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**The Clear and Present Dangers of the Clear and
Present Danger Test: *Schenck* and *Abrams*
Revisited**

Ronald J. Krotoszynski, Jr.

72 SMU L. REV. (2019)



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2019

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THE CLEAR AND PRESENT DANGERS OF THE CLEAR AND PRESENT DANGER TEST: *SCHENCK* AND *ABRAMS* REVISITED

*Ronald J. Krotoszynski, Jr.**

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JUSTICE Oliver Wendell Holmes pioneered the clear and present danger test as the constitutional yardstick for determining when the government could punish speech that might cause social harms.¹ The

* John S. Stone Chair, Director of Faculty Research and Professor of Law, University of Alabama School of Law. I want to thank the editors of the *SMU Law Review* for inviting me to participate in this symposium on *Abrams* and *Schenck*. The author wishes to acknowledge with gratitude generous summer research support from the Alabama Law School Foundation, which greatly facilitated my work on this project. I also wish to thank the Seattle University School of Law for hosting me as a Visiting Scholar in Residence during the summers of 2018 and 2019, periods when I was working on this project. The usual disclaimer applies: any errors or omissions are my responsibility alone.

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

Supreme Court's decision in *Schenck v. United States*, with Justice Holmes writing for a unanimous bench, was issued on March 3, 1919. *Schenck* held that the government may criminalize speech if it has a bad tendency—meaning that it makes unlawful conduct more likely to take place.²

By the fall of 1919, however, Justice Holmes had experienced a serious change of heart. Although nominally continuing to advocate for the use of the clear and present danger test to determine when the government may criminalize mere speech, Holmes's articulation of the test underwent a radical transformation between March 3 and November 10. During this period, the clear and present danger test, at least as Justice Holmes articulated and applied it, underwent a near-total transformation from a very weak test that permitted the government to proscribe speech that could have a bad tendency to a highly demanding test that required the government to tolerate even speech "fraught with death" in order to meet the requirements of the First Amendment.³

Unfortunately for Justice Holmes, his colleagues on the Supreme Court strongly preferred his original articulation and application of the clear and present danger test.⁴ Accordingly, the test continued to work major mischief from 1919 to 1969, when the Supreme Court, in *Brandenburg v. Ohio*, glossed the test in such a way as to require both a direct call to serious unlawful action and a high probability that the call to arms would be heeded.⁵ Cases subsequent to *Brandenburg* have usually, but not always, applied this test in a demanding fashion.⁶

Nevertheless, the ghost of the clear and present danger test still stalks the pages of the *United States Reports*. This is because judges, like almost

2. *Id.* (holding that speech may be criminalized if "its tendency and the intent with which it is done" reflect a subjective desire to bring about an unlawful result because the First Amendment does not require "success alone [as a condition of] making the act [of speaking] a crime").

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

4. *See, e.g., Dennis v. United States*, 341 U.S. 494, 508–09 (1951). As Chief Justice Fred M. Vinson stated the proposition, "[T]he words [of the First Amendment] 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." *Id.* at 509. Thus, "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." *Id.* Even feeble or ineffectual attempts to overthrow the government may be criminally prohibited because "[t]he 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." *Id.*

5. *See* 395 U.S. 444, 447–48 (1969) (per curiam) (holding that the First Amendment does "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" and explaining that mere abstract advocacy of unlawful action at some indefinite time in the future may not be criminalized).

6. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 107–09 (1973) (per curiam) (invalidating a breach of the peace conviction based on an anti-war protester telling a law enforcement officer, "We'll take the fucking street later" or "We'll take the fucking street again" because, in context, "there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent disorder*").

everyone else, are prone to mass panic and fear of mass-casualty terroristic attacks.⁷ It is easy enough to say that judges have a particular and special duty to exhibit courage in times of mass panic and distress—after all, as Professor Vince Blasi has famously argued, it is precisely in these times that the First Amendment is most needed to aid those with the temerity to raise dissenting voices.⁸ One can easily agree with Professor Blasi's separate but related point that a commitment to civil liberty in general—and the freedom of speech in particular—requires “civic courage” of all government officials (but especially judges).⁹

The difficulty of getting judges to act consistently with these normative commitments remains.¹⁰ Indeed, when judges exhibit extraordinary cour-

7. For a relevant discussion of the psychology literature and some useful suggestions on how judges might try to take account of the dangers of mass panic, see Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 158–222. Professor Wells notes that judges “remain subject to the same passions, fears, and prejudices that sweep the rest of the nation.” *Id.* at 117. Accordingly, “[i]t is one thing . . . for us to say that courts *should* take a more active role in protecting civil liberties” but “quite another to say that they the *will*.” *Id.*

8. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985). In my view, there is really no serious disputing Professor Blasi's normative argument that protecting dissent is most vital when the very survival of the institutions of government seem to be at some risk. *See id.* at 449–50, 472–75. However, the problem is not getting federal judges to agree with this proposition in the abstract; the difficulty lies in getting them to observe the principle when the potential social cost of protecting speech seems astonishingly high. In times of crisis, most judges, most of the time, revert to the “Hand Formula,” meaning they take into account the severity of the evil, discounted by its probability, to determine whether particular speech should enjoy First Amendment protection. *See United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (“In each case [federal judges] 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 have purposely substituted ‘improbability’ for ‘remoteness,’ because that must be the right interpretation.”), *aff'd*, 341 U.S. 494 (1951); *see also Dennis v. United States*, 341 U.S. 494, 510 (1951) (citing and quoting the Hand Formula and observing that “it is as succinct and inclusive as any other [test] we might devise at this time” and “takes into consideration those factors which we deem relevant”).

9. *See* Vincent Blasi, *The First Amendment and the Idea of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 690–91 (1988) (observing that “[t]o Brandeis, the measure of courage in the civic realm is the capacity to experience or even anticipate change—even rapid and fundamental change—without losing perspective or confidence” and positing that “the freedom of speech may be most valuable for its indirect effect, salutary even if subtle, on public attitudes toward change”). *But cf.* GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT* 230, 252–53 (2017) (noting that “[n]o wealthy or powerful speaker has ever lost a major First Amendment case in the Roberts Court” and criticizing the system of “managed speech” that the Roberts Court has developed because it “plac[es] a high premium on social and political stability,” “encourages a public discussion where a limited number of speakers exchange a limited range of ideas,” and relies on “powerful government and private managers to keep public discussion within responsible boundaries”). The kind of “managed speech” regime to which Professor Magarian objects so vociferously is literally the antithesis of a scheme of First Amendment rights premised on civic courage. *See* Blasi, *supra*, at 676–77, 682–84 (describing and discussing the concept of civic courage that animates the Brandeis concurring opinion in *Whitney* and arguing that “the ideal of civic courage expressed in the *Whitney* opinion constitutes one of the generative ideas of the [F]irst [A]mendment tradition”).

10. *See* Wells, *supra* note 7, at 117–18 (“While in the legal paradigm, adherence to the law and its objective criteria is supposed to prevent fear and prejudice from infecting judicial resolution of issues, even the Supreme Court’s doctrine most protective of civil liber-

age under difficult circumstances, as was the case with some very brave lower federal court judges in the Deep South tasked with implementing the Supreme Court's decision in *Brown v. Board of Education*,¹¹ legal scholars and historians describe them as "unlikely heroes" precisely because this kind of courage under fire comes as something of a surprise.¹²

More often than not, judicial courage proves to be in short supply—particularly in times of war or civil unrest. The Supreme Court itself has issued some truly horrendous decisions in periods of war, more likely than not because the Justices harbored misgivings about strict enforcement of constitutional rights at times and in places where doing so could impose very high social costs.¹³ It bears noting that clear-and-present-danger-type reasoning is hardly limited to the First Amendment; Justice Hugo L. Black deployed it to disastrous effect in *Korematsu v. United States*, holding that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."¹⁴

In other words, the ends justify the means. That, in essence, is what "clear and present danger" reasoning reduces to when taken to its logical conclusion. The government may act as it has acted because the justification for abridging or trampling fundamental rights is sufficiently compelling and, given the stakes, the imprecision of the exact means used by the government to achieve those ends is of no moment. The whole point of creating entrenched rights protected by a power of judicial review, however, is to prevent the government from taking actions that violate our civic community's first principles.

ties has proven no match for the infecting atmosphere associated with national security crises.").

11. 347 U.S. 483, 495 (1954).

12. See JACK BASS, UNLIKELY HEROES 14 (1981). Judge Frank M. Johnson Jr., who served on the U.S. District Court for the Middle District of Alabama during the height of the civil rights movement in the American South, provided a particularly salient example of a jurist possessed with a deep well of "civic courage"—in addition to an unrelenting commitment to enforcing fully and fairly the constitutional rights of litigants who appeared in his courtroom. See JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 3 (1993). Dr. Martin Luther King Jr. once remarked of Judge Johnson that he "gave true meaning to the word 'justice.'" *Id.* Operationalizing a "pathological perspective" to enforce the First Amendment strictly in times of social unrest and civic stress would require a great many Frank Johnsons. (In the interests of full disclosure, I should note that I had the privilege of serving as a law clerk to Judge Johnson from July 1991 to September 1992.)

13. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944) (upholding the involuntary imprisonment in military concentration camps of Japanese-American citizens who resided on the West Coast during World War II despite the fact that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions"), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597–600 (1940) (upholding a mandatory flag salute statute because "[t]he wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment"), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

14. *Korematsu*, 323 U.S. at 220.

In times of peace and prosperity, it is easy for federal judges to hold the line. In times of stress and tumult, however, holding the line can seem difficult because judges, like anyone else, have to ask themselves: “But what if the government’s assertions about the scope and nature of a risk prove out to be true?”¹⁵ Professor Blasi argues that the “overriding objective at all times should be to equip the [F]irst [A]mendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically.”¹⁶ He posits, consistent with this rule, that “[t]he [F]irst [A]mendment, in other words, should be targeted for the worst of times.”¹⁷ I agree entirely with his point—a point that other prominent First Amendment scholars have made with great force.¹⁸ The theory seems both sound and sensible. Yet, a pressing question almost immediately arises: “But how can this be done?”¹⁹

In this brief Essay, I cannot hope to do more than identify some serious and ongoing problems with clear-and-present-danger-based thinking in the context of expressive freedoms. My preliminary thought, and one that I assert only on a tentative basis, is that Justices Black and William O. Douglas might have been correct in *Brandenburg v. Ohio* to argue that speech should almost never be subject to criminal punishment as an incitement to unlawful action. Both Black and Douglas argued, with some persuasive force, that the government should be limited to punishing unlawful actions rather than mere words.²⁰

We see, even in contemporary times, judicial fears at work; if federal courts protect certain kinds of particularly dangerous speech, assembly, and association, “there could be trouble.”²¹ This is simply another mani-

15. See Wells, *supra* note 7, at 158–63 (discussing threat perception, risk perception, and the psychological dynamics that lead people, including judges, to grossly overestimate the potential risk of truly awful occurrences, such as terrorist attacks and observing that “[w]hen individuals perceive the possibility of a highly dreaded or unknown event occurring, they may overestimate the likelihood of this event or ignore the low likelihood of the event and demand action to prevent it”).

16. Blasi, *supra* note 8, at 449–50.

17. *Id.* at 450.

18. See, e.g., STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* xi–xiv (1999).

19. In fairness to Professor Blasi, he sets forth a number of theoretical and doctrinal principles that he argues could help operationalize the “pathological perspective,” including, for example, strict and clear doctrinal rules against content and viewpoint censorship. See Blasi, *supra* note 8, at 466–84, 504–13.

20. *Brandenburg v. Ohio*, 395 U.S. 444, 449–50 (1969) (per curiam) (Black, J., concurring) (arguing that “the ‘clear and present danger’ doctrine should have no place in the interpretation of the First Amendment”); *id.* at 456–57 (Douglas, J. concurring) (arguing that “[t]he line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts” and positing that pure speech should be “immune from prosecution”).

21. For a salient example, see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 38–40 (2010), which sustains a content-based ban on all communications abroad with certain groups that appear on a State Department list of terrorist organizations. For another, see *Morse v. Frederick*, 551 U.S. 393, 407–09 (2007), which sustains a public high school punishing a student for displaying a banner containing nonsense speech about marijuana use (“BONG HiTS 4 JESUS”). Both cases involve the Supreme Court abandoning strong pro-

festation of the kind of judicial fear that undergirds the clear and present danger test as applied by the majority in both *Abrams v. United States* and *Schenck*. If we are truly committed to a political marketplace of ideas that is “uninhibited, robust, and wide-open,”²² then stronger constitutional medicine than the clear and present danger test will be required.

Part I of this Essay considers the evolution in Justice Holmes’s application, if not articulation, of the clear and present danger test. Part II provides a brief historical explanation for his change of heart during 1919 and, hence, his major remodel of how the clear and present danger test should be applied to speech that calls for unlawful action. Part III provides an overview and critique of the clear and present danger test and the cost/benefit calculus that undergirds it. This part argues that Professor Blasi’s call for a pathological perspective and civic courage would support an even more robust test that limits the government’s ability to ever punish mere advocacy of unlawful conduct. Part IV provides a brief summary and conclusion.

The highly speech-protective iteration of the clear and present danger test that Holmes articulated in *Abrams* was surely an improvement over the “there might be trouble” version that he announced and applied in *Schenck*. However, the larger question that needs to be asked and answered is whether a test that renders the protection of political speech contingent on fear provides sufficiently robust protection of the freedom of speech. In my view, it does not.²³

Justice Louis Brandeis famously observed (apparently without irony): “Men feared witches and burnt women.”²⁴ Brandeis, ever the optimist,²⁵ saw a positive role for the freedom of speech in this horrifying fact, namely that “[i]t is the function of speech to free men from the bondage

tection for speech because of fears about the social costs of particular kinds of speech, even though, on the record, there was no evidence at all to suggest that the specific speech targeted for censorship presented *any credible risk* of bringing about a substantive social harm. Instead, judicial fears about speech activity with designated terrorist groups and speech arguably advocating marijuana use causing terrorist attacks or drug use by high school students led the Supreme Court to sustain content-based speech bans applied to speech that clearly implicated matters of public concern. See *Snyder v. Phelps*, 562 U.S. 443, 452–55 (2011) (holding that signs expressing homophobic viewpoints and attributing a soldier’s death while on active duty abroad to God’s will constitutes speech about a matter of public concern because, “[w]hile these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import”).

22. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

23. See *infra* Part III.

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

25. See Blasi, *supra* note 9, at 685 n.111 (“Brandeis was simply too much of an individualist, too dynamic in outlook, too fond of experimentation, too much a believer in economic enterprise, too optimistic to fit comfortably within the civic humanist tradition.”); see also *id.* at 676 (arguing that Brandeis believed public discourse would facilitate better governance because “he believed that in a political community[,] personal qualities such as hope and imagination tend to be contagious and reciprocal,” whereas repression of dissidents foments “fear and hate” not only within dissenting communities but within the dominant forces of the community as well).

of irrational fears.”²⁶ But what if a legislature views freedom of speech as the cause of witch burnings rather than the cure? If one views the question through this lens, then another regulatory response is both entirely possible and reasonable: speech that might lead to the immolation of large numbers of female citizens mistakenly thought to be witches should be banned and actively suppressed by the state through the criminal law.

It takes an almost Kierkegaardian kind of existential faith in the possibility of collective deliberative discourse to facilitate wise and humane governance to believe that when truth and falsity wrestle, truth will always and inevitably win. The 2016 presidential election in the United States and “Brexit” plebiscite in Britain render that proposition highly doubtful. Even so, it might still be the case that protection of speech “fraught with death”²⁷—to use Holmes’s turn of phrase—should be preferred to active government censorship of “fake news.” If this is so, however, it is not because an unregulated marketplace of ideas will inexorably lead the body politic to truth, but rather because the specter of government censorship of political speech presents a more “clear and present danger” to the free and fair operation of democratic politics than affording socially worthless speech constitutional protection.²⁸

I. THE CREATION AND EVOLUTION OF JUSTICE HOLMES’S VERSION OF THE CLEAR AND PRESENT DANGER TEST

Justice Holmes debuted the clear and present danger test in his majority opinion in *Schenck*. The case involved a group of socialists preparing and distributing leaflets opposing the use of conscription during World War I.²⁹ Quoting the text of the Thirteenth Amendment, which abolished slavery and involuntary servitude,³⁰ the pamphlets exhorted men who were subject to being drafted to “Assert Your Rights” and not to “submit

26. *Whitney*, 274 U.S. at 376.

27. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

28. See Lyriisa Barnett Lidsky, *Where’s the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1099–100 (2008) (arguing that socially valueless speech, such as Holocaust denial, should enjoy First Amendment protection not because persons who deny the Holocaust eventually will be brought around by the operation of the marketplace of ideas, but rather because “[t]he dangers of allowing courts or other government bodies to determine historical truth arguably outweighs the potential harm that Holocaust victims will suffer from official silence” and positing that banning false speech “may have the unintended and paradoxical consequence of strengthening the [objectively false] beliefs” producing a “perverse result”). Dean Lidsky warns that because of the psychological dynamics at work, the “punishment of Holocaust denial is likely to lend it legitimacy” and, hence, more adherents. *Id.* at 1100. In other words, we should not protect objectively socially harmful speech because it possesses social value or plays an integral role in some sort of dialectical reasoning process, but rather because government censorship is both dangerous (it can be abused) and also counterproductive (it simply does not work).

29. *Schenck v. United States*, 249 U.S. 47, 50–51 (1919).

30. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

to intimidation.”³¹ Charles Schenck was part of an organization that had 15,000 copies of the circular printed and distributed via the mail.

The federal government indicted, tried, and convicted Schenck of violations of the Espionage Act of 1917.³² More specifically, the charges alleged that Schenck had acted to obstruct military recruiting incident to a larger conspiracy to impede and obstruct recruiting military personnel.³³ On appeal, Schenck argued that the First Amendment prohibited convicting him of an offense for mere advocacy. The Supreme Court emphatically rejected this argument in a unanimous opinion by Justice Holmes.

Holmes explained 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.”³⁴ In time of war, however, “[i]t is a question of proximity and degree” and “[w]hen 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”³⁵ Holmes then enunciated a version of a “bad tendencies” test: “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.”³⁶

On the record before the Supreme Court, the government had failed to establish that even one inductee had refused to report because of Schenck’s advocacy, but the utter absence of any proof of efficacy was entirely irrelevant. Holmes explained that the Espionage Act “punishes conspiracies to obstruct as well as actual obstruction.”³⁷ Thus, if the circulars sought to impede the induction of new soldiers, it could serve as a basis for imposing criminal liability on Schenck.

A week later, on March 10, 1919, Justice Holmes delivered another unanimous opinion in *Debs v. United States*.³⁸ In *Debs*, Holmes glossed the clear and present danger test announced in *Schenck* and explained that a conviction under the Espionage Act of 1917 could stand if the “words used had as their natural tendency and reasonably probable effect” obstruction of the federal government’s military recruiting efforts.³⁹ In other words, speech “tending to obstruct” the government’s legitimate efforts to enlist new members of the armed forces enjoys no protection under the First Amendment.⁴⁰ Holmes also authored a third opinion, is-

31. *Schenck*, 249 U.S. at 51.

32. Espionage Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (1917).

33. *Schenck*, 249 U.S. at 48–49.

34. *Id.* at 52.

35. *Id.*

36. *Id.*

37. *Id.*

38. 249 U.S. 211 (1919).

39. *Id.* at 216.

40. *Id.*

sued on March 10, 1919, that applies the bad tendencies test in *Frohwerk v. United States*.⁴¹

Between March 10, 1919, the day *Debs* and *Frohwerk* issued, and November 10, 1919, the day *Abrams* issued, Justice Holmes changed his mind about the government's ability to regulate mere advocacy of unlawful conduct. In his storied *Abrams* dissent, Justice Holmes radically revised the clear and present danger test. No longer a bad tendencies test, the test now placed a serious burden of justification on the government to criminally punish speech.

In fact, the government had to show that criminal proscription of speech was essential:

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.⁴²

Holmes famously articulated and embraced the metaphor of a “market-place of ideas.” He argued,

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.⁴³

Although the words “clear and present danger” appear in both Holmes's opinions in *Schenck* and *Abrams*, the tests are radically different. Under the *Abrams* version, the nature of the harm must be both very serious and virtually certain, requiring an “immediate check” in order “to save the country.”⁴⁴ Speech that merely possesses a bad tendency—the *Schenck* standard—would not meet this standard. Moreover, even if speech is widely perceived to be affirmatively dangerous—quite literally “fraught with death”⁴⁵—it retains First Amendment protection unless it is virtually certain to bring about, more or less immediately, a catastrophic harm (a calamity). Thus, the government may criminalize speech *only* when an emergency “makes it immediately dangerous to leave the correction of evil counsels to time.”⁴⁶

This combination of requirements effectively prohibits convictions for seditious libel. Under Holmes's revised clear and present danger test, severe public criticism of the government and its policies will almost always

41. 249 U.S. 204, 206–07 (1919) (holding that efforts to persuade individuals to resist being drafted may be criminally punished without violating the First Amendment).

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

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 630–31.

enjoy robust First Amendment protection. It also bears noting that Holmes strenuously objected to the sentences imposed on the *Abrams* defendants—twenty years.⁴⁷ In his view, only “the most nominal punishment” could be imposed on the facts at bar.⁴⁸ The lengthy sentences, Holmes posited, reflected a deep-seated antipathy to “the creed that they [the defendants] avow” (namely, revolutionary socialism)⁴⁹ and punishment for abstract ideological beliefs cannot be reconciled with the Free Speech Clause of the First Amendment.⁵⁰

The evolution of the clear and present danger test from a very weak, undemanding test into a near-absolute prohibition on government efforts to criminalize the abstract advocacy of unlawful actions—all within the course of less than eight months—reflects a remarkable evolution in Justice Holmes’s constitutional logic. His free speech jurisprudence radically transformed from a posture of nearly abject deference to the government to one of intense judicial skepticism of government censorship of political speech. His *Abrams* dissent, to use Professor Blasi’s wonderful turn of phrase, reflects a bold vision animated by civic courage—democratic self-government implies tolerating risks.⁵¹

Of course, if the United States is genuinely committed to a program of democratic self-government, there is really no other choice. Elections can confer legitimacy on those who successfully contest them *only* if a process of free and open deliberation informs the act of voting on election day.⁵² As the iconic free-speech theorist Alexander Meiklejohn explains, democratic deliberation requires “not that everyone shall speak,” but rather that “everything worth saying shall be said.”⁵³ Moreover, “[t]o be afraid of ideas, any idea, is to be unfit for self-government.”⁵⁴ In other words, Meiklejohn argues that civic courage in the face of ideas widely believed to be dangerous is not discretionary—in a well-functioning democracy, it is mandatory.

The Holmes dissent in *Abrams* captures and reflects these crucial civic values far better than does the myopic and stunted understanding of freedom of expression in mass participatory democracy set forth in his majority opinion in *Schenck*. Even if this is so, however, one might still reasonably question whether the clear and present danger test, as articulated in *Abrams*, constitutes the best and most effective means of ensur-

47. See *id.* at 629 (“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.”).

48. *Id.*

49. *Id.* at 629–30.

50. See *id.* at 629–31.

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

52. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22–25, 89–91 (1948).

53. *Id.* at 25.

54. *Id.* at 27.

ing that the government will refrain from squelching core political speech based on fears that “there could be trouble” if it tolerates its dissemination.

For the reasons that I will set forth in Part III,⁵⁵ I share the skepticism of both jurists and legal scholars about the reliability of the clear and present danger test in times of national stress. First, however, it would be useful to consider why Holmes experienced a change of heart; after all, the reasons and arguments that brought Holmes from *Schenck* to *Abrams* might well shed important light on the potential jurisprudential virtues of the clear and present danger approach to enforcing the First Amendment. Although Holmes obviously reached the conclusion on his own that the *Schenck* version of the clear and present danger test seriously under protected core political speech—and accordingly, needed to be substantially revised (i.e., strengthened) to better protect the public advocacy of political thoughts, ideas, and ideologies—he certainly had some help in moving his thinking forward to arrive at this result.⁵⁶

II. THE TARGETED INTERVENTIONS THAT HELPED TO BRING ABOUT JUSTICE HOLMES’S CHANGE OF HEART REGARDING THE SCOPE AND MEANING OF THE CLEAR AND PRESENT DANGER TEST IN *ABRAMS*

So, what precisely happened between March 3, 1919, when the Supreme Court issued its decision in *Schenck*, and November 10, 1919, when it released its decision in *Abrams*? Why did Justice Holmes change his mind? That he changed his mind, as noted above, is clear beyond peradventure. The clear and present danger test morphed from a rather weak bad tendencies test into a test that requires the government to establish an overriding need to censor speech to avoid a calamity from befalling the nation.

Legal historians have provided the answer. Some measure of the credit belongs to Professor Zechariah Chafee, Jr., of the Harvard Law School faculty. Chafee engaged in a full-fledged lobbying effort to convince Justice Holmes that his approach in *Schenck* grossly under-protected the freedom of political speech. His campaign included publishing, at lightning speed, an article⁵⁷ proposing a new, more robust iteration of the clear and present danger test.⁵⁸

Chafee strenuously argued that:

Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of

55. See *infra* notes 74–131 and accompanying text.

56. See *infra* Part II.

57. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919). Chafee’s article appeared in the June 1919 edition of the *Harvard Law Review*.

58. See *id.* at 958–68.

life and liberty, or prolonged after its just purposes are accomplished.⁵⁹

He strongly criticized Justice Holmes for embracing a test that focuses instead on the “bad tendency” of speech, objecting that “bad tendency has been the test of criminality, a test which this article has endeavored to prove wholly inconsistent with freedom of speech, or any genuine discussion of public affairs.”⁶⁰ Chafee deemed it “regrettable that Justice Holmes did nothing to emphasize the social interest behind free speech, and show the need of balancing even in war time.”⁶¹

If Chafee hit the volleyball into the air, then Harold Laski, a Harvard history professor and Holmes’s chum, hit the ball over the net. During the summer of 1919, Laski personally lobbied Holmes to read the Chafee article.⁶² He also finagled a meeting between Chafee and Holmes during the summer of 1919, when both were in Rockport, Massachusetts (where Holmes routinely spent time in the summer months).⁶³ At this meeting, Chafee and Laski pressed the case for deploying the First Amendment more robustly to protect political speech. Laski continued his efforts to lobby Holmes over that summer—for example, recommending that Holmes read books advocating broad protection for the freedom of speech (which Holmes did).⁶⁴

Judge Learned Hand also merits a significant measure of credit for helping move Holmes from his positions in *Schenck*, *Debs*, and *Frohwerk*, which all embraced a bad tendencies test, to his *Abrams* dissent, which would have held speech protected “unless [speech] so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”⁶⁵ In March 1919, after the Supreme Court released its decisions in *Schenck*, *Debs*, and *Frohwerk*, Hand wrote to Holmes to communicate his disagreement with both the outcome and reasoning of the Supreme Court in these cases.⁶⁶ Holmes responded: “I don’t quite get your point,”⁶⁷ but the Justice’s subsequent behavior suggested that, in point of fact, he did get Hand’s point.

Judge Hand lamented his inability to bring Holmes around in a letter of May 7, 1919, to Ernst Freund. Freund, a University of Chicago law professor, had written a critical essay on the bad tendencies test that appeared in the *New Republic*. In this letter, Judge Hand complained that “I

59. *Id.* at 958.

60. *Id.* at 968.

61. *Id.*

62. THOMAS HEALY, *THE GREAT DISSSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND – AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 154–55 (2013).

63. *Id.* at 35–36, 153, 158–59.

64. *Id.* at 159–63.

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

66. RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 218–19 (1987).

67. *Id.* at 219.

have so far been unable to make him see that he and we have any real differences and that puzzles me a little.”⁶⁸

In an October 20, 1919 letter to Harold Laski, Holmes previewed some of his main themes in his iconic *Abrams* dissent.⁶⁹ He wrote that he worried “we have less freedom of speech here than . . . in England.”⁷⁰ Holmes observed that “[w]hen you are thoroughly convinced you are right — wholeheartedly desire an end — and have no doubt of your power to accomplish it — I see nothing but municipal regulations to interfere with your using your power to accomplish it.”⁷¹ He added that “[l]ittle as I believe in [freedom of speech leading to truth] as a theory I hope I would die for it and I go as far as anyone . . . in favor of it.”⁷² Based on this letter, we know with something approaching absolute certainty that the full court press by Hand, Chafee, Laski, and Freund had worked: Justice Holmes had changed his mind about the proper scope of the First Amendment’s application and no longer embraced a bad tendencies approach to enforcing it.

I do not mean to suggest that Hand, Chafee, Laski, and Freund are responsible, individually or collectively, for Justice Holmes’s change of heart. But surely they deserve at least some measure of credit for convincing this iconic jurist to rethink his approach to the First Amendment. As historian Richard Polenberg states the point, even though by October 1919 Holmes had not yet come around completely to the position of Hand, Chafee, Laski, and Freund, “his reading of history, biography, and political philosophy had made Holmes more sensitive to the value of free speech as a means of getting at the truth, to the importance of experimentation, and to the need to treat dissenters mercifully.”⁷³ Thus, whatever the precise causation, between March and late October, Justice Holmes substantially revised his views regarding the viability and the very constitutionality of the bad tendencies approach to enforcing the First Amendment.

III. THE PATHOLOGICAL PERSPECTIVE AND THE CLEAR AND PRESENT DANGER TEST

This section begins by considering how the Supreme Court attempted to reform the clear and present danger test by radically increasing the government’s burden of justification in cases involving incitements to unlawful conduct. It continues by showing how, despite this effort, the clear

68. *Id.* at 221.

69. *Id.* at 227–28.

70. *Id.* at 228.

71. *Id.* This language is remarkably close to the language Holmes used in his iconic *Abrams* dissent. See *United States v. Abrams*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“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.”).

72. POLENBERG, *supra* note 66, at 228.

73. *Id.* at 227.

and present danger test continues to cause damage to core First Amendment values. In at least two relatively recent cases, the Supreme Court has essentially adopted a clear and present danger approach to speech activity with terrorist organizations⁷⁴ and nonsense speech that arguably advocated the use of marijuana by kids.⁷⁵ Thus, even though the clear and present danger test no longer governs criminal liability for incitement, it continues to warp First Amendment jurisprudence in ways that seriously disserve core First Amendment values.

This section concludes by considering whether it is possible to reform the clear and present danger test effectively (i.e., to defang it). This section will also examine the related—and no less important—question of whether federal judges will ever be able to wean themselves from clear-and-present-danger-test-type reasoning. So long as federal judges routinely take into account the potential social cost of speech activity, clear-and-present-danger-type reasoning will find its way into the pages of the *United States Reports* and the *Federal Reporter*.

A. THE WARREN COURT'S EFFORTS TO TAME THE CLEAR AND PRESENT DANGER TEST

In *Brandenburg v. Ohio*, the Supreme Court did as much as it could do to reign in the potential ill effects of the clear and present danger test by requiring the nature of the harm to be extreme and the probability of it occurring virtually certain.⁷⁶ The case involved a Ku Klux Klan rally in suburban Cincinnati, Ohio, where the participants called for a race war—at some indefinite time in the future.⁷⁷ The most directly relevant comments included the statement that “We’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.”⁷⁸ In another comment that served as a basis for criminal charges under the Ohio Criminal Syndicalism Act,⁷⁹ the Klan speaker called for the repatriation of African-Americans to Africa and Jewish Americans to Israel.⁸⁰

A criminal petit jury convicted Brandenburg of criminal syndicalism—meaning advocating or calling for “crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.”⁸¹ The trial court then fined Brandenburg \$1,000 and sentenced him to a jail term of one to ten years.⁸² The state intermediate appellate

74. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31–32 (2010).

75. *Morse v. Frederick*, 551 U.S. 393, 394–95 (2007).

76. 395 U.S. 444, 447–49 (1969) (per curiam).

77. *Id.* at 445–47.

78. *Id.* at 446.

79. OHIO REV. CODE ANN. § 2923.13 (West 1958).

80. The exact language, which is profoundly offensive, does not bear quotation. See *Brandenburg*, 395 U.S. at 447.

81. § 2923.13.

82. *Brandenburg*, 395 U.S. at 444–445.

court affirmed both the conviction and sentence; the Supreme Court of Ohio declined to review the case on the merits.⁸³

The Supreme Court of the United States, in a brief, per curiam opinion, reversed *Brandenburg*'s conviction and voided Ohio's Criminal Syndicalism Act, § 2923.13 of the Ohio Revised Code, on First Amendment grounds. The Court held:

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.⁸⁴

Mere abstract teaching or advocacy cannot serve as the basis for criminal charges, but neither can calls for unlawful action at some indefinite point in the future. Moreover, "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments," because such a law "sweeps within its condemnation speech which our Constitution has immunized from government control."⁸⁵

After *Brandenburg*, only calls to "imminent lawless action"⁸⁶ can be criminalized and, even then, only if the call to imminent lawless action is highly likely to be successful.⁸⁷ *Brandenburg* essentially requires that speech directly advocate lawless action and that the words are likely to bring about the unlawful conduct more or less immediately. These requirements significantly restrict the government's ability to proscribe mere advocacy of unlawful action.

Even so, however, Justices Black and Douglas concurred in *Brandenburg* because they believed that the per curiam opinion was insufficiently protective of the freedom of speech. Justice Black argued that "the 'clear and present danger' doctrine should have no place in the interpretation of the First Amendment."⁸⁸ Justice Douglas, carefully revisiting prior Supreme Court precedents citing and applying the clear and present danger

83. *Id.* at 445.

84. *Id.* at 447.

85. *Id.* at 448.

86. *Id.* at 449.

87. *See Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (per curiam) (holding that a call to unlawful action must be both "intended to produce, and likely to produce, *imminent* disorder" to be criminally punished and that words may "not be punished by the State on the ground that they had 'a tendency to lead to violence'"). *Hess* clearly repudiates the bad tendency test that the Supreme Court adopted and applied in *Dennis*. *See Dennis v. United States*, 341 U.S. 494, 508–10 (1951) (holding that the government may prohibit words that advocate lawless activity even if the probability of it occurring is low provided that the nature of the risk is sufficiently grave); *see also Debs v. United States*, 249 U.S. 211, 216 (1919) ("We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had *as their natural tendency and reasonably probable effect* to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind." (emphasis added)).

88. *Brandenburg*, 395 U.S. at 449–50 (Black, J., concurring).

test,⁸⁹ rejected it because, in his view, “all matters of belief are beyond the reach of subpoenas or the probings of investigators.”⁹⁰ Douglas posits that the government may *never* punish speech qua speech. Instead, “[t]he line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.”⁹¹

The Black/Douglas position is an intriguing one. Should the government be limited to punishing criminal acts alone? And never permitted to criminalize mere speech even if the speech directly advocates unlawful action? Neither Justice Douglas nor Justice Black mean that speech may never be the subject of criminal charges—for example, if someone tries to defraud senior citizens by selling them investments in a Ponzi scheme, the fact that speech is used to accomplish the crime does not bring it within the First Amendment’s ambit.⁹² However, they were committed to the idea that *political advocacy* and *political activity* could never be the subject of criminal liability.

The law of incitement is sufficiently demanding post-*Brandenburg* that the difference between the per curiam opinion and the concurring opinions of Justices Black and Douglas contains relatively little daylight. The requirements of a direct call to action, a subjective intent to bring about the harm, and a very high objective probability of the harm coming into being make charges for “criminal syndicalism” a matter of merely historical interest. However, an important, larger question about the use of social cost to set the metes and bounds of the First Amendment’s scope of coverage remains with us today and continues to vex judges tasked with deciding whether or not the government may punish speech in order to reduce the risk of incurring serious social costs.

B. CLEAR AND PRESENT DANGER TEST-STYLE REASONING
CONTINUES TO UNDERCUT CORE FIRST AMENDMENT
VALUES INCLUDING THE RULE AGAINST THE
GOVERNMENT ENGAGING IN CONTENT-
AND VIEWPOINT-BASED CENSORSHIP

Even though *Brandenburg* banished the weak form of the clear and present danger test enunciated by Justice Holmes in *Schenck*, *Debs*, and *Frohwerk*, it did not, and probably could not, banish the more general reliance on the Hand Formula to establish the limits of protected speech.

89. *See id.* at 450–56 (Douglas, J., concurring).

90. *Id.* at 456.

91. *Id.*

92. *See id.* (arguing that speech intended to cause and that in fact causes harm, such as falsely shouting “Fire!” in a crowded theater, can be the subject of criminal prosecution consistent with the First Amendment); *see also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768–74 (2004) (describing and discussing how large swaths of everyday speech lay entirely outside the protection of the First Amendment and observing that this state of affairs does not seem to generate much excitement or concern among academics, judges, or lawyers).

When a harm seems sufficiently dreadful— “fraught with death”⁹³ to use the nomenclature favored by Justice Holmes in his *Abrams* dissent—most federal judges seek out the nearest available exit and do so by the shortest available route. Doctrinal niceties tend to go out the window when the government’s parade of horrors is sufficiently horrible. This is precisely why Justices Black and Douglas were so adamant in *Brandenburg* that any iteration of the clear and present danger test would afford insufficient protection to political advocacy.

Without belaboring the point, two relatively recent decisions reflect the resilience of the kind of parade of horrors reasoning that animates the weak version of the clear and present danger test. The first, *Holder v. Humanitarian Law Project*, sustains a content- and speaker-based ban on speech abroad with organizations that appear on a State Department list of known terrorist organizations.⁹⁴ The second, *Morse v. Frederick*, sustains non-criminal punishment of a student in a public high school for speech the majority deemed to advocate the use of marijuana.⁹⁵ Both cases reflect the kind of damage that clear and present danger reasoning can wreak on core First Amendment values when the potential social cost of advocacy frightens federal judges.

In *Humanitarian Law Project*, the majority sustained a federal law that criminalized providing “material support” to any organization appearing on a State Department list of known foreign terrorist organizations.⁹⁶ Since 1997, the Partiya Karkeran Kurdistan (PKK) appeared on the State Department’s list.⁹⁷

The Humanitarian Law Project (HLP) sought to meet with members of the PKK to teach them non-violent dispute resolution techniques.⁹⁸ The federal government did not make any credible argument that the HLP intended to offer any direct aid or “material support” to the PKK’s unlawful activities or objectives. Instead, the government argued that any contact between U.S. citizens and the PKK would lend the organization credibility, and even support of lawful activities by the PKK would thus lend indirect support to its unlawful purposes and objectives.⁹⁹

The Supreme Court, ostensibly applying strict scrutiny to a content-based speech regulation, found that the federal government had established both a compelling government interest and also had used the least restrictive means to achieve it.¹⁰⁰ Both claims are dubious at best. Essentially, in the majority’s view, any contact by U.S. citizens with the PKK presented a clear and present danger of aiding the PKK’s unlawful terror-

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

94. 561 U.S. 1, 40 (2010).

95. 551 U.S. 393, 410 (2007).

96. *See Humanitarian Law Project*, 561 U.S. at 7–14.

97. *Id.* at 9–10.

98. *Id.* at 10.

99. *See* Brief for the Respondents at 55–56, *Humanitarian Law Project*, 561 U.S. 1 (Nos. 08-1498, 09-89), 2009 WL 4951303, at *55–56.

100. *Humanitarian Law Project*, 561 U.S. at 33–39

istic objectives.¹⁰¹

Chief Justice John G. Roberts, Jr., explained that:

Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.¹⁰²

According to the majority, the use of nonviolent dispute resolution techniques could conceivably be weaponized by terrorist organizations.¹⁰³ Despite criticizing the dissent for failing to appreciate the "real dangers at stake,"¹⁰⁴ the majority fails to point to any record evidence that shows a direct link between training in international law and fomenting terroristic attacks.

Chief Justice Roberts acknowledged the absence of any concrete evidence that the specific speech and associational activity that HLP hoped to engage in with members of the PKK would cause any serious harm that the federal government may constitutionally seek to prevent. However, "[t]he Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."¹⁰⁵ This language could easily have appeared in the majority opinions in *Schenck*, *Debs*, *Frohwerk*, *Abrams*, or *Dennis*.

Because of the serious gravity of the harm, the absence of any empirical proof that contact of the sort HLP proposed with the PKK would bring such harm about is entirely irrelevant to the First Amendment analysis. In fact, the mere *possibility* that contact abroad between U.S. citizens and members of the PKK could lend the PKK "legitimacy" serves as a constitutionally sufficient justification for a content-based speech and association ban.¹⁰⁶

The clear and present danger test that Justices Black and Douglas feared and loathed is alive and well and stalking the pages of the *United States Reports*. *Humanitarian Law Project* simply substitutes the word "terrorist" for other words used in cases from the twentieth century (namely "communist," "socialist," and "anarchist") as a basis for the government imposing a flat ban on activities otherwise squarely protected by

101. *Id.*

102. *Id.* at 36.

103. *Id.* at 37 ("A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.").

104. *Id.* at 38.

105. *Id.* at 35.

106. *See id.* at 30 ("It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.").

the First Amendment (including speech, assembly, petition, and association). For the record, I do not have any problem with the federal government proscribing material support of terrorist activities, but contact with individuals and organizations aimed at teaching them non-violent dispute resolution techniques simply does not constitute support of terrorism. Indeed, the majority's parade of horribles reasoning comes perilously close to resembling a bad joke. In the Supreme Court's view, however, the war on terrorism justifies circumscribing First Amendment freedoms because any contact with a terrorist organization presents a clear and present danger of facilitating terroristic acts.

Along very similar lines, the Supreme Court sustained the imposition of serious discipline against Joseph Frederick, a student at a public high school in Juneau, Alaska, for displaying a banner with the phrase "BONG HiTS 4 JESUS" on it.¹⁰⁷ He did so at the 2002 Winter Olympic Torch Relay, as it passed through Juneau, Alaska. The high school's principal, Deborah Morse, stormed across the street and confronted Frederick, demanding that he take down the banner.¹⁰⁸ After he refused, the school district suspended him for ten days from school. The school board maintained a policy banning speech advocating the use of substances that are unlawful for minors while at school-related functions and events.¹⁰⁹

Technically, the relay was not a school assembly, and the banner was not even displayed on public school district property. But the Supreme Court characterized attendance at the torch relay as a school-sponsored event and treated it as a high school assembly.¹¹⁰ The message on the banner, which would appear to most reasonable observers to constitute a silly, nonsense message, actually constituted nefarious advocacy of pot smoking by kids, according to the *Morse* majority.¹¹¹

Having resolved both the locus of the speech activity and the meaning of the banner issues against Frederick, the *Morse* majority proceeded to frame the constitutional question presented as follows: "[W]hether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."¹¹² The majority concluded that public school district administrators need not tolerate such speech at school-sponsored events.¹¹³ Speech of this sort contradicts the government's anti-drug abuse policies and may, therefore, be censored.¹¹⁴

This case actually presents a question regarding how the incitement doctrine should apply to public school students at an official school event. One suitable way of framing the relevant question would be to inquire

107. *Morse v. Frederick*, 551 U.S. 393, 397, 407–09 (2007).

108. *Id.* at 398.

109. *Id.* at 397–99.

110. *Id.* at 400–01.

111. *See id.* at 401–03.

112. *Id.* at 403.

113. *See id.* at 409.

114. *See id.* at 407–09.

whether, on the assumption that Frederick's nonsense message actually constituted a clarion call for high school students to smoke marijuana, that advice was likely to be heeded. And, if so, was it on an imminent basis?

Of course, if one applies the *Brandenburg* test for incitement to unlawful action, the question is not even close—there was no record evidence that, upon seeing Frederick's banner, dozens of naughty high school students took out joints and bonges and proceeded to get high. To conclude that Frederick advocated unlawful activity is a stretch,¹¹⁵ but even assuming he did and that his subjective hope was that his classmates would take bong hits to please Jesus, there was simply no evidence that his advocacy created a serious risk of unlawful behavior actually occurring.¹¹⁶

But, once again, the clear and present danger test, phoenix-like, rises from the ash heap of constitutional law history to drive a result in a major First Amendment case. Whether or not Frederick's advocacy was even marginally efficacious was entirely beside the point. Chief Justice Roberts explained that:

It was reasonable for her [Principal Morse] to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.¹¹⁷

To speak of Frederick's banner as presenting a danger of rampant marijuana use by high school classmates of Frederick is utterly preposterous. A court could find Frederick's speech proscribable only if the school district had absolutely no burden to establish that his advocacy would actually incite unlawful drug use.

As it happens, however, because of the gravity of the evil, the fact that no realistic possibility of anyone acting on Frederick's advocacy was entirely constitutionally irrelevant. Roberts observed that “[s]tudent speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, . . . poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.”¹¹⁸ Not unlike Mr. Mackey from *South Park*, Principal Morse must be permitted to propagate an uncontested message that “Drugs Are Bad, Mokay.” Although my own view is that it is ludicrous to read Frederick's banner as meaning “Let's All Toke, Right Now!,” why

115. *See id.* at 439–42 (Stevens, J., dissenting).

116. *See id.* at 436–38 (“No one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, ‘ha[s] no chance of starting a present conflagration.’” (quoting *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (dissenting opinion))).

117. *Id.* at 410 (majority opinion).

118. *Id.* at 408.

shouldn't a high school student be permitted to advocate the legalization of marijuana as a social policy? And a minimum age that permits at least some high school students to legally purchase, possess, and consume marijuana products?

To take a similar example, in much of Europe, the drinking age is well below twenty-one and rates of binge drinking and driving while intoxicated are markedly lower than in the United States. Could a public school district suspend or expel a student who carries a sign stating "Let 16 Year Olds Drink Alcohol Legally!"? Because advocating a change in our existing social policies might lead some persons under twenty-one to quaff a beer before they may do so legally (like Justice Brett Kavanaugh, who famously liked beer before it was lawful for him to do so)?

Protecting minors from substance abuse is certainly an important, perhaps even a compelling, government interest. But advocating the legalization of marijuana or a lower drinking age is not the same thing as actually consuming pot or alcoholic beverages. Conflating speech with unlawful acts, because the speech might have a "bad tendency," is the principal vice of the clear and present danger test. And, this kind of reasoning, and this very vice, clearly manifest in the *Morse* majority's opinion, which conflates mere advocacy with unlawful conduct. Even if Frederick's banner advocated the use of marijuana, absent evidence that there was a high risk that his speech would imminently cause harm, he should not have been subject to discipline for displaying it in public.

Ill-considered or poorly conceived advocacy should enjoy no less purchase on the First Amendment than advice passing along the widely accepted wisdom of the ages. And, unless "an immediate check is required to save the country,"¹¹⁹ to use Justice Holmes' wonderful turn of phrase in his iconic *Abrams* dissent, the proper remedy for Frederick's poor counsel should have been wiser counsel from Principal Morse rather than government censorship of Frederick's message. A government empowered to censor "bad ideas" is likely to use that power to skew the political marketplace of ideas to suit its preferences. And, even if one thinks that Frederick's message added little value to the process of democratic discourse, a school district that can censor Frederick's nonsense is equally empowered to censor another student's political advocacy for the reform of drug laws (perhaps including legalization of marijuana, but also encompassing, for example, efforts to secure criminal justice reform in the context of drug-related offenses).

To be sure, one could attempt to minimize the importance of both *Humanitarian Law Project* and *Morse*. *Humanitarian Law Project* involves transborder speech activity—a form of First Amendment activity that has never enjoyed full and robust First Amendment protection.¹²⁰ So too, public school students may not shed their constitutional rights at the

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

120. See generally Ronald J. Krotoszynski, Jr., *Transborder Speech*, 94 NOTRE DAME L. REV. 473 (2018).

schoolhouse gate,¹²¹ but the Supreme Court has been quite solicitous of content-based speech bans in the context of a public school's curriculum.¹²² Thus, both areas of First Amendment law feature decisions that are more deferential to censorial government officials than holds true in other contexts. Even so, it is simply not plausible to fail to acknowledge that reasoning premised on the social harm of terrorism, on the one hand, and drug use by high school students, on the other, animated the majority in both *Humanitarian Law Project* and *Morse*.

C. SHOULD THE CLEAR AND PRESENT DANGER TEST BE
REFORMED OR ABANDONED?

Decisions like *Humanitarian Law Project* and *Morse* demonstrate that the concerns expressed by Justices Black and Douglas in *Brandenburg* were not without some basis in fact. Speech that has even a very low probability of causing serious social harms will prove a tempting target for censorially-minded government regulators. Moreover, federal judges who lack the civic courage of Justices Holmes and Brandeis may not be much inclined to disallow speech bans designed to forestall serious social harms (like acts of terrorism or drug use by minors). If *Brandenburg* did nothing to protect the members of Humanitarian Law Project or Joseph Frederick, the test is not a free speech jurisprudential panacea.

We also see that federal court judges are sometimes inclined to backslide into clear and present danger reasoning to sustain government speech bans when the stakes seem sufficiently high and the social value of the speech in question appears sufficiently low. The question that arises from this state of affairs is: How can we best prevent judges from using a very low probability of a serious harm occurring as a basis for permitting the government to ban speech?

There is nothing particularly weak-kneed or objectionable about *Brandenburg*'s rehabilitation of the clear and present danger test. It requires a direct call to unlawful activity,¹²³ a subjective intent to bring about an unlawful act, and an imminent risk of causing an unlawful act to occur.¹²⁴ The problem arises when the Supreme Court declines to apply *Brandenburg* at all—as happened in both *Humanitarian Law Project* and *Morse*.

121. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

122. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–85 (1986).

123. Learned Hand actually pioneered this device as a means of protecting unpopular political speech and unpopular political speakers. See *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) ("Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists."), *rev'd*, 246 F. 24 (2d Cir. 1917).

124. *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam).

Even if the Supreme Court had taken the approach advocated by Justices Black and Douglas in *Brandenburg* and required the government to publish bad acts and not speech that calls for unlawful action, it seems doubtful that the outcome in either *Humanitarian Law Project* or *Morse* would have been different. It is easy enough, for example, to characterize support for a terrorist organization as either a conspiracy to advance their unlawful objectives or as constituting being an accessory before or after the fact.

The *Humanitarian Law Project* majority could easily have characterized § 2339B as regulating criminal conduct rather than speech. By parity of logic, advocating illegal drug use while on a public high school campus or at a school-sponsored event could be characterized as a form of unlawful conduct rather than a ban on abstract advocacy. A more demanding First Amendment test that limits government to regulating “conduct” would not necessarily prevent a majority of the Supreme Court from permitting the federal and state governments to regulate or even proscribe “speech acts.” Even Justice Douglas, in his *Brandenburg* concurring opinion, conceded that falsely shouting “Fire!” in a crowded theater may be the subject of a criminal prosecution as a kind of speech act.¹²⁵

The larger problem is judicial credulousness—not the precise articulation of the governing legal test or formula. No legal formula will, as if by magic, succeed in making judges brave in times of national chaos and panic.¹²⁶ No matter how robust a verbal formulation of the requisite burden on the government, a traumatic national or international event will inevitably shake judicial confidence and lead federal judges to be more, rather than less, deferential to the political branches.

That, at bottom, is the problem with Professor Blasi’s pathological perspective. He is undoubtedly correct to posit that federal judges should protect speech with greater alacrity and vigor in times of national tumult. The difficulty, however, is getting judges to act contrary to their deeply felt instincts. In times of war or national crisis, the natural reaction of most judges is to be more, rather than less, deferential to Congress and the President. Getting federal judges to check that entirely understandable impulse is probably easier said than done. Put another way, the principal difficulty may be one of psychology rather than law.¹²⁷

If this is so, trying to parse the exact words used to constrain judicial discretion constitutes a quixotic task. No magic spell or legal incantation will make judges exhibit more courage than they are otherwise capable of

125. *Id.* at 456–57 (Douglas, J., concurring) (positing that “where speech is brigaded with action” the speech and conduct “are indeed inseparable and a prosecution can be launched for the overt acts actually caused”). Justice Douglas characterizes speech acts as “rare instances,” *id.* at 457, but because so many crimes involve pure speech (for example, many kinds of fraud), it’s simply not possible to say that “speech alone” cannot serve as a predicate for criminal charges. Once that concession has been made, however, drawing the line between protected political advocacy and unlawful conduct by speech acts becomes an exceedingly difficult task.

126. See Wells, *supra* note 7, at 201–22.

127. See *id.* at 158–80.

mustering (both individually and collectively). It is always easy to say, with the benefit of hindsight, “We made the wrong call in that case.”¹²⁸ And sometimes, the Supreme Court recognizes its original error in fairly short order.¹²⁹ The difficulty inheres in figuring out how to prevent the Supreme Court from taking the initial “wrong turn” in the first place.

For myself, I am skeptical that any particular verbal formula can safeguard constitutional rights in times of perceived national crisis. When the nation faces challenges that many in our polity believe present an existential threat, federal judges are unlikely to impose judicial restraints on policies generally and widely accepted as essential to the survival of the nation. And, even if a legal test is framed in the most demanding terms, for example, as demanding strict judicial scrutiny, when the nation is at war, even very capable judges are going to be inclined to apply the test in a forgiving fashion.¹³⁰

That said, constitutional tests are fashioned for times of peace and plenty as much, if not more, than for times of stress and turmoil. And more robust tests are likely to function more reliably in times of normalcy than tests that require relatively little of the government by way of justification for laws or policies that abridge or flatly deny fundamental constitutional rights. From this vantage point, then, Holmes’s change of heart between *Schenck* and *Abrams* constitutes a seismic shift in the meaning, import, and practical legal effect of the First Amendment as a limitation on government efforts to censor speech critical of its programs and activities. In sum, the failures of law to check the government in times of war should not be taken as a license for judicial abdication in times of peace.

Unlike Justice Holmes, the Supreme Court did not change its mind about the merits of the bad tendencies test for applying the First Amendment in the fall of 1919—or for a considerably longer period of time thereafter (arguably not until *Brandenburg* in 1969). Even today, the Supreme Court can and does fall under the spell of “the ends justify the means” reasoning in important First Amendment cases (like *Humanitarian Law Project* and *Morse*) and relies on “bad tendencies” reasoning to

128. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). *But cf. Trump*, 138 S. Ct. at 2423 (“The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear —has no place in law under the Constitution.” (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

129. Compare *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940) (upholding a Pennsylvania law mandating participation by public school children in a daily flag salute exercise), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), with *Barnette*, 319 U.S. at 642 (invalidating on First Amendment grounds a West Virginia state law requiring all public school students to participate in a mandatory daily flag salute exercise).

130. *Korematsu*, 323 U.S. at 216 (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”).

justify content-based speech regulations. In light of this reality, we probably should be realistic about the capacity of mere words to constrain effectively judicial discretion. Precedent can and does have a constraining effect, but at the end of the day, it limits but does not control substantive outcomes in constitutional litigation.

On the other hand, however, the inability of any particular legal test or verbal formula to work consistently over time and across cases should not be taken as evidence that words simply do not matter and that the rigor of a legal test (or the lack of it) will never constrain judicial discretion effectively. The Holmes dissent in *Abrams* is an iconic and enduring paean to the values and importance of the freedom of speech—even in a nation actively engaged in waging a war to end all wars. As such, it calls judges, lawyers, and ordinary citizens to think carefully and deliberately before indulging in our quite natural impulse to silence speakers whose views and ideas seem seriously misguided, highly offensive, or even dangerous (if not quite “fraught with death”).¹³¹

IV. CONCLUSION

If, from time to time, federal judges fail to honor either the letter or the spirit of Justice Holmes’s robust defense in his *Abrams* dissent of the absolute necessity of unfettered freedom of political speech in a democratic polity, we should perhaps keep in mind that Holmes himself initially failed to honor the letter and spirit of these powerful views before seeing and publicly acknowledging the error of his own ways—and he did so only after several highly targeted, and clearly effective, interventions, both public and private, by Chafee, Laski, Hand, and Freund.¹³² Moreover, no matter how strict a particular test for measuring the government’s burden of production and persuasion in a First Amendment case, a risk will always exist that federal judges will permit fear to overcome their reason. As Justice Brandeis observed in his famous *Whitney* concurrence, “Men feared witches and burnt women”¹³³—so too, the Supreme Court’s bench feared socialists and anarchists and jailed union leaders.¹³⁴

Brandeis was surely correct to posit that “[i]t is the function of speech to free men from the bondage of irrational fears.”¹³⁵ Irrational fears—whether of communists, socialists, terrorists, or pot smoking teenagers—commonly lead courts to abandon the First Amendment’s core values and to embrace the irrational fear that speech, if tolerated, will bring the nation to utter ruination. Civic courage is plainly requisite—but it is also sometimes a scarce judicial commodity.

In my view, the greater threat to our nation’s existence and flourishing lies in permitting government to decide which political ideas are fit for

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

132. See *supra* text and accompanying notes 57–73.

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

134. *Debs v. United States*, 249 U.S. 211, 216–17 (1919).

135. *Whitney*, 274 U.S. at 376.

public discussion and which are not. As Alexander Meiklejohn so forcefully argued, to permit the government to protect us from bad ideas—ideas that have bad tendencies—“would seem to be an admission that we are intellectually and morally unfit to play our part in what Justice Holmes called the ‘experiment’ of self-government.”¹³⁶ The same can be said for political associations and assemblies in support of causes that provoke widespread fear or rouse many citizens to righteous anger.¹³⁷

Democratic self-government can function properly only if there is a dynamic and ongoing public discourse about those who hold government power and the policies that they propose to implement on behalf of “We the People.” Elections can secure government accountability only if voters have the freedom to speak and think for themselves and, therefore, can cast well-informed ballots that reflect the benefit of a lively and ongoing process of democratic deliberation. The Justice Holmes of *Schenck* betrayed these core First Amendment values and functions, whereas the Justice Holmes of the iconic *Abrams* dissent forcefully vindicated them. Let us hope, over the longer run of history, that the Holmes of *Abrams* prevails over the Holmes of *Schenck* in the federal courts and also in our national constitutional ethos.

136. MEIKLEJOHN, *supra* note 52, at xiii–xiv.

137. For a useful—and highly persuasive—discussion of the importance of protecting unpopular groups and their ability to participate in public protest, see generally JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012).