

Introduction

Melvin I. Urofsky

Ever since the crack-up of communism in the 1980s, there has been an almost feverish interest in the American Constitution overseas, especially in those countries emerging from under the thumb of the Soviet Union. Within the Constitution no section draws more interest than the Bill of Rights, and there the greatest object of curiosity, veneration and awe is the First Amendment with its guarantees of freedom of expression.

But the First Amendment Speech Clause, which is the focus of this issue and the subject of a series of lectures at the Court in 1999 sponsored by the Society, also confuses many foreigners. While those for whom free speech has been a dream yearn to be able to say what they want, many also believe that there are limits—even in a free society—to what one may say.

In Australia, for example, the rules of libel still reflect nineteenth-century English custom, and a majority of libel suits in Australian courts are filed by government officials against newspapers who have been critical of their performance in office. When I lectured on American rights in eastern Europe for the United States Information Agency, I could always count on a good discussion about the limits of free speech. Much as my audiences envied American freedoms, they had a sense of communal order that supported restrictions on that very speech.

In this issue we get both a historical and a contemporary sense of how the jurisprudence of free speech has evolved in this country. Most constitutional law professors start with the 1919 Holmes opinions in *Schenck* and *Abrams*, and

then jump to the great exposition by Brandeis in *Whitney v. California*.

But recent scholarship argues that we need to go back further in our history if we really want to understand the First Amendment. Murray Dry looks at the infamous Alien and Sedition laws of the late eighteenth century to start our historical journey, and David M. Rabban, whose articles and books have been suggesting earlier antecedents than the World War I cases, looks at what he has called “the forgotten years.”

Students of free speech all learn of the clear and present danger test and, truth be told, that may be all they learn. It is often unclear if they really understand it. In these pages, Douglas Laycock takes us on an illuminating tour of one of the most famous constitutional tests ever enunciated.

But what of the present? Is clear and present danger still a viable test?

Departing from the standard lecture format, the Society invited a panel, moderated by Kenneth Tollett, to discuss that question. The introductory remarks of the panelists, Walter Berns and Philippa Strum, are published here. They serve as a useful preface to Lilian R. BeVier’s survey of free expression during the Warren Court and Burger Court eras.

On a personal note, I had Professor BeVier as a professor when I attended the University of Virginia Law School, and while she and I frequently disagreed, I always found her views, especially on the First Amendment, challenging. Let me take this space to thank her for helping me focus my own thoughts on the issue.

The Origins and Foundations of the First Amendment and the Alien and Sedition Acts

Murray Dry

We seem to accord more importance to the First Amendment freedoms, and the Bill of Rights in general, today than the American Founders did. Where they focused on the structure and powers of government, we focus on individual rights against government. I overstate the difference in order to make this point: the best way to study the First Amendment freedoms of religion and speech is to examine their relationship to the purpose of government as a whole.

This article has three main parts. In part one, I consider the significance of what could be called our country's dual founding: by Puritan settlers in the early seventeenth century and then by rights-based constitution-makers in the latter part of the eighteenth century. In part two, I look to the state constitutions for instruction about the meaning of religious freedom and freedom of speech. In part three, I examine the First Amendment, from the federal Constitution and the Bill of Rights to Madison's response to the Alien and Sedition Acts.

I. Origins and Foundations of Our First Amendment Freedoms

In his introduction to volume one of **Democracy in America**, published in 1835, Alexis de Tocqueville emphasized democratic revolution as the characteristic of his age. "This whole book has been written under the impulse of a kind of religious dread inspired by contemplation of this irresistible revolution...."¹ Tocqueville calls for a "new political science...for a world itself quite new." Moreover, he views America as the country to study,

since "I saw in America...the shape of democracy itself...its inclinations, character, prejudices, and passions...."²

Convinced that freedom cannot survive without good mores, and that good mores require religion, Tocqueville is most impressed with the way religion supports freedom in America. In France, on the other hand, "[m]en of religion fight against freedom, and lovers of liberty attack religions...honest and enlightened citizens are the enemies of all progress, while men without patriotism or morals make themselves the apostles of civilization and enlightenment!"³

Tocqueville's concern for the opposition between religion and freedom in France may account for his discussion of the Puritans in chapter two, which is titled "Concerning Their Point of Departure and Its Importance for the Future of the Anglo Americans." Remarketing on the importance of origins for understanding human beings, and then analogizing nations to human beings, Tocqueville calls this chapter, on the Puritans, "the germ of all that is to follow and the key to almost the whole work."⁴

The Puritans came from England with a common language, the germ of democracy, and a high level of education. The education comes from their religion: "[I]n America it is religion which leads to enlightenment and the observance of divine laws which leads men to liberty."⁵ Thus, the Puritans present Tocqueville with "a marvelous combination,... the spirit of religion and the spirit of freedom."

Religion regards civil liberty as a noble exercise of men's faculties, the world of politics being a sphere intended by the Creator for the free play of intelligence. Religion, being free and powerful within its own sphere and content with the position reserved for it, realizes that its sway is all the better established because it relies only on its own powers and rules men's hearts without external support.⁶

Tocqueville's discussion of Puritan compacts and their criminal codes complicates the relationship between liberty and religion however. Here is a part of the *Mayflower Compact*, which he quotes:

We whose names are underwritten ...having undertaken for the glory of God, and advancement of the Christian faith, and the honor of our king and country... do enact, constitute, and frame such just and equal laws ...as shall be thought most meet and convenient for the general good of the colony....⁷

After quoting a part of Connecticut's criminal code—"If any man after legal conviction shall have or worship any other God but the Lord God, he shall be put to death—," Tocqueville adds:

Blasphemy, sorcery, adultery, and rape are punish[able] by death; a son who outrages his parents is subject to the same penalty. Thus the legislation of a rough, half-civilized people was transported into the midst of an educated society with gentle mores; as a result the death penalty has never been more frequently prescribed by the laws or more seldom carried out.⁸

Tocqueville does not hesitate to call these "ridiculous and tyrannical laws," as he reminds his readers that they were "voted by the free agreement of all the interested parties themselves."⁹

A practicing Catholic, Tocqueville supports a version of Christianity that rejects the severity of the Old Testament in the name of gentle mores. Tocqueville not only celebrates a significant revision in the relationship between religion and government, but he implies that the change was bound to occur, was not fundamental, and hence barely needs to be noted. I think a full account of the relationship between the Puritans' religious polity and the spirit of religion and the spirit of liberty that characterize the American constitutional polity must acknowledge a principled break as well as continuity. That is why I have included the term foundations in the title of this essay. America's origins are with the Puritan settlers but our foundations as a people, as a body politic, rest on the principles of government articulated in the Declaration of Independence. These principles were embodied in the new state constitutions and brought to completion in the new federal Constitution, with its new form of federalism as well as its Bill of Rights.

There are differences between a body politic formed by the principles of the Declaration of Independence, which are in miniature a state-



Alexis de Tocqueville wrote that the Puritans possessed “a marvelous combination,...the spirit of religion and the spirit of freedom.”

ment of John Locke’s political philosophy, and the Puritan body politic. I will use John Winthrop’s sermon on Christian charity, given on board the *Arbella* in the Atlantic in 1630, and the Declaration of Independence to make this comparison. Each document describes government in terms of a covenant. I will focus on the parties to the covenant, the laws that guide them, and the purpose of the covenants.

For the Puritan body politic, the parties to the covenant are the fellows in the company and God, the laws are laws of nature and laws of grace, and the community’s end is “to improve our lives to do more service to the Lord.”¹⁰ In the Declaration, the parties to the covenant are every man to every man, the laws are the law of nature and Nature’s God, and the end is to secure the natural rights flowing from that law, the right to life, liberty and the pursuit of happiness. Winthrop’s law of nature focuses on the duty to “love thy neighbor as thyself,” and the law of the Gospel requires even more, that one love one’s enemies.¹¹

In the Declaration, when a people’s rights are seriously violated, they may alter or abolish their government and establish another. They may appeal “to the Supreme Judge of the world

for the rectitude of [their] intentions,” and they may declare their independence “with a firm reliance on the Protection of Divine Providence,” but it is their decision and they “mutually pledge lives, fortunes and sacred honor.”

Winthrop, in contrast, warns his company that

if we shall neglect the observation of these articles...and dissembling with our God, shall fall to embrace this present world and prosecute our carnal intentions, seeking great things for ourselves and our posterity, the Lord will surely break out in wrath against us, be revenged of such a perjured people, and make us know the price of the breach of such a covenant.¹²

This speech reveals that the original political communities in America were religious polities, even if they were not, in the case of the Puritans, hierarchical. It is not simply that religion was bound up with politics. Divine providence included an understanding of divine punishment. And the way of life the people were instructed to follow required a

much stricter control over desires of the body and passions for this worldly success than the Declaration of Independence's affirmation of the inalienable natural rights of life, liberty, and the pursuit of happiness.

Tocqueville may have deliberately concealed what I am describing as a break from the Puritans to the constitutional polity, in order to be able to convince his countrymen that religion and democratic freedom go together.

I am suggesting that the Declaration of Independence and the subsequent state constitutions and bills of rights reflect new principles of government and that these principles of government derive from the Enlightenment philosophy of the seventeenth and eighteenth centuries. For the Americans, this means Locke and Montesquieu in particular. The Puritan influence was not eradicated with the introduction of these new and different principles, however. Changes in practice tend to take place over time. Older language, and in some cases older laws, remain. Even today, we find indications of the dual character of our founding, or, differently stated, the tension between our Puritan beginnings and our liberal constitutional founding. Here is a contemporary illustration of that dualism: Many Americans do not understand why the Supreme Court has kept prayer out of the public schools, while judges and lawyers generally regard school sponsored prayer as a violation of the Establishment Clause.

II. The First Amendment Freedoms in the State Constitutions

The religious freedom that the First Amendment protects derives from our constitutional polity, not the Puritan polity. I now turn to the earliest manifestations of our First Amendment freedoms. I will start with religion.

A. Religion

From 1776 to 1784, every state but Rhode Island and Connecticut framed a new constitution; six of them, Virginia, Pennsylvania, Maryland, North Carolina, Massachusetts, and New Hampshire, included bills of rights as preambles

to the frame of government, in their constitutions. These bills of rights contain statements of the purpose of government similar to the Declaration of Independence. But the statements about religion differ. Here is Virginia's:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.¹³

Pennsylvania's provision also contains explicit prohibitions against compelled attendance of religious worship or financial support.¹⁴ But the Massachusetts bill of rights authorized the towns, parishes and precincts to provide financial support for public Protestant teachers of religion, and the legislature to require attendance, subject to considerations of conscience and convenience.¹⁵ John Adams, the main author of the Constitution, described the laws of Massachusetts "the most mild and equitable establishment of religion that was known in the world, if indeed they could be called an establishment."¹⁶ Massachusetts also required that the governor be a Christian. Except for Virginia and New Jersey, every other constitution had some religious requirement—either belief in God, Christianity, or Protestantism—for office holding, and five states had religious qualifications for the enjoyment of civil rights. These provisions reflected the view, stated in the Massachusetts Constitution, that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality...."¹⁷ This was Tocqueville's argument about mores and religion, used here to justify government support for religion.

The fullest debate over public support for religious instruction took place in Virginia. That state's religious freedom clause did not expressly prohibit such support, and the legis-

lature debated General Assessment bills twice during the Confederation period.

The first effort was made in 1779, partly in response to Jefferson's bill for establishing religious freedom. Jefferson's preamble began as follows.

Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone....

Jefferson goes on to argue "that our civil rights have no dependence on our religious opinions," and moreover "that truth is great and will prevail if left to herself; that she is the proper . . . antagonist to error..."¹⁸ This passage reveals an interesting connection between our First Amendment freedoms; what Jefferson, following Locke and Milton, maintains about religious opinions, John Stuart Mill extends to political opinions; and later Justice Oliver Wendell Holmes, Jr., brings it into American constitutional law as the marketplace of ideas.¹⁹

Neither Jefferson's bill nor the first Assessment bill was passed in 1779 and the issue was not reconsidered until after the War. In 1784, a second Assessment Bill was proposed and it had strong support. The proponents argued that legislative support for teachers of religion was justified because Christian knowledge tends to "correct the morals of men, restrain their vices, and preserve the peace of society." They also argued that it was constitutional,

since no distinctions were recognized "amongst the different societies or communities of Christians...." Quakers and Menonists were permitted to decide how their money could best be used "to promote their particular mode of worship."²⁰

When a final vote was delayed until after the next election, Madison took the opportunity to write out his objections to the bill and send it to his political friends, who circulated it among the people in 1785, urging them to send the legislature resolutions opposing Assessment. As a result of Madison's efforts, along with the efforts of the Baptists and the Presbyterians, the Assessment Bill was defeated and Jefferson's bill was passed in 1786.

Madison's **Memorial** takes the form of a petition from the people addressed to the legislature. It consists of fifteen points. Madison's central point was that "the establishment in question is not necessary for the support of Civil Government." I am interested in his first statement, which resembles Jefferson but is also distinctively Madisonian.

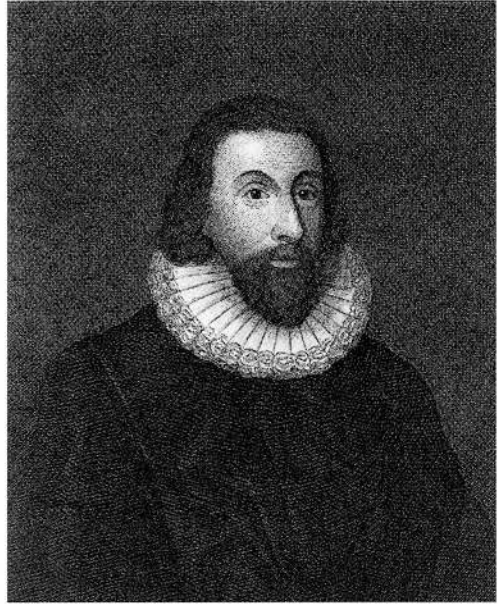
Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable because the opinions of men, depending only on the evidence contemplated by their own minds[,] cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.²¹

In her commentary on Madison's **Memo-**

rial, Eva Brann points out that Madison's definition of religion, taken from the Virginia Declaration of Rights, "is a conflation of the Roman notion of obligatory performance and the biblical idea of obedience to the Creator, while the Christian salvational sense, to be introduced in the middle paragraphs, is here missing."²² Since the divine duty is a right in relation to other men, it must be "*individually* discharged." Brann also notes that Madison's account of the separation of the realms of religion and government differs from Roger Williams's account of the "garden of the church and the *wilderness* [Brann's emphasis] of the world" in this manner:

In contrast, the precedence of the religious realm set out in the Memorial is not seen from the perspective of the world beyond, but from the position of a practicing citizen of *this* world, albeit with prior obligations. This is precisely why the functionaries of civil society may not invade the realm of religion—because that realm is here conceived as belonging to the active life of the world, not to civil society but certainly to society. The suspicion and contempt of the world, on the other hand, against whose intrusions the soul and the church must be guarded, belongs to *Christian* liberty, a *theological condition* and not a *civil right*.²³

Where Jefferson's bill referred to the extension of "our religion" by "its influence on reason alone," "Madison's civil theology," by encompassing all religions, Brann argues, "is a far more genuine grounding for religious pluralism."²⁴ At the same time, the prominence that Madison gives to "the active life of the world," in contrast to Roger Williams' preference for the "garden of the church" over the "wilderness of the world," agrees with Jefferson. This fact tells against historian Mark DeWolf Howe's argument that Williams' influence on the First Amendment was greater than Jefferson's.²⁵ Williams was the first to use the metaphorical "wall of separation" language, in a letter written to John Cotton from London in 1644. Jefferson appropriated the



The sermon on Christian charity given by John Winthrop aboard the *Arbella* in the Atlantic in 1630 included an understanding of divine punishment as well as of divine providence. He instructed his fellow Puritans to control strictly their desires of the body and their passions for worldly success.

phrase, as an interpretation of the First Amendment's religion clauses, in a public address to the Baptists of Danbury Connecticut in 1802.²⁶ That both Williams and Jefferson could use the same metaphor to describe church-state relations reflects what I have called our dual founding. I turn now to freedom of speech.

B. Freedom of Speech and Freedom of the Press

The state constitutional provisions concerning freedom of speech and freedom of the press address three points and are consistent from state to state: three state constitutions include a "Speech and Debate Clause" for lawmakers (Maryland, Massachusetts, and New Hampshire); eight secure the people's right to freedom of speech and press; and six states provide for the people's right to assemble and petition the government. What does the freedom of speech or of the press mean? Delaware's provision is the most complete.

The press shall be free to every citizen

who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty. In prosecutions for publications investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury may determine the facts and the law, as in other cases.²⁷

This reflects a liberalized version of English common law on freedom of the press. To understand it, we should turn to Blackstone's **Commentaries on the Laws of England**, the authority in England and America from its publication in 1765-1769. Blackstone describes liberty of the press at the end of his chapter "Of Offences Against the Public Peace," in particular after his discussion of libel. Libels as public offenses, or seditious libels, are as

malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed.²⁸

In criminal libel, the truth can be no defense "since the provocation, and not the falsity, is the thing to be punished criminally...." That is because "the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law."²⁹ In a civil action, however, "a libel must appear to be false, as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace...." Consequently, Blackstone continues, "the *liberty of*

the press, properly understood, is by no means infringed or violated" by subsequent punishments for libel, only by "previous restraints upon [the] publications." Punishment for "any dangerous or offensive writings...is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."³⁰

Blackstone's account suggests that there is a link between the two First Amendment freedoms. As Americans thought more about the implications of government based on consent of the governed and limited in its object to securing the rights of man, they were likely to view religion in terms of an individual right and freedom of speech as another right that is essential for holding officials responsible. The occasion to press this latter point did not arise until a decade after the Constitution's ratification.

Until then, the English common law principle was accepted, with one important qualification. The qualification arose out of the famous John Peter Zenger case, decided in 1735. Zenger printed criticism of the governor of New York. Zenger's lawyer, Andrew Hamilton, took the position that the law favored truth as a defense and a jury decision on the merits. The presiding judge ruled against Hamilton on the law and instructed the jury to limit themselves to the question whether Zenger printed the material that the judge found libelous. The jury acquitted, much to the delight of the crowd, as editor James Alexander reported. The Delaware constitution reflected the liberalized position that Zenger's lawyer advocated, unsuccessfully to the judge but successfully to the jury. This example of jury nullification shows how legal precedent may lag actual practice.³¹

III. The First Amendment Freedoms in the Federal Constitution and in the Bill of Rights

A. The Federal Convention and the Ratification Debate

The Framers of the federal Constitution, who met in the summer of 1787 in Philadelphia, hardly mentioned the subjects of freedom of speech or religion. They focused, instead, on

creating a genuine government for the union, one that did not rely on state requisitions, but had full powers to raise its own taxes and armies. They created a new form of federalism, one that included a full government of the union, albeit a government with an enumeration of legislative powers and which utilized two forms of legislative apportionment. Federalism plays a major role in the framing and debate over the meaning of the First Amendment.

Toward the end of the Convention, on August 20, Charles Pinckney proposed a series of Bill of Rights provisions, including these two:

The liberty of the press shall be inviolably preserved;

No religious test or qualification shall ever be annexed to any oath of office under the authority of the U. S.³²

The prohibition on religious tests or oaths became a part of the Constitution (VI-3). Provision for liberty of the press failed because the Framers did not think the power of Congress extended that far. I am not sure why the Framers did not think the same about religious oaths. A jury trial provision failed, at least in



In 1734 British troops burned copies of John Peter Zenger's *Weekly Journal* because it printed criticism of the governor of New York.



“It is not the bar, printing and publishing of a paper that will make it a libel,” argued defense counsel Andrew Hamilton during Zenger’s trial, “the words themselves must be libelous, that is, false, scandalous, and seditious, else my client is not guilty.” The jury acquitted.

part because there were different practices in the states.

I think the main reason why the Constitution contained no bill of rights is that it took a while for the advocates of the Constitution to figure out that the case for a federal bill of rights was no different than was the case for a state bill of rights. The original Federalist position was that since the powers given were enumerated, what was not enumerated remained with the states. But the enumeration, plus the Necessary and Proper Clause, left uncertainty concerning the scope of federal powers.

Once the Federalists came to this conclusion, and Madison, the father of the Constitution, was the first to grasp the issue fully, they endeavored to provide a bill of rights which did not compromise the structure of the federal government or its powers in relation to the states. This task was complicated by the Anti-Federalists’ strategy. While they advocated a bill of rights after the fashion of the state bills of rights, they also called for a second convention, with a view toward weakening the government altogether. After the Massachusetts Federalists got its ratification convention to

ratify unconditionally, with the promise of prompt consideration of amendments, subsequent Anti-Federal proposals included many amendments that would have limited the powers to tax or raise armies during peace time. So when Madison introduced amendments in the First House, he had to confront two challenges: many Federalists thought it was too soon to consider amendments and that the major business was the creation of the new government; and the Anti-Federalists sought amendments that would weaken the new government.³³

B. The Bill of Rights

When he introduced his amendments on June 8, 1789, Madison made clear that he had no intention of reopening any question concerning the structure or powers of the new government.³⁴ Madison proposed to insert the amendments into the original Constitution. The First Amendment freedoms would have been part of article I, section 9 in that case. The House chose to keep the original Constitution, which contained the signatures of the Framers, un-

changed, and to place the amendments at the end of the document. The House and the Senate passed twelve amendments, all based on Madison's proposals. Only after the first two, dealing with representation and compensation, were not ratified did the first amendment become the First Amendment as we know it.

Here are Madison's proposals for religious liberty and freedom of speech as they were to be applied to Congress.

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.³⁵

The statement on religious freedom covers more than rights of conscience, and hence might be taken to prohibit general assessment as well as restrictions on belief or worship. The statement of freedom of speech and freedom of the press is full, but it makes no reference to seditious libel or to the role of the jury in such cases.

On August 15, the full House took up Madison's religion proposal, which by then read: "no religion shall be established by law, nor shall the equal rights of conscience be infringed."³⁶ The responses varied. Mr. Silvester feared the language might be misunderstood and "have a tendency to abolish religion altogether." Mr. Sherman thought the amendment unnecessary, which was Madison's original position on the Bill of Rights altogether. Mr. Carroll thought the amendment would conciliate the minds of the people. Madison explained what he intended: "that congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."³⁷ This was in reply to the concern that Congress might pass tax laws that infringe on the rights of conscience

or establish a national religion. Mr. Huntington, sharing Mr. Silvester's concern, asked what effect the amendment might have on religious establishments in the states. While he understood the amendment to mean what Madison said, he nonetheless thought that it could be interpreted to threaten those New England states that had religious establishments. In particular, he feared that federal courts would not be able to uphold obligations against individuals for support of ministers or the building of places of worship. Madison, in reply, was willing to add the word "national," which was in his original proposal, but that brought an objection from Mr. Gerry, on the grounds that the government was federal not national (this discussion had already occurred in the Federal Convention). Mr. Livermore proposed an amendment to read "congress shall make no laws touching religion, or infringing the rights of conscience," and, after Madison withdrew his motion, the House passed Livermore's motion, 31-20.³⁸ Then on August 20, the House accepted Mr. Ames' motion to change the resolution to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof; or to infringe the rights of conscience. The final House resolution substitut[ed] 'prohibiting' for 'to prevent.'³⁹

While there are records of the House debate only, there are records of Senate motions. On September 9 it agreed to incorporate the religion and the speech clauses into one amendment. Finally, in a joint conference committee, both Houses agreed to the final language.

Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances.⁴⁰

The House also discussed religion on August 17, when it considered Madison's proposal concerning militias.

A well-regulated militia, composed of

the body of the people, being the best security of a free state; the right of the people to keep and bear arms shall not be infringed, but no person, religiously scrupulous, shall be compelled to bear arms.⁴¹

Most of the comments turned on the question whether this exemption from conscription should be constitutionally compelled or left to legislative discretion; some who favored it as a constitutional right wanted to require a payment in lieu of service. Mr. Sherman thought it should be left to the states' discretion, as they would be responsible for raising the militia; he also pointed out that those with conscientious objections would object to making a payment. Mr. Benson agreed and moved to strike the clause: "No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the government." The motion to strike the clause was defeated by a narrow 22-24 vote.⁴² Further discussion took place on August 20, and the language was changed to "No person religiously scrupulous shall be compelled to bear arms in person". Two days later, however, the House style committee dropped this without comment when it reported the articles of amendment, with the remaining religion provisions together as the third article.⁴³

The House considered the following free speech provisions on August 15. "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed."⁴⁴ After a brief consideration whether the right of assembly had to be mentioned, Mr. Tucker, an Anti-Federalist, moved to add the people's right "to instruct their representatives." This provoked a much longer discussion than the two separate discussions on religion put together. Madison spoke cogently against the people's right of instruction, and the motion was defeated by a vote of 10 to 41.⁴⁵ Madison pointed out that the people al-

ready had the free speech right to communicate their sentiments and wishes to their representatives. Madison thought popular sovereignty allowed the people to change their government, via revolution, but it did not grant them a constitutional right to bind their representatives with written instructions.⁴⁶ I think Madison's discussion of the people's right to communicate their sentiments to their representatives prefigures his later argument for an expanded understanding of freedom of speech.

The deliberations in the First Congress do not yield a clear conception of what the Framers meant by the two religion clauses. Consider the Establishment Clause. Does the prohibition on passing any laws respecting an establishment of religion require only neutrality as between religions, which is known as "non-preferentialism"? Or does it require a complete neutrality as between religion and irreligion, as the Supreme Court held in 1947? The difficulties lie partly in the language and partly in the varied practices in the several states. To start with what we can conclude from the discussion, the Framers intended to leave state practices alone. That is why Madison's separate proposal to prohibit the states from violating the rights of conscience failed. Next, when Madison was arguing against the need for a bill of rights, in the Virginia Ratification Convention, he asserted that Congress had no right to "intermeddle with religion." He surely did not change his mind on this matter. Historian Thomas Curry, citing Madison, argues against "non-preferentialism." He also notes that Americans did not make a distinction between permissible and impermissible forms of establishment. "American history offers abundant examples of writers using the concept of preference, when, in fact, they were referring to a ban on all government assistance to religion."⁴⁷ Adams' characterization of Massachusetts' mild establishment referred to its qualifications for office, not assessment. The disputes over assessment, in New England and Virginia, Curry claims, were not over establishment but over the meaning of "freedom of religion."⁴⁸

And on that point, the Jefferson/Madison position won.

Perhaps so, but I think the evidence is inconclusive. Here is another illustration of the dual character of the American founding. The only point that had to be made clear was that the religion clauses would leave the states unaffected; beyond that they could not go without risking serious disagreement. This illustrates why a constitutional founding is never complete. The language is majestic but as tough cases arise in courts, judges will be required to ascend from the particular details of history to a principled understanding of the meaning of freedom of religion.

The decision to leave the matter of exempting the religiously scrupulous from the duty to bear arms to the legislature, and not to include it in the Constitution, is relatively clear. This decision has a bearing on the Free Exercise

Clause. If we can generalize from what was said and decided in the First Congress, special exemptions from otherwise constitutional laws can be granted by the legislature. The Supreme Court has tended to follow this, although when it was confronted with the conscientious objector cases, it expanded the law. It interpreted "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" to encompass any serious ethical or moral objection to all wars.⁴⁹

I turn now to the episode that provoked Madison to think more about freedom of speech.

C. The Alien and Sedition Acts, the Virginia and Kentucky Resolutions, and the Virginia Report.

The Alien and Sedition Acts were passed



The Alien and Sedition Acts were passed in 1798 in the wake of the revolutionary French government's refusal to meet the three person delegation (left) President John Adams sent to Paris to try to reestablish diplomatic relations, broken off after the Jay Treaty. Talleyrand is represented here as a greedy, multiheaded monster demanding a bribe from the American envoys in order to commence negotiations.



The Sedition Act, which made it a crime to criticize the U.S. government or its leaders, became law in 1798 and was repealed in 1801. Of the twenty-five people arrested under the act, one was Rep. Matthew Lyon of Vermont, shown in a contemporary engraving attacking a fellow member of Congress.

in June and July 1798, in the wake of the Revolutionary French government's refusal to meet the three person delegation President John Adams sent to Paris to try to reestablish diplomatic relations, broken off after the Jay Treaty. French foreign minister Talleyrand sought an American loan and a bribe for the Executive Directory before negotiations could commence, and that provoked the now famous "No, no; not a sixpence."⁵⁰ When Adams notified Congress of the failure of the mission, he referred to Talleyrand's go-betweens as "X, Y and Z."⁵¹ This became the name of the affair that provoked the Alien and Sedition Acts, the Virginia and Kentucky Resolutions, the first organized political party, and Jefferson's election to the presidency in 1800, which he called "the second American Revolution."

The Alien Acts gave the President special powers to deport dangerous and enemy aliens. These laws raised due process but not free speech questions.

We are interested in the Sedition Act. It made unlawful any attempt at insurrection, riot, or unlawful assembly or any counseling or advising or attempt to procure such an insurrection (section 1). It also outlawed any writing, printing, uttering or publishing or the assisting in any writing or publishing of false and scandalous material against the Government of the United States, with the intent to defame the Government or the members of Congress or the President (section 2). The penalties were not to exceed a two thousand-dollar fine and two years in prison.⁵² The Act incorporated the Zengerian principles of allowing the jury to render a general verdict and allowing the defendant to offer evidence of the truth as a defense. It reflected an advance on the common law version of the "no prior restraint" rule. But then it was the first time the Americans were confronted with such a law, and only Republicans were prosecuted under it.

The Virginia and Kentucky Resolutions of

1799-1800, authored by Madison and Jefferson respectively, argued against the Sedition Acts solely on the basis of federalism; that means that Congress had no power to pass such laws. We are confronted with the same problem we noted with the Establishment Clause. If the Framers meant to rule out any congressional power over speech, in contrast to whatever power the state governments might have, they should have done a better job. And here, unlike with religion, the state provisions are similar to one another and to the First Amendment. The complete federalism argument must start from the original Constitution's enumeration of powers. The Virginia and Kentucky Resolutions do that. When Madison drafted an elaboration of the Virginia Resolutions, known as the Virginia Report, in 1800, he restated his federalism arguments but he also broke new ground in his understanding of freedom of speech.

Madison argued that the common law understanding of freedom of speech did not exhaust the meaning of that freedom in republican America because "the people, not the government, possess the absolute sovereignty." Moreover, Madison maintained that the practice in England was more liberal than its common law principles, and "the practice in America must be entitled to much more respect."⁵³

I think that Madison overstated the significance of the difference between the British Constitution and the American Constitution. The rights of man were understood by the Colonists to be rights of Englishmen, and they included the right of representation, and, thus, the right to criticize and displace members of the House of Commons. But a thoroughly elective government is likely to take public criticism of government more seriously. In addition, Madison's claim that the actual practice of freedom of the press is more extensive in both countries than is the older legal principle rings true, as we noted in the Zenger case and the absence of any sedition act until 1798. Madison goes on to say that "[s]ome degree of

abuse is inseparable from the proper use of every thing; and in no instance is this more true, than in that of the press."⁵⁴

What was Madison's understanding of freedom of the press? Madison referred to the magnitude of federal powers, the distance of the federal government from its constituents, and the difficulty of communicating adequate knowledge to them. He then asked whether such considerations might not

account for the policy of binding the hand of the federal government, from touching the channel which alone can give efficacy to its responsibility to its constituents; and of leaving those who administer it, to a remedy for injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties.⁵⁵

This indicates that federal officials should be able to gain satisfaction against libels in the state courts. But what kind of libel action could they bring or have brought, criminal or civil? Madison's statement about a more speech-protective rule than the common law provided requires protection of the people against any seditious libel action, prosecuted in either federal or state courts.

Madison confirmed this when he criticized the liberalized approach to seditious libel. This allowed a defendant to use truth as a defense and gave the final say over matters of law as well as fact to the jury. First, Madison noted that even if the matter concerns facts alone, it can be difficult to provide "the full and formal proof, necessary in a court of law."⁵⁶ Second, "opinions, and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves...."⁵⁷ Then Madison criticized the "intent to defame" requirement of the liberalized seditious libel law in this manner. Seditious libel laws punished truthful statements of facts

or opinions and inferences from facts whose tendency was to create animosities and to disturb the peace. Moreover, the more true, or thought to be deserved, the charges, the more likely the speech would produce the result that seditious libel punishes. That meant that the people are disabled from criticizing their government and its officials in the name of fear of disturbing the peace.⁵⁸ With such an argument Madison transcended his federalism approach to the subject. He still affirmed that all libel actions must be prosecuted in state courts, but his critique of seditious libel must be applicable to the state governments as well as the federal government. Otherwise, the people would be in the strange position of not being able to criticize their state government officials; they would have sacrificed their freedom for the sake of federalism. This is Leonard Levi's great discovery: that the attack on seditious libel was not made before the Republicans were confronted with the Sedition Act of 1798.⁵⁹

The Supreme Court applied Madison's argument in its landmark *New York Times v. Sullivan* decision.⁶⁰ The Court required public officials to prove actual malice, or reckless disregard for the truth, in order to be able to win a libel judgment. The Court pointed out that allowing public officials to win large civil libel judgments against newspapers for publishing reports or political advertisements that contained factual inaccuracies which were at most negligent, but not malicious, would have the same chilling effect on free speech that seditious libel laws had.

Conclusion

I close by returning to my observation that today most people identify with the Bill of Rights more than the Constitution, whereas the founders appear to have concentrated on the Constitution. In large measure this change reflects the successful development of judicial power, especially the Supreme Court's expounding of the Constitution's meaning in particular cases and controversies. I believe my

account of the origins and foundations of the First Amendment has shown two things. First, freedom of religion and freedom of speech must be understood in terms of the character of the republican form of government that the Constitution guarantees. Second, before the institution of judicial review was established, the American founders, and especially James Madison, successfully addressed important constitutional arguments to the people. As the country learned from its recent experience with impeachment, there is a place for the people and their political branches to take constitutional questions seriously. And when they do, they demonstrate that the Constitution's First Amendment freedoms must be understood within the framework of a modern republican polity. Sometimes this requires the affirmation of rights against the government, and sometimes it requires a recognition that government is necessary to secure these rights.

Endnotes

¹ *Democracy in America*, ed. by J. P. Mayer, Harper and Row, 1966, p. 6.

² *Ibid.* p. 12.

³ *Ibid.* p. 11.

⁴ *Ibid.* p. 26.

⁵ *Ibid.* p. 38.

⁶ *Ibid.* p. 40.

⁷ *Ibid.* p. 32.

⁸ *Ibid.* pp. 35.

⁹ *Ibid.* p. 36.

¹⁰ John Winthrop, "A Model of Christian Charity," written on board the Arbella on the Atlantic Ocean, in *The Puritans in America: A Narrative Anthology*, ed. by Alan Heimert and Andrew Delbanco, (Cambridge, Harvard University Press, 1985), p. 89.

¹¹ *Ibid.* p. 84, quoting Matthew 5.44.

¹² *Ibid.* p. 90-91.

¹³ *The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies*, compiled and edited by Francis Newton Thorpe, 7 vols. (Government Printing Office, Washington, 1909), vol. 7, p. 3814, section 16 of the Bill of Rights. This work will be subsequently cited as Thorpe.

¹⁴ *Ibid.* resolution 2, in vol. 5 p. 3082.

¹⁵ *Ibid.* vol. 3. pp. 1899-1900.

¹⁶ Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment*, (New York, Oxford University Press, 1986) p. 131.

¹⁷ In Thorpe, article III, vol. 3, p. 1889.

¹⁸ "A Bill for Establishing Religious Freedom," in *The Portable Thomas Jefferson*, ed. by Merrill D. Peterson,

(New York, Viking Press, 1975), p. 251-253.

¹⁹ See Justice Holmes' dissent in *Abrams v United States*, 250 U.S. 616, 630 (1919).

²⁰ Thomas E. Buckley, S.J. **Church and State in Revolutionary Virginia, 1776-1787**, (Charlottesville, University Press of Virginia, 1977) p. 188-189.

²¹ **The Papers of James Madison**, ed. by Robert A. Rutland et. al. (Chicago and London, University of Chicago Press, 1973), vol. 8, p. 299 (hereinafter cited as **PJM**).

²² "Madison's 'Memorial and Remonstrance': A Model of American Eloquence," in **The Past-Present: Selected Writings of Eva Brann** (Annapolis, Maryland, St. John's College Press, 1997), p. 216.

²³ *Ibid.* p. 217.

²⁴ *Ibid.* pp. 217-218, quoting from Jefferson's "Bill for Establishing Religious Freedom," in Peterson, *supra* note 18, p. 251.

²⁵ Mark DeWolfe Howe, **The Garden and the Wilderness: Religion and Government in American Constitutional History**, (Chicago & London, The University of Chicago Press, 1965) p. 19.

²⁶ Peterson, *supra* note 18, pp. 303-304.

²⁷ Section V of Delaware's Constitution of 1792, in Thorpe, vol. 1, p. 569.

²⁸ **Commentaries on the Laws of England**, a facsimile of the First Edition of 1765-1769, in 4 volumes (Chicago & London, The University of Chicago Press, 1979) vol. 4 chapter 11, p. 150.

²⁹ *Ibid.* p. 150.

³⁰ *Ibid.* pp. 150-152.

³¹ See **A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal**, by James Alexander, ed. by Stanley Nider Katz, (Cambridge, Belknap Press of Harvard University Press, 1963). My remarks draw on Katz's introduction.

³² Max Farrand, ed. **The Records of the Federal Convention of 1787**, revised edition in four volumes (New Haven, Yale University Press, 1937), vol. II, pp. 341-342.

³³ See Robert A. Goldwin, **From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution**, (Washington D. C. AEI Press, 1997).

³⁴ **Creating the Bill of Rights: The Documentary Record from the First Federal Congress**, ed. by Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, (Baltimore and London, The Johns Hopkins University Press, 1991), p. 79.

³⁵ *Ibid.*, p. 12.

³⁶ *Ibid.*, p. 157.

³⁷ *Ibid.*

³⁸ *Ibid.* pp. 158-159.

³⁹ *Ibid.* p. 30, note 9.

⁴⁰ *Ibid.* pp. 49-50.

⁴¹ *Ibid.* p. 182.

⁴² *Ibid.* p. 184.

⁴³ *Ibid.* pp. 198-199, 387-388. I am grateful to John Witte, Jr., for pointing this out in his book, **Religion and the American Constitutional Experiment: Essential Rights and Liberties** (Westview, Boulder, Co. 2000), p. 71.

⁴⁴ *Ibid.* p. 159.

⁴⁵ *Ibid.* p. 177.

⁴⁶ *Ibid.* p. 167.

⁴⁷ Curry *supra* note 16, p.211.

⁴⁸ *Ibid.* pp. 211, 213.

⁴⁹ See *United States v. Seeger* 380 U.S. 163 (1965) and *Welsh v. United States* 398 U.S. 333 (1970).

⁵⁰ James Morton Smith, **Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties**, (Ithaca, New York, Cornell University Press, 1956) p. 6.

⁵¹ *Ibid.* p. 7.

⁵² The Alien and Sedition Acts are printed in Henry Steele Commager, ed. **Documents of American History**, seventh ed. 2 vols. (New York, Meredith Publishing Company, 1963) vol 1, pp. 175-178.

⁵³ **PJM**, *supra* note 21, vol. XVII, pp. 336-338.

⁵⁴ *Ibid.* p. 338.

⁵⁵ *Ibid.* p. 341.

⁵⁶ *Ibid.* p. 343.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* p. 344.

⁵⁹ Leonard W. Levy, **Emergence of a Free Press**, (New York and Oxford, Oxford University Press, 1985).

⁶⁰ 376 U.S. 254 (1964).

Free Speech: The Lost Years

David M. Rabban

In this essay, I intend to cover three basic topics. First, I will explain how I became interested in the history of free speech in the United States before World War I. Second, I will present an overview of my unexpected discoveries about this history in the years between the Civil War and World War I. Finally, I will conclude by pointing out what I perceive to be some striking similarities between the analysis of free speech before World War I and significant current criticisms of First Amendment decisions by the Supreme Court since the 1970s.

My interest in free speech before World War I first developed while I was a student at Stanford Law School between 1971 and 1974. During my three years at Stanford, I took general survey courses in constitutional law and American legal history, advanced courses in constitutional law, and seminars in constitutional history and free speech. As I completed these classes, I increasingly was struck by the common, though largely unarticulated, assumption that no significant legal interpretation of free speech had occurred between 1801, when the Sedition Act of 1798 expired, and 1917, when Congress passed the Espionage Act soon after the United States entered World War I. Scholars typically viewed Justice Holmes' 1919 decision in *Schenck v. United States*¹ as the Supreme Court's initial confrontation with the meaning of free speech, and "Freedom of Speech in War Time,"² published three months later by Professor Zechariah Chafee, Jr., as the earliest major law review article dealing with the subject. They similarly regarded the American Civil Liberties Union (ACLU), founded in 1920, as the first significant organization devoted to defending freedom of expression. Many perceived the legal history of free speech since World War I primarily as the development of a "worthy tradition"³ of protection for unpopular speech, begun by the famous, mostly dissenting, opinions of Justices Holmes and Brandeis from 1919 through the 1920s, and reaching fruition in a series of landmark decisions by the liberal Supreme Court in the 1960s and early 1970s.

By the end of my third year of law school, I questioned the assumed absence of legal disputes over free speech during the long period between 1800 and 1917. The social unrest of the late nineteenth and early twentieth centuries—the years immediately before the supposed beginning of First Amendment jurisprudence—seemed especially likely to have produced debate and litigation about free speech. Just in the decades immediately before 1917, I suspected, agitation by workers, anarchists, and advocates of birth control tested the meaning of free speech.

My hunch proved correct, and my recent book, **Free Speech in Its Forgotten Years** (Cambridge University Press, 1997), is the result. An enormous variety of cases at all levels of the judicial system refutes the widespread assumption that litigation over free speech began abruptly with prosecutions under the Espionage Act of 1917. These cases, however, have been obscured ever since Chafee minimized and mischaracterized them in his 1919 article, “Freedom of Speech in War Time.”⁴ Relying uncritically on Chafee, subsequent scholars have not independently examined the pre-war period. They exceed even Chafee in their neglect of the substantial litigation over free speech before World War I. For example, no major casebook on constitutional law includes a single decision before 1917 in its section on freedom of expression.⁵

Only a few scholars have tried to explain the assumed absence of earlier judicial encounters with free speech issues. Like most people interested in constitutional matters, these scholars think mostly about the federal courts, particularly the Supreme Court. As a result, they have focused on possible factors limiting federal jurisdiction. The text of the First Amendment prohibits only Congress from abridging free speech. Some have asserted that the Sedition Act of 1798, which expired in 1801, was the only federal legislation before the Espionage Act of 1917 that posed significant threats to free speech. An important Supreme Court decision in 1812 held that federal courts did not have jurisdiction over common-law crimes,⁶ thereby reducing their exposure to free speech issues. The ratification of the Fourteenth

Amendment following the Civil War introduced federal jurisdiction over various forms of state action, but the Supreme Court did not “incorporate” First Amendment freedoms into the rights protected by the Fourteenth Amendment until 1925.⁷ During the period before incorporation, scholars assumed, state deprivations of free speech could not be litigated in federal courts. Hardly anyone thought about developments within the states. An occasional comment, however, observed that states rarely passed legislation that implicated their own constitutional guarantees of free speech.⁸

Examination of legal decisions before World War I reveals that some of these explanations for the assumed lack of free speech litigation are incorrect or incomplete. The Sedition Act of 1798 was not the only federal legislation that raised free speech issues before 1917. Congress passed the Comstock Act of 1873, which prohibited the interstate mailing of obscene material, and the Alien Immigration Act of 1903, which provided for the exclusion of aliens who advocated anarchist doctrines. Both of these acts produced Supreme Court decisions that affected speech, as did other postal legislation and an 1876 statute that prohibited federal employees from financial involvement in political campaigns. Requests for injunctions against labor leaders for expression alleged to violate federal law provided another source of free speech litigation in the federal courts, including a Supreme Court case brought by Samuel Gompers, the president of the American Federation of Labor. The Supreme Court, moreover, occasionally addressed free speech issues arising under state law without resolving debate over the relationship between the First and Fourteenth Amendments. The most significant example was the 1907 decision by Justice Holmes in *Patterson v. Colorado*,⁹ which limited the First Amendment to Blackstone’s prohibition against prior restraints. Holmes reached this conclusion without resolving Colorado’s claim that the Supreme Court lacked jurisdiction over the case because the Colorado Supreme Court had relied only on state common law in upholding an editor’s conviction for contempt.



U.S. Senator Thomas Patterson (above) ridiculed the Republican-dominated Colorado Supreme Court in newspapers he published. The attorney general of Colorado brought contempt proceedings against Patterson on behalf of the court, which led to *Patterson v. Colorado* (1907), a significant free speech decision issued by the U.S. Supreme Court before World War I.

Although the Supreme Court and other federal courts decided many more free speech cases than Chafee revealed and subsequent scholars assumed, a significantly larger number of cases in state courts even more clearly refutes the conventional wisdom that litigation over the constitutional meaning of free speech began in 1917. State courts frequently addressed whether various crimes and torts at common law violated the First Amendment or state constitutional protection for free speech, and more state than federal statutes presented free speech issues. Major topics of litigation included libel, contempt, obscenity, speech in labor disputes, political campaigning, public speaking, and the relationship between speech and crime.

Throughout the period from the Civil War to World War I, the overwhelming majority of decisions in all jurisdictions rejected free speech claims, often by ignoring their existence. This judicial response might account for

the many instances in which counsel did not assert free speech claims made by some of their colleagues in other cases. No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case. Most decisions by lower federal courts and state courts were also restrictive. Radicals fared particularly poorly, but the widespread judicial hostility to free speech claims transcended any individual issue or litigant. This historical record poses a substantial challenge to current constitutional theorists who identify an independent judiciary as the best protection for individual rights in a democracy.

The most pervasive and fundamental judicial approach to free speech issues between the Civil War and World War I used the bad tendency test derived from Sir William Blackstone's *Commentaries* on the English common law in the eighteenth century. Many decisions, like Justice Holmes in *Patterson*, followed Blackstone's conclusion that the legal right of free speech precludes prior restraints, but permits the punishment of publications for their tendency to harm the public welfare. In striking contrast to their increased oversight of economic and social legislation that infringed "liberty of contract" and property rights, judges gave great deference to the "police power" of legislators and administrators to determine the tendency of speech. Judges also readily found that speech, even if not directly prohibited, had a tendency to produce an action proscribed by statute and therefore could be penalized as a violation of the more general law.

The details of Holmes' opinion in *Patterson* highlights the reliance on Blackstone's bad tendency test in judicial decisions before World War I. Thomas Patterson was a U.S. Senator from Colorado. He also owned and edited newspapers in his home state. Through his newspapers, Patterson had actively supported reformers who in 1902 won a referendum that amended the state constitution by providing home rule to Denver. Patterson, who was a populist, became outraged when Republican members of the recently enlarged state supreme court overturned elections in Denver by invalidating the home rule amendment on state constitutional grounds. Editorials, cartoons, and letters in his

newspaper ridiculed the court. Their common theme was that the judges essentially acted as the tools of the utility corporations, which controlled the Republican Party. The attorney general of Colorado brought criminal contempt proceedings against Patterson on behalf of the state supreme court. The court convicted Patterson and fined him and his publishing company \$1,000 without allowing him to prove truth as a defense. It recognized that contempt applied only to criticism of judges in pending cases, but held that the decisions Patterson criticized remained pending because the losing parties could still request a rehearing.¹⁰

In his brief to the Supreme Court, Patterson argued that the state supreme court had violated his federal and state constitutional rights by precluding him from demonstrating the truth of his accusations. He stressed that the American conception of popular sovereignty, contained in the federal and in all state constitutions, protected truthful criticism of "public officials as to their official conduct." Only through public discussion, Patterson reasoned, "are the people who possess sovereign power informed of the merits or demerits of those who are chosen to rule over them." Patterson did not link this right of truthful public discussion to the First Amendment, but to "those general rights not specifically named in the constitution, which are reserved by the people." By contrast, in discussing the Colorado constitution Patterson found direct support in its provision "that every person shall be free to speak or write and publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence." Patterson maintained that this provision, although explicitly limited to libel, announced a general principle that "whenever the freedom of the press is called in question in any form of proceeding, it shall be sufficient to establish the truth of what is published as a defense to the action." Truthful criticism of judges, Patterson emphasized, is not an abuse of free speech. Invoking the federal constitution generally, Patterson asserted that "being armed with truth no man in this country must face the open jail doors before he dares to speak it, and having spoken it, to hear them close behind him."¹¹

Holmes tersely rejected Patterson's attack on his contempt conviction. The First Amendment, Holmes declared, prevents all "previous restraints upon publications," but allows "the subsequent punishment of such as may be deemed contrary to the public welfare." "The preliminary freedom," he added, "extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false." Holmes supported this holding with a citation to Blackstone's **Commentaries** and to state court decisions in 1788 and 1826 that had relied on Blackstone in libel cases.¹² In the section of the **Commentaries** cited by Holmes, Blackstone defined criminal libels as writings "of an immoral or illegal tendency" and considered them a subcategory of crimes, such as "challenges to fight," that tend to provoke breaches of the peace. Blackstone emphasized that "the provocation, and not the falsity, is the thing to be punished criminally."¹³

Holmes believed that Blackstone's reasoning, developed in the context of the common law of criminal libel, was particularly applicable to contempt of court. Publications criticizing judicial behavior in pending cases, he asserted, "tend to obstruct the administration of justice," whether or not the allegations are true.¹⁴ Patterson's brief had pointed out that Colorado law allowed a petition for rehearing to be filed at any time, and thus placed no limit on the state supreme court's definition of when a case is pending. As a result, Patterson argued, Colorado could impose a perpetual ban on criticism of judicial conduct. Without directly responding to this argument, Holmes simply maintained that the definition of when a case is pending should be decided under local law, "without interference from the Constitution of the United States," as long as there was no showing that "innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment."¹⁵ Holmes found no such showing by Patterson.

Justice Harlan's dissent in *Patterson* contained a vigorous, if undeveloped, defense of free speech under the First Amendment. Harlan explicitly opposed Holmes' conclusion that the First Amendment prevents only prior restraints. Holmes' view, Harlan feared, would allow a legislature to "impair or abridge the rights of a

free press and of free speech whenever it thinks that the public welfare requires that to be done.” According to Harlan, legislative determinations of the public welfare “cannot override constitutional privileges,” a position he stressed in interpreting the Constitution generally.¹⁶ Although Harlan did not elaborate his views on the First Amendment in other decisions, his analysis in *Patterson* provided a doctrinal alternative to the widespread practice of invoking the alleged bad tendency of speech as an automatic barrier against free speech claimants.

Although *Patterson v. Colorado* was the case that most clearly relied on the bad tendency test and that best revealed its source in Blackstone’s *Commentaries*, other Supreme Court decisions demonstrated the pervasive use of this approach. I will mention one more example, *Fox v. Washington*, which arose in a very different factual context, and which illustrates that the Supreme Court sometimes punished speech for its bad tendency without even referring to the First Amendment. Jay Fox, the editor of the newspaper published by the anarchist Home Colony, challenged a Washington state statute that made it a gross misdemeanor to publish, edit, or circulate written matter “in any form advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice.” Fox was convicted under this statute for editing an article entitled “The Nude and the Prudes,” which predicted and encouraged a “boycott” against those who interfered with nude bathing in the community. The article described the Home Colony as “a community of free spirits, who come out into the woods to escape the polluted atmosphere of priest-ridden, conventional society.” Bathing “with merely the clothes nature gave them” was “one of the liberties enjoyed by the Homeites.” Unfortunately, “a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people’s freedom” by securing the arrests of nude bathers on charges of indecent exposure.¹⁷

Decided eight years after *Patterson*, *Fox* gave Justice Holmes another opportunity to

consider the relationship between the bad tendency of speech and crime. As in *Patterson*, Holmes allowed the punishment of speech for its bad tendency and upheld Fox’s conviction. But in *Fox*, unlike in *Patterson*, Holmes did not address First Amendment issues, perhaps because the brief for Fox only referred to them in passing. Typically, Holmes stressed that the decision of the Court had “nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it cannot be said to infringe the Constitution of the United States.” With evident discomfort, Holmes strained to limit a statute he apparently did not like. He rejected the argument that the act was “an unjustifiable restriction of liberty and too vague for a criminal law.” Holmes contended that, “by implication at least,” the state court had “read the statute as confined to encouraging an actual breach of law.” Straining, he reasoned that it “would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law.” Moreover, Holmes doubted that the statute could be “construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general.”¹⁸

In *Fox*, “the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act.” The offensive article, Holmes found, “by indirection but unmistakably...encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure.” He noted that even without statutory prohibitions such statements, “if directed to a particular person’s conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged.” Holmes acknowledged that Fox’s article was directed to “a wider and less selected audience,” but he added, as if to dispose of this problem, that “[l]aws of this description are not unfamiliar.”¹⁹

The widespread judicial reliance upon the bad tendency test between the Civil War and World War I did not preclude the development of more specific analysis of free speech issues in connection with various discrete topics.



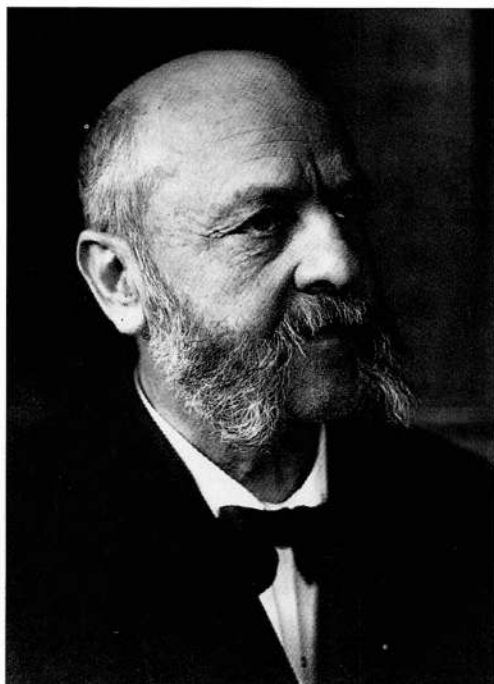
The Free Speech League was convinced that increased government repression of speech had created a broader group of Americans concerned about its protection. They particularly cited the imperialistic suppression of dissenting speech in the American colonies won during the Spanish-American War of 1898 and the outburst of legislation and prosecutions against anarchist speech after an anarchist assassinated President McKinley in 1901 (pictured above).

Many cases dealt with familiar categories of the common law, such as libel and contempt of court. Others arose from federal and state statutes that regulated areas as disparate as mail delivery and political campaigns. Labor unrest generated free speech cases over public speaking and the growing use of the injunction to restrain union activities. Moreover, in cases ranging from film censorship to commercial advertising, judges, and sometimes even counsel for the parties, ignored what today would be recognized as obvious free speech issues. On the other hand, federal courts, as in *Patterson*, occasionally addressed free speech issues that arose from state action without resolving the logically preliminary question of whether the First Amendment's prohibition against Congress extended to the states through the Fourteenth Amendment.

The overwhelming weight of judicial opin-

ion in all jurisdictions before World War I offered little recognition and even less protection of free speech interests. Although radical activity prompted many of the prosecutions, it alone cannot account for the restrictive results. Film censorship, political speech by government employees, public sermons by ministers, and newspaper reports of crime also produced decisions that rejected First Amendment claims. A general hostility to the value of free expression permeated the judicial system. This pervasive hostility had few doctrinal underpinnings, nor was it openly expressed. Judges often emphasized the sanctity of free speech in the very process of reaching adverse decisions in concrete cases.

Some opinions, predominantly in the state courts, reveal that restrictive decisions did not reflect the entire judicial spectrum. Courts occasionally protected freedom of expression and



Passed by Congress in 1873 and amended in 1876, the Comstock Act (named after anti-vice activist Anthony Comstock, above) prohibited the interstate mailing of “obscene” material. Censorship and convictions under the Comstock Act provoked many libertarian radicals to move from theoretical support of free speech to active engagement in its defense.

pointed to issues that contemporary scholars and postwar judicial decisions addressed more systematically. For the most part, however, the few relatively libertarian opinions were not analytically more rigorous than the norm for this period. Even when supporting free speech claims, they generally did not explain in any meaningful detail the basis for the result. They did not attempt to develop guidelines for determining what constitutes speech or when speech may be unlawful, perhaps because they devoted so little attention to considering the interests the constitutional protection for speech was designed to safeguard.

The analytical sterility of most opinions, regardless of outcome, was self-perpetuating. Judges did not challenge each other to think deeply about free speech and were therefore

less likely to revise their views. There were, however, a sufficient number of protective decisions to suggest that judges were not simply unable to conceive of more generous approaches to constitutional guarantees of free speech. Free speech claimants in some cases cited protective decisions by other courts. Even without the assistance of counsel, it seems likely that many judges who reached restrictive decisions knew some of the protective precedents and consciously, if seldom explicitly, rejected them. In any event, the fact that some prewar judges could be sympathetic to free speech claims suggests that the tradition of insensitivity was not so dominant that only an intellectual breakthrough in constitutional interpretation could have created the possibility of different results. The existence of protective decisions, even more than their relative paucity, emphasizes the general judicial hostility toward free speech before World War I.

Scholars as well as judges considered the meaning of freedom of expression between the Civil War and World War I. Just as many legal decisions confronted free speech issues before the Espionage Act cases, treatises and articles preceded Chafee. This legal scholarship stands in striking contrast to the tradition of judicial hostility to free speech claims. Unlike the prewar decisions, which were generally restrictive and poorly reasoned, much of the legal writing of this period used sophisticated analysis to reach protective standards. The authors included some of the most eminent scholars in the country. They offered convincing doctrinal support for freedom of expression, but their ideas did not gain significant judicial acceptance until after the United States entered World War I.

Within this scholarship, five authors were particularly important. The prodigious writings of Theodore Schroeder were the most extensive and libertarian treatments of free speech in the first two decades of the twentieth century.²⁰ Two respected and widely cited treatises, Thomas Cooley’s **Constitutional Limitations**, first published in 1868 and reissued in numerous subsequent editions,²¹ and Ernst Freund’s **The Police Power**, published in 1904, included sections on free speech.²² Henry Schofield, a

professor at Northwestern University Law School, presented a comprehensive paper on "Freedom of the Press in the United States" at the annual meeting of the American Sociological Society in 1914.²³ Roscoe Pound, perhaps the most influential legal scholar of his generation, wrote two articles in the *Harvard Law Review* in 1915 and 1916 that, while limited in scope, offered highly original and provocative interpretations of the First Amendment.²⁴

The prewar scholars had remarkably similar views on many important free speech issues, even though they often derived these views from vastly different social theories. They objected particularly to the common judicial position that the First Amendment and analogous provisions of state constitutions simply incorporated Blackstone's account of the English common law of free speech in the eighteenth century. The abuses of government power allowed by this English common law, many stressed, contributed to the grievances that provoked the American Revolution. They maintained that the constitutional protection for free speech in the United States helped to se-

cure the revolutionary victory by overturning the prior English common law. In particular, they emphasized that the American constitutions precluded the punishment of speech on matters of public concern for its alleged bad tendency. An expanded definition of free speech, they believed, was an essential element of the distinctively American conception of popular sovereignty and democratic government.

Just as most commentators have traced judicial and scholarly interpretation of the First Amendment from the period beginning with World War I, they have followed organized advocacy of free speech rights from the creation of the ACLU in the years between 1917 and 1920. The ACLU's initial focus on the protection of unpopular political dissent, they observe, understandably derived from the wartime and postwar repression that generated its founders' interest in free speech. They point out, however, that over time the ACLU developed a fuller conception of free speech that encompassed literary and artistic expression previously considered obscene. The work be-



Lincoln Steffens (left), the nationally recognized "muckraking" journalist, served on the board of directors of the Free Speech League, which was organized in 1902 to defend free speech for all viewpoints. The League repeatedly assisted radicals such as Emma Goldman (right), who was often arrested during her national speaking tours on topics such as anarchism and birth control.

gun by the small group of brave advocates in the ACLU after World War I, commentators generally conclude, culminated in the 1960s, when the Warren Court gave meaningful constitutional protection to the broad free speech rights that the ACLU had advocated for decades.

The lost tradition of libertarian radicalism obscured by the postwar civil libertarians reveals a substantially different history of free speech. Its defense did not begin with the respectable professionals who founded the ACLU after World War I. Before most of these people ever thought about the subject, an even smaller and braver group of libertarian radicals, often on the intellectual and social fringes of American society, advocated a much more protective conception of free speech that extended well beyond political expression.

Libertarian radicalism defended the primary role of individual autonomy against the power of church and state. It originated before the Civil War in individualist anarchism, in freethought, in radical abolitionism, and in struggles for labor reform and women's rights. Often provoked by disappointment with early experiments in utopian socialism, individualist anarchists instead emphasized the importance of individual sovereignty in social and economic life. Freethinkers rejected the authority of the church and asserted that religious truth can only be interpreted by autonomous individuals. Radical abolitionists insisted that the sinful and coercive laws of the state placed barriers between individuals and God's "higher law." Referring to marriage as a form of slavery, some early feminists claimed that wives, like slaves, lost their individual autonomy to white, male masters. Libertarian radicalism had fewer adherents following the Civil War, but it remained powerfully attractive into the early twentieth century for Americans who rejected both the competitive individualism of *laissez-faire* capitalism and the emphasis on social harmony in progressive thought.

The ideology and experiences of libertarian radicals produced a broad conception of free speech as an aspect of their underlying belief in individual autonomy. Just as individual autonomy justified freedom of conscience from religious and political authority, freedom to de-

termine the use of one's sexual organs even within marriage, and freedom to retain the value of one's own labor, it justified freedom to express personal opinions on any subject.

Many libertarian radicals, especially those who expressed radical views about sex, suffered in the late nineteenth century from the application of the Comstock Act and analogous state legislation. Passed by Congress in 1873 and amended in 1876, the Comstock Act prohibited the interstate mailing of "obscene" material. Although the statute failed to define obscenity, judicial decisions developed an expansive interpretation and provided postal officials with virtually unreviewable discretion to censor publications as "obscene." Led by Anthony Comstock, postal authorities deemed obscene publications that, in recognizing a woman's right to control her body, opposed legal regulation of marriage and provided sexually explicit information about contraception. They also defined obscenity to include blasphemy.

Censorship and convictions under the Comstock Act provoked many libertarian radicals to move from theoretical support of free speech to active engagement in its defense. Edward Bliss Foote, the author of a popular medical treatise, supplied much of the funding for these efforts. Convicted and heavily fined under the Comstock Act in 1876 for including information about birth control in his book, Foote deleted the offending material from subsequent editions. Foote and his son, however, subsequently devoted themselves to the defense of free speech, especially through financial support to the National Defense Association and the Free Speech League, organizations established by libertarian radicals decades before Roger Baldwin and other postwar civil libertarians created the ACLU.

The National Defense Association, founded in 1878, strenuously opposed the Comstock Act and aided defendants prosecuted under it. Libertarian radicals had more ambitious goals when they organized the Free Speech League in 1902. They were convinced that increased government repression of speech had created a broader group of Americans concerned about its protection. They particularly cited the imperialistic suppression of dissenting speech in

the American colonies won during the Spanish-American War of 1898 and the outburst of legislation and prosecutions against anarchist speech after an anarchist assassinated President McKinley in 1901. The Free Speech League, unlike the National Defense Association, committed itself to defending free speech for all viewpoints. Theodore Schroeder, who soon became the key administrator of the League, translated his scholarly views on free speech into arguments during actual controversies. Although the founders of the League and Schroeder were libertarian radicals, more mainstream figures took an active part in its work. The board of directors, for example, included Lincoln Steffens, the nationally recognized "muckraking" journalist, and Gilbert Roe, the best friend and former law partner of Wisconsin Senator Robert M. La Follette.

The Free Speech League followed through on its commitment to defend speech for all viewpoints, but its major beneficiaries were radicals. The League repeatedly assisted Emma Goldman, who was frequently arrested during her national speaking tours on topics such as anarchism and birth control; Margaret Sanger, whose publications linking birth control to class struggle provoked censorship and arrests by Comstock and local authorities; and the Industrial Workers of the World (IWW), whose free speech fights aroused national attention and extensive popular debate about the meaning of free speech. Among its many other activities, the League participated in two Supreme Court cases. It hired Clarence Darrow and Edgar Lee Masters in 1904 to defend a British journalist deported in the midst of an American lecture tour addressing various anarchist subjects. The League also represented Jay Fox, the anarchist editor convicted for publishing an article advocating nude bathing. The repression of anti-war speech under the Espionage Act, which transformed the founders of the ACLU and other progressives into civil libertarians, became yet another issue that the Free Speech League added to its already large agenda. Drawing on the commitment to individual autonomy in libertarian radicalism and on their long experience as activists, the leaders of the Free Speech League tried repeatedly but unsuccessfully to convince the emerging ACLU

that the defense of free speech should extend beyond the protection of dissenting political speech.

My investigation of the prewar period made me realize that developments during and immediately after World War I did not spontaneously create the modern era of free speech. Instead, these developments rapidly obscured the libertarian radical tradition and transformed judicial interpretation of the First Amendment. The impact of the war and its aftermath on progressives lies at the core of this process and reveals a decisive turning point in the history of American liberalism. In brief, World War I transformed many progressives into civil libertarians.

Before World War I, most progressives challenged traditional conceptions of individual rights protected by the Constitution. They identified constitutional rights with the excessive individualism to which they attributed the destructive inequality and division they saw throughout American society. Judicial recognition of these rights, they pointed out, blocked necessary social reform through positive state action. Property and liberty of contract—individual constitutional rights that the Supreme Court increasingly invoked to invalidate reform legislation—dominated the progressive attack on rights. But progressives were not sympathetic to other assertions of individual constitutional rights, including claims based on the First Amendment.

The emphasis by progressives on social harmony similarly limited their conception of free speech. Progressives often appreciated free speech, and even dissent, as qualities that a democratic society should nurture. But many reacted against dissent that was not directed toward positive social reconstruction. Progressives often saw no value in speech that expressed the structural inevitability of class conflict or that denied the feasibility of ultimate social unity.

World War I brought to the surface these latent but important views about free speech that had been embedded in the prior scholarship of progressive intellectuals. Most progressives supported the war. They often treated pacifists with impatience or even hostility, a reaction most dramatically illustrated

by a series of essays John Dewey published in *The New Republic* soon after the United States entered the war in 1917. Dewey, who was the leading public intellectual in the country, emphasized the social importance of widespread critical inquiry more than most progressives. Yet he criticized pacifist opposition to the war as a failure to seize its democratic possibilities and ridiculed dissenters for invoking “early Victorian platitudes” about “the sanctity of individual rights.”²⁵

The failure of World War I “to make the world safe for democracy,” combined with the widespread repression of speech during and after the war, forced many progressives, including Dewey, to reconsider both their prewar faith in a benevolent state and their corresponding aversion to constitutional rights. They retained their belief that property and liberty rights should not block progressive social and economic legislation. They also came to recognize, however, the state as a constant threat to

civil liberties, and they emphasized the centrality of constitutional free speech to the democratic themes that they had elaborated before the war. This combination of views became the core of New Deal constitutional ideology in the 1930s.

The progressives who became postwar civil libertarians developed a conception of free speech that differed significantly from defenses that prevailed before the war. Reflecting the lingering impact of their earlier views, the postwar civil libertarians based their emerging concern about free speech on its contribution to democracy rather than on its status as a natural right of autonomous individuals. They stressed the social benefits derived from freedom of political expression and essentially ignored the many other free speech issues that libertarian radicals, legal scholars, and other commentators addressed before the war. The actual circumstances that transformed progressives into civil libertarians, especially the severe repres-



Professor Zachariah Chafee of Harvard Law School minimized and mischaracterized free speech cases that arose before World War I in his 1919 article “Freedom of Speech in Wartime.” He is pictured at left here in 1929 with Walter N. Pollack, a fellow member of President Hoover’s crime commission.

sion of antiwar and postwar radical speech, reinforced their intellectual predisposition to focus on the protection of political expression.

In a pragmatic and largely successful effort to advance their new commitment to freedom of political speech, the postwar civil libertarians obscured both the more restrictive judicial tradition and the more protective libertarian radical tradition. Chafee's 1919 article in the *Harvard Law Review* was the key document in this effort. Like many progressives, Chafee had been uninterested in free speech issues before World War I. He began his study of free speech cases when he became an assistant professor at Harvard Law School in 1916. His reading soon led him to decisions holding that antiwar speech violated the Espionage Act, results that horrified Chafee. By the time he wrote "Freedom of Speech in War Time," Chafee had come to share the widespread disappointment among progressives with the outcome of the war. The failure to achieve the idealistic goals underlying American intervention, Chafee suggested, could be attributed to the repression of dissenting speech that had precluded honest debate during the war. Like most progressives who became civil libertarians, Chafee stressed social interests rather than individual rights in free speech. He especially emphasized that the emergence of truth about matters of public concern requires broad safeguards for political expression.

Chafee's article and subsequent 1920 book, **Freedom of Speech**,²⁶ soon became the starting point for analyzing the meaning and history of the First Amendment. Yet Chafee's own account of that history was misleading. He essentially ignored prewar discussion of free speech that differed from his own focus on the protection of political dissent in a democracy. Chafee did not fairly portray the prewar cases. Moreover, despite the urgings of other scholars he conspicuously ignored the extensive publications of Theodore Schroeder, the leading prewar commentator on free speech who wrote from the perspective of libertarian radicalism. The contrast between their scholarship is telling. For example, Schroeder emphasized that the use of anti-obscenity legislation to censor publications about contraception and other sexual topics violated the First Amendment,

whereas Chafee claimed that laws prohibiting obscenity did not raise constitutional issues.

To support his interpretation of the First Amendment, Chafee made related historical and legal arguments. He maintained that the Framers of the Constitution, in order to secure the popular sovereignty won by the American Revolution, intended the First Amendment to overthrow the English common law on free speech as formulated by Blackstone earlier in the eighteenth century. Blackstone interpreted the common law to preclude prior restraints on speech, but to allow subsequent punishment of expression for its tendency to disrupt peace and good order. Until Congress passed the Espionage Act in 1917, Chafee asserted, American federal and state courts rarely decided cases involving free speech claims. He added that the few prewar cases had not indicated the boundaries between protected and unprotected speech. As a result, he lamented, federal judges lacked sufficient guidance when suddenly confronted with an avalanche of prosecutions against antiwar speech under the Espionage Act.

Chafee complained that most of these judges applied the ancient English common-law test of bad tendency, which allowed the state to punish speech that had any tendency, however remote, to bring about violations of law. According to Chafee, prosecutors and judges previously relied on the bad tendency test only once in American history—under the Alien and Sedition laws passed by the Federalist Congress in 1798. The repressive results, Chafee stressed, enraged the American people and destroyed the Federalist party. Chafee was incredulous that American judges more than one hundred years later had revived this discredited approach.

Among the many judicial interpretations of the Espionage Act, Chafee found a few hopeful signs. He praised at length a decision by federal district judge Learned Hand, which overturned the refusal of the New York Postmaster to mail *The Masses*, a radical journal that contained articles and cartoons opposing the war.²⁷ Hand had rejected the bad tendency test while construing the Espionage Act to require a direct incitement to unlawful activity before speech could be punished. Chafee found

further encouragement in the opinion of Justice Holmes in *Schenck v. United States*, one of the initial group of Espionage Act cases decided by a unanimous Supreme Court in March 1919. Although all four of these cases had upheld convictions for antiwar speech, Chafee maintained that Holmes' opinion in *Schenck*—particularly a sentence containing the phrase, “clear and present danger”—closely resembled Hand's incitement standard and clearly rejected the bad tendency test.

For decades, scholars accepted uncritically Chafee's major conclusions. Many of his contemporaries in the law schools shared his revulsion at the repression of antiwar speech and had little incentive to question his welcome analysis. Subsequent scholars, who generally agreed with Chafee's defense of broad protection for political speech, did not reexamine the underlying research of what had become a classic article by an eminent professor. In 1960, however, Leonard Levy's **Legacy of Suppression**²⁸ vigorously attacked Chafee's interpretation of the original meaning of the First Amendment. Based on extensive historical investigation that Chafee himself never undertook, Levy “reluctantly” concluded that the Framers of the First Amendment had not intended to abolish either the English common-law crime of seditious libel or the bad tendency test. Both before and after Levy's book, other major scholars criticized Chafee's claim that Holmes intended the phrase “clear and present danger” in *Schenck* as a protective standard of First Amendment interpretation. Still, when I was a law student in the early 1970s, Chafee's historical assertion that no significant judicial encounters with free speech occurred between 1800 and 1917 remained unchallenged.

My research in Chafee's private papers and published reminiscences revealed that he was familiar with many of the prewar free speech cases when he wrote “Freedom of Speech in War Time.” I realized that this seminal article had obscured the earlier cases both by minimizing their extent and significance and, more importantly, by refusing to disclose their heavy reliance on the alleged bad tendency of speech to deny free speech claims. An accurate presentation of the judicial tradition would have undermined Chafee's historically incorrect as-

sertion that judges construing the Espionage Act of 1917 had revived that bad tendency test for the first time since the disastrous Sedition Act prosecutions at the close of the eighteenth century. Instead of criticizing the prewar cases directly, as had many previous scholars, Chafee tried to hide them as part of a disingenuous attempt to create a protective interpretation of the First Amendment out of a restrictive past. Chafee's accounts of the Framers' original intent and of clear and present danger, which both ascribed more protection to speech than the evidence permitted, supported my conclusion that he was writing more as an advocate than as a scholar.

Chafee had a receptive audience for his legal and historical misconstructions as the wartime and postwar repression of speech transformed a growing number of Americans into civil libertarians. Most significantly, Chafee's article provided intellectual cover for Justices Holmes and Brandeis when they began to dissent in First Amendment cases in the fall of 1919. Holmes had written three of the four Espionage Act decisions for the unanimous Supreme Court the previous March.²⁹ Justice Brandeis wrote the fourth, which avoided addressing the underlying First Amendment issues by dismissing the case on technical grounds. The Supreme Court decided its next Espionage Act case, *Abrams v. United States*,³⁰ in November 1919. During the intervening months, when the hysteria of the postwar “Red Scare” and the disillusionment with the Versailles Peace Treaty peaked, Holmes and Brandeis entered the ranks of the postwar civil libertarians. Although the Supreme Court majority in *Abrams* closely followed Holmes' March opinions while again rejecting First Amendment attacks on Espionage Act convictions, Holmes, joined by Brandeis, dissented.

In writing his dissent in *Abrams*, Holmes faced a major problem. Shackled by the heavy weight of restrictive precedents, including his own earlier Espionage Act opinions, Holmes had to find legal doctrines to support his changed views. Chafee's article, published in June 1919 between the original March decisions and *Abrams*, provided a brilliant and convenient solution. The myth Chafee created



In this 1918 cartoon Uncle Sam rounds up enemies of the United States. During World War I, Congress passed an amendment to the Espionage Act of 1917, imposing severe penalties on speech that interfered with the prosecution of the war.

about the original appearance of “clear and present danger” in *Schenck* allowed Holmes in *Abrams* to reject the bad tendency test without repudiating his own prior decisions that had relied so heavily upon it. Holmes actually developed the concept of clear and present danger from a theory of judicial deference to majority will and used the phrase as a variant of the bad tendency test. Yet clear and present danger became, through Chafee’s mediation, a protective standard of constitutional adjudication in the *Abrams* dissent. In a remarkable series of opinions from 1920 through 1927, Brandeis, relying heavily and often explicitly on Chafee’s scholarship, elaborated and expanded the protection for speech introduced by Holmes in *Abrams*. Like other postwar civil libertarians, Holmes, and espe-

cially Brandeis, emphasized the importance of political speech in a democracy.

Just as Holmes and Brandeis, with the substantial assistance of Chafee, transformed and obscured the restrictive prewar judicial tradition, the ACLU, with which Chafee maintained a close affiliation, overshadowed and superseded the libertarian radicals who had led the defense of free speech since the Civil War. Like other progressives who became postwar civil libertarians, many of the people who founded the ACLU in 1920 had little interest in the subject of free speech before the war. Aroused by the Espionage Act prosecutions and the ensuing Red Scare, they conceived of free speech almost exclusively in political terms. The early organizational work of the ACLU reflected this ideological orientation. Concentrating on the

protection of political speech, the ACLU ignored many issues that had preoccupied prewar defenders of free speech and that would become part of its own agenda in subsequent decades. It is revealing that in 1923 the ACLU rejected pleas from Schroeder and other libertarian radicals to defend a serious play about prostitution closed under a New York obscenity law. Although opposition to obscenity prosecutions had dominated the defense of speech by libertarian radicals before the war, the ACLU, reflecting Chafee's scholarly views, denied that the suppression of allegedly obscene material posed any significant threats to free expression.

In Chafee, Holmes, Brandeis, and many eminent people who joined the ACLU, World War I created a larger and more influential group than ever before committed to the defense of free speech. Themes that Justices Holmes and Brandeis borrowed from Chafee and developed in opinions throughout the 1920s became accepted by the Supreme Court majority in the 1930s. Many Supreme Court cases since the 1930s have reversed or implicitly overruled restrictive precedents decided before World War I. Yet the same postwar civil libertarians who ultimately helped transform judicial interpretation of the First Amendment viewed it more narrowly than had libertarian radicals and many other prewar commentators whose conception of free speech extended beyond political expression.

I want to close by observing that the key transformation of prewar progressives into postwar civil libertarians relates directly to a major, and perhaps the central, First Amendment debate of our time. There are significant parallels between the prewar views of the progressives and recent scholarly attacks on First Amendment decisions by the Supreme Court since the 1970s.³¹ The typical free speech claimant today, these scholars observe, is no longer the unpopular dissenter who was the focus of the "worthy tradition" that began with the postwar civil libertarians and culminated in decisions by the Warren Court. Instead, the free speech claimant in landmark First Amendment cases has become the economically and politically powerful individual

or corporation seeking to prevent regulation of campaign financing, the media, and harmful speech directed against minorities, women, and children. Just as prewar progressives attacked the judicial reliance on formally neutral rights of property and contract under the Fourteenth Amendment to protect the economic advantages of the wealthy, current scholars complain that judicial construction of the First Amendment preserves inequality by relying on formally neutral rights to free speech. And just as prewar progressives argued that social interests limited individual rights of property and contract, current scholars invoke the democratic social interest while advocating restrictions on individual rights to free speech. Current scholars seem unaware of these analogies and may not be familiar with the experience of the progressives. Yet in considering the understandable calls for state action against speech that arguably skews the electoral process or harms the most vulnerable members of society, it is important to remember what the progressives learned so painfully during and after World War I. Government regulation of speech, however well intentioned initially, can easily lead to repression of merely unpopular views. The progressives who became civil libertarians after the war grew to appreciate the social value of First Amendment rights against the state. Their example indicates that the search for alternatives to the Supreme Court's First Amendment decisions over the past twenty-five years should lead in other directions than the disparagement of "rights talk."

Endnotes

¹ *Schenck v. United States*, 249 U.S. 47 (1919).

² Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 *Harv. L. Rev.* 932 (1919).

³ See Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (Jamie Kalven, ed., 1988).

⁴ Chafee, *supra* note 2.

⁵ See, e.g., Daniel A. Farber, William N. Eskridge, Jr., and Philip P. Frickey, *Constitutional Law* (1993); Gerald Gunther, *Constitutional Law* (12th ed. 1991); William B. Lockhart, Yale Kamisar, Jesse H. Choper, Steven H. Shiffrin, and Richard H. Fallon, Jr., *The American Constitution* (8th ed. 1996); Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein and Mark V. Tushnet, *Constitutional Law* (3rd ed. 1996). Some of these casebooks

do refer in passing to *Commonwealth v. Davis*, 1162 Mass. 510, 39 N.E. 113 (1895), aff'd, 1167 U.S. 43 (1897), in connection with the later case, *Hague v. CIO*, 307 U.S. 496 (1939). See Gunther at 1250; Lockhart, at 881; Stone, at 1335. Professor Van Alstyne's innovative casebook on the First Amendment departs from the general constitutional law casebooks by including a pre-World War I case, *Patterson v. Colorado*, 205 U.S. 454 (1907). William W. Van Alstyne, *First Amendment* 9 (2nd ed. 1995).

⁶ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

⁷ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁸ See Walter Berns, *The First Amendment and the Future of American Democracy* 147-48 (1976); Paul L. Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* 14, 22, 248 (1972).

⁹ 205 U.S. 454 (1907).

¹⁰ See Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, at 340 (1993); Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* 1-7 (1991).

¹¹ Brief of Plaintiff in Error at 87-95.

¹² *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). See *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1826) and *Respublica v. Oswald*, 1 Dall. 319 (Pa. 1788).

¹³ 4 William, Blackstone, *Commentaries* 150.

¹⁴ 205 U.S. at 462.

¹⁵ 205 U.S. at 461.

¹⁶ 205 U.S. at 465.

¹⁷ *Fox v. Washington*, 236 U.S. 273, 275-77 (1915).

¹⁸ 236 U.S. at 277-78.

¹⁹ *Id.*

²⁰ Schroeder's major essays on free speech are collected in two volumes: Theodore Schroeder: *Free Speech for*

Radicals (enlarged ed, 1916) and Theodore Schroeder, *"Obscene" Literature and Constitutional Law* (1911).

²¹ Cooley's treatment of free speech issues did not change significantly over time. I cite from the 1883 edition, the last edition written solely by Cooley. Thomas M. Cooley *Constitutional Limitations* (5th ed. 1883). Subsequent editions appeared in 1890 and 1903.

²² Ernst Freund, *The Police Power* (1904).

²³ Henry Schofield, "Freedom of the Press in the United States," *9 Am. Soc. Soc'y: Papers & Proceedings* 67 (1914), reprinted in 2 Henry Schofield, *Essays on Constitutional Law and Equity* 510 (1921).

²⁴ Roscoe Pound, "Equitable Relief Against Defamation and Injuries to Personality," *29 Harv. L. Rev.* 640 (1916); Roscoe Pound, "Interests of Personality" (pts. 1-2), *28 Harv. L. Rev.* 343, 445 (1915).

²⁵ John Dewey, "Conscription of Thought" (1917), reprinted in 10 John Dewey, *The Middle Works 1899-1924*, at 276, 279 (Jo Ann Boydston ed., 1980).

²⁶ Zechariah Chafee, Jr., *Freedom of Speech* (1920).

²⁷ *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), rev'd, 246 F. 24 (2d Cir. 1917).

²⁸ Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (1960).

²⁹ *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

³⁰ 250 U.S. 616 (1919).

³¹ See, e.g., Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993); J. M. Balkin, "Some Realism About Pluralism: Legal Realist Approaches to the First Amendment," 1990 *Duke L. J.* 375; Owen M. Fiss, "Free Speech and Social Structure," 71 *Iowa L. Rev.* 1405 (1986).

The Clear and Present Danger Test

Douglas Laycock

“Clear and present danger” is one of a very few phrases that passed from a Supreme Court opinion into the public imagination and common vocabulary. Just in the week before this article was delivered as a lecture at the Court in October 1999, the wife of a Presidential candidate said that racism “is a clear and present danger;”¹ the Secretary of the Air Force warned of a clear and present danger to the quality of the research force at Air Force labs;² scholarly commentators described a clear and present danger to the neighbors of rogue states,³ and of a credit crisis in East Asia;⁴ and a columnist decried the clear and present danger of “the subsidy ideology.”⁵ The week before that, the President warned about the clear and present danger of terrorism,⁶ and a United States Senator denounced the clear and present danger of gun violence.⁷ The week before that, the *New York Post* reported a clear and present danger to the Mets in the bottom of the eighth.⁸

The phrase has spread around the world to where ever English is written; I found quite recent examples from Toronto,⁹ Sydney,¹⁰ Canberra,¹¹ Jakarta,¹² Jerusalem,¹³ Tel Aviv,¹⁴ Ankara,¹⁵ and General Santos City, The Philippines, where City Councilor Florentina Congson said that imported fish pose a clear and present danger to the city’s fishing industry.¹⁶ All told, I found 1,807 appearances of “clear and present danger” in newspapers and magazines from the beginning of 1998 to the week of this lecture in October 1999.¹⁷ No other phrase coined by the Supreme Court appeared so often.¹⁸

“Clear and present danger” appears in the title of eight books in my University’s library, on topics from freedom of speech to surging polar ice streams.¹⁹ It was the title of a Harrison Ford movie²⁰ based on a Tom Clancy technothriller,²¹ and no doubt vastly more people learned it from Harrison Ford than from Justice Holmes. But like the less famous authors before him, Clancy

chose the phrase in part because it would be familiar and evocative. “Clear and present danger” has had an eighty-year run as rhetoric and is still going strong as cliché.

It had a much shorter run as law. “Clear and present danger” was the dominant standard in free speech cases for only a decade. The phrase meant very different things to different Justices,

and even very different things to the same Justices at slightly different points in time. And it never recovered from its debacle in *Dennis v. United States*.²²

The remarkable true story of the clear and present danger test is well known to scholars in the field, but little known to the American people or even to most lawyers. The best account of the origins and early years of the phrase is by my colleague David Rabban, in the final chapters of *Free Speech in Its Forgotten Years*.²³ Perhaps the best account of the later years is by my teacher Harry Kalven in *A Worthy Tradition*.²⁴ Fully persuaded by their telling of the basic story, I can add only a few interesting details, some observations about judicial method, and (in section VI) a brief response to their principal critic. With respect to judicial method, I am struck by the irrelevance of constitutional text in the early cases, and by the relationship between the clear and present danger test and its successor, the compelling interest test.

I. Historical Context

The phrase “clear and present danger” originates in some of the most fundamental of free speech cases, those growing out of resistance to American policy in World War I. War is always an occasion for dissenting speech and a threat to the freedom of that speech. In World War I, circumstances combined to produce an unusual degree of dissent and to make that dissent seem, to government officials, especially threatening.

Even for a war, World War I was awful. Tactics failed to adapt to huge advances in the technology of killing, and a generation of Europeans died in the long stalemate in the trenches. Some blamed the arms merchants who sold the new technology. President Wilson said it was a war to make the world safe for democracy, but it could also be interpreted as a continuation of ancient European feuds and a battle for dominance among European empires. Today it seems obvious that our national interest was in the survival of the other great democracies. But that was less obvious in 1917, when some Americans still thought of Great Britain as our historic national enemy.²⁵

World War I also came at a time of worker unrest throughout the industrialized world. Industrialization had created miserable factory jobs

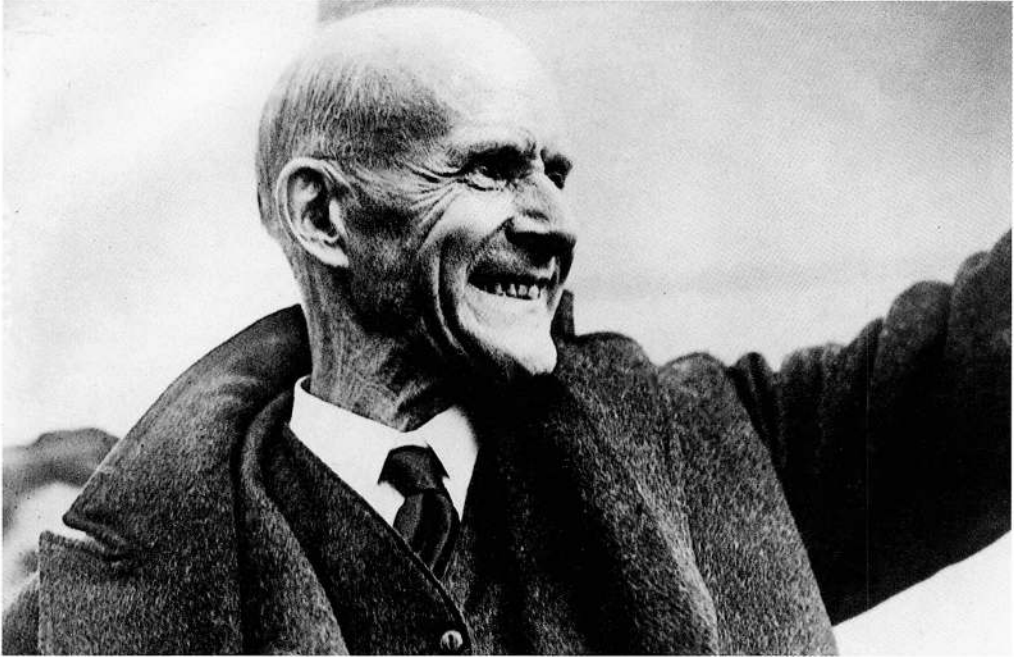
for long hours at low pay; it had not yet created high standards of living for most of the population. In the United States, these conditions spawned a large union movement, and within that movement, a much smaller but still substantial socialist wing.

In 1910, more than a quarter of the adult male population was foreign born.²⁶ Much of the recent immigration was from eastern and southern Europe, and these new immigrants seemed of doubtful reliability to many Americans. Some of them had sympathized with revolutionary movements in Europe, and some of them brought those sentiments with them to America. About ten percent of the population were either German-born or the children of German-born parents.²⁷ It had been perfectly legitimate to sympathize with Germany during the three years of American neutrality; that suddenly changed when the United States entered the war on the side of the Allies.

These currents of dissent combined to generate a substantial body of anti-war protest, mixing peace themes with socialist workers themes and German ethnic themes. Congress was alarmed, and in the Espionage Act,²⁸ it moved deliberately to limit dissent. The Conference Committee deleted a section expressly authorizing censorship of the press,²⁹ but left in a section expressly authorizing censorship of the mails. The most far reaching clauses of the original Act provided:

[W]hoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.³⁰

It would have been easy to interpret this statute to minimize free speech problems. If “willfully” and “attempt” had been read to require specific evidence of criminal intent, if “cause” had been read to require a close and direct causal relationship to actual insubordination or obstruct-



Union leader and perennial presidential candidate of the Socialist Party, Eugene Debs was prosecuted for making a speech in 1918 opposing the war on the ground that working men should oppose capitalists and not fight each other.

tion, if the courts had assumed that Congress did not mean to criminalize political debate, this article might never have been written.

Learned Hand took a large step in that direction in his opinion in *Masses Publishing Co. v. Patten*,³¹ a suit seeking to compel the Postmaster General to permit the mailing of a left wing anti-war publication called *The Masses*. Hand construed the statute to prohibit only direct incitement to unlawful conduct, arguing that any more restrictive meaning would be so at odds with American traditions of free speech that he would not impute it to Congress without a very clear Congressional statement of the more restrictive rule.

The Second Circuit promptly reversed, in an opinion that emphasized deference to the discretion of the Postmaster General, and also emphasized the then prevailing judicial doctrine in free speech cases.³² This doctrine, taken directly from the English common law of seditious libel, has come to be known as the "bad tendency" test. It held that government could punish speech that tended to cause unlawful consequences.³³

The most shocking recent application in the

Supreme Court had been *Patterson v. Colorado*,³⁴ affirming the conviction of a newspaper publisher (who was also a United States Senator) for criticizing decisions of the Colorado Supreme Court. The decisions were in fact outrageous, but the criticized justices held Patterson in contempt of court.³⁵ It was perhaps a saving grace that the penalty was only a \$1,000 fine.

In *Patterson*, as in the quoted section of the Espionage Act and in the common law of seditious libel, falsehood was not an element of the crime and truth was not a defense. Justice Holmes wrote for the Court that the First Amendment protects against prior restraints of publication, but allows "the subsequent punishment of such [publications] as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."³⁶

Under the bad tendency test, any criticism of the war, including truthful criticism, potentially violated the Espionage Act. Criticism of the war had the foreseeable effect of making young men

less likely to enlist, and speakers were presumed to intend the natural consequences of their acts; therefore, to criticize the war was willfully to obstruct the recruiting service. The more harsh or radical the criticism, the more likely the violation. The government argued that any publication or any speech to a large group might reach draft-age men; when necessary, it argued that communications to women might be passed on to their sons, brothers, and sweethearts. Judges instructed on some variation of the bad tendency test in all but a handful of the more than two hundred speech prosecutions during the war. So instructed, juries convicted.³⁷

The government was surely right that criticism of the war made men less likely to enlist. The problem was not that the law made no sense, or that the speech did no harm. The problem was that criticism of government policy is at the very core of the Free Speech Clause and at the very core of democratic self-government. This is why the cases were so fundamental.

It has become a common observation in our time, not yet tested by a war with unambiguously important stakes for the nation, that television coverage of war has made democracies unwilling to take casualties. The government's fear in World War I was similar. The government feared that vivid descriptions of warfare and vivid attacks on the wisdom of the war might make men less willing to serve and less willing to risk becoming casualties. There were two ways of describing the issue, and both descriptions were true. Unlimited criticism of the war would hurt the war effort, although the government plainly overestimated the effects. Unlimited criticism of the war was also core political speech in a democracy.

Even if the courts had held that harsh criticism of government policy could not in itself be a criminal offense, that would leave hard questions about statements that went beyond harsh criticism. What if the harsh critic implicitly—or explicitly—urged men to violate laws regulating conduct? Harsh criticism easily spills over into rhetoric about resistance, often hyperbolic, sometimes serious. Effective political rhetoric rarely draws the fine distinctions found in philosophy journals and law reviews. If the war oppressed the masses, it easily followed that the

masses should not cooperate in their own oppression.

II. The First Opinions

The war was over by the time the issue reached the Supreme Court. But tolerance of political dissent had not been restored, and the prosecutions continued, even increased. The peace negotiations did not achieve Wilson's idealistic vision of the war, and it turned out that there had been secret treaties and territorial ambitions among the Allies; this partial vindication of the critics, however slight, was not welcome news. The Bolshevik Revolution and the Russian Civil War were new sources of conflict and governmental fear, and there was a major Red Scare in 1919-20. The Communist Party U.S.A. was formed in 1919, a majority of states enacted new legislation against radical speech, and in January 1920, the federal government arrested ten thousand suspected Communists in the Palmer raids.³⁸

The Court wrote its first three Espionage Act opinions in March 1919. Charles Schenck, the lead defendant in *United States v. Schenck*, had arranged the printing and distribution of fifteen thousand flyers for the Socialist Party.³⁹ The flyer said the Conscription Act violated the Thirteenth Amendment and was "a monstrous wrong against humanity," and that those who failed to assert their rights were helping to deny the rights of all. It said "Do not submit to intimidation," but the Court noted, "in form at least, [it] confined itself to peaceful measures, such as a petition for the repeal of the act." Both defendants were convicted; their sentences do not appear in the reports. This was the government's strongest case in the Supreme Court, because Schenck had mailed the flyer only to men who had received their draft notices, and because a large mailing so directed might have supported an inference of actual intent to disrupt the draft.

The defendant in *Debs v. United States* was Eugene Debs, the great union leader and perennial presidential candidate of the Socialist Party.⁴⁰ He was prosecuted for a speech to the party's 1918 state convention in Canton, Ohio. The speech was mostly about socialism, which the Court conceded was outside the Espionage Act.

But socialists opposed the war, because working men were killed and maimed in the fighting and because working men of different countries should be united against capitalists instead of fighting each other. In his speech to the convention, Debs had vigorously criticized the war, praised several persons who had been convicted of aiding or encouraging others to refuse induction, urged delegates to decide for themselves whether there should be a war, and told them “to know that you are fit for something better than slavery and cannon fodder.” Debs was convicted and sentenced to ten years in prison.

United States v. Frohwerk was a prosecution of Jacob Frohwerk, who had published a series of articles criticizing the war and the draft in a German-language newspaper in St. Louis.⁴¹ The statement that came closest to urging unlawful action appears to have been a paragraph to the effect that it would be understandable if soldiers refused to fight, even though such soldiers would technically be in the wrong. Frohwerk was convicted and sentenced to ten years in prison.

Justice Holmes wrote the opinion in all three cases. The famous phrase first appears in *Schenck v. United States*, and only in *Schenck*:

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. It is a question of proximity and degree.⁴²

Applying this standard, the Court unanimously affirmed the conviction in *Schenck*. A week later, it unanimously affirmed *Frohwerk* and *Debs* on the authority of *Schenck*. In 1920, running from his prison cell, Debs got 919,000 votes for President of the United States. In 1921, President Harding commuted his sentence, along with twenty-three others imprisoned for political speech.⁴³

Later the clear and present danger test came to be understood as protective of speech. “Clear” and “present” came to be restrictive modifiers, limiting the class of dangers to only those that would clearly and presently follow from the speech. But none of this is in *Schenck*, *Frohwerk*, or *Debs*. It seems clear that for Holmes, “clear

and present danger” was merely a paraphrase of the bad tendency test. In the paragraph that contained the phrase “clear and present danger,” he twice referred to the flyer’s “tendency” to obstruct the draft.⁴⁴

The leading casebook notes that the jury could not have been instructed on clear and present danger, and asks why there was not a remand for a new trial under proper instructions.⁴⁵ The easy answer would be that Holmes was cheating on the record, but that is not the explanation. The explanation is that the jury had been instructed on the bad tendency test, and in Holmes’ view, that instruction was correct. As of March 1919, bad tendency and clear and present danger were the same.

The *Schenck* opinion did take one step towards greater protection for speech: Holmes confessed possible error in his earlier statement that the Free Speech Clause protects only against prior restraints.⁴⁶ An amicus brief in *Debs* had targeted that issue, arguing that the limitation to prior restraints came from Blackstone, that it represented a disputed view even in England and even when it was written, that the Speech Clause was intended to supersede Blackstone and the law of seditious libel, and that Americans had repeatedly so concluded, citing St. George Tucker’s American edition of Blackstone in 1803 and the nearly universal repudiation of the Sedition Act. The brief compared Blackstone’s belief in the efficacy of a rule against prior restraints to his belief in witchcraft: both had an “historical interest,” but neither was a credible measure of constitutional liberty in the United States.⁴⁷ *Patterson v. Colorado* seemed to confine the Speech Clause to prior restraints,⁴⁸ and *Schenck* appeared to repudiate that error. In a 1922 letter to Professor Zechariah Chafee, Holmes confessed much more clearly than in *Schenck* that he had not known the relevant history and had simply been mistaken in *Patterson*.⁴⁹

III. The Irrelevance of Constitutional Text

The *Schenck* opinion’s brief discussion of prior restraint seemed to acknowledge that the Speech Clause must mean something. But the most striking thing about the unprotective opinions in this era is the utter irrelevance of constitutional text. It appears to have made no differ-



Fellow Russian emigres Samuel Lipman, Hyman Lychowsky, Mollie Steiner, and Jacob Abrams were convicted under the Espionage Act of distributing several thousand copies of leaflets in English and in Yiddish to munitions workers calling on them to strike. They did not oppose the war in Germany but rather U.S. intervention in Russia's civil war.

ence to the judges that speech was singled out for special constitutional protection. Holmes drew his analysis of speech offenses in *Schenck* directly from his analysis of criminal attempts in **The Common Law**, the book that had begun his scholarly career nearly forty years before.⁵⁰ **The Common Law** sought to minimize the relevance of subjective intent. Holmes argued that the government can punish conduct that causes consequences the government wishes to discourage. It can punish as an attempt conduct that failed to produce the forbidden consequence, if the conduct would normally have had the forbidden consequence as its natural and probable effect. Holmes treated the speech in *Schenck* like an attempted obstruction of the draft; the difference between attempt by speech and attempt by physical acts appears to have made no difference. The sentence immediately following and elaborating the reference to clear and present danger—"It is a question of proximity and degree"—was taken verbatim from an earlier Holmes opinion discussing an attempt to monopolize.⁵¹

Perhaps even more revealing, Holmes had said in a letter to Hand that freedom of speech "stands no differently than freedom from vaccination,"⁵² a substantive due process claim that the Court had recently rejected.⁵³ The Court explicitly equated free speech with substantive due process in a 1925 speech case, *Gitlow v. New York*: "Every presumption is to be indulged in favor of the validity of the statute. . . . [P]olice 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable . . .'"⁵⁴ In support of this point, the Court cited *Mugler v. Kansas*,⁵⁵ a case upholding prohibition of alcoholic beverages against a substantive due process challenge, and *Great Northern Railway v. Clara City*,⁵⁶ a case upholding a requirement that a railroad build a sidewalk across its right-of-way.

It appeared not to matter that there is no vaccination clause, but there is a Speech Clause; or that the Constitution expressly authorizes regulation of commerce, but specifically prohibits laws abridging the freedom of speech, and that it does so in language that is textually absolute. It

is not clear what difference it made that the Speech Clause had been added to the Constitution, or what difference it would have made if the Speech Clause had been repealed. The Due Process or any other clause would do as well. This seems to be an extreme instance of the Constitution being what the judges say it is. Whole clauses could appear and disappear at will. For Justice Holmes and Justice Brandeis, the Speech Clause was about to appear.

IV. The Conversion of Holmes and Brandeis

In the summer of 1919, Holmes and Brandeis decided that the prosecution of speech had gone too far. It is not clear what changed their minds. Holmes never admitted that he had changed his mind,⁵⁷ and Brandeis appears to have acknowledged a shift in position only in conversations with Felix Frankfurter.⁵⁸

We know that even before *Schenck*, Holmes and Brandeis had been more willing than the rest of the Court to protect speech in the most egregious cases. Holmes had prepared a dissent in a case in which the defendant was convicted under the Espionage Act for sending a private petition to the governor of South Dakota and two other officials. The majority was prepared to affirm, but the government confessed error.⁵⁹

We know the three opinions in the spring were heavily criticized in published articles and in private correspondence, including an article by Ernst Freund in *The New Republic*.⁶⁰ We know that Holmes had conversations with some of those people over the summer. We know that there were pressures on Harvard that summer to fire Felix Frankfurter, Harold Laski, and Roscoe Pound, and that Holmes wrote the president of Harvard on their behalf.⁶¹ Many American intellectuals who had supported the war and had given little thought to the speech prosecutions during the war now became concerned about the threat to free speech. A significant free speech movement began to emerge.⁶²

The most important published critique was Chafee's "Freedom of Speech in War Time," in the June 1919 issue of the *Harvard Law Review*.⁶³ Chafee reported cases far more shocking than those that had been affirmed by the Supreme Court. A woman had been sentenced to ten years

in prison for writing a letter to the editor of the *Kansas City Star* that said, "I am for the people and the government is for the profiteers," and men prosecuted for comments in private conversations.⁶⁴

But Chafee did not blame the Supreme Court, and he did not call for outright repudiation of all three decisions from the spring. He endorsed Hand's incitement test from *Masses* as consistent with both the First Amendment and the common law of attempts. Then he said that *Schenck* and *Frohwerk* "were clear cases of incitement to resist the draft, so that no real question of free speech arose."⁶⁵ This was a stretch as to *Schenck*, and preposterous as to *Frohwerk*; if these publications counted as incitement, an incitement test would be little help. Anyway, neither case had been decided on the ground of incitement. But now Chafee had to reject only one case as wrongly decided.

Next he quoted what Holmes had said about free speech in *Schenck*, italicizing the sentence about "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Chafee noted that Holmes had not defined the substantive evils to which he referred in this sentence, but that if the relevant evils were "overt acts of interference with the war," then the clear and present danger test was very close to Hand's incitement test.⁶⁶ This is remarkable from our perspective, after many years of contrasting Hand with Holmes. But the reasoning seems to have been that only direct incitement is likely to create a clear and present danger. And Chafee had ratcheted up the required danger, from the possibility that someone somewhere might try to evade the draft to "overt acts of interference with the war."

Chafee conceded that if the Court had applied the clear and present danger test to *Debs*, it would have had to reverse. Apparently Holmes had not closely attended to the jury instructions; the jury had been permitted to convict on a mere showing of bad tendency. "If the Supreme Court test is to mean anything more than a passing observation, it must be used to upset convictions for words when the trial judge did not insist that [those words] must create a 'clear and present danger' of overt acts."⁶⁷

Chafee was the first to use "clear and present danger" to mean anything more than just dan-

ger. He gave the phrase content that it seems to have in ordinary English but that it had not had in *Schenck*. Surely Holmes was not fooled. But if Holmes were looking for a way to change his mind without confessing error, Chafee had offered him a way.

The change of position came in November, in *Abrams v. United States*.⁶⁸ *Abrams* differed from *Schenck*, *Frohwerk*, and *Debs* in several ways, and those differences might have mattered to Holmes and Brandeis. The differences might have suggested possible distinctions; they might also have suggested that there was little limit to how far these prosecutions might go, although the South Dakota petition case should have already shown them that.

The first difference was that *Abrams* and his codefendants did not oppose the war with Germany, but rather the futile U.S. intervention in the Russian Civil War. Lenin and the Bolsheviks seized control of the Russian government essentially by a coup in St. Petersburg; there followed a three-year Civil War for control of the country.⁶⁹ The United States landed troops at Murmansk, Arkhangel'sk, and Vladivostok, with no clear idea of what they might do, and without nearly enough numbers to make any difference.⁷⁰ The North Russia contingent sat in trenches through the winter, six hundred miles north of St. Petersburg, in 24-hour darkness with average temperatures at 30 below. The Vladivostok contingent moved inland along the Trans-Siberian railroad, mostly staying behind the fighting, and left the way they had come when the tide turned in favor of the Reds. The whole episode was one of the dumber foreign policy adventures in American history. But that was the target of the *Abrams* protest.

Abrams and his associates produced several thousand copies of two leaflets, one in English and one in Yiddish, warning munitions workers that they were making bullets to kill Russians as well as Germans, and urging a general strike to protest American opposition to the Russian Revolution. They insisted that they hated German militarism more than the American government did. Some of these leaflets were distributed in secret; the rest were dumped out of an upper story window.

The other difference between *Abrams* and the earlier cases is that *Abrams* and his associates

were convicted under the 1918 Amendments to the Espionage Act.⁷¹ The Attorney General had complained that while the Espionage Act was effective against organized propaganda, it did not reach "individual, casual, or impulsive disloyal utterances."⁷² To correct this perceived defect, Congress added several new offenses to the Espionage Act, and increased the maximum sentence. The amendments made it a felony, punishable by imprisonment for twenty years, to "willfully display the flag of any foreign enemy," or to utter or publish "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States," or its flag, or its military forces, or their uniform. Perhaps most remarkably, it was a felony punishable by twenty-years imprisonment to "by word or act oppose the cause of the United States" in the war. *Debs* had been charged with opposing the cause of the United States, but the jury had acquitted on that count.⁷³

The *Abrams* defendants were convicted of conspiring to publish words intended to encourage resistance to the United States in the war and of conspiring to advocate curtailment of production of war materials with intent to hinder prosecution of the war. They were sentenced to twenty years in prison. The Supreme Court affirmed on the authority of *Schenck*.

Holmes and Brandeis dissented. In Holmes' dissent, "clear and present danger" became "a clear and *imminent* danger that it will bring about *forthwith* certain substantive evils that the United States constitutionally may seek to prevent." And at another point: "*immediate* danger." And again: "present danger of *immediate* evil or an intent to bring it about."⁷⁴ Specific intent—not mere natural consequences this time—was relevant because "it might indicate a greater danger and at any rate would have the quality of an attempt."⁷⁵ But there was no evidence of intent to hinder the war effort; the only intent was to hinder attacks on the Russian revolutionaries, with whom we were not at war.

Then came a peroration about the values of free speech, and an emphatic rejection of the government's claim that the Speech Clause had not altered the English law of seditious libel.⁷⁶ And then this:

Only the emergency that makes it imme-

diately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."⁷⁷

The tone and methodology of this opinion could not be more different from those opinions and correspondence that equated freedom of speech with the most deferential version of substantive due process. Here was the germ of the modern compelling interest test: The constitutional text states a sweeping command; only immediate necessity justifies implied exceptions to that command.

Earlier opinions had defined things into and out of constitutional rights mostly by drawing categorical boundaries—sometimes sensibly and sometimes quite artificially. But to take a broad constitutional command at face value and imply exceptions by necessity was hardly ever done. The nearest precedent I can think of is dictum in *Ex parte Milligan*, reversing the conviction of a confederate sympathizer tried before a court martial.⁷⁸ The Court said that civilians might be tried in courts martial without a jury in places where the civil courts could not sit. But the courts were sitting in Indiana, so Milligan's military trial was unconstitutional. To say that the clause applies and is *prima facie* violated, but that emergency can justify exceptions, is a very different technique—often more honest, certainly more realist, and much more a feature of modern opinions—than to claim that the clause does not even apply. The *Abrams* dissent is among the earliest of this new style of opinion.

V. The Aftermath

In every case after *Abrams*, Holmes and Brandeis dissented or concurred separately, and the majority ignored them. The Court affirmed a suspension of mailing privileges⁷⁹ and two more convictions⁸⁰ under the Espionage Act, and a state conviction under a similar statute from Minnesota.⁸¹ Two of these cases were prosecuted under a section forbidding false statements made with intent to interfere with the war effort, and the Court appears to have held that it was criminal falsehood to say that the United States entered the war for any reasons other than those

offered by President Wilson in his address to Congress seeking a declaration of war.⁸² Making falsehood an element of the offense is no protection if every disagreement with official pronouncements is deemed criminally false.

Chafee expanded his article into a book published in 1920.⁸³ He said the Holmes dissent in *Abrams* carried great weight, not only because it was better reasoned than the majority's "meager discussion," not only because it was Holmes, but also because "it [was] only an elaboration of the principle of clear and present danger laid down by him with the backing of a unanimous Court in *Schenck*."⁸⁴

The next substantial developments came in two long delayed cases, *Gitlow v. New York*⁸⁵ in 1925 and *Whitney v. California*⁸⁶ in 1927. Both cases charged speech that occurred in 1919, growing out of conventions of new organizations that had spun off from the Socialist Party and would soon form the Communist Party U.S.A.

Gitlow became part of the Left Wing Section of the Socialist Party, which issued a manifesto condemning the regular socialists for pursuing change at the ballot box; the manifesto urged the necessity of Communist Revolution by revolutionary mass action. Gitlow was prosecuted for his role in issuing this manifesto under a criminal anarchy statute that made it an offense to "advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force and violence or by any unlawful means."⁸⁷

The New York Court of Appeals found no express advocacy of force or violence, but it held such advocacy unnecessary to conviction.⁸⁸ The U.S. Supreme Court, reading the manifesto for itself, thought it found the language of "direct incitement," despite the lack of any specifics about how or where or when the mass action should begin.⁸⁹ "There was no evidence of any effect resulting from the publication and circulation of the manifesto."⁹⁰

Gitlow's brief relied heavily on the clear and present danger test, and for the first time, the majority took notice of it. Justice Sanford did not say that the test was merely a paraphrase of the bad tendency test, or that its meaning was fixed by the affirmation on the facts of *Schenck*, which had involved less advocacy of illegal conduct than *Gitlow*. Holmes and Brandeis and



In 1925 the Supreme Court upheld the conviction of Benjamin Gitlow for publishing an article calling on workers to overthrow capitalism and the government by force.

Chafee were beginning to win the battle of making clear and present danger mean something.

Instead, Sanford said that the clear and present danger test applied only to statutes like the Espionage Act, and not to statutes like the criminal anarchy statute in *Gitlow*. The Espionage Act forbade conduct tending to produce a particular consequence—obstruction of the recruiting service. When the government charged that this statute was violated by speech, the Court had to decide in each case whether the speech was sufficiently likely to cause the forbidden consequence. Clear and present danger addressed that question.⁹¹

But in the criminal anarchy act, the legislature had forbidden certain kinds of speech as such. The legislature had made the judgment that this speech was so dangerous that it must be forbidden. The Court must defer to this legislative judgment. Holmes and Brandeis ignored the distinction; they dissented on the authority of the “criterion sanctioned by the full court in *Schenck*”—meaning the clear and present dan-

ger test.⁹²

In the majority’s view, the state need take no chances: “A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration.”⁹³ The state was entitled to extinguish every such spark, without waiting to see the consequences. Holmes had used a similar but less far-reaching metaphor in *Frohwerk*: it might have been found that the German language newspaper was circulated “in quarters where a little breath would be enough to kindle a flame.”⁹⁴

*Whitney v. California*⁹⁵ involved a similar manifesto issued by the California branch of the Communist Labor Party, another group that had seceded from the Socialists. Whitney herself had opposed the manifesto, sponsoring a resolution urging that the Party work through the political process. But she remained a member after the manifesto was adopted, and for this she was prosecuted under the California Criminal Syndicalism Act. Criminal syndicalism is an odd phrase that came to mean the use of unlawful acts or terrorism to seek political change.⁹⁶

Sanford’s opinion in *Whitney* was much like his opinion in *Gitlow*. Individual intent was irrelevant; the statute punished mere knowing membership. The legislature had decided that such membership was too dangerous to be permitted, and its judgment was entitled to deference. Brandeis concurred on the ground that *Whitney* had not preserved the issue of whether there was a clear and present danger; Holmes joined the Brandeis opinion.

But this concurring opinion by Brandeis offered the full elaboration of the clear and present danger test in its protective form. “Present” meant imminent or immediate, as Holmes had said in his *Abrams* dissent. The requirement of a “substantive evil Congress has a right to prevent” was ratcheted up to a “substantial” or “serious” evil. Moreover:

In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.⁹⁷

And Brandeis elaborated on the measure of imminence:

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is time for full discussion. If there be time . . . to avert the evil by the processes of education the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.⁹⁸

There were also echoes of Hand's incitement test: "The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."⁹⁹

This is an enormously important and helpful opinion. It goes far to solve the deep conundrums in the clear and present danger test. What was the danger in the World War I cases? That one man might read a flyer and decide not to enlist? Or that cumulative criticism would make it impossible to fill the ranks and force Congress to abandon the war effort? The first danger was not sufficiently serious; the second was never sufficiently imminent.

The danger of bringing the war effort to a halt depended on persuading thousands or millions of men, and for that, there was always time for counterspeech. If counterspeech were ineffective, the danger might still come to pass. But would that be a criminal offense, or democracy at work? It cannot be that government acquires the power to censor just as a political movement begins to succeed—that puny anonymities are protected but Debs was a criminal, or that Eugene McCarthy, the anti-war candidate of half a century later, lost his First Amendment rights when he nearly won the New Hampshire primary.¹⁰⁰ If the radicals are winning the argument, the government's constitutional remedy is to make a better case why the radicals are wrong.

VI. Explaining Holmes?

When able judges change position without plausible explanation, it is always possible that

some unstated distinction reconciled all their positions—a distinction that made sense to them but is lost to us.¹⁰¹ In the case of Holmes and free speech, the possibility of some unstated distinction is highlighted by the fact that his change of position was not cleanly chronological. He wrote the three opinions affirming convictions in March 1919, and he joined no opinion of the Court thereafter, but in 1920, he mysteriously concurred in the result in *Gilbert v. Minnesota*, upholding a state misdemeanor conviction for what appears to have been one of the milder anti-war statements to come before the Court.¹⁰² The principal issue in *Gilbert* was whether federal law pre-empted the similar state law, but the Court also rejected a free speech challenge, and Holmes' concurrence seems inconsistent with all his other votes from *Abrams* forward.¹⁰³

Holmes biographer Sheldon Novick believes that Holmes was consistent throughout this period: that for Holmes, the central issue was specific intent to interfere with the draft or the war effort, and that he voted to affirm in all those cases, and only those cases, where there was sufficient evidence of such intent to support a jury verdict.¹⁰⁴ Novick reads the Holmes opinions in light of an 1894 article in which Holmes had argued that specific intent is relevant to certain tort cases, including cases in which the defendant induces another to harm the plaintiff.¹⁰⁵ The analogy is that in the World War I cases, speakers were charged with attempting to induce listeners to obstruct the war effort. Novick's argument is too elaborate to fully explore here, and I have certainly not untangled all of Justice Holmes' thought about intent. But I do not see how specific intent can explain either the results or the opinions of 1919 and later.

In his *Abrams* dissent, Holmes clearly distinguished specific intent—actual motive to achieve the forbidden end—from the presumption that a speaker intends the natural consequences of his words:

I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. . . . But, when words are used exactly, a deed is

not done with intent to produce a consequence unless that consequence is the aim of the deed. . . . [An actor] does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind it.¹⁰⁶

Novick claims that this distinction was there all along, and that it is what Holmes meant the previous spring in *Schenck*, *Debs*, and *Frohwerk*. Novick concedes that in *Schenck*, it “is not clear . . . whether the ‘specific intent’ required by the Constitution was an actual subjective intent . . . or was simply an intent imputed from the manifest tendency to do harm.”¹⁰⁷ Indeed it is not clear, although it seems to be the latter: the opinion’s principal statement about intent infers Schenck’s intent from Holmes’ view of the effect that should have been expected.¹⁰⁸ And although Novick puts quotation marks around the phrase “specific intent,” that phrase does not appear in the *Schenck* opinion.

Frohwerk is much more explicit that Holmes meant only an imputed intent: “Small compensation would not exonerate the defendant if it were found that he expected the result, even if pay were his chief desire.”¹⁰⁹ Thus in *Frohwerk* Holmes said it is enough that defendant “expected” the forbidden result; in *Abrams*, he said it is not enough that defendant had “knowledge” that the forbidden result would ensue. In *Frohwerk* he said defendant is guilty even if a permitted result was defendant’s “chief desire;” in *Abrams* he said defendant is innocent unless the forbidden result was his “proximate motive.” Unless the result that a person “expect[s]” is different from the result that he “know[s] . . . will ensue,” and unless his “chief desire” in doing a thing is different from his “proximate motive” in doing the thing, the intent required in *Frohwerk* is irreconcilable with the intent required in the *Abrams* dissent. The quoted sentence from *Frohwerk* is the clearest statement on intent in the three opinions in March, but Novick disregards it.

Novick relies principally on Holmes’ comment that the *Debs* jury was instructed that it must find both that “the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service,” and that the “de-

fendant had the specific intent to do so in his mind.”¹¹⁰ This is the strongest evidence for Novick’s position, but it must be read in light of what Holmes said in *Frohwerk* the same day, and the tension between the two opinions largely disappears when one examines the whole jury charge in *Debs*.

The *Debs* jury charge said many things about intent, and it is impossible to know what the jury understood.¹¹¹ The judge repeatedly told the jury that conviction required “a specific, wilful, criminal intent,” including “the specific criminal intent to produce the results and consequences forbidden by the law.” But he never defined “specific criminal intent,” apart from some comments about how “intent” could be found. He did define “wilfully,” to mean “willingly, knowingly, purposely, intentionally, as contradistinguished from accidentally or inadvertently.”

Most important, he told the jury that “a person is presumed to intend the natural and probable consequences of his words and acts,” and he suggested that the jury could find intent based on what *Debs* “expect[ed],” or what he “ought” to have “reasonably foreseen” about what “would” or “might be” the natural consequences of his speech. He told them that good motives were irrelevant to the question of intent.

In short, specific intent in this jury charge meant exactly what Novick denies that Holmes meant: “simply an intent imputed from the manifest tendency to do harm.”¹¹² Despite the language of specific intent, this intent was presumed from the same evidence that would support a finding of intent as natural consequences, and thus, at the appellate level, a requirement of specific intent added nothing to the evidence required to support a conviction. The only difference would be that some language of specific intent would have to appear in the jury instruction, and in theory, a defendant could overcome the presumption and persuade the jury that he had not acted with specific intent. This instruction did defendants no good even in theory at the appellate level, and it is hard to imagine that it did them any good in fact with the jury.

The challenge for Novick’s theory then would be to find some minimally sufficient evidence of specific intent that was present in the March cases and in *Gilbert v. Minnesota*, but was not present in any of the other cases. With re-



An organizer for the Communist party in Georgia in the 1930s, Angelo Herndon was convicted under a slave insurrection statute for distributing literature advocating economic and political reforms and "self determination for the Black Belt."

spect to *Abrams*, Novick must read Holmes as saying that no reasonable jury could find specific intent to interfere with the war with Germany in light of defendants' express focus on the American intervention in Russia. That is straightforward enough, but it is not consistent with the results in *Schenck*, *Debs*, and *Frohwerk*. Certainly *Abrams* was guilty under the jury instruction in *Debs*: his explicit call for a strike in ammunition plants would foreseeably hinder the war effort, and he was presumed to specifically intend that result even if he also had a lawful motive to oppose the intervention in Russia. The problem in all four cases is that the very same words would manifest both the lawful intent to persuade the government to change its policies and the unlawful intent to hinder the war effort.

Either such words were enough to support a conviction, or they were not.

Whatever one does with *Abrams*, there is no explaining *Gitlow*. The manifesto in *Gitlow* expressly advocated mass action to overthrow the government. Unlike *Abrams*, there was no claim of an alternative and lawful goal, and unlike *Schenck*, *Debs*, and *Frohwerk*, there was no reliance on innuendo coupled with disclaimers of unlawful goals. A judge voting consistently on the basis of whether there was minimally sufficient evidence of specific intent could not vote to affirm in *Schenck*, *Debs*, and *Frohwerk* and then vote to acquit in *Gitlow*.

Even if Holmes' votes could all be reconciled with some series of technical distinctions, it would be impossible to reconcile the rhetoric

of the opinions. In *Schenck, Debs, and Frohwerk*, speech was nothing special; nothing in these three opinions is at all inconsistent with Holmes' privately expressed view that freedom of speech "stands no differently than freedom from vaccination." The *Abrams* dissent is full of soaring rhetoric about the importance of free speech, and thereafter Holmes joined a whole series of Brandeis opinions with similar rhetoric. The great weight of scholarly opinion is that Holmes and Brandeis changed their position in free speech cases,¹¹³ and I fully agree.

VII. The Long Transition

From *Schenck* to *Whitney* there were ten free speech decisions in eight years, all decided for the government. The first three were unanimous; in the next seven, Holmes and Brandeis filed separate opinions. Holmes' popular reputation as a civil libertarian is based almost entirely on these seven cases; he showed almost no civil libertarian inclinations in any other area of the law.

This is an early example of Justices persisting in dissent and refusing to accept the views of the majority. As disruptive as that may be to the Court's deliberations, and as frustrating as it undoubtedly is when the other fellow does it, this early example must count in favor of the practice.¹¹⁴ Eventually the Court came over to something like the Holmes-Brandeis position.

That long transition began on the same day as *Whitney*, in *Fiske v. Kansas*.¹¹⁵ *Fiske* was charged with criminal syndicalism for distributing radical literature of the Wobblies, the International Workers of the World. The Court unanimously set aside the conviction because there was no evidence to support it. The Wobbly literature advocated a change in the form of government, but nothing in that literature expressly advocated unlawful means to achieve the desired change. The conviction was therefore "an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment."¹¹⁶ Clear and present danger played no role, but this was the first victory for free speech in the Supreme Court.

The transition continued through the 1930s. *Stromberg v. California* struck down as uncon-

stitutionally vague a law against displaying a red flag "as a symbol or emblem of opposition to organized government."¹¹⁷ The Court announced a firm ban on prior restraints in *Near v. Minnesota*,¹¹⁸ and it struck down a discriminatory tax on certain newspapers in *Grosjean v. American Press Co.*¹¹⁹ It reversed another free speech conviction for lack of evidence in *DeJonge v. Oregon*.¹²⁰ It struck down standardless licensing requirements for distributing leaflets in *Lovell v. Griffin*¹²¹ and for assembling in the streets in *Hague v. CIO*.¹²² None of these cases involved the argument about clear and present danger, but each of these cases indicated a changing attitude toward freedom of speech. In *Palko v. Connecticut*, the Court said in dictum that "freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom."¹²³

The Court returned to clear and present danger in *Herndon v. Lowrey*.¹²⁴ Herndon was a black organizer for the Communist Party in Georgia. He distributed literature urging a list of economic and foreign policy demands; one item on the list was "self-determination for the Black Belt." The state argued that this referred to a book, found in Herndon's room, outlining the Party's position that a new state should be carved out with a black majority. Herndon was prosecuted under a slave insurrection statute that forbade "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State."¹²⁵

Chafee famously commented that of all the defendants in all these cases, Herndon was the most dangerous, because the black population of Georgia had so many just grievances and so little chance to redress those grievances through the political process.¹²⁶ But there was no evidence that Herndon had advocated force or violence. The book advocating the new state contained the usual ambiguities about how the state should be created, and anyway, there was no evidence he had distributed the book or even shown it to anyone.

Once again, the Court reversed for lack of evidence. It added that if the statute permitted conviction on a jury's inferences about possible future violence not yet advocated, the statute was unconstitutionally vague. Justice Roberts' opinion did not adopt the clear and present danger

test, but it went far towards rejecting the bad tendency test. He quoted and seemed to approve the rule in *Gitlow*: that if the legislature expressly forbade speech, the courts should defer—but, he added, only if the “statute denounced as criminal certain acts carefully and adequately described.”¹²⁷ *Gitlow* did not mean

that under a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor, the standard of guilt may be made the “dangerous tendency” of the words.

The power of a state to abridge the freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government.¹²⁸

Abridgments of speech and assembly are “the exception rather than the rule.” That is rather a basic proposition to have to announce 146 years after ratification of the First Amendment, but better late than never. The majority consisted of Chief Justice Hughes, and Justices Brandeis, Stone, Roberts, and Cardozo—the same majority that changed direction on economic regulation in the same Term. Justices Van Devanter, McReynolds, Sutherland, and Butler dissented.

The final victory for the clear and present danger test came in a pair of cases about peaceful labor picketing, *Thornhill v. Alabama*¹²⁹ and *Carlson v. California*,¹³⁰ decided together in 1940. From a contemporary perspective, these cases appear to have been much easier than the earlier cases; the facts were far removed from obstructing the war effort or overthrowing the government. Organized labor was an essential part of the New Deal coalition, and it is almost inconceivable that the New Deal Court would permit states to criminalize peaceful picketing by labor unions. But labor picketing was highly controversial at the time; there is evidence that Justice Murphy struggled with the opinion, which was bitterly criticized.¹³¹ These difficulties had mostly to do with picketing, not with clear and present danger. A momentous change in the general standard for free speech cases would occur

with little debate, subsumed in a fact-specific battle about a particular kind of speech and in a case where the result was inevitable.

In *Thornhill*, Murphy said that restrictions on political discussion “can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.”¹³² Murphy’s footnote at this point said simply: “See Mr. Justice Holmes in *Schenck* and *Abrams*.” He did not even mention that *Abrams* had been a dissent, or that the Court had rejected the position of that dissent in ten consecutive cases. He continued:

We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscriptions of freedom of discussion embodied in [this statute]. . . .

[N]o clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute . . .¹³³

The Court decided *Carlson* on the authority of *Thornhill*, again finding “no clear and present danger of substantive evils within the allowable area of State control.”¹³⁴

The *Abrams* dissent, as elaborated and clarified by the uncited Brandeis concurrence in *Whitney*, had become the law. The vote was eight to one; Justice McReynolds dissented without opinion. A month later, in *Cantwell v. Connecticut*, the West Publishing Company made a headline of the clear and present danger test¹³⁵ for the first time since *Schenck*.

Harry Kalven called the 1940s “the heyday of clear and present danger.”¹³⁶ Justice Jackson said the test had become “a commonplace.”¹³⁷ The test was invoked in some twenty cases in the 1940s, usually but not always leading to a decision protecting speech. Hardly any of these cases involved war resisters or revolutionaries; there was much less opposition to World War II

than to World War I, although there was more dissent, and more prosecutions, than one would infer from the Supreme Court's docket.¹³⁸ The prosecuted speakers in the 1940s were mostly labor organizers,¹³⁹ fascists,¹⁴⁰ Jehovah's Witnesses,¹⁴¹ and for some reason, vehement critics of judicial opinions.¹⁴² In these contexts, the argument was less about the *imminence* of the danger than about the *seriousness* of the danger: what dangers were great enough to justify suppression of speech? Clear and present danger—a particular test about the connection between speech and harmful action—was evolving in the direction of compelling governmental interest—a general test about fundamental constitutional rights.

It is hard to see how this Court can enforce constitutional rights without assessing the importance of the reasons offered to justify infringing those rights. But judicial assessments of the weight of competing interests have always been controversial, and the apparent consensus in Justice Murphy's two labor picketing cases did not survive the shift of emphasis.

Two Terms after Murphy's two labor opinions, Justice Frankfurter dissented for four in *Bridges v. California*.¹⁴³ This was a case about whether the state could punish vigorous criticism of judges, coupled with threats to call a lawful but dangerous strike in one case, and to editorialize against the judges' re-election in the companion case, if the judges decided pending cases in ways the critics did not like. It is one of history's coincidences that this case about threatening judges with a longshore strike that would tie up the whole West Coast was decided on the day after Pearl Harbor.

Justice Black for the majority reviewed the clear and present danger test and summarized it as follows: "[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."¹⁴⁴ Finding that defendants' attitudes were well known to the judges, and that the risk of strikes and editorials would have been obvious whether or not they had been explicitly threatened, the majority found no clear and present danger. Justice Frankfurter, dissenting, denied that clear and present danger was a formula; he insisted that there was only a "literary difference," without constitutional significance, between

"clear and present danger" and California's requirement of a "reasonable tendency."¹⁴⁵ He was all the way back to *Schenck's* original equation of clear and present danger with mere bad tendency.

Frankfurter dissented again in the second flag salute case, *West Virginia v. Barnette*.¹⁴⁶ He argued that to require "imminence of national danger" was to take clear and present danger wholly out of context and to assume for the Court "a legislative responsibility that does not belong to it."¹⁴⁷ He also implausibly insisted that the mandatory flag salute put no burden on freedom of speech, so there was nothing to justify.

The Court heard only two cases of protest against World War II. *Taylor v. Mississippi* was a prosecution of a Jehovah's Witness for condemning flag salutes as idol worship.¹⁴⁸ The Court reversed on the ground that if it were lawful to refuse to salute the flag, then it must be lawful to advocate refusal to salute the flag. A right to advocate lawful conduct is a potentially broad principle with applications to threats of editorials just before the next election and to advocacy of strikes, of refusing to work in defense plants, of declining to enlist unless drafted, of exhausting all appeals before submitting to the draft, and so on.

Another count in *Taylor* charged a conversation in which the defendant had said to several women, two of whom had lost sons in the war, that the war was wrong and "these boys were being shot down for no purpose at all."¹⁴⁹ The Court unanimously reversed, finding no criminal intent, no incitement, and "no clear and present danger to our institutions or our Government."¹⁵⁰

The other war protest case, *Hartzel v. United States*,¹⁵¹ was a prosecution under the Espionage Act. Hartzel printed three pro-German pamphlets and mailed them anonymously to selected leaders, including military officers. The pamphlets argued that the United States should abandon its allies and convert the war into a war of the white race against the yellow race.

The language of the Espionage Act was unchanged. The plurality read a requirement of specific intent into the statutory term "willfully." It also said that the statute required "a clear and present danger that the activities in question will bring about the substantive evils which Congress

has a right to prevent.”¹⁵² The government must prove both the specific intent and the clear and present danger beyond a reasonable doubt. The plurality found no evidence of specific intent to induce refusal of duty among the generally high-ranking military recipients of the letter, and Justice Roberts concurring found no evidence of something—he would not say what—so the conviction was reversed. Justices Reed, Frankfurter, Douglas, and Jackson dissented, arguing that the jury could have inferred specific intent from the words of the pamphlets. Neither side discussed whether the government had proved clear and present danger. It is fair to describe the case as coming within one vote of restoring *Schenck*.¹⁵³ As in *Schenck*, Hartzel targeted the military with his mailing. But even more clearly than in *Schenck*, Hartzel simply argued policy and advocated no specific or unlawful response by his recipients.

There were other dissents, and occasional decisions to uphold restrictions on speech, in

these cases in the 1940s. The clear and present danger test was the law, but it had determined critics, and its supporters interpreted it with varying degrees of stringency and enthusiasm. It was not in good shape for a renewed encounter with genuinely radical speech.

VIII. *Dennis v. United States*

That encounter came most directly in *Dennis v. United States*, the prosecution of the top leadership of the Communist Party U.S.A.¹⁵⁴ I assume that this series will have a separate lecture on the Cold War cases, and I cannot begin to do them justice today.¹⁵⁵ But let me briefly finish the story of the clear and present danger test.

Dennis was in one sense the opposite of many of the cases in the 1940s. Here the substantive evil was as great as could be imagined—the violent overthrow of constitutional government and the substitution of a regime that took Joseph Stalin as its leader, hero, and model.



Laying a wreath in 1934 to commemorate the 17th anniversary of the United States' entry into World War I, these students pledged not to support future wars. But during World War II there were few anti-war protests and most prosecutions involving speech were directed at labor organizers and Jehovah's Witnesses.

The government's problem was that this danger was not present. It was about as remote as could be imagined. Dennis was not charged with violent overthrow, nor with attempted violent overthrow, nor even with conspiracy to overthrow. Dennis was charged with conspiracy to advocate overthrow and with conspiracy to organize a group to advocate overthrow.¹⁵⁶ Even the advocacy of overthrow was remote and theoretical—that overthrow would be proper and desirable when the opportunity presented itself, and that the internal contradictions of capitalism would eventually lead to economic collapse and the opportunity for violent overthrow. As Justice Douglas argued so effectively in dissent, the only time the opportunity might imaginably have presented itself was in the past, in the depths of the Depression when people were losing faith in capitalism and when the purges and show trials and other evils of Stalinism had not yet been revealed.¹⁵⁷ Even then, the Communist Party U.S.A. had been politically effective only when it supported the government and emphasized its anti-fascism.¹⁵⁸

But the domestic communist party took its instructions from the international communist movement, and the international movement was on a roll. Communists had just taken over in China and all of Eastern Europe, and had nearly thrown us into the sea in South Korea.¹⁵⁹ There were large Communist parties in several western European countries. Communist spies had obtained secrets of nuclear weapons and advised the President of the United States.¹⁶⁰ It was a very hard time for judges to say that the domestic leaders of this movement were free to operate and say what they wanted so long as they refrained from illegal conduct. But everyone agreed that the clear and present danger test was now the law. How to convict the Communist leaders when the danger so obviously was not present?

Learned Hand, still sitting after all these years, led the way in his opinion for the Court of Appeals. He combined the separate elements of clear danger, present danger, and serious danger into a single sliding scale, modeled on his earlier definition of negligence.¹⁶¹ "In each case, courts must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the

danger."¹⁶²

If the gravity of the evil were infinite, then the probability of the evil could be infinitesimal and the test would still be met. The test had been converted from two separate and stringent requirements into one sliding scale in which neither element considered one at a time was even a requirement, let alone a stringent one, and in which there was no express statement that the combined standard—the discounted probability of evil—must be high to justify limitation of an express constitutional right. Chief Justice Vinson's opinion for the Court adopted this revised standard.¹⁶³ He did not acknowledge that he had changed anything; to have actually confronted the precedents would have required him to admit that this was a substantial reformulation.

Justice Douglas insisted that no clear and present danger had been shown, that the issue should have been submitted to the jury, and that even if it were to be decided by the trial judge, the decision must be based on evidence and not on judicial notice.¹⁶⁴ Justice Black condemned the majority's "repudiat[ion]" of the clear and present danger test, but made little effort to document the earlier formulation or show how the reformulation amounted to repudiation.¹⁶⁵

Justice Jackson, concurring, thought the clear and present danger test inapplicable to express advocacy of violent overthrow, even by an isolated individual, citing Justice Sanford's opinion in *Gitlow*.¹⁶⁶ And *a fortiori*, he thought the test inapplicable to the unique circumstances of the Communist Party. No court could accurately assess the danger.

Justice Frankfurter, who had never accepted the test, delivered a full blown explanation of why in his view, clear and present danger had never been the law and could not be the law.¹⁶⁷ But to the extent that it had sometimes appeared in the cases, it had been as separate requirements of immediacy and gravity, not the sliding scale adopted by the majority. He professed to be troubled by the convictions—advocacy of overthrow is coupled with "criticism of defects in our society," and "It is a sobering fact that in sustaining the convictions . . . we can hardly escape restrictions on the interchange of ideas."¹⁶⁸ But Congress had made a judgment and it was not for him to second guess. He voted to affirm the

convictions.

All the Justices voting to affirm distanced themselves from earlier cases. In those cases, there really had not been a danger, but here there really was. Even Frankfurter, the advocate of judicial deference, said that “It requires excessive tolerance of the legislative judgment to suppose that the *Gitlow* publication in the circumstances could justify serious concern.”¹⁶⁹

The clear and present danger test never recovered from *Dennis*. The majority’s reformulation fundamentally changed the nature of the test from two requirements to one sliding scale. That might not have mattered on facts less extreme than threatened violent overthrow, but talk about violent overthrow would be a large part of the Court’s speech cases in the 1950s. The reformulation left Black and Douglas with no confidence in the test; they began to insist on absolute protection for speech.¹⁷⁰ Frankfurter had repudiated the test outright, and Jackson had repudiated it in cases about talk of violent overthrow. Protection of radical speech would have to find another vehicle.

IX. Protecting Speech After *Dennis*

There were two lines of development. With respect to speech cases generally, and fundamental rights cases even more generally, the pre-*Dennis* requirement that the threatened danger be serious re-emerged as the compelling interest test. It was Justice Frankfurter of all people, concurring in *Sweezy v. New Hampshire*, who first said that to override a citizen’s “political autonomy, the subordinating interest of the state must be compelling.”¹⁷¹ *Sweezy* involved an attempt to silence a college professor, a threat to free speech that Frankfurter had personally experienced in 1919, and those facts apparently overcame his usual reluctance to assess the weight of government interests.

Justice Harlan quoted Frankfurter’s formulation in an opinion of the Court in *NAACP v. Alabama*,¹⁷² and “compelling interest” quickly became a standard statement of the state’s burden of justifying substantial restrictions on constitutional rights.¹⁷³ Its affinity to the seriousness prong of the clear and present danger test is illustrated by Justice Stewart’s string citation to the speech cases of the 1940s¹⁷⁴ and by an alter-

nate formulation that occasionally appeared: “Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” Justice Rutledge first offered this sentence in 1945 as an elaboration of the clear and present danger test;¹⁷⁵ Justice Brennan quoted it in 1963 as an elaboration of the compelling interest test.¹⁷⁶

There remained the more specific problem of speech that threatened illegal conduct. The roots of a solution to that problem were in Learned Hand’s long ago opinion in *Masses*: statutory interpretation before constitutional limits, and an objective requirement of deliberate incitement before, or instead of, a subjective assessment of danger.

The key move came in *Yates v. United States*.¹⁷⁷ *Yates* was a carbon copy of *Dennis*, a nearly identical prosecution of the leaders of the California Communist Party. But in *Dennis*, the Court had granted certiorari only on the constitutionality of the Smith Act,¹⁷⁸ refusing to look at the record or to consider sufficiency of the evidence. In *Yates*, Justice Harlan looked at the record, and it turned out that the government had proved very little.

Harlan interpreted the Act to require concrete advocacy of violent overthrow.¹⁷⁹ Theoretical discussion, or even advocacy in the abstract, was not enough. He did not require immediacy—that might have been too much in the teeth of *Dennis*—but he did require incitement to some specific action, even if in the future. His review of the record gave meaning to the opinion’s abstractions. The Court directed acquittals in five cases, and granted new trials for all the others. The opinion led to dismissals in nearly all the remaining Smith Act prosecutions.¹⁸⁰ Despite highly effective government infiltration of the party, the government apparently had no evidence that the Communist leadership had advocated any specific action directed towards violent overthrow of the government.

*Brandenburg v. Ohio*¹⁸¹ completed the recovery from *Dennis*. *Brandenburg* combined the element of immediacy from the clear and present danger test with the element of incitement from *Masses* and *Yates*; it held that government may not “forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is *directed to inciting* or producing im-

minent lawless action and is likely to incite or produce such action."¹⁸² The Court struck down the Ohio Criminal Syndicalism Act, enacted in 1919 and substantially the same as the California Act upheld in *Whitney*. *Whitney* was expressly overruled.

The idea of clear and present danger appears in *Brandenburg* as "imminent lawless action" "likely" to actually happen.¹⁸³ The idea, but not the phrase itself. The phrase was useless after its reformulation into a sliding scale in *Dennis*, and *Dennis* was too big a case, too big a political symbol—certainly in 1969, and maybe still today—to overrule or repudiate just to recover a familiar phrase. And anyway, "imminent" is a better word than "present;" "lawless action" is a better phrase than "danger." The new terms communicate more precisely what the Court meant after thinking about it off and on for fifty years.

The incitement half of the *Brandenburg* test did not improve on prior phrasings. Advocacy "directed to" inciting or producing imminent lawless action is ambiguous. It certainly includes express words of incitement, and some commentators have thought it limited to that. But on this point I think Sheldon Novick is right; advocacy "directed to" inciting imminent lawless action includes advocacy specifically intended to incite, even if the speaker cleverly avoids express words of incitement.¹⁸⁴ But the opinion cannot be read to include mere natural or foreseeable consequences, for in that event, the likelihood of imminent lawless action would embody the whole test, and "directed to inciting" would add nothing.

Perhaps the principal strength of the *Brandenburg* formulation is in its careful use of the word "imminent," which modifies both the



STEVE NELSON



WILLIAM ALBERTSON

BENJAMIN LOWELL
CAREATHERS, SR.

JAMES HULSE DOLSEN



ANDREW RUDOLPH ONDA



In *Dennis v. United States* (1951) the Supreme Court upheld the Smith Act, America's first peacetime sedition law since 1798, which outlawed any organized advocacy of changing the federal government by force or violence. As a result, the government prosecuted more than 100 Communist Party members, including the six district leaders from Pennsylvania, West Virginia, and Michigan shown above. Most of these defendants were convicted, but most of the convictions were vacated after *Yates v. United States* (1957).

danger element and the incitement element. “Imminent” limits the meaning of the verb by modifying the verb’s object, and it is incorporated into the next clause by the modifier “such.” The speaker’s words must be “directed to . . . imminent lawless action,” and “such action” must be likely to result. It is thus permissible to stir up opposition to government policy even with the specific intent that members of the audience be favorably disposed to lawless action at some future time. And it is permissible to expressly advocate lawless action if no one is likely to act on the advice, a principal that protects much emotionally fulfilling radical rhetoric about imaginary resistance.

Clear and present danger was an attempt to protect speech by balancing interests, with the scales tilted in favor of the constitutional right. It was, as I have said, a narrowly targeted precursor of the compelling interest test. Incitement is a categorical rule—certain narrowly defined statements are unprotected, and all other statements are protected.

Both forms of rule are necessary; either one alone is often insufficient. The problem with categorical rules is that they ignore the relative weights of competing interests. Get the category slightly wrong and you can find yourself punishing heartfelt exercises of core constitutional rights—sometimes for trivial reasons. The problem with balancing interests is that it is more difficult to administer and somewhat easier to manipulate. It is easy to overestimate the danger and to underestimate the importance of an annoying, idiosyncratic, or simply unfamiliar exercise of a constitutional right. The genius of *Brandenburg* is belts and suspenders—it provides both kinds of protection.

If the Court had started with the premise that criticism of government policy is the inviolable core of the Free Speech Clause, the details of how it described the unprotected residue would have been less important. This would be a different kind of categorical rule—a category of what is protected instead of a category of what is unprotected. In the overlap of speech that is political debate and speech that undermines government policy, the category of political debate would control the legal outcome. But the Court could not start with the premise that political

debate is the protected core, because of the legacy of the English law of seditious libel and the repeated efforts of American governments to resurrect that law—most obviously in 1798 and 1917.

This is why *New York Times v. Sullivan* is the essential silent partner to our story, even though it mentioned clear and present danger only in passing.¹⁸⁵ *New York Times* removed doubt about background presumptions by finally and unambiguously holding that the Speech Clause repealed the law of seditious libel. It established that criticism of government officials and policies is the most-protected core of free speech. Any statement of what is unprotected must now be consistent with that starting premise. Radical criticism of the government is protected, and any doctrinal line-drawing must be consistent with that premise.

X. Conclusion

The phrase “clear and present danger” continues to appear in the reports after *Brandenburg*, usually in contexts far removed from advocacy of illegal action. It figured prominently in the arguments in two cases about speech concerning the judicial system,¹⁸⁶ where the cases from the 1940s on criticism of judges seemed factually relevant—but the Court did not rely on the test in either case. It has been written into some statutes,¹⁸⁷ and it appears in other passages the Justices need to quote. Justice Stevens occasionally invokes it voluntarily, but only in separate opinions.¹⁸⁸ It still seems to convey a powerful meaning—but only if you take it literally and ignore its history. As a significant part of the Court’s doctrine, it is gone.

The problem it addressed is not gone. It will appear again in some new guise, with skilled lawyers arguing the need to punish speech that has some tendency to encourage bad conduct or a bad outcome. For that, we have *Brandenburg*, and the legacy of Justice Holmes and Justice Brandeis, and of the early Learned Hand.

Note: *The author is grateful to Mitchell Berman, William Forbath, L.A. Powe, and David Rabban*

for comments on an earlier draft, to John Barlow and Bradley Curl for research assistance, and to Jill Duffy and Marlyn Robinson of Tarlton Law Library for Tarlton's usual magnificent assistance with obscure sources.

Endnotes

- ¹ Carlos Santos, "Mrs. Gore, Visiting U.Va., Backs Affirmative Action," *Richmond Times-Dispatch*, Sept., 29, 1999, at B4 (1999 WL 4366335).
- ² Associated Press, "Air Force To Seek Help After Scientists' Exodus," *Albuquerque Journal*, Sept. 30, 1999, at B4 (1999 WL 26688904).
- ³ John B. Alexander, "Nonlethal Weapons: When Deadly Force Is Not Enough," *Futurist*, Oct. 1, 1999, at 34 (1999 WL 8578659).
- ⁴ James W. Dean, "Was East Asia Illiquid or Insolvent? With Special Reference to South Korea," *7 Multinat'l Bus. Rev.* 6067 (Oct. 1, 1999) (1999 WL 16114024).
- ⁵ James P. Pinkerton, "Primary (Totalitarian) Colors: Red and Brown," *Newsday*, Sept. 28, 1999, at A44 (1999 WL 8192486).
- ⁶ Bill Clinton, "World Terrorism," (Speech to United Nations General Assembly, reprinted in *Belfast Telegraph*, Sept. 23, 1999 (1999 WL 28235546)).
- ⁷ Barbara Boxer, "NRA Pressure Blocks Modest Gun-Control Bill," *San Francisco Examiner*, Sept. 23, 1999, at A27 (1999 WL 6877858).
- ⁸ David Waldstein, "Fantastic Voyage—Amazin' Trip Ends on Mile High Note," *N.Y. Post*, Sept. 16, 1999, at 84 (1999 WL 27650138).
- ⁹ Peter Cook, "Will a High Yen Hurt Wall Street?," *Toronto Globe & Mail*, Sept. 20, 1999, at B2 ("a high yen is a clear and present danger to U.S. well being").
- ¹⁰ Hamish McDonald, "Clear and Present Danger," *Sydney Morning Herald*, Sept. 18, 1999, at 33 (1999 WL 24899497) (commenting on the dangers of Australian troop deployment in East Timor).
- ¹¹ "Privacy Lost to Highest Bidder," *Canberra Times*, Sept. 21, 1999, at 9 (1999 WL 27686242) ("growth of the Packer organization [a media company], combined with new technology, is highlighting a clear and present danger to all Australian consumers").
- ¹² "Government Declines to Disclose Audit Result on Bank Scandal," *Jakarta Post*, Sept. 21, 1999 (1999 WL 20298823) (quoting a "law expert" that "There must be an exception [to bank secrecy laws] if there's clear and present danger").
- ¹³ Elli Wohlgelemerter, "Shoah Showdown," *Jerusalem Post*, Sept. 24, 1999, at 05B (1999 WL 9008511) (quoting historian Deborah Lipstadt that "I don't believe Holocaust denial is a clear and present danger; it's a clear and future danger. When there won't be anybody around to say 'this is my story, this is what happened to me,' it will become easier to deny.").
- ¹⁴ Aluf Benn & Gideon Alon, "Barak Seeks Solution for Shin Bet—PM: 'We are not in Holland,'" *Ha'aretz* (Tel Aviv), Sept. 16, 1999 (1999 WL 17471220) ("The ministerial committee yesterday appointed a panel of experts to find a legal solution to the interrogation of suspected terrorists in cases of clear and present danger.").
- ¹⁵ "Dreams May Come True," *Turkish Daily News* (Ankara), Sept. 14, 1999 (1999 WL 22749222) ("Selcuk stated very clearly that there is no clear and present danger [from Islamic fundamentalists], only a superfluous one").
- ¹⁶ "Philippine Govt Urged to Halt Fish Imports from Japan/Korea," *Asia Pulse*, Sept. 22, 1999 (1999 WL 27959967) (dateline General Santos City).
- ¹⁷ I conducted the search on October 11, 1999, searching for "clear and present danger," after December 31, 1997 and before October 7, 1999, in Westlaw's All News database.
- ¹⁸ "Separate but equal" appeared 1,694 times; "right to remain silent" appeared 1,445 times; "all deliberate speed" appeared 376 times. "Separation of church and state" appeared 7,578 times, but that is commonly attributed to Thomas Jefferson, and more accurately to Roger Williams, and only borrowed by the Supreme Court. All searches were conducted at the same time and with the same methods, described in note 17.
- ¹⁹ Charles Call, **Clear and Present Dangers: The U.S. Military and the War on Drugs in the Andes** (Washington Office on Latin America 1991); Nicholas Capaldi, **Clear and Present Danger: The Free Speech Controversy** (Pegasus 1969); John Walton Caughey, **In Clear and Present Danger: The Crucial State of Our Freedoms** (Univ. of Chicago Press 1958); Tom Clancy, **Clear and Present Danger** (Putnam 1989); M. Stanton Evans, **Clear and Present Dangers: A Conservative View of America's Government** (Harcourt Brace Jovanovich 1975); Donald R. Richberg, **Labor Union Monopoly, a Clear and Present Danger** (Regnery 1957); Bruce M. Russett, **No Clear and Present Danger: A Skeptical View of the United States Entry into World War II** (Harper & Row 1972); Uwe Radok, **On the Surging Potential of Polar Ice Streams: Antarctic Surges, A Clear and Present Danger?** (U.S. Dept. of Commerce, Nat'l Technical Information Serv. 1987).
- ²⁰ *Clear and Present Danger* (Paramount 1994).
- ²¹ Clancy, *supra* note 19.
- ²² 341 U.S. 494 (1951).
- ²³ David M. Rabban, **Free Speech in Its Forgotten Years** 248-380 (Cambridge Univ. Press 1997).
- ²⁴ Harry Kalven, Jr., **A Worthy Tradition: Freedom of Speech in America** 167-236 (Harper & Row 1988).
- ²⁵ For an account of the long slow decision to enter the war, and on which side, see David Fromkin, **In the Time of the Americans** 77-121 (Knopf 1995).
- ²⁶ U.S. Dept. of Commerce, Bureau of the Census, **Historical Statistics of the United States 1789-1945: A Supplement to the Statistical Abstract of the United States**, Table B237-278 at 32 (1949). Total male population over age 21 was 26,999,151; of those, 6,780,214 were foreign born.
- ²⁷ Fromkin, *supra* note 25, at 118.
- ²⁸ Espionage Act, ch. 30, 40 Stat. 217 (1917) (repealed 1948).
- ²⁹ H.R. 291, 65th Cong., 1st Sess. sec.2(c) (1917). For discussions of this provision, see Rabban, *supra* note 23, at 250-51; Harold Edgar & Benno C. Schmidt, Jr., "The Espionage Statutes and Publication of Defense Information," *73 Colum. L. Rev.* 929, 946-66 (1973); Thomas F.

Carroll, "Freedom of Speech and of the Press in War Time: The Espionage Act," 17 *Mich. L. Rev.* 621, 622-29, 636 (1919).

³⁰ Tit. I, sec.3, 40 Stat. 217, 219 (1917) (repealed 1948).

³¹ 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

³² *Masses Publishing Co. v. Patten*, 246 F. 24 (2d Cir. 1917).

³³ For earlier Supreme Court cases, generally supportive of the bad tendency test, see David P. Currie, **The Constitution in the Supreme Court: The Second Century, 1888-1986**, at 115-17 (Univ. of Chicago Press 1990).

³⁴ 205 U.S. 454 (1907).

³⁵ The remarkable facts are summarized in Lucas A. Powe, Jr., **The Fourth Estate and the Constitution** 1-7 (Univ. of California Press 1991). The articles, and Patterson's detailed defense of their truth, are set out at length in *People ex rel. Att'y Gen'l v. News-Times Pub'g Co.*, 35 Colo. 253 (1906), *aff'd as Patterson v. Colorado*, 205 U.S. 454 (1907).

³⁶ *Patterson*, 205 U.S. at 462.

³⁷ The lower court cases are reviewed in Rabban, *supra* note 23, at 255-69.

³⁸ See Marc Rohr, "Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era," 28 *San Diego L. Rev.* 1, 3-4 (1991).

³⁹ *Schenck v. United States*, 249 U.S. 47 (1919).

⁴⁰ *Debs v. United States*, 249 U.S. 211 (1919). For additional quotations from the speech and an account of the trial, see Nick Salvatore, **Eugene V. Debs: Citizen and Socialist** 291-96 (Univ. of Illinois Press 1982).

⁴¹ *Frohwerk v. United States*, 249 U.S. 204 (1919).

⁴² *Schenck*, 249 U.S. at 52.

⁴³ Salvatore, *supra* note 40, at 325-28.

⁴⁴ *Schenck*, 249 U.S. at 51-52.

⁴⁵ Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, & Mark V. Tushnet, **Constitutional Law** 1095 (Little Brown 3d ed. 1996).

⁴⁶ *Schenck*, 249 U.S. at 51-52 ("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*").

⁴⁷ Brief of Gilbert E. Roe as Amicus Curiae, *Debs v. United States*, 249 U.S. 211 (1919), described in Rabban, *supra* note 23, at 274. For Blackstone's defense of witchcraft laws, see William Blackstone, 4 **Commentaries on the Laws of England** 60 (1769).

⁴⁸ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

⁴⁹ Letter from Oliver Wendell Holmes, Jr., to Zechariah Chafee, Jr. (June 12, 1922) (Chafee Papers, Box 14, Folder 12, Harvard Law School Library), quoted in Rabban, *supra* note 23, at 285.

⁵⁰ Oliver Wendell Holmes, Jr., **The Common Law** 65-70 (Little Brown 1881).

⁵¹ *Swift & Co. v. United States*, 196 U.S. 375, 402 (1905).

⁵² Letter from Oliver Wendell Holmes, Jr. to Learned Hand (June 24, 1918) (Hand Papers, Box 103, Folder 24, Harvard Law School Library), quoted in Rabban, *supra* note 23, at 293.

⁵³ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁵⁴ 268 U.S. 652, 668 (1925).

⁵⁵ 123 U.S. 623 (1887).

⁵⁶ 246 U.S. 434 (1918).

⁵⁷ In his *Abrams* dissent, Holmes said he had "never [] seen any reason to doubt that the questions of law that were alone before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided." 250 U.S. at 627 (citations omitted). And in his 1922 letter to Chafee, *supra* note 49, Holmes still claimed to see little difference between bad tendency and clear and present danger.

⁵⁸ According to Frankfurter's notes, Brandeis said he had "never been quite happy" with his votes in *Schenck* and *Debs*, and that the opinions should have been based on the war power and confined to time of war. See Transcript of Conversations Between Louis D. Brandeis and Felix Frankfurter 23 (Brandeis Papers, Box 114, Folder 14, Harvard Law School Library) quoted in Rabban, *supra* note 23, at 362-63.

⁵⁹ *Baltzer v. United States*, 248 U.S. 593 (1918). Holmes's draft dissent is reprinted in Sheldon M. Novick, "The Unrevised Holmes and Freedom of Expression," 1991 *Sup. Ct. Rev.* 303, 388-90.

⁶⁰ Ernst Freund, "The *Debs* Case and Freedom of Speech," *New Republic* 13 (May 3, 1919), reprinted in Harry Kalven, Jr., "Professor Ernst Freund and *Debs v. United States*," 40 *U. Chi. L. Rev.* 235, 239-42 (1973).

⁶¹ See Liva Baker, **The Justice From Beacon Hill** 529-31 (Harper Collins 1991).

⁶² See Rabban, *supra* note 23, at 299-341.

⁶³ Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 *Harv. L. Rev.* 932 (1919).

⁶⁴ *Id.* at 965-66, 972.

⁶⁵ *Id.* at 967.

⁶⁶ *Id.*

⁶⁷ *Id.* at 968.

⁶⁸ 250 U.S. 616 (1919). For a full history of the *Abrams* case, see Richard Polenberg, **Fighting Faiths: the Abrams Case, The Supreme Court, and Free Speech** (Viking 1987).

⁶⁹ See generally W. Bruce Lincoln, **Red Victory: A History of the Russian Civil War** (Simon and Schuster 1989).

⁷⁰ See *id.* at 184-87, 271-85; David S. Foglesong, **America's Secret War Against Bolshevism** (Univ. of North Carolina Press 1995).

⁷¹ Ch. 75, 40 Stat. 553 (1918) (repealed 1948).

⁷² This is Chafee's paraphrase of the Attorney General's position. Chafee, *supra* note 63, at 935-36.

⁷³ For the charge, see the Tenth Count of the Indictment, Transcript of Record 125 (126), *Debs v. United States*, 249 U.S. 211 (1919). For the verdict, see *id.* at 154 (169). The pages of the printed record are numbered consecutively; the printed record also indicates the pagination of the original record. I have indicated pages of the original record in parentheses.

⁷⁴ *Abrams*, 250 U.S. at 627-28 (Holmes, J., dissenting) (all emphases added).

⁷⁵ *Id.* at 628.

⁷⁶ *Id.* at 630.

⁷⁷ *Id.* at 630-31.

⁷⁸ 71 U.S. (4 Wall.) 2 (1866).

⁷⁹ *United States ex rel. Milwaukee Social Democratic Pub'g Co. v. Burselson*, 255 U.S. 407 (1921).

⁸⁰ *Pierce v. United States*, 252 U.S. 239 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920).

⁸¹ *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

⁸² *Gilbert*, 254 U.S. at 333; *Pierce*, 252 U.S. at 247.

⁸³ Zechariah Chafee, Jr., *Freedom of Speech* (Harcourt Brace and Howe 1920).

⁸⁴ *Id.* at 155.

⁸⁵ 268 U.S. 652 (1925).

⁸⁶ 274 U.S. 357 (1927).

⁸⁷ An Act Relative to Criminal Anarchy, ch. 371, 1902 N.Y. Laws 958 (codified as amended in N.Y. Penal Laws sec.240.15 (2000)).

⁸⁸ *People v. Gitlow*, 136 N.E. 317, 324 (N.Y. 1922) (opinion of the court by Hiscock, C.J.). There were two opinions, each joined by a majority of the court. Pound and Cardozo, J.J., dissented, not on the ground that the Manifesto was constitutionally protected, but on the ground that it advocated communism and that the statute was directed only to advocacy of anarchy.

⁸⁹ *Gitlow*, 268 U.S. at 665.

⁹⁰ *Id.* at 656.

⁹¹ *Id.* at 670-71.

⁹² *Id.* at 672 (Brandeis, J., dissenting).

⁹³ *Id.* at 669 (opinion of the Court).

⁹⁴ *Frohwerk v. United States*, 249 U.S. 204, 209 (1919).

⁹⁵ 274 U.S. 357 (1927).

⁹⁶ See generally Eldridge F. Dowell, *A History of Criminal Syndicalism Legislation in the United States* (Da Capo Press 1969).

⁹⁷ *Whitney*, 274 U.S. at 376 (Brandeis, J. concurring).

⁹⁸ *Id.* at 377.

⁹⁹ *Id.* at 376.

¹⁰⁰ See generally George Rising, *Clean for Gene: Eugene McCarthy's 1968 Presidential Campaign* (Praeger 1997).

¹⁰¹ I explored another such shift in Douglas Laycock, "Federal Interference with State Prosecutions: The Cases *Dombrowski* Forgot," 46 *U. Chi. L. Rev.* 636, 669-79 (1979).

¹⁰² 254 U.S. 325 (1920).

¹⁰³ The chronology is also arguably disrupted by the unpublished dissent in *United States v. Baltzer*. But that prosecution—for sending a petition to the governor—was so extreme that the government confessed error. Just as the government's confession in *Baltzer* was not inconsistent with its prosecution of *Schenck*, *Debs*, and *Frohwerk*, so Holmes' draft dissent was not inconsistent with his opinions in those cases.

¹⁰⁴ This is the thesis of Novick, *supra* note 59.

¹⁰⁵ Oliver Wendell Holmes, Jr., "Privilege, Malice, and Intent," 8 *Harv. L. Rev.* 1 (1894). For the argument that this article thoroughly undermined Holmes's long effort to rest the law on objective standards, see Morton J. Horwitz, *The Transformation of American Law 1870-1960*, at 130-39 (1992).

¹⁰⁶ *Abrams*, 250 U.S. at 626-27 (Holmes, J., dissenting).

¹⁰⁷ Novick, *supra* note 59, at 339-40.

¹⁰⁸ "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." *Schenck*, 249 U.S. at 47.

¹⁰⁹ *Frohwerk*, 249 U.S. at 209.

¹¹⁰ *Debs*, 249 U.S. at 216.

¹¹¹ The jury charge appears in the Record at 264-81 (405-43). The principal discussion of intent was as follows:

I have also said to you that you must find beyond a

reasonable doubt that the defendant wilfully uttered or published these words and language, and that "wilfully" means willingly, knowingly, purposely, intentionally, as contradistinguished from accidentally or inadvertently; and that you must also find that the defendant had the specific criminal intent as charged in each of these four counts. . . . The government contends, among other things, that the defendant intended either to cause insubordination, disloyalty or refusal of duty in the military forces of the United States; or that he intended to obstruct the recruiting or enlistment service of the United States; or that he intended either to incite, promote, or encourage resistance, or to promote the cause of its enemies; also, that he intended, as charged in the tenth count, to oppose the cause of the United States. The defendant contends, as I understand, among other things, that his intention in uttering these words and language in his public address was merely to convey information to his fellow citizens of the United States in the exercise of a constitutional right of freedom of speech, and of freedom of assembly for the purpose of canvassing and discussing public affairs. . . .

You should be careful not to mix motive with intent. Motive is that which leads to the act. Intent is that which qualifies it. A crime may be committed with what may be regarded as a good motive, or it may be committed with an evil motive, or it may be committed with a good and an evil motive. To illustrate: the father of a large family steals bread for his starving children, and also to deprive the owner of its value. He may have two motives—one is good and the other evil, but he is guilty notwithstanding he has a good motive as well as an evil motive, for the law says he must not steal at all. So in this case, *no matter if the defendant's motive and purpose may have been good* and had been merely that which I have above stated as part of his contention, *namely, to convey information to his fellow citizens* in the assumed exercise and in the belief that he was rightfully exercising a constitutional right of free speech, he is nevertheless, guilty if he had the specific criminal intent to accomplish the acts and to produce the effects and results forbidden by the specific provisions of the law to which I have called your attention.

In passing on the question of the defendant's intent, you should also bear in mind that *a person is presumed to intend the natural and probable consequences of his words and acts*. In deciding what the defendant's intention was, permit me to suggest to you these questions: Did he intend or expect that his words and acts would have any influence upon or be likely to be adopted and followed by the young men between the ages of eighteen and forty-five, or twenty-one and thirty, who heard it? Or did he intend or expect that they would not act upon them in accordance with his utterances or address? *Ought he not to have reasonably foreseen* that the natural and probable consequences of such words and utterances would or might be to cause insubordination, disloyalty, or refusal of duty in the military forces of the United States? Or to obstruct the recruiting or enlistment service of the United States? Or to incite, provoke or encourage people to resist the United States? Or to promote the cause of its enemies?

If you find from the evidence beyond a reasonable doubt that he had a specific criminal intent to produce the results and consequences forbidden by the law, then he is

guilty, no matter whether he uttered these things in the exercise of a belief that he was promoting some good and worthy cause. If, however, you do not so find beyond a reasonable doubt such specific criminal intent, then it is equally your duty to find him not guilty.

Id. at 275-76 (emphasis added).

¹¹² Novick, *supra* note 59, at 340.

¹¹³ See Baker, *supra* note 61, at 511-47; Currie, *supra* note 33, at 120-24; Gerald Gunther, **Learned Hand** 163-67 (Knopf 1994); Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," 27 *Stan. L. Rev.* 719, 735-44 (1975); Kalven, *supra* note 24, at 130-46; Polenberg, *supra* note 68, at 207-42; Rabban, *supra* note 23, at 346 (Holmes), 362-63 (Brandeis); Fred Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," 58 *J. Am. Hist.* 24 (1971); Yosel Rogat & James M. O'Fallon, "Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases," 36 *Stan. L. Rev.* 1349, 1368-89 (1984); Rohr, *supra* note 38, at 31-32; Laurence H. Tribe, **American Constitutional Law** 841-44 (Foundation Press 2d ed. 1988); G. Edward White, **Justice Oliver Wendell Holmes** 412-54 (Oxford Univ. Press 1993); see also John F. Wirenius, "The Road to *Brandenburg*: A Look at the Evolving Understanding of the First Amendment," 43 *Drake L. Rev.* 1, 26-27 & n.171 (1994) (arguing that *Abrams* was an evolutionary change, rejecting the dominant claim of an abrupt change and also Novick's claim that there was no change at all).

¹¹⁴ See also Frank H. Easterbrook, "Ways of Criticizing the Court," 95 *Harv. L. Rev.* 802, 820-21 & n.43 (1982) (showing that justices adhering to their individual views alleviates voting paradoxes such as cycling and path dependence).

¹¹⁵ 274 U.S. 380 (1927).

¹¹⁶ *Id.* at 387.

¹¹⁷ 283 U.S. 359, 361 (1931).

¹¹⁸ 283 U.S. 697 (1931).

¹¹⁹ 297 U.S. 233 (1936).

¹²⁰ 299 U.S. 353 (1937).

¹²¹ 303 U.S. 444 (1938).

¹²² 307 U.S. 496 (1939).

¹²³ 302 U.S. 319, 326-27 (1937).

¹²⁴ 301 U.S. 242 (1937).

¹²⁵ Ga. Code sec.26-902 (1933), quoted in *Herndon*, 301 U.S. at 246 n.2 (codified as amended at Ga. Code sec.16-11-3 (1999)). Chafee traced the section to its antebellum roots in Ga. Code sec.4214 (1861). Zechariah Chafee, Jr., **Free Speech in the United States** 389 & n.41 (Harvard Univ. Press 2d ed. 1941).

¹²⁶ Chafee, *supra* note 125, at 397-98.

¹²⁷ *Herndon*, 301 U.S. at 256.

¹²⁸ *Id.* at 258.

¹²⁹ 310 U.S. 88 (1940).

¹³⁰ 310 U.S. 106 (1940).

¹³¹ See Woodford Howard, "Justice Murphy: The Freshman Years," 18 *Vand. L. Rev.* 473, 484-95 (1965).

¹³² *Thornhill*, 310 U.S. at 104-105.

¹³³ *Id.* at 105.

¹³⁴ *Carlson*, 310 U.S. at 113.

¹³⁵ 310 U.S. 296, 60 S.Ct. 900, 901 (1940) (headnote 15).

¹³⁶ Kalven, *supra* note 24, at 179.

¹³⁷ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

¹³⁸ See generally Richard W. Steele, **Free Speech in the Good War** (St. Martin's 1999).

¹³⁹ See *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Thomas v. Collins*, 323 U.S. 516 (1945); *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943); *Bakery & Pastry Drivers v. Wohl*, 315 U.S. 769 (1942); *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722 (1942); *Hotel & Restaurant Employees v. Wisconsin Employment Relations Bd.*, 315 U.S. 437 (1942); *AFL v. Swing*, 312 U.S. 321 (1941); *Bridges v. California*, 314 U.S. 252 (1941); *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941); *Carlson v. California*, 310 U.S. 106 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹⁴⁰ See *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Baumgartner v. United States*, 322 U.S. 665 (1944).

¹⁴¹ See *Saia v. New York*, 334 U.S. 558 (1948); *Tucker v. Texas*, 326 U.S. 517 (1946); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Follett v. McCormick*, 321 U.S. 573 (1944); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Taylor v. Mississippi*, 319 U.S. 583 (1943); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jones v. City of Opelika*, 319 U.S. 103 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Minersville School Dist. v. Gogbitis*, 310 U.S. 586 (1940); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁴² See *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1947); *Bridges v. California*, 314 U.S. 252 (1941).

¹⁴³ 314 U.S. 252 (1941).

¹⁴⁴ *Id.* at 263.

¹⁴⁵ *Id.* at 296 (Frankfurter, J., dissenting).

¹⁴⁶ 319 U.S. 624 (1943).

¹⁴⁷ *Id.* at 663 (Frankfurter, J., dissenting).

¹⁴⁸ 319 U.S. 583 (1943).

¹⁴⁹ *Id.* at 586.

¹⁵⁰ *Taylor*, 319 U.S. at 589-90.

¹⁵¹ 322 U.S. 680 (1944).

¹⁵² *Id.* at 687.

¹⁵³ See Kalven, *supra* note 24, at 185.

¹⁵⁴ 341 U.S. 494 (1951).

¹⁵⁵ For a good account of these cases, see Rohr, *supra* note 38.

¹⁵⁶ *Dennis*, 341 U.S. at 497.

¹⁵⁷ *Id.* at 587-88 (Douglas, J., dissenting).

¹⁵⁸ See Rohr, *supra* note 38, at 5-6 (confirming the subjective assessment with evidence of dramatic fluctuations in membership numbers).

¹⁵⁹ For accounts of this phase of the struggle with international Communism, see Richard Crockatt, **The Fifty Years War** 64-108 (Routledge 1995); Ronald E. Powaski, **The Cold War** 65-96 (Oxford Univ. Press 1998). For the connection between this struggle and domestic civil liberties, see David Caute, **The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower** (Simon and Schuster 1978).

¹⁶⁰ Alger Hiss had clerked for Justice Holmes, accompa-

nied President Roosevelt to Yalta, chaired the San Francisco Conference that created the United Nations—and passed State Department papers to the Soviets. *See generally* Allen Weinstein, *Perjury: The Hiss-Chambers Case* (Knopf 1978).

Hiss was convicted in January 1950. Klaus Fuchs, a physicist who worked at Los Alamos, confessed in February 1950. A week later, Senator Joseph McCarthy made his first speech claiming to have a list of Communists in the State Department. David Greenglass, a machinist at Los Alamos, was arrested in June; Julius Rosenberg, who had persuaded Greenglass to tell the Soviets what he knew, was arrested in July. Rosenberg and his wife Ethel were tried, convicted, and sentenced to death in March and April 1951, while *Dennis* was under submission in the Supreme Court. *See generally* Ronald Radosh & Joyce Milton, *The Rosenberg File* (Yale Univ. Press 2d ed. 1997).

¹⁶¹ *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

¹⁶² *United States v. Dennis*, 183 F.2d 201, 212 (1950).

¹⁶³ *Dennis*, 341 U.S. at 510.

¹⁶⁴ *Id.* at 587 (Douglas, J., dissenting).

¹⁶⁵ *Id.* at 579-80 (Black, J., dissenting).

¹⁶⁶ *Id.* at 562 (Jackson, J., concurring).

¹⁶⁷ *Id.* at 541 (Frankfurter, J., concurring).

¹⁶⁸ *Id.* at 549.

¹⁶⁹ *Id.* at 541.

¹⁷⁰ *See* L.A. Powe, Jr., "Evolution to Absolutism: Justice Douglas and the First Amendment," 74 *Colum. L. Rev.* 371, 407-08 (1974).

¹⁷¹ 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring).

¹⁷² 357 U.S. 449, 463 (1958).

¹⁷³ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *NAACP v. Button*, 371 U.S. 415, 439 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Barenblatt v. United States*, 360 U.S. 109, 127 (1959); *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959); *Scull v. Virginia*, 359 U.S. 344, 352-53 (1959); *Speiser v. Randall*, 357 U.S. 513, 529 (1958); *see also De Veau v. Braisted*, 363 U.S. 144, 155 (1960) (compelling state interest in avoiding federal pre-emption); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (same).

¹⁷⁴ *Bates*, 361 U.S. at 524.

¹⁷⁵ *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

¹⁷⁶ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

¹⁷⁷ 354 U.S. 298 (1957).

¹⁷⁸ 18 U.S.C. sec.2385 (1994).

¹⁷⁹ *Yates*, 354 U.S. at 324-25 ("The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.")

¹⁸⁰ The cases are reviewed in Robert Mollan, "Smith Act Prosecutions: The Effect of the *Dennis* and *Yates* Decisions," 26 *U. Pitt. L. Rev.* 705, 729-40 (1965).

¹⁸¹ 395 U.S. 444 (1969).

¹⁸² *Id.* at 447 (emphasis added).

¹⁸³ *Id.*

¹⁸⁴ *Compare* Novick, *supra* note 59, at 376 n.313 ("the only natural interpretation of this phrase seems to be that it refers to the defendant's intent"); *with* Gunther, *supra* note 113, 27 *Stan. L. Rev.* at 755 ("the inciting language of the speaker—the Hand focus on 'objective' words—is the major consideration"). Novick overstates the certainty of his reading, but it seems far more plausible than Gunther's.

¹⁸⁵ 376 U.S. 254 (1964).

¹⁸⁶ *See Gentile v. State Bar*, 501 U.S. 1030 (1991); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-46 (1978).

¹⁸⁷ *See, e.g.*, 18 U.S.C. sec. 2102(a) (1994) (defining "riot" to include threats of violence that create clear and present danger); 31 U.S.C. sec.1344(b)(9) (1994) (authorizing transportation of government employees from home to office, at government expense, in cases of clear and present danger); Pa. Stat. Ann. tit. 52, sec.1406.3(3) (1998) (finding that "mine subsidence has caused a very clear and present danger" to public health, safety, and welfare).

¹⁸⁸ *See Regan v. Time, Inc.*, 468 U.S. 641, 700 n.4 (1984) (Stevens, J., dissenting in part) (noting that advocacy of counterfeiting would be unprotected if it caused a clear and present danger of counterfeiting); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 581 (1980) (Stevens, J., concurring) (invoking clear and present danger test against a ban on advertising that promoted use of electricity); *Smith v. United States*, 431 U.S. 291, 318 n.16 (1977) (Stevens, J., dissenting) (describing features of the test); *see also Central Hudson*, 447 U.S. at 575 (Blackmun, J., concurring) (also invoking the test).

Issue: The Clear and Present Danger Test

On October 13, 1999, Howard University law professor Kenneth Tollett moderated a discussion on the clear and present danger test. The following are the introductory remarks made by the participants, Walter Berns and Philippa Strum.

Walter Berns:

Justice Holmes writing in the *Schenck* case: “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. It is a question of proximity and degree.”

I have long thought this test inadequate as a rule of law. Rather, it is a rule for prosecutors or, perhaps, legislators. They, better than judges, are likely to know whether a danger is clear, and present—or, after the *Abrams* case, clear and “imminent”—or whether the “evil” is substantive—or, again after the *Abrams* case—“substantial” or “serious.” It seems to me that my doubts about the test, about its adequacy as a rule of law, are confirmed in the history that Professor Laycock presents.

The Court’s decision in *Dennis v. United*

States was the decisive event in this history. As Professor Laycock rightly says, “clear and present never recovered from *Dennis*.” As I read his account, *Dennis*, a leader of the American Community Party, would not have been convicted under the test as formulated by Holmes. First, as to the new or reformulated test: it was drafted by Learned Hand in the Second Circuit Court of Appeals and adopted by the Supreme Court. It read as follows: “In each case, courts must ask whether the gravity of the “evil,” discounted by its improbability,

justifies such invasion of free speech as is necessary to avoid the danger."¹ Professor Laycock believes this is significantly different from the test as formulated by Holmes in the *Schenck* case. I doubt that. Secondly, under the Holmes version, Schenck went to prison; under the Hand version, Dennis went to prison. And, in each case, politics played a part, just as it played a part in the 1942 *Korematsu* case in which the Court upheld the relocation of the West Coast Japanese. My conclusion, and Professor Laycock's, is that something other than the clear and present danger test is needed to protect the right of free speech.

That "something," he believes, was provided by Justices Black and Douglas beginning in the *Barenblatt* case. As they made clear in subsequent cases, that "something" was to make free speech something of an absolute. In doing this they went back to Holmes, not the Holmes who wrote in *Schenck*, but the Holmes who wrote in his dissent in *Gitlow v. New York*, where he said, and became famous for saying, "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community the only meaning of free speech is that they should be given their chance and have their way."² Black reiterated this in his dissent in the 1961 case, *Communist Party U.S.A. v. The Subversive Activities Control Board*. What this means is that it is worse to suppress the advocacy of Stalinism than to be ruled by a domestic Stalin.

First Amendment scholars, particularly those under the aegis of the ACLU, speak of autonomous individuals as having antecedent rights against the state, including the right to say what they please irrespective of its effect on the state. As they would have it, the right protected by the First Amendment is a natural right. Now, it is true that this nation was founded by autonomous individuals, individuals living in the state of nature, who could say whatever they wanted to say, irrespective of its effect on a state because there was no state in the state of nature. But it is also true, as "Publius" (John Jay, in this case) said in *Federalist Paper No. 2*, "Nothing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and

however [government] is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers." So, what rights were surrendered and what rights were retained?

Our particular question is this: does the First Amendment protect the rights of autonomous individuals or the right of citizens, who, on becoming citizens, ceased to be autonomous?

Endnotes

¹ *United States v. Dennis* 341 U.S. 494 (1951).

² *Gitlow v. New York*, 268 U.S. 652 (1925).

Philippa Strum:

There have been a number of clear and present danger doctrines, not the least the two articulated on the one hand by Justice Holmes and on the other by Justice Brandeis. The difference between them would be of interest only to legal historians were it not for the fact that their disagreement points up the confusion about the role of speech in a democratic society that existed on this Court through much of the twentieth century and remains in the public mind to this day.

As Professor Laycock indicated last week, Holmes' clear and present doctrine as first expressed in *Schenck v. United States*, in 1919, was no more than a paraphrase of the bad tendency test. Holmes' words were, "If the act (speaking or circulating a newspaper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."¹ If speech *might* lead to an impermissible result, however farfetched that possibility, the government had the power to criminalize it.

This approach was very much in keeping with Holmes' general view of speech. Professor Laycock reminded us that Holmes wrote to Judge Learned Hand that freedom of speech "stands no better than freedom from vaccination." Holmes, who believed that the world and all human societies were governed by a

brutal Darwinian struggle for survival rather than the forces of rationality, simply did not see speech as being of special importance to human existence. If, in the end, all human history would reflect no more than survival of the fittest, the kinds of ideas that were expressed or the right to articulate them obviously was of no consequence.

That was not Brandeis' view. He believed passionately that human beings could create a society that would maximize their well-being, which he defined as the fulfillment of each individual's potential. To Brandeis, the way to advance from an imperfect society to one that might still be imperfect but would be much better was to permit the free flow of ideas. If people could not talk freely about what their society lacked and how it might be improved, if they did not have access to each others' ideas about the benefits and liabilities that would accrue from various proposed policies, then

there was no hope of progress. But progress was not inevitable; that is precisely why the expression of ideas had to be left almost entirely unrestrained. The fact that Brandeis believed fervently in the human ability permanently to improve society and Holmes did not was crucial for the differences in their speech jurisprudence.

Brandeis quietly concurred with Holmes' articulation of the clear and present danger in *Schenck* and with the Court's decision that *Schenck* could be imprisoned for publishing a flyer saying that the wartime draft was a "wrong against humanity." He very quickly gave up that view, however. Let me show how and try to explain why.

In a series of speech cases decided by the Court in 1920, Brandeis dissented from the upholding of convictions similar to that in *Schenck*. In one, *Schaefer v. United States*,² he said that contrary to Holmes' statement in



Brandenburg v. Ohio was perhaps the climax of the many Court decisions in the 1960s that significantly expanded First Amendment freedoms. Clarence Brandenburg was a member of the Ku Klux Klan who violated an Ohio syndicalism statute by advocating racial strife during a televised rally.

Schenck, the right of speech was the same in wartime as it was in peacetime—and perhaps even more important then. In *Pierce v. United States*³ he commented that speech was vital if people were to be able to strive for better conditions and institutions. Brandeis had begun thinking, for the first time, about the reasons speech had to take precedence over government power.

This became all the more apparent in his famous concurrence in *Whitney v. California*,⁴ in 1927. Two parts of it are relevant here. The first is the sentences in which he says that there is no clear and present danger unless the evil feared “is so imminent that it may befall before there is time for “the processes of education.” The second set of sentences, which has been almost totally ignored by both judges and commentators alike, reads as follows:

The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be *the probability of serious injury to the State* (emphasis added).

Do you see how radical that is? Speech that results “in some violence or in destruction of property is not enough to justify its suppression.” One can disagree with Brandeis, but we ought to understand what it is that he is saying. Speech that makes people angry enough to fight or results in property damage cannot be punished by the government—although the acts of violence certainly can. The *only* time speech can be criminalized is when there is an imminent probability that it will result in injury to the very fabric of government itself.

Now, how do we get from Brandeis going along with Holmes’ articulation of clear and present danger in *Schenck* to that statement of extreme protectiveness for speech? Felix

Frankfurter reported that Brandeis told him in 1924 that he, Brandeis, had not understood what free speech was all about, or “thought through” the necessity for free speech, until he wrote his dissents in *Pierce* and *Schaefer*, the two 1920 cases I mentioned earlier. Brandeis added that among the “things that are fundamental” were the right to speech and the right to education.⁵

Why are speech and education “fundamental?” Because, according to Brandeis, you can not have democracy without them, and without democracy, you can not achieve the conditions that will allow human beings to fulfill themselves. Donald Richberg wrote that, to Brandeis, “democracy is not a political program. It is a religion.”

It certainly was not a religion to Holmes. I would suggest that the needs of democracy were not adequately “thought through” by subsequent justices who watered down the clear and present danger doctrine to the point that it could be used in the 1950s to imprison the people who expressed the *idea* that a proletarian dictatorship would be good for the United States. And so it was not until 1969 and the effective adoption of the Brandeisian rather than the Holmesian formulation of the clear and present danger doctrine in *Brandenburg v. Ohio*⁶—speech can be punished if it constitutes “incitement to imminent lawless action”—that the doctrine became what it should be: an aid in keeping open the channels of communication so central to a democracy.

Endnotes

¹*Schenck v. United States*, 249 U.S. 47 (1919).

²*Schaefer v. United States*, 251 U.S. 266 (1920).

³*Pierce v. United States*, 252 U.S. 239 (1920).

⁴*Whitney v. California*, 274 U.S. 356 (1927).

⁵Felix Frankfurter, Untitled Notebook, Brandeis Papers, Harvard Law School, Box 114-7.

⁶*Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Free Expression in the Warren and Burger Courts

Lillian R. BeVier

The three and a half decades of the Warren and Burger Courts—1953 to 1986—were years during which First Amendment doctrine underwent profound change. The challenge of capturing even the highlights of this change in this brief essay has required me not only to be highly selective but, with regard to the material I have selected to discuss, to paint with a very broad brush, to omit significant details, and to forego nuance almost entirely. Even more frustrating has been the necessity of leaving all but the barest outlines of supporting arguments on the cutting room floor, for which I beg the reader's understanding and indulgence.

The free expression cases of the Warren and Burger era reflected the gamut of social upheavals that flowered during those turbulent years. Not every First Amendment case that the Court decided was an artifact of the salient controversies of those times, of course, but many were. Nor was every momentous series of events equally productive of First Amendment controversy, but—again—many were. Consider just four signal events: the Cold War and McCarthyism, the Civil Rights movement, Vietnam, and Watergate.

First, the Cold War. When Chief Justice Earl Warren took office, the Cold War was, well, still pretty hot. McCarthyism, as embodied in the Senator himself, may have just about run its course: he was censured by his Senate colleagues in 1954 and died in 1957. Still, many in the country were preoccupied by the internal threat that, they perceived, communists and their sympathizers posed. These preoccupations generated a variety of regulatory efforts, the operation of which in turn produced a con-

siderable volume of First Amendment litigation. Suspected communists, for example, were prosecuted and convicted for conspiracy to violate the Smith Act,¹ which made it a crime to advocate forcible overthrow of the government, and they challenged their convictions.² The Subversive Activities Control Act of 1950³ required "Communist Action organizations" to register, and they challenged the requirement.⁴ Government employees subjected to loyalty programs;⁵ witnesses reluctant to testify before

legislative investigators;^{5,1} bar applicants denied admission for their failure to answer questions concerning communist party membership;⁶ veterans claiming tax exemptions but refusing to disclaim advocacy of government overthrow by force or violence;⁷ and teachers objecting to filing annual affidavits listing the organizations to which they belonged⁸—all mounted First Amendment challenges.

As the Civil Rights movement gained momentum, it manifested itself in a variety of ways, and its opponents devised a number of strategies that attempted to use law to impede its progress. Many of these thrusts and counterthrusts also produced important First Amendment controversies. There were sit-ins, stand-ins, parades and demonstrations.⁹ The government demanded information from citizens, and its demands inspired refusals to comply based on claims to freedom-of-association.¹⁰ Activists organized litigation,¹¹ and tried to raise money—and public consciousness, and in the course of these efforts made an occasional defamatory and false statement of fact.¹² Some people burned flags.¹³ And always, it seemed, to goad and provoke, there was the Ku Klux Klan.¹⁴

In the late 1960s and early 1970s the Vietnam War occupied center stage. Controversy over US involvement drew from a deep well of protest sentiment, which expressed itself in activities that gave rise to some relatively novel First Amendment claims: draft protesters burned draft cards;¹⁵ students wore black armbands to school;¹⁶ newspapers published top secret Defense Department documents that a former Pentagon official had purloined.¹⁷ Young people emblazoned their clothes with words and symbols of their disaffection;¹⁸ they “misused” the American flag;¹⁹ they staged skits wearing military uniforms which they had no authorization to wear;²⁰ and they indiscriminately addressed others using language that in days gone by would have been considered insulting—to say the least.²¹

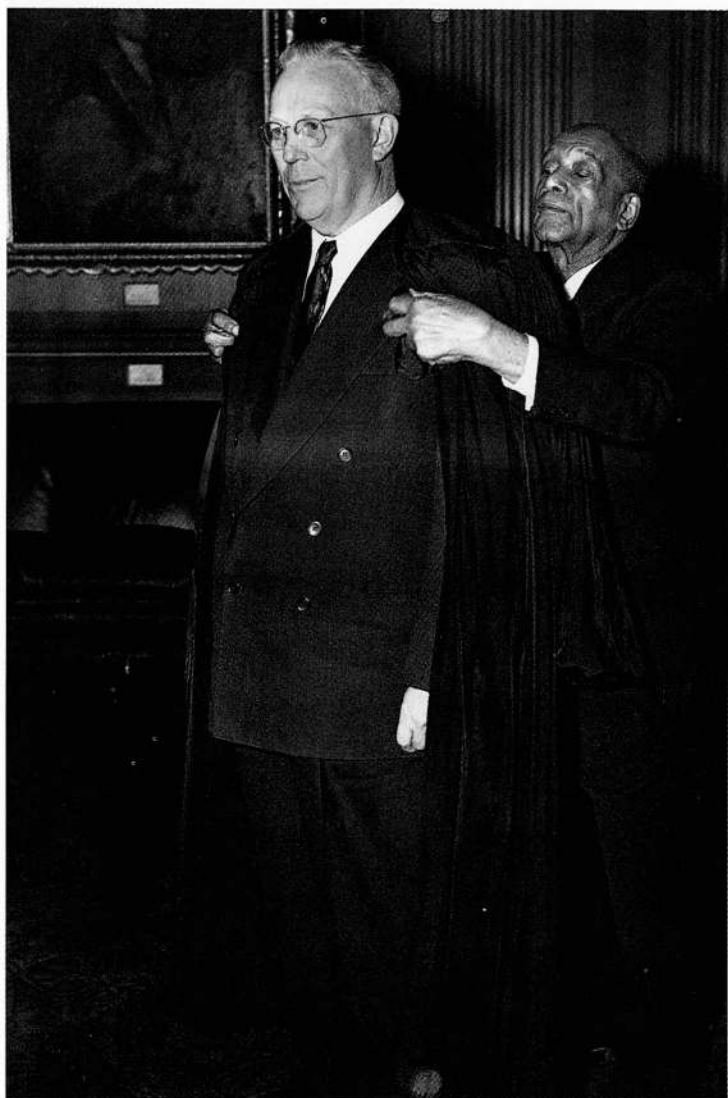
The Watergate scandal that so distracted the nation in 1973 and 1974 did not directly give rise to First Amendment litigation, but indirectly it did. For it was purportedly in response to the campaign abuses that the Watergate scandal brought to light that Congress passed the

wide-ranging amendments to the Federal Election Campaign Act of 1971, whose constitutionality was challenged in what became the flagship campaign finance case, *Buckley v. Valeo*.²²

The First Amendment that emerged from these eventful years lends itself to analysis from a variety of non-legal perspectives, but I propose to analyze its emergence primarily using a lawyer’s terms of reference. I will consider the Amendment as positive law—as a set of rules that place formal limits on government power and thereby inevitably affect the behavior of private citizens by *pro tanto* guaranteeing their liberty. Using this legal perspective enables one to gain insight into how some of the doctrinal tools that the Warren and Burger Court fashioned turned First Amendment litigation into a stage upon which practically the entire dramatic repertoire of contemporary American life could be played out.

One thing is certain: First Amendment doctrine in the shape it was in when Chief Justice Warren was sworn in 1953 could not have played the same role. It is startling to realize how scrawny was the body of free speech doctrine to which Chief Justice Warren and his Brethren fell heir, how underdeveloped its theoretical frame, how ill-stocked its methodological closet. Take a glance. First, just two “tests” of the substantive validity of government action did all the explicit First Amendment work. One was the “clear and present danger”²³ test which several of the other essays in this volume discuss. I will say very little more about it except to note that, if the Court were willing to discount a danger’s clearness and presentness by its gravity, as it did in the *Dennis* case in 1951,²⁴ the “clear and present danger” test would provide a most unreliable protective shield against laws aimed at subversive speakers.

The other First Amendment “test” that the Warren Court inherited was in fact not really a “test” at all, if by test one denotes a stable criterion or set of criteria by which the Court would evaluate the constitutionality of particular governmental activity. Rather it was a methodology, and a rather amorphous one at that, which required the Court in each case to weigh the government interest supposedly served by



When Earl Warren became Chief Justice in 1953, the Cold War was in full flower. Many citizens were preoccupied by the internal threat of communism, which led to numerous attempts to restrict speech.

the challenged governmental action against the First Amendment interest that the challenger claimed to vindicate.²⁵ The pre-Warren Court, of course, sometimes determined that the First Amendment interest was the weightier,²⁶ and more than one Justice spoke about freedom of speech in memorable and ringing terms,²⁷ but the Court did not use a formula that explicitly required it to take special care to preserve free speech values. It neither consistently demanded that the government demonstrate a “compelling interest” in achieving its postulated goals, nor generally did it insist that speech-related activity be regulated in the least

restrictive manner.²⁸ To the contrary, if pre-Warren Court First Amendment balancing had any tilt at all, it sometimes seemed to be a tilt in the government’s direction. For example, Justice Frankfurter insisted in his *Dennis* concurrence that the Court had always engaged in “careful weighing of conflicting interests.”²⁹ Still, he said, the Court “set aside the judgment of those whose duty it is to legislate *only* if there [were] no reasonable basis for it.”³⁰ Moreover, the interests the Court considered did not always have comparable weight: the Court sometimes put the whole of the government’s—implicitly the public’s—regulatory interest on one

side, and weighed it against not the *public's* interest in freedom of expression but rather the relatively puny individual defendant's interest in exercising First Amendment rights on the other.³¹

A second salient feature of the pre-Warren Court First Amendment is that it embodied a seemingly shared understanding that the Amendment wholly excluded from its protective ambit a number of categories of speech. The exclusions were taken for granted, unquestioned, and not in the least at odds with then-reigning intuitions about the proper scope of freedom of speech. Justice Holmes asserted in *Schenck* a proposition that (even today) remains unchallenged: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic."³² In 1940, the Court in *Cantwell v. Connecticut* proclaimed in dictum that "[r]esort to ... personal abuse is not ... safeguarded by the Constitution."³³ In 1942, in *Chaplinsky v. New Hampshire*,³⁴ sustaining the conviction of a defendant who had called his antagonist a "damned racketeer ... a fascist,"³⁵ the Court confidently announced that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the libelous, and the insulting or 'fighting' words. . . ."³⁶ In 1942, *Valentine v. Chrestenson*³⁷ added "purely commercial advertising" to the excluded list;³⁸ in 1951, *Feiner v. New York*³⁹ added incitement to riot;⁴⁰ and in 1952 *Beauharnais v. Illinois*⁴¹ cast out group libel and upheld an Illinois law forbidding speech which "portrays depravity, criminality, unchastity, lack of virtue of a group of persons, race, color, creed or religion."⁴²

A closer look at the Warren Court's First Amendment inheritance, however, also reveals pockets of nascent strength. A few seeds of doctrinal growth had begun to sprout. First, the question whether the First Amendment was incorporated in the Fourteenth had been affirmatively—almost blithely—resolved as early as 1925 in the *Gitlow* case.⁴³ Thus when the time became ripe the Court would be able to focus on the First Amendment's substantive content without getting that issue embroiled in

the incorporation debate that so vexed the resolution of other Bill of Rights controversies.⁴⁴ Second, *Schenck* had eliminated the possibility that the Court would confine the First Amendment to a prohibition on prior restraints, and not extend it to subsequent punishment.⁴⁵ Third, the Court had taken the first step toward development of what has come to be known as the "public forum doctrine" when it announced, in *Hague v. CIO* (1939), that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions."⁴⁶ The *Hague* dictum was pregnant with ambiguity: it took on the "rhetorical 'aura of a large democratic principle' of guaranteed access to public places...[it did] not specify the principle's lineage...[and] provided no analytical guidance on the criteria for determining"⁴⁷ its appropriate application in the future.

The Court was able in the following decade and a half to avoid directly confronting *Hague's* substantive uncertainties. Instead it resolved disputes over speech in public places by deploying a second order decisional strategy that eventually became an important component of the modern vagueness doctrine, which in turn developed into a crucial vehicle for implementing the First Amendment vision that the Warren and Burger Courts championed.⁴⁸

During the immediate post-*Hague* years, by enforcing the requirement that "legislatures...set reasonably clear guidelines for law enforcement officials and triers of fact,"⁴⁹ the Court was able to overturn convictions for violations of broad breach of the peace statutes or permit schemes that conferred standardless discretion on low level officials.⁵⁰ In doing so, the Court strongly hinted to legislatures that if they wanted to manage public property without running afoul of First Amendment constraints they themselves would have to confront the policy choices squarely: regulation pursuant to a specific relevant legislative judgment would probably survive, the Court said, so long as it limited the discretion of licensing authorities by confining them to considerations of time, place and manner.⁵¹

Despite these seeds of doctrinal growth, the overall picture of pre-Warren Court First Amendment doctrine is of rules and methodologies that offered fragile and undependable protection to a far-from-inclusive set of expressive activities. Sensitive though the Court claimed to be, and occasionally was, in weighing conflicting interests, its decisional tools lacked analytical subtlety, rested on a narrow view of what the stakes were in free speech cases, and avoided having to confront difficult theoretical issues by unquestioningly embracing the apparently conventional wisdom embodied in the categorical exclusions.

Contrast this with the First Amendment in 1986, when Chief Justice Burger retired. A transformation had occurred. The 98-lb. weakling of 1953 had become the (pro-wrestler) Jesse Ventura of constitutional amendments. Look at just four examples of the First Amendment's progress.

First, the Court no longer engaged in ad hoc balancing in First Amendment cases. Instead, when a challenger was able to persuade the Court that legislation burdened First Amendment rights, the Court engaged in strict scrutiny, requiring the government to defend the law by demonstrating that it served a compelling state interest by the least restrictive means.⁵² Second, in place of an implicit conception of law as a "transparently ideal set of commands or regulations"⁵³ that constitutional doctrine could assume operated within a frictionless and error-free world, the Court had adopted an approach that impelled it to try to craft rules explicitly to accommodate and correct for law's opacity, officials' temerity, and citizens' failures of nerve. For example, it had firmly and self-consciously put in place techniques of adjudication and substantive doctrines, such as vagueness and overbreadth, that attempted to avert the danger "of tolerating, in the area of [delicate, vulnerable and precious] First Amendment freedoms, the existence of...penal statute[s] susceptible to sweeping and improper application,"⁵⁴ to prevent substantive First Amendment violations by erecting procedural barriers to speech regulation,⁵⁵ and to craft rules that, by giving freedom of expression "breathing space," would foster "uninhibited, robust, and wide-open public debate."⁵⁶ Moreover, the

Court had begun to link its results directly to rationales that took account of the foibles of both private and legal actors⁵⁷ and that tried to implement a disparate array of instrumental First Amendment theories.⁵⁸ Third, the shifting, open-ended, unpredictable and unreliably protective clear-and-present danger test had given way to a considerably harder and faster *Brandenburg* rule that "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁵⁹ And fourth, the Court had rejected in principle the idea that the First Amendment excluded entire categories of speech. It announced, in *Police Dept of Chicago v. Mosley*,⁶⁰ that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."⁶¹ Specifically, it had explicitly absorbed two of the formerly excluded categories within the First Amendment's protective mantle. Libel's "talismanic immunity from constitutional limitations" yielded to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."⁶² And the First Amendment exception of commercial speech had succumbed to society's "strong interest in the free flow of commercial information."⁶³ Two of the other excluded categories had been confined within narrow boundaries, both procedural and substantive. Fighting words could apparently only be punished pursuant to very precisely drawn statutes limited in their reach to the use of "insulting and provocative epithets that describe a particular individual and are addressed specifically to that individual in a face-to-face encounter."⁶⁴ Significant procedural requirements constrained the control of obscenity; in addition the Court had "carefully limited" the permissible substantive scope of regulation under the obscenity rubric to "works which depict or describe sexual conduct [that is] specifically defined by the applicable state law."⁶⁵ Indeed, it had even concluded that nude dancing was "not without its First Amendment protections."⁶⁶

The outward thrust of First Amendment boundaries was by no means complete when Chief Justice Warren retired in 1968. Conventional wisdom acknowledges that the Burger Court did not effect the across-the-board “counter-revolution” in constitutional doctrine that many observers had dreaded and some had hoped for.⁶⁷ Certainly there was no contraction of newly expanded First Amendment boundaries. Still, one commentator thought that the Burger Court’s First Amendment decisions portended a “legal future” for the press that looked “somewhat bleak” on account of the fact that the decisions displayed a less “friendly attitude” than had the Warren Court.⁶⁸ Another discerned “much slippage” in speech protective doctrines during the Burger Court years.⁶⁹ Such assessments, in my view, misconstrue the state of the law of the First Amendment when Chief Justice Burger retired in 1986. The ambit of First Amendment coverage did not contract during his years as Chief Justice. In fact, it expanded—and by a not inconsiderable distance. It was the Burger Court that extended First Amendment protection to commercial speech;⁷⁰ the Burger Court that limited the fighting words and offensive speech exclusions;⁷¹ the Burger Court that discovered a First Amendment barrier to political patronage;⁷² the Burger Court that gave the press an almost complete victory in what had previously been perceived to be an irreconcilable tension between a free press and criminal defendants’ fair trial rights;⁷³ the Burger Court that found a way to offer more reliable protection to symbolic speech than had the Warren Court;⁷⁴ the Burger Court that protected nude dancing and the showing of naked bodies on drive-in movie theatre screens;⁷⁵ and the Burger Court that refused to enjoin the *New York Times* and the *Washington Post* from publishing the purloined Pentagon Papers.⁷⁶

It is true that the Burger Court refused to push some Warren Court-discovered rights to their logical limits. It rejected, for example, Justice Brennan’s proposal in *Rosenbloom v. Metromedia*⁷⁷ to extend the *New York Times* actual malice privilege regarding false and defamatory statements of fact to “all discussion and communication involving matters of public or general concern, without regard to whether the

persons involved are famous or anonymous.”⁷⁸ Instead, the Burger Court opted for a rule that made the privilege available only to false statements of fact about public officials or public figures.⁷⁹

Another example of its refusal to push the Warren Court’s jurisprudence to the limits of its logic can be found in the Burger Court’s occasional effort to delineate brighter, less permeable, First Amendment boundaries. For example, early in Chief Justice Burger’s tenure, the Court attempted to clarify the scope of permissible regulation of obscenity in *Miller v. California*⁸⁰ and *Paris Adult Theater v. Slaton*.⁸¹ And in *Perry Educators’ Association v. Perry Local Educators’ Association*,⁸² the Court announced a categorical treatment of speech rights in public places, thus attempting to eliminate some of the indeterminacy of *Hague* and its progeny.⁸³

And sometimes the Burger Court refused to go into new territory so as fully to exploit the implications of the Warren Court’s doctrinal innovations. It confined the reach of the overbreadth doctrine to cases in which “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to [its] plainly legitimate sweep.”⁸⁴ Moreover, despite occasional rhetorical invocations of the notion that the people have a right “to a free flow of information and ideas on the conduct of their government,”⁸⁵ the Court refused to recognize either testimonial privileges for journalists⁸⁶ or press rights of access to government information.⁸⁷ In addition, whether some of the Burger Court’s decisions advanced the First Amendment ball depends on highly contested points of theoretical view. Some observers, for example, questioned the Burger Court’s refusal, in *Miami Herald Publishing Co. v. Tornillo*,⁸⁸ to permit fairness or right of reply obligations to be imposed on print media, especially since it had sustained the Federal Communications Commission’s fairness doctrine as applied to the electronic media in *Red Lion Broadcasting Co. v. FCC*.⁸⁹ Others think the Court took a wrong First Amendment turn when it applied strict First Amendment scrutiny to campaign finance regulations in *Buckley v. Valeo*⁹⁰ and struck down a prohibition on corporate spending for political speech during referendum cam-



Following parental complaints, in 1963 police commissioner Michael Murphy (center) and district attorney Frank O'Connor (right) raided a distributor of allegedly obscene books in Queens, N.Y. During the tenures of Chief Justices Warren and Burger, the Court attempted to clarify the scope of permissible regulation of obscenity.

paigns in *First National Bank of Boston v. Bellotti*.⁹¹ To them, the political freedom that the Court embraced in *Buckley* and *Bellotti* represents a misconceived view of the First Amendment, which they view as implementing not so much *free* political participation as *fair* political deliberation, and which they therefore believe ought to be read to permit legislative efforts to enhance political debate.⁹²

But every failure to expand when the opportunity arose, or every attempted clarification of doctrine that might be described as ungenerous does not constitute slippage. Nor does every controversial affirmation of First Amendment rights in situations where some of the Amendment's usual cheerleaders were rooting for a different result necessarily portend a bleak future. Thus, it is not accurate to portray the Burger Court cases in which such things occurred as counterexamples of the expansionist First Amendment trend that the Warren Court began.

I propose in what follows to consider how a few of the Warren Court's early opinions re-

veal that the expansion was initiated and to identify the crucial shifts in perspective that led to the broadening of its factual and theoretical horizon. The opinions of Justice Brennan are sometimes credited with having signaled the sea-change and crafting its doctrinal embodiment.⁹³ Justice Brennan was a consistent champion of the First Amendment and the analytic innovations he introduced did have profound and lasting effects on free speech law. His landmark opinion in *New York Times v. Sullivan*,⁹⁴ for example, amply testifies to his rhetorical gifts and his facility at doctrinal innovation. But Justice Brennan's was not the only powerful judicial mind at work on First Amendment issues. Justice Harlan, for example, who served on the Court for most of the Warren Court years, made an often overlooked contribution⁹⁵ to the First Amendment's expansion, despite the fact that he embraced a generally more conservative judicial philosophy than did Justice Brennan and, indeed, disagreed with him on the merits in a number of First Amendment cases.⁹⁶

A good place to begin tracing the shifts in

the Court's First Amendment perspective during the Warren and Burger years is with four of these particular Justices' early opinions, *Roth v. United States*,⁹⁷ and *Speiser v. Randall*⁹⁸ from Justice Brennan, and the other two, *Yates v. United States*,⁹⁹ and *NAACP v. Alabama*,¹⁰⁰ from Justice Harlan.

Begin with *Roth*, in which Justice Brennan started the Warren Court on its "frustrating and largely unsuccessful"¹⁰¹ effort to define, guide, and constrain the regulation of obscenity. In *Roth*, apparently without foreseeing the practical enforcement difficulties that eventually persuaded him to abandon altogether his own participation in the Court's obscenity jurisprudence,¹⁰² Justice Brennan treated the First Amendment issue as if it could be resolved in categorical, definitional terms. "The dispositive question," he said, "is whether obscenity is utterance within the area of protected speech and press."¹⁰³ The answer was no: obscenity, is "utterly without redeeming social importance"¹⁰⁴ and may be suppressed without regard to whether it creates a clear and present danger.¹⁰⁵

For Justice Brennan in *Roth*, the First Amendment question amounted to a boundary issue pure and simple. The sole issue for the Court was the extent of formal state power. The Justice conceived of the boundary between constitutional and unconstitutional exercises of state power as preexisting and fixed, its location independent of any effects the exercise of power might have on citizens' willingness to engage in activity on the constitutionally protected side.

Justice Harlan's approach in *Yates* also assumed that the First Amendment clearly marked the boundary between those occasions when the exercise of state power to punish speech required substantial justification and those when it did not.¹⁰⁶ *Yates* overturned the Smith Act conspiracy convictions of several members of the Communist Party on the ground that they had been convicted of advocating merely the *idea* of violent overthrow of the government rather than advocating action to that end.¹⁰⁷ Justice Harlan's opinion insisted that the Smith Act did not purport to make mere advocacy a crime, since to have done so Congress would have had to "disregard a constitutional danger

zone"—between advocacy of abstract doctrine and advocacy directed at promoting unlawful action—that Justice Harlan claimed was "clearly marked."¹⁰⁸ Thus in *Yates* Justice Harlan did not use the conception that the First Amendment had a clearly marked boundary to justify a finding that the defendants had engaged in an *unprotected* category of speech. Instead, he used it to advantage the First Amendment claimants by artfully deploying the boundary concept in the service of strict construction of the Smith Act. As Gerald Gunther put it, by reading

the statute in terms of constitutional pre-suppositions, [by striving] to find standards 'manageable' by judges and capable of curbing jury discretion, [and insisting] on strict statutory standards of proof emphasizing the actual speech of the [defendants], . . . Harlan claimed to be interpreting *Dennis*. In fact, *Yates* . . . represented doctrinal evolution in a new direction.¹⁰⁹

Justice Harlan was even more innovative the next year in his opinion in *NAACP v. Alabama*.¹¹⁰ Alabama had insisted that the NAACP reveal the names and addresses of all its Alabama members and agents.¹¹¹ The NAACP resisted, claiming a First Amendment right of nondisclosure based on evidence it produced that revelation of the identity of its rank and file members exposed them to public hostility and therefore had an adverse effect on the *organization's ability to retain members and thus to engage in effective group advocacy*.¹¹² Justice Harlan undertook a complex analysis in which the existence of state power to regulate did not depend on the simple delineation of the categorical boundaries of protected speech. Rather it depended on the Court's assessment of the *effects* that attempts to comply with the state's regulations might be expected to have, not merely upon those directly subject to its commands but also upon other persons in their communities:¹¹³ by predictably causing other private actors to engage in retaliatory actions against those who complied with the regulation, the regulation would predictably cause the regulated parties to engage in less

expressive activity.¹¹⁴

Justice Harlan's opinion for a unanimous Court sustained the NAACP's claim that the state's demand for the NAACP's membership list was unconstitutional. The state argued that no constitutional rights were involved because the "repressive effect"¹¹⁵ of disclosure followed "not from state action but from private community pressures."¹¹⁶ Justice Harlan rejected the argument and announced, as if he were merely reiterating a principle that had long been firmly embedded in First Amendment doctrine, that in determining the constitutionality of the Alabama regulation "[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."¹¹⁷

NAACP v. Alabama was recognized when it was decided as a significant case in large part because of the constitutional shield it provided to major civil rights activists.¹¹⁸ It also has major importance for free speech doctrine, for it was the first time the Court explicitly acknowledged that group association enhances effective advocacy and that a "vital relationship [exists] between freedom to associate and privacy in one's associations."¹¹⁹ Also the Court articulated the connection between privacy in group association and preservation of association freedom.¹²⁰ The full First Amendment significance of *NAACP v. Alabama* resides neither in the particular factual assumptions upon which the opinion rests, nor in the precise causal connections between state actions and private responses that the opinion traced; rather, the full First Amendment significance of the case resides in the methodological shift that it initiated. For *NAACP v. Alabama* broadened the Court's First Amendment vision, and thereby expanded the range of real world facts that would henceforth be relevant to the resolution of First Amendment cases—e.g., how will compliance with disclosure requirements affect the behavior of citizens who are hostile to those whose membership is disclosed, how in turn will their hostility affect those who might otherwise become members, and how in turn will that affect the organization's ability effectively to engage in group advocacy. It is this latter point that may portend the most sig-

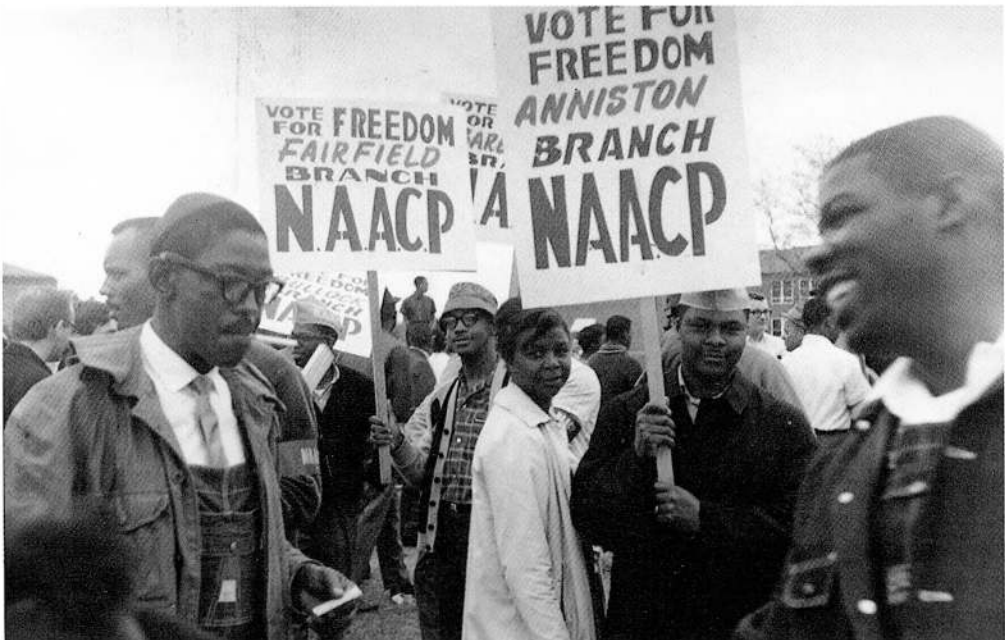
nificant change, on account of its strong implication that the First Amendment guarantees not just the right to associate free from formal state interference but the right to engage in *effective* group advocacy.

Speiser v. Randall,¹²¹ with Justice Brennan writing for the Court, came down the same day as *NAACP v. Alabama*. If nothing else, *Speiser* indicates that *NAACP v. Alabama* was not an aberration whose methodological innovations were driven by—and likely to be deployed solely in the service of—the Court's deep commitment to the civil rights cause. The challenged regulation in *Speiser* was prompted by fear of communists, not of civil rights activists. The case involved a California tax exemption available to veterans, but only if they took an oath that they did not advocate the forcible overthrow of the government.¹²² As indeed he was impelled to do on account of *Dennis* and even of *Yates*, Justice Brennan conceded that California had power to proscribe advocacy of forcible overthrow, and he even conceded that California could deny the tax exemption to veterans who engaged in such advocacy.¹²³ But as had Justice Harlan in *NAACP v. Alabama*, he insisted that the constitutionality of the challenged requirement was not merely a function of the formal existence of state power.¹²⁴ And as had Justice Harlan, he assessed the law's likely impact on the willingness of persons to engage in *protected* speech.¹²⁵ The fact that the oath requirement was limited by its terms to speech that could, according to the holding in *Dennis*, constitutionally be punished did not save it. Other perceived realities overwhelmed the formal boundary question. California put the burden on the taxpayer to prove that he had not engaged in the proscribed speech.¹²⁶ This the Court found problematic: the line between speech which may constitutionally be regulated and speech which must be free is "finely drawn," and "sensitive tools" are needed to draw it;¹²⁷ fact-finding in litigation has a "margin of error . . . which both parties must take into account;"¹²⁸ and finally, in a passage which Professor Robert Post credits with "mark[ing] a major innovation in American constitutional law . . . [and] lastingly reshap[ing] the very landscape of First Amendment jurisprudence,"¹²⁹ Justice Brennan announced that

[t]he vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free.¹³⁰

Yes, *Speiser* is of seminal importance, but it must be seen in tandem with *NAACP v. Alabama*. Both broadened the Court's First Amendment horizon and adumbrated a conception of the Court's function that requires the justices to be engineers of a system of free speech rights, that charges them to identify and forestall the effect of hitherto disregarded imperfections in seemingly carefully designed regulatory efforts and that requires them to craft rules that purport to take realistic account of the incentives confronting *all* the affected actors. Both opinions implicitly set out not merely to preserve formal freedom but to encourage—or at the very least not predictably to discourage—its exercise. Both have about them an air of down to earth, fact-bound realism, though truth to tell what passes in each for pragmatic assessment of law's actual functioning is based more on educated guesswork about how people behave than on rigorous empiricism.

But whether they were rigorously empirical or not, *Speiser* and *NAACP v. Alabama* signaled both normative and methodological shifts that transformed the First Amendment. Normatively, the Court embraced the notion that more (and more effective) speech is a good thing, so that laws which unnecessarily deter



In *NAACP v. Alabama* (1958), a unanimous Court held unconstitutional Alabama's demand that the NAACP reveal the names and addresses of all its members and agents in the state. The decision markedly broadened the horizons of the First Amendment.

speech are bad. The methodological shift was two-fold. First, the Court began systematically and self-consciously to evaluate government justifications strictly, and to insist that the state needed to demonstrate that the interest it pursued was “compelling.”¹³¹ Second, the Court shifted to a decision-making process that included the incentives of private actors in the First Amendment rule-making calculus, and it crafted rules in a deliberate effort to maximize speech opportunities by scrutinizing laws to ensure that they reaped a minimal “unearned increment of deterrence.”¹³² These departures from prior norms and practices significantly affected the scope and content of substantive doctrine. Also, the normative impulse and the behavioral insight that it was the Court’s duty to invalidate laws that would “chill” speech accounted for the development of ancillary doctrinal tools whose principal function was strategically to fortify substantive First Amendment protections. Specifically, the Court erected procedural barriers to regulation of First Amendment activity,¹³³ it developed the overbreadth doctrine,¹³⁴ and it put a specifically First Amendment “spin” on the vagueness doctrine.¹³⁵

Consider first the procedural barriers that the Court erected in such cases as *Smith v. California*,¹³⁶ *Freedman v. Maryland*,¹³⁷ and *Carroll v. President and Commissioners of Princess Anne*.¹³⁸ The Court erected them to forestall the implementation of substantive regulations that would otherwise have had “the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant [or the less legally free] to exercise it.”¹³⁹ In *Smith v. California*, for example, a city ordinance imposed strict criminal liability upon a bookstore owner who had obscene books in his shop. Deploying the methodology of looking to the incentive effect of such a rule on private behavior, Justice Brennan traced and found unacceptable the perverse consequences that the “bookseller’s self-censorship” would have on the amount of expressive activity that would take place: “[T]he bookseller’s burden would become the public’s burden, for by restricting him the public’s access to reading matter would be restricted...[T]he distribution of all books, both obscene and not obscene, would be im-

peded.”¹⁴⁰ In *Freedman v. Maryland*, the Court noted that a state “is not free to adopt whatever procedures it pleases for dealing with obscenity [] without regard to the possible consequences for constitutionally protected speech,”¹⁴¹ and in order to obviate the potentially onerous consequences from a system of movie censorship it listed a number of constitutionally mandated procedural safeguards, such as placing the burden of persuasion on the state and assuring timely judicial review of administrative determinations. And, although the Court had held in *Walker v. City of Birmingham*,¹⁴² that the unconstitutionality of an injunction against expressive activity may not be challenged in a contempt proceeding for its violation, the subsequent case of *Carroll v. President and Commissioners of Princess Anne* mitigated *Walker*’s effect by holding that, without a showing that it is impossible to serve or notify opposing parties and give them an opportunity to participate, there “is no place within this area of basic freedoms guaranteed by the First Amendment”¹⁴³ for the issuance of *ex parte* temporary restraining orders without notice.

Consider next the overbreadth doctrine, which evolved from *United States v. Robel*’s pronouncement that “when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal [only] by means which have [the least] drastic impact on the continued vitality of First Amendment freedoms.”¹⁴⁴ The Warren Court invoked this axiom in several other cases. In *Shelton v. Tucker*, it invalidated an Arkansas statute that compelled teachers in state institutions annually to list their organizational affiliations. The statute’s “unlimited and indiscriminate sweep,” said Justice Stewart, went “far beyond what might be justified in the exercise of the State’s legitimate inquiry into the fitness and competency of its teachers.”¹⁴⁵ And in *NAACP v. Button*,¹⁴⁶ the Court invalidated a section of a Virginia statute that, in pursuit of preventing barratry, champerty and maintenance, banned as improper solicitation of legal or professional business certain litigation-related activities of the NAACP. Concluding that, for “such a group as the NAACP,” association

for the purpose of litigation is protected group activity, Justice Brennan's opinion for the Court put the full power of his considerable rhetorical muscle behind his analysis. The opinion declared that First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society...[and they] need breathing space to survive."¹⁴⁷ Accordingly, "government may regulate in the area only with narrow specificity."¹⁴⁸

Although some commentators have seen the overbreadth doctrine as a means by which the Court enabled itself to avoid the difficult task of delineating First Amendment boundaries,¹⁴⁹ the fact remains that in application these doctrines shielded many First Amendment actors not just from being convicted in particular cases but from being subjected to generally intrusive rules regarding expressive activity. For overbreadth is an exception to two usually applicable rules of constitutional litigation. First, it permits individuals to challenge laws "on their face" rather than "as applied," so that a defendant whose own speech could constitutionally be punished may persuade the Court to invalidate a statute by pointing out that the statute also purports to regulate speech that is constitutionally protected. Second, and because it permits a defendant to challenge a statute that could be constitutionally applied to him, it confers standing on such defendants to litigate not their *own* constitutional rights (which by hypothesis have not been violated) but those of third parties. In *Gooding v. Wilson*,¹⁵⁰ Justice Brennan articulated the by-then familiar intuition that justified the relaxation of ordinary standing rules: "...persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."¹⁵¹

Finally, consider the vagueness doctrine. Recall that in pre-Warren Court days the doctrine that legislatures must set reasonably clear guidelines for law enforcement officials and triers of fact had been used to overturn the convictions of defendants accused of unlawful expressive activity on publicly-owned property. Traditionally, the vagueness doctrine was understood to implement the concern with fair

notice that has long been integral to the enforcement of the requirements of due process of law. This concern is captured by the rule that a law is void on its face if it is so vague that persons of "common intelligence must necessarily guess at its meaning and differ as to its application."¹⁵² In this guise it embodies "rule of law" values that are not unique to the First Amendment. It

signifies the constraint of arbitrariness in the exercise of government power....[I]t means that the agencies of official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection.¹⁵³

But during the Warren Court years the Court began to understand that vagueness could be deployed in strategic defense of First Amendment values as well. The Court came to believe that the vice of vagueness inhered not merely in the license that vague mandates conferred on arbitrary officials and in the lack of fair warning inherent in unclear statutory commands. In addition, building on the methodological shift begun in *NAACP v. Alabama*, the Court started to express concern with the perverse private incentive effects that vague statutes might have on the willingness of citizens to engage in First Amendment activity. In *Baggett v. Bullett*,¹⁵⁴ for example, the Court invalidated a loyalty oath for teachers citing *NAACP v. Alabama*, and opining that vague statutes cause citizens to "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked,¹⁵⁵ an effect the Court deemed unacceptable because it would cause citizens to "restrict[] their conduct to that which is unquestionably safe. Free speech may not be so inhibited."¹⁵⁶

From the vantage point of the present, the First Amendment's doctrinal expansion during the Warren and Burger Court years has acquired a certain aura of inescapability. It was not in-



Police Commissioner L.B. Sullivan (second from left) celebrated his \$500,000 state court libel victory over the *New York Times* in 1960. The Supreme Court overturned this victory in *New York Times v. Sullivan* ruling that the press can be held liable for publishing false statements of fact only when they have done so "with actual malice."

evitable, however. There were some key forks in the road, points at which a narrower view of the Amendment's reach was within the Court's doctrinal grasp but where instead it embraced the broader vision.¹⁵⁷ Without pausing to defend that controversial assertion, I conclude this essay by speculating about another issue: When First Amendment boundaries expand, they stay expanded. Why?

Of course to a certain extent by the force of precedent alone new constitutional boundaries once drawn tend to embed themselves inextricably into the fabric of the law. But we can enrich our appreciation of the complexity and multiplicity of influences that exert pressure on the shape and direction of legal doctrine if we consider explanations in addition to precedent for the resistance of First Amendment boundaries to contraction.

The most intriguing explanations derive neither from the importance nor the great value of freedom of expression, nor from the familiar litany of broadly beneficial instrumental purposes that disinterested persons might as-

cribe to protecting it. They take account rather of serendipitous centrifugal forces that have been created by the combination of a multiplicity of theoretical justifications for protecting freedom of speech, and the increasing willingness of the Court to deploy doctrine strategically. The combination caused First Amendment doctrine to flower. And now, putting aside the question of whether it advances the common good, the legal status quo that has emerged on account of this combination of forces serves a number of particularized interests so well that they are inclined to invest significant resources to preserve it. At the same time, except for pockets of resistance from campaign finance reformers, pornography regulators, hate-speech monitors, and patriotic flag-protectors, no effective or stable constituency exists to identify, articulate, or consistently demand enforcement of principled limits on First Amendment rights.

Begin with the multiplicity of theoretical justifications for freedom of expression. During the Warren and Burger Court years, a pro-

fusion of First Amendment theorists took to the law reviews.¹⁵⁸ Though most theorists have a personal favorite among the panoply of First Amendment values, it has become conventional wisdom that the First Amendment implements not one value but several, not one theory but a multitude, and that it serves both instrumental and noninstrumental objectives.¹⁵⁹ Many if not most people who think about the First Amendment think it advances a veritable cornucopia of benign ends, and what I wish to emphasize about this is not what a gold mine of societal beneficence freedom of expression is *in fact* but rather that the very variety of justifications for protecting it puts a highly diversified arsenal of rhetorical weapons into the hands of First Amendment advocates. Defenders of narrow First Amendment boundaries or single-valence First Amendment theories, therefore, find themselves fighting on many fronts. What matters here is not the conceptual solidity of any of the theories but that the very multiplicity of justifications has rhetorical and persuasive utility to First Amendment advocates. For the grab-bag of First Amendment premises means that, in practically every case, where one theoretical justification offers no support for a First Amendment claim, another can be found.

The variety of First Amendment justifications, coupled with the perception that freedom of speech serves both as an instrument for the attainment of broad social goals and as an end in itself, has had an additional, more subtle, effect: it has created an impression that at least at a general level freedom of speech is practically an unequivocal good. That is to say that there exists no salient, systematically identifiable, inevitable, ever-present, rhetorically available social cost incurred in protecting freedom of speech. Its protection does not inevitably imply an obvious and fundamental choice between the beneficiaries of First Amendment rights and a class of their victims. This is not because protection of free speech involves no trade-offs, nor is it because those who exercise their speech rights cause no harm. Rather it is because the costs of protecting speech have come to seem remote, tenuous, and even speculative whereas its benefits more obviously accrue in one way or another to practically everyone. Also, those who suffer particularized

harm on account of others' speech do not constitute a stable group with whom we can easily or consistently identify—they are isolated individuals who emerge only from case to case. Nor do they tend to attract the support of special interest groups who might through collective action enhance their ability to attract attention to their grievances.

Moreover, the rhetorical deck is stacked in two ways against the social goods—order, protection of national security, sexual morality—that are potentially sacrificed in order to purchase all the advantages—autonomy, knowledge, self-fulfillment, political freedom—that free expression provides. First, the social interests that are thought to be threatened by freedom of expression are distant abstractions; they do not appear to represent values that seem genuinely in peril or even that at this point in our country's history many citizens are likely to be passionate about defending. Second, and more important, it has proved child's play for academics and First Amendment advocates to portray the social interests that freedom of speech threatens not as genuinely legitimate objects of government concern but rather as the obsessions of narrow-minded, tight-sphinctered, paranoid reactionaries. When commentators imply, for example, that freedom of expression is incompatible with such fuddy-duddy values as conformity, paternalism and enforced orthodoxy, and that speech regulations are reflections of impulses no more admirable than the urge to suppress dissent, have you any doubt whose side you want to be on?

Just as—perhaps because—there is neither a stable group of victims of First Amendment rights nor an energizing set of systematic reasons to thwart expressive activities, there exists no stable legal or political constituency to find, articulate, and advocate enforcement of principled limits on the expansion of First Amendment boundaries. The exercise of First Amendment rights tends to evoke highly particularized opposition. Regulations applied to or aimed at First Amendment activity tend to be defended in Court by isolated non-repeat players who seem to represent relatively parochial interests.¹⁶⁰

On the other hand, the line-up of First Amendment advocates is loaded with heavy

and influential hitters. First Amendment scholars supply a steady stream of theoretical, moral and intellectual support both to one another and to First Amendment litigators.¹⁶¹ When it comes to litigation, the First Amendment bar boasts several extraordinarily talented repeat players. Several individual lawyers have accumulated impressive expertise and invaluable experience arguing before the Court.¹⁶² Their professional careers have been so heavily invested in winning cases for First Amendment clients that it would seem a betrayal were they ever to assert that “the First Amendment has gone too far.” Organizations such as the ACLU (though of course there are no organizations “such as” the ACLU—there’s only the ACLU), long stalwart defenders of freedom of speech, are also repeat players of the First Amendment game, with a deep bench of able and experienced members of the team.

Last but not least in the line-up of heavy-hitting First Amendment advocates, of course, is the media itself—the First Amendment’s most obvious beneficiary and consequently its most stalwart ally (as well as its most influential one). The press is reliably on the First Amendment side when it comes to reporting and commenting on decisions in First Amendment cases, giving them what might seem to a disinterested observer coverage possibly disproportionate to their intrinsic or relative importance. In Court, as litigant, the press vigorously advocates its own cause. Although the Court has never held that the press enjoys First Amendment rights greater than the speech rights of other citizens, several of the most significant First Amendment expansions in recent years have come at the behest of—and tend primarily to benefit—the press. Unlike other profit-making businesses, for example, for whom the trend was in the direction of more and stricter liability during the Warren and Burger Court years, the press received a very substantial reprieve. On account of the then unprecedented reading of the First Amendment, *New York Times v. Sullivan*, and its progeny, the press is liable for publishing false defamatory statements of fact only when they have done so “with actual malice.”¹⁶³ Unlike other information providers—commercial advertisers, for example—the press enjoys the benefit of a pow-

erful presumption against being subjected to prior restraint: whereas injunctive relief has typically been the (constitutionally permissible) remedy of choice in litigation against misleading commercial advertisers, injunctions against the press—even to restrain the publication of secret, illicitly obtained government documents—cannot be obtained unless the government carries an extremely “heavy burden of showing justification for the imposition of such a restraint.”¹⁶⁴ On account of the First Amendment, the print media enjoys almost wholly unfettered editorial autonomy. So, now, does the electronic media since the FCC, acting in large part on its constitutional doubts, abandoned the Fairness Doctrine.¹⁶⁵

The news media’s editorial autonomy is of enormous strategic importance to the press itself, of course, for it enables journalists and their editors and publishers to report what they choose about government without having to fear official sanction. In addition it enables the press, through its choices about what stories to cover and what editorial positions to adopt, to protect and enhance its own power relative to that of other institutions. In addition to providing the press with a formal legal shield, the First Amendment provides the press with such a powerful rhetorical weapon that it would almost never be in the press’ perceived self-interest to concede the legitimacy of any contraction of the First Amendment¹⁶⁶ or to oppose any expansion.

A final reason why the boundaries of the First Amendment tend always to expand and never to contract is that decisions giving broad protection to First Amendment rights are almost never characterized as being too activist. This is not to say that expansive results in particular cases uniformly escape criticism for having perhaps gone too far. It is rather to note that, in the seemingly endless debate over the merits of judicial activism versus those of judicial restraint, those who decry activism almost never cite First Amendment jurisprudence in general, or particular cases, as exemplifying judicial overreaching. The observation holds even for cases in which, in order to protect First Amendment rights, the Court fundamentally altered the boundary between federal and state power and that between state and private ac-

tion. For example, long before the incorporation controversy came to symbolize both the federalism and the individual rights aspects of activism versus restraint during Chief Justice Warren's tenure, the Court had without fanfare incorporated the First Amendment into the Fourteenth.¹⁶⁷ And during Warren's tenure, the Court seemed to be tying itself in knots to avoid a head-on confrontation with the meaning of "state action" in the civil rights arena, and commentators were having a field day trying to figure out what principle had animated the Court to find state action in *Shelley v. Kraemer*.¹⁶⁸ Meanwhile, *New York Times v. Sullivan* had begun life as a garden variety state law private defamation action.¹⁶⁹ In an almost unnoticed—but certainly crucial—step on its way to claiming the power to decide it on First Amendment grounds, the Court exhibited a stunning lack of self doubt when it announced that a state court judgment in private defamation litigation amounted to state action.¹⁷⁰

But that academic commentators have been able to ascribe such a versatile multitude of benign ends to free expression, and that the expansive tendencies of First Amendment

boundaries are propelled by a variety of serendipitously conjoined forces such as those suggested above, only partially explain the doctrinal expansion that did in fact occur. The theories would have remained academic exercises, and the interest groups that found it worth their while to invest in First Amendment litigation would never have coalesced around a common agenda had not the Court developed, during the Warren and Burger Court years, analytical tools and decisional strategies that permitted the theories to be woven into the fabric of First Amendment doctrine and created a doctrinal status quo that was worth preserving. The tools of analysis that were available to the Court in the mid-1950s could not have been used to implement an expansionist agenda. Recall the state of the First Amendment in 1953. Had the Warren Court continued working with the doctrines it inherited—doctrines that stacked the deck against First Amendment claimants, and assumed away even the possibility, to say nothing of the desirability, of protecting many kinds of speech, the scholars who trumpeted the many virtues of freedom of expression would likely have remained voices crying in the academic



In 1971 the Burger Court allowed newspapers to publish the Pentagon Papers, a top secret study of the Vietnam War that had been purloined by a Pentagon employee. William Frazer, chief of the presses at the *Washington Post*, checked the first edition headlining the Supreme Court's 6-3 decision.

wilderness. As we have seen, however, during the Warren Court years the Court changed almost completely its approach to the tasks of identifying what was at stake in First Amendment cases and adjudicating First Amendment claims. The Court came sympathetically to embrace the ideas that, for whatever reason, the First Amendment occupies a “preferred position” in the hierarchy of constitutional freedoms and that the exercise of First Amendment rights by individual citizens is a Good Thing for society—an activity to be encouraged, fostered and celebrated rather than merely tolerated, and never ever to be unnecessarily deterred if the Court could help it.

More importantly, perhaps, led to the insight by Justices Harlan and Brennan, the Court came to understand that First Amendment doctrine has two very different kinds of effects. The obvious, familiar, and strictly legal one is the effect on the formal authority of public officials. The necessary corollary of First Amendment rights is to constrain government, to limit the reach of legislative and administrative power, and to provide rules that have direct impacts on official behavior. Not so obvious is the indirect, incentive effect that First Amendment rules have on the behavior of individual citizens. Devotees of today’s “law and economics” approach would characterize the Court’s attempt to evaluate First Amendment rules in terms of their incentive effects as “ex ante” analysis.¹⁷¹ Constitutional commentators who noted the change in approach called it a shift to “pragmatic” or “strategic” considerations.¹⁷² But the labels count for little. What matters is that, with *NAACP v. Alabama* and *Speiser v. Randall*, the Court had come to recognize that First Amendment doctrine does more than set the parameters for official conduct. It also affects the way individual citizens behave and determines their relative willingness to engage in expressive activity. Since 1958 the Court has frequently decided cases and crafted rules that were explicitly premised on its determination to eliminate unearned increments of deterrence from laws that applied to expressive activity. *NAACP v. Alabama* and *Speiser v. Randall* were the first, but far from the last, First Amendment decisions to take account of the facts that citizens deciding

whether to engage in expressive activity need to know whether their conduct will be protected; that “the separation of legitimate from illegitimate speech calls for...sensitive tools”¹⁷³ because otherwise “the possibility of mistaken fact finding...create[s] the danger that the legitimate utterance will be penalized,”¹⁷⁴ that this would cause citizens to “steer far wider of the unlawful zone”¹⁷⁵ and thus deter “speech which the Constitution makes free.” In other words, the First Amendment as in effect the impresario of “speech which the Constitution makes free”¹⁷⁶—this is the single most significant idea that the Warren Court conceived and the Burger Court embraced.

It seems appropriate to close with one of the most eloquent rhetorical tributes ever paid to the First Amendment, especially as it comes from an opinion of Justice Harlan—his opinion for the Court in *Cohen v. California*.¹⁷⁷ I have offered in this essay a number of somewhat unconventional reasons why the First Amendment has so much support from so many quarters. The few sentences that follow serve as reminders of the values which, ultimately, vindicate our loyalty to the freedom it guarantees:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.¹⁷⁸

Endnotes

¹ 54 Stat. 670 (1940), as amended by 62 Stat. 808 (1948) and 70 Stat. 623 (1956).

² *Yates v. United States*, 354 U.S. 298 (1957) (overturning convictions under Smith Act where defendant Communist

Party leaders merely advocated overthrow of the government as an “abstract principle”); *Scales v. United States*, 367 U.S. 203 (1961) (construing the membership clause of the Smith Act to require “active and purposive” membership, but holding that the Act—so construed—did not violate the First Amendment); *Noto v. United States*, 367 U.S. 290 (1961) (reversing convictions under the membership clause of the Smith Act where, unlike *Scales*, there was no showing that the Communist Party had advocated specific action to effect the forcible overthrow of the government).

³ 64 Stat. 987 (1950).

⁴ *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961) (upholding Internal Security Act’s requirement that “communist action organizations” register with a national Subversive Activities Control Board).

⁵ *Elfrandt v. Russell*, 384 U.S. 11 (1966) (striking down an Arizona loyalty oath statute which made it a violation for an individual to be a member of any organization that advocated the violent overthrow of the state government—regardless of whether that individual subscribed to this illegal purpose); See also *United States v. Robel*, 389 U.S. 258 (1967) (striking down on similar grounds a federal statute regulating employees at defense facilities who were members of “Communist-action organizations”).

^{5.1} *Barenblatt v. U.S.*, 360 U.S. 109 (1959) (upholding conviction for contempt of Congress where witness refused to testify about his communist affiliations); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) (reversing NAACP leader’s contempt conviction for refusing to provide membership list to state legislative committee investigating communist activities where Court determined that there was no demonstrated nexus between the NAACP and subversive organizations).

⁶ *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961) (affirming state refusal to admit lawyer into practice where bar applicant had refused to answer questions concerning membership in the Communist Party).

⁷ *Speiser v. Randall*, 357 U.S. 513 (1958). See *infra*, notes 121-30 and accompanying text.

⁸ *Shelton v. Tucker*, 364 U.S. 479 (1960) (striking down as overbroad an Arkansas statute that required every teacher in state-supported schools annually to list all organizations to which he belonged or which he supported during the previous five years).

⁹ *Edwards v. South Carolina*, 372 U.S. 229 (1963) (reversing, on free speech grounds, breach of peace convictions of peaceful and non-obstructive civil rights demonstrators); *Cox v. Louisiana*, 379 U.S. 536 (1965) (reversing breach of peace conviction of leader of peaceful demonstration on the grounds that vague law under which he had been convicted could be deployed to suppress unpopular speech); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Adderley v. Florida*, 385 U.S. 39 (1966) (affirming trespass convictions of peaceful civil rights demonstrators); *Walker v. Birmingham*, 388 U.S. 307 (1967) (affirming criminal contempt convictions of demonstrators who in violation of a court order conducted parade without a permit where defendants had neither sought a permit nor pursued litigation to challenge the injunction); *Brown v. Louisiana*, 383 U.S. 131 (1966) (overturning breach of peace convictions of defendants who had engaged in a sit-in at a segregated public library).

¹⁰ See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958), *infra* at notes 110-22 and accompanying text; *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), (overturning, as violation of First Amendment, contempt conviction for failing to tell legislative committee whether fourteen particular individuals were members of the NAACP); *Talley v. California*, 362 U.S. 60 (1960) (striking down Los Angeles ordinance that required all handbills to include information identifying the disseminating party).

¹¹ *NAACP v. Button*, 371 U.S. 415 (1963) (striking down on free speech grounds a Virginia law that prohibited informing a third party that his legal rights had been violated and offering legal assistance to vindicate those rights).

¹² See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (raising standards of proof and liability in defamation claims brought by public officials).

¹³ See *Street v. New York*, 394 U.S. 576 (1969) (reversing flag-burner’s conviction under New York law which made it a crime “to mutilate, deface, defile, defy, trample upon, or cast contempt upon an American flag either by words or act”).

¹⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing Ohio criminal syndicalism conviction of Klan leader on the grounds that the relevant statute unconstitutionally proscribed mere advocacy of violence and did not require a showing of “incitement to imminent lawful action”).

¹⁵ *United States v. O’Brien*, 391 U.S. 367 (1968) (rejecting argument of defendant burner of draft card that this behavior—prohibited by federal law—was constitutionally protected symbolic speech).

¹⁶ *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (finding that the wearing of black armbands by high school and junior high school students to express their disapproval of the Vietnam War was “pure speech” entitled to protection under the First and Fourteenth Amendments).

¹⁷ *New York Times Co. v. United States*, 403 U.S. 713 (1971) (denying request for a permanent injunction against publication of Pentagon Papers on the grounds that government failed to meet burden of showing need for prior restraint).

¹⁸ *Cohen v. California*, 403 U.S. 15 (1971) (reversing on First Amendment grounds a breach of peace conviction for wearing jacket emblazoned with words “Fuck the Draft”).

¹⁹ *Spence v. Washington*, 418 U.S. 405 (1974) (invalidating on First Amendment grounds the conviction of college student who had superimposed a peace symbol on the flag).

²⁰ *Schacht v. United States*, 398 U.S. 58 (1970) (holding that theatrical-performance exception to law against unauthorized wearing of military uniforms which encompassed only performances that portrayed military in favorable light was an unconstitutional abridgment of freedom of speech).

²¹ *Gooding v. Wilson*, 405 U.S. 518 (1972) (defendant’s conviction under Georgia law prohibiting use of “opprobrious words or abusive language” for saying to police officers “You son of a bitch, I’ll choke you to death;” “White son of a bitch I’ll kill you;” and “You son of a bitch, if you ever put your hands on me again I’ll cut you all to pieces” on the grounds that statute was overbroad—it was not restricted merely to fighting words).

²² 424 U.S. 1 (1976) (upholding campaign contribution

limits and public funding of presidential campaigns, but striking down expenditure limits and limits on contributions to political committees).

²³ *Schenck v. United States*, 249 U.S. 47 (1919).

²⁴ *Dennis v. United States*, 341 U.S. 494 (1951).

²⁵ For a lucid summary of a number of pre-Warren Court cases and a telling account of the “ad hoc process of adjudication” in which the Court engaged, see *Niemotko v. Maryland*, 340 U.S. 268, 273-89 (1951) (Frankfurter, J., concurring).

²⁶ See, e.g., *Schneider v. State*, 308 U.S. 147 (1939) (government’s interest in keeping city streets clean did not outweigh First Amendment interest in disseminating information in pamphlets or handbills).

²⁷ Perhaps the most famous of a pre-Warren Court Justice’s paeans to freedom of speech is Justice Brandeis’ famous concurrence in *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

²⁸ In a concurring opinion in an early-Warren Court case, Justice Frankfurter asserted that “[f]or a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling.” *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring). It is noteworthy, however, that he cited no case authority for the proposition.

²⁹ *Dennis v. United States*, 341 U.S. 494, 542 (1951).

³⁰ *Id.* at 525.

³¹ An example of this kind of stacking the deck against the First Amendment claim is an early Warren Court decision, *Barenblatt v. U.S.*, 360 U.S. 109 (1959), in which the Court weighed a “highly generalized and obviously crucial interest, such as the right of the legislature to inform itself of matters bearing on national security, against [a] rather particular and narrowly conceived claim such as the right of a particular individual to withhold a particular, perhaps trivial, item of information from a committee on this occasion.” Charles Fried, “Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test,” 76 *Harv. L. Rev.* 755, 763 (1963). During the early years of the Warren Court, ad hoc balancing came under fierce attack both from within the Court and from commentators. Justice Black became famous, for example, for his insistence that the First Amendment was an absolute. See, e.g., *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (Answering the majority’s statement that adjudication “has necessarily involved a weighing of the governmental interest involved,” *id.* at 51, by contending that the “First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”); see also Justice Hugo L. Black, “The Bill of Rights,” 35 *N.Y.U.L. Rev.* 865 (1960) (supporting absolute approach); Edmond Cahn, “Justice Black and First Amendment ‘Absolutes’: A Public Interview,” 37 *N.Y.U.L. Rev.* 549 (1962). Within the academy, Justice Black had both defenders, see, e.g., Laurent Frantz, “The First Amendment in the Balance,” 71 *Yale L. J.* 1424 (1962) (balancing converts First Amendment into a license to abridge) and critics, see, e.g., Wallace Mendelson, “On the Meaning of the First Amendment: Absolutes in the Balance,” 50 *Calif. L. Rev.* 821 (1962) (ambiguity of constitutional text necessitates bal-

ancing). The conventional wisdom today is that the debate between “absolutists” and “balancers” was “vigorous but ultimately unproductive.” Robert C. Post, “William J. Brennan and the Warren Court,” in Mark Tushnet, Ed., *The Warren Court in Historical and Political Perspective* 130 (1993).

³² *Schenck v. United States*, 249 U.S. 47, 52 (1919).

³³ 310 U.S. 296, 309-10 (1940).

³⁴ 315 U.S. 568 (1942).

³⁵ *Id.* at 569.

³⁶ *Id.* at 571-72.

³⁷ 316 U.S. 52 (1942).

³⁸ *Id.* at 54.

³⁹ 340 U.S. 315 (1951).

⁴⁰ *Id.* at 320-21.

⁴¹ 343 U.S. 250 (1952).

⁴² *Id.* at 251.

⁴³ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁴⁴ For a brief, helpful summary of the “incorporation debate,” see Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law*, 804-13 (3d ed. 1996).

⁴⁵ *Schenck v. United States*, 249 U.S. 47, 51 (1919) (Holmes, J.) (“It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints...”). Cf. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) (The Constitution prohibits all “previous restraints upon publication as had been practiced by other governments,” but not “the subsequent punishment of such as may be deemed contrary to the public welfare”).

⁴⁶ *Hague v. CIO*, 307 U.S. 496, 515 (1939).

⁴⁷ Lillian R. BeVier, “Rehabilitating Public Forum Doctrine: In Defense of Categories,” 1992 *Sup. Ct. Rev.* 79, 83, quoting Harry Kalven, Jr., “The Concept of the Public Forum: *Cox v. Louisiana*,” 1965 *Sup. Ct. Rev.* 1, 13.

⁴⁸ See text accompanying notes 152 and 156, *infra*.

⁴⁹ *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

⁵⁰ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Feiner v. New York*, 340 U.S. 315 (1951). See generally BeVier, “Rehabilitating Public Forum Doctrine,” *supra* note 47, at 84-85 (describing Court’s use of this aspect of the vagueness doctrine to resolve cases involving expressive activity in public places in the thirty years following *Hague*).

⁵¹ Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (suggesting the Court would defer to legislative judgments that were “narrowly drawn to define and punish specific conduct”); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (sustaining conviction for parading without a permit since the state court had limited the discretion of the licensing authority to considerations of time, place and manner.)

⁵² The cases supporting this proposition are legion, and citation to all of them would serve no purpose. For a small sample, see, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963); *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵³ Post, “William J. Brennan and the Warren Court,” in Tushnet, *The Warren Court* *supra* note 31, 131.

⁵⁴ *NAACP v. Button*, 371 U.S. 415, 438, 432-33 (1963).

⁵⁵ See, e.g., *Smith v. California*, 361 U.S. 147 (1959) (invalidating ordinance imposing penalties for possession of obscene writings because it lacked a *scienter* requirement);

Freedman v. Maryland, 380 U.S. 51 (1965)(invalidating a state obscenity censorship scheme because it lacked appropriate procedural safeguards).

⁵⁶ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁵⁷ See *id.* (adopting actual malice standard in libel litigation, in part because the Court feared that doubts about being able to prove truth in court might deter would-be critics of government).

⁵⁸ See, e.g., *Virginia State Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)(holding, based on rationales as disparate as consumers' commercial interest in the free flow of information and citizens' interest in informed public decision-making, that the First Amendment protects commercial speech).

⁵⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
408 U.S. 92 (1972).

⁶¹ *Id.* at 95.

⁶² *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁶³ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976).

⁶⁴ Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, **The First Amendment** 83 (1999). See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972).

⁶⁵ *Miller v. California*, 413 U.S. 15, 24 (1973).

⁶⁶ *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981).

⁶⁷ See generally Vincent Blasi, Ed., **The Burger Court: The Counter-Revolution That Wasn't** (1983).

⁶⁸ Thomas I. Emerson, "Freedom of the Press under the Burger Court," in Blasi, **Counter-Revolution**, *supra* note 67, at 26-27.

⁶⁹ Nadine Strossen, "Freedom of Speech in the Warren Court," in Bernard Schwartz, Ed., **The Warren Court: A Retrospective** 68 (1996).

⁷⁰ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

⁷¹ Compare *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) with *Cohen v. California*, 403 U.S. 15 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

⁷² *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980).

⁷³ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

⁷⁴ Compare *United States v. O'Brien*, 391 U.S. 367 (1968) and *Street v. New York* 394 U.S. 576 (1969) with *Spence v. Washington*, 418 U.S. 405 (1974) and *Smith v. Goguen*, 415 U.S. 566 (1974).

⁷⁵ *Shad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

⁷⁶ *New York Times v. United States*, 403 U.S. 713 (1971).
403 U.S. 29 (1971).

⁷⁷ *Id.* at 43-44.

⁷⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁸⁰ 413 U.S. 15 (1973).

⁸¹ 413 U.S. 49 (1973).

⁸² 460 U.S. 37 (1983).

⁸³ For a description and analysis of public forum doctrine beginning with *Hague* and defending *Perry's* categorical approach, see BeVier, "Rehabilitating Public Forum Doctrine," *supra* note 47.

⁸⁴ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

⁸⁵ *Saxbe v. Washington Post Co.*, 417 U.S. 843, 864 (1974) (Powell, J., dissenting).

⁸⁶ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁸⁷ *Pell v. Procunier*, 417 U.S. 817 (1974).

⁸⁸ 418 U.S. 241 (1974).

⁸⁹ 395 U.S. 367 (1969). See, e.g., Jerome Barron, "Access to the Press: A New First Amendment Right," 80 *Harv. L. Rev.* 1641 (1967).

⁹⁰ 424 U.S. 1 (1976).

⁹¹ 435 U.S. 765 (1978).

⁹² For examples of these views, see, e.g., Cass R. Sunstein, "Free Speech Now," 59 *U. Chi. L. Rev.* 255 (1992); J. Skelley Wright, "Politics and the Constitution: Is Money Speech?," 85 *Yale L. J.* 1001 (1976). For a summary and analysis of the argument that *Buckley* was rightly decided, see Lillian R. BeVier, "Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform," 73 *Calif. L. Rev.* 1045 (1985).

⁹³ See, e.g., Post, "William J. Brennan and the Warren Court," in Tushnet, **The Warren Court** *supra* note 31, at 134 (articulation and development of First Amendment doctrine designed as an instrument of policy and based on a pragmatic conception of constitutional law "can authoritatively be traced to Brennan").

⁹⁴ 376 U.S. 254 (1964).

⁹⁵ But see Gerald Gunther, "In Search of Judicial Quality on a Changing Court: The Case of Justice Powell," 24 *Stan. L. Rev.* 1001 (1972)(praising Justice Harlan's methodology and citing his opinion in *Cohen v. California* as a model of speech-protective balancing).

⁹⁶ See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963)(Justice Brennan writing for the majority over Justice Harlan's dissent, invalidating Virginia's attempt to regulate the activities of the NAACP under the rubric of improper solicitation of legal business).

⁹⁷ 354 U.S. 476 (1957).

⁹⁸ 357 U.S. 513 (1958).

⁹⁹ 354 U.S. 298 (1957).

¹⁰⁰ 357 U.S. 449 (1958).

¹⁰¹ Stone, Seidman, Sunstein & Tushnet, **The First Amendment**, *supra* note 64, at 188.

¹⁰² Justice Brennan dissented from the line of obscenity cases that began with *Miller v. California* and *Paris Adult Theatre I v. Slaton*, on the ground that states' nontrivial interests in regulating obscenity "cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 112-13 (1973)(Brennan, J., dissenting).

¹⁰³ *Roth*, 354 U.S. at 481.

¹⁰⁴ *Id.* at 484.

¹⁰⁵ *Id.* at 485.

¹⁰⁶ *Yates v. United States*, 354 U.S. 298, 319 (1957).

¹⁰⁷ *Id.* at 319-27.

¹⁰⁸ *Id.* at 319.

¹⁰⁹ Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," 27 *Stan. L. Rev.* 719, 753 (1975).

¹¹⁰ 357 U.S. 449 (1958).

¹¹¹ *Id.* at 453-54.

¹¹² *Id.* at 460; 462-63.

¹¹³ *Id.* at 461.

¹¹⁴ *Id.* at 462-63.

¹¹⁵ *Id.* at 463.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 463. Although it is beyond the scope of this essay to develop the point, it is worth noting that Justice Harlan's insistence that the "crucial factor" determining constitutionality is the "interplay of governmental and private action" seems to contradict conventional wisdom that constitutionality *vel non* is solely a function of the exercise of formal "state action."

¹¹⁸ *Cf., e.g.,* Harry Kalven, Jr., **The Negro and The First Amendment** 91-95 (1965).

¹¹⁹ 357 U.S. at 462.

¹²⁰ *Id.* at 462 ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

¹²¹ 357 U.S. 513 (1958).

¹²² *Id.* at 515-16.

¹²³ *Id.* at 519-20 ("For the purposes of this case we assume without deciding that California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned.").

¹²⁴ *Id.* at 520 ("When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.").

¹²⁵ *Id.* at 525-26.

¹²⁶ *Id.* at 521.

¹²⁷ *Id.* at 525.

¹²⁸ *Id.*

¹²⁹ Post, "William J. Brennan and the Warren Court," in Tushnet, **The Warren Court**, *supra* note 31 at 131.

¹³⁰ 357 U.S. at 526.

¹³¹ *Speiser*, 357 U.S. at 529; *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). The Court had first articulated something like a "compelling state interest" test in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), though the result in that case did not turn on resolution of the First Amendment issue.

¹³² Alexander Bickel first coined the phrase. Alexander Bickel, **The Least Dangerous Branch** 149 (1962).

¹³³ See generally Henry Monaghan, "First Amendment 'Due Process,'" 83 *Harv. L. Rev.* 518 (1970).

¹³⁴ See generally Martin Redish, "The Warren Court, the Burger Court, and the First Amendment Overbreadth Doctrine," 78 *Nw. L. Rev.* 1031 (1983); Note, "The First Amendment Overbreadth Doctrine," 83 *Harv. L. Rev.* 844 (1970).

¹³⁵ See generally Anthony Amsterdam, "The Void for Vagueness Doctrine in the Supreme Court," 109 *U. Pa. L. Rev.* 67 (1960).

¹³⁶ 361 U.S. 147 (1959).

¹³⁷ 380 U.S. 51 (1965).

¹³⁸ 393 U.S. 175 (1968).

¹³⁹ *Smith*, 361 U.S. at 151.

¹⁴⁰ *Id.* at 153-54.

¹⁴¹ *Freedman*, 380 U.S. at 57 (citations omitted).

¹⁴² 388 U.S. 307 (1967).

¹⁴³ *Carroll*, 393 U.S. at 180.

¹⁴⁴ *United States v. Robel*, 389 U.S. 258, 268 (1967).

¹⁴⁵ *Shelton v. Tucker*, 364 U.S. 479, 490 (1960).

¹⁴⁶ 371 U.S. 415 (1963).

¹⁴⁷ *Id.* at 433.

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., Gerald Gunther, "Reflections on *Robel*: It's Not What the Court Did But the Way That It Did It," 20 *Stan. L. Rev.* 1140 (1968).

¹⁵⁰ 405 U.S. 518 (1972).

¹⁵¹ *Id.* at 521.

¹⁵² *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926).

¹⁵³ John Calvin Jeffries, Jr., "Legality, Vagueness, and the Construction of Penal Statutes," 71 *Va. L. Rev.* 189, 212 (1985).

¹⁵⁴ 377 U.S. 360 (1964).

¹⁵⁵ *Id.* at 372.

¹⁵⁶ *Id.*

¹⁵⁷ *Cf.* Lillian R. BeVier, "The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle," 30 *Stan. L. Rev.* 299 (1978) (arguing that many of the cases that seemed to expand the ambit of First Amendment protection beyond political speech could be explained instead as strategic attempts to protect political speech "enough.").

¹⁵⁸ For a selection from and citations to the abundant literature, see John H. Garvey and Frederick F. Schauer, **The First Amendment: A Reader** 1-426 (2d ed. 1996).

¹⁵⁹ For a useful brief summary of the various values the First Amendment is thought to serve, the rationales that have been offered in support of each, and citations to the relevant literature, see Stone, Seidman, Sunstein, & Tushnet, **The First Amendment** *supra* note 64, at 8-16 (1999).

¹⁶⁰ Consider, for example, the Southern police commissioner who was the plaintiff in *New York Times v. Sullivan*, or the anonymous rape victim in *Florida Star v. B.J.F.* 491 U.S. 524 (1989).

¹⁶¹ See sources cited note 159 *supra*.

¹⁶² The Supreme Court's **U.S. Reports** repeatedly report the participation, on briefs or at oral argument, of attorneys, such as Floyd Abrams, Joel Gora, and Burt Neuborne, whose names have become practically synonymous with the First Amendment.

¹⁶³ 376 U.S. 254, 279-80 (1964).

¹⁶⁴ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

¹⁶⁵ Syracuse Peace Council, 2 FCC Rec. 5043 (1987); FCC, Report Concerning the Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985).

¹⁶⁶ An important exception to the statement in text is that many powerful voices in the print media have been raised in favor of campaign finance reform, and in opposition to *Buckley*. It should be noted, however, that media corporations are the only profit-making corporations specifically exempted from restrictions on spending corporate treasury funds to promote or defeat candidates for federal office. 2 U.S.C. 431 (9) (B) (i) (1994).

¹⁶⁷ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁶⁸ 334 U.S. 1 (1948). See, e.g., Louis Henkin, "Shelley v. Kraemer: Notes for a Revised Opinion," 110 *U. Pa. L. Rev.* 473 (1962); Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harv. L. Rev.* 1, 29-31 (1959).

¹⁶⁹ 376 U.S. 254 (1964).

¹⁷⁰ *Id.* at 265.

¹⁷¹ Cf. Frank H. Easterbrook, "Foreword: The Court and the Economic System," 98 *Harv. L. Rev.* 4,10-12 (1984) (explaining and distinguishing between ex ante and ex post perspectives).

¹⁷² Post, "William J. Brennan and the Warren Court," in Tushnet, **The Warren Court in Historical Perspective**, *supra* note 31, at 131.

¹⁷³ *Speiser*, 357 U.S. at 525.

¹⁷⁴ *Id.* at 526.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 403 U.S. 15 (1971).

¹⁷⁸ *Id.* at 24.

Contributors

Walter Berns is University Professor Emeritus at Georgetown University Law Center and Resident Scholar at the American Enterprise Institute.

Lillian R. BeVier is Henry and Grace Doherty Charitable Foundation Professor of Law, University of Virginia School of Law.

Murray Dry is Charles A. Dana Professor of Political Science at Middlebury College.

Douglas Laycock is Alice McKean Young Regents Chair in Law at the University of Texas at Austin.

David M. Rabban is Dahr Jamail, Randall Hage Jamail and Randall Lee Jamail Regents Chair in Law at the University of Texas at Austin School of Law.

Philippa Strum is Broeklundian Professor of Political Science Emerita, Brooklyn College-City University of New York; Walter Gibbs Visiting Professor of Constitutional Law at Wayne State University.

Photo Credits

Page 131, Library of Congress USZ62-3291-211967	Page 158, Library of Congress USZ62-3291-211967
Page 134, Library of Congress USZ62-1004-211967	Page 163, Library of Congress
Page 136, Library of Congress USZ62-043743-211966	Page 166, From the Collection of Paul Avrich
Page 137, Library of Congress USZ62-049739-211966	Page 170, Library of Congress
Page 140, Huntington Library and Art Gallery	Page 173, Corbis Images
Page 141, Library of Congress USZ62-1551-211965	Page 177, Corbis Images
Page 147, Library of Congress USZ62-5377-211967	Page 180, Corbis Images
Page 150, Library of Congress USZ62-3291-211967	Page 189, Library of Congress USZ62-116824-212024
Page 151, Corbis Images	Page 193, Corbis Images
Page 152 (left), Library of Congress USZ62-42997-211966	Page 197, Corbis Images
Page 152 (right), Library of Congress USZ62-20178-211965	Page 200, Library of Congress USZ62-123478-212024
Page 155, Corbis Images	Page 203, Corbis Images
	Page 206, Corbis Images

Cover: Socialists protesting World War I. Corbis images.