DRAKE LAW REVIEW

Volume 43 | 1994 | Number 1

THE ROAD TO *BRANDENBURG*: A LOOK AT THE EVOLVING UNDERSTANDING OF THE FIRST AMENDMENT

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I. INTRODUCTION

The First Amendment has been called the most "charismatic" provision of the United States Constitution by one eminent scholar[1] and has been enshrined in our cultural morality in a way no other law has been. Although law normally at best receives respect (even if only in the breach), the First Amendment commands—and gets—devotion. At some level, this provision, tacked on to the federal constitution with nine companions at the last minute to ensure its ratification, has become the centerpiece of our civic religion. We celebrate our heritage in terms of our freedom, not from Great Britain—that battle was fought and won centuries ago—but rather in terms of our creation of a free society.

The platitudes about freedom have become bromides: comforting, but in the end, insubstantial. All Americans, of whatever ideological stripe, can say they favor freedom. It is hard indeed to find anyone to proclaim they are against freedom of speech, or its guarantor, the First Amendment.[2] Nevertheless, each of the various constituencies claiming devotion to the First Amendment has a distinct vision of what it means and exactly what it does and does not protect.

The paradox of devotion to a rule of law, the parameters and the basic meaning of which cannot be agreed upon within the legal academy, let alone by the general populace, can be attributed to several factors. It could be claimed this fact stems from human nature; it is easier to proclaim freedom of speech in the abstract than to champion it for speech one finds personally offensive. As Mark Twain once wrote, "[I]t's nobler to teach others, and no trouble."[3] This factor alone surely does not account for the paradox; otherwise First Amendment literature would simply consist of charges and countercharges of hypocrisy. A more fundamental cause is implicit in the jurisprudence that has evolved.

The First Amendment has been assigned numerous functions in our society, functions that range from the enhancement of individual self-fulfillment to the hypothesis that the marketplace of ideas will inevitably lead to the discovery of truths. All of these various concepts urged to vindicate and shape our understanding of free speech play a role in our late twentieth-century jurisprudence. The warring emphases placed upon these values and other values with which these come into tension have led to an increasing breakdown in the scope given the First Amendment's protections. In the name of equality, for example, various scholars have urged the censorship of speech rationally deemed to reinforce attitudes held to contribute to discriminatory and even criminal behavior.[4]

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1. Jamie Kalven, *Introduction* to HARRY KALVEN, A WORTHY TRADITION xii (1988) (quoting the late Harry Kalven, Jr.).

2. Although this secular religion aspect of the First Amendment may well pertain to the Free Exercise and Establishment Clauses, safeguarding the right of individuals to worship as they please, and preventing the government from worshipping at all, the subject of this Article is limited to the Free Speech and Free Press Clauses.

3. MARK TWAIN, FOLLOWING THE EQUATOR 6 (American Publishing Co. 1897).

4. CATHARINE A. MACKINNON, TOWARD FEMINIST THEORY OF THE STATE 139-52 (1989); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 616-19; *see also* Tracy Higgins, *Giving Women the Benefit of Equality: A Response to Wirenius*, 20 FORDHAM URB. L.J. 77 (1992). For my views on the specific issue of pornography in light of the various values served by the First Amendment, see John F. Wirenius, *Giving the Devil the Benefit of Law:*

Jurists and scholars have called for an overt ad hoc balancing by judges of the importance of the speech at issue against the interest the state would protect by censorship.[5]

The uncertainty over what the First Amendment means and what values it serves has fueled these efforts, both ancient and modern, and has given them a veneer of respectability. Although no simple Rosetta stone for First Amendment jurisprudence exists, such an ad hoc approach is consistent neither with the language of the First Amendment—"Congress shall make *no law* . . . abridging the freedom of speech"[6]—nor with its history, if one goes back to the beginning.

The "official" history of First Amendment jurisprudence begins with the World War I Espionage Act cases.[7] Although the intent of the Framers in connection with the Sedition Act is often debated, the actual jurisprudence prior to these cases is almost never discussed.[8] Even when discussion does occur, it tends to be cursory statements of the rule of law, simply showing how repressive the "bad old days" were. What has been lacking, despite the yeoman work of some constitutional historians, is a focused examination of the evolution of the reasons underlying society's[9] choice to protect or not to protect dissent. Although the classic image is that a repressive, conservative Court ruthlessly quashed dissent over the protests of the prophetic liberals Oliver Wendell Holmes and Louis D. Brandeis, an examination of the jurisprudence shows it was not that simple.

Such an examination of the evolving First Amendment jurisprudence from the pre-Civil War period to 1969 shows a gradual refinement of the way in which judges viewed free speech issues. The conservative Espionage Act decisions reflect the dawn of a radical rethinking of the nature of free speech, which the later dissents of Holmes and Brandeis would justify and elaborate. This rethinking eventually would gain the force of law, after having first been tentatively embraced by the majority, and then backed away from by it as its implications became clearer. It is this path, which truly represents the "worthy

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Pornographers, the First Amendment and the Feminist Attack on Free Speech, 20 FORDHAM URB. L.J. 27 (1992).

5. *See* Winters v. New York, 333 U.S. 507, 531-32 (1948) (Frankfurter, J., dissenting). Justice Frankfurter dissented from an opinion striking down a statute construed by a state court to prohibit distribution of magazines and other printed matter "made up of news or stories of criminal deeds so massed as to become vehicles for inciting violent and depraved crimes against the person." *Id.*; *see also* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (upholding imposition of criminal liability for defamatory statements concerning minority groups); Higgins, *supra* note 4, at 87.

6. U.S. CONST. amend. I (emphasis added).

7. *See* KENT GREENWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 188 (1989) ("Substantial Supreme Court development of First Amendment doctrine began with review of convictions under the 1917 Espionage Act."); *see also* Dennis v. United States, 341 U.S. 494 (1951) (discussed *infra* parts IV (A), (B)).

8. An important exception is David Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981). Although Professor Rabban cites many of the cases referred to here, he does not attempt to relate them to an emerging tradition as does this discussion. While he sees a sea-change in the "conversions" of Holmes and Brandeis, this Article argues the evolving views of the two Justices, and of their conservative brethren, are an integral part of an essentially coherent progression. Rabban does, however, valuably point to a split between the court-evolved prewar jurisprudence and the thought of many academicians who were far more protective of speech.

9. For "society," read "the Supreme Court."

tradition" justly celebrated by First Amendment scholars,[10] that this Article explores. Along the way, some of the orthodoxies of our current jurisprudence are challenged by reference to seldom-cited views of freedom of speech and also by viewing some old friends in a new context. Clearly, such an exploration is not merely of antiquarian interest; it is impossible to choose a destination and a route without an awareness of where the journey began.

II. EARLY VIEWS BEFORE THE CONSERVATIVE REVOLUTION

A. *The Pre-Civil War Understanding*

For the initial understanding of the First Amendment's meaning, no better source can be found than Joseph Story, who, over twenty years after his appointment to the Supreme Court, wrote:

> That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen. . . . It is plain, then, that the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government. It is neither more nor less, than an expansion of the great doctrine, recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives and for justifiable ends.[11]

Story then stated, "[T]o punish any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."[12] Like Blackstone before him—whom he approvingly quotes—Story finds this restrictive rule does not limit freedom of thought or inquiry; only the dissemination of "bad sentiments," not thought itself, is subject to ban.[13]

The Supreme Court did not construe the First Amendment, however, until a generation after Story's endorsement of the common-law rule. When it did, it did not simply follow the Blackstonian view Story advocated. Rather, the Supreme

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10. *See* KALVEN, *supra* note 1.

11. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 993 (14th ed., reprint Carolina Academic Press 1987) (1833); *see also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (1901) ("[I]t has . . . become a constitutional principle in this country, that 'every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right . . . .'").

12. STORY, *supra* note 11, § 995.

13. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *150-52).

Court viewed the Amendment in the context of a federalist system, a system in which the states and the federal government existed in separate spheres of influence, and with the balance far more favorable to the states than that which exists today. The jurisprudence of the First Amendment that prevailed in the pre-Civil War era, and for some thirty years after it, was predicated on an understanding of the scope of the Bill of Rights that has long since died: its provisions had been held by the Supreme Court in the very year Story published his treatise, 1833, to inhibit only the exercise of power by the federal government and to have no impact on the states.[14]

The language of the First Amendment seems to command such a reading. The Amendment states, "*Congress* shall make no law abridging" the rights it guarantees.[15] Thus, the Supreme Court's extension of the rule of nonapplicability of the Bill of Rights upon the states to the First Amendment was hardly a great step, although it was not taken until 1875 in *United States v. Cruikshank*.[16] In an opinion by Chief Justice Waite, the Court refused to apply the Free Assembly Clause to state governments.[17] The Court intimated just how dependent that right was for its existence upon the goodwill of the states:

> The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.[18]

Although it arrived ten years after the close of the Civil War, the reasoning of *Cruikshank*, and of its direct antecedent *Barron v. Mayor of Baltimore*,[19] is grounded in the doctrine of enumerated powers established by the Marshall Court's decision in *Gibbons v. Ogden*.[20] That doctrine, limiting the federal government's powers to those specifically enumerated in the Constitution, reflected the same fear the Bill of Rights itself did—that the size of the federal government would lead it to usurp the prerogatives of the states and become an engine of

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14. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
15. U.S. CONST. amend. I (emphasis added).
16. United States v. Cruikshank, 92 U.S. 542 (1875).
17. *Id.* at 552.
18. *Id.*
19. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
20. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 185, 195 (1824) (upholding exercise of Congress's specifically enumerated power to regulate interstate commerce, and voiding state effort to grant a monopoly to interstate ferry line).

> The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Id.

oppression. The responsiveness of the state governments to the will of their citizens, and their ability to safeguard the rights of the individual, are assumptions of the Court—and in view of the First Amendment's own language—of the Framers.

The level of protection afforded free expression by the states is made clear in several key decisions. The classic example of the states' approach to the issue can be found in *Respublica v. Oswald.*[21] In *Respublica*, the Pennsylvania Supreme Court opined in words reminiscent of Blackstone:

> The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society, to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.[22]

The states, then, were given plenary power over speech; a power not conferred by the federal constitution, rather a power the federal constitution disabled Congress from affecting, or from exercising, itself. The states themselves exercised their power in accordance with the English common-law rule delineated by Blackstone. The end result was a rule of law in which freedom of speech amounted to little more than a freedom from licensing.

The federal noninvolvement in free speech issues postulated in *Cruikshank*, although aptly reflecting the constitutional orthodoxy of the time, was by no means the last word even before the Civil War Amendments were brought to the Supreme Court's attention. In *Ex parte Jackson*,[23] the Supreme Court upheld regulation by Congress of the content of the federal mails.[24] The Court found inherent in Congress's power to determine what can be mailed a corollary power to determine what matter could be excluded, and the Court relied on the fact the mails were not the only available competitive means of transporting publications in upholding the exercise of that power.[25] The Court conceded, however:

> Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere . . . with

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21. Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325-26 (Pa. Super. Ct. 1788) (upholding an adjudication of a libel defendant as being in contempt of court for "addressing the public" in an effort to win popular support for his position in the lawsuit). For the Supreme Court's wrestling with identical issues, see Bridges v. California, 314 U.S. 252 (1941).

22. Respublica v. Oswald, 1 U.S. at 326. For other state court views to the same effect from the same period see Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313-14 (1825). This view was not an aberrational one; indeed, the same analysis lasted into the twentieth century. *See* People v. Most, 64 N.E. 175, 178 (N.Y. 1902) ("The punishment of those who publish articles which tend to corrupt morals, induce crime, or destroy organized society is essential to the security of freedom and the stability of the state.")

23. *Ex parte* Jackson, 96 U.S. 727 (1877).

24. *Id.* at 737.

25. *Id.* at 733. The Constitution gives Congress the power to regulate mail. *Id.*

> the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing. . . . If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress.[26]

Similarly, in *Ex parte Curtis*,[27] the Court upheld a ban on the solicitation or the giving of political contributions by federal employees.[28] Without even mentioning the First Amendment, the Court grounded its opinion in the perceived need to protect civil servants from "shakedowns" from superiors.[29] Nonetheless, the decision represented a direct congressional limitation of political speech and organizing—albeit in a federal enclave. That is, the ban was restricted to those who voluntarily affiliated themselves with the federal government. Perhaps the decision is best viewed in light of Justice Holmes's subsequent distinction (long since itself rejected) that although there is a right to free speech, there is no constitutional right to be a government official.[30] In any case, the Court did not even refer to the First Amendment in its opinion.

B. *Enter the Fourteenth Amendment*

A new form of analysis of civil liberties questions made its debut, though surrounded in uncertainty, in *Spies v. Illinois*.[31] In *Spies*, the Court reaffirmed the doctrine of *Barron v. Mayor of Baltimore*[32] that "the first ten Articles of Amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone."[33] The Court acknowledged the argument that the Fourteenth Amendment had altered that half-century old doctrine.[34] Chief Justice Waite addressed the petitioners' argument:

> Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments as limitations on power only apply to the Federal Government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and

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26. *Id.*
27. *Ex Parte* Curtis, 106 U.S. 371 (1882).
28. *Id.* at 375.
29. *Id.* at 374.
30. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").
31. Spies v. Illinois, 123 U.S. 131 (1887).
32. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
33. Spies v. Illinois, 123 U.S. at 166.
34. *Id.*

> the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.[35]

The Court found it unnecessary to decide the validity of this approach, holding that the state constitutional provision permitting the jury selection method contested on appeal was "substantially the provision" of the Federal Constitution relied upon by the petitioners before the Supreme Court; therefore, no federal constitutional violation could have occurred.[36] Although the Privileges and Immunities Clause of the Fourteenth Amendment died an ignominious death in *The Slaughter-House Cases*,[37] the impact of the Fourteenth Amendment on First Amendment jurisprudence would be profound and would grow in the next few decades.

In the meantime, the simple model of jurisprudence under which Congress had no power to regulate speech while the states had whatever power they chose was dealt several serious blows. In *Davis v. Beason*,[38] the Court upheld the conviction of a Mormon who registered to vote in violation of a territorial statute depriving those who practice or teach polygamy of the right to vote.[39] In sustaining the statute against a First Amendment challenge, the Court reasoned, "Laws were made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[40] The Court did not draw any distinction, however, between the actual practice and the simple advocacy of such beliefs.[41] Although marking a new distinction between speech and action, this approach did not necessarily imperil the autonomy of the states. The case involved territories, which were creatures of the federal government and under the substantial control of Congress.[42]

The Court returned to the issue of Congress's power over the mails in *Rosen v. United States*,[43] in which a congressional prohibition of the transportation of obscene materials through the mails was upheld.[44] The Court did not discuss the First Amendment because the issue raised by the defendant on appeal was not freedom of expression, but the sufficiency of the indictment in light of his right to know the charges against him.[45]

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35. *Id.*
36. *Id.* at 170.
37. The Slaughter-House Cases, 83 U.S. 36 (1872); *see also id.* at 111-23 (Bradley, J., dissenting).
38. Davis v. Beason, 133 U.S. 333 (1890).
39. *Id.* at 334.
40. *Id.* at 344.
41. *Id.* at 344-45.
42. *See* U.S. CONST. art. IV, § 3.
43. Rosen v. United States, 161 U.S. 29 (1895).
44. *Id.* at 30.
45. *Id.* at 31.

In 1897, the Court refined its First Amendment view in *Robertson v. Baldwin*[46], revising the essentially two-tiered structure created in *Cruikshank*.[47] In *Robertson*, the Court explored the impact on the federal government of the Bill of Rights.[48] Its conclusions were, perhaps, surprising:

> The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties [sic] and immunities which we had inherited from our English ancestors, and which from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation.[49]

Rather than endorsing the complete disabling of the federal government from speech regulation implied in *Cruikshank*, the *Robertson* Court made clear Congress is restrained, within its area of competent jurisdiction (itself perhaps broadened by implication in the opinion), only by the common-law limitations on the regulation of speech. What limits, if any, the Fourteenth Amendment imposes upon state regulation of speech are not hinted at in the opinion.

The sway of the common law, as explicated by Blackstone, over free speech analysis was clinched just ten years after *Robertson* was decided. In *Patterson v. Colorado*,[50] the Court described the "main purpose" of the First Amendment as "to prevent all such *previous restraints* upon publications as had been practiced by other governments" and had flatly stated that the amendment does "not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[51] The Court elaborated, "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend to the true as well as to the false."[52]

Justice Story had argued that the First Amendment guaranteed to the citizen the right to publish free of prior restraint, without differentiating between the power of the state and national governments to regulate.[53] *Cruikshank* had simply written the federal judiciary out of the business of reviewing state

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46. Robertson v. Baldwin, 165 U.S. 275, 280-82 (1897) (upholding statute forcing deserting seamen to live up to their contract against a Thirteenth Amendment claim that the statute imposed "involuntary servitude").

47. *See supra* text accompanying notes 18-20.

48. Robertson v. Baldwin, 165 U.S. at 281.

49. *Id.*

50. Patterson v. Colorado, 205 U.S. 454, 462-63 (1907) (upholding criminal contempt statute as constitutionally applied and finding the only error, if any, to be one of state law).

51. *Id.* at 462.

52. *Id.*

53. *See supra* text accompanying note 11-13.

regulation.[54] Twenty years later, the two approaches would merge: Congress's power over speech was defined by the common law relied on by Story, and the states were still absolutely free to approach the matter in their own ways.

Or were they? Despite the ringing endorsement of the common-law position in *Patterson* (authored by Justice Oliver Wendell Holmes, already the author of *The Common Law*,[55] but not yet the trailblazer of a liberal First Amendment tradition), the Court explicitly left "undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First."[56] Just as in *Cruikshank*, the Court in *Patterson* left the possibility open that the states' freedom may have been circumscribed by the Fourteenth Amendment. Under either scenario, that limitation of their power would only require the states to adopt the common-law doctrine of free speech, which they had already done. As late as 1907, the law was clear at least this far: There were no substantive limitations on what either the states or the federal government could suppress or punish after publication.

III. THE CONSERVATIVE REVOLUTION

A. *Early Noises*

With the birth of the twentieth century, the Supreme Court was in a deeply conservative groove, one that would last from the turn of the century until Franklin Roosevelt's court-packing plan and the famous "switch in time that saved nine." It is one of the paradoxes of history that this conservative, *Lochner*-loving Court[57] would act not only boldly but also radically in expanding the pro-

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54. *See supra* text accompanying notes 18-20.

55. OLIVER WENDELL HOLMES, THE COMMON LAW (Boston, Little, Brown & Co. 1881).

56. Patterson v. Colorado, 205 U.S. 454, 462 (1907). In his dissenting opinion, Justice Harlan would have answered the question in the affirmative, relying on the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* at 464-65 (Harlan, J., dissenting). The failure of Harlan's bold, but estimable, effort to overrule the holding of The Slaughter-House Cases, 83 U.S. 36 (1872) is one of the great tragedies of civil liberties jurisprudence in general. From *Patterson* on, the Court was doomed to slog through the substantive due process swamp that has marred the jurisprudence into the present. The derivation of substantive liberties from the Privileges and Immunities Clause would have made eminent sense, whereas the notion of substantive due process is an oxymoron. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980). This is not to say incorporation of fundamental rights through the Fourteenth Amendment is improper. Rather, the wrong clause has been employed—a clause with no inherent limiting principles—and as a result the Court has been given carte blanche to legislate its own prejudices.

57. The Court's allegiance to Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating state maximum hour statute for bakers) and its progeny, which relied on "substantive due process" (that is, the substantive rights guaranteed by the Fourteenth Amendment Due Process Clause) to invalidate pro labor regulation of work conditions on the grounds such regulations deprived the laborers of their "liberty of contract," has deservedly won opprobrium for its proponents. *See, e.g.*, BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980). In this line of cases, the Court essentially constitutionalized its economic prejudices, as was pointed out by Justice Holmes in dissent. The irony here is the very Justices who inflexibly vetoed every effort of the Progressive Movement to better the conditions of the working class on the grounds of constitutionality did so

tections accorded speech. It is an even more amusing paradox that the decisions in which the Court took these bold steps are regarded even today as high points of repression.

The conservative revolution began with a few feeble indications that the eighteenth century's prohibition of prior restraint might not be the full extent to which the Constitution protected speech. In *American School of Magnetic Healing v. McAnnulty*,[58] the Court refused to allow the Postmaster General to ban opinions he considered "false" from being disseminated through the mail under a statute allowing him to prevent the use of the mails to promote "fraud."[59] Justice Peckham's opinion for the majority at no time relied on the First Amendment; in fact, it relied solely upon the statutory language.[60] Nonetheless, the opinion marks a rare note of tolerance in a hitherto entirely intolerant jurisprudence.

In *Gompers v. Bucks Stove & Range Co.*,[61] the Court upheld an injunction restraining as an illegal boycott technique statements accusing the boycottee of "unfair practices."[62] The Court found the First Amendment was not involved because the words were used under such circumstances as to "become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."[63] This ruling is intriguing for two reasons. First, it approved punishment for violation of a prior restraint, which violated the only protection accorded speech in the common-law jurisprudence up to this point. More significantly, it was predicated on a distinction between speech and conduct, legitimating the punishment of words not for their communicative content but because they are the equivalent of physical actions. In view of this libertarian stride—for if words are not in any way protected subsequent to their speaking, why distinguish them from conduct at all?—it is tempting to dismiss the actual holding as an example of the result-oriented jurisprudence of its day, typical of the Court of that era in its free-wheeling ability to disregard both logic and precedent to reach the desired result.

In view of the decision of the Court in *Turner v. Williams*,[64] the temptation becomes irresistible. In *Turner*, the federal Alien Immigration Act of 1903, which barred the entrance of anarchists to the United States, was upheld against a First Amendment challenge.[65] The Court found the authority for such a bar in the ability to secure self-preservation "inherent in sovereignty," or alternatively, in the power of Congress to regulate commerce with foreign nations.[66] The Court described itself as "at a loss" to understand how the law could violate the First Amendment, reasoning that

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without being able to cite a single constitutional provision to support their conclusions. Their line of argument was particularly tenuous in view of the holding in The Slaughter-House Cases, 83 U.S. 36 (1872).

58. American Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).
59. *Id.* at 109-11.
60. *Id.* at 94-111.
61. Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).
62. *Id.* at 435-37.
63. *Id.* at 439.
64. United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).
65. *Id.* at 294-95.
66. *Id.* at 290.

> [i]t has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or petitioning in this country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law.[67]

The Court in *Turner* emphatically declared that it was "not to be understood as depreciating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, itself unconquerable," but again asserted "this case does not involve such considerations."[68] In this opinion, itself an instrument of repression, one strain seems clear: the Court seemed to believe that if the petitioner had been a citizen, he could not have been punished for his expressed anarchist beliefs—or why distinguish this case from one involving a citizen? By implication, then, some limit on the ability of Congress to punish the expression of opinion had been enunciated in defiance of a century's jurisprudence.

Similarly, in *Fox v. Washington*,[69] the Court, in an opinion by Justice Holmes, upheld a statute prohibiting the willful printing or circulating of matter advocating crime or disrespect for the law and construed the statute narrowly, explicitly to avoid a finding of unconstitutionality.[70] The Court emphasized:

> [I]t does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act.[71]

The Court, therefore, interpreted "disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law."[72]

Again, what is fascinating about this saving construction is that it was wholly unnecessary under the Blackstonian approach, which ostensibly held

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67. *Id.* at 292. The long precedential reach of *Turner* can be seen in Matthews v. Diaz, 426 U.S. 67, 69 (1976) (upholding federal statute limiting participation in federal medical insurance program to citizens and resident aliens). The *Matthews* Court wrote, "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 79-80; *see also* Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972) (upholding provision of the 1950 Internal Security Act declaring foreign Communists ineligible to receive visas to enter the United States).

68. United States *ex rel.* Turner v. Williams, 194 U.S. at 294.

69. Fox v. Washington, 236 U.S. 273 (1915).

70. *Id.* at 275-77.

71. *Id.* at 277.

72. *Id.*

sway. In all three cases, the Justices were beginning to carve out an area of substantive protection for free speech, even if only by showing when it did not apply.

B. *The Conservative Revolution Redux: The Birth of Substantive Protection*

In moving from these cases to the familiar and execrated Espionage Act cases, the realm of implication is left behind, and the existence of an area of absolutely protected speech becomes explicit. This great, though gradual, stage in the evolution is largely dismissed, and the Court's opinions written off as a set of repressive decisions, memorable only for their wrong-headedness and for the initial joining in the repression of Justices Oliver Wendell Holmes and Louis D. Brandeis, who would later defect to the more liberal view in dissent. Once again, the story was not that simple.

In *Schenck v. United States*,[73] the Court upheld the convictions of two members of the Socialist Party for violating the Espionage Act by seeking to cause insubordination in the military and seeking to obstruct recruitment, by circulating antiwar literature among "men who had been called and accepted into military service" (conscriptees).[74] The defendants asserted their conduct was protected by the United States Constitution, especially because, as the Court grudgingly conceded, "[t]wo of the strongest expressions are said to be quoted respectively from well known public men."[75] In evaluating this First Amendment claim, the Court overruled—at first only tentatively, but then firmly—*Patterson*:

> It may well be that the prohibition of the 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. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.*[76]

The Court then began its first effort to construct a jurisprudence acknowledging substantive limitations (as opposed to limitations regarding time, manner, or place) on Congress's ability to regulate what free citizens could or could not say to each other. Holmes began with the common-law proposition that "the character of every act depends upon the circumstances in which it is done," opining that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic."[77] From this seemingly indisputable and oft-quoted extreme, Holmes took an intermediate step that is vital but often forgotten. His next sentence was, "It [freedom of speech]

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

74. *Id.* at 48-49.

75. *Id.* at 51.

76. *Id.* at 51-52 (emphasis added) (citation omitted).

77. *Id.* at 52 (citing Aikens v. Wisconsin, 195 U.S. 194, 205-06 (1904) (upholding state statute barring malicious mischief inflicted upon business) as authority for this "common law proposition").

does not even protect a man from an injunction against uttering words that may have all the effect of force."[78]

Thus, Holmes had resurrected a distinction that would haunt jurisprudence in the future, that between "pure speech" and speech that has the effect of action, with the implication one is granted a higher level of protection than the other. Holmes was, it seems, edging toward the zone of protection. All can agree with the example of shouting "fire," but Holmes then took a harder example, the labor injunction involved in *Gompers*.[79] It too did not involve an infringement of freedom of speech, Holmes reasoned, because the speech involved was not regulated for its expressive content alone, but for the context in which it was uttered—a context that made the ordinarily protected speech tantamount to action.[80]

Before following Holmes's next step, this passage should be pointed out as the possible birthplace of much libertarian constitutional theory. The distinction between speech and "speech brigaded with action" as a freedom-enhancing distinction would become central under the advocacy of Justices William O. Douglas and (although to a lesser extent) Hugo Black. Douglas, as will be seen, constructed a seemingly monolithic jurisprudence in which the regulation of conduct falling on the action side of this distinction formed one of the only two permissible restrictions on free expression.[81] The distinction Douglas relied upon dates back to *Gompers*, but is only given real life in Holmes's typically terse opinion in *Schenck*.

Holmes did not, however, entirely anticipate Douglas. Instead, he proceeded from these context-based examples to provide a more lax general rule:

> The question . . . 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. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[82]

Although this rule led to the affirmance of the convictions of Schenck and his codefendant Baer, and to the censorship of their views (as the subsequent cases would show), it nonetheless was a great stride forward. First, the ghosts of Blackstone and Story were finally laid to rest, in spite of the recent precedent of

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78. *Id.* (citing Gompers v. Buck Stove & Range Co., 221 U.S. 418, 419 (1911)).

79. *Id.*

80. Although no reasoning was given to explain the propriety of forbidding the false shout of fire, the emphasis Holmes placed on the context of speech both before and after the example seems to indicate it was simply an easier case involving the same precept as the labor injunction example. *See id.*

81. Indeed, Justice Douglas found the source of his theory in *Schenck*'s example of falsely shouting fire in a crowded theatre, writing, "The example given by Holmes of one who shouts 'fire' in a crowded theatre is of course an utterance; but like a top sergeant's command in the Army it is so closely brigaded with action as to be part of the instant action that takes place." WILLIAM O. DOUGLAS, THE SUPREME COURT AND THE BICENTENNIAL 23 (1978).

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

Patterson reaffirming their views.[83] Second, this new test explicitly requires the speech to be viewed in its context before it can be censored, and that the speech must create by its utterance a real danger—a proximate danger—of some resulting evil. Finally, the evil must be one that Congress has the right under the Constitution to prevent—no small concession coming from a jurist who believed "if my fellow citizens want to go to Hell I will help them. It's my job."[84] Thus, the right to strive for lawful change through such methods as electioneering was now secured, even for those whose views were despised by the conservatives who sat on this Court. Eugene Debs, for example, ran for president—in prison—but he was at least allowed to run. In the pre-*Schenck* world that right was by no means safe under the law.

A week after *Schenck*, the Supreme Court decided Eugene Debs's fate in *Debs v. United States*[85] and also decided a companion case, *Frohwerk v. United States*.[86] In *Frohwerk*, the Court upheld another Espionage Act conviction,[87] this one based on the writing and distribution of an antiwar newspaper.[88] The Court found itself faced with a record far less clear than in *Schenck*, "[o]wing to unfortunate differences" between the parties preventing the filing of a bill of exceptions.[89] Expressing "a natural inclination to test every question of law to be

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83. Although Harry Kalven recognized this contribution of *Schenck*, he did so grudgingly. *See* KALVEN, *supra* note 1, at 137. The watershed nature of *Schenck* in Holmes's evolution was noted in David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 141-49 (1982) (contending Holmes underwent a conversion in reading the government briefs in *Schenck* and was thereafter far more protective of speech). Although this Article argues the Court's overruling of *Patterson*, and the establishment of some level of substantive protection, was an eradication of the common-law tradition, at least one author portrays it as a "set of judicially articulated norms" that "drew heavily upon the pre-existing state-centered constitutional structure" in that they "derived almost entirely from common law precepts." David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1717 (1991). Yassky's view of *Schenck* seems more apt when applied to the jurisprudence leading up to it, but because his entire analysis of the Espionage Act cases is confined to their results, and not to their methodology, he erroneously treats them as part of the "'tradition' of indifference to [free] speech values" he states extended into the 1930s. *Id.* at 1718-19. Yassky believes "Holmes' change of heart came in *Abrams v. United States*." *Id.* at 1720 n.79 (citing Abrams v. United States, 250 U.S. 616 (1919)). That Holmes underwent a conversion in *Abrams* comparable to that on the road to Damascus is a cliché of the literature. *See, e.g.*, G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 412-38 (1992) (dividing Holmes's jurisprudence between his "orthodox" pre-*Abrams* and his subsequent libertarian jurisprudence); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1208-09 (1983). Bogen, in placing Holmes's conversion at *Schenck*, is closer but is still off the mark. From his whole-hearted endorsement of the Blackstonian common law in *Patterson*, Holmes, in *Fox*, engaged in a saving construction of a statute wholly unnecessary under the Blackstonian view, exhibiting some doubt in the validity of that approach. *See supra* text accompanying notes 69-72. In fact, Holmes's development was evolutionary, not revolutionary, so much so he may not have noticed its occurrence. *See infra* text accompanying notes 167-72.

84. 1 HOLMES-LASKI LETTERS 249 (Mark DeWolfe Howe ed., 1953).

85. Debs v. United States, 249 U.S. 211 (1919).

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

87. *Id.* at 210.

88. *Id.* at 205.

89. *Id.* at 206.

found in the record very thoroughly before upholding the very severe penalty imposed," Justice Holmes wrote for a unanimous Court that such testing was impossible on the scanty record before it and found "on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[90]

The Court reaffirmed *Schenck*'s dictum that the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language."[91] This time the illustration given of plainly permissible regulation came in the form of an expression of confidence that "neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[92] The Court further explained that *Schenck* did not create a special wartime exception to the First Amendment stating, "It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the Country is at war."[93] Whether the minimal review accorded was the true, denuded meaning of the seemingly tremendous advance in *Schenck* or the result of the peculiarities of appellate review of a flimsy, confused record could only be seen in the context of other cases.

Debs was, on its face, hardly a propitious signal. In *Debs*, the great socialist leader (who would poll impressively high in his 1920 run for the Presidency) was convicted under the "new and improved" Espionage Act for giving a speech.[94] The main theme of Debs's speech, according to Justice Holmes's opinion for the still-unanimous Court, "was socialism, its growth, and a prophecy of its ultimate success."[95] Nevertheless, upon a closer look, *Debs* may even have represented another baby step forward. In his opinion, Justice Holmes hewed still to the general line expressed in *Schenck* by stating, with regard to the speaker's main theme:

> With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech.[96]

Justice Holmes found such "manifest intent" in Debs's statements. The record indicated Debs stated he "had to be prudent and might not be able to say

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90. *Id.* at 208-09.

91. *Id.* at 206.

92. *Id.* Interestingly, this example also falls neatly on the action side of the *Gompers* pure speech/speech-action distinction Douglas would later rely on so heavily. *See infra* text accompanying note 308.

93. Frohwerk v. United States, 249 U.S. 204, 208 (1919).

94. Debs v. United States, 249 U.S. 211, 212 (1919).

95. *Id.* at 212.

96. *Id.* at 212-13.

all that he thought, thus intimating to his hearers that they might infer that he meant more."[97] Debs then praised (among other protesters and resisters) three individuals convicted for helping another to avoid the draft,[98] stating, "Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves."[99] Holmes also considered Debs's statements to the crowd: "[Y]ou need to know that you are fit for something better than slavery and cannon fodder."[100] A document endorsed by Debs, advocating resistance to the war, was also introduced, and Holmes used it as evidence that if Debs's words tended to obstruct recruiting, Debs intended them to have that effect.[101]

Holmes concluded the status of Debs's speech under the Constitution turned on the question of whether it was given with intent to obstruct recruitment. If it was "intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a . . . general and conscientious belief."[102] Holmes also noted approvingly that "the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, [etc.], and unless the defendant had the specific intent to do so in his mind."[103]

The purpose of this discussion is not to justify the results reached by the Court under Justice Holmes's tutelage. Indeed, the persecution of dissenters during and immediately after the First World War was a national disgrace, as Holmes himself began to realize.[104] Rather, it is to point out how in one hectic term, including three hotly controversial cases in one week, the conservative justices substantially revised the law of free speech. These three cases demolished the presumption speech could be suppressed once given an airing and replaced it with a presumption of substantive protection. Moreover, *Debs* strengthened the "clear and present danger" proximity test of *Schenck* by adding a specific intent

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97. *Id.* at 213.
98. *Id.*
99. *Id.* at 214.
100. *Id.*
101. *Id.* at 216.
102. *Id.* at 215.
103. *Id. at* 216. Professor White is able to claim these three cases were consistent with the common-law orthodoxy both by devaluing their importance and by providing the *Patterson* tradition with a limiting concept. White states the "Espionage Act trilogy" applied the so-called "bad tendency test"—that is, it simply required the government to show "a tendency to prevent or obstruct the war effort." White, *supra* note 83, at 413-14. The clear and present danger language is dismissed as "dicta." *Id.* at 415-19. He further argues *Patterson* and *Fox* established a need for a "bad tendency" to be found in the speech to justify its suppression. *Id.* at 400-03. I find no such limit in the cases. *Patterson* reaffirms the Blackstonian view of the common law requires only that the restraint come after publication. Patterson v. Colorado, 205 U.S. 454, 462 (1907). White seems to be reading a limiting principle into the Court's purely permissive statement that the state "may" regulate speech if it decides it is contrary to the public weal. *See id.* The *Fox* opinion engaged in a saving construction of the state subversive advocacy statute involved, but did not create a new test. *See supra* text accompanying notes 69-72.
104. *See* 1 HOLMES-LASKI LETTERS, *supra* note 84, at 190; 2 HOLMES-POLLOCK LETTERS 11 (Mark D. Howe ed., 2d ed. 1961).

requirement. The convictions were affirmed, but the groundwork was also established for a new, libertarian jurisprudence.

The conservative revolution had one last achievement left to it: the resolution of the doubt first raised in *Spies v. Illinois*[105]—whether the Fourteenth Amendment rendered the First Amendment applicable to the states. In *Gitlow v. New York*,[106] the Court, in upholding a conviction for violating a New York statute banning the advocacy of "criminal anarchy," answered the question with a tentative "yes." "For present purposes," Justice Sanford wrote for the majority, "we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."[107] In doing so, the Court explicitly invalidated its own contrary statement issued a mere three years earlier in *Prudential Insurance Co. v. Cheek*.[108] In determining the extent to which states could infringe upon the rights of the speaker, the *Gitlow* Court cited a hodge-podge of sources including Story,[109] *Robertson*, *Schenck*, *Frohwerk*, and *Debs*, making no distinction between sources construing the First Amendment regarding Congress and sources that did not.[110] In *Whitney v. California*,[111] the Court, citing *Gitlow*, accepted as an axiom that the First Amendment was made applicable to the states through the Fourteenth Amendment.[112]

C. *Common Law by Uncommon Lawyers: Holmes, Hand, and Constitutional Reasoning*

The cases dealt with up until *Gitlow* and *Whitney* represent a consensus of judicial thought, essentially noncontroversial to the brethren themselves, although the results did not command the universal enthusiasm of the academicians of the time.[113] The first three Espionage Act opinions, authored by Oliver Wendell

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105. Spies v. Illinois, 123 U.S. 131 (1887); *see supra* text accompanying notes 31-37.

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

107. *Id.* at 652, 666.

108. Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 543 (1922) (upholding state statute requiring corporation at employee's request to furnish letter setting forth nature and duration of service, as well as cause of departure, and rejecting corporate free speech claim, writing, "As we have stated, neither the Fourteenth Amendment, nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech.'"). The Court cited no authority for this proposition, a wise move as no such authority existed—the question had been repeatedly left open.

109. STORY, *supra* note 11.

110. Gitlow v. New York, 268 U.S. 652, 666-67 (1925).

111. Whitney v. California, 274 U.S. 357 (1927).

112. *Id.* at 371.

113. See Rabban, *supra* note 8, for the more speech protective views of various academics. The repressive consensus, as Rabban notes, was not without its defenders. In addition to those cited by Rabban, two scholars supporting the Blackstonian view were Westel Willoughby and Henry Wolf Bikle. *See* WESTEL WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 843-45 (1910); Henry Wolf Bikle, *The Jurisdiction of the United States Over Seditious Libel*, 50 AM. L. REG. 1 (1902).

Holmes, clearly mark a midpoint in Holmes's development, rather than a first stab at the issue.

Holmes's first stab at the matter was taken in *Patterson*. Interestingly, the only authority he cited for the proposition that the First Amendment's impact was merely to prohibit prior restraint is state court authority: *Respublica v. Oswald*,[114] the 1788 Pennsylvania case, and *Commonwealth v. Blanding*,[115] a Massachusetts case from 1825. He did cite Blackstone as well, but only as an afterthought, appending the reference as part of a string cite.[116] Nevertheless, at no time did Holmes cite any constitutional authority—not even Justice Story's opinion to the same effect in the *Commentaries*,[117] or the similar statements in Chancellor Kent's *Commentaries on American Law*.[118] Holmes's use of state law authority and of Blackstone when two eminent commentators on the Constitution were available, in addition to the case law discussed earlier, demonstrates his initial belief the Constitution had simply codified the common law, as applied to Congress. The same result by inference applied to the states by the effect of the Fourteenth Amendment—if indeed any impact upon the states had been effected, the question *Patterson* left open.

In *Patterson*, Holmes seemingly cleared the way for a uniform application of the Blackstonian view of the First Amendment against both the states and the federal government, a view presaged, as explained earlier,[119] by the Court's ruling in *Robertson*. Nevertheless, in *Schenck*, decided a mere twelve years after *Patterson*, Holmes spoke for a unanimous Court in destroying the sway of the common law and extending the protection accorded free speech.

Beyond that, the three Espionage Act cases in which Holmes wrote for a unanimous Court tentatively created a new standard of review. It has become commonplace that the *Schenck* rule was not speech protective. Certainly, the results in these cases bear out that notion. Comparing the rule as enunciated by Justice Holmes in *Schenck*, *Frohwerk*, and *Debs* with its most famous contemporary, the test enunciated by Learned Hand in *Masses Publishing Co. v. Patten*,[120] the rule stands up better than its applications.

The rule established in the *Schenck* trilogy requires, for any censorship to pass constitutional muster, that the utterance of the speech first create a significant risk (a "clear and present danger") of an evil resulting. Second, that evil must be one Congress has the right to prevent. Third, the actor must have

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114. Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (Pa. Super. Ct. 1788).

115. Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313-14 (1825).

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

117. STORY, *supra* note 11.

118. 2 KENT, *supra* note 11. Although it is possible Holmes was unaware of Story's views on the subject, it is unlikely, as Story's book was used as a textbook at Harvard Law School during Holmes's attendance. *See* LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 170-71 (1991). Certainly Holmes was aware of Kent's views; he spent much of the years 1870 to 1873 editing the twelfth edition of Kent's treatise. *Id.* at 209-11; MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 10-25 (1963).

119. *See supra* text accompanying notes 46-56.

120. Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917) (holding left-wing magazine's opposition to First World War and conscription did not violate Espionage Act because the magazine fell short of advocating violation of law).

uttered the speech with the specific intent of causing that very evil. The Hand test from *Masses* requires the "direct incitement" or "direct advocacy" of unlawful conduct.[121] Thus, it contains a specific intent requirement; the speaker must seek to persuade his or her audience to violate the law.

Hand's efforts, through his correspondence with Holmes, to persuade Holmes to adopt this test led Holmes to reply, "I don't see how you differ from the test as stated by me."[122] Gerald Gunther has referred to this comment as proof of "Holmes'[s] lack of awareness of distinctions quite plain to more concerned contemporary observers."[123] It seems patently clear from the context of the letter that Holmes was adverting to the intent requirement in his own test; just prior to the comment allegedly showing Holmes's obliviousness, he discussed intent, although he backed away somewhat from his opinion in *Debs*, concluding somewhat defensively, "Even if absence of intent might not be a defence [sic] I suppose that the presence of it might be material."[124]

Bearing in mind the intent requirement of *Debs*, it is easier to understand Holmes's confusion; the chasm between the *Masses* test and the *Debs* test is, after all, neither so wide nor so deep. This is particularly evident in light of Hand's statement, "I haven't a doubt that Debs was guilty under any rule conceivably applicable."[125] Professor Gunther dismissed this comment as "an effort to seem to agree with the result while trying to persuade the master" because "it differs from the tenor of his remarks to others."[126] It is difficult to determine if Hand's remarks were indeed so disingenuous by merely contrasting two series of inconsistent, equally casual remarks. This is especially the case when one can readily envision at least one instance in which Holmes, but not Hand, would protect speech: when such speech was a direct incitement to unlawful conduct but did not create a "clear and present danger" of such conduct.[127]

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121. *Id.* at 542. For a deeply illuminating look at Hand's structuring of his First Amendment test through a construction of the Espionage Act, as well as an account of the correspondence between Hand and Holmes, suggesting Holmes's conversion may have been partially caused through Hand's advocacy of a more libertarian test, see Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Pieces of History*, 27 STAN. L. REV. 719 (1975). Gunther's conclusions are soundly endorsed in Rabban, *supra* note 83, at 1210. As Gunther relies on the "tendency" prong of *Schenck* alone, and misses entirely the intent requirement of *Debs*, he is able to posit, as does Rabban, that Holmes moved significantly forward in his justly famous libertarian dissents, but the Hand test was far more speech protective. Gunther, *supra*, at 734-36; Rabban, *supra* note 83, at 1210. Gunther concludes, "In its origin, clear and present danger reflected neither special sensitivity to free speech values nor special concern for tailoring doctrine to implement those values." Gunther, *supra*, at 736; *see also* White, *supra* note 83, at 402-03. The text argues this analysis is essentially founded on a misunderstanding of the trilogy.

122. Letter from Oliver Wendell Holmes to Learned Hand (Apr. 3, 1919), *in* Gunther, *supra* note 121, at 759-60.

123. Gunther, *supra* note 121, at 741.

124. Letter from Oliver Wendell Holmes to Learned Hand (Apr. 3, 1919), *in* Gunther, *supra* note 121, at 759.

125. Letter from Learned Hand to Oliver Wendell Holmes (Mar.), *in* Gunther, *supra* note 121, at 758-59.

126. Gunther, *supra* note 121, at 739.

127. Indeed, Hand explicitly stated as much an a 1950 letter to Elliot L. Richardson: "I would make the purpose of the utterrer the test of his constitutional protection. Did he seek to bring

The main flaws in this theoretical defense of Holmes's initial test are its application—how little sufficed to establish a clear and present danger, and the ease with which intent could be shown. Both flaws, although serious, are not fatal to the argument. First, the fact the test was not properly applied does not wholly invalidate it as a jurisprudential stride, any more than early bungling in the application of *Brown v. Board of Education*[128] invalidated its importance as a ground-breaking precedent. More fundamentally, however, the two flaws stem from Holmes's allegiance to common-law thought processes, although no longer to the common law of free speech.

With regard to intent, Holmes had pioneered the application of objective tests for intent in his 1881 classic *The Common Law*.[129] In the context of criminal law, Holmes argued the deterrence theory of punishment, which he advocated, required that liability for criminal acts should not be measured by moral blameworthiness, but rather by failure to conform to the external standard of what would be blameworthy in the average citizen.[130] From this, Holmes defined intent objectively, in terms of consequences of inherently neutral acts.[131] Holmes's analysis of intent in the First Amendment context of *Debs* and the result in that case make far more sense with this concept of intent in mind. The Court held Debs to the objective standard and found he failed the test; the results of his speech were foreseeable to the average citizen. Whether or not Debs in fact anticipated them was irrelevant to Holmes.

The proximity requirement also stems from Holmes's concept of foreseeability. The volitional nature of the act and proximity of the unwanted result together make up intent at common law as defined by Holmes. The requirement of proximity in the trilogy was not yet the requirement of temporal imminence it would become in later cases, a requirement based upon Justice Brandeis's insight that the cure for evil speech is not enforced silence, but rather corrective speech, and Brandeis's corresponding belief that suppression is only justified when there is no time for the war of words to run its course.[132] Rather, it is a requirement of foreseeability in the context of an intentional act. Thus, when the unlawful result of speech is foreseeable to the average person, it is irrebuttably presumed to be

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about a violation of existing law? If he did, I can see no reason why the constitution should protect him, however remote the chance may be of his success." GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 604-05 (1994).

128. Brown v. Board of Educ., 347 U.S. 483 (1954); *see generally* RICHARD KLUGER, SIMPLE JUSTICE 744-78 (1975) (describing lower court failures to implement decision).

129. HOLMES, *supra* note 55. Holmes's advocacy of the "external standard" in criminal law is contained in Lecture II. *Id.* at 49-51.

130. *Id.*

131. *Id.* at 53-57. Professor Rabban discusses the impact of Holmes's thoughts in *The Common Law* on the First Amendment, particularly the portion of the book in which Holmes discusses attempts, in which Rabban sees the dawn of "clear and present danger." Rabban, *supra* note 83, at 1265-85. Rabban thoroughly explores the subject of Holmes's thinking in terms of attempts, but I do not agree with his readings of the *Schenck* trilogy as a restrictive set of decisions from which Holmes moved in a "transformation to a libertarian position." *Id.* at 1208-09. His conclusions are accepted and expanded upon by White, *supra* note 83, at 412-19 ("*Schenck*, *Debs* and *Frohwerk*, taken together, suggest that Holmes' 'clear and present danger' test was simply a restatement of 'attempts' language found in his earlier opinions.").

132. *See infra* text accompanying notes 206-11.

intended—the question is, as Holmes wrote in *Schenck*, a question of proximity and degree.[133]

Professor Rabban has suggested Holmes's approach to the *Schenck* trilogy was based on his previous work in *The Common Law* on attempts.[134] Although Rabban properly draws support from Holmes's letters to demonstrate the Justice's thinking in terms of his earlier work in analyzing the First Amendment, this analysis overemphasizes the cases strictly comparable to attempts. Holmes's thinking on the subject of criminal liability in general provides a better means of understanding his approach to all of the First Amendment cases at this stage of his development. Holmes's concept of the neutrality of actions in themselves colored both his writings on attempts and his First Amendment jurisprudence.[135]

According to Holmes, attempts are acts done either with a specific intent or in circumstances when an intent on the part of the reasonable actor can be inferred.[136] Speech can be punished, as Rabban properly notes, when it can be likened to an attempt.[137] The more general point may well be obscured, however, by such an intent-focused analysis. For Holmes, the context of any action determined its meaning, whether the action was the enunciation of words or the firing of a pistol.[138]

Thus, Holmes would permit the imposition of punishment for the utterance of words when the circumstances in which they were uttered were analogous to a criminal act—for example, an attempt. His discussion of attempts is a specific development of that general theme of criminal liability that runs through *The Common Law*.[139] Holmes's paradigm, however, clearly goes beyond attempts.[140] Indeed, it is made so by the opinion in *Schenck*, albeit in Holmes's elliptical style. In *Schenck*, Holmes referred to what he termed "the common law doctrine" that the nature of every act depends upon its context, for which he cited his own opinion in *Aikens v. Wisconsin*.[141] In *Aikens*, Holmes had written in language strikingly similar to his general discussion of criminal liability in *The Common Law*:

> [A]n act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. . . . The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.[142]

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133. Schenck v. United States, 249 U.S. 47, 52 (1919).
134. *See* Rabban, *supra* note 83, at 1265-85.
135. *See* HOLMES, *supra* note 55, at 53-57.
136. *Id.* at 65-70.
137. Rabban, *supra* note 81, at 1271-73.
138. HOLMES, *supra* note 55, at 91.
139. *Id.* at 39-76.
140. *See infra* text accompanying note 165.
141. Schenck v. United States, 249 U.S. 47, 52 (1919) (citing Aikens v. Wisconsin, 195 U.S. 194, 205-06 (1904)).
142. Aikens v. Wisconsin, 195 U.S. at 205-06; *see generally* HOLMES, *supra* note 55, at 39-76.

Thus, in *Schenck*, Holmes explicitly relied not on the doctrine of attempts, which requires specific intent for a finding of liability,[143] but on his general theory of liability.[144] Rabban, in relying on Holmes's enunciation of the concept of attempts, neglected those circumstances in which such specific intent—subjective intent—might be lacking, but in which Holmes, in this common-law phase of his development, would permit the imposition of liability.[145]

It is possible with this analysis to again resurrect the pure speech/speech tantamount to action distinction relied on previously. Holmes stated the government may punish speech when it fits the common-law definition of an intentional crime. Speech, like any other action for Holmes, is neutral. It becomes criminal under certain circumstances, just as the action of crooking one's finger becomes criminal when the finger is nestled against the trigger of a gun pointed at a bystander.[146] According to Holmes, it is not the expressive content of speech that permits suppression, but the foreseeability of a resulting breach of law—an evil Congress has the right to prevent and has acted to prevent in the statute under review. Speech may be punished when it is an act tantamount to a criminal act as defined at the common law.

This presents a fascinating parallel with Judge Hand's later First Amendment theory. Just as Holmes turned to the common-law definition of criminal intent to find the context in which the neutral act of speech ceased to be protected expression and became criminal conduct, Hand turned to the common law of torts. In *United States v. Dennis*,[147] Hand upheld the convictions of several defendants (including perennial presidential candidate Gus Hall) under the Smith Act for "'wilfully and knowingly' conspiring to organize the Communist Party of the United States as a group to 'teach and advocate the overthrow and destruction' of the government 'by force and violence.'"[148] Hand's opinion, replete with the anticommunist rhetoric of the day, explained the constitutional test as "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[149]

This formulation hearkens back to Hand's famous economic formulation of tort liability in *United States v. Carroll Towing Co.*[150] In *Carroll Towing Co.*, Hand defined a barge owner's duty to provide against resulting injuries "[a]s a

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143. In *The Common Law*, Holmes reinterpreted the doctrine of attempts to some extent. Although urging the objective standard be applied to the doctrine of attempts, he conceded for a "class" of attempts "actual intent is clearly necessary, and the existence of this class as well as the name (attempt) no doubt tends to affect the whole doctrine." HOLMES, *supra* note 55, at 66. Had Holmes continued to insist upon using this analysis, my difference from Professor Rabban would be solely one of method. Holmes, however, subsequently used the more common notion of an attempt requiring specific (subjective) intent in analyzing free speech claims. *See infra* text accompanying note 168.

144. Schenck v. United States, 249 U.S. 47, 51-52 (1919).

145. *See infra* text accompanying note 165.

146. HOLMES, *supra* note 55, at 54.

147. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

148. *Id.* at 205.

149. *Id.* at 212.

150. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. . . . [I]f the probability be called P; the injury, L; and the burden B; liability depends upon whether B is less than L multiplied by P. . . ."[151] Thus, for Hand, tortfeasors act at their peril when the burden is less than the product of the probability and the magnitude of the likely injury, just as speakers speak at their peril when the invasion of free speech (the burden) is less than the magnitude of the injury combined (multiplied?) with its (im)probability. The identic nature of the tests should not be lost merely because in *Dennis* Hand described the probability factor negatively—rather than multiplying by probability, he "discounts by improbability," which is the same thing. Hand treats speech as a common-law tort situation, whereas Holmes seeks to find the presence or absence of common-law criminal intent in the circumstances of the speech. Both look, however, to the common-law areas in which they excelled to find guidance in constructing a constitutional standard. Intriguingly, both Holmes (at this stage of his development) and Hand did not always see a difference between the two modes of reasoning, or any need for a special level of protection. Holmes would grow beyond common-law constitutional reasoning; Hand would not.[152]

D. *The Holmes-Brandeis Dissents*

The looseness of the Holmes definition may be explained, but it is a flaw nonetheless. Violation of the law by an audience member may be held foreseeable even though the speaker may not in fact foresee it. Therefore, speakers may be held to speak at their peril regardless of what it is they say. By treating speech like any other action, Holmes, and Hand, may be missing the point; not every other kind of action has a constitutional provision protecting it. Should one really speak "at his peril," as Holmes frequently phrased it,[153] in light of this protection?

Holmes's evolving jurisprudence in this area was not, however, quite complete. The next, and final stage, for which Holmes has been hailed as often as he has been vilified for the *Schenck* trilogy, comes in his great dissents in partnership with Justice Louis D. Brandeis. These cases also marked the end of the Court's tradition of unanimity in First Amendment cases.

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151. *Id.* at 173.

152. This is not to imply Hand underwent a conversion from liberal constitutionalist (*Masses*) to crusty old common-law lawyer (*Dennis*). Two things should be pointed out about *Masses*. First, Hand did not rule Congress could not have prohibited the speech at issue, but only that it did not. Masses Publishing Co. v. Patten, 244 F. 535, 538 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). The opinion is an exercise in statutory construction, not in constitutional reasoning, although Hand construed the statute in harmony with the values of the Constitution. *Id.* at 540; *see* Gunther, *supra* note 121, at 725; Vincent Blasi, *Learned Hand and the Self-Government Theory of The First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, 8-11 (1990). Moreover, as already suggested, the *Masses* test is not a great improvement over the midpoint reached by Holmes that permitted as it does proscription of any speech advocating violation of law, however remote the potential for harm. Masses Publishing Co. v. Patten, 244 F. at 540; GUNTHER, *supra* note 127, at 604-05.

153. *See, e.g.*, HOLMES, *supra* note 55, at 79.

The Court split first in *Abrams v. United States*,[154] yet another Espionage Act prosecution. In *Abrams*, five Russian immigrants, who were anarchists, were prosecuted for printing pamphlets opposed to the sending of American troops into Russia and urged "the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war."[155] The Court found in the pamphlet direct incitement to "arise and put down by force the Government of the United States."[156] In addition, the pamphlet urged a general strike to oppose federal policy toward Russia.[157] The Court rejected the argument that the defendants' sole intent was to prevent injury to the Russian cause and not to obstruct the war against Germany.[158] Drawing from Holmes's "objective" concept of intent, the Court wrote, "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."[159] The Court accepted that the defendants'"primary purpose and intent" may have been to aid Russia, but "the plan of action that they adopted necessarily involved, before it could be realized, defeat of the war program of the United States."[160] There was no discussion of the imminence requirement beyond the statement quoted above that the results were "likely" or foreseeable.

In Holmes's dissent, joined by Justice Brandeis, the great exponent of the common law of intent emphasized the statute's specific intent requirement—that the speech be uttered "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war."[161] Holmes explained:

> 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. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. 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. . . . It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by

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154. Abrams v. United States, 250 U.S. 616 (1919).

155. *Id.* at 620-21.

156. *Id.* at 620. For details of the inaccuracy of the translations relied on by the government, as well as a revealing look at the trial and appellate stages of *Abrams*, see RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 49-55 (1987).

157. Abrams v. United States, 250 U.S. at 622 (1919).

158. *Id.* at 621.

159. *Id.*

160. *Id.*

161. *Id.* at 626 (Holmes, J., dissenting).

> other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.[162]

Having so construed the Espionage Act, Holmes then moved on to "a more important aspect of the case," the First Amendment.[163] Reaffirming his belief that the *Schenck* trilogy had been correctly decided, Holmes restated the trilogy's premise: "[B]y the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."[164] Interestingly, Holmes bifurcated the standard: either the speech must actually produce a clear and imminent danger, in which case the watered-down, common-law "objective" form of intent would suffice, or there must be specific intent to cause the foreseen result, in which case a subjective showing would be required.[165] From this general principle, he asserted whether in time of war or of peace, the right to free speech survives, although the increased dangers inherent in wartime gave the government greater power to encroach upon free speech.[166]

Dismissing the first prong of the test with regard to the leaflet, Holmes declared, "[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[167] Noting that had the act been done with the requisite intent, the act would have constituted an attempt[168] and been legally cognizable, Holmes reiterated he did not "see how anyone can find the intent required by the statute in any of the defendants' words."[169] He further declared, "To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems . . . by no means enough to show an attempt to produce that effect."[170]

In *Abrams*, Holmes had further refined his thinking, producing not the "conversion" referred to by Professors Rabban and Gunther, but rather another

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162. *Id.* at 626-27 (Holmes, J., dissenting).

163. *Id.* at 627 (Holmes, J., dissenting).

164. *Id.* (Holmes, J., dissenting).

165. *Id.* at 628 (Holmes, J., dissenting). This is another reason for the emphasis on Holmes's general theory of criminal liability. *See supra* text accompanying note 134. Only the latter variety of speech corresponds precisely to an attempt, which is the source of Professor Rabban's analysis. *See supra* text accompanying notes 134-45.

166. Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

167. *Id.* (Holmes, J., dissenting).

168. Here, of course, Professor Rabban's reliance on Holmes's letters emphasizing the connection between free speech jurisprudence and the common law of attempt bears fruit. Holmes treats unsuccessful efforts to achieve the unlawful result as failed attempts like any others, done with the specific intent to bring about the proscribed result. However, at the time Holmes wrote *Schenck*, speech, when not spoken with the requisite intent to constitute an attempt, was an act like any other, to be measured by the external standards of criminal liability. *See supra* text accompanying notes 134-45. *Abrams* marks Holmes's fullest exposition of, as well as his evolution beyond, this common-law paradigm.

169. Abrams v. United States, 250 U.S. at 628 (Holmes, J., dissenting).

170. *Id.* at 629 (Holmes, J., dissenting).

evolutionary step. Two changes were noticeable from the *Schenck* trilogy. The first was the newly bifurcated standard, requiring either specific intent or a "clear and present danger" from which common-law intent could be found. It is possible Holmes did not mean to leave the concept out from the *Schenck* trilogy—it would further explain the results in those cases, which are far more like attempts than they are like clear and present danger cases. It would also explain his puzzlement at Hand's disagreement with him on the standard—that direct advocacy of law breaking and advocacy with the specific purpose of inciting law breaking overlap considerably. But the concept is not necessarily inferred from those opinions.

The factual circumstances of the trilogy do not negate such a continuity between the three cases and *Abrams*. Debs, of course, admitted trying to stir up opposition to the war, which was perhaps an admission of an attempt to Holmes's jaundiced eye. *Frohwerk* is best seen as an instance of the vagaries of appellate review because Holmes, unsure of his record, was reluctant to second-guess the trial court. *Schenck* itself could fairly be said to involve a clear and present danger of the obstruction of recruitment (with or without the presence of specific intent) because the defendant was handing his leaflets to conscriptees, urging them to resist the draft and reminding them of a destiny higher than cannon fodder.

The second and more fundamental step was Holmes's substitution of an "immediacy" requirement for that of foreseeability in the initial triad of cases. This step further divorced the twentieth-century jurisprudence from its common-law roots and brought the rule within hailing distance of the general rule for subversive advocacy in place today.[171] Offering a rationale for this newly tightened requirement, Holmes defined the Constitution as "an experiment, as all life is an experiment," and stated, "[E]very year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[172]

Holmes boldly declared:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get

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171. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). *See also infra* text accompanying notes 302-306. The argument in the text, that the test propounded by Holmes in *Abrams* and in his subsequent dissents with Justice Brandeis represents a "further refinement" of his thinking, is contrary to the view of Holmes's recent biographer, Sheldon Novick. Sheldon Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303. Novick correctly disputes the views of Rabban and Gunther, but denies the existence of any development on Holmes's part. *Id.* at 353-56. Such an argument denies not only the subtle changes of vision explained in the text, but also requires the reader, with Novick, to conclude Holmes could not have "entirely accepted Brandeis's argument" in Whitney v. California, 274 U.S. 357 (1927), despite his joining in Brandeis's opinion in that case. Novick, *supra*, at 371.

172. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). That this belief was part of Holmes's own philosophy is reflected in his epigram that "[t]o have doubted one's own first principles is the mark of a civilized man." OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 307 (1920).

> itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[173]

Thus, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[174] Holmes concluded "the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command" of the First Amendment.[175]

In addition to Holmes's stirring rhetoric in defense of the "free trade in ideas," the Holmes dissent in *Abrams* contains one other important feature. Recanting his previous view in *Patterson*, Holmes declared, "I wholly disagree with the argument of the Government that the First Amendment left the common law of seditious libel in force," citing the historical rejection of the Sedition Act of 1798 and the government's "repentance" of that Act, manifested through its repayment of fines imposed pursuant to the Act.[176] Finally, while noting in *Abrams* the Court dealt "only with expressions of opinion and exhortations,"[177] Holmes left open the question of how to treat other speech.

Just how far apart the majority was from the dissenters was shown in *Gitlow v. New York*.[178] In finding New York's ban of advocacy of violent change within the First Amendment's purview, the majority pointed out that the "statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays."[179] The Court implicitly limited the statute's sweep, exempting speech "too trivial to be beneath the notice of the law."[180]

Although the *Gitlow* majority was seemingly ready to rely on the old advocacy-incitement distinction of *Fox*, it then set out its test for constitutional

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173. Abrams v. United States, 250 U.S. at 630 (Homes, J., dissenting). This is not to say Holmes had a simplistic faith that the forces of the market inevitably lead to truth and the market would take care of itself. Rather, Holmes believed the free expression of ideas, in which ideas may be rejected but not proscribed, was the "best chance" to reach truth. Wirenius, *supra* note 4, at 65. Milton believed truth could not be bested; Holmes knew the received wisdom of any age was suspect and the eradication of "error" overcommitted society to dubious first principles. *See id.* at 64-65.

174. Abrams v. United States, 250 U.S. at 630 (Homes, J., dissenting).

175. *Id.* at 630-31 (Homes, J., dissenting).

176. *Id.* at 630 (Homes, J., dissenting). The impact of the Alien and Sedition Acts on the jurisprudence is actually minimal; the laws were never tested before the Supreme Court. Several lower federal courts did uphold their constitutionality, however. *See, e.g.*, *Trial of Matthew Lyon* (D. Vt. 1798), *in* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES 333 (Philadelphia, Carey & Hart 1849); *Trial of Thomas Cooper* (D. Pa. 1800), *in* STATE TRIALS OF THE UNITED STATES, *supra*, at 659. Other cases are cited in Bikle, *supra* note 113, at 19-20.

177. Abrams v. United States, 250 U.S. 616, 630 (1919) (Homes, J., dissenting).

178. Gitlow v. New York, 268 U.S. 652, 654, 672 (1923) (upholding conviction under state law for "criminal anarchy" based on advocacy of violent overthrow of the government).

179. *Id.* at 664.

180. *Id.* at 670.

regulation of free speech: "[A] State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."[181]

In explicating this "bad tendency" test, the Court squarely rejected the *Schenck* trilogy's foreseeability requirement, to say nothing of the more stringent imminence requirement of Holmes and Brandeis.[182] The Court limited *Schenck* to cases in which the utterances themselves were not proscribed, but in which the use of language was claimed to have had an effect violative of a statute.[183]

In dissent, Holmes rejected the majority's various premises. Holmes flatly declared the *Schenck* test as the appropriate test, acknowledging "this criterion was departed from in [*Abrams*], but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and *Schaefer v. United States* have settled the law."[184] More fundamentally, Holmes rejected the majority's attempt to differentiate between "theory" and "advocacy":

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted upon unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces in the community, the only meaning of free speech is that they should be given their chance and have their way.[185]

Thus, for Holmes (and Brandeis who joined this dissent), the right to free speech extends beyond speech that stands no chance of being adopted. Holmes recognized that freedom is risky—the populace may well choose to abandon the fundamental precepts of our society and to impose new ones. That choice, if

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181. *Id.* at 667.

182. *Id.* at 669. The Court stated:

> And the immediate effect is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when . . . it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

Id.

183. *Id.* at 670-71.

184. *Id.* at 673 (Holmes, J., dissenting) (citations omitted).

185. *Id.* (Homes, J., dissenting). Holmes's oft-expressed willingness to assist his fellow citizens on the road to hell should they choose to go, a concept of the appropriate role of the judge, is therefore tied to a theory of the state that the people must be free to steer the Republic in whichever direction they might choose. *See* Blasi, *supra* note 152, at 23-24.

made, must be honored, so long as it is a genuine choice and not itself the product of an "immediate conflagration."

E. *Justice Brandeis Recasts Clear and Present Danger*

In *Schaefer v. United States*,[186] the split in the Court between the conservative wing and the Holmes-Brandeis liberal wing became more clear. The majority opinion contains not a single reference to clear and present danger. In fact, the majority bluntly stated:

> The[] effect [of the statements involved] or the persons affected could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for offense—their 'intent' and 'attempt,' for those are the words of the law—and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny.[187]

Thus, the Court explicitly rejected the imminence and the proximity requirements, enshrining only the meaningless platitude the speech had a "bad tendency." Although this bad tendency test, as it has come to be known, is not quite the open season on prosecution of speech (so long as no prior restraint was involved) that antedated *Schenck*, it is hardly more protective, perhaps comparable to a "rational basis" test of constitutionality. Although some hope was left due to the Court's reference to the speech's "efficacy," the result was incomprehensible as it followed a sweeping declaration that the effect of the speech, or any risk posed by it, need not be proven. The Court's opinion, by Justice McKenna, openly displayed anger at the "curious spectacle" of the invocation of the First Amendment in this case, which the Court described as "a strange perversion of its precepts."[188] This also did not bode well for future claimants.

The dissent of Justice Brandeis, joined by Justice Holmes, hewed closely to the lines of Holmes's *Abrams* dissent, even at one point comparing the "rule of reason" applicable in free speech cases to that obtaining in "the case of criminal attempts and incitements."[189] In his dissenting opinion, Justice Brandeis sounded

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186. Schaefer v. United States, 251 U.S. 466, 468-69 (1920) (upholding Espionage Act convictions of the staff of a German language newspaper for publishing false information and for statements intended to cause subordination, disloyalty, and mutiny, and to obstruct enlistment and recruiting). Justice Clarke dissented with regard to several affirmed counts, neither seeing appropriate conduct by the court below, nor a substantial First Amendment issue. *Id.* at 496-501 (Clarke, J., dissenting). He rested his opinion on the trivial and technical nature of the so-called "false statements" that he explained as errors by the government translators or as innocuous statements, and he disagreed with the government's theory as to what constituted a false report when a newspaper edited reprinted material. *Id.* (Clarke, J., dissenting). Justice Brandeis's dissent catalogued these and similar errors of fact mandating, in his view, a reversal. *Id.* at 484-93 (Brandeis, J., dissenting).

187. *Id.* at 479.

188. *Id.* at 477.

189. *Id.* at 482, 486 (Brandeis, J., dissenting).

a warning note.[190] Reminding the Court that "[t]he constitutional right of free speech has been declared to be the same in peace and in war," he chided his brethren, stating, "In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past to stamp as disloyal opinions with which it disagrees."[191] Convictions such as these, he concludes, "beside abridging freedom of speech, threaten freedom of thought and of belief."[192]

Justice Brandeis's dissent raises, however, at least one concern not present in Holmes's writings on the subject: the nature of repression. For Holmes, persecution of those who hold minority opinions was "perfectly logical."[193] For Brandeis, however, it was a result of, at best, intolerance, and at worst, fear. This concern with the character of repression would form the underlying theme of Brandeis's great contribution to First Amendment doctrine, *Whitney v. California.*[194]

Much of what needs to be said about *Whitney* has been stated elsewhere and in detail.[195] The case arose when Anita Whitney, a member of the California branch of the Communist Labor Party who attended several of its organizing sessions and did some committee work for it, was tried and convicted under the state Criminal Syndicalism Act.[196] Ms. Whitney's defense was "it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law."[197] In rejecting Ms. Whitney's various attacks upon the constitutionality of the Act, the Court found it constitutional both on its face[198] and as applied to the speech uttered by Ms. Whitney.[199] The Court gave

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190. Most of Brandeis's opinion points out the deficiencies in the charges. So does the dissenting opinion of Justice Clarke, who depicted the case as "simply a case of flagrant mistrial, likely to result in disgrace and great injustice, probably in life imprisonment for two old men" because of the Court's pusillanimity in refusing to exercise its power to correct error at the trial level. *Id.* at 501 (Clarke, J., dissenting).

191. *Id.* at 495 (Brandeis, J., dissenting).

192. *Id.* (Brandeis, J., dissenting). It is difficult not to find in Brandeis's prophetic warning a hint of the agonies the nation would be subjected to by Senator Joseph McCarthy and his ilk in the name of "loyalty," a process that far outlasted the fall of the demagogue from Wisconsin. *See generally* THOMAS C. REEVES, THE LIFE AND TIMES OF JOE MCCARTHY (1982); WILLIAM O. DOUGLAS, POINTS OF REBELLION (1970). Although Douglas's biographer dismisses Douglas's book as seeming "to have been churned out for the quick buck," JAMES SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 410 (1980), his publication of the "inflammatory volume" was one of the grounds asserted by then Representative Gerald R. Ford in his abortive attempt to impeach Douglas. *Id.* at 405.

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

194. Whitney v. California, 274 U.S. 357 (1927).

195. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

196. Whitney v. California, 274 U.S. at 365-66.

197. *Id.* at 366.

198. *Id.* at 368 (rejecting claims the Act violated the Due Process Clause mandate that criminal statutes be sufficiently definite in their prohibitions as to provide notice as to what conduct

her free speech claim short shrift, repeating the "bad tendency" language from *Gitlow*.[200] This time, the Court summarily concluded "a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question."[201]

Moreover, the Court decided the legislature's judgment on joining an organization that promoted these values by advocating or teaching the use of force[202] was a "determination [which] must be given great weight."[203] The statute could not be deemed unconstitutional unless "it [was] an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest."[204]

Once again, the Court seems to have relapsed to the *Robertson v. Baldwin*[205] formulation, treating any speech the state deemed to be harmful to the public weal subject to proscription, and with the scales of review firmly weighted in favor of the state on review. Although the Court did not backslide all the way to the Blackstonian view that any author or speaker makes his or her views known at his or her peril—there remained, after all, the mandate that a statute regulating the speech be in place—it seems fair to say although Holmes and Brandeis evolved, the Court devolved. Indeed, compared to the incremental steps by which Holmes and Brandeis made "clear and present danger" an ever more speech protective doctrine, the Court's abrupt renunciation of the *Schenck* trilogy's rule inexorably leads to the conclusion the "revolution" critics find in the cases that split the Court was in the minds of the conservative justices and not in those of the liberals.

The concurrence of Brandeis in *Whitney*, joined by Holmes, brought to its pinnacle the authors' tradition of dissent, articulating an entirely new theory of

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is and is not lawful and also rejecting claims the Act violated the Equal Protection Clause of the Fourteenth Amendment).

199. *Id.* at 371.

200. *Id.*

201. *Id.*

202. The Court never addressed Ms. Whitney's defense that the Communist Labor Party of California had no intent of using terroristic means or of violating any laws. *See id.* at 366-68.

203. *Id.* at 371.

204. *Id.* Again, the Court had so far removed itself from the test announced in the *Schenck* trilogy as to be once again treating free speech cases as any other common-law form of regulation. The standard of review—that the state's action must be "arbitrary" or "unreasonable"—closely corresponds to the "arbitrary and capricious" or "rational basis" test currently used by the Court to review economic and social legislation. This deferential level of constitutional review asks only if the measure adopted bears a rational relationship to a constitutionally permissible goal. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 581-84 (2d ed. 1988). The "bad tendency" test is claimed by White to be inherent in Holmes's pre-*Abrams* opinions, but that seems to confound Holmes's permissive statement in *Patterson* that the state "may" punish such statements as they deem contrary to public order. *See supra* note 103.

205. Robertson v. Baldwin, 165 U.S. 275 (1897); *see supra* text accompanying notes 46-52.

free speech in the jurisprudence.[206] After disparaging the Court's failure to articulate a standard by which a danger is to be deemed "clear" or "present,"[207] Brandeis turned to the fundamental business at hand—once again explaining the whys of free speech to an unappreciative Court:[208]

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine, that the greatest menace to freedom is an inert people. . . .
>
> Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.
>
> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt [sic] women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . .
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may fall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, then the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.[209]

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206. Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). Justice Brandeis, joined by Justice Holmes, cited a technical question of reviewability as the reason for the concurrence.

207. *Id.* at 374 (Brandeis, J., concurring).

208. Just how unappreciative the Court was can be seen in the off-the-bench remarks of Chief Justice Taft regarding Brandeis, whom he portrayed in distinctly unflattering terms, and Holmes, whom Taft dismissed as senile clay in the hands of the master manipulator. *See* BAKER, *supra* note 118, at 560-61.

209. Whitney v. California, 274 U.S. at 375-77.

So long an extract from even Justice Brandeis's great rhetoric would need justification, save for the remarkable revamping of the rationales underlying the free speech jurisprudence contained in these stirring words. Brandeis was not simply restating Holmes's previous rationales; he was recasting them, endowing them with an ethical component previously lacking.

Although to Holmes, free speech represented the best chance of attaining truth, for Brandeis, it represented far more. As Vincent Blasi aptly points out, Brandeis saw freedom of speech as a means of encouraging the sort of citizen a democracy wants: brave, self-reliant men and women.[210] Moreover, for Brandeis, repression was a sign of panic and of weakness. His rhetoric conjures up the image of shifty, sweaty demagogues silencing their opponents in a panic that their machinations will be exposed, as opposed to the calm, rational censors depicted by Holmes in *Abrams*.[211] Brandeis had something new to say about the conflicting natures of freedom and repression.

Brandeis transformed the imminence requirement from a prophylactic rule protecting the admittedly shaky marketplace of ideas (Holmes's rationale for it once he left behind his foreseeability position) into a mandate that the democratic process must take its course. Brandeis left suppression as a possible option only in those aberrational cases in which the rush of events prevented the populace from deliberating.

Brandeis's new rationales were compatible, however, with those advanced by Holmes and indeed were concurred in by the elder justice. These rationales represent another incremental step and not a rejection of Holmes's thoughts on the subject. Brandeis's insistence that people are the ultimate sovereigns and the state can only act to ensure sufficient opportunity for deliberation amplifies Holmes's flat declaration in *Gitlow* that "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."[212] What Brandeis did achieve, that Holmes neglected to do in his own opinions, was to tie First Amendment jurisprudence to

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210. *See* Blasi, *supra* note 152, at 25; *see also* LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 90 (1986).

211. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me to be perfectly logical. If you have no doubt of your premises or of your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.").

212. Gitlow v. New York, 268 U.S. 652, 673 (1923) (Holmes, J., dissenting). Brandeis's analysis is different because it is grounded, not in a view that the people must be free to choose a path in an uncharted, chaotic sea, but in the notion that the dignity of the people, and the desired character of both people and institutions, require freedom as a precondition. *See* Blasi, *supra* note 152, at 25. Sheldon Novick's conclusion that Holmes did not fully agree with Brandeis's argument in *Whitney* is based on Holmes's disbelief "that the Constitution had in it any program of social reform," a statement undoubtedly true. Novick, *supra* note 171, at 371. Novick, however, does not reckon with Holmes's willingness to let the majority rule and in his belief that courage was the supreme virtue. As Novick himself points out, "His definition of a gentleman was someone who would die for a point of honor, or a feather." *Id.* at 384. The only distinction between Holmes and Brandeis regarding *Whitney* seems rooted in Brandeis's faith in the journey's destination, altogether lacking in Holmes.

a democratic theory in a positive way, as opposed to Holmes's more negative way.

The basic tradition was in place. All that was necessary was for the Holmes-Brandeis view to command the assent of a majority of the Court.

IV. THE NASCENT TRADITION

The slow death of *Whitney* in the 1930s and the Court's gradual adoption of the Holmes-Brandeis rule is not itself to the point. During this period, the Court ruled in favor of speakers whose conduct was essentially indistinguishable from that of Anita Whitney or her equally unfortunate predecessors.[213] Beyond these rulings, intimations of a new climate, one weighted more in favor of free speech claims, began to appear.[214] In the celebrated "footnote four" of *United States v. Carolene Products Co.*,[215] the presumption of constitutionality attached to statutes relied on by the *Gitlow* and *Whitney* majorities was stripped from statutes restricting speech.[216] In *Thomas v. Collins*,[217] the Court likewise emphasized freedom of speech has a "preferred position" among the Constitution's

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213. *See* Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931).

214. The case law from this time period is both well known and voluminous. A complete exposition of these decisions would not serve the present project, which is an examination of the Supreme Court's evolution of a rationale for the treatment of admittedly protected speech of which subversive advocacy is the quintessential example, and of its meaning for First Amendment jurisprudence. Only those cases that illuminate the evolution toward *Brandenburg* have been discussed; other cases, including those that vindicate speech interests but do not involve subversive advocacy, are not discussed. This latter category includes such cases as Board of Educ. v. Barnette, 319 U.S. 624 (1943) (overuling Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) and invalidating a regulation mandating public school students to salute and pledge their allegiance to the nation's flag). Further, the evolution of classes of "low value" speech, speech deemed to be outside the scope of the First Amendment or to have only marginal protection, *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), is outside this Article's scope, although this unfortunate evolution narrows the extent to which the tests discussed herein are *the* First Amendment tests. *See infra* text accompanying notes 238-55; *see also infra* notes 238, 247.

Although these omissions make it possible to focus on the continued evolution of the First Amendment rationale for or against censorship, they present an artificially narrow view of the Court's political coalitions, especially of the brief harmony and subsequent dissonance of those Justices appointed by Franklin D. Roosevelt. After a brief time of cooperation, those Justices sympathetic to Felix Frankfurter's judicial deference to the legislature in cases involving civil liberties found themselves at loggerheads with their colleagues—spearheaded by Hugo L. Black and William O. Douglas—who believed in a more skeptical, independent approach. According to Douglas, and to his and Black's biographers, the final rupture came with *Barnette*. *See* SIMON, *supra* note 192, at 11; HOWARD BALL & PHILIP COOPER, OF POWER AND RIGHT: HUGO L. BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 108-09 (1992).

For a more complete history of the free speech jurisprudence between 1940 and 1970, see KALVEN, *supra* note 1; Frank R. Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

215. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

216. *Id.* at 152 n.4.

217. Thomas v. Collins, 323 U.S. 516 (1945).

guarantees.[218] Several cases even adverted to the *Schenck* formulation of clear and present danger, or to the rationales advanced in the Holmes-Brandeis dissents, without explicitly repudiating the majority opinions.[219]

A. Dennis v. United States: *Speech Wins By Losing*

In 1951, the Court explicitly adopted the Holmes-Brandeis rationale in *Dennis v. United States*,[220] although the case was itself a blow to free speech as it upheld a conviction under the Smith Act.[221] The Court's failure in *Dennis* to provide protection for speech in the context of the Red Hysteria of the 1950s[222] showed how far the Court had to go, but once again, it was at least mouthing the right words.

The opinions in *Dennis* represented the next, and penultimate, step in the road to *Brandenburg v. Ohio*,[223] a step that presented a surprisingly strong parallel to the Conservative revolution delineated earlier. In *Dennis*, the Court upheld the application of the Smith Act to the organizers of the Communist Party of the United States of America for conspiring to organize "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."[224] In reaching this decision, the plurality (the Court split 4-2-2) took a bold, radical step forward.

After stating that "[n]o important case involving free speech was decided by this Court prior to *Schenck v. United States*,"[225] the Court bluntly stated, "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the holdings in those cases, there is little doubt subsequent opinions have inclined toward the Holmes-Brandeis rationale."[226] In rejecting the bad tendency test once and for all, the Court adopted the clear and present danger test—but, as with the first libertarian stride, there was a catch. In *Dennis*, the catch was that the version of the clear and present danger test the Court adopted bore little resemblance to any variant authored by Holmes, Brandeis, or their brethren. Instead, the Court accepted the formulation of Learned Hand in the district court:

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218. *Id.* at 530.

219. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940) (invalidating state statute prohibiting picketing) ("Abridgment of the liberty of such discussion [of matters of public interest] 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."); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (reversing conviction for disorderly conduct).

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

221. *Id.* at 507; *see also* Yates v. United States, 354 U.S. 298, 320-24 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978).

222. *See generally* Strong, *supra* note 214.

223. Brandenburg v. Ohio, 395 U.S. 444 (1969); *see infra* part IV (D).

224. Dennis v. United States, 341 U.S. at 497.

225. *Id.* at 494. Earlier, the popular misconception that free speech jurisprudence begins with *Schenck* was adverted to. Its genesis can quite fairly be traced to this statement of Chief Justice Vinson's, which is followed by the gross oversimplification that "the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances indicates that the Court at earlier dates placed no unique emphasis on that right." *Id.*

226. *Id.* at 507.

"'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.'"[227] Thus, the courts must perform their own utilitarian calculus, weigh the harm on an ad hoc basis, and constantly second guess the state's decision that the balance tips against the speaker.

The Court in *Dennis* held free speech "cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited."[228] Finding the right to prevent revolution regardless of the revolution's chance of success, the Court also stressed the existence of a group "ready to make the attempt" more than nullified the argument that no attempt had been made.[229] Chief Justice Vinson, writing for the plurality concluded, "[T]his analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger."[230]

The end result of this balancing approach is a loss of the clarity that is a prerequisite for criminal laws.[231] The fact the same speech can be protected or proscribed depending on the authorities' (and the courts') subjective (and necessarily unprovable) judgment that the speech may or may not eventually lead to a harm the legislature is empowered to prevent, deprives the speaker of clear notice that his or her conduct is about to cross the line into criminality. This violates the constitutional mandate that the state provide clear notice of what is prohibited.

After some preliminary rumblings, the conservative wing boldly strode forward, claiming to adopt the "Holmes-Brandeis view," but then backed away from the meaning of that bold stride. Just as clear and present danger melted back into bad tendency under the Taft Court, the Court under Chief Justice Vinson again invoked clear and present danger, but then backed down and adopted a haphazard balancing test.

The Court's explicit affirmance and adoption of Hand's balancing approach resulted in a decidedly nonconstitutional type of analysis. The Court treated free speech as comparable to tortious conduct—a breed of conduct not insulated by any special level of protection.[232] Intriguingly, however, rather than adopt more traditional tort or criminal law reasoning, as Holmes did in the *Schenck* trilogy, the *Dennis* Court followed the logic of Hand's pioneering opinion in what has been deemed the first "Law and Economics" case, *United States*

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227. *Id.* at 510 (quoting *Dennis v. United States*, 183 F.2d 201, 212 (2d Cir. 1950)). Hand's formulation treats conduct protected by a constitutional provision in the same way as conduct not so protected, allowing criminal liability for speech under the identic circumstances as justify the imposition of civil liability for any form of action. *See supra* text accompanying notes 147-52. The upshot of this formulation is that speech is accorded no special treatment from any other act deemed criminal. *Id.*

228. Dennis v. United States, 341 U.S. 494, 509 (1951).

229. *Id.* at 510.

230. *Id.* at 511.

231. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (reversing conviction of editors for seditious libel and rejecting existence of common-law federal crimes, thereby mandating federal crimes be legislatively defined).

232. *See supra* text accompanying notes 147-52.

v. Carroll Towing.[233] The Supreme Court's adoption of essentially economic analysis to determine the scope of constitutional rights is reminiscent of more recent promptings to apply similar methods in nonbusiness law contexts,[234] but its conflation of constitutionally-protected conduct (speech) with unprotected conduct (maintaining a toxic waste dump) renders it especially unconvincing.

The concurring opinion by Justice Frankfurter reflects a somewhat different understanding of the First Amendment. Frankfurter combined an unusual frankness with a willingness to disregard precedent. He candidly admitted the Court's own prior pronouncements regarding clear and present danger "and their cumulative force has, not without justification, engendered belief that there is a constitutional principle, expressed by those attractive but imprecise words, prohibiting restriction upon utterance unless it creates a situation of imminent peril against which legislation may guard."[235] Frankfurter dutifully set out these statements to the effect that the usual standard by which the constitutionality of legislation is judged does not apply in free speech cases: "'The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.'"[236]

Denouncing these "uncritical libertarian generalities," Frankfurter conceded the issue is one that requires a careful answer, in view of the Court's prior statements.[237] He began by reviewing the various cases decided by the Court, dividing them into six categories: (1) use of public space for political speech, (2) restrictions on picketing, (3) deportation for expression of political views, (4) taxes on the press alone, and prior restraints on libel, (5) the Taft-Hartley Act's requirement that officers of unions employing the services of the National Labor Relations Board sign affidavits that they are not Communists, and (6) statutes prohibiting speech tending to lead to crime—the very issue involved in *Dennis*.[238]

In reviewing this last category, Frankfurter recast Holmes's *Abrams* dissent as a difference "on its view of the evidence," failing to recognize any difference in the test applied by the Court from that advocated by Holmes and Brandeis.[239]

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233. United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947); *see supra* text accompanying notes 152-53. In Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972), Judge Posner uses *Carroll Towing* to urge the adoption of economic analysis as a general means of determining tort liability.

234. *See, e.g.*, Richard Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (urging adoption of economic analysis to determine substantive content of criminal law).

235. Dennis v. United States, 341 U.S. 494, 527 (1951) (Frankfurter, J., concurring).

236. *Id.* at 526 (Frankfurter, J., concurring) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1944)).

237. *Id.* at 527-28 (Frankfurter, J., concurring).

238. *Id.* at 529-35 (Frankfurter, J., concurring). Frankfurter reviewed the cases to synthesize what speech has been deemed protected and what has not, a project leading him to a brief survey of holdings and not of rationales. That survey, although useful in its own terms (to buttress Frankfurter's contention that the judicial branch must defer in these matters to the legislative), has little to do with the rationales advanced for the Amendment. To put it more simply, Frankfurter, as a good Legal Realist, sought to demonstrate what courts have allowed, whereas this Article has endeavored to explain why they have allowed it.

239. *Id.* at 535 (Frankfurter, J., concurring).

In *Gitlow* and *Whitney*, Frankfurter did recognize a difference—the immediacy requirement.[240] Declining to reconcile these cases, Frankfurter contended the Court had erred both in favor of speech[241] and on the side of suppression.[242] From this grand array of decisions, he derived his own approach. Frankfurter urged that free speech cases not be given heightened scrutiny, but rather courts should defer to legislative judgment.[243] Frankfurter looked wistfully to *Gitlow*, but acknowledged its dissent "has been treated with the respect usually accorded to a decision."[244] He therefore rejected the case's holding, but not its reasoning of judicial deference to the legislative will.[245] He rejected the clear and present danger rubric as an "'oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched.'"[246] Frankfurter went on to invoke the concept, first articulated in *Chaplinsky v. New Hampshire*,[247] that not all speech deserves equal protection under the First Amendment.[248] Although *Chaplinsky* drew a rough line, according certain classes of speech no protection whatsoever,[249] Frankfurter applied a sliding scale involving multiple levels of protection to speech, which would vary depending on the value society accorded that speech.[250] Relying on *Fox v. Washington*,[251]

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240. *Id.* at 536-37 (Frankfurter, J., concurring).

241. Frankfurter cited Bridges v. California, 314 U.S. 252 (1941), as an example. In *Bridges*, the Court reversed the convictions of a newspaper editor and publisher for criminal contempt based on harsh editorials urging a judge toward a particular result in a pending case. *Id.* at 271-72. The majority deemed strength against such pressure a prerequisite to properly filling a position on the bench. *Id.* at 273. Frankfurter, dissenting, saw the result as sacrificing the defendant's right to a fair trial to the press' right to free speech, a right Frankfurter deemed less urgent in the circumstances. *Id.* at 279-305 (Frankfurter, J., dissenting).

242. Dennis v. United States, 341 U.S. 494, 539 (1951) (Frankfurter, J., concurring).

243. *Id.* at 539-41 (Frankfurter, J., concurring).

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

245. *Id.* at 541-42 (Frankfurter, J., concurring).

246. *Id.* at 542-43 (Frankfurter, J., concurring) (quoting PAUL FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949)).

247. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("[T]he lewd and the obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—fall outside of the First Amendment as "low value" speech the proscription of which does not even raise a constitutional question.). The decision in *Chaplinsky*, ruling many classes of speech out of the First Amendment's scope, represents a major change in the Amendment's jurisprudence, and one that impacts upon the Amendment's importance. *Chaplinsky* disrupted the evolution of this jurisprudence by narrowing the field of protected speech, not by altering the manner in which admittedly protected speech is treated. Thus, its impact needs to be assessed separately from this Article, which considers only admittedly protected speech—specifically, political speech, whether merely unpopular or as detested as subversive advocacy.

248. Dennis v. United States, 341 U.S. 494, 544 (1951) (Frankfurter, J., concurring).

249. "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

250. Dennis v. United States, 341 U.S. at 544-45 (Frankfurter, J., concurring).

251. Fox v. Washington, 236 U.S. 273 (1915).

Frankfurter concluded that advocating violent overthrow of the government ranks low on the scale of valuable speech.[252]

For Frankfurter, then, the test is whether Congress, having "the primary responsibility for reconciling" these conflicting values, did so in a rational manner.[253] Bearing in mind the world-threatening danger he found in communism, Frankfurter found the Smith Act, although unwise and intolerant, well within the scope of Congress's powers.[254] Frankfurter's concurrence is of more than historical interest, as his conception and justification of a balancing test would buttress the viability of the plurality's approach until *Brandenburg*.[255]

At more than one level, *Dennis* is a victory for free speech—and not only for the seeming resuscitation of clear and present danger and the repudiation of *Gitlow* and *Whitney*. Perhaps the most important aspect of *Dennis* is that Frankfurter's opinion did not command a court. That subtle and sophisticated scale of values would, even more than the plurality's three-variable standard, have ushered in an age of utter subjectivity, in which "the speech that we hate" could be accorded minimal protection by a stroke of the pen deeming it "low value." Worse, by couching censorship as an application to the general rule immortalized in the stirring rhetoric of Holmes and Brandeis, the Court would be able to conceal the extent to which the exceptions would in fact embody the rule.

B. *The* Dennis *Dissents*

Justice Black's dissent in *Dennis* runs only three pages, but nonetheless packs a punch wholly disproportionate to its size. Black takes on Justice Jackson as a threshold matter, pointing out that Jackson's treatment of the case, based on the defendants' alleged conspiracy to overthrow the government, was not reflective of the charges against them.[256] The defendants were charged with conspiring to organize to advocate.[257] Thus, Jackson's questioning whether Congress can punish subversive advocacy was not to the point. The question before the Court was whether Congress could properly punish conspiring to organize with the purpose of eventually advocating—a danger far more remote than Jackson was willing to admit.

Black then moved on to the issue as framed by Jackson and conceded:

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252. Dennis v. United States, 341 U.S. at 545 (Frankfurter, J., concurring). Frankfurter also declared this is especially so as "no government can recognize a 'right' of revolution." *Id.* at 549 (Frankfurter, J., concurring). This seems peculiar in light of the explicit recognition of such a right in the Declaration of Independence, itself a deliberate act passed by the Continental Congress, and one of the earliest constitutive documents of the United States. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

253. Dennis v. United States, 341 U.S. 494, 550-52 (1951) (Frankfurter, J., concurring).

254. *Id.* at 554-56 (Frankfurter, J., concurring).

255. Justice Jackson's shrill and unpersuasive concurrence adds essentially nothing to the debate, treating the case as a criminal conspiracy in spite of the lack of an overt act as required by the statute. *Id.* at 561-79 (Jackson, J., concurring). Jackson maintained that the conspiracy itself was a crime separate from any attempt to bring it to fruition. *Id.* at 574 (Jackson, J., concurring).

256. *Id.* at 579 (Black, J., dissenting).

257. *Id.* (Black, J., dissenting).

> a governmental policy of unfettered communication of ideas does entail dangers. To the founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . . "[258]

Black therefore revived Holmes's notion that free speech is risky and not for the faint of heart. Like Holmes, he asserted this risk was necessary to "provide the best insurance against destruction of all freedom."[259] Black asserted freedom and its risks were worth bearing for the benefits they bring us, a view reminiscent of Brandeis in *Whitney*.

Black did more than rehash the views propounded by Holmes and Brandeis. He asserted that judicial restraint, the concept so reverently invoked by Frankfurter, mandated the reversal of Dennis's conviction.[260] He denied the clear and present danger test was a failure of judicial humility as Frankfurter asserted, stating it "does 'no more than recognize a minimum compulsion of the Bill of Rights.'"[261] Moreover, he regarded the preference for freedom as one not to be left in the hands of the populace, but enshrined in the command of the First Amendment.[262]

Finally, Black attacked the application of rational basis review to free speech cases.[263] He observed Frankfurter's approach "waters down the First Amendment so that it amounts to little more than an admonition to Congress."[264] Such a construction "is not likely to protect any but those 'safe' or orthodox views which rarely need its protection."[265]

Justice Douglas's dissent is interesting more for what it does not say than for what it does. He did not yet advocate the First Amendment absolutism that has come to be thought of as his greatest legacy. Indeed, he referred approvingly to the obscenity doctrine.[266] What Douglas did in *Dennis* is point out the fallacy of the majority, which would allow teaching of Communist doctrine by those who do not believe in it, but punish the same teaching when done by a believer.[267] As Douglas pointed out:

> The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said*, but on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen. . . . Intent, of course, often makes the

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258. *Id.* at 580 (Black, J., dissenting).
259. *Id.* (Black, J., dissenting).
260. *Id.* (Black, J., dissenting).
261. *Id.* (Black, J., dissenting) (quoting Bridges v. California, 314 U.S. 252, 263 (1941)).
262. *Id.* (Black, J., dissenting).
263. *Id.* (Black, J., dissenting).
264. *Id.* (Black, J., dissenting).
265. *Id.* (Black, J., dissenting).
266. *Id.* at 581 (Douglas, J., dissenting). For Douglas's absolutism as his greatest legacy, see BALL & COOPER, *supra* note 214, at 146-47; MELVIN I. UROFSKY, THE DOUGLAS LETTERS 196 (1987).
267. Dennis v. United States, 341 U.S. 494, 583 (1951) (Douglas, J., dissenting).

> difference in the law. An act otherwise excusable or carrying minor penalties may grow to an abhorrent thing if the evil intent is present. We deal here, however, not with ordinary acts but with speech, to which the Constitution has given a special sanction.[268]

Douglas set out the nature-of-government rationale leading to a Brandeisian reliance on counterspeech whenever possible,[269] and then, in his peroration, began to draw a conclusion:

> The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Constitution provides no exception. . . . Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself.[270]

Douglas was already beginning to move away from the clear and present danger test as propounded in the Holmes-Brandeis dissents and toward the absolutism of his later years. The rest of the story is how he and Justice Black pulled the majority with them, past the Holmes-Brandeis version of clear and present danger and toward *Brandenburg*.

C. Yates, Scales, *and* Noto: *Justice Harlan's Balancing Act*

Dennis marked a turning point in the jurisprudence, but a peculiar one in that it was a way station to further developments. The next three opinions show Justice John Marshall Harlan striving to apply the *Dennis* test under increasingly strident fire from Black and Douglas. Along the way, the subjectivity of that test became even clearer.

In *Yates v. United States*,[271] Justice Harlan, in seemingly explicating *Dennis*, in fact substantially limited its rule. According to Harlan, Chief Justice Vinson in *Dennis* had not meant to erase the consistently recognized "distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action," a distinction Harlan found in *Fox v. Washington* and *Schenck*, and one he stated was "heavily underscored" in *Gitlow*.[272] Harlan went on to describe the "heart of *Dennis*":

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268. *Id.* (Douglas, J., dissenting).

269. *Id.* at 584-86 (Douglas, J., dissenting).

270. *Id.* at 590 (Douglas, J., dissenting).

271. Yates v. United States, 354 U.S. 298, 303, 312-27 (1956) (reversing conviction under Smith Act for various grounds, including judge's jury charge intimating the Act banned simple advocacy of abstract ideas rather than incitement to action), *overruled by* Burks v. United States, 437 U.S. 1 (1978).

272. *Id.* at 318. Relying on *Gitlow*, Harlan quoted the Court's statement there that "the statute [the New York Criminal Anarchy Act] does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action." *Id.* Harlan did concede, however, that the *Gitlow* Court took a "narrow view" of the First Amendment. *Id.* In fact, the *Gitlow* Court simply used these qualifications to show how moderate the New York statute was and to separate what issues were not before it. There is no reason to

> The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule or principle of action," and employing "language of incitement," . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. That is quite a different thing from the view . . . that mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*.[273]

Harlan's recasting of *Dennis* is less than accurate; the language Harlan cited came from the charge upheld by the Court, and the opinion's own discussion of advocacy leads to an entirely different conclusion. Harlan, for example, pointed out that in Vinson's statement there could be no conviction for "advocacy in the realm of ideas."[274] The full statement—also merely describing the charge—is, however, that "they [the jury] could not convict if they found the petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas,'" a statement that shows the "advocacy" referred to is not that of belief but of the bloodless setting out of a foreign concept.[275] Moreover, as if there were any doubt, the statement Harlan relied on follows the blunt statement that the Smith Act "is directed at advocacy, not discussion."[276] Indeed, Justice Clark chided the majority's restatement of *Dennis*, stating he could "see no resemblance between it and what the respected Chief Justice wrote in *Dennis*, nor [could he see] any such theory in the concurring opinions."[277] It is difficult not to agree with him.

In *Yates*, then, a new element had been added to the mixture. In addition to the balancing mandated by *Dennis*, the courts must distinguish between "advocacy or teaching of abstract doctrines, with evil intent, and that which is directed to stirring people to action"—even if the action is remote in time.[278] This distinction, admitted by Harlan to be "fine," seems nonexistent. As the "evil intent" involved is said to be "specific intent to accomplish overthrow,"[279] Harlan was saying it was different to urge people to overthrow the government while

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believe the bad tendency test of *Schaefer* and *Gitlow* would except advocacy if Congress chose to punish it.

273. *Id.* at 321-22 (quoting Dennis v. United States, 341 U.S. 494, 511-12 (1951)).

274. *Id.* at 297 (quoting Dennis v. United States, 341 U.S. at 502).

275. Dennis v. United States, 341 U.S. at 502.

276. *Id.*

277. Yates v. United States, 354 U.S. 298, 350 (1956) (Clark, J., dissenting), *overruled by* Burks v. United States, 437 U.S. 1 (1978).

278. *Id.* at 326.

279. *Id.* at 320.

hoping they will overthrow it than to urge people to overthrow the government while hoping it will be overthrown. Surely this is the sort of logic that leads to cotillions on the heads of pins.

It can be argued what Justice Harlan was really trying to do was drag the Court a little further from the subjective, free-floating balancing approach of *Dennis*. He was seeking a way to retain the flexibility of the balancing approach and at the same time to protect patently harmless speech. Harlan found that method by subtly rewriting *Dennis*, teasing from it a distinction that had been arguably drawn in *Fox*. Harlan's method could be used to create a common sense exception to *Dennis*'s world where all speech had to be balanced before its status was known.

Certainly the distinction Harlan had drawn is one for the protection of speech. Besides providing the one reversal of a conviction seen so far, by separating "advocacy" from "incitement," Harlan was providing a rubric under which to protect antigovernment speech, albeit a murky one.

The concurrence by Justice Black, in which Justice Douglas joined, showed no retreat from its position in *Dennis*. Black put his absolutist view, not explicated in *Dennis*, quite succinctly:

> The Court says that persons can be punished for advocating action to overthrow the Government by force and violence, where those to whom the advocacy is addressed are urged "to *do* something, now or in the future, rather than merely to *believe* in something." Under the Court's approach, defendants could still be convicted simply for agreeing to talk as distinguished from agreeing to act. I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal. As the Virginia Assembly said in 1785, in its "Statute for Religious Liberty," written by Thomas Jefferson, "it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order."[280]

In *Yates*, then, the conflict is stark and sharp. Harlan and the majority tinkered with *Dennis* in the hope of creating a clear and present danger approach that was speech-protective enough to allow legitimate dissent but flexible enough to allow the government to quell "dangerous" speech. Black and Douglas on the other side asserted the legitimacy of all dissent, even that which questions the very heart of our political order. Even clear and present danger has been rejected by them—perhaps due to its dilution by the majority.

In *Scales v. United States*,[281] Harlan clarified the impact of *Yates*. "*Dennis* and *Yates*," he wrote, "have definitely laid to rest any doubt that present advocacy of *future* action for violent overthrow satisfies statutory and constitutional

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280. *Id.* at 340 (Black, J., concurring) (citations omitted).

281. Scales v. United States, 367 U.S. 203 (1961) (upholding application of Smith Act provision prohibiting knowing membership in organization advocating violent overthrow of government to Communist Party member).

requirements equally with advocacy of *immediate* action to that end."[282] In clarifying what constituted such advocacy, as opposed to protected "abstract advocacy," Harlan stated the Smith Act offenses, "involving as they do subtler elements than are present in most other crimes, call for strict standards in assessing the adequacy of the proof needed to make out a case of illegal advocacy."[283]

As a threshold matter, this shows a willingness on Harlan's part to admit *Yates* was not the mere restatement of *Dennis* it claimed to be. The opinion did add, if only implicitly, a higher burden of proof. Moreover, by distinguishing between "harmless" advocacy of violent overthrow and dangerous advocacy, Harlan added a perhaps unstated, but real, recognition that some subversive advocacy is simply beneath the notice of the Court, or endemic to the political process. It is perhaps helpful to recall Vinson's (and Jackson's) repetitive use of the conspiracy doctrine against the Communist Party. Harlan may well have been striving to exempt nonconspiratorial, inactive communists from the strictures he felt were properly applied to members of the Communist Party.

Harlan's distinction in *Scales* between active and inactive members in the Communist Party appears to support this. The latter, he wrote, may well be "foolish, deluded, or perhaps merely optimistic, but he is not, by this statute, made a criminal."[284] Because he wanted to exempt these individuals or because he genuinely saw the ultra-fine distinction between these two forms of advocacy of violent overthrow as weighty, Harlan specified what does not in itself constitute sufficient proof to show illegal advocacy:

> This category includes evidence of the following: the teaching of Marxism-Leninism and the connected use of Marxist "classics" as textbooks; the official general resolutions and pronouncements of the Party at past conventions; dissemination of the Party's general literature, including the standard outlines on Marxism; the Party's history and organizational structure; the secrecy of meetings and the clandestine nature of the Party generally; statements by officials evidencing sympathy for and alliance with the U.S.S.R.[285]

In dissent, Justice Black chided the Court for having "practically rewritten" the statute to require activity and specific intent prior to penalizing membership in the Party. Black argued persuasively that by so doing, the Court impermissibly transformed a provision void on its face into a valid one, in effect itself passing an ex post facto law: the defendant's right to be tried under a clearly defined, pre-existing law has been vitiated.[286] Black then passed to his more fundamental objection with the majority's approach. The majority, he stated, sought to have it both ways. First, the majority claimed that only when no "direct" abridgment of First Amendment freedoms is involved, the proper test to be

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282. *Id.* at 251.

283. *Id.* at 232. Harlan admitted this view was "not articulated in the [*Yates*] opinion, though perhaps it should have been." *Id.*

284. *Id.* at 230.

285. *Id.* at 232.

286. *Id.* at 260-61 (Black, J., dissenting).

applied is the balancing of harms first introduced in *Dennis*.[287] Nevertheless, Black noted, the defendant had been sentenced to six years imprisonment for his association with those who "have entertained unlawful ideas and said unlawful things, and that of course is a *direct* abridgment of his freedoms of speech and assembly."[288] Thus, Black doubted the majority only applied the balancing test to cases not involving direct abridgment.[289]

Black strongly rebuked the majority for "balancing away" First Amendment freedoms, arguing:

> [T]he question in every case in which a First Amendment right has been asserted is not whether there has been an abridgment of that right, not whether the abridgment of that right was intentional on the part of the Government, and not whether there is any other way in which the Government could accomplish a lawful aim without an invasion of the constitutionally guaranteed rights of the people. It is, rather, simply whether the Government has an interest in abridging the right involved, and, if so, whether that interest is of sufficient importance, in the opinion of a majority of this Court, to justify the Government's action in doing so. This doctrine, to say the least, is capable of being used to justify almost any action Government may wish to take to suppress First Amendment freedoms.[290]

Here, surely, Black is correct. As the "distinction" Harlan draws is elusive at best, and quite possibly nonexistent,[291] it is difficult to deduce any limiting principle save for Harlan's personal judgment that the speech in *Yates* was harmless while that in *Scales* was not.

Douglas, in his dissent, reviewed the evidence and concluded "[n]ot one single illegal act is charged to petitioner. That is why the essence of the crime covered by the indictment is merely belief—belief in the proletarian revolution, belief in the Communist creed."[292] Reviewing the long tradition against punishing belief,[293] Douglas also pointed out that the right to rebel has been long honored, although society's right to prevent armed revolt has also been recognized.[294] He pointed out that the Court, in denying it was punishing belief, nonetheless "speaks of the prevention of 'dangerous behavior' by punishing those 'who work to bring about that behavior.'"[295] Like Black, he concluded the whole concept of "balancing" is at fault: "We have too often been balancing the right of speech and association against other values in society to see if we, the

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287. *Id.* at 261-62 (Black, J., dissenting).

288. *Id.* at 261 (Black, J., dissenting).

289. This criticism of the majority seems a trifle unfair. Although Black did adduce support for the proposition that the balancing test is only involved in "indirect" cases, *Dennis* seems quite fairly to stand for its across-the-board application. *See supra* text accompanying notes 221-46.

290. Scales v. United States, 367 U.S. 203, 262 (1961) (Black, J., dissenting).

291. *See supra* text accompanying notes 281-85.

292. Scales v. United States, 367 U.S. at 265 (Douglas, J., dissenting).

293. *Id.* at 265-68 (Douglas, J., dissenting).

294. *Id.* at 269-73 (Douglas, J., dissenting).

295. *Id.* at 270 (Douglas, J., dissenting).

judges, feel a particular need is more important than those guaranteed by the Bill of Rights."[296]

Balancing, which for Frankfurter and Harlan represented an act of judicial humility, was for Douglas an act of arrogance, a usurpation of the prerogatives of the Framers of the Constitution who in adopting the First Amendment struck the balance already—struck it in favor of speech.[297]

On the same day *Scales* was decided, the Court reversed a conviction under the same provision in *Noto v. United States*.[298] In *Noto*, the Court found the membership provision of the Smith Act had not been violated by a Communist Party member who had made inflammatory comments.[299] These comments included the statement, "Sometime I will see the time we can stand a person like this S.O.B. against the wall and shoot him."[300] Harlan's treatment of this statement as not advocating future violence, but as mere venom, muddied the already untenable distinction drawn by the Court between lawful and unlawful advocacy. Despite the fact that the defendant's statements, in conjunction with his speeches advocating violent overthrow of the government, fell clearly within the boundaries of proscribable speech under *Dennis*, *Scales*, and *Yates*, the Court reversed the conviction.

Plainly, by this stage, the Court's approach to determining what speech advocating violence is dangerous and what is not had degenerated to a subjective approach akin to that of Justice Stewart in deciding what is and what is not obscene: The Court knows it when it sees it.[301]

D. Brandenburg: *Who Shall Claim the Victory?*

In 1969, the Court decided *Brandenburg v. Ohio*.[302] The case arose from the conviction, under the Ohio Criminal Syndicalism statute prohibiting the advocacy of violent change, of the leader of a Ku Klux Klan group.[303] The speech involved statements such as "bury the niggers" and "if our President our Congress our Supreme Court continues to suppress the white Caucasian race, its possible that there might have to be some revengance [sic] taken."[304]

The Court reversed the conviction in a short (six page) *per curiam* opinion. Admitting the statute was "quite similar" to that upheld in *Whitney*, the Court reiterated "*Whitney* has been thoroughly discredited by later decisions," citing *Dennis*.[305] The Court then summarized these "later decisions" in a manner surprising to anyone familiar with them: "[T]he Constitutional guarantees of free

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296. *Id.* at 270-71 (Douglas, J., dissenting).

297. That this view was shared by Black is also evident. *See supra* text accompanying note 258; HUGO L. BLACK, A CONSTITUTIONAL FAITH 50-51 (1968).

298. Noto v. United States, 367 U.S. 290 (1961).

299. *Id.* at 298-99.

300. *Id.* at 296. At least one other similar statement by the defendant had been introduced into evidence. *Id.*

301. *See* Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring).

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

303. *Id.* at 444-45

304. *Id.* at 446.

305. *Id.* at 447.

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 or is likely to incite or produce such action."[306]

At the very least, the Court in *Brandenburg* substantially revised the standard. It eliminated Harlan's efforts to distinguish between "good" advocacy and "bad" advocacy of unlawful conduct. In fact, it did much more. The basic holding of *Dennis* was overruled. The vision of "clear and present danger" adopted was that of the later Holmes and Brandeis dissents, complete with the imminence requirement. Indeed, the specific intent requirement flirted with by Holmes and enunciated by Learned Hand in *Masses* was also read into the standard.[307]

Black and Douglas concurred in the result only, emphasizing in their view "clear and present danger" had proven to be too amorphous a standard. Douglas emphasized, after pointing out the dilution this standard had suffered in the past, that only those rare cases in which speech and the resulting action are inseparable—cases of "speech brigaded with action"—are properly subject to prosecution.[308] In such cases, it is the overt act that is prosecuted and not the speech, save insofar as it is the trigger for that act. The actor under those circumstances, it is fair to say, has become the agent of the speaker.[309]

Despite Douglas's reservations about the *Brandenburg* rule,[310] the rule seems to encapsulate Douglas's requirement that the speaker-audience relationship have been analogous to that of principal and agent. The imminence and specific intent requirement capture that dynamic nicely; liability only

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306. *Id.* The Court relied on *Yates* in its decision and quoted *Noto* to the effect that "'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.'" *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

307. In his recent biography of Hand, Gerald Gunther misleadingly states, "By the late 1960s, the Supreme Court announced its most speech-protective standard ever. And that standard is essentially an embracing of Hand's *Masses* approach." GUNTHER, *supra* note 127, at 152. This is simply untrue. Hand's test utterly lacks an imminence requirement. Hand specifically denied the relevance of such a requirement in subsequent correspondence, reaffirming his faith in his own *Masses* test. *Id.* at 604-05. It is more apt to think of *Brandenburg* as uniting the two tests, requiring both specific intent and imminence.

308. *Id.* at 455-57 (Douglas, J., concurring).

309. *See* DOUGLAS, *supra* note 81, at 23. Such a requirement was prefigured in *Gompers*'s concept of the "verbal act," which could, unlike speech in the ordinary course, be prosecuted. *See supra* text accompanying note 63. Another preview of Douglas's standard, essentially adopted by the Court, was presented in Fox v. Washington, 236 U.S. 273 (1915) when the Court stated the statute in question "lays hold of encouragements that, apart from statute, 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 principle in the crime encouraged and deals with the publication of them to a wider and less selected audience." *Id.* at 277-78. Although the *Fox* Court did not use the concept as a limiting principle, it may have acted as a spur to Douglas's analysis, especially as the verbal acts concept was so used in *Gompers*.

310. Douglas's reservations did not decrease over time, but rather grew more profound. In *The Supreme Court and the Bicentennial,* Douglas stated that "[a]ll of the objections to the 'clear and present danger' test are equally applicable to the new *Brandenburg* test." DOUGLAS, *supra* note 81, at 22.

attaches when the speaker knows the audience will act as a result of the speech, and intends that it should do so. Under such circumstances, particularly given the lack of time for the audience to reflect (the imminence requirement), the audience can be said to be acting under the direction of the speaker and in fulfillment of his or her will.[311] Despite the Court's refusal to explicitly adopt the Black-Douglas rationale, the opinion seems to have done so *sub silentio*.

V. CONCLUSION

Along the long road to *Brandenburg*, the cause of free speech went through many gains and set-backs, repeatedly receiving lip service in the process of having any substantive protection denatured. From the common-law tradition in which the state could punish any publication it chose, provided it first allowed publication (adding a new dimension to "publish or perish"), to the Conservative Revolution above described, the First Amendment seemed a paltry thing. With the birth of substantive protection, and the evolution of "clear and present danger," a new day seemed at hand. The Court backed away from its radical stride, however, leaving Justices Holmes and Brandeis to work out many of the meanings of free speech in dissent. In the 1950s, the Court repeated this sleight-of-hand process, overruling *Whitney* and singing the praises of Holmes and Brandeis, while emptying their standard of virtually all its meaning. Yet again, it took a duet of dissenters' efforts to haul the majority to a speech protective standard.

The conceit of the evolving First Amendment jurisprudence as a Socratic Dialogue between the American populous and the Supreme Court was first postulated by Harry Kalven.[312] Perhaps it is more appropriate to compare this evolution to a Socratic Dialogue among the members of the Court itself. Those Justices who would afford the protection of speech a high ranking in our scheme of Constitutional values have consistently prodded, questioned, and even fulminated against the more wary of their brethren, who feared for the stability of a truly free State. By this continual probing of the weaknesses and inconsistencies of the censorial mind, the dissenters were able to bring the majority to their point of view.

It would be foolhardy to postulate this evolution is at an end, although in which direction the tradition will evolve cannot easily be predicted. All that one can say with certainty is that the dialectic will continue, that both speech and repression will find new champions.

311. *See* DOUGLAS, *supra* note 81, at 23; Wirenius, *supra* note 4, at 70-71.
312. KALVEN, *supra* note 1.