

University of San Diego

Digital USD

University of San Diego Public Law and Legal
Theory Research Paper Series

Law Faculty Scholarship

March 2004

Toleration and Liberal Commitments

Steven Douglas Smith

University of San Diego, smiths@sandiego.edu

Follow this and additional works at: https://digital.sandiego.edu/lwps_public



Part of the [Public Law and Legal Theory Commons](#)

Digital USD Citation

Smith, Steven Douglas, "Toleration and Liberal Commitments" (2004). *University of San Diego Public Law and Legal Theory Research Paper Series*. 4.

https://digital.sandiego.edu/lwps_public/art4

This Article is brought to you for free and open access by the Law Faculty Scholarship at Digital USD. It has been accepted for inclusion in University of San Diego Public Law and Legal Theory Research Paper Series by an authorized administrator of Digital USD. For more information, please contact digital@sandiego.edu.

Smith:



Public Law and Legal Theory Research Paper Series

Spring 2004

Toleration and Liberal Commitments

Steven D. Smith

TOLERATION AND LIBERAL COMMITMENTS

Steven D. Smith¹

Toleration is a venerable notion, but it is often disparaged by criticism from either of opposite directions. One kind of criticism (less common today than formerly) objects to toleration for being *too liberal*. Thus, toleration is said to be incoherent and impossible as a logical or psychological matter, or else possible but too permissive and thus undesirable as a normative matter. Given the choice, why should we knowingly put up with error? A different and in modern times more familiar kind of criticism objects to toleration for being *not liberal enough*. The ideal of toleration implies, after all, that there is a preferred or orthodox position which deigns to “tolerate” or put up with dissenting views; and this discriminating and condescending posture may seem offensive to the liberal notion that the state must be “neutral” towards religion or toward conceptions of the good, or that the state must treat persons and their ideas as equal.

My own view is that these criticisms are misguided, and that if our political community aspires to be liberal (or at least to claim the political benefits associated with liberalism) it will necessarily adopt a posture of toleration.² The only choice, at this level, is whether we will confess to holding this position or will pretend to operate on some other principle.

In the United States, an appreciation of the centrality of toleration seems especially important at this point in American history. There may be times when we can successfully practice toleration without avowing or defending it, but ours does not seem to be such a time. Looking inward, we perceive an exhausted liberalism striving vainly to contain or conceal a series of “culture wars.” Looking outward, we perceive prospects of a “clash of civilizations” which calls upon us to forego the complacent

agnosticism of “neutrality” and to affirm and defend what is central to our way of life. Under these conditions, I will suggest, a renewed exploration of the meaning and grounds of toleration becomes urgent.

My argument will unfold as follows: in Part I, I will offer a brief explanation of what a position of toleration entails. In Parts II and III, respectively, I will attempt to respond to the criticisms noted above—namely, the criticisms objecting that toleration is too liberal or else not liberal enough. In Part IV, I will discuss the timeliness of toleration at this point in our history.

I. The Elements of Toleration

Although the term is used in different ways, for present purposes I offer the following as a stiff but useful statement of the elements of toleration: Toleration describes the practice³ of a position adopted when (a) in a condition of *pluralism* (b) an *agent* c) adheres to a *base position* or orthodoxy under which (d) competing values and ideas are classified into *three categories*: i) those within or at least not inconsistent with the orthodoxy, ii) those that while inconsistent with the base position or orthodoxy are nonetheless within the field of toleration, and iii) those that are intolerable. Each of these elements needs elaboration.

(a) *Pluralism*. The possibility of and need for toleration arise only in a situation in which different values or ideas, or perhaps different classes of persons, occupy a common space in potential opposition to each other. The pluralism might be of religious or political views, or of races, or of cultural practices; thus, we sometimes talk of religious toleration, political toleration, racial tolerance, or just plain tolerance. In this essay, my concern is mainly with a condition of pluralism in the core *beliefs*,

including religious beliefs, that are often taken to be central to human life. My main concern, in other words, is with toleration as a possible philosophy of or strategy for the kinds of issues we discuss under the heading of the First Amendment to the United States Constitution.

(b) The agent. This condition of pluralism presents a question about how to negotiate or deal with the competition among beliefs. We can refer to the entities that must confront this question as agents. An agent might be an individual person or some institutional entity; in this essay, the agent I am primarily concerned with is an institution—namely, government, or the state.⁴ I do not of course mean to deny the importance of tolerance as a virtue of individual persons or as an element of social interaction—points stressed in Professor Morgan’s response⁵—but those aspects of tolerance are not the focus of this essay.

c) The base position. In making judgments about how to deal with or react to competing ideas, an agent will act on the basis of certain beliefs that he or she or it holds and that seem relevant at some level to the conflicts that arise. We can describe this set of beliefs that inform the agent’s judgments as a “base position” or an “orthodoxy.” However, I emphatically do not mean these terms to suggest that the base position or orthodoxy must be coherent, or permanently fixed, or even fully conscious. Usually the contrary will be true: persons and even more so the governments of large and diverse communities will act in different situations on the basis of beliefs that are in tension with each other and in constant process of reexamination and change, and that are often held only tacitly. My modest point—virtually a truistic one, I hope—is simply that as conflicting ideas present themselves for acceptance and action, an agent will necessarily make judgments, and these judgments will be shaped by beliefs the agent holds.

(d) *The three-category scheme.* Though every agent will of necessity act from some sort of base position, not every such position can plausibly be described as tolerant. A tolerant position, I have suggested, entails a three-category scheme for classifying ideas (although it is theoretically possible that in a given context the second or third categories, like Hell in gentler theologies, might happen to be empty). Some ideas will be within or at least not inconsistent with the currently prevailing orthodoxy. At least potentially, other ideas will be contrary to the orthodoxy but nonetheless within the field of toleration; if the agent is the government, this means that the government will not attempt to suppress such ideas. And the term “toleration” implies that, at least potentially, still other ideas may be outside of the field of toleration, and hence “intolerable,” so that an agent will attempt to defeat or discourage or suppress such ideas.⁶

I hasten to admit that this description makes the categories seem cleaner than they actually are. In the real world, the application of these categories will present a host of questions. It will often be debatable whether a particular idea is or is not consistent with the base position; this uncertainty is inevitable given the fact that the base position itself, as noted above, may be inconsistent and changing and not entirely consciously held. Similarly, the boundaries separating the field of toleration from the domain of the intolerable will often be obscure and contested. Moreover, within the latter domain there will still be ethical and prudential questions about what means are appropriate for discouraging or suppressing intolerable ideas. Should heretics be burned? Or merely denied state subsidies that the proponents of more acceptable ideas receive? And so forth.

Instead of the three-category scheme, it might be more accurate to say that there are degrees of tolerability and intolerability: some ideas receive our fullest endorsement and support (they are

highlighted in presidential addresses, perhaps, or are part of the required curriculum in public schools); other ideas receive less support; others are left alone; and still others may be banned—albeit with sanctions of varying degrees of severity. This “sliding scale” model may indeed be more true-to-life. However, I think the three-category scheme, however simplified, has the advantage of permitting a useful contrast with the positions (also purified) that represent toleration’s main competitors.⁷

Thus, what we can call the “illiberal” position in essence discards the middle category—the category of presumptively wrong but nonetheless tolerable ideas. Consequently, in this view an idea will be part of (or at least not inconsistent with) the orthodoxy, or else it will be intolerable. “Agree with us or else.” Conversely, what we can call the ultra-liberal position attempts to get by with only one category. Or rather it dispenses with categories altogether, vowing to treat every person’s beliefs as equal and thus to remain neutral among beliefs and the persons who hold them.⁸

I doubt that this last position is entirely coherent. How can the ultra-liberal agent really be neutral toward, say, anti-liberal views, or toward the idea that neutrality among beliefs is shameful or impossible? But then, as I have already noted, a base position need not be fully coherent. So to say that the ultra-liberal position is incoherent is not to say that it is impossible for someone to hold that position (or at least to *think* he holds it). And indeed modern experience seems to prove the point: what is, is possible.

Since toleration is not the only possible response to pluralism, we naturally will want some reason for adopting a position of toleration. Why adopt the three-category scheme rather than the two-category or the one- or no-category schemes?

II. Tolerance versus Illiberalism: Why Put Up with Error?

We can consider first the two-category position, or what I have called the “illiberal” position, which urges that ideas should be classified as either consistent with the prevailing set of beliefs or else intolerable. Though its public appeal may have declined in recent times, the illiberal position has enjoyed considerable historical support; it also claims some ongoing visible support,⁹ as well as more justification (and perhaps more latent or perhaps unwitting support¹⁰) than we sometimes suppose.

A. The Case for Intolerance

We can divide the arguments for Illiberalism and against tolerance into two main kinds (though in actual argumentation these strands are often blended). One kind of argument suggests that the two-category scheme is logically or perhaps psychologically irresistible. If you think that *X* is true, then you will naturally think that not-*X* is false.¹¹ And how can you treat a false idea with respect? On the contrary, you are in principle committed to resisting, opposing, and defeating false ideas if you have the power to do so. Thus, “persecution for the expression of opinions seems to me perfectly logical,” Holmes famously observed. “If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”¹²

In short, belief in the truth necessarily commits you to oppose falsehood. Let us call this view—the view, that is, that belief in *X* necessarily commits you to suppressing not-*X*-- the *entailment argument*. “Error has no rights,” as the old slogan had it: belief in truth entails intolerance of falsehood.

A different kind of argument concedes that a posture of tolerance is possible but argues that it is undesirable or unattractive. Toleration means that error and falsehood are allowed to flourish

unopposed. But how can beings with commitments to truth adopt this careless and perhaps dangerous stance? Let us call this the *normative argument* against toleration.

B. Resisting Intolerance

The arguments against toleration and for illiberalism have *prima facie* force, I think, but they are not unanswerable.¹³ Let us consider the “entailment” argument before discussing the more troublesome normative argument.

1. The entailment argument

Standing alone, the entailment argument seems faulty because it assumes that *disagreement* with an idea automatically entails a desire or perhaps a duty to *suppress* the idea. An equivocation may be at work here. Disagreement with an idea does indeed entail (or simply amounts to) “opposition” to the idea in one sense of the word. If you disagree with idea *X*, you “oppose” *X*—intellectually, at least. But that sort of opposition—mere disagreement—is not normally thought to constitute “intolerance.” On the contrary, disagreement is a prerequisite for the possibility of tolerance: it would be odd to say that you “tolerate” an idea that in fact you find wholly unobjectionable.¹⁴

The sort of opposition that is typically described as “intolerance” is something more aggressive, consisting of overt efforts to condemn or suppress. But intellectual rejection does not necessarily entail, either logically or psychologically, such more aggressive opposition. On the contrary, it is perfectly possible to disagree with an idea and yet, for all sorts of laudable or less than laudable reasons, to refrain from any attempt to eliminate it—perhaps because you respect the freedom of those who hold

the (erroneous) idea, or because you just don't care, or even because you are malicious and enjoy seeing others wallow in error.¹⁵

2. The normative argument

The normative argument, on the other hand, is more formidable. After all, though free speech advocates like Mill sometimes declaim on the benefits of falsehood, it is hard to maintain that a world in which truth is mixed with falsehood is somehow preferable to a world in which truth is triumphant. If people's truth-discerning capacities became too highly developed, would we really feel the need to promote or subsidize views known to be erroneous just to obtain the benefits of error?¹⁶ The point is not merely abstract or academic: if error inhabits the world, and if its proponents are allowed to promote their falsehoods in alluring ways, there is a significant chance that your friends, your children, perhaps you yourself will be induced to embrace falsehood. Who wants that?

Nonetheless, over the centuries, proponents of tolerance have developed a variety of rationales for tolerating divergent ideas. Though the list is hardly exhaustive, I think the leading rationales can be grouped under four main headings. Some of these rationales seem stronger than others, and none makes the case for toleration in any decisive and across-the-board way. Moreover, some rationales are more closely tied to a pure idea of toleration than others are. Still, in various contexts, each of these rationales can provide a persuasive warrant for putting up with beliefs we disagree with.

Indifference. One kind of argument for tolerating ideas with which an agent disagrees suggests that ideas— or at least the particular ideas for which tolerance is advocated— are not really important or threatening anyway. Thus, religious toleration may increase in proportion as religious doctrines become

less important to people. So creedal distinctions that once produced inquisitors and martyrs now provoke queries of “Who cares?” and “What difference does it really make?”¹⁷ In a similar vein, Justice Douglas opposed suppression of communist advocacy on the ground that domestic communism (as opposed to international communism) was impotent— a “bogey-man.”¹⁸

The toleration that results from indifference arguably produces a cheap sort of freedom. There is nothing much to admire in an agent who tolerates ideas she disagrees with because, in the end, she really doesn’t care enough to suppress them.¹⁹ Nor does this attitude of indifference convey much respect for the persons and beliefs being tolerated; rather, it suggests something closer to contempt. Nonetheless, indifference probably has been among the leading rationales for— or at least causes of— a practice of toleration.

Skepticism. Another leading rationale for toleration is skepticism deployed to temper the agent’s own beliefs. Holmes famously employed this rationale. We have already noted how Holmes conceded— or rather he reveled in asserting— that persecution of people with false ideas is perfectly logical.²⁰ But he then went on to suggest that would-be persecutors should realize, upon mature reflection, that their confidence in their own ideas is misplaced, and they should accordingly leave the determination of truth to the marketplace of ideas.²¹ In a similar vein, skepticism about religion or religious beliefs is often said to be a leading cause of the rise of toleration in early modern Europe.²²

Once again, the accommodation that results from skepticism is arguably an insipid sort of tolerance.²³ If I decline to suppress an opinion that deviates from my own only because, come to think of it, I’m not so sure about my opinion anyway, I will hardly earn much praise. Indeed, a fully successful skeptical strategy arguably does not promote tolerance at all, but rather obviates and negates

it; that is because skepticism, by subverting the agent's base position, in effect dissolves the disagreement which is a prerequisite to tolerance.

Conversely, upon reflection it seems that a *partial* skepticism— or at least a lively sense of our own fallibility— does nothing by itself to justify tolerance of ideas with which we disagree. Suppose I have the power to suppress idea *X*, which some people hold but which I think is erroneous and pernicious; but then I reflect that *X* (and the people who believe *X*) might be right, while I might be wrong. This reflection doesn't lead me to conclude that I actually *am* wrong, of course— or if it does I will abandon *X* for myself, so the issue of toleration will go away— but I concede that I *might be* wrong. Without more (and I stress the “without more”), this concession gives me no more reason to permit other people to hold a pernicious idea that I think is *probably* wrong than it gives me to adopt that presumptively pernicious idea for myself. At least from my perspective, the risk of error is the same for them as for me: so if I am willing to take that risk for myself, why should I not take it for them?²⁴

In short, I think the efficacy of skepticism as a source of and rationale for tolerance is greatly overrated. Still, it seems undeniable that as a historical matter, and logically or not, skepticism has played a role in persuading people of the value of toleration.

Practical limitations. Probably one of the most effective rationales for tolerating objectionable ideas has been simple practicality. We would suppress the heresy if we could, but we can't. Or it would be too costly— in money, or morale, or whatever.²⁵ In an ideal world, perhaps, we would eradicate pernicious ideas *X*, *Y*, and *Z*; . . . and we would also have quality education for all children, and quality universal health care, and a private jet for everyone, and But all of these things are costly, so we put up with a second- or third- or fourth-best state of affairs.

Arguments for toleration are often of this character: they point out that efforts to suppress disfavored ideas are likely to be unsuccessful, or even counterproductive. Suppression may make the erroneous ideas seem more enticing, or it may drive those ideas underground where they cannot be effectively opposed or criticized. Or even if suppression were possible, it may be too costly: we just can't afford to expend the resources (including, as the early modern Wars of Religion remind us, the human lives) that would be needed to stamp out some heresy.

Once again, practical rationales do not make toleration appear to be an especially moral or noble stance: the ruler who declares "I *would* crush you but I just can't afford to" does not win our admiration. Nonetheless, it seems likely that practical rationales have been powerful in inducing both governments and individuals to adopt a practice of toleration. For example, practical considerations surely played a leading role in the change by which nations that for decades had battled to establish the true religion were induced to embrace the alternative of peaceful coexistence among competing sects.

Voluntariness or authenticity rationales. A different and more morally appealing type of rationale derives from the contention that some human goods cannot be realized except by voluntary acceptance, or that they necessarily depend on the quality of personal authenticity. Any number of goods appear to be of this character: love, friendship, and (perhaps most importantly for our purposes) belief or faith. I may desire your friendship, but the very nature of this good entails that I cannot compel you to give it. My smitten eight-year-old son's tragic romantic reflection may serve to make the point. "I wish I could *make* Kelly like me," he said, but then a moment later added despondently, "But I guess if I could, it wouldn't really be *her*; I'd just be friends with myself." Essentially the same argument has been advanced by proponents of religious freedom from Lactantius to Locke and from Roger Williams

to James Madison.

The argument from voluntariness appears to provide a more admirable or principled rationale for toleration than the rationales we have considered earlier. I may believe (perhaps with unshakable confidence) that your religious belief is false: nonetheless, even if I could somehow force you to relinquish the idea, my goal of inducing a genuine true faith would not thereby be realized. So I respect your autonomy: I treat you as a person whose beliefs and choices matter *because they are yours*, even when I think they are mistaken.

It is not surprising that arguments of this kind have played a major role in justifying tolerance and opposing illiberalism. Such arguments are powerful and important, I think, but they are not quite as decisive as we sometimes like to suppose, for two main reasons. First, the argument from voluntariness is not free-standing or self-justifying. It depends upon a base position— and not just any base position, either: rather, it requires a base position that emphasizes goods that depend for their realization upon free, authentic acceptance.²⁶ Second, even with respect to a base position that emphasizes these sorts of voluntariness-dependent goods, illiberalism has two *prima facie* plausible responses to the voluntariness argument.

First, illiberalism can respond that even if suppressing heresy *X* will do no good for those who already hold that damnable view, a policy of suppression can prevent the spread of error to others, who will as a result maintain the true view voluntarily and authentically. In this vein, proponents of suppression have often compared error to counterfeit money that must be kept out of circulation, or to a contagion that must be kept from spreading. In early modern Europe, the historian Brad Gregory explains, it was thought that “[m]urderers killed bodies, but heretics killed souls.” Consequently, “[t]he

spreading of heresy was religious reckless endangerment by spiritual serial killers.²⁷ Not surprisingly, the dominant view was that such killers should be stopped.

Second, even for those who already hold the heresy we might seek to suppress, compelled renunciation might tend to produce, over time, an authentic and ultimately voluntary embrace of truth. If errors are suppressed, potential or erstwhile heretics may consequently be forced into greater exposure to true ideas, and they might thereby come to perceive the superiority of those ideas. Or error might be viewed as a sort of addicting drug: forced to go cold turkey, people might overcome the addiction and come to realize the virtues of embracing truth. Theories of cognitive dissonance may suggest how, in order to avoid the dissonance between (initially compelled) public professions and (initially contrary) inner belief, a person might reshape her belief so as to achieve a more satisfactory harmony. In any of these ways, beliefs (or at least professions) that were initially compelled might come to be sincerely and even freely held.²⁸

To these arguments, I think, there is no decisive, once-and-for-all response. In children, we do often proceed on the assumption that involuntary measures can help in the achievement even of goods (good attitudes or character traits, correct ideas) that *ultimately*—the qualifier is crucial—depend on sincere acceptance. In adults, perhaps, we may rightly think these measures less appropriate, or less effective: in some cases they may merely produce resentment and resistance. But then of course the distinction between children and adults, though practically indispensable, is to a large extent conventional and pragmatic and normatively conclusory; it is scarcely a hard-and-fast natural fact, like the difference between copper and iron. It is easy, and not wholly illogical, to regard those who cling to manifest foolishness as “children” in an important sense.

3. A “universal” rationale for tolerance?

The tenuous, provisional nature of the case for toleration suggested above may leave us uneasy. It would be comforting to have some more sweeping, once-and-for-all, knockdown argument for toleration. Not surprisingly, therefore, arguments claiming this character have often been entertained. And though I do not think these more universal arguments hold up well under examination, they probably have been influential in gaining or at least consolidating support for the practice of toleration.

Perhaps the most popular “universal” rationale for tolerance is rooted in the ideal of “reciprocity.” Thus, Jurgen Habermas reports that “[i]nitially, the toleration of religious minorities was justified only pragmatically, e.g., for mercantilist reasons; in order to maintain law and order; for legalistic reasons, since spontaneous convictions elude legal constraint; or for epistemological reasons, since the human mind is deemed to be fallible.”²⁹ These rationales, of course, are among those considered above. But Habermas suggests that this “pragmatic” defense of toleration eventually matured into a more Kantian and “universally convincing” position based on the notion of reciprocity. As an illustration, Habermas cites Pierre Bayle’s argument that Christians cannot consistently object to the suppression of Christian evangelization in Japan and at the same time forbid Muslim proselytizing in Christian Europe.³⁰

Far from being “universally convincing,” however, this reciprocity argument would likely seem merely obtuse to those to whom it is supposedly directed. *If* Christianity, Islam, and, say, Shintoism are relevantly similar, then of course reciprocity may indeed suggest that if Christians expect to be permitted to evangelize in territories dominated by Islam or Shinto they ought to allow representatives of those religions to proselytize in Christendom. But that premise— that the religions are relevantly

similar— is precisely what is at issue, and what the believers in these faiths emphatically deny.³¹ In *their* view, one of the religions leads to salvation, while the others may lead to damnation: that is hardly equivalence. So why would reciprocity demand that truth be treated in the same way falsehood is? It is as if a failing student were to argue, on grounds of reciprocity, that if the school gives credit for true answers on a test it must give equal credit for false answers.

To be sure, even the most fervent devotees of the different religions might be able to acknowledge that the religions are similar in the sense that their own followers *believe* them to be true. But that similarity is the dispositive one only if we tacitly assume that *belief*, not actual *truth* (or salvific efficacy), is the relevant factor— an assumption that the believers themselves are likely to find as implausible as the school would find a similar claim made by students who insist that they *believed* their (erroneous) answers were correct (or perhaps still believe this, quite possibly on the basis of epistemic criteria that the school does not accept as valid).

We can put this point in a different way. Toleration, as I have said, is a possible response to pluralism— and most likely, in the modern world, to a deep pluralism that applies not only to what we might call primary belief systems such as religion but also to second order beliefs regarding matters such as the nature of justice, the meaning and scope of democracy, and the proper or best ways of negotiating primary religious, political, and epistemic disagreements. It would be wonderful if we could decree that although people will and should be allowed to disagree with each other at one level (about, say, religion), at some other level (such as where coercion by the state is involved) we will all act only on universally acceptable grounds. A large body of modern political theory can be understood as a powerful (if often ponderous) expression of this pleasant illusion.³² And if such universally acceptable

grounds were available, we might also hope for a “universal” argument for toleration.³³ But to recommend this solution is simply to refuse to acknowledge the depth and reality of the pluralism that gives rise to the possibility of and need for toleration in the first place.

4. The “instability” of tolerance

The burden of the discussion thus far has been that there *are* arguments favoring tolerance, and taken cumulatively they may often be sufficient to justify a practice of toleration. But their force will vary with the circumstances. So the case for toleration cannot simply rest on any one-time articulation of a value such as voluntariness or reciprocity. The case depends, rather, on the ongoing defense of base positions that support liberty or tolerance, and on contextual application of voluntariness considerations, probably in conjunction with other rationales. As Bernard Williams explains, “the practice of toleration has to be sustained

not so much by a pure principle resting on a value of autonomy as by a wider and more mixed range of resources. Those resources include an active skepticism against fanaticism and the pretensions of its advocates; conviction about the manifest evils of toleration’s absence; and, quite certainly, power, to provide Hobbesian reminders to the more extreme groups that they will have to settle for coexistence.³⁴

It follows, I think, that toleration is not a position that, once attained, is a secure resting place. It is, as George Fletcher says, an unstable position.³⁵ As such, it is a position that must be constantly defended.

III. Ultra-Liberalism: the Objection to “Mere” Toleration

By contrast to illiberalism, the ultra-liberal position finds toleration unsatisfactory not because it is too permissive, but rather because even while forbearing from coercion or suppression a tolerant agent continues to treat some ideas and values as superior to others that are merely “tolerated”: in this way, toleration may seem to violate liberal commitments to equal concern and respect.³⁶ Michael Walzer describes the objection:

To tolerate someone else is an act of power; to be tolerated is an acceptance of weakness. We should aim at something better than this combination, something beyond toleration, something like mutual respect.³⁷

This objection is long-standing. In this vein, Thomas Paine scoffed that “[t]oleration is not the *opposite* of intolerance, but is the *counterfeit* of it. Both are despotisms.”³⁸ And in a similar spirit, the young James Madison managed to defeat George Mason’s Virginia proposal to protect “the fullest *Toleration* in the Exercise of Religion,” to be replaced by a provision providing that “all men are *equally* entitled to the full and free exercise of religion,”³⁹

This objection is reinforced by the suggestion that core beliefs are in a sense “constitutive” of who a person is.⁴⁰ On this assumption, if the state embraces beliefs held by some citizens but not by others, it would seem to treat those whose views are merely tolerated with less than equal respect. This attitude is easily discernible in, for example, the modern jurisprudences of free speech and freedom of religion that purport to require “neutrality” of the state, at least in limited domains. Thus, viewpoint neutrality has become the centerpiece of modern free speech doctrine.⁴¹ And the principal rationale for the modern “no endorsement” interpretation of the establishment clause asserts that if government says

or does things that send messages endorsing or disapproving of a religion, it thereby treats citizens who disagree with that message as “outsiders, not full members of the political community.”⁴²

Appealing though this ultra-liberal position is, it is also self-defeating— at least as a response to pluralism in the realm of *ideas* (including religious ideas). The reasons for this conclusion have been argued for at length elsewhere⁴³; here I will only state them summarily. In the first place, “ultra-liberalism” is itself a position or set of beliefs; more specifically, it is a position that some people accept and others reject. So if it is impermissible for the state to affirm by word or action some ideas while rejecting or declining to affirm other ideas, it should follow that the state is forbidden to affirm or act upon the ultra-liberal position.

Second, any state that would maintain the allegiance and support of its citizens seemingly needs to appeal to their central beliefs (as in fact our political tradition acknowledges in countless ways: mottos and pledges and pronouncements and rituals of various kinds). But this appeal, if it is to be effective and not merely insipid, will necessarily involve the public affirmation of actual, substantial beliefs— beliefs that, inevitably, some but not all citizens will hold.

Not surprisingly, therefore, the ultra-liberal position flourishes only in the realm of theory: it does not correspond to the way governments typically acknowledged to be “liberal” ever have behaved, or behave now— or, we can confidently say, ever will behave. On the contrary, governments constantly and necessarily affirm some beliefs and reject others— in the public school curriculum, in decisions about which programs and art forms and research agendas to subsidize, in official pronouncements of various kinds that routinely issue from governments at all levels, and in the justifications given for every decision that is made and every piece of legislation that is enacted.

Notice that these objections apply only to the ultra-liberal ideal of equality as a strategy for addressing pluralism in matters of *belief*; they do not apply to liberalism as a response to other forms of pluralism. There is no incoherence in asserting that a liberal regime will treat *persons* with equal respect.⁴⁴ So it is perfectly plausible, for example, to say that a liberal regime must not privilege any race while merely tolerating other races. Conversely, the notion that one or some races are “orthodox” and that other races are merely tolerated does indeed seem contrary to the meaning and spirit of liberal democracy. In this domain, in short, equality rather than tolerance seems the appropriate ideal. It may be that the ultra-liberal notion of equality as expressed in the jurisprudences of free speech and freedom of religion gains some of its appeal from its evident rightness in the area of race or, more generally, in describing the liberal attitude toward *persons*.

The difficulty occurs in the transition from an ideal of equal respect for *persons* to an ideal of equal respect for or equal treatment of *beliefs*. Though rhetorically parallel, these ideals are not mutually supporting. On the contrary, they are mutually incompatible: if the state embraces the idea that persons are in some sense of equal moral worth, it thereby necessarily rejects contrary beliefs or ideas—namely, inegalitarian beliefs—and it thereby rejects the notion that beliefs or ideas can be treated with equal respect. That “all men are created equal” is one of the “truths” that “we hold”—and that we hold over against contrary claims that we reject.

In sum, ultra-liberalism in the realm of beliefs is a position that could never be maintained. Or even if somehow it could, it would undermine the very liberalism that it seeks to uphold.

IV. The Timeliness of Toleration

If liberalism is to prevail, consequently, it will do so only by adopting a posture of toleration. It does not necessarily follow, however, that a liberal regime must *acknowledge* its commitment to toleration. Ultra-liberal equality might serve a diplomatic function; it might provide an attractive rhetoric for concealing or disguising the difficult and potentially divisive choices among competing beliefs that the state will inevitably make. In short, a liberal state might *practice* toleration while *talking* the language of ultraliberalism.

There is no way to say in the abstract, I think, whether this diplomatically deceptive rhetoric is warranted. It may be— in some contexts. But in our own time this prescription begins to look increasingly ineffectual and even perilous.

A. Citizen versus Person?

The difficulties can be traced back to a disturbing paradox at the heart of the ultra-liberal position. On the one hand, liberalism strives for a sort of unity between government and “We the people.” Indeed, the distinctive feature of liberal democracy, as opposed to other forms of government in which “the rulers” and “the ruled” are more decisively separated, is that democracy is supposed to be government “of the people, by the people, for the people.” On the other hand, the ultra-liberal or “neutrality” approach to democracy insists on a sharp divide between what we might call the moral mindset of government and that of individual persons. *Persons* are supposed to hold and actively pursue thick “conceptions of the good.” They are expected to have beliefs— beliefs that reflect the acceptance of some ideas and the rejection of others.⁴⁵ *Government*, by contrast, is supposed to remain neutral or agnostic in these matters.

In sum, government is supposed to be constituted by “the people” but it is also supposed to adopt an approach to the issues of life that is utterly different from the approach that people themselves— or, if you like, *persons*-- adopt. The prescribed divide is especially sharp in the area of religion, where ultra-liberalism assumes that people (many of them anyway) will embrace and live by religious beliefs but that government is absolutely forbidden to maintain any views whatever on such matters.⁴⁶

It is not so hard to imagine some such division of mindset operating in non-liberal or undemocratic regimes. On the contrary, it seems natural to suppose that if the rulers are one class of persons and the ruled are a different class, these classes might well operate on the basis of significantly different assumptions and values. The problem, once again, is that in a liberal democracy these classes are supposed to converge— the government and the people are supposed to be in some sense the same-- but their ways of thinking are nonetheless supposed to diverge drastically (at least according to the ultra-liberal prescription). John Smith the Person is supposed to express and act on beliefs about the good, including religious beliefs; but John Smith the Official (or even, by extension, John Smith the Citizen) is expected to refrain from any such expressions or actions.

To be sure, the scope of conflict might be reduced in various ways. We might limit the neutrality constraints, perhaps, to matters involving religion, . . . or to *coercive* regulations of speech, . . . or perhaps to matters involving “constitutional essentials and matters of basic justice.”⁴⁷ Or we might imaginatively try to abstract the “government” that is subject to such ultraliberal constraints away from the real people who staff the government as officials and citizens.⁴⁸ But these containment measures seem suspect. If the ultra-liberal ideal is just and right, after all, why should it be necessary to be

continually shrinking its scope of application?⁴⁹ And why would a liberal want to abstract government away from the people? Isn't the identification of government with the people— the actual, flesh-and-blood people— supposed to be the essence and glory of democracy? The repeated resort to limiting measures thus suggests that there is something wrong with an ultra-liberal ideal that must be repeatedly qualified and contained.

So perhaps the more forthright approach would be to champion the ideal and insist that although the government and the people-as-citizens are indeed the same body, whenever people are acting *as citizens*— that is, when they are constituting and administering the government— they must strive to suspend their normal modes of thinking and to refrain from believing and acting on the basis of religious beliefs and particular conceptions of the good. But this prescription provokes powerful objections. Is it really possible for John Smith so to divide himself between Smith-as-Person and Smith-as-Citizen? And supposing it is possible, is this course healthy? And even if we can answer these questions in the affirmative, haven't we sacrificed the liberal democratic ideal after all? The goal, once again, was to establish a government “of the people, by the people, for the people.” It would be natural to assume that this means government “of John Smith et al., by John Smith et al., for John Smith et al.” But if democracy imposes such a sharp divide between Smith the Person and Smith the Citizen, then it is doubtful whether a government of “We the Citizens” can accurately be described as a government of “the people” after all: “We the People” for government purposes turns out to be an entity quite independent of me and you.⁵⁰

And in any case, it seems more likely that the prescribed division between person and citizen will not be realistically maintainable.⁵¹ But if the division between person and citizen is breached, then it

seems that either the Citizen will come to overwhelm the Person, or else the Person will commandeer the Citizen. Neither outcome seems attractive, as becomes apparent if we consider them in turn.

B. The Impoverished Soul

Consider the first alternative. Suppose that Smith the Citizen, steeped in the anti-judgmental language of neutrality and equality, comes to dominate Smith the Person. Smith accordingly comes to believe (pardon the incoherence) that “there is no such thing as a false idea”⁵²— an initially cheering notion which upon reflection seems to imply, sadly, that there is no such thing as a genuinely true idea either. (Much in the same way that the happy thought “Nobody can lose” entails that “Nobody can win.”) In this contingency, Smith will slip into a kind of lackluster or ironic agnosticism toward the issues of life: he will lose his grip on his convictions and his capacity to act resolutely to choose among and pursue contested ideas of the good. With luck, his life will be peaceful— or at least untroubled by the struggles of conviction that have sometimes convulsed both communities and individual consciences— but also empty, devoid of larger purpose or meaning.

William Galston expresses the concern: “The greatest threat to children in modern liberal societies is not that they will believe in something too deeply, but that they will believe in nothing very deeply at all.”⁵³ In a similar vein, Larry Alexander argues that the liberal embrace of cosmopolitanism as a good leads to “a way of life [that] is shallow, denatured, bereft of deep commitments.”⁵⁴ Ronald Beiner argues that modern liberal theory, with its commitment to an agnostic neutrality, has produced a “reluctance to engage with the kind of large and ambitious claims about human nature and the essence of our social situation that alone furnish a critical foothold for bedrock judgments about the global

adequacy or deficiency of a given mode of life.”⁵⁵ Instead, quoting Richard Rorty, he argues that modern liberalism deliberately seeks to produce individuals who are ““bland, calculating, petty and unheroic.””⁵⁶

This description surely captures one aspect of our contemporary culture— but not all of it. If we look beyond the world of *Seinfeld* and the complacent consumerism of the stereotypical suburbs, it seems that belief is still very much alive and well— or at least alive-- in other quarters. But that phenomenon presents a different sort of problem.

C. Impoverished Discourse

Looking inward. From one perspective, the modern world suffers not so much from an absence of conviction, but rather from an excess of it.⁵⁷ On the domestic scene we see a series of “culture wars” pitting people of strong and incompatible views against each other. One widely noted study of this phenomenon is James Davison Hunter’s *Culture Wars*. Hunter reports that across a wide variety of seemingly independent political and social issues, Americans tend to coalesce into two broad camps, which he calls “progressive” and “orthodox.” The progressive camp is composed partly of “secularists” but also of persons who, though counting themselves religious, place their trust in “personal experience or scientific rationality.” By contrast, the “orthodox” camp, reflecting a “biblical theism” that includes many Catholics, Protestants, and Jews,” is defined by “*the commitment on the part of adherents to an external, definable, and transcendent authority.*”⁵⁸

Because their views and assumptions are so different, these cultural camps have difficulty communicating with each other. “Each side of the cultural divide,” Hunter observes, “speaks with a

different moral vocabulary.”

Each side operates out of a different mode of debate and persuasion. Each side represents the tendencies of a separate and competing moral galaxy. They are, indeed, “worlds apart.”⁵⁹

In another sense, though, the public rhetoric employed by the sides exhibits common and worrisome features— a sort of “symmetry in antipathy,” as Hunter puts it.

Both ends of the cultural axis claim to speak for the majority, both attempt to monopolize the symbols of legitimacy, both identify their opponents with a program of intolerance and totalitarian suppression. Both sides use the language of extremism and thereby sensationalize the threat represented by their adversaries. And finally, each side has exhibited at least a proclivity to indulge the temptation of social bigotry.⁶⁰

Whether this divide can be bridged is uncertain. What seems clear, though, is that the ultra-liberal discourse of equality and neutrality, though developed as a strategy for dealing with such cultural conflict, has proven inadequate not only to dissolve the differences but even to comprehend or express them. This failure is hardly surprising; on the contrary, it is in a sense deliberate. How could a discourse intentionally crafted to keep fundamental premises and commitments off the public agenda hope to express deep convictions, and disagreements, on such issues?⁶¹ But the upshot is that ultra-liberal discourse becomes ineffectual— a source not of engagement and resolution but of manipulation and suspicion.

We can put the point in terms of the Citizen versus Person conflict noticed earlier. Suppose that rather than being subjugated by Smith the Citizen, Smith the Person manages to dominate his civic *alter ego*, using the citizen now as a sort of puppet to advance his own views and interests. So Smith will hold and act on his convictions both in private and in the civic sphere. But if the discourse norms of ultra-liberalism persist in the civic sphere, then when acting in that context Smith will of necessity learn to hide his true motives and convictions, translating them into the bland discourse of equality and neutrality. And if John Smith acquires these arts of concealment, we can imagine that Mary Adams and Carlos Sanchez and Anita Wang will do the same— and that each of them will come to suspect the others of speaking and behaving in this deceptive way. Their discourse will become unpersuasive and manipulative, and known to be such; and each of these characteristics will reinforce the other. The more manipulative, the less persuasive; the less genuinely persuasive, the more merely manipulative.

The modern judicial discourse of constitutional law is to a significant degree a fulfillment of this dark prophecy. To a large extent, constitutional decisions under the First and Fourteenth Amendments are exercises in the deployment of the vocabulary of equality and neutrality. The same themes are sounded again and again, whether the cases concern nonestablishment or free exercise or free speech or race or gender or sexual orientation. And as critics from all points on the political spectrum point out, these judicial decisions seem increasingly incapable of either conveying or inspiring conviction. Modern Supreme Court opinions, as Dan Farber observes, are “increasingly arid, formalistic, and lacking in intellectual value”: they “almost seem designed to wear the reader into submission as much as actually to persuade.”⁶² At the same time, the decisions also fail either to express or to conceal the cultural differences that lie behind the Justices’ positions. “Kulturkampf” is of course a theme often

asserted in dissent by Justice Scalia,⁶³ and whatever one may think of Scalia's choice of rhetoric or his own favored alternatives, in this respect his assessment often seems more cogent than anything offered in the majority opinions he criticizes.

As a result, what the Court is pleased to call "reasoned judgment" often amounts, as Robert Nagel has persuasively shown, to little more than thinly veiled exercises in name-calling, as the Justices peremptorily dismiss the positions they disfavor as products of "prejudice," "fear," "antipathy," "irrationality," or "a bare . . . desire to harm a politically unpopular group." "[T]o a remarkable extent," Nagel observes, "our courts have become places where the name-calling and exaggeration that mark the lower depths of our political debate are simply given a more acceptable, authoritative form."⁶⁴

Looking outward. If we look outward beyond our boundaries, we perceive a similar phenomenon on a global level. One widely discussed diagnosis puts the situation in terms of a "clash of civilizations," with "civilizations" and "cultures" being treated almost as interchangeable terms.⁶⁵ The culture of Western civilization, Samuel Huntington argues, is constituted by features that include rule of law, a Christian and classical heritage, a separation of spiritual and temporal authority, social pluralism, individualism, and government by representation.⁶⁶ Against the view that sees these values as a sort of natural or even inevitable destination for the world as a whole, Huntington argues that other civilizations see this particular constellation of values as decadent and, given Western power, threatening. And though Western civilization is easily the most powerful at the moment, its economic and cultural power relative to some other civilizations appears to be in the early phases of decline.⁶⁷

Over the long run, therefore, the continuing viability of the culture distinguished by these values is very much in jeopardy. Huntington stresses in particular the ongoing competition with Islamic

culture— in comparison with which, he asserts, the “twentieth-century conflict between liberal democracy and Marxist-Leninism is only a fleeting and superficial historical phenomenon.”⁶⁸ Given this conflict, the preservation of Western civilization depends very much, he argues, on our ability to affirm and defend what he calls (perhaps unfortunately, especially given his own emphasis on “civilization” as the important unit) “the American Creed.” This Creed includes the values of “liberty, democracy, individualism, equality before the law, constitutionalism, private property,” as well as the Christian foundation from which these commitments historically arose.⁶⁹

Whether any such defense will succeed is unforeseeable. One obstacle, however, is a sort of self-imposed paralysis that hinders the affirmation and defense of this Creed. Huntington’s comment on that abnegation sounds desperate: “Rejection of the Creed and of Western civilization means the end of the United States as we have known it. . . . Americans cannot avoid the issue: Are we a Western people or are we something else? The futures of the United States and of the West depend upon Americans reaffirming their commitment to Western civilization.”⁷⁰

Huntington’s is a controversial diagnosis, to be sure: not only the details but many of the broad outlines of his argument are eminently debatable.⁷¹ For present purposes, though, the important point is the scarcely deniable fact of serious cultural conflict on the global level. The recent Iraq war together with the conflict in Afghanistan, following in the wake of September 11, surely confirm Huntington’s claim that history is not foreordained to any happy, smooth convergence on a culture of human rights, representative democracy, and rule of law. Even on the contestable supposition that these commitments enjoy the support of a *domestic* “overlapping consensus,” allowing us to appeal to them for internal purposes without invoking any more fundamental premises or “comprehensive views,” they

clearly do not enjoy any such consensus on the global level. Hence, the ambition to defend such values in the long run and even to extend them to other communities characterized by other cultures— say, Iraq— probably involves, among other things, an effort to articulate and defend the premises— the Creed, as Huntington puts it— in which such values are grounded.

But once again, the ultra-liberal discourse of neutrality and equality subverts and obstructs that effort.⁷² Perhaps ironically, this incapacity is perhaps most conspicuous with respect to the value that ultra-liberalism seeks especially to exalt— that is, equality. The Declaration of Independence asserts, as one of the central truths on which the Republic was founded, that “all men are created equal.” In recent decades equality has become arguably the central value in some of our most justly celebrated political movements (in particular the civil rights movement), in a good deal of political philosophy, and also in much constitutional law, not only under the equal protection clause but in First Amendment jurisprudence as well.⁷³ Yet this assertion of equality or equal worth, ennobling and exhilarating though it may be, is not on its face intuitively compelling, or even plausible. George Fletcher observes that “[n]othing quite like ‘all men are created equal’ is ever cited in the German jurisprudence of equality or, so far as I know, in any other legal culture of the world.”⁷⁴ And he adds that “[a]s a descriptive matter, the thesis that ‘all men are created equal’ is obviously false. People differ in every conceivable respect— size, strength, intelligence, musical talent, beauty.”⁷⁵

So then what is the justification for saying that all persons are in some important sense of equal worth? The Declaration of Independence is quite clear in offering a religious foundation for the doctrine of equality: we “are created” equal, and we are equal at least in the sense that we “are *endowed by [our] Creator*” with rights. Thus, as Fletcher explains, “[b]ehind those *created* equal stands a

Creator— the source as well of our basic human rights . . .”⁷⁶ More generally, Louis Pojman argues that as a historical matter, the idea of human equality descends from religious rationales. Often the justification takes the form of a claim that all humans are made by, and in the image of, God.⁷⁷ The justification is also expressed in the imagery of family: “The language of human dignity and worth implies a great family in which a benevolent and sovereign Father binds together all his children in love and justice.”⁷⁸ And that rationale can be given more analytical form: Pojman identifies two principal justifications in the religious tradition, which he calls “the Essentialist Argument” and “the Argument from Grace.”⁷⁹

But the ideal of ultraliberal neutrality operates to exclude these sorts of justifications from public discourse,⁸⁰ thus reviving the question: What *is* the justification (if there is one) for this momentous but counterintuitive claim about human equality? The modern ultraliberal position seems powerless to respond. Fletcher observes that “[m]odern philosophical approaches toward equality . . . are strongly committed, . . . but they offer no reason why they are so intensely committed to this value. . . . In the contemporary liberal culture, equality is one of those values that has become so deeply held that it is neither questioned nor justified.”⁸¹ In a similar vein, Louis Pojman examines ten leading secular arguments advanced by theorists such as Dworkin, Rawls, Kai Nielsen, Joel Feinberg, Thomas Nagel, and Alan Gewirth; and he finds all of these arguments wanting. Sometimes the arguments turn on demonstrable fallacies or on flagrant and unsupported discursive leaps; more often they do not actually offer any justification for equality at all but instead simply assert or assume it, or else posit that in the absence of any persuasive justification one way or the other we should adopt a “presumption” of equal worth. . . .⁸² Jeremy Waldron’s recent analysis of Locke’s arguments for equality points to a similar

conclusion.⁸³

Patrick Brennan comments that “[t]he persistent inquirer will find a kind of circularity in the equality-talk, a sort of pseudo-analytic house-of-mirrors that would confirm Michael White in his judgment that equality-talk is destined for triviality, if not downright dishonesty.”⁸⁴ And triviality, dishonesty, or mere evasion or muteness with respect to our most fundamental political commitments hardly provide a secure basis for enduring political community.

In sum, whether we look inward to the domestic “culture wars” or outward to the more global cultural conflicts, the impoverished discourse of ultra-liberalism seems powerless not only to acknowledge and engage the fundamental issues but even to defend its own animating commitments.

D. Toleration as Remedy

The preceding discussion has described two sorts of impoverishment that seem to afflict at least parts of contemporary culture: a sort of spiritual impoverishment (or impoverishment of the soul) manifested in an inability to hold and affirm convictions of the kind that arguably are central to what makes human life distinctively meaningful and valuable, and an impoverishment of discourse that renders us incapable of engaging our most fundamental convictions and differences or of defending our most fundamental commitments. My argument has been that this unfortunate condition is a direct result of the commitment to an ultra-liberal position that tells us, in essence, that when “We the People” are acting in a public capacity, we are not supposed to affirm our most fundamental beliefs— not overtly, at least.

This position produces a sort of squeamishness about even acknowledging that our liberal commitments are grounded in a (contestable but, hopefully, defensible) base position or orthodoxy.

And it in effect seeks to sever the Citizen from the Person. But if the ultra-liberal divide between Citizen and Person is not maintainable (as seems likely), then it looks as if the result will be either a sort of anemic, least-common-denominator culture lacking in conviction or purpose, or else a deceptive civic culture in which participants disguise their true interests and convictions in a homogenizing public vocabulary that is “neutral” but ineffectual, or else some combination of these.

The principal reason for maintaining this unhappy state of affairs, perhaps, is fear of the alternative. If the only alternative to ultra-liberalism is an intolerant illiberalism, that is, then we might prefer to stay with what we have been doing regardless of the dissonances it creates. But the burden of this essay has been, first, that under current conditions there is no warrant for confidence that the ultra-liberal position itself is maintainable in the long run but, second, that there is an alternative: toleration. A position of tolerance allows us to affirm forthrightly that we are acting on the basis of beliefs—beliefs, to be sure, that are substantive and non-trivial and, hence, contestable and, usually, contested. Having acknowledged as much, we would then be in a position to consider, openly and deliberately, whether those beliefs are warranted and whether and how they support toleration of other, inconsistent beliefs.

We might worry that a more candid examination will not end up providing convincing reasons for tolerance: it might lead us to the illiberal position. Realistically, though, this does not seem to be a serious risk. Or, rather, it does not seem to be an objection that an ultra-liberal can cogently make. That is because whatever reasons the ultra-liberal may have for favoring ultra-liberal neutrality (even as a pretense) over illiberalism ought to be capable of being elaborated in the form of cogent rationales for tolerance. This suggestion assumes, perhaps, that the ultra-liberal’s reasons are plausible and admissible ones. But if they are not, then the ultra-liberal should not be averse to being persuaded otherwise.

Conclusion

The essential argument is captured in a brief response by Richard John Neuhaus, editor-in-chief of the journal *First Things*, to a recent essay by Bernard Lewis, the noted historian of Islam. Lewis maintains (at least according to Neuhaus) that the possibility of peace and mutual respect among Muslims and Christians depends on the “relativists” in each religion prevailing over the true believers, or “triumphalists.” If this is in fact Lewis’s view, then it resonates with the “ultra-liberal” response to the challenge of pluralism. But Neuhaus argues that Lewis’s view misconceives the basis of Christian tolerance. “[T]he reason we do not kill one another over our disagreements about the will of God is that we believe it is against the will of God to kill one another over our disagreements about the will of God. Christians have come to believe that.” (Neuhaus admits that the development of Christian tolerance has been slow, complicated, and uneven.) By the same token, “[i]f Islam is to become tolerant and respectful of other religions, it must be as a result of a development that comes from within the truth of Islam, not as a result of relativizing or abandoning that truth.” By contrast, the relativizing strategy “plays into the hands of Muslim rigorists who pose as the defenders of the uncompromised and uncompromisable truth.”⁸⁵

As a historical matter, both responses— truth-oriented tolerance, and the strategy of indifference and skepticism and “relativism” culminating in what I have called “ultraliberalism”— have surely contributed to the domestication of pluralism. But the burden of this essay has been that in the world as it is now and in the face of current challenges both internal and external, the kind of tolerance that is compatible with (and indeed derived from) the affirmation of truth deserves renewed emphasis.

1. Warren Distinguished Professor of Law, University of San Diego. I thank Larry Alexander, Jack Coons, Michael Perry, and Andrew Sabl for helpful comments on an earlier draft. I also benefitted from the very thoughtful responses by Professors Forst and Morgan.
2. To say that a good and attractive regime will be tolerant is not of course to say (as Professor Morgan seems to understand me to suggest) that every regime that can be classified as “tolerant” will necessarily be good and attractive. See Glyn Morgan, *Can Liberal Tolerate Religious Majorities? __ NOMOS __* [draft at 5].
3. Different writers talk about toleration as a “practice” or an “attitude” or perhaps a “virtue.” These dimensions are difficult to disentangle, but my emphasis in this paper is on the “practice” of toleration (which will, to be sure, both grow out of and manifest itself in certain beliefs or attitudes).
4. Toleration thus presents the familiar question of how an entity such as “the state” or “the government” can be said to have or act on beliefs. However, that is not the question with which I am concerned in this essay.
5. Morgan, *supra* note At [draft at 8-16].
6. Cf. Jurgen Habermas, *Intolerance and Discrimination*, 1 *I.CON* 2, 5 (2003) (“Each act of toleration must circumscribe a characteristic of what we must accept and thus simultaneously draw a line for what cannot be tolerated. There can be no inclusion without exclusion.”).
7. In this respect, my use of a three-category scheme for understanding toleration tracks the explanation of Rainer Forst, *Tolerance as a Virtue of Justice*, 3 *Phil. Explorations* 193, 194 (2001).
8. See Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 *J. Contemp. Leg. Issues* 897, 898 (2002) (noting that “[a]ccording to the standard view, . . . [t]he liberal state neither favors nor disfavors any particular belief-system; it is neutral.”).
9. Perhaps the most conspicuous proponent in recent academic writing has been Stanley Fish. See, e.g., Stanley Fish, *Mission Impossible: Settling the Just Bounds between Church and State*, *Colum. L. Rev.* 2255 (1997); Stanley Fish, *Why We Can’t All Just Get Along*, 1996 *First Things* 18 (Feb. 1996).
10. For example, it is possible (and critics often charge) that the ultra-liberal position easily collapses into a form of intolerance. Cf. Stolzenberg, *supra* note 8 at 898 (“Generations of critics have argued that, despite—and indeed because of—its commitments to diversity, tolerance, and pluralism, liberalism is intolerant and inhospitable to certain ways of life and beliefs, especially traditional and illiberal ones.”).
11. Stanley Fish observes that although “modern theorists try in every way possible to avoid” the fact, it is nonetheless true that “[i]f you believe something you believe it to be true, and perforce, you regard those who believe contrary things to be in error.” Fish, *Mission Impossible*, *supra* note 9 at 2256.

12. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

13. Holmes tersely foreshadowed several of the major answering rationales in his *Abrams* dissent: “To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.” *Id.*

14. Cf. Forst, *supra* note 7 at 193 (“[I]t is essential for the concept of toleration that the tolerated beliefs or practices are considered to be objectionable and in an important sense wrong.”)

15. For more detailed consideration of the point, see Steven D. Smith, *Getting Over Equality* 144-47 (New York: New York University Press, 2001).

16. James Gordley observes that “[c]ertainly, if there were a shortage of plausible sounding racial bigots, the state wouldn’t subsidize bigotry and the development of plausible arguments for it simply to ensure their citizens were exposed to them.” James Gordley, *Morality and the Protection of Dissent*, 1 *Ave Maria L. Rev.* 127, 140 (2003).

17. See Alan Wolfe, *The Transformation of American Religion* 67-95 (New York: Free Press, 2003). No doubt with some exaggeration, Martin Gardner colorfully describes the current culture:

Today, you will have a hard time discovering what any prominent Christian actually believes. . . . Who cares? It is not so much that the public is irreligious, but that it is lukewarm, indifferent to religious dogmas. . . .

Millions of Catholics and Protestants around the world now attend liberal churches where they listen to music and Laodicean sermons, and (if Protestant) sing tuneless Laodicean hymns. They may even stand and recite the Apostles’ Creed out of force of habit and not believe a word of it

It is a scandal of American Protestantism that no one knows whether Reinhold Niebuhr did or did not believe in the afterlife taught by Jesus. I once tried to find out by writing to his widow, but she replied in a diplomatic letter that she had to let her husband’s writings speak for themselves. Alas, nowhere in those writings can one find a clear answer to this question. Either Mrs. Niebuhr herself didn’t know, or she wouldn’t tell me. . . .

Martin Gardner, Introduction to G. K. Chesterton, *The Ball and the Cross* vi-vii, Dover ed. (New York: Dover Publications, 1995).

18. *Dennis v. United States*, 341 U.S. 494, 588 (1951) (Douglas, J., dissenting).

19. In this vein, George Fletcher observes that in “a posture of indifference” there is “no issue of tolerance, properly understood”: “Calling my hands-off attitude a matter of tolerance cheapens the virtue” George P. Fletcher, *The Instability of Tolerance*, in *Toleration: An Elusive Virtue* 158, 158 (David Heyd ed., Princeton, NJ: Princeton University Press, 1996).

20. See *supra* note 12. In a letter to Learned Hand, Holmes made the point more dramatically, asserting a “sacred right to kill the other fellow when he disagrees.” The correspondence is recounted in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan. L. Rev.* 719, 755-56 (1975).

21. “But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas” *Abrams*, 250 U.S. at 630.

22. See generally *Early Modern Skepticism and the Origins of Toleration*, Alan Levine ed. (Lanham: Lexington Books, 1999).

23. Bernard Williams thus observes that “with indifference and skepticism, . . . the point will be reached at which” apathy prevails, and “toleration will not be necessary.” But Williams concedes that these attitudes can support “toleration as a matter of practice.” Bernard Williams, *Toleration: An Impossible Virtue?*, in *Toleration: An Elusive Virtue*, *supra* note 19 at 18, 25, 20.

24. For an elaboration of the point, see Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 *S. Cal. L. Rev.* 649, 685-89 (1987).

25. Cf. Jonathan Harrison, *Utilitarianism and Toleration*, 62 *Philosophy* 421, 425 (1987) (presenting as rationale for toleration the claim that “[p]reventing wrong is always expensive, involving paying policemen and detectives and lawyers and prison wardens, and the money may be better spent”).

26. Cf. Fletcher, *supra* note 19 at 162 (“Without these ultimate values, . . . the basis for tolerance collapses.”). See also Williams, *supra* note 23 at 25 (arguing that “it is only a substantive view of goods such as autonomy that could yield the value that is expressed by the practices of toleration”).

27. Brad S. Gregory, *Salvation at Stake: Christian Martyrdom in Early Modern Europe* 85, 86 (Cambridge, Mass.: Harvard University Press, 1999).

28. Cf. Steven H. Resnicoff, *Professional Ethics and Autonomy*, in *Law and Religion* 329, 334 (Richard O'Dair & Andrew Lewis, eds., Oxford University Press, 2001) (emphasis added, footnotes omitted):

In a society governed by Jewish law, rabbinic leaders would use coercion— including physical force if necessary— to induce an individual to perform a commandment requiring a specific action. . . . Jewish law believes that a person is metaphysically affected by his deeds. Fulfillment of a commandment, even if not done for the right reason, leads a person to performing more commandments and, *ultimately, to doing so for the right reason*. . . . Thus, such coercion leads to the coerced individual’s ultimate perfection.

29. Habermas, *supra* note 6 at 4.

30. *Id.* at 5.

31. Indeed, on the not implausible assumption that these religions teach contradictory doctrines (or even explicitly assert the falsehood of the others), it is hard to see how anyone could view them as relevantly equivalent except perhaps by regarding them all as false, or at least by declining to take the propositional content of their teachings at face value in the way the believers themselves typically do. Very likely the popularity of the reciprocity rationale in recent times reflects some such attitude.

32. See the virtual libraries of work by and about John Rawls.

33. See Forst, *supra* note 7 at 196-97.

34. Williams, *supra* note 23 at 26-27.

35. Cf. Fletcher, *supra* note 19 (explaining “instability” of tolerance).

36. Thus, George Fletcher observes that “we would all prefer to have our religion, our political views, or our sexual orientation respected rather than merely tolerated.” Fletcher, *id.* at 159. In a similar vein, John Horton remarks on “the frequently observed pattern that what begins, when people are faced with intolerance, as a demand for toleration becomes transformed into a demand for more than *mere* toleration” John Horton, *Toleration as a Virtue*, in *Toleration: An Elusive Virtue*, *supra* note 19 at 28, 35-36.

37. Michael Walzer, *On Toleration* 52 (New Haven, [Conn.]; London: Yale University Press, 1997) (footnote deleted).

38. Thomas Paine, *The Rights of Man*, in *Reflections on the Revolution in France and The Rights of Man* 267, 324 (Garden City, New York: Anchor Press/Doubleday, 1973) (emphasis in original).

39. See John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 69-70 (Berkeley, Calif.; London: University of California Press, 1998).

40. Cf. John Rawls, *Political Liberalism* 31 (New York: Columbia University Press, 1996) (“[Citizens] may regard it as simply unthinkable to view themselves apart from certain religious, philosophical, and moral convictions”).

41. See Kent Greenawalt, *Viewpoints from Olympus*, 96 *Colum. L. Rev.* 697, 698 (1996).

42. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O’Connor, J., concurring).

43. For my own attempts to show the errors of ultraliberalism, see, e.g., Steven D. Smith, *Barnette’s Big Blunder*, 78 *Chi-Kent L. Rev.* 625 (2003); Steven D. Smith, *Believing Persons*, *Personal*

Believings: The Neglected Center of the First Amendment, 2002 U. Ill. L. Rev. 1233; Steven D. Smith, The Restoration of Tolerance, 78 Calif. L. Rev. 305 (1990).

44. Inconsistencies arise, however, under a strong version of the claim that persons are *constituted by* their beliefs, so that an agent who rejects inegalitarian *beliefs*, for example, would be deemed to be treating *persons who hold those beliefs* with less respect. The claim that persons are constituted by their beliefs, though intuitively appealing on some levels, also seems highly problematic; but this problem lies beyond the scope of this essay.

45. Cf. Larry Alexander, Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism, 12 J. Contemp. Leg. Issues 625, 626 (2002) (“As individuals, we cannot be ‘neutral’ about what is good and what is true. To live is to make choices—to pick A over B because we prefer A, or value A, or believe A to be right.”).

46. Thus, Andrew Koppelman argues that in the midst of raging controversies about the meaning of religious freedom it is nonetheless a secure “axiom” that the “Establishment Clause forbids the state from declaring religious truth.” Andrew Koppelman, Secular Purpose, 88 Virg. L. Rev. 87, 108 (2002). Kent Greenawalt concurs that “[t]he core idea that the government may not make determinations of religious truth is firmly entrenched.” Kent Greenawalt, Five Questions about Religion Judges Are Afraid to Ask, in *Obligations of Citizenship and Demands of Faith* 196, 197 (Nancy L. Rosenblum ed, Princeton, NJ: Princeton University Press, 2000). See also Douglas Laycock, Equal Access and Moments of Silence: the Equal Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 7 (1986) (“In my view, the establishment clause absolutely disables the government from taking a position for or against religion. . . . The government must have no opinion because it is not the government's role to have an opinion.”).

47. See Rawls, *supra* note 40 at 214.

48. Cf. Ronald Dworkin, *Law's Empire* 172 (Cambridge, Mass: Belknap Press, 1986) (arguing that “the community can adopt and express and be faithful or unfaithful to principles of its own, distinct from those of any of its officials or citizens as individuals”).

49. Though the domain of obligatory “public reason” in Rawls’s theorizing seems to have shrunk over the years as Rawls responded to objections by introducing various qualifications, see, e.g., “The Idea of Public Reason Revisited, reprinted in John Rawls, *The Law of Peoples* 131, 133-35 (Cambridge, Mass.: Harvard University Press, 1999), Rawls also quietly acknowledged that if the notion of public reason is viable and attractive then the progression *ought* to run the other way—toward a *larger* scope of application. See Rawls, *Political Liberalism*, *supra* note 40 at 215:

Some will ask: why not say that all questions in regard to which citizens exercise their final and coercive political power over one another are subject to public reason? Why would it ever be admissible to go outside its range of political values? To answer: my aim is to consider first the strongest case where the political questions concern the most

fundamental matters. If we should not honor the limits of public reason here, it would seem we need not honor them anywhere. Should they hold here, we can then proceed to other cases. Still, I grant that it is usually highly desirable to settle political questions by invoking the values of public reason. . . .

50. Cf. Michael J. Perry, *Morality, Politics and Law* 181-82 (New York: Oxford University Press, 1988):

One's basic moral/religious convictions are (partly) self-constitutive and are therefore a principal ground— indeed, the principal ground— of political deliberation and choice. To “bracket” such convictions is therefore to bracket— to annihilate— essential aspects of one's very self. To participate in politics and law— in particular, to make law, or break law, or to interpret law— with such convictions bracketed is not to participate as the self one is but as some one— or, rather, some thing— else.

51. Thus, John Tomasi observes that “[p]olitical norms, even gently and indirectly, cannot help but shape the character of people in their own image.” Consequently, “[l]iberals have increasingly recognized that liberal institutions unavoidably influence the ethical worldviews of all reasonable citizens.” John Tomasi, *Liberalism Beyond Justice* 11, 14 (Princeton: Princeton University Press, 2001).

52. *Gertz v. Robert Welch*, 418 U.S. 323, 339 (1974).

53. Quoted in Tomasi, *supra* note 51 at 14.

54. Alexander, *supra* note 45 at 631.

55. Ronald Beiner, *Philosophy in a Time of Lost Spirit* 55 (Toronto; Buffalo: University of Toronto Press, 1997).

56. *Id.* at 12.

57. Contrary to initial appearances, these phenomena— that is, the lack of and the excess of conviction— are not necessarily contradictory; they may even be complementary. See Martin Marty, *The Public Church* 134-35 (New York: Crossroad, 1981):

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

58. James Davison Hunter, *Culture Wars* 44-45, 71, 44 (New York: Basic Books, 1991) (emphasis in original). Hunter elaborates:

Such objective and transcendent authority defines, at least in the abstract, a consistent, unchangeable measure of value, purpose, goodness, and identity, both personal and collective. It tells us what is good, what is true, how we should live, and who we are. It is an authority sufficient for all time.

Id.

59. Id. at 128.

60. Id. at 156.

61. One familiar response to this concern suggests that liberalism does not exclude the presentation of religious or “comprehensive doctrines,” or of reasons based on such doctrines, in the public sphere: liberalism merely holds that important public decisions should not be *based on* such reasons. I understand Professor Forst to take this position, see Rainer Forst, *Toleration and Truth* __ NOMOS __ [draft at 11] (“That decisions would not be based on reciprocally contested beliefs for which no side can give mutually non-rejectable arguments does not mean that such views would not be allowed in the public realm.”); Rawls’s “proviso” and “wide view” are to similar effect. Rawls, *Political Liberalism*, supra note 40 at li-lii. This position in effect tells citizens: “You’re free to express your deep convictions in public and in political debate— so long as those beliefs don’t ultimately make any difference in the public decisions that are made.” At the very least, this restriction obviously reduces the incentive to present and discuss such reasons in public discourse. Moreover, insofar as the “so long as the reasons make no difference” restriction is embodied in constitutional doctrine— establishment clause doctrine, for example— there remains a significant incentive *not* to present such reasons in order to avoid the risk that a decision will be invalidated based on a court’s perception that the decision was based on an impermissible reason or purpose.

62. Daniel A. Farber, *Missing the “Play of Intelligence,”* 36 *Wm. & Mary L. Rev.* 147, 147, 157 (1994). For a collection of similar judgments by scholars from all points of the political and jurisprudential spectrum, see Steven D. Smith, *The Constitution and the Pride of Reason* 125-26 (New York: Oxford University Press, 1998).

63. See, e.g., *Lawrence v. Texas*, 539 U.S. ____, 123 S.Ct. 2472, 2496-97 (2003); *United States v. Virginia*, 518 U.S. 515, 566-67 (1996); *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992).

64. Robert F. Nagel, *Judicial Power and American Character* 126, 128, 129 (New York: Oxford University Press, 1994).

65. Samuel P. Huntington, *The Clash of Civilizations* 41 (New York: Touchstone, 1997) (“Civilization and culture both refer to the overall way of life of a people, and a civilization is a culture writ large.”).

66. Id. at 69-72.

67. Id. at 81-91, 305-308.

68. Id. at 209.

69. Id. at 305. See also id. at 311 (Western civilization's distinctive "values and institutions . . . include most notably its Christianity, pluralism, individualism, and the rule of law").

70. Id. at 306-07.

71. For example, although Christianity has surely been historically important in the development of Western civilization, it is arguable that its political significance in promoting the values of rule of law and human rights has derived not so much from its distinctively *Christian* theology as from its capacity to carry, support, and develop a *classical* natural law tradition. See, e.g., John Courtney Murray, S. J., *We Hold These Truths* (New York: Sheed and Ward, 1960). And the recent international politics surrounding the Iraq war may subvert Huntington's depiction of a substantially unified "Western" civilization.

72. Cf. Alan Levine, Introduction: The Prehistory of Toleration and Varieties of Skepticism, in *Early Modern Skepticism* 4 (Lanham: Lexington Books, 1999):

Far from attempting to justify liberalism to outsiders or on first principles, Rorty and Rawls prefer not to take up the challenge. Content to harmonize our pre-existing opinions, they do not and cannot address the fundamental challenges that Nietzsche, for example, poses.

73. See generally Ronald Dworkin, *Sovereign Virtue* (Cambridge, Mass.: Harvard University Press 2000).

74. George Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 *Colum L Rev* 1608, 1612-13 (1999) (citations omitted).

75. George P. Fletcher, *Our Secret Constitution* 95 (Oxford; New York: Oxford University Press, 2001).

76. Id. At 102.

77. See also Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, in *Equality: Selected Readings* 295 (Louis P. Pojman and Robert Westmoreland eds, New York: Oxford University Press, 1997), ("The argument implicit in the Judeo-Christian tradition seems to be that God is the ultimate value and that humans derive their value by being created in his image and likeness.").

78. Id. at 295. For a careful argument in the same vein focusing not on equality *per se* but on the equally fundamental idea of human rights, see Michael J. Perry, *The Idea of Human Rights: Four Inquiries* 11-41 (New York; Oxford: Oxford University Press, 1998).

79. The first argument holds that “God created all humans with an equal amount of some property P, which constitutes high value.” The second argument suggests that “actual value may be different in different people but grace compensates the difference.” Pojman, *supra* note 77 at 295.

80. A dramatic example is the controversial Ninth Circuit decision in *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 597), invalidating the phrase “under God” in the Pledge of Allegiance: the phrase “one nation, under God” comes of course from the same speech—the Gettysburg Address,—in which Lincoln asserted that “this Nation under God” was “dedicated to the proposition that all men are created equal.”

81. Fletcher, *Secret Constitution*, *supra* note 75 at 95-96.

82. Pojman, *supra* note 77 at 283-94. Pojman concludes that egalitarian commitments are “simply a leftover from a religious world view now rejected by all of the philosophers discussed in this essay.” *Id.* at 283. Secular egalitarians are free riders, living off an inheritance they view with disdain. And he wonders whether “perhaps we should abandon egalitarianism and devise political philosophies that reflect naturalistic assumptions, theories which are forthright in viewing humans as differentially talented animals who must get on together.” *Id.* at 296.

83. Waldron argues that Locke’s commitment to equality was firmly based in religious assumptions, and that modern efforts to support the commitment have not to this point succeeded. See generally Jeremy Waldron, *God, Locke, and Equality* (Cambridge; New York: Cambridge University Press, 2002). Waldron’s concluding observations sound faintly ominous:

[M]aybe the notion of humans as one another’s equals will begin to fall apart, under pressure, without the presence of the religious conception that shaped it. . . .

Locke believed this general acceptance [of equality] was impossible apart from the principle’s foundation in religious teaching. We believe otherwise. Locke, I suspect, would have thought we were taking a risk. And I am afraid it is not entirely clear, given our experience of a world and a century in which politics and public reason have cut loose from these foundations, that his cautions and suspicions were unjustified.

Id. at 243.

84. Patrick McKinley Brennan, *Arguing for Human Equality*, 18 *J. Law & Relig.* 99, 121 (2002).

85. *Why Aren’t Muslims Like Us?*, *First Things* 60-61 (No. 134, June/July 2003).