THE RIGHT OF DISSENT AND AMERICA'S DEBT TO HERODOTUS AND THUCYDIDES

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ABSTRACT: The United States prides itself as a country that respects free speech, the right of all persons to criticize the government even in times of war. However, it was not always so. The events related to World War I brought the first cases raising free speech issues to the U.S. Supreme Court. While several justices, in particular, Oliver Wendell Holmes, praised free speech, the Court upheld all the Government prosecutions of dissidents. It has taken nearly a century since those cases for the Supreme Court to come full circle and now protect those who criticize the Government in time of war. When the Court changed its views to create the modern protections, it relied on philosophical justifications for free speech that go all the way back to the ancient Greeks, 2,400 years ago. The modern justification for free speech relies on these philosophers from ancient Greece. There is little new under the sun. While governments typically believe that, for the public good, they must censor speech and squelch dissenters in time of war, the Greeks believed that their free speech made them stronger, not weaker. There are those who argue it is more difficult for a democracy to go to war because it cannot conduct the war successfully if the people oppose it and dissenters remain free to criticize. That is a good thing, not a bad thing. In modern times, no democracy has warred against another. As Pericles reminds us, "[t]he great impediment to action is, in our opinion, not discussion, but the want of knowledge that is gained by discussion preparatory to action." As other countries embrace democracy and protections for dissidents, our increased freedoms should bring us more peace and less war.

KEYWORDS: American Constitutionalism; U.S. Supreme Court; Freedom of Speech; War; Right of Dissent.

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RESUMO: Os Estados Unidos se orgulham por ser um país que respeita a liberdade de expressão, o direito que todos indivíduos têm de criticar o governo, mesmo em tempos de guerra. Contudo, nem sempre foi assim. Os eventos relacionados à Primeira Guerra Mundial trouxeram os primeiros casos submetendo questões de liberdade de expressão à Suprema Corte dos Estados Unidos. Enquanto diversos *Justices*, em particular Oliver Wendell Holmes, louvavam a liberdade de expressão, a Corte confirmava todas as perseguições do governo a seus dissidentes. Demorou cerca de um século até que aqueles casos da Suprema Corte encerrassem o ciclo e, agora, passassem a proteger aqueles que criticam o governo em tempos de guerra. Quando a Corte mudou suas visões para criar a moderna proteção, ela repousou sobre justificações filosóficas em prol da liberdade de expressão que retornam todo o trajeto para os antigos Gregos, há 2.400 anos. As justificações modernas em defesa da liberdade de expressão recai sobre estes filósofos da Grécia Antiga. Há pouca novidade sob o sol. Enquanto governos tipicamente acreditam que, em nome do interesse público, eles precisam censurar o discurso e reprimir dissidentes em tempos de guerra, os Gregos acreditavam que a liberdade de expressão os tornava mais fortes, e não mais fracos. Há aqueles que alegam ser mais difícil para uma democracia deflagrar em guerra, porque não pode conduzi-la com sucesso se o povo se opuser e se seus dissidentes permanecerem livres para criticar. Isso é uma coisa boa, não algo ruim. Em tempos modernos, nenhuma democracia tem guerreado contra outra. Conforme Péricles nos recorda, "[o] grande obstáculo à ação é, em nossa opinião, não a discussão, mas a carência do conhecimento que se ganha com a discussão preparatória à própria ação". À medida que outros países incorporam a democracia e as proteções para dissidentes, nossas liberdades expandidas nos proporcionarão mais paz e menos guerra.

PALAVRAS-CHAVE: Constitucionalismo Norte-Americano; Suprema Corte dos Estados Unidos; Liberdade de Expressão; Guerra; Direito de Dissidência.

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Over 2,400 years ago, in ancient Greece, the cradle of democracy, the Athenians believed that freedom of speech made their armies more courageous. The Greek philosophers believed that free speech made them stronger, not weaker. They developed the first philosophical arguments favoring free speech and opposing government regulation, even in time of war.

The three primary ancient Greek figures were two historians, Herodotus, Thucydides, and Aeschylus, the playwright. We sometimes refer to Herodotus as the father of history. He wrote the history of the Persian Wars (499-479 BC) in nine books. Before Herodotus, people wrote history in the sense of chronicling events, writing lists (there was a battle; a king lost, etc.). Herodotus was interested in why things happened; what caused nations or leaders to do one thing or another. Admittedly, he relied on oral recollections, rumors, and legends, which is why others call him the father of lies. In contrast, Thucydides wrote only about the history of events that occurred during his lifetime that he sought to confirm through eyewitness accounts and written records.

Herodotus, in his history, sought to understand and explain why Athenians could win victories over the more numerous Persians in the first part of the fifth century B.C. His answer was that Athenians fought as free people, not as slaves. It is not that the Athenians were braver than the Persians were, or that their archers were more accurate, or their weapons more advanced. Instead, Herodotus argued, when the Athenians were under despotic rulers, they "were no better in war than any of their neighbors, yet once they got quit of despots they were far and away the first of all," because "when they were freed each man was zealous to achieve for himself."[1] Freedom made the Athenians braver.

Thucydides, in his History of the Peloponnesian War, included long speeches that historical figures had possibly delivered. Thucydides tells us that a custom of the times was for a prominent figure to give a funeral oration. In book 2 of his history, he gives us the Funeral Oration of Pericles. Although Thucydides presents this speech as if it were a verbatim transcript of Pericles' discourse, Thucydides does not want us

[1] HERODOTUS, HISTORIES, 4 VOLS. (1922–1931), 5:78 (3:87), *apud* I.F. STONE, THE TRIAL OF SOCRATES (1988), pp. 50.

to that it is so. Instead, he said the words represent what Pericles intended, what was "called for in the situation."[2]

Thucydides tells us that Pericles also argued that the Athenians were stronger because they were free. Athens was not a formidable city-state *in spite of* free speech but *because of* free speech. Pericles' famous funeral oration argued:

> Our city is thrown open to the world, and we never expel a foreigner or prevent him from seeing or learning anything of which the secret if revealed to an enemy might profit him. We rely not upon management or trickery, but upon our own hearts and hands (...) The great impediment to action is, in our opinion, not discussion, but the want of knowledge that is gained by discussion preparatory to action.[3]

The third major figure is the playwright, Aeschylus. In his play *The Persians,* he echoed Herodotus and Thucydides. Aeschylus explained that the Greeks were victorious because, "Of no man are they the slaves or subjects."[4] Art reflects life, and Aeschylus, in his play, reflected what many Athenians believed — Greeks should celebrate their victory not as a victory of Greeks over Persians but a victory of free men over slaves. "The victors at Salamis were men elevated and inspired by the freedom to speak their minds and govern themselves."[5]

Herodotus, Thucydides, Aeschylus — all embraced this ancient truth. People who are free are people who work more intensely because they work for themselves, not for a master. It is for the same reason that it takes many hunting dogs to catch one fox: the fox works harder because he is self-employed.

America was slow to learn this lesson. It took nearly two centuries before we broadly embraced the principle that free speech and the right to dissent are essential for a free people, even in wartime. The road to the modern legal protections was not straight and narrow. Justice Oliver Wendell Holmes, whom the liberals of his day idolized, did free speech no favors with his advocacy of the "clear and present danger" test. In fact,

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[2] ALAN RYAN, ON POLITICS: A HISTORY OF POLITICAL THOUGHT: FROM HERODOTUS TO THE PRESENT (2012), pp. 23.

[3] Pericles, *Funeral Oration, in*, THUCYDIDES: TRANSLATED INTO ENGLISH (B. Jowett transl., 1881), pp. 116, 118–19.

[4] AESCHYLUS, PLAYS, 2 VOLS. (1922–1926), I:109; I:241FF., *apud*, I.F. STONE, THE TRIAL OF SOCRATES (1988), pp. 51.

[5] I.F. STONE, THE TRIAL OF SOCRATES 51 (1988).

the Supreme Court has never used his "clear and present danger" test to invalidate a criminal prosecution of speech that interfered with the war effort. The Court, as discussed below, either ignored the test or used it to uphold convictions.

While there will always be those who call for prosecutions of dissenters, modern American courts are a much more reliable bulwark. How we moved from "clear and present danger" to the modern, more robust protection for political dissent when the nation is at war offers an important historical lesson. This lesson is important not only because it tells us how we reached the contemporary view and why our journey was so slow. It is also important because it explains the modern rationale justifying vigorous protection for speech even in time of war and civil unrest. When we understand that rationale, we will be less likely to repeat the tragic mistakes of the past.

II. THE ORIGIN OF THE BILL OF RIGHTS AND THE FIRST AMENDMENT

The Framers created the "separation of powers," by dividing power between the states and the federal government (vertical separation) and among three branches of the Federal Government (horizontal separation).

Besides these structural safeguards, the Framers imposed some direct limitations on the government. The original Constitution not only created the various branches of the central government and divided power between the central government and the states; it also guaranteed several important rights. The original Constitution prohibits any religious test of any office, state, or federal,[6] a restriction that was very progressive for its time. The original Constitution also guarantees the right to a jury trial in criminal cases. It prohibits Congress from suspending the right of habeas corpus, or from enacting any *ex post facto* law or bill of attainder.[7] It also forbids the states from enacting any bill of attainder or *ex post facto* law.[8]

[6] *U.S. Constitution*, art. VI, cl. 3.

[7] *U.S. Constitution*, art. III, § 2, cl. 3; *U.S. Constitution*, art. I, § 9, cl. 2, 3.

[8] *U.S. Constitution*, art. I, § 9, cl. 2, 3; *U.S. Constitution*. art. III,§ 2, cl. 3; *U.S. Constitution*, art. I, § 10, cl. I.

To protect reasonable expectations the Constitution forbids states from impairing the obligation of contracts.[9]

When the Framers lobbied the people urging them to approve the new Constitution, many were concerned that the structural protections of federalism and the few direct limited in the Constitution were not enough. They feared that the government could use its powers to restrict freedoms that the people assumed to exist but to which the Constitution did not refer.

For example, Congress has the power to declare war,[10] and the President has the power of the commander-in-chief of the Armed Forces.[11] Congress, when the nation is at war, has the power to wage war effectively. The Necessary and Proper Clause augments these express powers. Thus, Congress not only has its express powers but it has implied powers — the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[12] Could Congress use the war power to limit free speech in time of war? Prohibiting criticism of a war by people within the United States may make is easier to conduct a more effective war against foreign enemies.

Hence, when Framers submitted the proposed Constitution to the people for ratification, they responded to the pressure of those who wanted the Constitution explicitly to grant more protections. The Framers promised that once the Constitution went into effect, the first Congress would propose a Bill of Rights.[13] The politicians actually kept their promise: the first Congress under the new Constitution promptly proposed, on September 25, 1789, what we now call the Bill of Rights.[14] It

[9] *U.S. Constitution*, art. I, cl. I, § 10. *See Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 427-28, 54 S. Ct. 231, 235-36, 78 L. Ed. 413 (1934) (contract clause adopted to give predictability to business of society).

[10] *U.S. Constitution*, art. I, § 8, cl. 11.

[11] *U.S. Constitution*, art. II, § 2, cl. 1.

[12] *U.S. Constitution*, art. I, § 8, cl. 18. This clause greatly increases federal power by authorizing implied powers, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed.579 (1819).

[13] CHARLES WARREN, THE MAKING OF THE CONSTITUTION (1928), pp. 733-82.

[14] CHARLES WARREN, THE MAKING OF THE CONSTITUTION (1928), pp. 819-20.

granted even more individual freedoms, though these rights did not limit the states until after the enactment of the Fourteenth Amendment.[15]

The very first amendment that the people ratified was the First Amendment, protecting freedom of speech and of the press. Some modern constitutions have provisions that suspend constitutional rights in times of public danger. The South African Constitution, which Justice Ruth Bader Ginsburg has praised,[16] devotes 970 words to an article dedicated to suspending right, including free speech. There is a table of "non-derogable rights," but free speech is not one of them.[17] In contrast, the First Amendment speaks in broader terms: "Congress shall make no law (...) abridging the freedom of speech, or of the press (...)."

III. THE EARLY FIRST AMENDMENT – FROM THE EIGHTEENTH CENTURY TO WORLD WAR I

The first test of the Free Speech Clause was the ill-fated Alien and Sedition Acts of 1798. Congress enacted those laws in an effort to squelch criticism of President Adams. No cases reached the Supreme Court, but there were lower court prosecutions involving the Sedition Act. At this early time in American history, the restrictions that the language of the

[15] *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672. 250 (1833) (holding that Bill of Rights only applies to United States Government); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, VOL. 2 (2012), § 14.1-14.2 (Bill of Rights did not apply to state governments until passage of the Fourteenth Amendment).

[16] Ronald D. Rotunda, *Egypt's Constitutional Do-Over: This Time Around, Take a Closer Look at America's* Bill of Rights, WALL STREET JOURNAL, July 17, 2013, pp. A13

[17] Ronald D. Rotunda, *Exporting American Freedoms*, *in* MODEL, RESOURCE, OR OUTLIER? WHAT EFFECT HAS THE U.S. CONSTITUTION HAD ON THE RECENTLY ADOPTED CONSTITUTIONS OF OTHER NATIONS?, May 17, 2013, pp. 12 (emphasis added): "Consider the South African constitution. The title of Article 37 is 'States of Emergency.' This one article, dedicated to *suspending* rights under various circumstances, is 970 words long. This one article is more than 20 percent of the length of the entire U.S. Constitution of 1787. Article 37 has a table of 'non-derogable rights.' Free speech is not one of those." [Emphasis in original]. *Available at* <http://www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations>.

First Amendment imposed ("Congress shall make no law"), appeared to be as effective as chains made of parchment.

Under the Alien Act, the President could order all aliens "as he shall judge dangerous to the peace and safety of the United States (...)" to leave the country.[18] The President never formally invoked this law, and it expired after two years, but its existence did result in some aliens leaving the country or going into hiding.[19]

Its companion, the Sedition Act, prohibited "publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress (...) or the President (...) with intent to defame (...) or to bring them (...) into contempt or disrepute (...)."[20] The law allowed the defendant to use truth as a defense to a prosecution. In addition, the jury had a right to determine the law and facts under the direction of the court.

To that extent, the Sedition Act was actually relatively tolerant for its time. England did not establish a defense of truth until 1843.[21] Before that, supporters of sedition laws argued, "The greater the truth, the greater the libel." The fact that the criticism was true made it *more dangerous*, because people are more likely to believe the truth. Truthful criticism is more likely to undermine government authority.[22] Moreover, if you say something is true, you cannot retract it without lying.

President Adams used the Sedition Act against members of Jefferson's Democratic-Republican Party for their criticism of his administration. Jefferson objected to the Sedition Act, but his actions were hardly a paean to free speech. When he assumed the Presidency, he urged his supporters to use *state* laws, rather than federal law, to keep the press in line. Thus, he wrote the Governor of Pennsylvania that there should be a "few well-placed prosecutions" of those newspapers who attacked the Jeffersonians.[23]

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[18] 1 Stat. at Large 570.

[19] RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, VOL. 5 (2012), § 20.5(b).

[20] 1 Stat. at Large 596.

[21] 6 & 7 Vic. c. 96 (1843) (*Lord Campbell's Act*); J.S. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, VOL. 2 (1883), pp. 383. England did allow the jury to return a general verdict during this period. *Fox's Libel Act*, 32 Geo. 3, c. 60 (1792).

[22] This maxim is typically attributed to Lord Mansfield, William Murray, first Earl of Mansfield.

[23] LEONARD LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963), pp. 58-59. Jefferson's letter to the Governor argued that the Federalists failed to destroy the press

No case involving the Sedition Act ever worked its way to the Supreme Court. Still, historians today agree that this law would not survive constitutional scrutiny. Perhaps the First Amendment's protections, initially, only were chains made of parchment, because the Federal Government enforced the Sedition Act. However, afterwards, opponents of that law used the promises of the First Amendment to persuade Congress to undo the wrong, to protect free speech, not abridge it. The Sedition Act "crystallized a national awareness of the central meaning of the First Amendment."[24]

After the Sedition Act expired,[25] a different Congress enacted a law to repay the fines that the Government had levied against violators of the Sedition Act, because it considered the law unconstitutional.[26] When Thomas Jefferson became President, he pardoned those whom courts had convicted and sentenced under the Act. He said, "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image."[27]

Decades later, on February 4, 1836, Senator Calhoun, speaking to the U.S. Senate, said that the unconstitutionality of the Sedition Act was a matter "which no one now doubts."[28] Over the years, various Justices, in case law[29] or their other writings,[30] have volunteered that this law violated

by their gag law so they then appeared to destroy it by encouraging its licentiousness. His remedy was few well-placed prosecutions to restore the "integrity" of the press.

[24] *New York Times v. Sullivan*, 376 U.S. 254, 273, 84 S.Ct. 710, 722, 11 L.Ed.2d 686 (1964).

[25] The Act, by its own terms, expired in 1801.

[26] *Act of July 4, 1840*, c. 45, 6 Stat. 802, accompanied by *H.R. Rep. No. 86*, 26th Cong., 1st Sess. (1840).

[27] Thomas Jefferson, *Jefferson's Letter to Mrs. Adams, July 22, 1804, 4*, JEFFERSON'S WORKS (H. Washington ed., 1853), pp. 555, 556.

[28] *Report with Senate bill No. 122*, 24th Cong., 1st Sess., pp. 3, discussed in *New York Times v. Sullivan*, 376 U.S. 254, 276, 84 S.Ct. 710, 724, 11 L.Ed.2d 686 (1964).

[29] *E.g.*, Holmes, J. (joined by Brandeis, J.) dissenting in *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919); Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 288-89, 72 S.Ct. 725, 747, 96 L.Ed. 919 (1953); *New York Times v. Sullivan*, 376 U.S. 254, 276, 84 S.Ct. 710, 723–24, 11 L.Ed.2d 686 (1964) (Brennan, J., for the Court).

[30] WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE (1958), pp. 47.

the First Amendment. Classical constitutional law commentators came to a similar conclusion.[31]

After the sad experience of the enforcement of the Sedition Law, there was little activity raising free speech issues, until shortly before World War I. The federal government, particularly during the Civil War,[32] occasionally tried to punish critical speech, but the Supreme Court had no important role to play.[33] That all changed with America's entry into World War I. The Supreme Court came out of hibernation.

IV. WORLD WAR I AND ITS AFTERMATH

The politicians of the early 20th century forgot our experience with the Alien and Sedition Acts of the early 18th century. Congress, in response to the domestic political unrest that greeted America's entrance into World War I, passed the Espionage Act of 1917[34] and the Sedition Act of 1918.[35] These laws did not respect the right to dissent in time of war. Cases that the government brought under this legislation reached the Supreme Court, for the first time. The court then developed standards for

[31] THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (1927), pp. 899-900; ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES (1942), pp. 27-28.

[32] Michael Kent Curtis, *Lincoln, Vallandigham, and the Anti-War Speech in the Civil War*, 7 WILLIAM & MARY BILL OF RIGHTS JOURNAL 105 (1998), discusses the arrest by Union soldiers of Clement L. Vallandigham, a former Democratic congressman, because of his anti-war speech of May 1, 1863. He said the purpose of the war was not to save the Union but to free the slaves and sacrifice liberty to "King Lincoln. That arrest started a debate about the role of free speech in time of war. Vallandigham sued for release under *habeas corpus*, but the Supreme Court said it had no jurisdiction to issue the writ to a military commission. *Ex Parte Clement L. Vallandigham*, 68 U.S. (1 Wall.) 243, 17 L. Ed. 589 (1863).

[33] Alexis Anderson, *The Formative Period of First Amendment Theory*, 1870–1915, 24 AMERICAN JOURNAL OF LEGAL HISTory 56 (1980); David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE LAW JOURNAL 516 (1981); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 UNIVERSITY OF CHICAGO LAW REVIEW 1205 (1983); Howard Owen Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY LAW JOURNAL 59 (1986); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920 (1999).

[34] *Espionage Act of June 15, 1917*, ch. 30, 40 Stat. 217.

[35] *Sedition Act of May 16, 1918*, ch. 75, 40 Stat. 553.

approaching First Amendment rights at a time when the nation was at war. The climate was not conducive to any expansive reading of the free speech guarantee. The Court, like the politicians, forgot the Greek philosophers and the historical lessons of the Alien and Sedition Acts.

In 1919, the Supreme Court handed down two important decisions involving free speech issues, *Schenck v. United States*[36] and *Abrams v. United States*.[37] In the first case, the Court introduces the "clear and present danger" test. In both, the Court denied any protection for speech.

1. *Schenck v. United States*

In *Schenck,* the Court affirmed the defendants' conviction for conspiracy to violate the Espionage Act of 1917. The year was 1919. The great Red Scare had begun, inspired by Communist successes in Russia and Eastern Europe. Feeding this fear were bomb-throwing anarchists, plus the popularity of the Industrial Workers of the World (an international radical industrial labor organization). In January 1919, Attorney General A. Mitchell Palmer launched a gigantic two-year Red witch-hunt, complete with mass arrests without benefit of habeas corpus, hasty prosecutions, and mass deportation of Communists and other radicals.[38]

The *Schenck* defendants, on the other hand, harangued no crowd, threw no bombs, and made no threats. Instead, they merely *mailed* leaflets to men eligible for military service, and argued that the draft violated the Thirteenth Amendment, which prohibits involuntary servitude (slavery). These leaflets, the government argued, violated the Espionage Act, which prohibited obstruction of military recruiting.

Nowadays**,** we think of Justice Holmes' opinions as a hymn to free speech. He was the darling of the liberals of his day, and his belief in free speech was a major reason for his popularity. Ironically, Holmes was a social Darwinist — a cynical believer in the survival of the fittest. He did not believe in progressive taxation, or social reform, or in antitrust enforcement. He fought in the Civil War and had an abolitionist

[36] *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

[37] *Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919).

[38] *E.g.*, A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (1970), pp. 690.

background, but the plight of black people did not move him. He was "an atheist, a materialist, a behaviorist and a resolute enemy of natural law."[39]

Only seven months before the parties argued the *Schenck* case before the Supreme Court, Holmes shared an interesting train ride with Judge Learned Hand. That meeting resulted in them exchanging correspondence. In his letter of June 24, 1918, Holmes actually declared to Learned Hand, "free speech stands no differently than freedom of vaccination. The occasions would be rarer when you cared enough to stop it but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong."[40]

Holmes, writing for the *Schenck* Court, *upheld* the convictions and the restraint on freedom of expression. He claimed that the convictions were necessary to prevent grave and immediate threats to national security. Ordinarily, Holmes, believed, leaflets should be constitutionally protected but:

> [T]he character of every act depends upon the circumstances in which it is done (...) The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force (...) The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[41]

Holmes concluded that First Amendment protection should not protect speech that hindered the war effort.[42]

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[39] Richard Posner, *Star of the Legal Stage*, WALL STREET JOURNAL, August 9, 1989 (Midwest ed.), pp. A9, cols. 1, 2.

[40] Frederic Kellogg, *Learned Hand and the Great Train Ride*, 56 THE AMERICAN SCHOLAR 471 (1987), pp. 471, 481. *See also* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989).

[41] *Schenck v. United States*, 249 U.S. 52, 39 S.Ct. (1919), pp. 249.

[42] One week after Holmes wrote the *Schenck* opinion, he wrote two other opinions for the Court affirming convictions in similar cases. In *Frohwerk v. United States*, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561 (1919), he stated that: "[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language (...) Whatever might be thought of the other counts on the evidence, if it were before us, we have

Holmes' conclusion does not flow from his hypothetical, which we should examine in detail. He said,

> The most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theater and causing a panic.

We should ask, why not? Notice that Holmes posits that the speaker is speaking falsely. If there really is a fire in a theater, should we not tell others about it? Or, do we quietly head for the exits and let others burn? There surely is nothing wrong in *truthfully* warning the theatre audience that there is a fire, even if many people injure themselves while trying to escape. The alternative would be to forbid people from warning others about fire. If that were the law, fire alarms would be illegal. Hence, the speaker can truthfully shout fire in a crowded theater. Holmes seems to assume that, even though the shout of fire will cause the same panic.

Let us consider his hypothetical a bit further. What is the speaker is speaking falsely but he does not know that it is false. The speaker, reasonably believing that there is a fire, will therefore shout a warning. The speaker shouting falsely (but reasonably) is not lying — not acting with scienter. Holmes may be assuming, with his hypothetical, that the speaker is knowingly causing a panic, but that knowledge should not cause liability if the person acts quite reasonably in warning fellow theatergoers even though the particular warning happens to be incorrect. We have fire alarms so that people can warn others, and we do not punish them if they act reasonably in triggering the alarm.

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decided in *Schenck v. United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion." *Schenck v. United States*, 249 U.S. 206, 39 S.Ct. (1919), pp. 250. In *Debs v. United States*, 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566 (1919), Holmes also affirmed the conviction of Eugene Debs, a prominent Socialist of the time, for allegedly encouraging listeners to obstruct the recruiting service. Holmes in this case spoke more in common law speech terms, which the Court adopted later (but not Holmes) in *Abrams* and *Gitlow*, discussed below. Holmes said in the *Debs* case: "We should add 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, & c., and unless the defendant had the specific intent to do so in his mind." *Debs v. United States*, 249 U.S. 211, 39 S.Ct. (1919), pp. 254 (emphasis added). *See* Paul Freund, *The Debs Case and Freedom of Speech*, 19 THE NEW REPUBLIC 13 (1919), reprinted in 40 UNIVERSITY OF CHICAGO LAW REVIEW 239 (1973); Harry Kalven, Jr., *Professor Ernst Freund and Debs v. United States*, 40 UNIVERSITY OF CHICAGO LAW REVIEW 235 (1973).

Holmes' "fire in the theater" hypothetical has another important (and unarticulated) qualifier that is not present in his conclusion about speech hindering the war effort. The Holmes hypothetical assumes that there is no time for others to respond to someone who falsely shouts "fire." We cannot debate the issue as to whether there is a fire because there is no time for debate. The circumstances are not conducive to the give and take of normal conversation. A fire alarm is not a call to debate.

Modern courts often say that the best remedy for speech that we do not like is more speech, not enforced silence. In the free marketplace of ideas, we can use speech to persuade others to reject the false speech. However, the Holmes hypothetical must necessarily assume that there is no time for the marketplace of ideas to work. Shouting the knowingly false words will cause a panic, and there is no time to debate the shouter, just like sounding the knowingly false fire alarm is not a call to discuss.

None of that is true of speech that opposes war. Those who object to the war protestors can engage them and dispute them in the marketplace of ideas. The speech in *Schenck* — or more precisely, the *leaflets* that the defendants *mailed* to men eligible for military service — could not cause a panic. There was plenty of time for proponents of the draft to respond to the claims of those opposed to the war. There was not even a claim that defendants were lying. They did not have scienter. They were not inciting anyone in the sense that the rabble-rouser harangues the lynch mob, goading, provoking, or prodding the crowd to storm the jail

Moreover, the Holmes hypothetical does not deal with speech that is inherently connected with an act that is independently criminal. For example, Holmes was not talking about a spy who informs the enemy how to break a top-secret code. That is speech tied in with an illegal action (aiding the enemy in time of war), and one could not rely on the market place of ideas to counteract the secret actions of a spy. Similarly, when someone takes an oath to tell the truth and then perjures himself on a material matter, he is not merely talking but he is using his words to engage in the act of obstructing justice.[43]

[43] *United States v. Alvarez*, 132 S.Ct. 2537, 2546 (2012): "It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.' Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system." (Plurality opinion of Kennedy, J.) (Internal citation omitted). *See* also, *United States v. Alvarez*, 132 S.Ct. 2537, 2554 (2012) (Breyer, J., joined by Kagan, J., concurring in the judgment).

2. *Abrams v. United States*

In his dissenting opinion in *Abrams v. United States*,[44] Holmes again embraced his "clear and present danger" test and tried to explain its application. This time, Holmes supported free speech but he could not persuade the majority. The government convicted the defendants of conspiracy to violate the Espionage Acts amendments, which prohibited speech that encouraged resistance to the war effort and curtailment of production "with intent to cripple or hinder the United States in the prosecution of the war."[45] These war protestors were not objecting to the war against Germany; instead, they distributed pamphlets criticizing the United States' involvement in the effort to crush Russia's new communist government.

The government was creative in explaining how the efforts of the United States in involving itself in Russia's civil war had anything to do with the war against Germany. The prosecutors used a chain of inferences that reminds us of the nursery rhyme, "This is the house that Jack built." The actual statute involved forbade conspiracies to interfere with production with the intent to hinder the prosecution of the war. The theory of the trial court and the Supreme Court majority was that to reduce arms production for the Russian fight might aid Germany (with whom the United States was at war) because the United States would have fewer total arms. The Court did not require any specific intent by defendants.

The majority in *Abrams* rejected the free speech defense and was unimpressed with Holmes' clear and present danger test.[46] Because of the "bad tendency" of the defendants' speech, the Court upheld the convictions, even though the lower court had sentenced defendants to lengthy prison terms of twenty years.[47] Under the majority's use of the

[44] *Abrams v. United States*, 250 U.S. 616, 624, 40 S.Ct. 17, 20, 63 L.Ed. 1173 (1919).

[45] *Espionage Act of June 15, 1917*, ch. 30, 40 Stat. 217, as amended May 16, 1918, 40 Stat. 553.

[46] *Abrams v. United States*, 250 U.S. at 621, 40 S.Ct. (1919), pp. 19: "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." The free speech defense was very briefly dismissed as "sufficiently discussed and is definitely negatived in *Schenck* (...)" and other cases. *Abrams v. United States*, 250 U.S. at 619, 40 S.Ct. (1919), pp. 18.

[47] *Abrams v. United States*, 250 U.S. at 629, 40 S.Ct. (1919), pp. 21-22.

bad tendency test, the government could prohibit speech if it would tend to bring about harmful results.

Holmes argued that it was ridiculous to assume these pamphlets would actually hinder the government's war efforts in Germany, which is what the statute required. He then quickly moved beyond the language of the statute to consider the constitutional issues. Holmes contended that the government could only restrict freedom of expression when there was "present danger of immediate evil or an intent to bring it about (...) Congress certainly cannot forbid all effort to change the mind of the country."[48] Laws regulating free speech, Holmes conceded, would be an effective way for the government to stifle opposition, but he maintained hope that people would realize that:

> the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of thought to get itself accepted in the competition of the market (...) That (...) is the theory of our Constitution.[49]

Holmes warned against overzealous repression of unpopular ideas:

> [W]e 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.[50]

Still, he hardly embraced any robust restriction on government power over speech:

> [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. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable.[51]

[48] *Abrams v. United States*, 250 U.S. at 628, 40 S.Ct. (1919), pp. 21.
[49] *Abrams v. United States*, 250 U.S. at 630, 40 S.Ct. (1919), pp. 22.
[50] *Abrams v. United States*, 250 U.S. at 630, 40 S.Ct. (1919), pp. 22.
[51] *Abrams v. United States*, 250 U.S. at 628, 40 S.Ct. (1919), pp. 21.

Under Holmes' utilitarian theory, we are left to wonder why the government must wait until the dangers of the plan are immediate. If one can punish such speech if it is successful, would it not be better to nip the problem in the bud? Holmes himself concedes, "Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt."

If the government can prosecute if the danger is greater, why wait until it is a greater danger? Holmes' rationale does not explain (to turn to the fire alarm analogy, once again), why the firefighters should wait until the little blaze becomes a big fire before trying to squelch it.

3. The *Gitlow* Decision

Six years after *Abrams*, the Court continued to use the bad tendency test to uphold restrictions on free speech. State prosecutors convicted defendants in *Gitlow v. New York*,[52] of violating New York's "criminal anarchy statute." This law prohibited advocating violent overthrow of the government. Defendants had printed and circulated a radical manifesto encouraging political strikes. There was no evidence that the manifesto had any effect on the individuals who received copies. It was simply unpersuasive.

The majority of the *Gitlow* Court once again upheld the conviction and the statute, finding the "clear and present danger test" inapplicable. The Court reasoned that the "clear and present danger test" applies when a statute prohibiting particular acts does not include any restrictions on the use of language. Only then, the majority argued, should the court use the "clear and present danger" standard to determine if the particular speech is constitutionally protected. In such a case, where the statute does not ban speech directly, the government must prove the defendants' language brought about the statutorily prohibited result.[53] However, *Gitlow* noted that the legislature had already determined what utterances would violate the statute. The government's decision that certain words are likely to cause the substantive evil "is not open for consideration."[54] The government must then show only that there is a reasonable basis for the statute. It is irrelevant that the particular words do or do not create a "clear and present danger."[55]

[52] *Gitlow v. New York,* 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).

[53] *Gitlow v. New York,* 268 U.S. at 670-71, 45 S.Ct. (1925), pp. 631-32.

[54] *Gitlow v. New York,* 268 U.S. at 670, 45 S.Ct. (1925), pp. 632.

[55] *Gitlow v. New York,* 268 U.S. at 671, 45 S.Ct. (1925), pp. 632.

Holmes dissented. He argued that if the "clear and present danger" test were properly applied it would be obvious there was no real danger that the defendants' pamphlets would instigate political revolution. If the manifesto presented an immediate threat to the stability of the governments, then there would be a need for suppression.[56] In the absence of immediate danger, Holmes concluded, the defendants were entitled to exercise their First Amendment rights.

Yet, Holmes once again appeared to concede that the government could limit speech if the speaker is convincing. He would protect the defendants in this case because their "redundant discourse (...) had no chance of starting a present conflagration."[57] The Constitution, it would seem, only protects boring speakers.

If the government may limit speech when it becomes persuasive, why wait? The government should be able to stop the problem at its source. Holmes' rationale for the "Clear and Present Danger" test suggests that the state can crush dissent when people start to believe in it (a "present" danger). If that is true, one might think that the state should not have to wait. Firefighters should wait and not act until the brushfire becomes a barnburner. As another justice later argued:

> [T]he words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed (...). If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members (...) action by the Government is required (...) Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent.[58]

4. The *Whitney* Case

In 1927, *Whitney v. California*,[59] the "clear and present danger" test made its appearance yet again, and this time at least it was in a concurrence, rather than a dissent. Still, it did not protect the defendant.

[56] *Gitlow v. New York,* 268 U.S. at 673, 45 S.Ct. (1925), pp. 632.

[57] *Gitlow v. New York,* 268 U.S. at 673, 45 S.Ct. (1925), pp. 632 (Holmes, J., dissenting, joined by Brandeis, J.).

[58] Chief Justice Vinson, speaking for a plurality, in *Dennis v. United States*, 341 U.S. 494, 509, 71 S.Ct. 857, 867, 95 L.Ed. 1137 (1951).

[59] *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).

In fact, when Holmes was on the Court, it never used the "clear and present danger" test to overturn any conviction.

The government convicted Mrs. Whitney of violating the California Criminal Syndicalism Act by assisting in the organization of the Communist Labor Party of California. The statute defined criminal syndicalism as any doctrine "advocating teaching or aiding and abetting (...) crime, sabotage (...) or unlawful acts of force and violence" to effect political or economic change.[60]

Whitney said that she had argued at the organizing convention for political reform through the democratic process. The majority of the Court, however, disagreed with her and found that she supported change through violence and terrorism. She maintained that she had not assisted the Communist Party with knowledge of its illegal purpose. The state based her conviction on her mere presence at the convention.[61]

The Court held the jury had resolved adversely to Mrs. Whitney important factual questions concluding (1) that she had participated at the convention, (2) that the united action of the Communist Party threatened the welfare of the state, and (3) that she was a part of that organization.[62] That was enough for the majority: it affirmed her conviction.

What is significant about *Whitney* is Justice Brandeis' Concurring Opinion. Brandeis labeled his opinion "concurring," but it reads like a dissent. Brandeis' technical reason for affirming the conviction (Ms. Whitney did not specifically raise the "clear and present danger" test), was probably a ploy or stratagem. The justices can call their opinions whatever they want. He wanted his opinion to carry more authority for future Justices, and an opinion called "concurring" should carry more weight than a dissent, which is, by definition, not precedent. Brandeis understood that the Supreme Court had not yet used Holmes' "clear and present danger test" to overturn a free speech conviction. If the Court used it at all, it only did so to affirm a conviction. (Brandeis did not know it yet but the Supreme Court would never use the "clear and present danger" test to overturn a conviction.)

Brandeis' opinion, which Holmes joined, upheld the conviction only on a narrow procedural ground. More importantly, he offered a rationale for free speech that was much more principled than Holmes' rationale. It did not adopt Holmes' concession that the government could not ban boring speech but could ban persuasive speech. The fatal flaw in Holmes'

[60] *Whitney v. California*, 274 U.S. at 359-60, 47 S.Ct. (1927), pp. 642.

[61] *Whitney v. California*, 274 U.S. at 363-67, 47 S.Ct. (1927), pp. 644-45.

[62] *Whitney v. California*, 274 U.S. at 367-72, 47 S.Ct. (1927), pp. 645-47.

reasoning what that, by conceding that the government can punish persuasive speech, it allowed the government to respond that it should be able to nip the problem in the bud by banning the same speech before the speaker become persuasive. The First Amendment does not protect much if it only protects the speaker engaged in a "redundant discourse, who has "no chance of starting a present conflagration."[63]

Brandeis, first, specifically objected to any notion, first presented in *Gitlow*, that the enactment of a statute foreclosed the application of the clear and present danger test by the Court.[64] Then he proceeded to justify the right of free speech even for those who protest a war or advocate communism or similar doctrines. To do that, he adopted the rationale of Herodotus, Pericles, Aeschylus, nearly two and one-half millennia earlier.

Brandeis argued that the state does not ordinarily have "the power to prohibit dissemination of social, economic, and political doctrine which a vast majority of its citizens believe to be false and fraught with evil consequence."[65] That is because the Framers "valued liberty both as an end and as a means." Those who drafted the First Amendment "believed liberty to be the secret of happiness and courage to be the secret of liberty."[66] His words mirrored similar sentiments in the funeral oration of Pericles, who said that we should regard "courage to be freedom and freedom to be happiness (...)."[67]

Brandeis also argued that free speech does not undermine but secures public order. "[R]epression breeds hate; (...) hate menaces stable government; (...) the path of safety lies in the opportunity *to discuss freely* supposed grievances and proposed remedies (...)"[68] That also channeled Pericles who said, "The *great impediment to action is, in our opinion, not discussion*, but the want of that knowledge *that is gained by discussion preparatory to action*."[69]

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[63] *Gitlow v. New York,* 268 U.S. at 673, 45 S.Ct. (1925), pp. 632 (Holmes, J., dissenting).

[64] "[T]he enactment of the statute cannot alone establish the facts which are essential to its validity." 274 U.S. at 374, 47 S.Ct. at 648 (Brandeis, J., concurring). *See* Nathaniel L. Nathanson, *The Philosophy of Mr. Justice Brandeis and Civil Liberties Today*, *in* SIX JUSTICES ON CIVIL RIGHTS (R.D. Rotunda ed., 1983), pp. 161-71.

[65] *Whitney v. California*, 274 U.S. at 374, 47 S.Ct. (1927), pp. 648.

[66] *Whitney v. California*, 274 U.S. at 375, 47 S.Ct. (1927), pp. 648.

[67] Pericles, *Funeral Oration*, *in*, THUCYDIDES: TRANSLATED INTO ENGLISH (B. Jowett transl., 1881), pp. 116, 122.

[68] *Whitney v. California*, 274 U.S. at 376-77, 47 S.Ct. (1927), pp. 648-49.

[69] Pericles, *Funeral Oration*, *in*, THUCYDIDES: TRANSLATED INTO ENGLISH (B. Jowett

Brandeis' concurrence emphasized that the government must prove *incitement* — an unthinking, Pavlovian response from the audience:

> [E]ven advocacy of [law] violation however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on (...) [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[70]

Only when speech is in a context that it causes unthinking, immediate action is the rationale for the protection of the First Amendment withdrawn. That is because when the speaker *incites* the crowd — for example, the leader incites a lynch mob, or the man knowingly and falsely shouts fire in a crowded theater — is there no opportunity for full discussion. There is no way to counter the speech we do not like by presenting more speech.

Brandeis concluded that in situations where the rights of free speech and assembly were infringed the defendant might contest this suppression alleging a violation of free speech. Instead, Whitney had challenged her conviction on the basis of denial of due process; therefore, Brandeis said that he was unable to pass on the free speech issue.[71] This technicality meant that Brandeis was able to call his opinion a concurrence, thus lending it more authority for future citations.

There was a long and winding road from Brandeis' concurrent in *Whitney* to the modern free speech doctrine. Rather than retrace each step, a journey that one can consider elsewhere,[72] let us move to the modern right to dissent and the protections of those who advocate (but do not engage in) violence and other illegal conduct. The modern view rejects "clear and present danger" and adopts a stricter test that incorporates and extends the Brandeis rationale.

transl., 1881), pp. 116, 118, 119 (emphasis added).

[70] *Whitney v. California*, 274 U.S. at 376-77, 47 S.Ct. (1927), pp.648-49.

[71] *Whitney v. California*, 274 U.S. at 379, 47 S.Ct. (1927), pp. 649.

[72] RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, VOL. 5 (2012), §§20.1 to 20.17.

V. THE MODERN TEST

During the late 1960s as the Court focused on protecting the advocacy of unpopular ideas. This modern test is much more protective of the right to dissent. It grew out of three cases decided by the Court in the late 1960s: *Bond v. Floyd*,[73] *Watts v. United States*,[74] and *Brandenburg v. Ohio*.[75]

1. The *Julian Bond* Case

Julian Bond was a duly elected member of the George House of Representative. The other Members of the Georgia House refused to seat him. The problem was that Bond had publicly expressed his support of a statement issued by the Student Nonviolent Coordinating Committee (SNCC) criticizing the United States' involvement in Viet Nam and the operation of the draft laws.[76] The Georgia legislature conducted a special hearing to determine if Bond, in good faith, could take the mandatory oath to support the Constitution. At the legislative hearing, Bond said that he was willing and able to take his oath of office. He testified that he supported individuals who burned their draft cards but, he added, he did not burn his own nor had he counseled anyone to burn their card.[77] Nonetheless, the Georgia House voted not to administer the oath or seat Bond. Bond sued and that led to *Bond v. Floyd*.[78]

The U.S. Supreme Court held that the Georgia House violated Bond's right of free expression.[79] Although the oath of office was constitutionally valid, Chief Justice Warren wrote, this requirement did not empower the state representatives to challenge a duly elected legislator's sincerity in swearing allegiance to the Constitution. Such authority could be used to

[73] *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966).

[74] *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*).

[75] *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*).

[76] *Bond v. Floyd*, 385 U.S. at 118-21, 87 S.Ct. (1966), pp. 341-42.

[77] *Bond v. Floyd*, 385 U.S. at 123-24, 87 S.Ct. (1966), pp. 343-44. The Supreme Court later upheld the constitutionality of federal laws punishing draft card burning in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[78] *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966).

[79] *Bond v. Floyd*, 385 U.S. at 137, 87 S.Ct. (1966), pp. 350.

stifle dissents of legislators who disagreed with majority views.[80]

The Court also ruled that it would be unconstitutional for the Federal Government to convict Bond under the Selective Service Act for counseling or aiding persons to evade or refuse registration. The Court said that one could not reasonably interpret Bond's statements "as a call to unlawful refusal to be drafted."[81] Bond actually appeared to be advocating legal alternatives to the draft, not inciting people to violate the law. The Court concluded that Bond's punishment for these statements violated the First Amendment.[82]

2. The *Watts* Decision

A harbinger of the later cases is *Watts v. United States*.[83] In a brief, per curiam opinion the Supreme Court reversed Watts's conviction for violating a statute prohibiting persons from "knowingly and willfully (...) threat[ening] to take the life of or to inflict bodily harm upon the President." Watts, during a public rally in Washington, D.C., stated he would not report for his scheduled draft physical. Then he referred to President Johnson (L.B.J.) and added:

> If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.[84]

The Court said that the statute, is "constitutional on its face," because the nation certainly has a valid interest in protecting the President. However, the Court must interpret this statute, criminalizing certain forms of pure speech, in light of the First Amendment. "What is a threat must be distinguished from what is constitutionally protected speech."[85] Watts' statement was only "political hyperbole" and not a true threat.

> The language of the political arena (...) is often vituperative, abusive, and inexact. [The defendant's] only offense here was "a kind of very crude

[80] *Bond v. Floyd*, 385 U.S. at 132, 87 S.Ct. (1966), pp. 347-48.

[81] *Bond v. Floyd*, 385 U.S. at 133, 87 S.Ct. (1966), pp. 348.

[82] *Bond v. Floyd*, 385 U.S. at 134, 87 S.Ct. (1966), pp. 348-49, citing *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957).

[83] *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*).

[84] *Watts v. United States*, 394 U.S. at 706, 89 S.Ct. (1969) (*per curiam*), pp. 1401.

[85] *Watts v. United States*, 394 U.S. at 707, 89 S.Ct. (1969) (*per curiam*), pp. 1401.

offensive method of stating a political opposition to the President."[86]

One must consider Watts' statement in context. His "threat" was conditional, and his listeners responded by laughing. His words should only be interpreted as an expression of political belief.

The circumstances of the speech of Watts did not amount to a literal *incitement* of violence. If it had, the Court's reasoning and analysis would have been different.

The influence of the "incitement" prong of Brandies' concurrence in *Whitney*[87] is evident in both of these cases. The pivotal determination in *Bond* was the fact that the defendant was merely expressing his grievances with the government, not inciting a lynch mob to unlawful action. The Court reversed the defendant's conviction in *Watts* because his statement did not clearly present any imminent threat to the President.

That leads to the decision that incorporates the learning of the past and gives us the modern test — *Brandenburg v. Ohio*,[88] which finds its origins 2,500 years ago.

3. The *Brandenburg* Test

The culmination of the modern test is in *Brandenburg v. Ohio*.[89] It signaled a major shift in the Court. Many commentators, at the time, did not appreciate its significance, because the Court issued it ruling in a brief per curiam opinion, a designation often given to less significance opinions. The Warren Court rejected the limited protection of "clear and present danger" test as Holmes had advanced it, and instead adopted crucial differences in phrasing and emphasis to assure that its free speech protections would not be diluted.

Instead, *Brandenburg* created new test. First, it explicitly overruled the *Whitney*[90] decision. It did not adopt the clear and present danger test, and never explicitly referred to it. However, Justices Black and Douglas did. In their separate concurrences they made clear that, "the 'clear and

[86] *Watts v. United States*, 394 U.S. at 708, 89 S.Ct. (1969) (*per curiam*), pp. 1401-02.

[87] *Whitney v. California*, 274 U.S. 357, 372-80, 47 S.Ct. 641, 647-50, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

[88] *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*).

[89] *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*).

[90] *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).

present danger' doctrine should have no place in the interpretation of the First Amendment."[91] *Brandenburg* also added new vigor to the reasoning of the Brandeis concurrence in *Whitney*, and eliminated the open-ended use of the test that had prevailed in the "bad tendency" and "balancing" years.

The *Brandenburg* Court's per curiam opinion reversed the conviction of a Ku Klux Klan leader for violating Ohio's criminal syndicalism statute. Ohio charged Brandenburg with advocating political reform through violence and assembling with a group formed to teach criminal syndicalism. The facts showed that a man identified as Brandenburg arranged for a television news crew to attend a Ku Klux Klan rally. During the news film made at the rally, Klan members, including Brandenburg, discussed the group's plan to march on Congress.

The Court acknowledged that it had upheld a similar criminal syndicalism statute in *Whitney*, but, the Court said, later decisions discredited *Whitney*. The Court then held that the right of free speech protects advocacy of violence as long as the advocacy did not incite people to *imminent* action. The key is "incitement."

When a speaker uses speech to cause unthinking, immediate lawless action, one cannot rely on more speech in the market place of ideas to correct the errors of the original speech; there simply is not enough time, because there is an incitement. In these rare cases, the state has a significant interest in, and no other means of preventing, the resulting lawless conduct. The situation is comparable to someone urging the lynch mob to string up the prisoner. Or, to apply this test to the Holmes' analogy, it is akin to someone (a) knowingly and *falsely* shouting "fire" in a crowded theater (b) with the intent to cause a riot, in such circumstances, (c) where there is no time for reasoned debate, because both the *intent* of the speaker, his *objective* words, his scienter (he is knowingly and false shouting), and the circumstances in which he harangues the crowd amount to incitement.

Thus, *Brandenburg* developed a new, four-part test that emphasizes the need for the state to prove incitement. For the state conviction to be valid, the state must prove: (1) the speaker *subjectively intended* incitement; (2) in context, the words used are "likely to incite or produce" "*imminent*,

[91] *Brandenburg v. Ohio*, 395 U.S. 444, 449-50, 89 S.Ct. (1969) (*per curiam*), pp. 1831 (Black, J., concurring). *See* also, *Brandenburg v. Ohio*, 395 U.S. 444, 454, 89 S.Ct. (1969) (*per curiam*), pp. 1833 (Douglas, J., concurring): "I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it."

lawless action;"[92] and (3) the words used by the speaker *objectively encouraged*, urged, and (4) provoked imminent action. The Court made clear this third part of the test, with its focus on the objective words used by the speaker, in a later decision, *Hess v. Indiana*,[93] discussed below.

The *Brandenburg* Court then summarized the new test for speech that advocates unlawful conduct: The state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[94] Merely teaching abstract doctrines, the Court noted, was not like leading a group in a violent action. Moreover, the statute must be narrowly drawn to reflect these limitations. If the statute failed to distinguish between advocacy of a theory and advocacy of action, it abridges First Amendment freedoms.

Criminal syndicalism, as defined in the Ohio statute, did not pass the *Brandenburg* test. The statute forbade teaching of violent political revolution with the intent of spreading such doctrine or assembling with a group advocating this doctrine. At the defendant's trial, the prosecution made no attempt to distinguish between incitement and advocacy. Thus, the Ohio statute abridged the First and Fourteenth Amendments. Any law punishing mere advocacy of Ku Klux Klan doctrine and the assembling of Klan members to advocate their beliefs was unconstitutional.

Brandenburg's new formulation offers broad new protection for strong advocacy. Its major focus is on the inciting language of the speaker, that is, on the *objective* words, in addition to the need to show that the speech

[92] *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. (1969) (*per curiam*), pp. 1827, 1829 (emphasis added) ("advocacy is *directed* to *inciting* or producing *imminent* lawless action *and* is likely to incite or produce such action") (footnote omitted).

[93] *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973). *See*, Eugene Volokh, *Crime-Facilitating Speech*, 57 STANFORD LAW REVIEW 1095 (2005).

[94] *Brandenburg v. Ohio*, 395 U.S. at 447, 89 S.Ct. (1969) (*per curiam*), pp. 1829 (footnote omitted). Justice Douglas concurred separately entering the caveat that there was no place for the "clear and present danger" test in any cases involving First Amendment rights. He was distrustful of the test, which he believed could be easily manipulated to deny constitutional protection to any speech critical of existing government. *Brandenburg v. Ohio*, 395 U.S. at 450-52, 89 S.Ct. (1969) (*per curiam*), pp. 1831-32 (Douglas, J., concurring). Justice Black also concurred separately, and similarly objected to the clear and present danger test as insufficiently protective of free speech. *Brandenburg v. Ohio*, 395 U.S. at 449-450, 89 S.Ct. (1969) (*per curiam*), pp. 18311.

is directed to produce immediate, unthinking lawless action and that, in fact, the situation makes this purpose likely to be successful.

4. *Hess v. Indiana* and Its Vindication of *Brandenburg*

A post-Warren Court decision, *Hess v. Indiana*,[95] is significant because it demonstrates that the Court is serious and literal in its application of the test proposed in *Brandenburg*. The police arrested Hess (who was subsequently convicted) for disorderly conduct when he shouted "we'll take the fucking street later (or again)" during an antiwar demonstration. Two witnesses testified Hess did not appear to exhort demonstrators to go into the street that the police had just cleared, that he was facing the crowd, and that his tone of voice (although loud) was no louder than any of the other demonstrators.[96] The Indiana Supreme Court upheld the trial court's finding that Hess intended his remarks to incite further riotous behavior and were likely to produce such a result.

However, the United States Supreme Court reversed, and in its brief per curiam opinion the Court stated:

> At best, (...) the statement could be taken as counsel for present moderation; at worst it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the state to punish Hess' speech. Under our decisions, "the Constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."[97]

Because Hess' speech was "not directed to any person or group of persons," Hess had not advocated action that would produce imminent disorder. His statements, therefore, did not violate the disorderly conduct statutes.[98]

Justice Rehnquist, joined by Chief Justice Burger and Justice

[95] *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973).

[96] *Hess v. Indiana*, 414 U.S. at 106-07, 94 S.Ct. (1973), pp. 327-28.

[97] *Hess v. Indiana*, 414 U.S. at 108, 94 S.Ct. (1973), pp. 328 (emphasis in original), citing *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969) (*per curiam*).

[98] *Hess v. Indiana*, 414 U.S. at 108-09, 94 S.Ct. (1973), pp. 328-29.

Blackmun, strongly dissented to the per curiam opinion's "somewhat antiseptic description of this massing" of people and preferred to rely on the decision of the trial court, which was free to reject some testimony and accept other testimony. The majority, Rehnquist claimed, was merely interpreting the evidence differently, and thus exceeding the proper scope of review.[99] The majority was unmoved. There was some evidence that Hess' "the statement could be taken as counsel for present moderation" and hence his "objective words" did not meet the requirements of *Brandenburg*.

The new *Brandenburg* test — a test more vigorously phrased and strictly applied than the older clear and present danger test — now is the proper formula for determining when speech that advocates criminal conduct may constitutionally be punished. With its emphasis on incitement, imminent lawless action, and the objective words of the speaker, it should provide a strong measure of First Amendment protection.

When a speaker advocates violence using speech that does not literally incite,[100] the Court should protect the speaker. The Government

[99] *Hess v. Indiana*, 414 U.S. at 109-12, 94 S.Ct. (1973), pp. 329-30.

[100] Consider the application of this principle to those who sue the media, because of what they broadcast. A woman sued a television network and publisher for injuries inflicted by persons who, she alleged, were stimulated by watching a scene of brutality broadcast in a television drama. *National Broadcasting Co., Inc. v. Niemi*, 434 U.S. 1354, 98 S.Ct. 705, 54 L.Ed.2d 742 (1978) (Rehnquist, Circuit Justice), certiorari denied 435 U.S. 1000, 98 S.Ct. 1657, 56 L.Ed.2d 91 (1978), appeal after remand 126 Cal.App.3d 488, 178 Cal. Rptr. 888 (1981). The petitioners sought a stay of the state court order remanding for a trial. Circuit Justice Rehnquist denied the stay for procedural reasons, and he noted that the trial judge rendered judgment for petitioners because he found that the film "did not advocate or encourage violent and depraved acts and thus did not constitute an incitement." *National Broadcasting Co., Inc. v. Niemi*, 434 U.S. at 1356, 98 S.Ct. (1978), pp. 706. The *Brandenburg* test should be applicable to determine the free speech defense to plaintiff's tort claim. *See* also *Herceg v. Hustler Magazine, Inc*., 814 F.2d 1017, 1021 (5th Cir.1987). This case overturned a jury verdict against Hustler Magazine arising out of the death of an adolescent who attempted sexual practice described in a magazine article. "[W]e hold that liability cannot be imposed on Hustler on the basis that the article was an incitement to attempt a potentially fatal act without impermissibly infringing upon freedom of speech," *Herceg v. Hustler Magazine, Inc.*, *certiorari* negado, 485 U.S. 959, 108 S.Ct. 1219, 99 L.Ed.2d 420 (1988).

might urge the Court to look for proximity to violence rather than to the literal words of incitement.[101] However, *Brandenburg* rejects that theory.

5. *Brandenburg* and Marc Antony

Brandenburg's new formulation offers broad new protection for strong advocacy. Its major focus is on the inciting language of the speaker, that is, on the *objective* words, in addition to the need to show that the speaker subjectively *intends* the speech to produce immediate, unthinking lawless action in a situation that makes this purpose likely to be successful.

Let us apply this test of another funeral oration, not the oration of Pericles, but Marc Antony's funeral oration in Shakespeare's JULIUS CAESAR**.** Here are a few of Antony's words:

> I come to bury Caesar, not to praise him. The evil that men do lives after them; The good is oft interred with their bones; So let it be with Caesar. The noble Brutus Hath told you Caesar was ambitious: If it were so, it was a grievous fault, (...) [Caesar] was my friend, faithful and just to me: But Brutus says he was ambitious; And Brutus is an honourable man. (...) I thrice presented him a kingly crown, Which he did thrice refuse: was this ambition? Yet Brutus says he was ambitious; And, sure, he is an honourable man. I speak not to disprove what Brutus spoke, (...) My heart is in the coffin there with Caesar, And I must pause till it come back to me.[102]

[101] *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 928, 102 S.Ct. 3409, 3433, 73 L.Ed.2d 1215 (1982): "The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. *If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct.* In this case, however--with the possible exception of the Cox incident--the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966 speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." (emphasis added).

[102] William Shakespeare, *Act III, scene ii*, JULIUS CAESAR.

First, we can safely assume that Antony *subjectively intended* incitement. Second, in context, the words used were *likely to produce* imminent, lawless action. We all know what happened next: Civil War. Antony's side won, although it was a short-lived victory for Antony. His ally, Octavius Caesar, soon turned against him and forced Antony to commit suicide.

Still, Antony's speech does not meet the third part of the test — the words used by the speaker must *objectively encourage*, urge, and provoke imminent action. This third part of the test, with its focus on the objective words used by the speaker, protects Antony. He did not literally advocate violence. Indeed, he said his opponents were "honourable" men. He did not advocate war: he said he only spoke to bury Caesar. When he spoke, the ruling in *Brandenburg* would protect him. And in so doing the First Amendment protects all of us.

VI. CONCLUSION

A newspaper exchange occurred several years ago in a prominent legal newspaper on the pros and cons of government restrictions on the press corps covering the first Persian Gulf War. It illustrated a peculiar American tradition.[103] While we cling to our First Amendment rights to engage in robust debate about national affairs and, ultimately, to dissent from the policies of our government, we also indulge a penchant for robustly debating the conditions under which we should carry out our robust debates about national affairs. You might call this the First Amendment squared.

If there is any disadvantage to this preoccupation, it is that outsiders — for example, dictators like Saddam Hussein — may interpret failure of the United States Government to stifle debate and dissent as a sign of weakness and divisiveness. For example, shortly before the first Gulf War, Cable News Network correspondent Peter Arnett interviewed Saddam, who expressed gratitude to American anti-war demonstrators — apparently not understanding that dissent in America is par for the course.

None of this is cause to limit or even question our traditional freedoms. But it's worth a moment of appreciation for what we enjoy and a warning about the importance of preserving our expressive freedoms even — especially — when they become most inconvenient.

[103] Victor Navasky, *Press Limits: Censorship or Prudence; Pentagon Rules Impose Illegal Prior Restraint*, LEGAL TIMES, January 28, 1991, pp. 19.

The lesson that strength lies in free speech goes back at least as far as ancient Athens. Strength does not lie in enforced silence, but rather in robust dissent. The lessons of history should teach us that any efforts by war supporters to attack dissent would be playing right into the dictator's hands, adopting his rules as our own. Our way is to slug it out domestically. There is no point at which debate is closed. There is no point at which the only acceptable course of action is to rally round. Those who will argue — as some always do — that our soldiers will be demoralized by domestic dissent sell them short and do not understand the premium our Constitution places on free speech, or the power that freedom yields.

If we gathered a group of political actors and theorists — such as the early Congress (which enacted the Alien and Sedition Laws) and the Supreme Court (which adopted the bad tendency test) — they would advise us that a country could not conduct a war successfully if the government allows those opposed to it to speak out against it openly. Throughout most of our history, any such gathering would produce the same answer. Yet Herodotus, Pericles, Aeschylus, and their fellow Athenians knew better.

There are those who say it is more difficult for a democracy to go to war because it cannot conduct the war successfully if the people oppose it. That is a good thing, not a bad thing. In modern times, no democracy has warred against another. As Pericles reminds us, "The great impediment to action is, in our opinion, not discussion, but the want of knowledge that is gained by discussion preparatory to action."[104]

When the world is full of democracies and the dictators and terrorists whom they harbor are no more, then we will have lasting peace. In the meantime, the United States has demonstrated what many commentators and political theorists have long assumed could not be true. We can be a democracy, protect dissent even in time of war, and still be a major military and economic power, the world's only superpower.

We know, from our own experience, that even a nation at war need not sacrifice free speech. Many political commentators of old would tell us that we could not expect a nation to survive if it allows dissent in time of battle. Yet, American's experience with free speech tells us something else. The United States has not only survived but it has *thrived*, even though it allows dissent even in time of war.

As Senator John F. Kennedy said, while running for President, approximately 2,400 years ago, "We must know all the facts and hear all the alternatives and listen to all the criticisms. Let us welcome

[104] Pericles, *Funeral Oration*, *in*, THUCYDIDES: TRANSLATED INTO ENGLISH (B. Jowett transl., 1881), pp. 116, 118–19.

controversial books and controversial authors. For the Bill of Rights is the guardian of our security as well as our liberty."[105] When he said that, he echoed the ancient Greeks. There is little new under the sun.

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[105] John F. Kennedy, *Response to Questionnaire*, SATURDAY REVIEW, October 29, 1960, pp. 44. *See also*, TATYANA ECKSTRAND, THE LIBRARIAN'S BOOK OF QUOTES (2009), pp. 10; RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS (Library of Congress ed., 2010), pp. 29.

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