tests in state elections); *see also* White v. Register, 412 U.S. 755 (1973) (if state adopts electoral system to fill state posts, equal protection clause confers upon all qualified voters a right to participate equally in electoral process).

The only case somewhat on point arose when a county clerk in New Jersey declined to place Communist candidates on a ballot for local public office. The clerk based his action on the CCA. The New Jersey Superior Court dismissed the plaintiff's action to get on the ballot and the state supreme court unanimously affirmed. Salwen v. Rees, 16 N.J. 216, 108 A.2d 265 (1954) (per curiam). The appellant argued that the CCA has to do with the Communist Party as such and not with any individual person. He maintained that the CPUSA, as such, was therefore not appearing on the ballot. It is difficult to determine whether the court's decision supports the application of the CCA or merely considers the appellant not a proper party in interest. At one point, the court said that the CCA is directed at the CPUSA, suggesting that the individual candidate need only cease to use the CPUSA label to escape the CCA's effect. *Id.* at 217, 108 A.2d at 265.

It is also arguable that the *Salwen* court based its decision on the premise that Congress has not overstepped its power to regulate local elections. The court answered the plaintiff's allegation that the CCA is an unconstitutional amending of the qualification for local public office by tested such concepts as ex post facto, bill of attainder, due process and equal protection. However, the most important concepts that have been applied to this problem are the justifiable limitations on basic principles of freedom of speech and freedom of association. The Supreme Court has developed a ruling principle that these freedoms are subordinate to the right of government to self protection. Although this priority of principles has been called a necessary part of sovereignty,[139] we will now see that West Germany has constructed a different heirarchy.

VII. THE GERMAN EXPERIENCE WITH SUBVERSIVE POLITICAL PARTIES

The drafters of the Bonn Constitution concluded, perhaps wrongly, that the catastrophic events that led Germany into and through Nazism were caused by the Weimer Republic's indifference to the goals of political parties.[140] So that history would not repeat itself, the drafters vowed the creation of a "valiant democracy." The state was not to be neutral towards political parties.[141]

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saying:

> [I]f the larger objective requires in individual instances . . . that there be a pertinent restriction upon access to public office, then such restriction must be supported. And if, in order to make good the outlawry of the Communist Party as such, it becomes unavoidable that individuals be prevented from carrying its banner, so to speak, well, that course will have to be taken in the administration of the law.

Id. at 218, 108 A.2d at 266.

The New Jersey Supreme Court decision appears to have missed most of the issues raised by the CCA cases. It finally arrived at the conclusion that the CCA was meant to outlaw the CPUSA. Section 3 of the CCA may have been meant to keep the CPUSA from the ballot, but it is too simple to conclude that § 3 was meant to make the CPUSA's existence unlawful. Indeed, § 3 expressly states that it shall not be construed as amending the ISA. CCA § 3, 50 U.S.C. § 842 (1982). The information required for registration under the ISA assumes a degree of activity—for example, that the party will continue to have offices, officers, and members; to collect and spend money; to make and keep records; and that it will pay income tax and engage in radio and television broadcasts. All of these activities, as well as the fact that Senator Humphrey's original proposal to outlaw the CPUSA was rejected, show that Congress did not intend complete prohibition.

Many of the inconsistencies and uncertainties of state laws against subversive political parties were resolved by a 1951 Supreme Court decision holding that the Smith Act preempted the area of sedition against the United States. Pennsylvania v. Nelson, 350 U.S. 497 (1951). Under this decision, the Michigan Supreme Court declared that a state statute providing that no Communist name may be printed on the ballot was included among those provisions pre-empted by the federal legislation. Albertson v. Millard, 345 Mich. 519, 77 N.W.2d 104 (1956).

139. Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CAL. L. REV. 4, 10 (1961).

140. The argument against this view is strong. The Weimer Republic possessed constitutional and statutory power to act against parties hostile to the Weimer government and the values it represented. GRUNDGESETZ [GG] art. 48(2) (W. Ger. 1919) and Law for the Protection of the Republic of July 21, 1922, Reichsgesetzblatt [RGBl] 585, *amended by* Act of June 2, 1927, RGBl 125 (W. Ger.). *See* Mauer, *Das Verbot Politischer Parteien: Zur Problematik des Art 21, Abs. 2 G.G.*, 96 ARCHIV DES OFFENTLICHEN RECHTS 203, 206 (1971) (between 1922 and 1929, in Prussia alone, nearly 30 political parties and groups were disbanded).

141. McWhinney, *The German Constitutional Court and the Communist Party Decision*, 32 IND. L.J. 295 (1957).

While this constitution, the Basic Law of The Federal Republic of Germany (FRG), permits the free formation of political parties,[142] it also declares in article 21(2) that "Parties which, according to their aims and the behavior of their members, seek to impair or abolish the free democratic basic order or to jeopardize the existence of the FRG, shall be unconstitutional."[143] The Basic Law assigns to the constitutional court the power to decide whether a political party is contrary to the Basic Law.[144]

In late 1951, the FRG's federal government, by motion, requested a determination by the federal Constitutional Court that the West German Communist Party (KPD) was unconstitutional under article 21(2). This motion reached the court a week later accompanied by an identical government motion against the Socialist Reich Party (SRP), an extreme right wing neo-Nazi party. Almost a year later, the court declared the SRP to be unconstitutional.[145] In 1956, the court made a similar finding about the KPD.[146]

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142. GG art. 21(1).

143. GG art. 21(2). Political parties, as used in Article 21, was defined by the Political Parties Act of June 24, 1967, as:

> organizations of citizens exercising influence throughout the Federation or a state on the formation of the political will, and seeking to participate in popular representation in either the Bundestag or a state assembly. The organization must be able to demonstrate that the pursuit of such a goal is not without seriousness of purpose. Such a demonstration may be made from the totality of the parties' circumstances, especially the breadth and stability of the party organization, the number of party members and the extent of the members entering into public life.

1967 Bundesgesetzblatt [BGBl] I 773, § 2(1)(1) (W. Ger.)

144. GG art. 93; *see also* F. CASTBERG, FREEDOM OF SPEECH IN THE WEST 378-83 (1960).

145. Decision of October 23, 1952, Bundesverfassungsgericht, 2 BVerfG 1 (W. Ger.) [hereinafter cited as SRP Decision].

146. Decision of August 17, 1956, Bundesverfassungsgericht, 5 BVerfG 85 (W. Ger.) [hereinafter cited as KPD Decision].

The KPD then sought help from the European Commission of Human Rights, asserting that the FRG's dissolution of the KPD violated the Convention for the Protection of Human Rights and Fundamental Freedoms, to which the Federal Republic of Germany is a signatory. This convention, commonly known as the European Convention on Human Rights, states in Article 11 that:

> (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

European Convention on Human Rights, Nov. 4, 1950, art 11, 213 U.N.T.S. 222, 232.

Article 17, however, provides that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein . . . ." *Id.*, art. 17, at 234. The Commission held that the KPD's complaint was inadmissible based on article 17.

At the time of these decisions, the bench of the court was, in the tradition of continental courts, anonymous. Its members were not well known to the general public. It delivered only single, per curiam opinions in each case with no publication of actual voting by the judges and no concurring or dissenting opinions being permitted.[147] The court's opinions in the SRP and KPD cases were lengthy and carefully analyzed the position of subversive political parties in West Germany.[148]

The evidence clearly indicated that the SRP was a Nazi-front organization.[149] The SRP argued, however, that it was not contrary to the free democratic order since it received popular support and power democratically. The court held that the activities of the SRP showed it to be contrary to the character of the free democratic order and thus lacking in the prerequisites necessary for "a party's participation in the formation of the political will."[150]

In the Communist Party case, the KPD defended with the assertion that article 21(2) was itself inconsistent with constitutional norms because it stood in the way of the more basic norms of reunification, free speech and free association. The KPD also argued that the Marxist-Leninist ideology of the

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Decision of July 20, 1957, 1955-57 Y.B. EUR. CONV. ON HUMAN RIGHTS 222, 225 (Eur. Comm'n on Human Rights). In applying Article 17, the Commission would not recognize a difference between short term legal aims and ultimate objectives of the KPD. *Id.*

This decision was discussed by the European Court of Human Rights in a 1961 case interpreting Article 17. The court said that:

> the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interest the principles enunciated by the Convention; but that to achieve that purpose it is not necessary to take away every one of the rights and freedoms guaranteed in the Convention from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms; that Article 17 covers essentially those rights which, if invoked, would facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of "any of the rights and freedoms set forth in the Convention"; that the decision on the admissibility of the Application submitted by the German Communist Party (Application No. 250/57) was perfectly consistent with this construction of Article 17; . . . those rights, if extended to the Communist Party, would have enabled it to engage in the very activities referred to in Article 17 . . . .

Lawless Case, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438, 450 (Eur. Comm'n on Human Rights) (merits).

147. This traditional continental approach was criticized in the 1960's. Heidenhain, *Der 47. Deutsche Juristentag*, 23 JURISTENZEITUNG 755, 757 (1968). The criticism resulted in a statutory change amending § 30 of the Law Concerning the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz) as amended in 1971. Now decisions, if they are not unanimous, state how many judges voted for and against a position. Dissenting opinions are published with the majority opinion, and judges joining in the dissenting opinion are named. *See* R. SCHLESINGER, *supra* note 14, at 420.

148. For an English translation of the KPD decisions, see OUTLAWING THE COMMUNIST PARTY (W. von Schmertzing trans. & ed. 1957).

149. Franz, *Unconstitutional and Outlawed Political Parties: A German-American Comparison*, 5 B.C. INT'L & COMP. L. REV. 51, 56 (1982). Evidence summarized in the court's opinion included correspondence between SRP members in which they referred to each other as "old warriors" who were "still loyal to the cause." *Id.*

150. SRP Decision, 2 BVerfG at 73.

party is a science and therefore not subject to court review.[151] Although the German Constitutional Court has recognized in the past the possibility of an "unconstitutional constitutional norm," it has allowed for this possibility "only if the norm is contradictory to a fundamental constitutional principle by which the individual positive provisions of the Constitution can and must be measured."[152] The fundamental principles the court referred to, though not stated in the FRG's Constitution,[153] were first developed in the SRP decision. They are based on human dignity and, thus, are applicable even though they might not now win popular support.[154] The court defined these principles as follows:

> The fundamental free democratic order is an order which, to the exclusion of all rule of force or arbitrariness, implies an order of government with rule of law based on the self determination of the people in accordance with the will of the current majority and based on freedom and equality. Accordingly, the fundamental principles of this order must at least include: respect for the human rights formulated in the Constitution, above all the right of the individual to life and free development, the sovereignty of the people, the separation of powers, the accountability of the government, the legality of administration, the independence of the judiciary, the principle of several parties and equality of opportunity for all political parties, and the right of constitutional creation and exercise of an opposition.[155]

The KPD's argument that the constitutional goals of free speech, association, and national reunification should prevail over norms which might lead to political party suppression was rejected by the court. The court held that "there can be no thought of a formally higher rank for either."[156] But, as one commentator has stated, "despite language to the contrary, the court ranked protection of the liberal democratic order and thus the suppression of subversive political parties above both reunification and free expression of political opinion."[157]

The KPD's defense that its Marxist-Leninist doctrine was scientific and thus beyond judicial review was also rejected. The court stated that it was not outlawing ideas but merely ruling on the constitutional status of a political party that is a constitutional institution.[158] The loss of that status, rather than the legality of ideas, was at issue.

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151. KPD Decision, 5 BVerfG at 105.

152. *Id.* at 137. This idea of supra-constitutional norms has been identified with natural law concepts. Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany*, 42 VA. L. REV. 1 (1956); Von Hippel, *The Role of National Law in the Legal Decisions of the German Federal Republic*, 4 NAT. L.F. 106, 112 (1959); *see also* Hahn, *Trends in the Jurisprudence of the German Federal Constitutional Court*, 26 AM. J. COMP. L. 631, 637 (1978).

153. These characteristics of the free democratic order were announced without any authority or rationale. H. GOERLICH, WERTORDNUNG UND GRUNDGESETZ 33-44 (1973).

154. KPD Decision, 5 BVerfG at 139.

155. SRP Decision, 2 BVerfG at 12-13.

156. KPD Decision, 5 BVerfG at 1373.

157. *See* Franz, *supra* note 149, at 62.

158. KPD Decision, 5 BVerfG at 1373.

The court received a considerable amount of oral and written evidence on the nature of the KPD. After viewing the KPD's history and teaching, the court declared that the goal of the KPD was the establishment of the Communist social order and dictatorship of the proletariat through a proletarian revolution. The proletarian revolution and the dictatorship of the proletariat were held by the court to be incompatible with the free democratic order.[159]

The KPD argued that inchoate intentions were not enough to violate article 21(2). They contended that there must be a showing of overt acts such as an undertaking to commit an act of high treason—something like the clear and present danger test. The court disagreed with this argument and held that, although the KPD goals were not immediately realizable, their long range goals made it clear that the party intended presently to undermine the free democratic order. The court concluded that the political fate of the KPD was to be determined by its present intention, because the goal of article 21(2) was to prevent the rise of political parties with anti-democratic objectives.[160]

On the basis of its conclusions, the Constitutional Court decreed that the KPD was unconstitutional and was therefore dissolved. Moreover, the creation of a "front" or substitute organization for the KPD or the continuation of existing organizations as "fronts" was prohibited. The property and wealth of the KPD was declared to be confiscated by the government.[161] A further consequence of the decision was that KPD representatives in federal and state lawmaking bodies lost their mandates.[162]

In arriving at its decision, the court made it clear that the Bonn Constitution is based on different premises than that of the Weimer Republic. The court stressed that, given a multitude of goals and opinions that have taken shape in the form of political parties, the Bonn Constitution selected certain *fundamental principles* of policy. The principles, once recognized in a democratic way, were to be acknowledged as absolute and, thus, protected by the state.[163]

Today in West Germany it is not a crime to be a communist. This is permitted under the constitutional guarantee of free speech.[164] It is forbidden, however, to organize, support, or make propaganda for the Communist Party.[165] This is because decisions of the Constitutional Court under article

159. *Id.* at 142.

160. *Id.*

161. *Id.* at 85-86.

162. McWhinney, *supra* note 141, at 304 n.16.

163. OUTLAWING THE COMMUNIST PARTY, *supra* note 148, at 13.

164. GG art. 5. *But see* GG art. 17 (limitations).

165. Adam, *West Germany's Political Trials*, 75 NEW STATESMAN 29, 34 (1968) (prosecution has been vigorous and has led to thousands of convictions).

In a survey conducted in 1968, thirty-seven percent of the West German population favored re-licensing of the KPD. The leaders of the Social Democratic Party have been against the outlawing of the KPD primarily because they feel that allowing the KPD to function will improve relations with the East Bloc.

21(2) are operative rather than declarative. The party *becomes* unconstitutional only when the court adjudges it so. The court may abolish a constitutional entity, but it may not proscribe doctrines.[166]

Thus, all constitutional entities are subject to immutable constitutional norms. So immutable are these norms that if a government comes to power by popular vote, and that government is contrary to those basic democratic principles, the citizens of the state have a constitutionally protected right to resist that government. This subordinate position of government to constitutional norms was recognized in the KPD decision and, in 1968, was specifically added to the FRG Constitution.[167]

The German normative approach is in sharp contrast to the more positivist approach of the United States. In the United States, abstract doctrine or party goals alone cannot be a basis for criminality. As long as a party tries to achieve its goals by means other than advocating the violent overthrow of the present government, the party and its membership are protected. Chief Justice Vinson viewed the right of a particular government to protect itself as superior to every other value.[168] Thus, there is no constitutionally recognized right to urge resistance against the present government of the United States. Consequently, there is arguably little place for the Communist Party in American political life.

VIII. CONVENTIONAL LEGAL ANALYSIS

The judicial opinions and legislation dealing with subversive political parties have led to what commentators have called a paradox.[169] The paradox of freedom arises when democratic process is used to gain power by those who will destroy the democratic process. The German Constitutional Court denies anti-democratic parties access to the democratic process. The United States Supreme Court, however, has declared that the United States Constitution does not deny groups with anti-democratic ideas the use of the democratic process unless they advocate achieving power by anti-democratic means. One commentator has noted that the United States Constitution does not place any substantive limits on procedurally lawful change.[170] Nevertheless, the United States effectively prevented the Communist Party from participating in the democratic process for two decades because the Party's major purpose was to urge a displacement of a present democratic government by revolution.

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166. KPD Decision, 5 BVerfG at 376.

167. GG art. 20(4).

168. *Dennis*, 341 U.S. at 498.

169. J. RAWLS, A THEORY OF JUSTICE 216-21 (1971). Justice Cardozo has stated that liberty as a legal concept contains an underlying paradox. Liberty in the most literal sense is the negation of law, for law is restraint, and the absence of restraint is anarchy. On the other hand, anarchy by destroying restraint would leave liberty the exclusive possession of the strong or the unscrupulous. B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 94 (1928).

170. Franz, *supra* note 149, at 85. *See also*, Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 692-93 (1980).

To determine the extent of protection of free speech and access to the political process, judicial and legislative decision makers in Germany and the United States have attempted to balance the protection of free speech against what they view as substantial interests of the community. This weighing of conflicting priorities has also been undertaken by numerous commentators, who define the scope of free speech in light of their choice of priority. On the side of unrestricted free speech are those who argue for an approach consistent with a free market place theory of the first amendment.[171] Contrasting this position is one that points out that in antitrust law certain forms of speech are prohibited for the sake of competition and that, similarly, political parties should be made to play by "the rules of the game."[172] John Rawls has put forth a view that, while less extreme, is still in favor of restriction. Rawls, assuming "that the capacity for a sense of justice is possessed by the overwhelming majority of mankind," argues that "a just citizen should strive to preserve the Constitution with all its equal liberties as long as liberty itself and their own freedom are not in danger . . . ."[173] Like Rawls, Professors Ernest Van den Haag and Carl Auerbach have put forward the view that democracy is justified in denying political privileges to those who would destroy it because of the inherent nature of liberty.[174] Van den Haag's and Auerbach's arguments are based on a passage from John Stuart Mill's essay on the nature of liberty:

> The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty . . . . But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself . . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.[175]

Arguments based on the above quotation neglect that Mill was not writing about the power of the state to prevent individuals from giving up freedom. Although the complete passage is admittedly less than clear, it is clear that Mill was writing about contracts between private individuals. Mill felt that contracts between individuals that do not harm others should generally be enforced but that some contracts, such as one to become a slave, are

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171. Tribe, *supra* note 16, at 240 (discussion of free market theory).

172. McWhinney, *supra* note 141, at 308.

173. J. RAWLS, *supra* note 169, at 506. Rawls first claims a "priority" for liberty and then proceeds to list the circumstances that call for its limitation. *Id.* at 243-50.

174. Auerbach, *supra* note 118, at 189; R. ROSS & E. VAN DEN HAAG, THE FABRIC OF SOCIETY 632 (1958). Auerbach questioned the effectiveness of legislation such as the Smith Act, Internal Security Act, and Communist Control Act of 1954, which effectively drives Communists underground. He argued that suppression has the undesirable effect of creating more intense loyalties to the Communist Party and that the Acts may be unwise because they curb the free public debate that would expose the totalitarian nature of the party. Auerbach, *supra* note 118, at 219-20.

175. Mill, *On Liberty*, in 25 THE HARVARD CLASSICS 299 (1909) (quoted in Auerbach, *supra* note 118, at 188).

exceptions and should not be enforced by the state. Mill did not say that the state should actively prevent a situation of slavery. He merely said that the state apparatus, in upholding liberty, should not be used to *enforce* a contract of slavery. It is a common idea in jurisprudence that an individual may be at liberty to agree to a relationship without creating a correlative right in another party.[176] That is, the state may not prevent a certain type of relationship from being formed but it will also not enforce the *continuance* of the relationship once one party wants it dissolved. Mill's argument, based on the nature of liberty, that the state should not enforce a relationship of slavery, should not be used as an argument that the state should prevent individuals from voting for a subversive political party.

Another statement of Mill's, more in line with Rawl's position, seems more appropriate to this issue:

> No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of the corn-dealer . . . .[177]

Professor Auerbach bases his position on more than a quotation from Mill. He also adopts a theory of Professor Popper's, based on social contract, that there is a right to revolution only in a society that does not incorporate agreed-upon institutional methods of change.[178] We should, therefore, set up institutions that avoid tyranny; that is, we should bar the anti-democratic from the democratic process.[179] Both Auerbach and Popper have concluded that "even a bad policy in a democracy (as long as we work for peaceful change) is preferable to submission to a tyranny, however wise or benevolent."[180]

In contrast to Popper's approach, Professor Alan Gewith has said that democracy:

> already involves certain basic freedoms for all men equally, and in general equal possibility of access to political authority and influence . . . . Political authority is not just if its operation violates or restricts the freedoms and

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176. Mill, *Representative Government*, in THE TRADITION OF FREEDOM, Part III, 93 (M. Mayer ed. 1957).

177. Mill, *On Liberty*, in 25 THE HARVARD CLASSICS 250 (1909).

178. K. POPPER, *supra* note 16, at 123.

179. *Id.* at 265 n.4.

> [W]e should claim the *right* to suppress [intolerant philosophies] if necessary even by force, for it may turn out that [the intolerant] are not prepared to meet us on the level of rational argument, but . . . by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerants. We should claim that any movement preaching intolerance places itself outside the law . . . .

Id.

180. *Id.* at 125.

equalities of that method of consent which is the condition of justly acquiring the right of governmental power.[181]

Gewith believes that if we restrict the means or methods of gaining political power, we have thereby already gone a long way toward achieving the tyranny we hoped to avoid.

Professor Riesman has also objected to the position taken by Professors Auerbach and Popper, suggesting that it is unworkable because of the difficulties of determining the true intentions of totalitarian groups, like the Communists, that at times profess their affection for civil liberties and other democratic procedures.[182] Riesman also asks whether Auerbach would ban every group that would deny others their civil liberties. Auerbach apparently would not go this far but would ban only those anti-democratic groups involved in the struggle for political power.[183] This position of Auerbach's is directly opposed to the position taken by Professor Meiklejohn that public speech (as distinguished from libelous or riotous speech or advertising which serves only private purposes) must be unrestricted because it is the condition of the public purpose.[184]

Perhaps the most restrictive or "confusing"[185] position is taken by Judge Bork, a former professor and Solicitor General. According to Judge Bork, only explicit political speech should be accorded constitutional protection. Moreover, Judge Bork suggests that within the category of political speech, it should be constitutionally permissible to criminalize speech that advocates overthrow of the government or violation of any law.[186]

IX. Structuralist Analysis and A Deconstruction of Legal Analysis

All of these approaches, from a structuralist point of view, are seeking to justify or understand possible answers to the paradox of freedom through a conscious ordering of subconscious oppositions. The various approaches disagree only on the ordering of hierarchies of foundational principles. The structuralist would argue that these hierarchies reflect innate categories of thought and processes of transformation from which one can recognize the development of legal doctrine without resort to functional or historical analysis.[187]

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181. Gewith, *Political Justice*, in SOCIAL JUSTICE 119, 143-44 (R. Brandt ed. 1962).

182. Riesman, *Civil Liberties in a Period of Transition*, 3 PUBLIC POLICY 33, 58 (1942).

183. Auerbach, *supra* note 118, at 184.

184. D. MEIKLEJOHN, FREEDOM AND THE PUBLIC 107 (1965); Bloustein, *The Origin, Validity and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372, 385 (1981).

185. Dworkin, *Reagan's Justice*, N.Y. REV. BOOKS, Nov. 8, 1984, at 27, 30, 31; Kalven, *Reagan's Next Justice?* 1983 NATION 262.

186. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971). Judge Bork stated "[t]here is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." *Id.*

187. Hermann, *supra* note 5, at 1192.

Structural analysis would find a major shift in doctrinal premise in the United States, since 1930, from prohibiting political access and favoring punishment of members of any political party with revolution as its platform, to allowing membership and political activity as long as there is no incitement to violence. In Germany, over the same span of time, the doctrinal shift has been toward a greater restriction on the ability of revolutionary parties to participate in the political process but more protection for the individual to espouse revolutionary doctrine and even to work for and incite revolution, in limited circumstances.

The structuralist would try to resolve these seemingly disparate approaches by claiming that they result from the innate, primary, deep structure of binary opposition between self and environment, which is transferred to the deep structure of the opposition of the individual and others, and the opposition of natural and unnatural. These deep structures are mediated in surface or conscious structure as legal doctrine. There, the opposition is between individual right and societal obligation.

If this analysis is indeed based on innate, unconscious structures, it is difficult to understand (using only structural analysis) why each culture has been transforming and mediating the same unconscious binary oppositions into different conscious legal doctrine. Rather than start with innate binary oppositions, the deconstructive method would instead take an approach that examines the ruling metaphor of "presence" and its effect on the ordering of hierarchies. The deconstructionist argues not that there are foundational principles that need to be set in a system of priority, but that this orientation is the result of logocentrism, which assumes an order of meaning.[188] The deconstructive approach points out that competing positions are then merely versions of competing logocentrisms.[189] And, logocentrism is founded upon the metaphor of "presence." Derrida states that, through history, analysis has been determined by the meaning of being, which in turn has been determined by the metaphor of "presence" in its general form.[190]

Analysis thus becomes "the enterprise of returning 'strategically,' in idealization, to an origin or a 'priority' seen as simple, intact, normal, pure, standard, and self identical, in order *then* to conceive of derivation . . . ."[191]

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188. "Logocentrism" is "the orientation of philosophy toward an order of meaning—thought, truth, reason, logic, the Word—conceived as existing in itself, as foundation." J. CULLER, *supra* note 15, at 92.

189. For example, Prof. Miller has characterized theoretical critics as those "who, primarily, share the Socratic penchant, what Nietzsche defined as 'the unshakeable faith that thought, using the thread of logic, can penetrate the deepest abysses of being.' " Miller, *Stevens' Rock and Criticism as Cure, II*, 30 GEORGIA REVIEW 330, 335 (1976). *See also* J. CULLER, *supra* note 15, at 92-93.

190. "Presence" also includes several sub-determinations, such as:

> presence of the thing to the sight as *eidos*, presence as substance/essence/existence [ousia], . . . self presence of the cogito, consciousness, subjectivity, the co-presence of the other and of the self, intersubjectivity as the intentional phenomenon of the ego . . . . Logocentrism would thus support the determination of the being of the entity as presence.

J. DERRIDA, *supra* note 15, at 12.

191. Derrida, *supra* note 73, at 236.

Concepts derived from the metaphor of presence create oppositions or hierarchies in which terms or concepts belonging to the logos are basic and, therefore, of superior value. The second term in opposition is merely the imitation, derivation, or negation of the first. Oppositions such as presence/absence and order/chaos are examples. Logocentrism, as Jonathan Culler has written, assumes the priority of the first term.[192]

In more conventional legal analysis, one expects to find words invested with absolute meaning. Thus, when Rawls dealt with anti-subversive decision making as a question of "tolerance of the intolerant,"[193] he set up the hierarchy tolerance/intolerance and enlisted presence to give priority to the first term as being *foundational*. As with all arguments that cite this particular instance of presence as a ground for further development, however, the foundational concept of tolerance is already a complex construction. What is proposed as a given can be shown to be merely a product that is dependent or derived in ways that will deprive it of the authority of pure or simple presence.[194] All signs only have meaning as difference and are, thus, dependent on difference. Consequently, tolerance is given meaning only because it is different from intolerance and is, thus, dependent on intolerance.

Culler has pointed to a more famous paradox, that of Zeno, which demonstrates the difficulty of a system based on presence/absence and how meaning is based on difference. The present is said to be a reality at any given moment. But at any given moment, an arrow that is in flight is in a particular spot and, thus, is never in motion. Culler explains that "the presence of motion is conceivable . . . only insofar as every instant is already marked with the traces of the past and future."[195] Thus, motion can exist "only if the present instant is not a foundation but merely a product of the relations between past and future."[196]

So must the would-be foundational principle of tolerance be derived. If tolerance (presence) is to function, it must have the qualities that supposedly

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192. Culler writes:

> The authority of presence, its power of valorization, structures all our thinking. The notions of "making clear," "grasping," "demonstrating," "revealing," and "showing what is the case" all invoke presence. To claim . . . that the "I" resists radical doubt because it is present to itself in the act of thinking or doubting is one sort of appeal to presence.

J. CULLER, *supra* note 15, at 94.

When Professor Hermann posits self and environment as an innate opposition, he assumes a binary opposition that gives greater value to the first term in that opposition. From this set of assumptions his structural analysis flows toward societal obligation, but it is always secondary or exceptional to a doctrine protecting self. The deconstructionist, however, would point out that this sort of structuralist argument is based on logocentric myth. Deconstructive method reminds us that "self" has meaning only as it relates to and is different from environment. Meaning for signs is dependent on difference. Indeed, to assume that self has some absolute meaning to be set against environment is to give to self an aura of the absolute premise that structuralists were initially instrumental in unveiling as myth.

193. J. RAWLS, *supra* note 169, at 216-21.

194. J. CULLER, *supra* note 15, at 94.

195. *Id.*

196. *Id.*

belong to its opposite, intolerance (absence). Rather than define intolerance in terms of tolerance, as its negation, we can treat tolerance as the effect of a generalized intolerance, or as only a form of *"différance."* "Différance" is a term devised by Derrida to allude to the idea that meaning in language is not only the result of phonic difference as a condition of signification but also an act of *deferring* meaning.[197] The deconstructive method maintains that the development of language depends on the idea that signs or words (such as tolerance) are never completely settled on an absolute meaning. Thus "tolerance" is stripped of its absolute quality so that it can not form part of a binary opposition that leads to paradox.

Another metaphysically imposed opposition central to anti-subversive decisions is cause/effect. In the United States, words that might cause a clear and present danger of violent overthrow of the government are proscribed. In Germany the holding of certain goals by a political party might cause the people to abandon the free democratic order. Causality is assumed in our universe to be a basic principle, but deconstructing the cause/effect opposition strips it of its metaphysical significance.

Causality assumes the logical and temporal priority of cause to effect. This structure, however, is not a given. Rather, the hierarchical opposition of cause/effect is the product of a precise or rhetorical operation. Culler explains: "Suppose one feels a pain. This causes one to look for a cause and spying, perhaps, a pin, one posits a link and reverses the perceptual or phenomenal order, *pain . . . pin* to produce a causal sequence, *pin . . . pain.*"[198] Thus the question becomes whether the second term (effect), usually treated as secondary, does not prove to be the condition of possibility of the first (cause). Nevertheless, the principle of causality is not illegitimate. Rather, "the deconstruction itself relies on the notion of cause: the experience of pain . . . *causes* us to discover the pin and thus causes the production of a cause."[199] The effect rather than the cause, therefore, may be treated as the origin:

> By showing that the argument which elevates cause can be used to favor effect, one uncovers and undoes the rhetorical operation responsible for the hierarchization and one produces a significant displacement. If either cause or effect can occupy the position of origin, then origin is no longer originary; it loses its metaphysical privilege.[200]

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197. J. DERRIDA, POSITIONS 27 (A. Bass trans. 1981):

> [D]ifferance . . . is a structure and a movement no longer conceivable on the basis of the opposition presence/absence. *Differance* is the systematic play of differences, of traces of differences, of the *spacing* [espacement] by means of which elements are related to one another. This spacing is the simultaneously active and passive (the *a* of *differance* indicates this indecision as concerns activity and passivity, that which cannot be governed or distributed between the terms of this opposition) production of the intervals without which the "full" terms would not signify, would not function.

198. J. CULLER, *supra* note 15, at 86.

199. *Id.* at 87.

200. *Id.* at 88.

Deconstructed, causation is merely another concept, stripped of the authority of presence.

When courts in Germany or the United States base their decisions, as they have, on a concept of cause/effect or on a preference for tolerance as opposed to intolerance, they are working in a logocentric way. What they are describing in fact is a generalized intolerance. This intolerance, in turn, is based on their analogues of a "reality" that assumes certain fundamental principles such as cause and effect.

Another approach of the deconstructive method is to look for key words in the text that reveal points at which the text is straining to impose as basic reality what are merely logocentric conclusions. In the United States, the structure of society and the government's right to self preservation are held to be fundamental. In Germany, the free democratic order is the foundational principle given the status of presence. To establish such foundations, decision makers must take as a given, must assume the presence of, that which such principles represent. Although both systems rely on fundamental principles, the reality that decision makers impose and about which they feel familiar is seemingly not the same "reality" in Germany as in the United States. Various basic models of reality have developed, for example, including the Lockean,[201] utilitarian,[202] Hegelian,[203] individualist, and altruistic[204] models. We are all influenced by these conflicting models of reality, aware and pained that they clash as separate realities. When forced to reconcile them, the language of decision makers shows the strains of logocentric imposition. Decision makers use metaphors to make a proposition not clearly founda-

201. Locke's emphasis on natural law "led to the concept of government by consent and limited by law." J. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 170 (2d ed. 1959). According to Locke, "tyranny began when government invaded the natural rights of man." *Id.* "The traditional culture of the United States is an applied utopia in which John Locke defines the idea of the good." *Id.* at 124. Locke declared that his whole purpose in philosophy was to be a servant to "the incomparable Mr. Newton." H. PROSCH, THE GENESIS OF TWENTIETH CENTURY PHILOSOPHY 84 (1966).

202. At the time of the framing of the Constitution, the United States was essentially Lockean in outlook. J. MILLER, *supra* note 201, at 170. But there were also elements in American society that retained the Episcopalian and aristocratic social ideas of England. Hamilton and Jay, for example, wanted no part of the egalitarian democracy of Locke and Jefferson and stated their views in favor of a federalist principle. B. DUMBALD, THE BILL OF RIGHTS 34 (1957). The rise of industrialism following the Civil War created a new interest in economics, transforming the content of the search for justice. J. DEWEY, LIBERALISM AND SOCIAL ACTION 18 (1935). America adopted the classical economic theory of William Stanley Jevons, which was based on Bentham's utilitarian theory as determined by the philosophy of David Hume. F. NORTHRUP, THE MEETING OF EAST AND WEST 111 (1966); E. KAYSER, THE GRAND SOCIAL ENTERPRISE 29-30, 87 (1932).

203. Except for the period from the Treaty of Versailles to Hitler, German thought could be traced in a continuous line to Fichte's *Addresses to the German People.* Northrup traces this development through Hegel, from whom the idea developed that the institutions of society are absolute and that opposition to those institutions can be overridden in the name of one's society. F. NORTHRUP, *supra* note 202, at 206, 214, 217.

204. For a discussion of the competing rhetorical modes of individualism and altruism, see Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685, 1713-22, 1776-78 (1976).

tional to society appear familiar and well grounded. The use of these often extreme metaphors exposes the insecurity of their makers.

For example, the Smith Act has been surrounded with the use of such metaphors from the day it was first proposed. Congressman Howard Smith of Virginia introduced the bill to the House of Representatives on March 20, 1939 with the following metaphorical extravaganza:

> I realize that there are those who will seek to sabotage any effort to suppress this wave of un-American and subversive activities, and the chief method of doing so is to call such bills "red baiting." This term always seems to have some magical effect on some people. Personally, I do not see anything against "red baiting." I myself am for "red baiting." The "reds" have been baiting loyal Americans and the American form of government constantly, and a little "red baiting" by good, patriotic, red-blooded American citizens with the same kind of poison bait that is being used to weaken our system of government meets with my full approbation. I am strong for the old philosophy of "fighting the devil with fire."[205]

Congressman Smith had an easier time introducing this legislation than Justice Vinson did in applying it in the *Dennis* case. Justice Vinson was faced with a prior doctrine put forward by Justice Holmes, that the first amendment right to free speech should only give way when words are used to create a clear and present danger that they will *bring about* the substantive evil that Congress has a right to prevent.[206] Justice Vinson argued that the test cannot mean that the government "must wait until the *putsch* is about to be executed."[207] In moving away from Justice Holmes' formulation, Justice Vinson used extreme metaphors of personification of government and concluded by arguing for a general relativity of concepts: "To those who would *paralyze* our Government in the face of impending threat by *encasing* it in a semantic *straightjacket* we must reply that all concepts are relative."[208]

Another deconstructive move is to pay attention to the marginal or what was previously thought unimportant. It is usually through the process of exclusion or marking off exceptions that hierarchies are developed. That is, general principles are possible only through a process of excluding what does not fit. Thus, by looking at the excluded, one defines or "houses" the principle. In this way the general principle is dependent on the excluded. The metaphorical play shows how the exceptions "create" the principle.

Freedom of speech and association are general principles. Justice Holmes, in *Schenck,* allowed that speech could be limited such that one could be convicted for shouting "fire" in a crowded theater.[209] In *Dennis,* Justice Vinson adopted the metaphor of fire in characterizing the limits of free speech, and wrote of the "inflammable nature of world conditions."[210] He

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205. 84 CONG. REC. 2972 (1939).
206. Schenck v. United States, 249 U.S. 47, 52 (1919).
207. Dennis v. United States, 341 U.S. 494, 509 (1951).
208. *Id.* at 508 (emphasis added).
209. *Schenck,* 249 U.S. at 52.
210. *Dennis,* 341 U.S. at 511.

again combined the metaphors of fire and government as helpless victim when he declared, "If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."[211]

Justice Frankfurter, choosing among foundational principles, used a territorial metaphor inherent in the word "danger."[212] He wrote in *Dennis* of "conflicting claims supported by weighty title deeds"[213] and the "soil in which the Bill of Rights grew."[214] He set "barren words" against "illumined" experience, and "crystallized" constitutional provisions against an unparalyzed "living instrument."[215] Justice Frankfurter further freed himself of Holmes' clear and present danger test by arguing that Holmes meant it to apply only to "puny anonymities" and "impotent" speech rather than speech that has a chance "of starting a present conflagration."[216]

Justices Vinson and Frankfurter both wrote of speech as a value in a hierarchy of values. Justice Vinson stated that the violent overthrow of the government was "certainly a substantial enough interest for Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."[217] Justice Frankfurter adopted the metaphor of feminine helplessness when he quoted a speech by a former Director General of the BBC that there are "powerful forces in the world today misusing the privileges of liberty in order to destroy *her*".[218] Justice Frankfurter also noted that "no debate is ever permanently won by shutting ones ears or by even the most Draconian policy of silencing opponents."[219] He indicated that we must have moved beyond the following pronouncement attributed to J.S. Mill:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[220]

It took the decisions of *Yates, Scales,* and *Noto* to place a limit on how far the Court would stray from Mill's dictum. In *Yates,* Justice Harlan moved to a position somewhat more protective of free speech. Quoting the extreme metaphors used in *Dennis,* Justice Harlan allowed speech to be restricted only in circumstances more extreme than *Dennis* seemed to indi-

211. *Id.*

212. The word "danger" derives from the Middle English "daunger," which meant "to be in the lord's jurisdiction or power." E. PARTRIDGE, *supra* note 68, at 140 (1983).

213. *Dennis,* 341 U.S. at 519 (Frankfurter, J., concurring).

214. *Id.* at 521 (Frankfurter, J., concurring).

215. *Id.* at 523 (Frankfurter, J., concurring).

216. *Id.* at 535 (Frankfurter, J., concurring). Justice Frankfurter referred to the clear and present danger test as "a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict." *Id.* at 519 (Frankfurter, J., concurring).

217. *Id.* at 508-09.

218. *Id.* at 553 (Frankfurter, J., concurring).

219. *Id.* (Frankfurter, J., concurring) (quoting speech by unnamed broadcasting executive).

220. *Id.* (Frankfurter, J., concurring).

cate.[221] He held the Smith Act constitutional in *Yates* only because it allows the "teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end."[222] The "abstract" is permissible; the "concrete" is not. In *Scales* it was recognized that mere "nominal" or passive membership in the CPUSA is protected by the first amendment and that a "blanket" prohibition would be a real "danger" to legitimate political expression.[223] In *Scales,* Justice Douglas avoided the metaphor of the smothering blanket, but he did use a territorial metaphor in his dissent. He argued that we, as free persons, "should not venture again into the field of prosecuting beliefs."[224] He presented the Jeffersonian position on whether peace is best preserved by "giving energy to the government or information to the people. This last is the most certain, and the most legitimate engine of government."[225]

The German Constitutional Court has been more consistent in imposing its structures and hierarchies in its political party decisions. Indeed, the court begins by viewing political parties generally as an organic part of the state. "They are a 'necessary part of the constitutional structure' which, through their collaboration in shaping political thinking, 'carry out the functions of a constitutional *organ.*' "[226] Given this basic organic metaphor of structure, surgery cannot be far off. It is not a very long step to reach the conclusion that "certain basic principles, once approved in a democratic manner, must be accepted as absolute values and, as such, must be defended resolutely against any attack."[227] That is to say that the Federal Republic of Germany has made a "conscious effort to achieve a synthesis of the principle of tolerance and certain untouchable values of the political system."[228] Thus, to be unconstitutional is to reject the values of the constitutional system. Attitude is enough; without action, an aggressive attitude toward the system may be proscribed even if there is no chance that this attitude will gain its end in the foreseeable future. Opposition parties are constitutional only if their resistance is ultimately directed toward the preservation of the existing system. The "resistance" of the KPD, it is held, is meant to "undermine" the existing system and is, therefore, counter-constitutional.[229]

CONCLUSION

Decision makers in Germany and the United States have argued from the premise that they represent tolerant systems that are intolerant only if caused

221. *Yates,* 354 U.S. at 321 (quoting "putsch" language in *Dennis,* 341 U.S. at 509); *id.* at 324 (quoting catalyst metaphor from *Dennis,* 341 U.S. at 511).

222. *Yates,* 354 U.S. at 318.

223. Scales v. United States, 367 U.S. 203, 229 (1960).

224. *Id.* at 267 (Douglas, J., dissenting).

225. *Id.* at 273 (Douglas, J., dissenting) (quoting T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 391-92 (Memorial ed. 1903)).

226. OUTLAWING THE COMMUNIST PARTY, *supra* note 148, at 12 (emphasis added).

227. *Id.* at 13.

228. *Id.*

229. *Id.* at 224.

to be intolerant. A deconstructionist approach can show that in both systems tolerance is not the foundational principle but rather a constantly redefined intolerance. It is not that speech and association cause danger but rather that a feeling of danger or insecurity causes speech or association to be intolerable. It is thus the feeling of danger that causes us to define the level of our intolerance and by which our concepts of democracy and liberty are determined.

The deconstruction of logocentric theories does not lead to a new theory that answers all questions, nor is it meant to. Indeed, the deconstructive process is itself subject to logocentric premises. All "[t]heory may well be condemned to a structural inconsistency."[230] To deconstruct an opposition such as cause/effect, presence/absence, or tolerance/intolerance is not to destroy it and leave in its place a single concept. Deconstruction means only to undo and displace the opposition; to situate it differently in order to reinstate it with a reversal that gives it a different status and impact. A deconstructed position is shown not to be grounded on immutable principle and, one hopes, not to be so tyrannical that it precludes the play of creative thought in the development of new principles. Rather, deconstruction suggests an answer to the question of whether we can avoid the tyranny of our consensus and develop new principles without appearing merely arbitrary. Honestly recognizing that our answers are part of a metaphorical process will allow us to value them only as long as they prove to be adequate. To value answers that conform to familiar analogues of our selves and society is not to say our rules are arbitrary. But it will, one hopes, cause us to be less apt to adopt or keep a doctrinal position that is ultimately harmful to ourselves as a society.

230. J. CULLER, *supra* note 15, at 109.