

CHAPTER

9

FIRST AMENDMENT: FREEDOM OF EXPRESSION

A. INTRODUCTION

The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The next chapter, Chapter 10, considers the Religion Clauses. This chapter focuses on the other provisions of the First Amendment, all of which concern aspects of freedom of expression.

1. *Historical Background*

The First Amendment undoubtedly was a reaction against the suppression of speech and of the press that existed in English society. Until 1694, there was an elaborate system of licensing in England, and no publication was allowed without a government-granted license. Blackstone, in his famous commentaries on the law, remarked that “[t]he liberty of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. . . . [To] subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”¹ It is widely accepted that the First Amendment was meant, at the very least, to abolish such prior restraints on publication.

Speech in England also was restricted by the law of seditious libel that made criticizing the government a crime.² The English Court of the Star Chamber announced the principle that the King was above public criticism and that, therefore, statements critical of the government were forbidden. Chief Justice

1. 4 William Blackstone, *Commentaries on the Laws of England*, 151-152 (1769) (emphasis in original).

2. A classic history of the First Amendment, which reviews this background, is Zechariah Chaffee, Jr., *Free Speech in the United States* (1941).

Holt, writing in 1704, explained the perceived need for the prohibition of seditious libel: "If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."³ Truth was not a defense to the crime because the goal was to prevent and punish all criticism of the government; if anything, true speech was perceived as worse because it might do more to damage the image and reputation of the government. Professor Zechariah Chaffee said that "the First Amendment was . . . intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America."⁴

The record for protection of freedom of speech in the colonies was mixed. There were fewer prosecutions for seditious libel than in England during the time period, but there were other controls, formal and informal, over dissident speech. Professor Leonard Levy said that each community "tended to be a tight little island clutching its own respective orthodoxy and . . . eager to banish or extralegally punish unwelcome dissidents."⁵

Of the prosecutions that occurred for seditious libel, the most famous was the trial of John Peter Zenger in 1735 for publishing criticisms of the Governor of New York. Zenger's lawyer argued that truth should be a defense to the crime of seditious libel. Although the court rejected this argument, the jury was persuaded to disregard the law and to acquit Zenger.⁶

There is thus little doubt that the First Amendment was meant to prohibit licensing of publication such as existed in England and to forbid punishment for seditious libel. Beyond this, though, there is little indication of what the framers intended. Certainly, nothing in the historical record sheds light on most of the free speech issues that face society and the courts in the late twentieth century. Professor Rodney Smolla remarked that "[o]ne can keep going round and round on the original meaning of the First Amendment, but no clear, consistent vision of what the framers meant by freedom of speech will ever emerge."⁷

In fact, ascertaining the framers' intent is made more difficult by the fact that Congress in 1798—with many of the Constitution's drafters and ratifiers participating—adopted the Alien and Sedition Acts of 1798.⁸ The law prohibited the publication of "false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . ; or to bring them . . . into contempt or disrepute; or to excite against them . . . hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States."⁹ The law did allow truth as a defense and required proof of malicious intent.

3. 14 Thomas Howell, *A Collection of State Trials* 1095, 1128 (1704).

4. Chaffee, *supra* note 2, at 21.

5. Leonard W. Levy, *The Emergence of a Free Press* 16 (1985).

6. See Vincent Buranelli, *The Trial of Peter Zenger* (1957).

7. Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* at 1-18 (1996).

8. 1 Stat. 596, Act of July 14, 1798.

9. *Id.*

The Federalists under President John Adams aggressively used the law against their rivals, the Republicans. The Alien and Sedition Act was a major political issue in the election of 1800, and after he was elected President, Thomas Jefferson pardoned those who had been convicted under the law. The Alien and Sedition Act was repealed, and the Supreme Court never ruled on its constitutionality. However, in *New York Times v. Sullivan*, in 1964, the Court declared: “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”¹⁰

Not surprisingly, then, Supreme Court cases dealing with freedom of expression focus less on the framers’ intent than do cases involving many other constitutional provisions. There is relatively little that can be discerned as to the drafters’ views other than their desire to prohibit prior restraints, such as the licensing scheme, and their rejection of the crime of seditious libel.

2. *Why Should Freedom of Speech Be a Fundamental Right?*

Inevitably, the courts must decide what speech is protected by the First Amendment and what can be regulated by the government. Although the First Amendment is written in absolute language that Congress shall make “no law,” the Supreme Court never has accepted the view that the First Amendment prohibits all government regulation of expression. Justice Hugo Black took the absolutist view of the First Amendment,¹¹ but he is virtually alone among Supreme Court Justices.¹² Indeed, the Court expressly declared that it “reject[ed] the view that freedom of speech and association, . . . as protected by the First and Fourteenth Amendments, are absolutes.”¹³

No matter how appealing the absolute position may be to the First Amendment’s staunchest supporters, it is simply untenable. Even one example of an instance where government must be able to punish speech is sufficient to refute the desirability of an absolutist approach. For example, perjury laws or laws that prohibit quid pro quo sexual harassment (“sleep with me or you are fired”) both punish speech, but no one would deny that such statutes are imperative.

Line drawing is inevitable as to what speech will be protected under the First Amendment and what can be proscribed or limited. Moreover, lines must be drawn as to where and when speech will be allowed. Even an absolutist view surely would not permit spectators to yell out while a court is in session and prevent the judge from hearing the proceeding. Lines also must be drawn in defining what is speech. Justice Black attempted to make his view plausible by distinguishing between speech and conduct, allowing the government to regulate the latter, but not the former. This distinction, too, requires line drawing as to when nonverbal communication should be regarded as speech.

10. 376 U.S. 254, 276 (1964).

11. See, e.g., Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 874, 879 (1960) (“The phrase ‘Congress shall make no law’ is composed of plain words, easily understood. The language is absolute . . . [T]he framers themselves did this balancing when they wrote the [First Amendment]. . . . Courts have neither the right nor the power to make a different judgment”).

12. Justice William O. Douglas also took this view at times. *Konigsberg v. State Bar of California*, 366 U.S. 36, 56 (1961) (Black, J., dissenting, joined by Douglas, J.).

13. *Konigsberg v. State Bar of California*, 366 U.S. at 49.

Because even for originalists there is little guidance from history or the framers' intent as to the meaning of the First Amendment, the Supreme Court inescapably must make value choices as to what speech is protected, under what circumstances, and when and how the government may regulate. Such analysis is possible only with reference to the goals that freedom of speech is meant to achieve.

There thus is a voluminous literature debating why freedom of speech should be regarded as a fundamental right. The issue is important in general in understanding freedom of expression, but is also crucial in appraising specific First Amendment issues and how they have been handled by the Supreme Court.

There is not a single, universally accepted theory of the First Amendment, but rather, several different views as to why freedom of speech should be regarded as a fundamental right. To a large extent, the theories are not mutually exclusive, although the choice of a theory can influence views on many specific issues. The four major theories, reviewed below, are that freedom of speech is protected to further self-governance, to aid the discovery of truth via the marketplace of ideas, to promote autonomy, and to foster tolerance. Justice Louis Brandeis offered an eloquent explanation for why freedom of speech is protected that includes all of these rationales. He wrote:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.¹⁴

a. Self-Governance

Freedom of speech is crucial in a democracy: Open discussion of candidates is essential for voters to make informed selections in elections; it is through speech that people can influence their government's choice of policies; public officials are held accountable through criticisms that can pave the way for their replacement. Alexander Meiklejohn wrote that freedom of speech "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."¹⁵ He argued that "[s]elf-government can exist only insofar as the

14. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

15. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 27 (1948).

voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”¹⁶ Professor Vincent Blasi argued that freedom of speech serves an essential “checking value” on government.¹⁷ He wrote of the value that free speech serves in checking the abuse of power by public officials and said that through speech voters retain “a veto power to be employed when the decisions of officials pass certain bounds.”¹⁸

There is little disagreement that political speech is at the core of that protected by the First Amendment. The Supreme Court has spoken of the ability to criticize government and government officers as “the central meaning of the First Amendment.”¹⁹ Some commentators have argued that political speech should be the *only* speech protected by the First Amendment. Robert Bork is perhaps the foremost advocate of this position and argued that the “notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives.”²⁰

The Supreme Court never has accepted this view that the First Amendment protects only political speech. Indeed, the Court has declared that the “guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.”²¹ In part, this is probably because of the difficulty of defining what is political speech. Virtually everything from comic strips to commercial advertisements to even pornography can have a political dimension. In part, too, the refusal to narrowly limit the First Amendment in this way reflects the importance of freedom of speech about other topics ranging from scientific debates to accurate commercial information in the marketplace.

b. Discovering Truth

Another classic argument for protecting freedom of speech as a fundamental right is that it is essential for the discovery of truth. Justice Oliver Wendell Holmes invoked the powerful metaphor of the “marketplace of ideas” and wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”²² The argument is that truth is most likely to emerge from the clash of ideas.

John Stuart Mill expressed this view when he wrote that the “peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation — those who dissent from the opinion, still more than those who hold it.”²³ He said that an opinion may be true

16. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255.

17. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 523.

18. *Id.* at 542.

19. *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

20. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 28 (1971).

21. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

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

23. John Stuart Mill, *On Liberty* 76 (1859).

and may be wrongly suppressed by those in power, or a view may be false and people are informed by its refutation. Justice Brandeis embraced this view when he said that the “fitting remedy for evil counsels is good ones” and that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”²⁴

The marketplace of ideas rationale for freedom of speech has been subjected to powerful criticism by scholars.²⁵ Critics argue that it is wrong to assume that all ideas will enter the marketplace of ideas and even if they do, some may drown out others because some have more resources to have their voices heard. Professor Laurence Tribe observed that “[e]specially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that ‘free trade in ideas’ is likely to generate truth?”²⁶ Professor Jerome Barron said that “if ever there were a self-operating marketplace of ideas, it has long ceased to exist.”²⁷

Moreover, critics of the marketplace metaphor argue that it is wrong to assume that truth necessarily will trump over falsehood; history shows that people may be swayed by emotion more than reason. Professor Edwin Baker argued that “the belief that the marketplace leads to truth, or even to the best or most desirable decision, is implausible.”²⁸ He said that it assumes that people will use “their rational capabilities in order to eliminate distortion caused by the form and frequency of message presentation. . . . This [assumption] cannot be accepted. . . . People consistently respond to emotional or irrational appeals.”²⁹ Moreover, even if truth ultimately prevails, enormous harms can occur in the interim. Professor Harry Wellington powerfully made this point when he wrote: “In the long run, true ideas do tend to drive out false ones. The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas. . . . [M]ost of us do believe that the book is closed on some issues. Genocide is an example. . . . Truth may win, and in the long run it may almost always win, but millions of Jews were deliberately and systematically murdered in a very short period of time. . . . Before those murders occurred, many individuals must have come ‘to have false beliefs.’”³⁰

However, the response to these criticisms is to concede the problems with the marketplace of ideas, but to argue that the alternative—government determination of truth and censorship of falsehoods—is worse. The marketplace of ideas may be terribly flawed, but allowing the government to decide what is true and right and suppress all else is much worse. Inevitably, government will censor to serve its own ends, such as by silencing its critics, and even a benevolent government will make mistakes as to what is true and false. Professor Nimmer thus remarked that “[i]f acceptance of an idea in the competition of the market

24. *Whitney v. California*, 274 U.S. at 375, 377 (Brandeis, J., concurring).

25. See, e.g., C. Edwin Baker, *Human Liberty and Freedom of Speech* (1989); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1.

26. Laurence H. Tribe, *American Constitutional Law* 786 (2d ed. 1988).

27. Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1641 (1967).

28. Baker, *supra* note 25, at 12.

29. *Id.*

30. Harry Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105, 1130, 1132 (1979).

is not the ‘best test,’ [what] is the alternative? It can only be acceptance of an idea by some individual or group narrower than that of the public at large.”³¹

c. Advancing Autonomy

A third major rationale often expressed for protecting freedom of speech as a fundamental right is that it is an essential aspect of personhood and autonomy. Professor Baker said that “[t]o engage voluntarily in a speech act is to engage in self-definition of expression. A Vietnam war protestor may explain that when she chants ‘Stop This War Now’ at a demonstration, she does so without any expectation that her speech will affect continuance of the war . . . ; rather, she participates and chants in order to *define* herself publicly in opposition to the war. This war protestor provides a dramatic illustration of the importance of this self-expressive use of speech, independent of any effective communication to others, for self-fulfillment or self-realization.”³²

Protecting speech because it aids the political process or furthers the search for truth emphasizes the instrumental values of expression. Protecting speech because it is a crucial aspect of autonomy sees expression as intrinsically important.³³ Justice Thurgood Marshall observed that “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit — a spirit that demands self-expression.”³⁴

This view, too, has been criticized. Robert Bork, for example, argued that there is no inherent reason to find speech to be a fundamental right compared with countless other activities that might be regarded as a part of autonomy or that could advance self-fulfillment. Bork said that the self-fulfillment/autonomy rationale does “not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, working as a barmaid, engaging in sexual activity, or in any of thousands of other endeavors. Speech can be preferred to other activities only by ranking forms of personal gratification. One cannot, on neutral grounds, choose to protect speech on this basis more than one protects any other claimed freedom.”³⁵

Moreover, critics of this view maintain that it ignores the ways in which protecting freedom of speech for some can undermine the autonomy and self-fulfillment of others. In recent years, some have argued for restricting hate speech or pornography because of how such expression demeans and injures others.³⁶

31. Melville Nimmer, *Nimmer on Freedom of Speech* 1-12 (1984).

32. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 994 (1978).

33. See, e.g., Martin Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982) (arguing that self-realization should be regarded as the exclusive value of the First Amendment).

34. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

35. Bork, *supra* note 20, at 25.

36. See, e.g., Mari Matsuda, *Public to Racist Speech: Considering the Victim's Story*, 87, Mich. L. Rev. 2320 (1989); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) (arguing for restriction of hate speech); Catharine MacKinnon *Feminism Unmodified* 146-213 (1987) (arguing for restriction of pornography because of its harmful effects on women). Hate speech is discussed below.

d. Promoting Tolerance

Another explanation for protecting freedom of speech as a fundamental right that has received substantial attention in recent years is that it is integral to tolerance, which should be a basic value in our society. Professor Lee Bollinger is a primary advocate of this view, and he argued: “[W]hile free speech theory has traditionally focused on the value of the activity protected (speech), [an alternative approach] seeks a justification by looking at the disvalue of the [frequently intolerant] response to that activity. . . . [The free speech principle] involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.”³⁷ The free speech principle is thus concerned with nothing less than helping to shape “the intellectual character of the society.”³⁸

The claim is that tolerance is a desirable, if not essential, value and that protecting unpopular or distasteful speech is itself an act of tolerance. Moreover, such tolerance serves as a model that encourages more tolerance throughout society. But critics question why tolerance should be regarded as a basic value.³⁹ For example, critics argue that society need not be tolerant of the intolerance of others, such as those who advocate great harm, even genocide. Preventing such harms is claimed to be much more important than being tolerant of those who argue for them.

e. Conclusion

These four theories are not mutually exclusive.⁴⁰ None is sufficient to explain all of the cases, and none is without problems.⁴¹ Yet all are important in understanding why freedom of speech is protected, in considering what expression should be safeguarded and what can be regulated, and in appraising the Supreme Court’s decisions in this area.

3. The Issues in Free Expression Analysis

In examining the First Amendment’s protection of freedom of expression, analysis is divided into five sections. First, Section B examines ways of evaluating any government action restricting freedom of speech. For example, any law can be reviewed to determine whether it is content-based or content-neutral, a distinction that the Court has said is crucial in determining whether strict scrutiny or

37. Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* 9-10 (1986).

38. *Id.* at 120.

39. See David Strauss, *Why Be Tolerant?*, 53 U. Chi. L. Rev. 1485 (1986).

40. See Rodney A. Smolla, *Free Speech in an Open Society* 14-17 (1992) (arguing for “multiple justifications” for freedom of speech); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212 (1983) (many values underlie the First Amendment; no need to reduce the First Amendment to a single theory).

41. See Ronald Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. Rev. 1405 (1987) (criticizing the foundational theories of the First Amendment).

intermediate scrutiny should be used.⁴² Also, any law regulating speech is unconstitutional if it is unduly vague or overbroad. The Court additionally has said that prior restraints of speech are strongly disfavored and thus any government action restricting speech can be challenged if it constitutes a prior restraint. Finally, there is the basic question in evaluating any law as to whether it constitutes a restriction of speech; what government actions sufficiently burden expression as to trigger First Amendment analysis?

Second, Section C focuses on types of speech that are unprotected by the First Amendment or less protected. The Supreme Court has declared that some types of expression are unprotected so that they may be prohibited and punished. There are other categories of speech that are deemed less protected so that the government has more latitude in regulating them. These categories include incitement of illegal activity, fighting words and provocation of hostile audiences, obscenity and sexually oriented speech, defamatory speech, conduct that communicates, and commercial speech.

Third, Section D considers the places that are available for speech. Many First Amendment cases involve a claim of a right of access to government-owned property for speech purposes or present a challenge to restrictions on the use of public property for expression. The Supreme Court has drawn distinctions among types of government properties and has articulated rules as to when the government may regulate speech in each.

Fourth, Section E examines freedom of association. Although association is not expressly mentioned in the First Amendment, the Supreme Court has held that it is a fundamental right because of its close relationship to speech and assembly.⁴³

Finally, Section F focuses on freedom of the press. Many issues concerning press freedom are discussed throughout the chapter. For example, prior restraint of the press—a crucial aspect of the Constitution’s protection of the media—is discussed in Section B. Section F considers the extent to which the First Amendment is a shield that protects the press from government regulation, such as from being taxed or forced to disclose information or being required to allow others to use it. The section also considers whether and when freedom of the press creates a right for the press to have access to government papers, activities, and facilities.

Part of what makes First Amendment analysis difficult is that many of these issues can be present in the same case, and there is no prescribed order for analysis. For instance, if the government were to prohibit sexually explicit displays in public parks, the law might be challenged as vague and overbroad; it might be analyzed as to whether it is obscenity unprotected by the First Amendment; and it might be considered as to whether it is a permissible restriction of speech in a public forum. All these issues and others are presented. There is no reason why one question should inherently precede the others. Simply put, it is not possible to comprehensively flowchart the First Amendment as a defined series of questions in a required sequential order. There are many ways of approaching and evaluating government actions restricting expression.

42. *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994).

43. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

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~~they impermissible pressure in light of *Bantam Books*? Cases such as *Bantam Books* and *Meese* point in opposite directions. Ultimately, the task for courts is to evaluate the degree of pressure against speech. If the pressure is more than minimal, cases such as *Bantam Books* suggest that First Amendment scrutiny is required. *Meese v. Keene* might be distinguished on the ground that the Court saw little adverse effect on speech by the government labeling material as “political propaganda.”~~

C. TYPES OF UNPROTECTED AND LESS PROTECTED SPEECH

The Supreme Court has identified some categories of unprotected speech that the government can prohibit and punish. Incitement of illegal activity, fighting words, and obscenity are examples of such categories of unprotected speech. Additionally, there are categories of less protected speech where the government has more latitude to regulate than usual under the First Amendment. For instance, government generally can regulate commercial speech if intermediate scrutiny is met. Also, the Court has indicated that some types of sexually oriented speech, although protected by the First Amendment, are deemed to be of “low value,” and thus are more susceptible to government regulation.

These categories are defined based on the subject matter of the speech and thus represent an exception to the usual rule that content-based regulation must meet strict scrutiny. Until very recently, it was thought that the government had broad latitude to prohibit and regulate speech within the categories of unprotected expression. The conventional view was that laws in these areas would be upheld so long as they met the rational basis test that all government actions must satisfy. However, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), discussed below, the Court indicated that generally content-based distinctions within categories of unprotected speech must meet strict scrutiny. In *R.A.V.*, the Court declared unconstitutional a city’s ordinance that prohibited hate speech based on race, color, religion, or gender that was likely to “anger, alarm, or cause resentment.” The Court said that even though fighting words are a category of unprotected speech, the law impermissibly drew content-based distinctions among fighting words, such as prohibiting expression of hate based on race, but not based on political affiliation. It is unclear after *R.A.V.* how much its reasoning will limit the ability of government to regulate within the categories of unprotected speech.

The categories of unprotected and less protected speech reflect value judgments by the Supreme Court that the justifications for regulating such speech outweigh the value of the expression. For each of the categories discussed below, the Court’s judgment can be questioned. For example, is the Court correct that obscenity is “utterly without redeeming social importance” and therefore is unprotected by the First Amendment?¹⁰⁵ Is the Court right that commercial speech is less important than other types of speech and therefore worthy only

105. *Roth v. United States*, 354 U.S. 476, 484 (1957).

of intermediate scrutiny? Also, it is important to consider whether other categories of unprotected speech should be recognized because of the harms of such speech relative to its benefits.

Moreover, the categorical approach requires careful attention to how the types of unprotected speech are defined. For instance, the definitions of “incitement” or “obscenity” are enormously important because they determine whether the government can punish the speech or whether the expression is safeguarded by the First Amendment. A recurring theme throughout this section is whether the Court’s definitions of the categories are sufficiently specific and a desirable way of separating protected from unprotected speech.

1. *Incitement of Illegal Activity*

a. Introduction

The topic of incitement is important for many reasons. It was the first area that produced a large body of Supreme Court cases. Thus, the doctrines articulated in this area — such as the clear and present danger test — have been carried over to many other areas of First Amendment law.

The issue of incitement also is important because it poses a basic value question: How should society balance its need for social order against its desire to protect freedom of speech? When, if at all, may speech that advocates criminal activity or the overthrow of the government be stopped to promote order and security?

Some commentators have argued that all such advocacy of illegal conduct should be deemed unprotected by the First Amendment. Robert Bork, for example, contended that “[a]dvocacy of law violation is a call to set aside the results that political speech has produced. The process of the ‘discovery and spread of political truth’ is damaged or destroyed if the outcome is defeated by a minority that makes law enforcement, and hence the putting of political truth into practice, impossible or less effective. There should, therefore, be no constitutional protection for any speech advocating violation of law.”¹⁰⁶

The Supreme Court never has taken this view. Justice Brandeis explained that “even 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.”¹⁰⁷ The strong presumption in favor of protecting speech is viewed as justifying safeguarding even advocacy of illegality unless there is a substantial likelihood of imminent harm. Also, advocacy of law violation, or even civil disobedience, is seen as a powerful way of expressing a message. But the Court also never has taken the position that such speech is completely protected by the First Amendment, and the government is limited to punishing the criminal acts themselves.

Thus, the Court has been confronted with the task of defining when advocacy of illegality constitutes unprotected incitement and when it is safeguarded by

106. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 31 (1971).

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

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the First Amendment.¹⁰⁸ Over the course of this century, the Supreme Court has used at least four major different approaches in this area. Interestingly, often the later tests have replaced earlier ones without overruling them or even acknowledging their differences.

During World War I and the years immediately following it, the Supreme Court articulated and applied the “clear and present danger test.” During the 1920s and 1930s, the Court did not often use this formulation, but instead used a “reasonableness test” that allowed the government to punish advocacy of illegality so long as it was reasonable to do so. The reasonableness test is the one approach that has been expressly repudiated by later Court decisions. In the 1950s, during the McCarthy era, the Court reformulated the clear and present danger test as a risk formula; whether speech was protected depended on the gravity of the evil compared with its likelihood. Most recently, since the late 1960s, the Court has narrowly defined incitement to maximize protection of speech. Under this approach, advocacy can be punished only if there is a likelihood of imminent illegal conduct and the speech is directed to causing imminent illegality. These four approaches are discussed in turn. In reading the cases from each era, it is important to consider whether the Court was creating a new test or using an old one and also, most important, whether the Court struck an appropriate balance between protecting freedom of speech and society’s need for law and order.

b. The “Clear and Present Danger” Test

There was substantial criticism within the country of American involvement in World War I.¹⁰⁹ There was significant opposition to the draft, and it is estimated that there were over 350,000 draft evaders or delinquents during the war.¹¹⁰ At about the same time, the success of the Bolshevik revolution in Russia led to fears of a leftist uprising in this country.

In response to all of this, two months after America’s entry into World War I, Congress enacted the Espionage Act of 1917. The law, in part, made it a crime when the nation was at war for any person willfully to “make or convey false reports or false statements with intent to interfere” with the military success or “to promote the success of its enemies.”¹¹¹ The law also made it a crime to willfully “obstruct the recruiting or enlistment service of the United States.”¹¹² Convictions could be punished by sentences of up to 20 years’ imprisonment and fines of up to \$10,000.

In 1918, Congress adopted a law even more restrictive of speech. The Sedition Act of 1918 prohibited individuals from saying anything with the intent to obstruct the sale of war bonds; to “utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language” intended to cause contempt or scorn for the form of the government of the United States, the Constitution, or the

108. For an excellent in-depth discussion of the law in this area, see Kent Greenawalt, *Speech, Crime, and the Uses of Language* (1989).

109. See David Rabban, *The First Amendment in Its Forgotten Years*, 90 Yale L.J. at 581-582; Zechariah Chaffee, *Free Speech in the United States* 108-111 (1941).

110. Robert J. Goldstein, *Political Repression in Modern America from 1870 to the Present* 105 (1978).

111. Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219.

112. *Id.*

flag; to urge the curtailment of production of war materials with the intent of hindering the war effort; or to utter any words supporting the cause of any country at war with the United States or opposing the cause of the United States.¹¹³

In a series of cases, the Supreme Court upheld the constitutionality of both the laws and their application to speech that, in hindsight, was mild and ineffectual.¹¹⁴ The Court articulated the clear and present danger test and found it was met in the cases before it.¹¹⁵ The first cases—*Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States*—involved the 1917 Act. In each of these cases, the Court upheld convictions.

SCHENCK v. UNITED STATES

249 U.S. 47 (1919)

Justice HOLMES delivered the opinion of the Court.

This is an indictment [that] charges a conspiracy to violate the Espionage Act of June 15, 1917, by causing and attempting to cause insubordination in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendant wilfully conspired to have printed and circulated to men who had been called and accepted for military service a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The defendants were found guilty.

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on, "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens

113. Act of May 16, 1918, 40 Stat. 553.

114. In addition to Supreme Court rulings, there were notable decisions by lower federal courts concerning the acts. For example, in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917), Judge Learned Hand attempted to draw a clear distinction between incitement and discussion. He wrote that one "may note counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action." Criticism of the law is constitutionally protected, advocacy of its violation is not.

In *Shaffer v. United States*, 255 F. 886 (9th Cir. 1919), the court upheld the application of the Espionage Act of 1917 against a book critical of American involvement in World War I. The court said that the test is "whether the natural and probable tendency and effect of [the publication] are such as are calculated to produce the result condemned by statute."

115. For a thorough review of these cases, see Zechariah Chaffee, Jr., *Free Speech in the United States* (1941).

and residents of the United States to retain.” It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, winding up, “You must do your share to maintain, support and uphold the rights of the people of this country.” Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. 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.

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. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

FROHWERK v. UNITED STATES

249 U.S. 204 (1919)

Justice HOLMES delivered the opinion of the Court.

This is an indictment in thirteen counts. The [indictment alleges] a conspiracy between the plaintiff in error and one Carl Gleeser, they then being engaged in the preparation and publication of a newspaper, the Missouri Staats Zeitung, to violate the Espionage Act of June 15, 1917. It alleges as overt acts the preparation and circulation of twelve articles in the said newspaper at different dates from July 6, 1917, to December 7 of the same year. The other counts allege attempts to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, by the same publications, each count being confined to the publication of a single date. There was a trial and Frohwerk was found guilty on all the counts except the seventh, which needs no further mention.

He was sentenced to a fine and to ten years imprisonment on each count, the imprisonment on the later counts to run concurrently with that on the first.

The first [article] begins by declaring it a monumental and inexcusable mistake to send our soldiers to France, says that it comes no doubt from the great trusts, and later that it appears to be outright murder without serving anything practical; speaks of the unconquerable spirit and undiminished strength of the German nation, and characterizes its own discourse as words of warning to the American people. Later, on August 3, came discussion of the causes of the war, laying it to the administration and saying "that a few men and corporations might amass unprecedented fortunes we sold our honor, our very soul" with the usual repetition that we went to war to protect the loans of Wall Street. Later, after more similar discourse, comes "We say therefore, cease firing."

It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war. It does not appear that there was any special effort to reach men who were subject to the draft.

But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out. Small compensation would not exonerate the defendant if it were found that he expected the result, even if pay were his chief desire. When we consider that we do not know how strong the Government's evidence may have been we find ourselves unable to say that the articles could not furnish a basis for a conviction upon the first count at least.

DEBS v. UNITED STATES

249 U.S. 211 (1919)

Justice HOLMES delivered the opinion of the Court.

This is an indictment under the Espionage Act of June 15, 1917. It has been cut down to two counts, originally the third and fourth. The former of these alleges that on or about June 16, 1918, at Canton, Ohio, the defendant caused and incited and attempted to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and with intent so to do delivered, to an assembly of people, a public speech, set forth. The fourth count alleges that he obstructed and attempted to obstruct the recruiting and enlistment service of the United States and to that end and with that intent delivered the same speech, again set forth. The defendant was found guilty and was sentenced to ten years' imprisonment on each of the two counts, the punishment to run concurrently on both.

The main theme of the speech was Socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech. The speaker began by saying that he had just returned from a visit to the

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workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class—these being Wagenknecht, Baker and Ruthenberg, who had been convicted of aiding and abetting another in failing to register for the draft. He said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more, but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind. Later he added further eulogies and said that he was proud of them. He then expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States. There followed personal experiences and illustrations of the growth of Socialism, a glorification of minorities, and a prophecy of the success of the international Socialist crusade, with the interjection that “you need to know that you are fit for something better than slavery and cannon fodder.”

Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained. Therefore it is less important to consider whether that upon the third count, for causing and attempting to cause insubordination in the military and naval forces, is equally impregnable. The jury were instructed that for the purposes of the statute the persons designated by the Act of May 18, 1917, registered and enrolled under it, and thus subject to be called into the active service, were a part of the military forces of the United States. The Government presents a strong argument from the history of the statutes that the instruction was correct and in accordance with established legislative usage. We see no sufficient reason for differing from the conclusion but think it unnecessary to discuss the question in detail.

Interestingly, later in the year in which these cases were decided, Justice Holmes dissented in the case of *Abrams v. United States*, in which the Supreme Court upheld convictions for violating the 1918 Act. In reading *Abrams*, consider whether there is a meaningful distinction between it and the earlier cases, *Schenck*, *Debs*, and *Frohwerk*, in which Holmes wrote the majority opinions. Notice Justice Holmes’s eloquent dissent in *Abrams* in which he articulated the marketplace of ideas metaphor for the First Amendment.

ABRAMS v. UNITED STATES

250 U.S. 616 (1919)

Justice CLARKE delivered the opinion of the Court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the Espionage Act of Congress of 1917 as amended by Act of 1918. Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: In the first count, “disloyal, scurrilous and

abusive language about the form of government of the United States;" in the second count, language "intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute;" and in the third count, language "intended to incite, provoke and encourage resistance to the United States in said war." The charge in the fourth count was that the defendants conspired "when the United States was at war with the Imperial German Government, . . . unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war."

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the city of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment. All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf, and of these three frankly avowed that they were "rebels," "revolutionists," "anarchists," that they did not believe in government in any form, and they declared that they had no interest whatever in the government of the United States.

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that 5,000 of them had been printed and distributed about the 22d day of August, 1918. The circulars were distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that amendment. This contention is sufficiently discussed and is definitely negated in *Schenck v. United States* and in *Frohwerk v. United States*.

Justice HOLMES, dissenting.

This indictment is founded wholly upon the publication of two leaflets. The first of these leaflets says that the President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that "German militarism combined with allied capitalism to crush the Russian revolution"—goes on that the tyrants of the world fight each other until they see a common enemy—working class enlightenment, when they combine to crush it; and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world and that is capitalism; that it is a crime for workers of America, etc., to fight the workers' republic of Russia, and ends "Awake! Awake, you workers of the world! Revolutionists." A note adds "It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reason for denouncing German militarism than has the coward of the White House."

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The other leaflet, headed “Workers — Wake Up,” with abusive language says that America together with the Allies will march for Russia to help the Czecho-Slovaks in their struggle against the Bolsheviki, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propaganda by which their sympathy and help to the prosecution of the war have been called forth and says that with the money they have lent or are going to lend “they will make bullets not only for the Germans but also for the Workers Soviets of Russia,” and further, “Workers in the ammunition factories, you are producing bullets, bayonets, cannon to murder not only the Germans, but also your dearest, best, who are in Russia fighting for freedom.”

No argument seems to be necessary to show that these pronouncements in no way attack the form of government of the United States. [I]t seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918. But to make the conduct criminal that statute requires that it should be “with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.” It seems to me that no such intent is proved.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the Cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody 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.

I do not see how anyone can find the intent required by the statute in any of the defendant’s words. [I]t is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government — not to impede the United States in the war that it was carrying on. In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all

opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

c. The Reasonableness Approach

During the 1920s and the 1930s, the Court decided a series of cases involving criminal syndicalism laws, statutes that made it a crime to advocate the overthrow of the U.S. government or industrial organization by force or violence. The Court decided these cases without invoking the clear and present danger test. Rather, the Court appeared to use a reasonableness approach; it upheld the laws and their applications so long as the government's law and prosecution were reasonable.

Gitlow v. New York, the first case that indicated that the First Amendment applied to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment, upheld a conviction under the New York criminal anarchy statute.

GITLOW v. NEW YORK

268 U.S. 652 (1925)

Justice SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. Its material provisions are: "Sec. 160. Criminal Anarchy Defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony." He was separately tried, convicted, and sentenced to imprisonment.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the

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defendant was a member, and left to it the adoption of a “Manifesto.” This was published in *The Revolutionary Age*, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Coupled with a review of the rise of Socialism, it condemned the dominant “moderate Socialism” for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the “Communist Revolution” by a militant and “revolutionary Socialism,” based on “the class struggle” and mobilizing the “power of the proletariat in action,” through mass industrial revolts developing into mass political strikes and “revolutionary mass action,” for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a “revolutionary dictatorship of the proletariat,” the system of Communist Socialism. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the head quarters of the Left Wing, and occupied by the defendant and other officials.

The precise question presented is whether the statute, as construed and applied in this case, by the State courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment. For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States.

The statute does not penalize the utterance or publication of abstract “doctrine” or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action.

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great

weight. Every presumption is to be indulged in favor of the validity of the statute. And the case is to be considered “in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare”; and that its police “statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest.”

That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler’s scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency.

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

Justice HOLMES (dissenting).

Justice BRANDEIS and I are of opinion that this judgment should be reversed. If I am right then I think that the criterion sanctioned by the full Court in *Schenck v. United States* applies: “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 [the State] has a right to prevent.”

If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

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Similarly, the Court used a reasonableness approach to uphold a conviction for criminal syndicalism in *Whitney v. California*. *Whitney* is perhaps most famous for Justice Brandeis's eloquent opinion defending the importance of freedom of speech. Ironically, Brandeis's opinion is a concurrence to a majority opinion upholding the conviction.

WHITNEY v. CALIFORNIA

274 U.S. 357 (1927)

Justice SANFORD delivered the opinion of the Court.

By a criminal information filed in the Superior Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. The pertinent provisions of the Criminal Syndicalism Act are: "Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change." She was tried, convicted on the first count, and sentenced to imprisonment.

The following facts, among many others, were established on the trial by undisputed evidence: The defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent delegates to the national convention of the Socialist Party held in Chicago in 1919, which resulted in a split between the "radical" group and the old-wing Socialists. The "radicals" — to whom the Oakland delegates adhered — being ejected, went to another hall, and formed the Communist Labor Party of America. Shortly thereafter the Local Oakland withdrew from the Socialist Party, and sent accredited delegates, including the defendant, to a convention held in Oakland in November 1919, for the purpose of organizing a California branch of the Communist Labor Party. The defendant, after taking out a temporary membership in the Communist Labor Party, attended this convention as a delegate and took an active part in its proceedings. She also testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.

By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or

assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest.

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

Justice BRANDEIS (concurring).

The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled.

This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to [be] the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction;

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that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of 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. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability

of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed.

In several cases after *Gitlow* and *Whitney*, the Supreme Court overturned convictions under criminal syndicalism laws. In each, the Court still did not use the clear and present danger test, but rather, found the convictions unreasonable. In *Fiske v. Kansas*, 274 U.S. 380 (1927), the Supreme Court for the first time overturned a state court conviction as violating the First Amendment as applied to the states through the Fourteenth Amendment. In *Fiske*, the Court concluded that there was no evidence of criminal syndicalism because there were no declarations by the defendant, or his organization, urging unlawful acts. The Court said that the conviction was “an arbitrary and unreasonable exercise of the police power of the State.”

Similarly, in *DeJonge v. Oregon*, 299 U.S. 353 (1937), the Court overturned a conviction for holding a meeting of the Communist Party. Again, the Court emphasized that no one at the meeting advocated illegal acts or the overthrow of the government. The Court said that “peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed.”

The majority in all of these cases used an approach that now would be termed rational basis review. None applied the clear and present danger test or anything akin to heightened scrutiny.¹¹⁶ Thus, the reasonableness approach is inconsistent with the now firmly established heightened scrutiny for fundamental rights. Indeed, the Supreme Court has declared that “*Whitney* has been thoroughly discredited by later decisions.”¹¹⁷

d. The Risk Formula Approach

During the late 1940s and early 1950s, Senator Joseph McCarthy led a crusade to identify and exclude communists in government. It was the age of suspicion; a

116. Interestingly, in other areas, not involving advocacy of illegal activity, the Court during the 1930s and 1940s expressly used the clear and present danger test. *See, e.g.*, *Bridges v. California*, 314 U.S. 252 (1941) (speech critical of courts could be held in contempt only if there was a clear and present danger); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (speech that provokes a hostile audience can be punished only if there is a clear and present danger).

117. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

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time when merely being suspected of being part of a communist or radical group was enough to cause a person to lose a job or appear on a blacklist.¹¹⁸

Amid this, in 1951, the Supreme Court decided *Dennis v. United States*.

DENNIS v. UNITED STATES

341 U.S. 494 (1951)

Chief Justice VINSON announced the judgment of the Court and an opinion in which Mr. Justice REED, Mr. Justice BURTON, and Mr. Justice MINTON join.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act during the period of April, 1945, to July, 1948. Sections 2 and 3 of the Smith Act, provide as follows: "Sec. 2. (a) It shall be unlawful for any person — (1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; (2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof. Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of . . . this title."

The indictment charged the petitioners with wilfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.

The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence.

118. See Victor Navasky, *Naming Names* (1980).

In this case we are squarely presented with the application of the “clear and present danger” test, and must decide what that phrase imports. Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase “clear and present danger” of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. 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. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government as speedily as circumstances would permit. This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words. The mere fact that from the period 1945 to 1948 petitioners’ activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

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We hold that the Smith Act [does] not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a “clear and present danger” of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are affirmed.

Justice FRANKFURTER, concurring in affirmance of the judgment.

In enacting a statute which makes it a crime for the defendants to conspire to do what they have been found to have conspired to do, did Congress exceed its constitutional power? Few questions of comparable import have come before this Court in recent years. The appellants maintain that they have a right to advocate a political theory, so long, at least, as their advocacy does not create an immediate danger of obvious magnitude to the very existence of our present scheme of society. On the other hand, the Government asserts the right to safeguard the security of the Nation by such a measure as the Smith Act. Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country.

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment? — who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. We are to determine whether a statute is sufficiently definite to meet the constitutional requirements of due process, and whether it respects the safeguards against undue concentration of authority secured by separation of power. Above all we must remember that this Court’s power of judicial review is not “an exercise of the powers of a super-Legislature.”

Civil liberties draw at best only limited strength from legal guaranties. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value. Even those who would most freely use the judicial brake on the democratic process by invalidating legislation that goes deeply against their grain, acknowledge, at least by paying lip service, that constitutionality does not exact a sense of proportion or the sanity of humor or an absence of fear. Focusing attention

on constitutionality tends to make constitutionality synonymous with wisdom. When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional. The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law.

Justice BLACK, dissenting.

At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids.

But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners although not indicted for the crime of actual advocacy, maybe punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm these convictions is to repudiate directly or indirectly the established “clear and present danger” rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the “clear and present danger” test does not “mark the furthestmost constitutional boundaries of protected expression” but does “no more than recognize a minimum compulsion of the Bill of Rights.”

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress’ or our own notions of mere “reasonableness.” Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those “safe” or orthodox views which rarely need its protection.

Justice DOUGLAS, dissenting.

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is

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not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts.

The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial. There is a statute which makes a seditious conspiracy unlawful. Petitioners, however, were not charged with a “conspiracy to overthrow” the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and advocate the overthrow of our Government by force or violence and with a conspiracy to advocate and teach its overthrow by force and violence. It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: *Foundations of Leninism* by Stalin (1924); *The Communist Manifesto* by Marx and Engels (1848); *State and Revolution* by Lenin (1917); *History of the Communist Party of the Soviet Union (B.)* (1939).

Those books are to Soviet Communism what *Mein Kampf* was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely.

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime?

If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that as a political party they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogey-man; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. [T]he people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it.

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

Neither prejudice nor hate nor senseless fear should be the basis of this solemn act. Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that

petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims.

In the years following *Dennis*, the Supreme Court decided several cases under the Smith Act. In *Yates v. United States*, 354 U.S. 298 (1957), the Court overruled the convictions of several individuals for conspiracy to violate the Smith Act. The Court emphasized that there was a crucial “distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action.” The Court did not overrule *Dennis*, but distinguished it. Justice Harlan, writing for the Court, said that *Dennis* held that “the indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify the apprehension that action will occur.” But the Court said that was not present in *Yates*. Justice Harlan explained that the “essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something.”

The problem, of course, is deciding whether speech is advocacy of doctrine or advocacy to action. In many instances, this is likely to be an ephemeral distinction based entirely on how a judge chooses to characterize the speech. As Justice Holmes said, “[e]very idea is an incitement.”¹¹⁹

Yates did not mark the end of the Court’s willingness to uphold convictions under the Smith Act. For example, in *Scales v. United States*, 367 U.S. 203 (1961), the Court upheld a conviction for being a member of an organization that advocates the overthrow of the government. The Court stressed that for the government to punish such association there must be proof that an individual actively affiliated with a group, knowing of its illegal objectives, and with the specific intent of furthering those goals. The Court concluded that there was sufficient evidence in the record “to make a case for the jury on the issue of illegal Party advocacy.” In contrast, in *Noto v. United States*, 367 U.S. 290 (1961), the Court reversed a conviction under the Smith Act for conspiracy because of inadequate evidence to meet these requirements.

e. The *Brandenburg* Test

By the mid-1960s, the Court appeared to be much more protective of speech. In *Bond v. Floyd*, 385 U.S. 116 (1966), the Court held that the Georgia General Assembly could not refuse to seat Representative Julian Bond because of his support for a statement strongly critical of the Vietnam War and the draft. The Court invoked *Yates v. United States* (1957) and concluded that Bond’s statements were advocacy of ideas protected by the First Amendment.

Also, in *Watts v. United States*, 394 U.S. 705 (1969), the Court reversed the conviction of an individual for violating the law that made it a crime to

119. *Gitlow v. New York*, 268 U.S. (1925), at 673.

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“knowingly and willfully . . . [threaten] to take the life of or to inflict bodily harm upon the President.” An individual was convicted under this law for saying, “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.” The Court said that Watts’s statement was “political hyperbole,” not a real threat, and thus was protected by the First Amendment.

The key case defining when the government may punish advocacy of illegality is *Brandenburg v. Ohio*.

BRANDENBURG v. OHIO*395 U.S. 444 (1969)*

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for “advocate[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” He was fined \$1,000 and sentenced to one to 10 years’ imprisonment.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan “rally” to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. The prosecution’s case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech.

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of “revengeance” was omitted, and one sentence was added: “Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.” Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California’s Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California* (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States* (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and

free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

As we said in *Noto v. United States* (1961), “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio’s Criminal Syndicalism Act cannot be sustained. The Act punishes persons who “advocate or teach the duty, necessity, or propriety” of violence “as a means of accomplishing industrial or political reform”; or who publish or circulate or display any book or paper containing such advocacy; or who “justify” the commission of violent acts “with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism”; or who “voluntarily assemble” with a group formed “to teach or advocate the doctrines of criminal syndicalism.” Neither the indictment nor the trial judge’s instructions to the jury in any way refined the statute’s bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, cannot be supported, and that decision is therefore overruled.

Brandenburg is the Supreme Court’s most speech-protective formulation of an incitement test. A conviction for incitement under *Brandenburg* is constitutional only if several requirements are met: imminent harm, a likelihood of producing illegal action, and an intent to cause imminent illegality. None of the earlier tests had contained an intent requirement. Also, none ever had so clearly stated a requirement for a likelihood of imminent harm.

Therefore, on a doctrinal level, it is puzzling that the Court presented the *Brandenburg* test as if it followed from the *Dennis* formulation, rather than as a substantial expansion in the protection of speech. In *Dennis*, the Court expressly denied that there was a requirement for proof of an imminent danger of likely harm.

Brandenburg does not answer, however, how imminence and likelihood are to be appraised. Are these requirements to be assessed relative to the harms to be prevented, so that the more serious the danger, the less in the way of imminence or likelihood that will be required? Or is some showing of imminence and likelihood necessary no matter how great the harm? If imminence and likelihood are judged relative to the nature of the danger, then *Brandenburg* in essence creates a risk formula like the *Dennis* test, even though one is not expressly stated in the *Brandenburg* formulation. Nor does the Court in *Brandenburg* elaborate as to the intent requirement and what must be proven to satisfy it.

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~~Common sense permits no other conclusion. This is demonstrated by the fact that the appellee, and this Court, attack the statute, not as it applies to the appellee, but as it conceivably might apply to others who might utter other words.~~

~~In three other cases also decided in 1972 — *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), *Lewis v. City of New Orleans*, 408 U.S. 913 (1972), and *Brown v. Oklahoma*, 408 U.S. 914 (1972) — the Court overturned fighting words laws by finding them to be impermissibly vague and overbroad. *Rosenfeld*, *Lewis*, and *Brown* all involved the angry use of profanity in a manner likely to provoke an audience. In each case, the Court overturned a fighting words conviction and vacated in light of *Gooding v. Wilson*. In *Rosenfeld*, the defendant, speaking at a school board meeting, repeatedly used the word “mother-fucker” in describing teachers and school board members. In *Lewis*, a woman called the police, who were arresting her son, “god-damn-mother-fucker police.” In *Brown*, an individual in a speech referred to police officers as “mother-fucking fascist pig cops” and spoke of one particular officer as a “black mother-fucking pig.” In each of the instances, the Court reversed the convictions, making it clear that speech is protected even if it uttered in anger, filled with profanities, and likely to anger the audience.~~

~~In *City of Houston v. Hill*, 482 U.S. 451 (1987), the Court overturned a city ordinance that made it a crime for a person to “oppose, molest, abuse, or interrupt any policeman in the execution of his duty.” The Court explained that the “ordinance’s plain language is admittedly violated scores of times daily. . . . It is not limited to fighting words nor even to obscene or opprobrious language, but prohibits speech that ‘in any manner . . . interrupt[s] an officer.’ The Constitution does not allow such speech to be made a crime.”~~

~~These cases indicate that a fighting words law will be upheld only if it is specific and narrowly tailored to apply just to speech that is not protected by the First Amendment. Otherwise, the statute or ordinance will be deemed void on vagueness grounds or invalidated as being impermissibly overbroad.~~

iii. Narrow Fighting Words Laws as Content-Based Restrictions

~~However, a very narrow fighting words law likely will be declared unconstitutional as impermissibly drawing content-based distinctions as to what speech is prohibited and what is allowed. This was the result in *R.A.V. v. City of St. Paul*, the Supreme Court’s most recent fighting words decision.~~

R.A.V. v. CITY OF ST. PAUL, MINNESOTA

505 U.S. 377 (1992)

Justice SCALIA delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs.

They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990), which provides: “Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment. The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner’s overbreadth claim because, as construed in prior Minnesota cases, the modifying phrase “arouses anger, alarm or resentment in others” limited the reach of the ordinance to conduct that amounts to “fighting words,” i.e., “conduct that itself inflicts injury or tends to incite immediate violence . . .,” and therefore the ordinance reached only expression “that the first amendment does not protect.” The court also concluded that the ordinance was not impermissibly content based because, in its view, “the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.”

I

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. Accordingly, we accept the Minnesota Supreme Court’s authoritative statement that the ordinance reaches only those expressions that constitute “fighting words” within the meaning of *Chaplinsky*. Petitioner and his amici urge us to modify the scope of the *Chaplinsky* formulation, thereby invalidating the ordinance as “substantially overbroad.” We find it unnecessary to consider this issue. Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the “fighting words” doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

The First Amendment generally prevents government from proscribing speech, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

We have sometimes said that these categories of expression are “not within the area of constitutionally protected speech,” or that the “protection of the First Amendment does not extend” to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally

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repeated shorthand characterizing obscenity “as not being speech at all.” What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government “may regulate [them] freely.” That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well. It is not true that “fighting words” have at most a “de minimis” expressive content, or that their content is in all respects “worthless and undeserving of constitutional protection,” sometimes they are quite expressive indeed. We have not said that they constitute “no part of the expression of ideas,” but only that they constitute “no essential part of any exposition of ideas.” *Chaplinsky v. New Hampshire*.

The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses — so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

And just as the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements.

In other words, the exclusion of “fighting words” from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a “nonspeech” element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a “mode of speech,” both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility — or favoritism — towards the underlying message expressed.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience — i.e., that which involves

the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is “justified without reference to the content of the . . . speech,” *Renton v. Playtime Theatres, Inc.* (1986). A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

These bases for distinction refute the proposition that the selectivity of the restriction is “even arguably conditioned upon the sovereign’s agreement with what a speaker may intend to say.” There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular “neutral” basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State’s prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of “fighting words,” like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

II

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in

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connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable.

Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

Justice WHITE, with whom Justice BLACKMUN and Justice O’CONNOR join, and with whom Justice STEVENS joins concurring in the judgment.

I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there. This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment.

This Court’s decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. *Chaplinsky v. New Hampshire* (1942). For instance, the Court has held that the individual who falsely shouts “fire” in a crowded theater may not claim the protection of the First Amendment. *Schenck v. United States* (1919). The Court has concluded that neither child pornography nor obscenity is protected by the First Amendment. *New York v. Ferber* (1982); *Miller v. California* (1973). And the Court has observed that, “[l]eaving aside the special considerations when public officials [and public figures] are the target, a libelous publication is not protected by the Constitution.”

All of these categories are content based. But the Court has held that the First Amendment does not apply to them because their expressive content is worthless or of *de minimis* value to society. This categorical approach has provided a principled and narrowly focused means for distinguishing between expression

that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need.

Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are “not within the area of constitutionally protected speech.” The present Court submits that such clear statements “must be taken in context” and are not “literally true.” To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence.

Nevertheless, the majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection—at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because “[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.” Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

To borrow a phrase: “Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.” It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

In a second break with precedent, the Court refuses to sustain the ordinance even though it would survive under the strict scrutiny applicable to other protected expression. Assuming, *arguendo*, that the St. Paul ordinance is a content-based regulation of protected expression, it nevertheless would pass First Amendment review under settled law upon a showing that the regulation “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”

St. Paul has urged that its ordinance, in the words of the majority, “helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination. . . .” The Court expressly concedes that this interest is compelling and is promoted by the ordinance. Nevertheless, the Court treats strict scrutiny analysis as irrelevant to the constitutionality of the legislation. Under the majority’s view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis.

Although I disagree with the Court’s analysis, I do agree with its conclusion: The St. Paul ordinance is unconstitutional. However, I would decide the case on overbreadth grounds. Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment.

Justice BLACKMUN, concurring in the judgment.

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I regret what the Court has done in this case. The majority opinion signals one of two possibilities: It will serve as precedent for future cases, or it will not. Either result is disheartening.

In the first instance, by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws. This weakens the traditional protections of speech. If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden to categorize, as the Court has done here, we shall reduce protection across the board. It is sad that in its effort to reach a satisfying result in this case, the Court is willing to weaken First Amendment protections.

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence but, instead, will be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over “politically correct speech” and “cultural diversity,” neither of which is presented here. If this is the meaning of today’s opinion, it is perhaps even more regrettable.

I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

I concur in the judgment, however, because I agree with Justice WHITE that this particular ordinance reaches beyond fighting words to speech protected by the First Amendment.

R.A.V. can be appraised on many levels. First, it can be analyzed in terms of what it means for the fighting words doctrine. *R.A.V.* means that a fighting words law will be upheld only if it does not draw content-based distinctions among types of speech, such as by prohibiting fighting words based on race, but not based on political affiliation. The problem, though, is that it will be extremely difficult for legislation to meet this requirement without being so broad that the law will be invalidated on vagueness or overbreadth grounds.

Second, *R.A.V.* can be analyzed in terms of the Court’s holding that there is a strong presumption against content-based discrimination within categories of unprotected speech. This was the issue that most divided the Justices in the majority from those concurring in the judgment. On the one hand, Justice Scalia makes a powerful argument that the government should not be able to prohibit only obscenity or fighting words that contain messages critical of the government. But on the other hand, the dissent makes a persuasive point that inevitably in regulating categories of unprotected speech, the government will not forbid all such speech, but draw lines. Such lines are vulnerable after *R.A.V.*