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The Right to Shout Fire in a Crowded Theatre: Hateful Speech and the First Amendment

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I. INTRODUCTION

Oliver Wendell Holmes’s dictum that the First Amendment “would not protect a man in falsely shouting fire in a theatre,”¹ summarizes free speech law for many people. They think it allows Congress to make *some* laws restricting, if the laws are necessary, even though the First Amendment says, “Congress shall make *no* law . . . abridging freedom of speech or of the press.”² Plug “falsely shouting fire in a crowded theater” into Google and you will find over 3.3 million results.³ Remove the adjective, “crowded” (Justice Holmes did not use it), and the references climb to about 9 million.⁴ Limit the phrase to case citations in Westlaw, and you find over 200 cases and another 200 court documents. These references are often approving if not fawning.

Yet, if we look closely at what the law as it is now—rather than as Justice Holmes imagined it, or as Justice Holmes thought it should be—we will see that Justice Holmes was wrong. It would be a very rare circumstance that the government could constitutionally prohibit one from shouting “fire” in a crowded theatre.

The United States Supreme Court has travelled on a long and twisting path to reach that destination. We owe our thanks

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¹ The full quotation is:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre 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.

Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) (internal citations omitted).

² U.S. CONST. amend. I (emphasis added).

³ Note, the number of results is as of April 10, 2019.

⁴ Note, the number of results is as of April 10, 2019.

to the Greek philosophers and playwrights who first blazed that trail, nearly two and one-half millennia ago.

As discussed below, the Supreme Court now protects hateful speech, such as a burning cross.⁵ It protects threats against the life of the President, except for the narrow category of “true ‘threat[s].’”⁶ In general, speech alone (in contrast to speech *plus* an action or an activity) is protected,⁷ which is why there is a constitutional right to *lie* about receiving the Congressional Medal of Honor,⁸ although not a right to commit fraud (e.g., by using deceptive speech to take money under false pretenses). Those who receive government grants even have a free speech right to receive these subsidies while rejecting a government requirement that they affirm in their award documents that they are “opposed to prostitution”⁹

⁵ See, e.g., *Virginia v. Black*, 538 U.S. 343, 366–67 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992); *Brandenburg v. Ohio*, 395 U.S. 444, 445, 449 (1969) (per curiam).

⁶ *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). The Court did not invalidate, on its face, the statute (8 U.S.C. § 871(a)) which prohibits threats against the President. It did overturn the conviction, directed an acquittal, and explained that the government must prove more than that the defendant said the forbidden words. See *id.* at 707. “[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.” *Id.* at 707–08.

“Hundreds of celebrity howlers threaten the President of the United States every year, sometimes because they disagree with his policies, but more often just because he is the President”—yet there is no prosecution. STALKING, THREATENING, AND ATTACKING PUBLIC FIGURES: A PSYCHOLOGICAL AND BEHAVIORAL ANALYSIS 111 (J. Reid Meloy, Lorraine Sheridan & Jens Hoffmann eds., 2008).

⁷ There are a few categories of speech that the Court historically has not protected, such as “obscenity” and “defamation,” both terms of art that are narrowly defined. *New York Times v. Sullivan*, 376 U.S. 254, 269, 271–74 (1964) (analyzing “defamation” and “knowing falsehood” about public officials); *Miller v. California*, 413 U.S. 15, 24–26 (1973) (defining obscenity as “patently offensive representations . . . of ultimate sexual acts” that lack “serious literary, artistic, political, or scientific value”). Such decisions, however, do nothing to undercut the protection the First Amendment gives to hateful speech.

⁸ See *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012). This case made clear that there are very few constitutional content-based restrictions on free speech:

[C]ontent-based restrictions on speech have been permitted . . . only when confined to the few “historic and traditional categories [of expression] Among these categories are advocacy intended, and likely, to incite lawless action, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent

Id. at 717 (internal citations omitted).

⁹ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 210, 221 (2013) (internal quotation marks omitted). Chief Justice Roberts, for the Court, held that the Agency for International Development’s (AID) requirement violated the First Amendment because it compels, as a condition of federal funding, recipients to affirm a belief that, by its nature, cannot be confined within the scope of the government program. *Id.* There is a constitutional distinction between (1) conditions that define the limits of the government spending program (that is, they specify the activities Congress wants to subsidize) and (2) conditions that try to leverage funding “to regulate speech outside the contours of the program itself.” *Id.* at 214–15.

The law may require that the grantee may not use federal funds to promote or advocate the legalization or practice of prostitution. *Id.* at 218. However, the government’s

When the Court allows prohibitions of some speech, such as perjury, it makes clear that it is speech *plus* something else.¹⁰ If I hold a gun to your head and say, “give me your money or your life,” I’m engaging in conduct (robbery) accompanied by words. If I say, “I wish I had Bill Gates’ money,” or, “I hate the idle rich,” I am just engaging in speech.

Another example is speech that proposes an illegal commercial transaction. If it is illegal to hire an assassin, the law can make it illegal to publish an advertisement that says, “Wanted: A hitman; no questions asked.”¹¹

Similarly, a law that prohibits aiding and abetting a “foreign terrorist organization,” can apply to a group that uses speech to support the lawful and nonviolent purposes of the terrorist organization because the law does not ban “pure political speech. . . .”¹² It bans speech plus, that is, speech used in connection with an activity in order to help the terrorist group under the direction of that group.

An organization or individual can say or advocate whatever they want. They can argue, if they wish, that Hamas is a good organization and its methods are justified. That is independent advocacy. However, the Court upheld a statute limiting speech that aided foreign terrorists because it did not limit pure speech. It “reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the

second requirement is invalid, because it improperly *leverages* funding. *Id.* at 215–16. It requires a funding recipient to “espouse a specific belief as its own.” *Id.* at 219. This Policy Requirement, “by its very nature” affects speech outside the scope of the federally funded program. *Id.* at 218. It “goes beyond preventing” grantees from using private funds in a way that would undermine the federal program. *Id.* at 220. “It requires them to pledge allegiance to the [g]overnment’s policy of eradicating prostitution.” *Id.* This “Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the [g]overnment program.” *Id.*

¹⁰ “It is not simply because perjured statements are false that they lack First Amendment protection.” *Alvarez*, 567 U.S. at 720. When the Court allows civil or criminal penalties for “defamation, fraud, or some other legally cognizable harm associated with a false statement” there is speech plus something else, “such as an invasion of privacy or the costs of vexatious litigation.” *Id.* at 719. Perjury, that is, intentionally introducing false evidence, interferes with a trial in the same way that an action, such as introducing a forged document, interferes with a fair trial. *Id.* at 720. As the Court said in *United States v. Dunnigan*, “[t]o uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned.” 507 U.S. 87, 97 (1993).

¹¹ It is not “an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.*, 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)) (internal quotation marks omitted); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

¹² *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28–29 (2010).

group's legitimacy is not covered."¹³ Congress may enact this statute to prevent terrorist organizations like Hamas from using "its overt political and charitable organizations as a financial and logistical support network for its terrorist operations."¹⁴

The government cannot limit the speaker simply because the audience is upset with the words spoken. There is no longer any heckler's veto, even when the speaker spews forth hate. Thus, the Nazis have a constitutional right to march through Skokie, Illinois, a town that the American Nazis chose specifically because a large number of Holocaust survivors lived there.¹⁵ The point of the Nazi march was to impose psychic harm—yet the First Amendment still protected it.¹⁶

In order to understand modern speech doctrine, where people have a right to lie, to march celebrating Nazi hate, to advocate anarchy, to accept federal money while rejecting some of the conditions attached to it—to know how we arrived here, with substantially more free speech rights than Justice Holmes would ever have imagined—we have to understand free speech's ancient roots.

It is more important than ever to understand the intellectual rationale of modern free expression, and learn why Justice Holmes was wrong, because today, free speech is under renewed attack from those who used to be its supporters.

The usual suspects who reject free speech would include terrorists, like those who, in 2015, attacked *Charlie Hebdo*, the satirical French newspaper, and claimed twelve lives.¹⁷ To that group there is another, more surprising addition—those who intimated that *Charlie Hebdo* had it coming to them. These people argued that those who parody should exercise self-censorship if the objects of their satire are prone to violence.¹⁸ In other words, blame the victim.

¹³ *Id.* at 31–32.

¹⁴ *Id.* at 31 (quoting MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD 2* (2006)).

¹⁵ See *Collin v. Smith*, 578 F.2d 1197, 1198–200 (7th Cir. 1978). The members of the National Socialist Party of America, clothed with the swastika and other symbols of the Nazis, planned to march in front of the Village Hall in Skokie, a Chicago suburb with a large Jewish population, including several thousand survivors of the Holocaust. *Id.* The court invalidated various attempts to forbid the march, including ordinance No. "995," prohibiting the dissemination of any materials promoting and inciting racial hatred. *Id.* at 1207.

¹⁶ *Id.*

¹⁷ Ronald D. Rotunda, *Je Suis Charlie Hebdo*, VERDICT (Feb. 16, 2015), https://verdict.justia.com/2015/02/16/je-suis-charlie-hebdo?utm_source=twitter&utm_campaign=wordtwit&utm_medium=web [<http://perma.cc/N2TL-UUDM>].

¹⁸ See, e.g., Erik Wemple, *On CNN, Jay Carney Sticks to Position that Charlie Hebdo Should Have Pulled Back*, WASH. POST (Jan. 8, 2015), https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/01/08/on-cnn-jay-carney-sticks-to-position-that-charlie-hebdo-should-have-pulled-back/?utm_term=.28144e322e05 [<http://perma.cc/JA74-JJ5B>]; Charles Lane,

What is even more troubling is that to the list of usual suspects, we must add some *unusual* suspects—those who think of themselves as liberal and supportive of free speech yet justify restriction to prohibit what they regard as hateful or hurtful speech. That group is more worrisome, because its members used to be the champions of free speech.

Our universities are educating the leaders of tomorrow. These future leaders do not believe in free speech. We know from news reports that when university students do not agree with a viewpoint of a speaker, the students protest, sometimes violently.¹⁹ Recent surveys show that the protestors are not merely a small but vocal minority. Instead, they are a majority.²⁰

If we survey Democrats, Republicans, or Independents, fewer than half think the First Amendment protects speech the students regard as “hate speech.”²¹ A significant number of students, regardless of political affiliation, believe it is completely appropriate for students to disrupt a speaker so that no one in the audience can hear him or her.²² One-fifth of all college students believe that *violence* is appropriate to prevent the speaker from being able to speak at all.²³ In 1984, twenty percent of college students thought that universities should ban speakers they considered extreme.²⁴ By 2015, that percentage more than doubled to forty-three percent.²⁵

Charlie Hebdo's Editors Took Big Risks to Defend Freedom of Expression, WASH. POST (Jan. 7, 2015), https://www.washingtonpost.com/opinions/charles-lane-charlie-hebdos-editors-took-risks-to-defend-the-freedom-of-expression/2015/01/07/8b4a3782-9694-11e4-927a-4fa2638cd1b0_story.html?utm_term=.819dfad16d51 [<http://perma.cc/3Y4S-6K57>].

¹⁹ See Lisa Rathke, *US colleges confront a new era of sometimes-violent protest*, AP NEWS (Apr. 26, 2017), <https://www.apnews.com/116336dc947e4e8faba1d5ccd1805398/US-colleges-confront-a-new-era-of-sometimes-violent-protest> [<http://perma.cc/G9RL-AZ27>].

²⁰ See John Villasenor, *Views among college students regarding the First Amendment: Results from a new survey*, BROOKINGS INST. (Sept. 18, 2017), <https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/> [<http://perma.cc/NQK7-5NH2>].

²¹ *Id.* (finding only thirty-nine percent of students surveyed believe hate speech is protected).

²² *Id.* (finding fifty-one percent of students surveyed agreed with the statement “A student group opposed to the speaker disrupts the speech by loudly and repeatedly shouting so that the audience cannot hear the speaker. Do you agree or disagree that the student group’s actions are acceptable?”).

²³ *Id.* (finding nineteen percent of students agreed with the statement “A student group opposed to the speaker uses violence to prevent the speaker from speaking. Do you agree or disagree that the student group’s actions are acceptable?”).

²⁴ See Jean M. Twenge, *The Smartphone Generation vs. Free Speech*, WALL ST. J. (Sept. 1, 2017, 10:08 AM), <https://www.wsj.com/articles/the-smartphone-generation-vs-free-speech-1504274890>.

²⁵ See *id.*; see also Jean M. Twenge, Review --- *The Smartphone Generation vs. Free Speech --- Risk-Averse and Unaccustomed to Independence, they Flee From the ‘Hurt’ of Words*, WALL ST. J., Sept. 2, 2017, at C.3; JEAN M. TWENGE, iGEN: WHY TODAY’S SUPER-CONNECTED KIDS ARE GROWING UP LESS REBELLIOUS, MORE TOLERANT, LESS HAPPY—AND COMPLETELY UNPREPARED FOR ADULTHOOD 252 (2017).

Instead of being bastions of free discourse, many universities are now politically correct. Take Iowa State University for example. Last year, it required its students to waive their free speech rights. It explicitly told its students that they must agree, in order to graduate, that the University can punish speech it regards as “harassment” even though the student is “[e]ngaging in First Amendment protected speech activities.”²⁶ The inevitable lawsuit followed, and the university settled and agreed to change its ways.²⁷ As the verified complaint explained—quoting the Iowa State University’s “Student Disciplinary Regulations”—the University’s “Discriminatory Harassment” policy prohibits students from engaging in “unwelcome behavior” on the basis of specific classifications, including religion, and confirms that “[e]ngaging in First Amendment protected speech activities” may be deemed harassment “depending upon the circumstances.”²⁸

In law schools nowadays, it is common for constitutional law professors to teach that there are many limits to the First Amendment. Often, they begin a course on free speech by quoting Justice Holmes, explaining that protection for free speech requires “balance,” and then justifying whatever restrictions they would like to impose. Although the First Amendment provides that Congress “shall make no law . . . abridging the freedom of speech, or of the press,”²⁹ it does not really mean “no law”—that is how the argument goes and its proponents use it to justify banning hate speech, politically incorrect speech, and hurtful speech.³⁰

Others to add to the list of those who reject First Amendment values are some lower courts.³¹ They do not acknowledge the modern vigorous protections for unpopular speech perhaps because they do

²⁶ Verified Compl. for Declaratory and Injunctive Relief ¶¶ 124, 133, *Dunn v. Leath*, No. 4:16-CV-00553-JAJ-CFB (S.D. Iowa Oct. 17, 2016).

²⁷ The University settled and changed its policies in 2017. *See* Settlement Agreement & Release at 2, *Dunn v. Leath*, No. 4:16-CV-00553-JAJ-CFB (S.D. Iowa Oct. 17, 2016).

²⁸ Verified Compl. for Declaratory and Injunctive Relief, *supra* note 26, ¶ 133.

²⁹ U.S. CONST. amend. I.

³⁰ Professor and Judge Richard Posner frankly adopts a balancing test in First Amendment cases. *See, e.g.*, RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 67 (2001) (“[S]peech should be allowed if but only if its benefits equal or exceed its costs discounted by their probability and by their futurity, and reduced by the costs of administering a ban.”). *See also* *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1097 (7th Cir. 1990) (Posner, J., concurring) (“I insist that bullfighting is an expressive activity,” but the state can still forbid it “because in American society its harmful consequences are thought to outweigh its expressive value”), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

³¹ *See, e.g.*, *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 767, 770 (9th Cir. 2014) (holding that a public school could prohibit students from wearing a symbol of the American Flag on their clothing because doing so might upset some Mexican American students); *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 233 (6th Cir. 2015) (en banc) (overruling the panel which had upheld a heckler’s veto).

not understand the modern rationale for free speech—a rationale that traces its ancestry to ancient roots.

Typically, these people—university administrators, university students, law school professors, lower courts, modern pundits—go on to agree that the restrictions on free speech that occurred in an earlier time were wrong and were not justified at the time, *but*—there is always a “but”—today is different.

Justice Frankfurter is a typical example of this phenomenon, and the vehicle he used to justify his position is his concurring opinion in *Dennis v. United States*, in which the Court upheld the conviction of the defendants for violating the Smith Act.³² *Dennis* came down in 1951, in the midst of the second Red Scare, which lasted from about 1947 to mid-1950s.³³ It was the heyday of McCarthyism.

Justice Frankfurter agreed that the government overreacted to the first Red Scare, in the 1920s, but the government, he said, is not overreacting to the second Red Scare, which he was living through.³⁴

Justice Frankfurter took “judicial notice” of the ascendancy of the Communist doctrine in the 1950s because it was, to him, a matter of “common knowledge,” and that knowledge “would amply justify a legislature in concluding that recruitment of additional members for the [Communist] Party would create a substantial danger to national security.”³⁵ What the Court is doing now, said Justice Frankfurter, is not like what the Court did in *Gitlow v. New York*, when it upheld a state conviction for “criminal anarchy.”³⁶ Justice Frankfurter would require:

[E]xcessive tolerance of the legislative judgment to suppose that the *Gitlow* publication in the circumstances could justify serious concern. In contrast, there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security.³⁷

In contemporary America, many of those who ridicule both the first and the second Red Scare of yesteryear have no problem attacking unpopular speech today, banning it, or limiting it to certain “zones” with trigger warnings to protect the sensitive.

³² 341 U.S. 494, 541–42 (1951) (Frankfurter, J., concurring).

³³ See RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 3 (1991); see also MICHAEL J. HEALE, MCCARTHY’S AMERICANS: RED SCARE POLITICS IN STATE AND NATION, 1935–1965, at 2 (1998); LANDON R. Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT 1 (2012).

³⁴ See generally David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 22 (2003).

³⁵ *Dennis*, 341 U.S. at 547 (Frankfurter, J., concurring).

³⁶ *Gitlow v. New York*, 268 U.S. 652, 654, 670 (1925).

³⁷ *Dennis*, 341 U.S. at 541–42 (Frankfurter, J., concurring).

Like Justice Frankfurter, they say, “This time it’s different. The prior generation overreacted, but what we are doing now is justified.” That is the way the argument goes, and each generation that justifies restrictions uses it.

The universities, which used to be the citadels of free speech—think of the University of California, Berkeley, famous for its “free speech movement” in the 1960s³⁸—are now famous for limiting free speech.³⁹ Courts now justify banning students from wearing t-shirts with the American Flag because showing it might upset those who see it.⁴⁰ In this new legal regime, we have a right to burn the flag⁴¹ but not to display it.

Justice Frankfurter’s false distinction between the first Red Scare and the second one, as well as Berkeley’s free speech turnaround, should teach us that each generation must re-learn the importance of free speech, even rebellious speech in time of war, even speech that promotes hate, or advocates anarchy. And to re-learn that lesson, we must start with the ancient Greeks.

II. PERICLES AND THE BIRTH OF FREE SPEECH

Over 2400 years ago, in the cradle of democracy, the people of Athens believed that freedom of speech made their armies more courageous, and that free speech made them stronger, not weaker. Their philosophers, historians, and playwrights crafted the first arguments favoring free speech and opposing government regulation, even in time of war. The primary ancient Greek figures, along with Pericles, were Herodotus, Thucydides, and Aeschylus.

Herodotus wrote the *Histories*, his History of the Persian Wars (499–479 BC), in nine books. We sometimes refer to Herodotus as the father of history.⁴² Before Herodotus, people wrote history in the sense of chronicling events, writing lists (there was a battle; a king lost; another king sealed his victory by a propitious marriage, and so forth). Herodotus was different: He was interested in *why* things happened; what caused nations or

³⁸ See ROBERT COHEN, FREEDOM’S ORATOR: MARIO SAVIO AND THE RADICAL LEGACY OF THE 1960s 82 (2009).

³⁹ John Woodrow Cox, *Berkeley Gave Birth to the Free Speech Movement in the 1960s. Now, Conservatives are Demanding it Include Them*, WASH. POST (Apr. 20, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/04/20/berkeley-gave-birth-to-the-free-speech-movement-in-the-1960s-now-conservatives-are-demanding-it-include-them/?utm_term=.2e7f010e6538 [http://perma.cc/5TQH-S5H3].

⁴⁰ See *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 774–75 (9th Cir. 2014). Discussed *infra*.

⁴¹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399 (1989); *United States v. Eichman*, 496 U.S. 310, 312 (1990).

⁴² J. A. S. Evans, *Father of History or Father of Lies: The Reputation of Herodotus*, 64 CLASSICAL J. 11 (1968).

leaders to do one thing or another.⁴³ Our word, “history” comes from the Greek wording meaning “inquiry” or “investigation.”⁴⁴ Admittedly, he relied on oral recollections, rumors, and legends, which is why others call him the father of lies.⁴⁵

Herodotus sought to understand and explain why Athenians could win victories over the more numerous Persians in the first part of the fifth century BC⁴⁶ His answer was that Athenians fought as free people, not as slaves.⁴⁷ 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.”⁴⁸ Freedom made the Athenians braver.

In contrast to Herodotus, Thucydides wrote about the history of events that occurred during his lifetime.⁴⁹ He sought to confirm facts through eyewitness accounts and written records. Yet his histories were no transcript of what people said. In his *History of the Peloponnesian War*, Thucydides included long speeches that historical figures *might* have delivered.⁵⁰ 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 famous Funeral Oration of Pericles. Although one might think that Thucydides presents this speech as if it were a verbatim transcript of Pericles’ discourse, Thucydides does not pretend that it is so. Instead, he said the words represent what Pericles intended, what he could have said, what was “called for in the situation.”⁵¹

The Funeral Oration indicates free speech was not merely a theory of a few academicians. Democratically elected political leaders were also embracing it. Pericles delivered his speech as a

⁴³ *See id.* at 12.

⁴⁴ *Id.*

⁴⁵ *See id.* at 11; *see also* DONALD LATEINER, *THE HISTORICAL METHOD OF HERODOTUS* 8–9 (1989); DAVID SACKS, *ENCYCLOPEDIA OF THE ANCIENT GREEK WORLD* 155 (Lisa R. Brody ed., 2005).

⁴⁶ LATEINER, *supra* note 45, at 182.

⁴⁷ *Id.*

⁴⁸ I.F. STONE, *THE TRIAL OF SOCRATES* 50 (1988) (footnote omitted).

⁴⁹ *See* Julia Kindt, *Guide to the Classics: Thucydides’s History of the Peloponnesian War*, CONVERSATION (June 12, 2017, 3:56 PM), <http://theconversation.com/guide-to-the-classics-thucydides-history-of-the-peloponnesian-war-71550> [<http://perma.cc/ZZZ6-HGUL>].

⁵⁰ *See id.*

⁵¹ ALAN RYAN, *ON POLITICS: A HISTORY OF POLITICAL THOUGHT: FROM HERODOTUS TO THE PRESENT* 23 (2012).

tribute to those who died in the war that year.⁵² When he spoke, the first year of Peloponnesian War was just ending.⁵³

Thucydides tells us that Pericles 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. False. The great impediment to action is, in our opinion, not discussion, but the want of knowledge that is gained by discussion preparatory to action.⁵⁴

Pericles does not focus on the achievements of Athens' military. Instead, he praises the Athenian form of government and its protection of free speech.⁵⁵

The final ancient figure justifying free speech as essential to democracy is the playwright, Aeschylus. His play, *The Persians*, echoed Herodotus and Thucydides.⁵⁶ He wrote it in 472 BC. That same year, this play won first prize at the dramatic competitions in the City Dionysia festival of Athens.⁵⁷ Remember that at this time, in contrast to little city-state of Athens, dictators and kings ruled the rest of the world.

Aeschylus explained that the Athenians were victorious because, “[o]f no man are they the slaves or subjects.”⁵⁸ Art reflects life, and Aeschylus, in his play, reflected what many Athenians believed: Athenians should celebrate their victory not as a victory of Greeks over Persians, but as 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.”⁵⁹ The Persians outnumbered the Greeks, but the Greeks won a decisive victory led by Themistocles, a non-aristocratic Athenian politician and general.

Herodotus, Thucydides, Aeschylus, along with political leaders like Pericles, all embraced this ancient truth: People who are free are people who work more intensely because they work

⁵² See Kindt, *supra* note 49.

⁵³ *Id.*

⁵⁴ Pericles, *Funeral Oration*, in BENJAMIN JOWETT, THUCYDIDES 116, 118–19 (Clarendon Press, 1881).

⁵⁵ *See id.*

⁵⁶ See Tim Rood, *Thucydides' Persian Wars*, in OXFORD READINGS IN THUCYDIDES 168–69 (Jeffrey S. Rusten ed., 2009).

⁵⁷ See AMNON KABATCHNIK, BLOOD ON THE STAGE: 480 B.C. TO 1600 A.D. 4 (2014). *The Persians* is the first play in recorded history that contains a ghost scene. *Id.*

⁵⁸ STONE, *supra* note 48, at 51 (quoting 2 AESCHYLUS, *PLAYS*).

⁵⁹ *Id.*

for themselves, not for a master.⁶⁰ 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.

The countries of the world were slow to learn this lesson. When the United States began its experiment with democracy, it was also slow to learn. 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 favor with his advocacy of the “clear and present danger” test. In fact, the Supreme Court has typically used the “clear and present danger” test to uphold a criminal prosecution of speech.⁶¹ In contrast, the modern Court now follows the path that Pericles and the Greek philosophers first walked.

While there will always be those who call for prosecutions of those who spew hate, history has taught us that the best response for the speech we do not like is more speech, not less. How we moved from the “clear and present danger” test to the modern, more robust protection for hate speech and political dissent offers an important historical lesson. This lesson is important, not only because it tells us how we reached the contemporary view, but also reveals why our journey was so slow. When we understand the rationale to protect hateful speech, we will be less likely to repeat the mistakes of the past.

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

The Framers were conversant with the Greek philosophers as well as the classical Roman and European philosophers.⁶² Reflecting the political theories of the ancients, 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).⁶³

The original Constitution created the various branches of the central government and divided power between the central

⁶⁰ *Id.*

⁶¹ As Justice Douglas’s concurrence explained in *Brandenburg v. Ohio*, “My own view is quite different. I see no place in the régime 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.” 395 U.S. 444, 454 (1969) (Douglas, J., concurring).

⁶² See generally CARL J. RICHARD, *GREEKS & ROMANS BEARING GIFTS: HOW THE ANCIENTS INSPIRED THE FOUNDING FATHERS* (2008).

⁶³ See Ronald D. Rotunda, *Vertical Federalism, the New States’ Rights, and the Wisdom of Crowds*, 11 FLA. INT’L U. L. REV. 307, 307–08 (2016).

government and the states—those were the structural protections. Other than these structural safeguards, the Framers imposed few direct limitations on the government. The original Constitution guarantees only a few important rights. It prohibits any religious test for any office—state or federal⁶⁴—a restriction that was very progressive for its time. The original Constitution also guarantees the right to a jury trial in criminal cases.⁶⁵ It prohibits Congress from suspending the right of habeas corpus, or from enacting any *ex post facto* law or bill of attainder.⁶⁶ It also forbids states from enacting any bill of attainder or *ex post facto* law.⁶⁷ To protect reasonable expectations, the original Constitution forbids states from impairing the obligation of contracts.⁶⁸ Yet, it had no bill of rights.

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 limits 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.⁶⁹

For example, the body of the Constitution does not give the central government any power to regulate the press or speech. However, Congress does have the power to declare war,⁷⁰ and the President has the power of the Commander-in-Chief of the Armed Forces.⁷¹ Congress, when the nation is at war, has the power to wage war effectively. The Necessary and Proper Clause augments these express powers with 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.”⁷² 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 it easier to conduct a more effective war against foreign enemies.

Because the proposed Constitution had few limits, some people who favored it were worried that it did not explicitly grant

64 See U.S. CONST. art. VI, cl. 3.

65 See *id.* at art. III, § 2, cl. 3.

66 See *id.*; *id.* at art. I, § 9, cl. 2–3.

67 See *id.* at art. I, § 9, cl. 2–3; *id.* at art. III, § 2, cl. 3; *id.* at art. I, § 10, cl. 1.

68 *Id.* at art. I, § 10, cl. 1. See also *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427–28 (1934) (explaining that the Contract Clause was adopted to give predictability to the business of society).

69 See *infra*.

70 See U.S. CONST. art. I, § 8, cl. 11.

71 *Id.* at art. II, § 2, cl. 1.

72 *Id.* at art. I, § 8, cl. 18. This clause greatly increases federal power by authorizing implied powers. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418–20 (1819).

more protections. The Framers responded to these pressures by promising that once the Constitution went into effect, the first Congress would propose a Bill of Rights.⁷³ 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.⁷⁴ It granted more individual freedoms, though these rights did not limit the states until after the enactment of the Fourteenth Amendment.⁷⁵

The Bill of Rights gave us the First Amendment, protecting freedom of speech and press.⁷⁶ Some modern constitutions have provisions that suspend constitutional rights in times of public danger. For example, the South African Constitution, which Justice Ruth Bader Ginsburg has praised,⁷⁷ devotes 970 words to an article dedicated to suspending rights, including free speech.⁷⁸ There is a table of “non-derogable rights,” but free speech is not one of them.⁷⁹ In contrast, the First Amendment speaks in broader terms: “Congress shall make no law . . . abridging the freedom of speech, or of the press”⁸⁰ There is no provision for suspending any rights.

IV. 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

⁷³ See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 768–69 (1928).

⁷⁴ See ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS: 1776–1791*, at 214–15 (1955).

⁷⁵ See *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Bill of Rights only applies to the United States government); see also 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 14.2 (5th ed. 2012) (explaining that the Bill of Rights did not apply to state governments until the passage of the Fourteenth Amendment).

⁷⁶ U.S. CONST. amend. I.

⁷⁷ See Ronald D. Rotunda, *Egypt's Constitutional Do-Over: This Time Around, Take a Closer Look at America's Bill of Rights*, WALL ST. J. (July 17, 2013), <https://www.wsj.com/articles/SB10001424127887323740804578601383340547860>.

⁷⁸ S. AFR. CONST., 1996 art. 37.

⁷⁹ See Ronald D. Rotunda, Model, Resource, or Outlier? What Effect has the U.S. Constitution had on the Recently Adopted Constitutions of Other Nations?, Panel Discussion hosted by the Heritage Foundation (Oct. 11, 2012), in *THE HERITAGE FOUNDATION*, May 17, 2013, at 12, 15, <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> [<http://perma.cc/5F2R-MNAT>]. “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 [twenty] 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.” *Id.* (emphasis in original).

⁸⁰ U.S. CONST. amend. I.

an effort to squelch criticism of President Adams.⁸¹ 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 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.⁸² 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.⁸³

Its companion law, 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”⁸⁴ In spite of these prohibitions, the law was relatively tolerant for its time: It allowed the defendant to use truth as a defense to a prosecution; and it gave the defendant a jury trial; and it authorized the jury to determine the law and facts under the direction of the court.⁸⁵

In contrast, England did not establish a defense of truth until 1843.⁸⁶ Before that, supporters of sedition laws argued, “[t]he greater the truth, the greater the libel.”⁸⁷ 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.⁸⁸ Moreover, if you say something is true, you cannot retract it without lying. Our sedition law, measured against the English prohibitions, was moderately enlightened for its time.

President Adams used the Sedition Act against members of Thomas Jefferson’s Democratic-Republican Party for their

⁸¹ See *Alien and Sedition Acts*, HISTORY (last updated Aug. 21, 2018), <https://www.history.com/topics/early-us/alien-and-sedition-acts> [http://perma.cc/TEV4-BKAR].

⁸² Alien Act, ch. 58, § 1, 1 Stat. 570–71 (1798).

⁸³ 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.5 (5th ed. 2012).

⁸⁴ Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798).

⁸⁵ *Id.* § 3.

⁸⁶ See Libel Act 1843, 6 & 7 Vict. c. 96 (Eng.); see also 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 383 (London, MacMillan and Co. 1883). England did allow the jury to return a general verdict during this period. See Fox’s Libel Act 1792, 32 Geo. 3, c. 60.

⁸⁷ 2 HENRY SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY AND OTHER SUBJECTS 516 (Fac. of L. Nw. Univ. ed., 1921). This maxim is typically attributed to Lord Mansfield, William Murray, first Earl of Mansfield. See THE OXFORD DICTIONARY OF PROVERBS 136 (Jennifer Speake ed., 2003).

⁸⁸ See *id.*

criticism of his administration.⁸⁹ Jefferson objected to the Sedition Act, but his actions were hardly a paean to free speech.⁹⁰ When he assumed the presidency, he urged his supporters to use *state* laws, rather than federal law, to keep the press in line.⁹¹ Thus, he pressed the Governor of Pennsylvania to institute a “few [selected] prosecutions” of those newspapers who attacked the Jeffersonians.⁹²

The First Amendment’s protections, initially, were chains made of parchment because the federal government enforced the Sedition Act, although no case involving the Sedition Act ever worked its way to the Supreme Court. Historians today agree that this law would not survive constitutional scrutiny.

The Sedition Act “crystallized a national awareness of the central meaning of the First Amendment.”⁹³ After the Sedition Act expired,⁹⁴ 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.⁹⁵ 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”⁹⁶

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.”⁹⁷ Over the years, various Justices, in case law⁹⁸ or their other writings,⁹⁹ have

⁸⁹ LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* 58–59 (Ivan R. Dee, Inc. ed., Elephant Paperbacks 1989) (1963).

⁹⁰ *See id.*

⁹¹ *See e.g.*, Ryan Mattimore, *Presidential Feuds With the Media Are Nothing New*, *History* (Jan. 26, 2018), <https://www.history.com/news/presidents-relationship-with-press>.

⁹² LEVY, *supra* note 89.

⁹³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

⁹⁴ The Act, by its own terms, expired in 1801. Sedition Act, ch. 74, §4, 1 Stat. 597 (1798).

⁹⁵ *See* Act of July 4, 1840, ch. 45, 6 Stat. 802; H.R. REP. NO. 26-86, at 2 (1840).

⁹⁶ Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 4 *THE WRITINGS OF THOMAS JEFFERSON: BEING HIS BIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE* 555–56 (H. A. Washington ed., 1854).

⁹⁷ *Sullivan*, 376 U.S. at 276 (quoting S. REP. NO. 24-122, at 3 (1836)).

⁹⁸ *See, e.g.*, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting); *see also* *Beauharnais v. Illinois*, 343 U.S. 250, 288–89 (1953) (Jackson, J., dissenting); *Sullivan*, 376 U.S. at 276.

⁹⁹ *See* WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 47 (Doubleday and Co. 1958).

volunteered that this law violated the First Amendment. Classical constitutional law commentators came to a similar conclusion.¹⁰⁰

After the sad experience of the enforcement of the Sedition Law, there was little activity raising free speech issues until World War I. The federal government, particularly during the Civil War,¹⁰¹ occasionally tried to punish critical speech, but the Supreme Court had no important role to play.¹⁰² That all changed with America's entry into World War I. The Supreme Court came out of hibernation.

V. THE BIRTH OF SHOUTING "FIRE" IN A CROWDED THEATRE: WORLD WAR I AND ITS AFTERMATH

The politicians of the early twentieth century forgot our experience with the Alien and Sedition Acts of the early eighteenth century. Congress, in response to the domestic political unrest that greeted America's entrance into World War I, passed the Espionage Act of 1917¹⁰³ and the Sedition Act of 1918.¹⁰⁴ 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.¹⁰⁵ The Court then developed standards for 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.

¹⁰⁰ See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 899–900 (8th ed., Carrington, 1927); see also ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 17–28 (Harv. Univ. Press, 1954) (1941).

¹⁰¹ See Michael Kent Curtis, *Lincoln, Vallandigham, and the Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105 (1998) (discussing the arrest by Union soldiers of Clement L. Vallandigham, a former Democratic congressman, because of his anti-war speech of May 1, 1863). Vallandigham said the purpose of the war was not to save the Union but to free the slaves and sacrifice liberty to "King Lincoln." *Id.* at 123. 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. See *Ex Parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1863).

¹⁰² See Alexis Anderson, *The Formative Period of First Amendment Theory, 1870–1915*, 24 AM. J. LEGAL HIST. 56, 64 (1980); see also David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 516, 581–82 (1981); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1227–29 (1983); Howard Owen Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY L.J. 59, 72–73 (1986); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 1 (1999).

¹⁰³ Espionage Act of 1917, ch. 30, 40 Stat. 217.

¹⁰⁴ Sedition Act of 1918, ch. 75, 40 Stat. 553 (repealed 1920).

¹⁰⁵ See generally Marcie K. Cowley, *Red Scare*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1063/red-scare> [http://perma.cc/7K7B-T36F].

In 1919, the Supreme Court handed down two important decisions involving free speech issues, *Schenck v. United States*¹⁰⁶ and *Abrams v. United States*.¹⁰⁷ In the first case, the Court introduces the “clear and present danger” test.¹⁰⁸ In both, the Court denied any protection for speech.¹⁰⁹

A. *Schenck v. United States*: Shouting Fire in a Theatre

In *Schenck*, the Court affirmed the defendants’ conviction for conspiracy to violate the Espionage Act of 1917.¹¹⁰ The year was 1919. The great Red Scare (later called the first Red Scare) had begun, reacting to Communist successes in Russia and Eastern Europe.¹¹¹ Feeding this fear were bomb-throwing anarchists, plus the growing popularity of the Industrial Workers of the World¹¹² (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.¹¹³

However, the *Schenck* defendants harangued no crowd, threw no bombs, and made no threats.¹¹⁴ 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).¹¹⁵ These leaflets, the government argued, violated the Espionage Act, which prohibited obstruction of military recruiting.¹¹⁶

Nowadays, we think of Justice Holmes’s opinions as a hymn to free speech. He was the darling of the liberals of his day, and the perception that he believed in free speech was a major reason for his popularity.¹¹⁷ Ironically, Justice Holmes was a Social

¹⁰⁶ 249 U.S. 47 (1919).

¹⁰⁷ 250 U.S. 616 (1919).

¹⁰⁸ *Schenck*, 249 U.S. at 52.

¹⁰⁹ *Id.* at 52–53; *Abrams*, 250 U.S. 623–24.

¹¹⁰ *Schenck*, 249 U.S. at 53.

¹¹¹ See Cowley, *supra* note 105.

¹¹² See *Industrial Workers of the World*, ENCYCLOPAEDIA BRITANNICA (last updated June 15, 2015), <https://www.britannica.com/topic/Industrial-Workers-of-the-World> [<http://perma.cc/B5HW-4RQZ>].

¹¹³ See, e.g., 2 ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 690 (4th ed. 1970).

¹¹⁴ *Schenck*, 249 U.S. at 48–51.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Elizabeth R. Purdy, *Oliver Wendell Holmes Jr.*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1337/oliver-wendell-holmes-jr> [<http://perma.cc/A66L-GAU2>] (“[Justice Holmes] was viewed as a civil libertarian who protected the First Amendment from encroachments, particularly during World War I and the period of hostility to dissent that followed the war.”).

Darwinist—a cynical believer in the survival of the fittest.¹¹⁸ He did not believe in progressive taxation, or social reform, or in antitrust enforcement. Although he fought in the Civil War and had an abolitionist background, the plight of black people did not move him.¹¹⁹ Justice Holmes was “an atheist, a materialist, a behaviorist and a resolute enemy of natural law.”¹²⁰

Only seven months before the parties argued the *Schenck* case before the Supreme Court, Justice Holmes shared an interesting train ride with Judge Learned Hand, which resulted in them exchanging correspondence.¹²¹ In his letter of June 24, 1918, Justice Holmes actually declared to Judge Learned Hand:

[F]ree 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.¹²²

The following year, Justice Holmes, writing for the *Schenck* Court, *upheld* the convictions and the restraint on freedom of expression.¹²³ He claimed that the convictions were necessary to prevent grave and immediate threats to national security.¹²⁴ Ordinarily, Justice Holmes believed, leaflets should be constitutionally protected, but—

the 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 theatre 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.¹²⁵

¹¹⁸ See generally Seth Vannatta, *Justice Holmes the Social Darwinist*, 4 PLURALIST 78 (2019).

¹¹⁹ See *id.* at 81, 89.

¹²⁰ See Richard A. Posner, *Bookshelf: Star of the Legal Stage*, WALL ST. J., Aug. 9, 1989, at A9.

¹²¹ See Frederic R. Kellogg, *Learned Hand and the Great Train Ride*, 56 AM. SCHOLAR 471, 480–81 (1987).

¹²² *Id.*; see also DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 1870–1920*, at 293 (Arthur McEvoy & Christopher Tomlins eds., 1997).

¹²³ See *Schenck v. United States*, 249 U.S. 47, 52–53 (1919).

¹²⁴ *Id.* at 52.

¹²⁵ *Id.* (internal citations omitted).

Justice Holmes concluded that First Amendment protection should *not* protect speech that hindered the war effort.¹²⁶ That presents a “clear and present danger.”¹²⁷

Justice Holmes’s 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.¹²⁸

We should ask, why not? Notice that Justice Holmes limits the prosecution to the speaker who is speaking falsely. That is his only limitation, and it certainly makes sense. If there really is a fire in a theatre, 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. Justice Holmes seems to assume that, even though shouting of fire will cause the same panic. That is the only restriction he imposes on his famous hypothetical—that the speaker is speaking falsely.

Let us consider his facile hypothetical a bit further. What if the speaker is speaking falsely but he does not know that it is false? The speaker, reasonably believing that there is a fire, will

¹²⁶ *Id.* One week after Justice Holmes wrote the *Schenck* opinion, he wrote two other opinions for the Court affirming convictions in similar cases. In *Frohwerk v. United States*, he stated:

[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 decided in *Schenck v. United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion.

249 U.S. 204, 206 (1919) (emphasis removed).

In *Debs v. United States*, Justice Holmes also affirmed the conviction of Eugene Debs, a prominent Socialist of the time, for allegedly encouraging listeners to obstruct the recruiting service. 249 U.S. 211, 216 (1919). Justice Holmes in this case spoke more in common law speech terms, which the Court (but not Justice Holmes) later adopted in *Abrams* and *Gitlow*, discussed below. Justice 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.

Id. (emphasis added). See generally Paul Freund, *The Debs Case and Freedom of Speech*, 19 NEW REPUBLIC 13 (1919) (reprinted in 40 U. CHI. L. REV. 235, 239 (1973)); Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition: Professor Ernst Freund and Debs v. United States*, 40 U. CHI. L. REV. 235, 236–38, 240 (1973).

¹²⁷ *Schenck*, 249 U.S. at 52.

¹²⁸ *Id.*

therefore shout a warning. The speaker shouting falsely (but reasonably) is not lying—not acting with scienter. Even if there is a panic, the government will not punish the person who acts reasonably in warning his fellow theatregoers.

Let us turn to the portion of Justice Holmes’s hypothetical where there is a panic. Justice Holmes does not say that the speaker knows that he will be causing a panic. Yet, even if Justice Holmes meant to impose that limitation—that the speaker is knowingly causing a panic—that knowledge should not cause liability if the person acts quite reasonably in warning fellow theatregoers even though the particular warning happens to be incorrect. We install fire alarms so that people can warn others without the need to shout, and we do not punish them if they act reasonably in triggering the alarm.

Justice Holmes’s hypothetical does not provide, but must assume, that the theatre audience believes the speaker is speaking the truth, even if the speaker is speaking falsely. Assume, for example, that the ushers were removing a member of the audience because he was unruly and talking too loudly. The rest of the audience might cheer the miscreant as he is escorted to the exits. If this troublemaker starts shouting, “invasion,” “fire,” “flood,” the audience would laugh as the ushers escort him to the exits. The miscreant was knowingly and falsely shouting fire in a crowded theater, but he would not be prosecuted for starting a riot because there would be no panic.

Now assume the speaker knowingly and falsely shouts fire in the crowded theatre, but there is no panic because of the circumstances. For example, if the audience was watching a play or movie, and an actor shouted “fire,” there would be no panic because the audience would not believe the speaker even if he had the acting ability of Meryl Streep.

If several members of the audience—perhaps they were inattentive because it was a boring play—misunderstood and thought that the voice shouting fire was someone in the audience, and subsequently panicked, we still would not prosecute the actor who was simply playing his part. Think of the “War of the Worlds” radio broadcast of Orson Welles. Many of the people who tuned in after the show began to think that the Martians were really invading New Jersey.¹²⁹ There were no prosecutions of Orson Welles although many people were upset with him.¹³⁰

¹²⁹ See A. BRAD SCHWARTZ, BROADCAST HYSTERIA: ORSON WELLES’S WAR OF THE WORLDS AND THE ART OF FAKE NEWS 3–7 (2015).

¹³⁰ See *id.* at 131–35.

Justice Holmes's "fire in the theatre" hypothetical has another important (and unarticulated) qualifier that is not present in his conclusion about speech hindering the war effort. The hypothetical assumes that there is no time for others to respond to someone who falsely shouts "fire." We cannot normally 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. Yet, there was plenty of time to debate the assertion of the *Schenck* defendants that the draft violated the Thirteenth Amendment.

It is not difficult to imagine a situation where there was time to debate, even in the "shout fire" hypothetical. A member of the audience shouts "fire," while pointing to smoke in a corner of the stage. An actor on the stage responds, "No need to worry; that's just smoke from dry ice, which the magician will use in the next act." The audience, already rising from their chairs, sits down, waits for the next act, and wonders how the magician will use a solid form of carbon dioxide in a magic trick.

The "shouting fire" hypothetical necessarily assumes that there is no time for responsive speech. Yet, often there is time. Modern courts often say that the best remedy for speech that we do not like is more speech, not enforced silence.¹³¹ In the free marketplace of ideas, we can use speech to persuade others to reject the false speech. Justice Holmes's hypothetical unavoidably assumes that there is no time for the marketplace of ideas to work. In the right circumstances, shouting the knowingly false words will cause a panic, and there will be no time to debate the shouter. In that factual situation, falsely pulling the fire alarm is not a call to discuss the nature of fire.

The state may punish someone who knowingly triggers a false fire alarm with the intent of causing a panic, thereby causing a panic, but there will be no punishment or a substantially less severe one if no one hears the alarm because there will be no panic. That is also true in the Justice Holmes's "shouting fire" hypothetical. If the audience were composed of deaf people watching a movie with closed captions, and our hypothetical malefactor sneaks into the theatre and shouts "fire," there will be no panic. Whatever one might prosecute this reprobate for, causing a riot will not be one of the counts because there will be no riot. Justice Holmes's hypothetical should be assuming that the audience is ripe to hear the words and act on them before anyone can counteract the speech. We are talking about the language of incitement. Merely knowingly shouting falsely is not enough.

¹³¹ See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927).

Now, let us think of the speech involved in *Schenck*—where Justice Holmes wrote the opinion upholding the criminal prosecution.¹³² The defendants opposed the war, but speeches that oppose war do not fit the hypothetical. Those speeches are not like falsely shouting “fire” in a crowded theatre knowing that the audience will panic instinctively, because there is no time to reason with them.

The speech in *Schenck*—or more precisely, the *leaflets* that the defendants *mailed* to men eligible for military service—could not cause a panic, yet Justice Holmes upheld the convictions. Those who object to the war protestors can engage them and dispute them in the marketplace of ideas. 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 the defendants were lying about anything. They believed what they were saying and thus did not have the scienter to lie knowingly. They were also not inciting anyone in the sense that the rabble-rouser harangues the lynch mob, goading, provoking, or prodding the willing crowd to storm the jail immediately.

In addition, Justice Holmes’s hypothetical does not require that the speech be inherently connected with an act that is independently criminal. For example, Justice 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 marketplace 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.¹³³ Or, if the bank robber passes a note to the teller saying, “This is a stick-up,” the writing is connected to an act, an attempted theft.

B. *Abrams v. United States*

In his dissenting opinion in *Abrams v. United States*, Justice Holmes again embraced his “clear and present danger” test and tried to explain its application.¹³⁴ This time, Justice Holmes

¹³² See generally *Schenck*, 249 U.S. at 48.

¹³³ *United States v. Alvarez*, 567 U.S. 709, 720–21 (2012) (Kennedy, J.) (plurality opinion). As Justice Kennedy explained:

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.

Id. (internal citations omitted). See also *id.* at 734–38 (Breyer, J., joined by Kagan, J., concurring).

¹³⁴ *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting).

finally supported free speech but he could not persuade the majority to overturn the guilty verdicts.¹³⁵ The government convicted the defendants of conspiracy to violate the Espionage Acts amendments,¹³⁶ which prohibited speech that encouraged resistance to the war effort and curtailment of production “with intent by such curtailment to cripple or hinder the United States in the prosecution of the war”¹³⁷ At the time, we were at war against Germany, but 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.¹³⁸

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.¹³⁹ 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 of “things necessary to the prosecution of war” with the intent to hinder the prosecution of the war.¹⁴⁰ 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.¹⁴¹ The Court did not require any specific intent by the defendants.¹⁴²

The majority in *Abrams* rejected the free speech defense and was unimpressed with Justice Holmes’s clear and present danger test.¹⁴³ Because of the “bad tendency” of the defendants’ speech, the Court upheld the convictions, even though the lower court had sentenced the defendants to lengthy prison terms of twenty years.¹⁴⁴ Under the majority’s use of the bad tendency test, the government could prohibit speech if it could tend to bring about harmful results.

Justice Holmes argued that it was ridiculous to assume these pamphlets would actually hinder the government’s war

¹³⁵ *See id.* at 631 (Holmes, J., dissenting).

¹³⁶ *Id.* at 623–24.

¹³⁷ Espionage Act of 1917, ch. 30, sec. 3, 40 Stat. 21 (as amended May 16, 1918 at ch. 75, §3, 40 Stat. 553) (repealed 1948).

¹³⁸ *See Abrams*, 250 U.S. at 624–25 (Holmes, J., dissenting).

¹³⁹ *Id.* at 624–26 (Holmes, J., dissenting).

¹⁴⁰ *Id.* at 626 (Holmes, J., dissenting).

¹⁴¹ *Id.* at 622.

¹⁴² *Id.* at 629 (Holmes, J., dissenting).

¹⁴³ *See id.* at 621 (“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 negated in *Schenck . . .*” and other cases. *Id.* at 619.

¹⁴⁴ *Id.* at 629 (Holmes, J., dissenting).

efforts in Germany, which is what the statute required.¹⁴⁵ 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.”¹⁴⁶

Laws regulating free speech, Justice Holmes conceded, would be an effective way for the government to stifle opposition, but he maintained hope that people would realize that:

[T]he 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.¹⁴⁷

Justice 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.¹⁴⁸

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.¹⁴⁹

Under Justice Holmes’s 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? Justice 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.”¹⁵⁰

¹⁴⁵ *Id.* at 626–27 (Holmes, J., dissenting).

¹⁴⁶ *Id.* at 626–28 (Holmes, J., dissenting).

¹⁴⁷ *Id.* at 630 (Holmes, J., dissenting).

¹⁴⁸ *Id.* (Holmes, J., dissenting).

¹⁴⁹ *Id.* at 628 (Holmes, J., dissenting).

¹⁵⁰ *Id.* (Holmes, J., dissenting).

If the government can prosecute if the danger becomes greater, why wait until it is a greater danger? Justice Holmes's rationale does not explain (to turn to the fire analogy, once again) why the firefighters should wait until the little blaze becomes a big fire before trying to squelch it. If the danger is very great, such as the danger of a forcible overthrow of the government, should we not nip it in the bud? Why wait until the revolutionaries have advanced from pistols to Howitzers? If a speaker is haranguing a crowd, and the crowd seems uninterested, is that not the best time to take down the speaker, before the crowd gets bigger and when it is not absorbed with radical ideas?

C. 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*, of violating New York’s “criminal anarchy statute.”¹⁵¹ This law prohibited advocating for a violent overthrow of the government.¹⁵² Defendants had printed and circulated a radical manifesto encouraging political strikes.¹⁵³ There was no evidence that the manifesto had any effect on the individuals who received copies.¹⁵⁴ The manifesto was unpersuasive.¹⁵⁵

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.¹⁵⁶ Only then, the majority argued, should a court use the “clear and present danger” test to determine if the particular speech is constitutionally protected.¹⁵⁷ 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.¹⁵⁸ However, *Gitlow* noted that the legislature had already determined what utterances would violate the statute.¹⁵⁹ The government’s decision that certain words are likely to cause the substantive evil “is not open for consideration.”¹⁶⁰ The government must then show only that there is a reasonable basis for the

¹⁵¹ See *Gitlow v. New York*, 268 U.S. 652, 654–55 (1925).

¹⁵² *Id.* at 654.

¹⁵³ *Id.* at 655–56.

¹⁵⁴ *Id.* at 656.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 671.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 670–71.

¹⁵⁹ *Id.* at 670.

¹⁶⁰ *Id.*

statute. It is irrelevant that the particular words do or do not create a “clear and present danger.”¹⁶¹

Justice 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.¹⁶² If the manifesto presented an immediate threat to the stability of the government, then there would be a need for suppression.¹⁶³ In the absence of immediate danger, Justice Holmes concluded, the defendants were entitled to exercise their First Amendment rights.

Yet, Justice 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.”¹⁶⁴ The Constitution, it would seem, only protects boring speakers. Persuasive speakers are fair game for criminal prosecution under Justice Holmes’s rationale.

If the government may limit speech when it becomes persuasive, why wait? The government should be able to stop the problem at its source. Justice Holmes’s 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—just like firefighters should not wait to act until the brushfire becomes a barnburner.

D. *Whitney*, Justice Brandeis, and the Influence of Pericles

In the Court’s 1927 decision, *Whitney v. California*,¹⁶⁵ 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. In fact, when Justice Holmes was on the Court, it never used the “clear and present danger” test to overturn any conviction.

The government convicted Ms. Whitney of violating the California Criminal Syndicalism Act by assisting in the organization of the Communist Labor Party of California.¹⁶⁶ The statute defined criminal syndicalism as any doctrine “advocating, teaching or aiding

¹⁶¹ *See id.*

¹⁶² *Id.* at 672–73 (Holmes, J., joined by Brandeis, J., dissenting).

¹⁶³ *Id.* at 673 (Holmes, J., joined by Brandeis, J., dissenting).

¹⁶⁴ *Id.* (Holmes, J., joined by Brandeis, J., dissenting).

¹⁶⁵ 274 U.S. 357 (1927).

¹⁶⁶ *Id.* at 360–64.

and abetting . . . crime, sabotage . . . or unlawful acts of force and violence” to effect political or economic change.¹⁶⁷

Ms. Whitney said that she attended the organizing convention to advocate for political reform through the democratic process.¹⁶⁸ The majority of the Court, however, disagreed with her and found that she supported change through violence and terrorism.¹⁶⁹ 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.¹⁷⁰

The Court held that the jury had resolved adversely to Ms. Whitney important factual questions, concluding that (1) she had participated at the convention, (2) the united action of the Communist Party threatened the welfare of the state, and (3) she was a part of that organization.¹⁷¹ That was enough for the majority, and they affirmed her conviction.¹⁷²

What is significant about *Whitney* is Justice Brandeis’s concurring opinion. Justice Brandeis labeled his opinion “concurring,” but it reads like a dissent. His 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 likely 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. Justice Brandeis understood that the Supreme Court had not yet used Justice Holmes’s 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. (Justice Brandeis did not know it yet, but the Supreme Court would never use the clear and present danger test to overturn a state or federal conviction based on criminal syndicalism.)

Justice Brandeis’s opinion, which Justice Holmes joined, upheld the conviction only on a narrow procedural ground.¹⁷³ More importantly, he offered a rationale for free speech that was much more principled than Justice Holmes’s rationale. It did not adopt Justice Holmes’s concession that the government could not ban boring speech but could ban persuasive speech. One fatal flaw in Justice Holmes’s reasoning is that, by conceding that the government can punish persuasive speech, he allowed the

¹⁶⁷ *Id.* at 359.

¹⁶⁸ *See id.* at 367.

¹⁶⁹ *Id.* at 367–68.

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at 367–72.

¹⁷² *Id.* at 372.

¹⁷³ *See id.* at 372–74 (Brandeis, J., joined by Holmes, J., concurring).

government to respond that it should be able to thwart the problem early, by banning the same speech before it becomes 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.”¹⁷⁴

Justice 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.¹⁷⁵ 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, Thucydides, Pericles, and Aeschylus, nearly two and one-half millennia earlier. Justice Brandeis focused on “incitement.”¹⁷⁶

Justice 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 believes to be false and fraught with evil consequence.”¹⁷⁷ That is because the Framers “valued liberty both as an end and as a means.”¹⁷⁸ Those who drafted the First Amendment “believed liberty to be the secret of happiness and courage to be the secret of liberty.”¹⁷⁹ 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”¹⁸⁰

Justice Brandeis also argued that free speech does not undermine, but rather 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”¹⁸¹ That argument channeled Pericles who said, “The *great impediment to action is, in our opinion, not discussion, but the want of that knowledge which is gained by discussion preparatory to action.*”¹⁸²

¹⁷⁴ See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

¹⁷⁵ *Whitney*, 274 U.S. at 374 (Brandeis, J., joined by Holmes, J., concurring) (“[T]he enactment of the statute cannot alone establish the facts which are essential to its validity.”); see also SIX JUSTICES ON CIVIL RIGHTS 161–71 (Ronald D. Rotunda ed., 1983).

¹⁷⁶ See *Whitney*, 274 U.S. at 376 (Brandeis, J., joined by Holmes, J., concurring).

¹⁷⁷ *Id.* at 374 (Brandeis, J., joined by Holmes, J., concurring).

¹⁷⁸ *Id.* (Brandeis, J., joined by Holmes, J., concurring).

¹⁷⁹ *Id.* at 375 (Brandeis, J., joined by Holmes, J., concurring).

¹⁸⁰ 1 PERICLES, THUCYDIDES 116, 122 (B. Jowett trans., Clarendon Press, 1881).

¹⁸¹ *Whitney*, 274 U.S. at 375 (Brandeis, J., joined by Holmes, J., concurring) (emphasis added).

¹⁸² 1 PERICLES, *supra* note 180, at 119 (emphasis added).

Justice Brandeis's 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.¹⁸³

The government cannot ban speech that “falls short of incitement.”¹⁸⁴ 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 knowing that the crowd will listen to him and believe him—there is no opportunity for full discussion. There is no way to counter the speech we do not like by presenting more speech.

Justice 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, Ms. Whitney had challenged her conviction on the basis of a denial of due process; therefore, Justice Brandeis said that he was unable to pass on the free speech issue.¹⁸⁵ This technicality meant that Justice Brandeis was able to call his opinion a concurrence, thus lending it more authority for future citations.

Justice Brandeis's plea for toleration fell on deaf ears. Recall that during the second Red Scare, in the 1950s, the federal government once again prosecuted those who advocated anarchy, communism, and social unrest.¹⁸⁶ Recall also that Justice Frankfurter, concurring in *Dennis v. United States*,¹⁸⁷ thought that—unlike in Justice Brandeis's day—there is now “ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security.”¹⁸⁸

183 *Whitney*, 274 U.S. at 376–77 (Brandeis, J., joined by Holmes, J., concurring).

184 *Id.* (Brandeis, J., joined by Holmes, J., concurring).

185 *Id.* at 379 (Brandeis, J., joined by Holmes, J., concurring).

186 See Landon R. Y. Storrs, *McCarthyism and the Second Red Scare*, OXFORD RES. ENCYCLOPEDIA: AM. HISTORY (2015), <http://oxfordre.com/americanhistorical/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-6> [<http://perma.cc/XA7A-YLFH>].

187 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

188 *Id.* at 541–42 (Frankfurter, J., concurring).

Justice Frankfurter was not alone. His factual assertions were also “obvious” to the *Dennis* plurality, which upheld the conviction. Chief Justice Vinson spoke for the plurality:

Obviously, the words [clear and present danger] 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.¹⁸⁹

Chief Justice Vinson said the Court must look at “the gravity of the ‘evil,’ discounted by its improbability.”¹⁹⁰ The evil in this case is the overthrow of the government. That evil is so grave that the government may punish speech that is unlikely to be persuasive and is far divorced from any action.

Justice Holmes used his clear and present danger test to uphold the conviction of Mr. Schenck and his colleagues for mailing leaflets arguing that the draft violated the Thirteenth Amendment.¹⁹¹ This test became an even weaker protection for unpopular speech when Chief Justice Vinson turned the test on its head. As the potential evil becomes greater, the need for the government to move earlier is greater, so the less clear and present the danger may be.

There was a long and winding road from Justice Brandeis’s concurrence in *Whitney* to the modern free speech doctrine. Rather than retrace each step, a journey that one can take elsewhere,¹⁹² let us move to the modern right to advance unpopular speech, to propagate hate, and to advocate (but 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 Justice Brandeis’s rationale.

VI. THE MODERN TEST

During the late 1960s, the Court focused on protecting the advocacy of unpopular ideas. Thus, this modern test is much more protective of the right to dissent. It grew out of four cases decided by the Court in the late 1960s: *Bond v. Floyd*,¹⁹³ *Watts v. United*

¹⁸⁹ *Id.* at 509 (Vinson, C.J., speaking for a plurality). Only Justices Black and Douglas dissented. *See id.* at 579 (Black, J., dissenting); *id.* at 581 (Douglas, J., dissenting).

¹⁹⁰ *Id.* at 510 (Vinson, C.J. speaking for a plurality) (quoting *United States v. Dennis*, 183 F.2d 201, 210 (Hand, C.J.)).

¹⁹¹ *See supra* Part V.A.

¹⁹² *See generally* 5 ROTUNDA & NOWAK, *supra* note 83, §§ 20.1–20.17.

¹⁹³ 385 U.S. 116 (1966).

States,¹⁹⁴ *Brandenburg v. Ohio*,¹⁹⁵ and *Hess v. Indiana*.¹⁹⁶ The last two cases, in particular, create the modern incitement test, which requires the government to prove that the speaker both subjectively and objectively intended to incite immediate and unthinking lawless violence in a situation that makes this purpose likely to be successful.¹⁹⁷

A. The *Julian Bond* Case

Mr. Julian Bond was a duly elected member of the Georgia House of Representative.¹⁹⁸ The other Members of the Georgia House refused to seat him. The problem was that Mr. 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.¹⁹⁹ The Georgia legislature conducted a special hearing to determine if Mr. Bond, in good faith, could take the mandatory oath to support the Constitution.²⁰⁰ At the legislative hearing, Mr. Bond said that he was willing and able to take his oath of office.²⁰¹ 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.²⁰² Nonetheless, the Georgia House voted not to administer the oath or seat Mr. Bond. He sued and that led to *Bond v. Floyd*.²⁰³

The U.S. Supreme Court held that the Georgia House violated Mr. Bond’s right of free expression.²⁰⁴ 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.²⁰⁵ Such authority could be used to stifle dissents of legislators who disagreed with majority views.²⁰⁶

The Court also ruled that it would be unconstitutional for the federal government to convict Mr. Bond under the Selective Service Act for counseling or aiding persons to evade or refuse

¹⁹⁴ 394 U.S. 705 (1969) (per curiam).

¹⁹⁵ 395 U.S. 444 (1969) (per curiam).

¹⁹⁶ 414 U.S. 105 (1973) (per curiam).

¹⁹⁷ See 5 ROTUNDA & NOWAK, *supra* note 83, § 20.15(d).

¹⁹⁸ See *Bond*, 385 U.S. at 118.

¹⁹⁹ *Id.* at 118–21.

²⁰⁰ *Id.* at 123.

²⁰¹ *Id.* at 125.

²⁰² *Id.* at 123–24. The Supreme Court later upheld the constitutionality of federal laws punishing draft card burning in *United States v. O'Brien*, 391 U.S. 367, 381–82 (1968).

²⁰³ *Bond*, 385 U.S. at 123, 125–26.

²⁰⁴ *Id.* at 137.

²⁰⁵ *Id.* at 132.

²⁰⁶ See *id.*

registration.²⁰⁷ The Court said that one could not reasonably interpret Mr. Bond's statements "as a call to unlawful refusal to be drafted."²⁰⁸ Mr. Bond actually appeared to be advocating legal alternatives to the draft, not inciting people to violate the law. The Court concluded that Mr. Bond's punishment for these statements violated the First Amendment.²⁰⁹

B. The *Watts* Decision

A harbinger of the later cases is *Watts v. United States*.²¹⁰ In a brief, per curiam opinion, the Supreme Court reversed Mr. 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"²¹¹ Mr. 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.²¹²

The Court said that the statute was "constitutional on its face," because the nation certainly has a valid interest in protecting the President.²¹³ However, the Court must interpret this statute narrowly, so that it does not criminalize pure speech, protected by the First Amendment.²¹⁴ "What is a threat must be distinguished from what is constitutionally protected speech."²¹⁵ Mr. Watts's statement was only "political hyperbole" and not a "true threat."²¹⁶

²⁰⁷ *Id.* at 132–33.

²⁰⁸ *Id.* at 133.

²⁰⁹ *Id.* at 134 (citing *Wood v. Georgia*, 370 U.S. 375 (1962); *Yates v. United States*, 354 U.S. 298 (1957); and *Terminiello v. Chicago*, 377 U.S. 1 (1949)).

²¹⁰ 394 U.S. 705, 706, 708 (1969) (per curiam).

²¹¹ *Id.* at 705.

²¹² *Id.* at 706 (internal quotation marks omitted).

²¹³ *Id.* at 707.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 708 (concluding that the government must "prove a true 'threat'"); see also *Virginia v. Black*, 538 U.S. 343, 359 (2003) (plurality opinion) ("True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). The plurality ruled that a provision of the Virginia cross burning statute, which stated that burning a cross in public view "shall be prima facie evidence of an intent to intimidate," was facially unconstitutional under the First Amendment because it was not limited to "true threats." *Id.* at 347–48. It is a "true threat" if "a speaker directs a threat to a person . . . with the intent of placing the victim in fear of bodily harm or death." *Id.* at 359–60. A "true threat" is one "where the speaker *means* to communicate a *serious* expression of an *intent* to commit an act of unlawful *violence* to a particular individual or group of individuals." *Id.* at 359 (emphasis added). "[S]ome cross burnings fit within this meaning of intimidating speech and rightly so." *Id.* at 360 (emphasis added).

The language of the political arena . . . is often vituperative, abusive, and inexact. [The defendant's] only offense here was "a kind of very crude offensive method of stating a political opposition to the President."²¹⁷

One must consider Mr. Watts's 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. Moreover, the circumstances of Mr. Watts's speech 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 Justice Brandeis's concurrence in *Whitney*²¹⁸ is evident in both *Bond* and *Watts*. 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. Furthermore, the Court reversed the defendant's conviction in *Watts* because his statement did not clearly present any imminent threat to the President.

Later, the Court clarified that a "true threat" requires not only that the recipient of the threat believe it to be a real and serious threat, but also that the defendant *intended* to issue a true threat, had *scienter*, and specifically knew that the communications would be viewed as threats.²¹⁹

This leads to the two decisions that incorporate the learning and mistakes of the past to give us the modern test—*Brandenburg v. Ohio*,²²⁰ and *Hess v. Indiana*.²²¹ The origins of this modern test lie 2500 years ago.

C. The *Brandenburg* Test

The culmination of the modern test is found in *Brandenburg v. Ohio*.²²² It signaled a major shift in the Court. Many commentators at the time did not appreciate its significance because the Court issued its ruling in a brief per curiam opinion,²²³ a designation often given to less significance opinions. The Warren Court rejected the limited protection of the "clear and present danger" test as Justice Holmes had advanced it, and instead

²¹⁷ *Watts*, 394 U.S. at 708.

²¹⁸ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

²¹⁹ See *Elonis v. United States*, 135 S. Ct. 2001, 2011–12 (2015) (holding that, in order for the government to convict the defendant of issuing threats on Facebook, it must prove that the defendant, with scienter, *intended* to issue and true threat or knew that communications would be viewed as threats). Defendant said such things as, "if worse comes to worse I've got enough explosives," and, "hell hath no fury like a crazy man in a Kindergarten class." *Id.* at 2006.

²²⁰ 395 U.S. 444 (1969) (per curiam).

²²¹ 414 U.S. 105 (1973) (per curiam).

²²² *Brandenburg*, 395 U.S. at 447.

²²³ *Id.* at 444.

adopted crucial differences in phrasing and emphasis to assure that its free speech protections would not be diluted.²²⁴

Instead, *Brandenburg* created a new test. First, it explicitly overruled the *Whitney* decision.²²⁵ 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 present danger’ doctrine should have no place in the interpretation of the First Amendment.”²²⁶ *Brandenburg* also added new vigor to the reasoning of Justice Brandeis’s 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.²²⁷ Ohio charged Brandenburg with advocating political reform through violence and assembling with a group formed to teach criminal syndicalism.²²⁸ The facts showed that a man identified as Brandenburg arranged for a television news crew to attend a Ku Klux Klan rally.²²⁹ During the news film made at the rally, Klan members, including Brandenburg, discussed the group’s plan to march on Congress.²³⁰

The Court acknowledged that it had upheld a similar criminal syndicalism statute in *Whitney*, but the Court said, later decisions discredited *Whitney*.²³¹ 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.²³² 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 Justice Holmes’s analogy, it is akin

²²⁴ *Id.* at 450.

²²⁵ *See id.* at 449 (overturning *Whitney v. California*, 274 U.S. 357, 376 (1927)).

²²⁶ *Id.* at 449–50 (Black, J., concurring); *see also id.* at 454 (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.”).

²²⁷ *Id.* at 444–45.

²²⁸ *See id.* at 445.

²²⁹ *Id.*

²³⁰ *See id.* at 446.

²³¹ *Id.* at 447.

²³² *Id.*

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 falsely 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, lawless action*;²³³ 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*,²³⁴ 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.”²³⁵ 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.²³⁶ The statute forbade teaching of violent political revolution with the intent of spreading such doctrine or assembling with a group advocating this doctrine.²³⁷ 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.²³⁸ Any law punishing mere

²³³ *Id.* at 447 (emphasis added) (footnote omitted) (“[A]dvocacy is *directed to inciting* or producing *imminent* lawless action *and* is likely to incite or produce such action.” (emphasis added)).

²³⁴ 414 U.S. 105, 109 (1973) (per curiam); see also Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1179, 1193–94 (2005).

²³⁵ *Brandenburg*, 395 U.S. at 447 (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. *Id.* at 452 (Douglas, J., concurring). He was distrustful of the test, which he believed could be easily manipulated to deny constitutional protection to any speech critical of existing government. *Id.* at 451–52 (Douglas, J., concurring). Justice Black also concurred separately, and similarly objected to the clear and present danger test as insufficiently protective of free speech. *Id.* at 449–50 (Black, J., concurring).

²³⁶ *Id.* at 449.

²³⁷ See *id.*

²³⁸ *Id.* at 448–49.

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

D. *Hess v. Indiana* and its Vindication of *Brandenburg*

A post-Warren Court decision, *Hess v. Indiana*,²³⁹ is significant because it demonstrates that the Court is serious and literal in its application of the test proposed in *Brandenburg*. The police arrested Mr. Hess (who was subsequently convicted) for disorderly conduct when he shouted “we’ll take the fucking street later (or again)” during an antiwar demonstration.²⁴⁰ Two witnesses testified Mr. 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.²⁴¹ The Indiana Supreme Court upheld the trial court’s finding that Mr. Hess intended his remarks to incite further riotous behavior and were likely to produce such a result.²⁴²

However, the 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[s] 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.”²⁴³

Because Mr. Hess’s speech was “not directed to any person or group of persons,” he had not advocated action that would produce imminent disorder.²⁴⁴ Mr. Hess’s statements, therefore, did not violate the disorderly conduct statutes.²⁴⁵

²³⁹ See *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (per curiam).

²⁴⁰ *Id.* at 106–07.

²⁴¹ *Id.* at 107.

²⁴² *Id.*

²⁴³ *Id.* at 108 (emphasis in original) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

²⁴⁴ *Id.* at 108–09.

²⁴⁵ *Id.*

Justice Rehnquist, joined by Chief Justice Burger and Justice 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.²⁴⁶ The majority, Justice Rehnquist claimed, was merely interpreting the evidence differently, and thus exceeding the proper scope of review.²⁴⁷ The majority was unmoved. There was some evidence that Mr. Hess's "statement could be taken as counsel for present moderation" and hence his "objective words" did not meet the requirements of *Brandenburg*.²⁴⁸

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, the *Brandenburg* test should provide a strong measure of First Amendment protection.

When a speaker advocates violence using speech that does not literally incite,²⁴⁹ the Court should protect the speaker. The government might urge the Court to look for proximity to violence rather than to the literal words of incitement. However, *Brandenburg* rejects that theory.²⁵⁰

²⁴⁶ See *id.* at 110–11 (Rehnquist, J., dissenting).

²⁴⁷ *Id.* at 109, 111–12 (Rehnquist, J., dissenting).

²⁴⁸ See *id.* at 108.

²⁴⁹ 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 whom, she alleged, were stimulated by watching a scene of brutality broadcast in a television drama. *Nat'l Broad. Co., Inc. v. Niemi*, 434 U.S. 1354 (1978), *cert. denied*, 435 U.S. 1000 (1978), *appeal after remand* 126 Cal. App. 3d 488 (1981). The petitioners sought a stay of the state court order remanding for a trial. *Id.* 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." *Id.* at 1356. 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) *cert. denied*, 485 U.S. 959 (1988), which overturned a jury verdict against *Hustler Magazine* arising out of the death of an adolescent who attempted sexual practice described in a magazine article. *Id.* "[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." *Id.*

²⁵⁰ See, for example, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982), which declared:

The emotionally charged rhetoric of Charles Evers'[s] 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

E. *Brandenburg*, Marc Antony, and Shouting Fire

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 to 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 interrèd 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.²⁵¹

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

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.

Id. (emphasis added).

²⁵¹ WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2, at 66–71, 77–79, 88–92, 98–99 (Marvin Spevack ed., Cambridge Univ. Press 2004) (1599).

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 him to commit suicide.²⁵²

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 speaker's objective words, 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. Thus, the ruling in *Brandenburg* would protect him. And in so doing the First Amendment protects all of us.

VII. APPLYING THE MODERN TEST TO UNDERSTAND THE MODERN LAW

A. Fighting Words

In the era before *Brandenburg*, the Court created a category of unpopular speech that the First Amendment did not protect, so-called “fighting words.” The first case was *Chaplinsky v. New Hampshire*, decided in 1942, during World War II.²⁵³ The defendant, Walter Chaplinsky, encountered the city fire marshal, addressed him as a “God damned racketeer and a damned fascist.”²⁵⁴ The Court upheld his conviction under a state statute banning face-to-face words having “a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”²⁵⁵ “The test,” said the Court, “is what men of common intelligence would understand would be words likely to cause an average addressee to fight.”²⁵⁶

We can think of the speech in *Brandenburg* or in *Hess*, as a call for mayhem on a wholesale level. Recall that neither speech in those cases met the strict three-part requirements of incitement that would allow the government to intervene. The call to fight in *Chaplinsky* we might compare to a call for mayhem on a retail level, face-to-face. However, that speech hardly met the test laid out in *Brandenburg* and *Hess*, yet the Court affirmed the conviction.

The Court indicated some discomfort with the *Chaplinsky* “fighting words” test in *Terminiello v. Chicago*.²⁵⁷ In *Terminiello*, the Court invalidated the defendant's breach of the peace

²⁵² See generally *id.*

²⁵³ 315 U.S. 568 (1942).

²⁵⁴ *Id.* at 569.

²⁵⁵ *Id.* at 573.

²⁵⁶ *Id.*

²⁵⁷ 337 U.S. 1, 26 (1949).

conviction for denouncing Jews and others.²⁵⁸ However, the Court reversed the conviction without reaching the question of whether the speech constituted “fighting words.” Instead, the Court found the jury instruction was in error.²⁵⁹ The trial judge had instructed the jury to convict if the speech “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.”²⁶⁰ Denouncing the instruction, the Court stated that “a function of free speech under our system of government is to invite dispute,” and do the other things explicitly forbidden by the jury instruction.²⁶¹ A conviction “resting on any of those grounds [relied on in the jury instruction] may not stand.”²⁶²

The last Supreme Court decision that embraced the “fighting words” doctrine is now two-thirds of a century old, *Feiner v. New York*.²⁶³ It spoke of a possible “fighting words” exception to free speech—that case no longer lives with any vigor.

Feiner upheld the disorderly conduct misdemeanor conviction of Irving Feiner, who was speaking on a street corner, calling President Truman a “bum,” and the American Legion the “Nazi Gestapo.”²⁶⁴ Some in the crowd were hostile and others favored Mr. Feiner. After he had spoken for about a half hour urging blacks to “rise up in arms,” the police arrested him and led him away in an effort to prevent violent reaction.²⁶⁵ The Court reasoned,

It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.²⁶⁶

Notice that the Court did say, as a factual matter, that Mr. Feiner was *inciting* the crowd and upheld the conviction. Justices Black, Douglas, and Minton dissented.²⁶⁷

Feiner was the high-water mark for the “fighting words” doctrine. Subsequent Supreme Court cases chipped away at it over the years.²⁶⁸ For example, in *Gooding v. Wilson*, Mr. Johnny C. Wilson said to police officers who were attempting to restore

²⁵⁸ *Id.* at 3, 5–6.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 4.

²⁶² *Id.* at 5.

²⁶³ 340 U.S. 315, 331–32 (1951).

²⁶⁴ *Id.* at 330 (Douglas, J., dissenting).

²⁶⁵ *See id.* (Douglas, J., dissenting).

²⁶⁶ *Id.* at 321.

²⁶⁷ *Id.* (Black, J., dissenting); *id.* at 329 (Douglas, J., joined by Minton, J., dissenting).

²⁶⁸ *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972).

order to a public building: “White son of a bitch, I’ll kill you,” and to another: “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.”²⁶⁹ The Georgia statute prohibited “opprobrious words or abusive language, tending to cause a breach of the peace”²⁷⁰ The state standard allowed juries to determine guilt as “measured by common understanding and practice”²⁷¹—a phrase too broad and not necessarily limited to incitement. What the defendant said would not “tend to *incite* an *immediate* breach of the peace”²⁷² and the Court overturned Wilson’s conviction.²⁷³

After *Brandenburg* and *Hess*, the Court held that the state could not allow a tort for intentional infliction of emotional distress because a congregation of the Westboro Baptist Church picketed military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America’s military.²⁷⁴ The offensive picketers peacefully displayed their signs stating, for example, “Thank God for Dead Soldiers.”²⁷⁵ The Court explained, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁷⁶

One case in the Sixth Circuit illustrates the reluctance of some judges to recognize the modern full-bodied protection of free speech.²⁷⁷ The first opinion in that case ignored the lessons of *Brandenburg* and *Hess* and applied the “fighting words” test to restrict free speech.²⁷⁸ In the second opinion, the *en banc* Sixth Circuit overturned the panel and embraced *Brandenburg* and *Hess*.

The case arose because a Christian evangelical group was “preaching hate and denigration to a crowd of Muslims, some of whom responded with threats of violence” during a city festival celebrating Arab culture.²⁷⁹ The police responded by removing the evangelicals, who then filed a civil rights claim under 42 U.S.C. 1983 against the sheriff and deputies, alleging that they

²⁶⁹ *Id.* at 534 (Blackmun, J., dissenting).

²⁷⁰ *Id.* at 519.

²⁷¹ *Id.* at 528.

²⁷² *Id.* at 522 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis added)).

²⁷³ *See id.* at 520.

²⁷⁴ *Snyder v. Phelps*, 562 U.S. 443, 459 (2011).

²⁷⁵ *Id.* at 448.

²⁷⁶ *Id.* at 458 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

²⁷⁷ *See Bible Believers v. Wayne Cty.*, 805 F.3d 228 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2013 (2016).

²⁷⁸ *Bible Believers v. Wayne Cty.*, 765 F.3d 578, 597 (6th Cir. 2014) *rev’d*, 805 F.3d 228 (6th Cir. 2015).

²⁷⁹ *Bible Believers*, 805 F.3d at 234.

violated the evangelicals' rights to freedom of speech, free exercise of religion, and equal protection by cutting off their protests.²⁸⁰ The trial court entered summary judgment for the defendants, and the Sixth Circuit panel affirmed.²⁸¹ But the *en banc* Sixth Circuit reversed and protected the hate speech.²⁸²

The state may not silence the speaker as expedient or efficient alternative to containing rioting individuals' lawless behavior because there is no right to a heckler's veto.²⁸³ The *en banc* court recognized that *Feiner* and "fighting words" only exist when the speaker is engaged in *incitement* within the meaning of *Brandenburg* and *Hess*.²⁸⁴ As the *en banc* Sixth Circuit makes clear:

Maintenance of the peace should not be achieved at the expense of the free speech. The freedom to espouse sincerely held religious, political, or philosophical beliefs, especially in the face of hostile opposition, is too important to our democratic institution for it to be abridged simply due to the hostility of reactionary listeners who may be offended by a speaker's message.²⁸⁵

The incantation of "fighting words" no longer offers a justification to restrict speech. It is one thing if a speaker *incites* a lynch mob—that meets the *Brandenburg* and *Hess* test—but quite another if the speaker promotes hate speech or advocates positions that upset the crowd, even if the crowd responds with mayhem.²⁸⁶ As *Bible Believers* explained, in light of the present case law, "[t]he better view of *Feiner* is summed up, simply, by the following truism: when a speaker incites a crowd to violence, his *incitement* does not receive constitutional protection."²⁸⁷ "Incitement" is a term of art that requires speech, plus something else, such as inciting a lynch mob to lynch in a narrow factual context.²⁸⁸ That restriction is a bequest from the ancient Greeks.

B. Provocative Speech in Schools

Dariano v. Morgan Hill Unified School District is a peculiar case, because it endorses a heckler's veto.²⁸⁹ This case held that a public school could prohibit students from wearing

²⁸⁰ *Id.* at 241–42.

²⁸¹ *Id.* at 242.

²⁸² *Id.* at 233, 242.

²⁸³ *Id.* at 252, 265 (overruling *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975) because there is no right to a heckler's veto).

²⁸⁴ *Id.* at 248.

²⁸⁵ *Id.* at 252.

²⁸⁶ *Id.* at 245 (quoting 5 ROTUNDA & NOWAK, *supra* note 83, § 20.39(a)) (noting that "[t]he authority of *Feiner* has been undercut significantly in subsequent [Supreme Court] cases").

²⁸⁷ *Bible Believers*, 805 F.3d at 245.

²⁸⁸ See *supra* Part VI.E. (discussing Marc Antony's funeral oration as an example of a speech that does not meet the strict *Brandenburg* and *Hess* test).

²⁸⁹ 767 F.3d 764, 777–78 (9th Cir. 2014).

a symbol of the American Flag on their clothing because doing so might upset some Mexican American students.²⁹⁰ Yes, we live in world where a public school can ban the American Flag because it is hate speech, but the government cannot ban burning the American Flag.²⁹¹ Those who support the decision in *Dariano* explain that it was correct for the court to “balance” the interests involved; that is only what the First Amendment requires, we are told.²⁹²

However, that is not what the Supreme Court ruled when it decided a very similar issue in 1969.²⁹³ We were in the middle of the Vietnam War, and the disputes between the hawks and doves did not end with debates in Congress and protests in the streets. They continued in our public high schools. The Supreme Court decision on this issue was *Tinker v. Des Moines Independent School District*.²⁹⁴ Some high school students—the doves—claimed a constitutional right to wear black armbands as a symbol to protest the Vietnam War.²⁹⁵ The Court has long held that the First Amendment protects not only words but also symbols, such as flags, banners, pictures of donkeys and elephants.²⁹⁶

The principals of all of the Des Moines schools sided with the hawks. They adopted a policy, first, to ask any student to remove the armband protesting the war.²⁹⁷ If the student objected, the school would suspend her until she returned without the armband.²⁹⁸ Oddly enough, the principals imposed no ban on students wearing national political campaigns buttons; some students even wore the Iron Cross, traditionally a symbol of Nazism.²⁹⁹ However, a symbol of peace was just too much for the schools. They had to draw the line.

The Court decided against the school district.³⁰⁰ The Court acknowledged that the nature of the students’ rights is different because a school is not a public forum in the sense that a public street is, however, neither students nor teachers “shed their constitutional rights to freedom of speech or

²⁹⁰ *Id.* at 777.

²⁹¹ *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 420 (1989); *United States v. Eichman*, 496 U.S. 310, 318–19 (1990).

²⁹² *See, e.g.*, Julie Hilden, *A Ninth Circuit Panel Balances First Amendment Rights Against School Safety*, VERDICT (Mar. 3, 2014), <https://verdict.justia.com/2014/03/03/ninth-circuit-panel-balances-first-amendment-rights-school-safety> [<http://perma.cc/US2G-59FT>].

²⁹³ *See generally* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 504.

²⁹⁶ *See, e.g.*, *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

²⁹⁷ *Tinker*, 393 U.S. at 504.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 510–11.

³⁰⁰ *Id.* at 514.

expression at the schoolhouse gate.”³⁰¹ For example, during a history class about the Civil War, no student would have a right to disrupt the lesson by asserting a right to talk about the Vietnam War. Similarly, the geography teacher can limit discussion to issues of geography that relate to that day’s lesson. However, wearing black armbands (like wearing pierced earrings) does not disrupt the education of the school. The *Tinker* Court understood this distinction:

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance *on the part of petitioners*. There is here no evidence whatever of *petitioners’ interference*, actual or nascent, *with the schools’ work* or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.³⁰²

Tinkers made clear that the students wearing armbands protesting—the doves—were not interfering with anything. Some of the students opposed to the doves—the hawks—were upset. A “few students [the hawks] made hostile remarks to the children wearing armbands,”³⁰³ but if schools were going to punish anyone, they should punish the hawks. *Tinker* did not approve of any “heckler’s veto.” If the hawks decided to beat up the doves, that would not authorize the school to restrict the free speech of the doves.

Tinker acknowledged that any “word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.”³⁰⁴ Nonetheless, the “Constitution says we must take this risk,” and our openness is “the basis of our national strength” and part of the warp and woof of our “often disputatious” society. If the heckler is disturbing the speaker, the law interferes to protect the speaker, not the heckler.³⁰⁵

There have been a few cases since *Tinker* where the Supreme Court has clarified (but not undercut) its holding. For example, a school assembly is also not a public forum. If the school provides for an assembly for all the students (including some as young as fourteen years of age), where students could speak on behalf of candidates for student government, then the school could require the students not to engage in lewd speech.³⁰⁶

³⁰¹ *Id.* at 506.

³⁰² *Id.* at 508 (emphasis added).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 508–09.

³⁰⁶ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

If the high school students in a journalism class, under the supervision of a teacher, publish a school newspaper, the high school educators could exercise editorial control over the newspaper.³⁰⁷ The high school student newspaper is not a public forum; instead, it is part of a course for credit, under the teacher's supervision. More recently, the Court held that the school could confiscate a student's banner advocating illegal drug use and ban "student speech at a school event" from promoting illegal drug use, in violation of school policy.³⁰⁸ All of these cases cited and reaffirmed *Tinker*.

The response of the Ninth Circuit in *Dariano* was to reject *Tinker* and uphold the heckler's veto.³⁰⁹ *Dariano* upheld the power of the Morgan Hill Unified School District to order students to cover up the U.S. flag shirts or go home, because, the District claimed, if some students wore those colors on Cinco de Mayo, the fifth of May, celebrating Mexican heritage and pride, other students might turn to violence.³¹⁰ The school ban on the students wearing American flag colors, as the district court explained, was "in order to protect their own safety."³¹¹

However, these same school administrators did not ask any students to refrain from wearing the colors of the Mexican flag because, they said, students wearing American flags "were threatened with violence," but students with Mexican flag colors were not.³¹² One might say that the Anglo students were threatened, but the "Mexican students" (the term the court repeatedly used) were not. Hence, "all students whose safety was in jeopardy were treated equally."³¹³

The court invented a most unusual rule: If hecklers threaten students who do nothing but wear colors that reflect the American flag, the school authorities should restrict the peaceful students, not the rowdy hecklers. If that is the law, what the lawyers for the principals in *Tinker* should have advised them was that they could punish the doves if only the hawks had physically threatened and hit the doves. Surely, that cannot be what the *Tinker* Court intended.

Recall, *Tinker* found it telling that the school principals did not ban all symbols; they allowed students to wear Democratic

³⁰⁷ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988).

³⁰⁸ *Morse v. Frederick*, 551 U.S. 393, 394 (2007).

³⁰⁹ *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 766 (9th Cir. 2014).

³¹⁰ See *id.* at 767.

³¹¹ *Dariano v. Morgan Hill Unified Sch. Dist.*, 822 F. Supp. 2d 1037, 1046 (N.D. Cal. 2011), *aff'd*, 767 F.3d 764 (9th Cir. 2014).

³¹² *Id.* at 1045–46.

³¹³ *Id.*

campaign buttons even if that upset Republicans.³¹⁴ The principals allowed students to wear a symbol of the Nazis, the Iron Cross.³¹⁵ The fact that principals distinguished among the types of buttons that were verboten was evidence that the school principals were banning symbols because of their content, their message. This was not a case where the school principals said, for example, that no students could wear armbands or any other symbols on their school band uniforms because the whole point of uniforms is to be, well, uniform.

Yet, in California, the rule is different. Mexican students can wear Mexican flag colors, but others cannot wear American flag colors. Why? The trial court claimed that the Mexican students were threatening the other students, but the trial court found no evidence that anyone was threatening the Mexican students, so the school only protected the hecklers.³¹⁶

Let us apply the Ninth Circuit's reasoning to other situations. Assume that some students wear the Star of David and other students object and threaten them. These other students wear the Iron Cross. The Star of David students (perhaps grandchildren of those who barely survived the Holocaust) do not threaten violence. The Ninth Circuit rule would allow the Iron Cross—but not the Star of David—because only the Iron Cross students threatened violence. As the trial court said in *Dariano*, to support its restriction of free speech, a male student “shoved a Mexican flag at [a student with an American flag symbol] and said something in Spanish expressing anger at Plaintiffs’ clothing.”³¹⁷ The remedy that the *Dariano* court chose was not to punish the student who “shoved a Mexican flag” at the other student, but to take away the free speech rights of that other student.

That is not what our high schools should be teaching students. We live in a diverse society and, in the words of *Tinker*, “apprehension of disturbance is not enough to overcome the right to freedom of expression.”³¹⁸ Instead, the Ninth Circuit and the Morgan Hill Unified School District prefer to teach schoolchildren that, if you want to shut up other fellow students, just rely on the heckler's veto. This school district is not very good at teaching tolerance: Earlier, gay students sued this same school district for failing to take action to protect them from harassment from their fellow students.³¹⁹ It would

³¹⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969).

³¹⁵ *Id.*

³¹⁶ *Dariano*, 822 F. Supp. 2d at 1046.

³¹⁷ *Id.* at 1044.

³¹⁸ *Tinker*, 393 U.S. at 509.

³¹⁹ See generally *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003).

be much better if the school followed Rodney King's plea that we all should learn to "get along."

VIII. 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.³²⁰ It illustrated a peculiar American tradition. 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 Kim Jong-un of North Korea—may interpret failure of the United States Government to stifle debate and dissent as a sign of weakness and divisiveness, perhaps not understanding that dissent in America is par for the course.

None of this gives 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.

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 adopting the rules of dictators 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.

The free speech that we now protect in times of war is handmaiden to the free speech we must protect in times of peace. Hateful speech is, well, hateful, but the remedy, history teaches us, is more speech, not less. We protect the rights of Nazis to

³²⁰ See *Press Limits: Censorship or Prudence?*, LEGAL TIMES, Jan. 28, 1991, at 19.

march in Skokie, Illinois, so civil rights protestors can march in Selma, Alabama.³²¹

If we gathered members of the early Congress (which enacted the Alien and Sedition Laws) and members of the Supreme Court (during the time it adopted the “bad tendency test” in the beginning of the twentieth century), 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. They would advise us that allowing people to spew hurtful speech, could cause unrest and dissension. 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.”³²²

When the world is full of democracies and the despots and terrorists whom they harbor are no more, then we will have lasting peace. On the home front, there will always be those who preach hate, but we will learn to turn away and ignore their message or undercut the speech we do not like with more speech, rather than enforced silence. American’s experience with free speech tells us something else. The United States has not only survived but it has *thrived*, when it allows dissent, even in times of war. And when it punished dissent, our history teaches us that the people who enforce the censorship are not wise Platonic guardians.

Under modern free speech doctrine, the government may not prohibit or punish hateful, provocative, or offensive speech unless it proves *incitement*, a term of art that requires the government to prove that the speaker both subjectively and objectively intended to incite immediate, unthinking lawless violence before a volatile crowd in a situation that makes this intention likely to be successful. The government, under this

³²¹ See *Williams v. Wallace*, 240 F. Supp. 100, 110 (M.D. Ala. 1965) (enjoining defendants from interfering with a proposed civil rights march along U.S. Highway 80 from Selma to Montgomery which sought government redress for being deprived of the right to vote).

³²² Pericles, *supra* note 54, at 118–19.

test, could prohibit haranguing a lynch mob but could not punish hate speech.

As Senator John F. Kennedy said, while running for President, “We must know all the facts, and hear all the alternatives, and listen to all the criticisms. Let us welcome controversial books and controversial authors. For the Bill of Rights is the guardian of our security as well as our liberty.”³²³ When he said that, he echoed the ancient Greeks. There is little new under the sun.

³²³ John F. Kennedy, Response to Questionnaire, in Irving Kolodin, *The Candidates and the Arts*, SATURDAY REV., Oct. 29, 1960, at 42, 44; see also TATYANA ECKSTRAND, *THE LIBRARIAN’S BOOK OF QUOTES 10* (2009); LIBRARY OF CONGRESS, *RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 29* (2010).

