

Breathing Space in the Marketplace of Ideas: The First Amendment Implications of Electronic Surveillance

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Introduction

The United States government has monitored domestic telecommunications networks since the early twentieth century. Recent technological advancements have resulted in intelligence agencies having increased capabilities for monitoring content of communication, as well as the actual routing information for telephone calls. The monitoring of content through government surveillance is studied in this article from both a theoretical and legal perspective. This article will trace the development of the theory behind the marketplace of ideas, the chilling effect, breathing space, and the potential impact a changing legal structure will have on citizen's ability to express opinions without experiencing government censorship or punishment. This article presents a First Amendment analysis of the changing legal structure of electronic surveillance, establishing a nexus between First Amendment rights to free speech and association and Fourth Amendment rights to privacy. This connection is weighed against a historical balancing of concerns for protecting national security and concerns for protecting civil liberties.

Since September 11, 2001, the government has significantly modified laws governing electronic surveillance in the United States. The Bush Administration and intelligence agencies created new policies, such as the Terrorist Surveillance Program (*hereinafter* TSP), that governs electronic surveillance of citizen's phone conversations. In many ways, these modifications to existing surveillance laws have changed the understanding of how constitutional protections for Americans are interpreted. These modifications in some ways mimic the increased surveillance and monitoring engaged in by government agencies during past eras such as the communist scares during the McCarthy era. Contemporary policies have yielded a new round of suits filed by citizens and advocates who complain that not only their Fourth Amendment right to privacy, but also their First Amendment rights to free expression have been violated. Traditionally, judges have decided cases involving electronic surveillance on Fourth Amendment privacy grounds, but the new cases highlight a shifting balance between protections for civil liberties and national security. These new cases also make claims on grounds that there are First Amendment protections for telephone communications. Already, one judge has issued an opinion citing judicial precedent for the protection of free expression in private communications.

Although Fourth Amendment rights are the basis of most court decisions involving electronic surveillance, plaintiffs often invoke First Amendment protections for free speech, free religion and peaceable assembly. These First Amendment activities are protected not just nationally by the constitution, but internationally by human rights agreements. The Fourth Amendment's implicit guarantee of privacy, although not explicitly stated, insulates these rights by allowing citizens to develop political ideas and

beliefs in private. This “breathing space” enables citizens to then dialogue in a public forum without government intervention and oversight. Growing concerns over national security—specifically terrorism—may modify the understood legal balance between autonomous speech and national security. The purpose of this article is to examine the connection between Fourth Amendment protections for privacy and First Amendment protections for free speech and association by exploring the balance between citizen’s protections for civil liberties guarantees and the government’s need to protect national security.

During the 21st century, the United States government has engaged in increasingly sophisticated surveillance of citizen’s communications. After the terrorist attacks on September 11th, 2001, the United States declared a war on terrorism. One strategy in this war was to update electronic surveillance laws to defend the nation against this new threat to domestic security. How this initiative affected citizen’s First Amendment rights has not yet been fully explored. Changes in laws that govern electronic surveillance could potentially affect the First Amendment rights of free speech, free assembly and the right to a free press. Expanded technological capabilities and increasingly sophisticated government-controlled telecommunications networks and infrastructure also influence the laws that govern the electronic monitoring of citizen’s phone and Internet activities. The Terrorist Surveillance Program could have a “potential chilling effect” on the First Amendment activities of United States citizens. This chilling effect, and its influence over the “breathing space” citizens need to develop well-reasoned political ideas, represents a changing paradigm in how the United States government handles the interception of domestic telephone communications.

The modification of surveillance laws is a well-recognized threat to privacy, but the effect these changes will have on citizen's ability to participate in the marketplace of ideas has yet to be examined. Increased government monitoring of telecommunication channels might act as a deterrent to citizens expressing unpopular ideas. If a person believes everything he or she says is monitored by the government, he or she may be less likely to voice opinions that contradict national policy. This potential stifling of the marketplace may have a negative effect on the democratic processes necessary to produce informed and engaged participants.

I. Purpose

This article traces the development of the theory behind the marketplace of ideas, the chilling effect, and breathing space to discuss the impact a changing legal structure will have on citizen's ability to express opinions without experiencing government censorship or punishment. This topic has become increasingly important, in part, due to developing technologies that facilitate the government's monitoring of individual citizens without their knowledge. In the past, government agents would get a warrant or a court order to tap the phone line of a suspect. In the digital age, technology allows the same agents to intercept calls without the physical constraints of having to "bug" an individual phone line. Domestic calls are easily intercepted and filtered through sophisticated computer programs designed to detect "key words" and social connections between callers and known subversives.

The advances in the telecommunications infrastructure mean current laws are outdated. George W. Bush's administration acknowledged this when it disclosed the existence in 2005 of the Terrorist Surveillance Program, a secret domestic wiretapping

program that operated without warrants or judicial oversight.¹ Neither the former Bush administration nor scholars have been quick to address the implications an updated surveillance legal structure would have on citizen's constitutional rights. There are many legal analyses based on the Fourth Amendment right to privacy and how statutory changes would affect citizen's rights to a secure home and secure correspondence.

Threats to privacy from an unchecked surveillance program are easy to see, but the threats to the tangential free speech protections are subtle because they involve the citizen's perception of the government's intentions in monitoring their communications.

The First Amendment has a well-developed body of literature addressing free speech. Fourth Amendment analysis focuses on privacy rights. However, there has yet to be a thorough academic discussion of how these two areas relate to each other in regards to an insular area for the development of political expression. By examining the First Amendment implications of electronic surveillance, this article seeks to shed new light on the paradox between protecting national security and protecting individual rights to free speech and expression.

II. Chilling Effect

The chilling effect was first mentioned in a 1951 *Vanderbilt Law Review* article by Paul Freund exploring a double standard in the judicial treatment of civil liberties.² Freund reasoned that a judicial rule against vagueness or over breadth should depend on the moral quality of the conduct, so as to not "chill" constitutionally protected conduct

¹ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at 1, 22.

² Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951).

that might have “genuine social utility.”³ This differentiation of activities based on morality protects the public interest in freedom of expression by providing for a rational exploration of political ideas.⁴ Freund argued that the “chilling” of constitutional protections can be just as bad as “prohibiting” them in the cases of monitoring subversive phone conversations.⁵

When government intervenes in the marketplace of ideas, regulations can have a “chilling effect” on free speech and open dialogue.⁶ Frederick Schauer wrote that the chilling effect doctrine was a combination of two legal principles. First, the legal process is uncertain because it involves “people-made rules” and it is difficult to have a high degree of confidence in predicting outcomes.⁷ Second, the legal system is wrought with errors which, in the context of free speech, poses greater comparative harm to an individual and the legal process.⁸ Schauer suggested that the government imposition of restrictive laws of free expression does not create benign deterrence but invidious deterrence of protected activities.⁹

The very essence of a chilling effect is an act of deterrence. While one would

³ *Id.*

⁴ *Id.* at 540, 549.

⁵ Michael N. Dolich, *Alleging a First Amendment "Chilling Effect" to Create a Plaintiff's Standing: A Practical Approach*, 43 DRAKE L. REV. 175, 175-76 (1994).

⁶ Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

⁷ *Id.* at 687.

⁸ *Id.* at 687-88.

⁹ *Id.* at 690. Historian Howard Zinn mentioned a “chill” on free speech in the chapter of his book on American ideology. In discussing the First Amendment, he envisioned a scenario where “all of the restrictions on freedom of speech” are suddenly removed. Zinn said this would result in a “chill on free speech caused by the secret surveillance of citizens.” *See generally* HOWARD ZINN, DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY 182-230 (1991).

normally say that people are deterred, it seems proper to speak of an activity as being chilled. The two concepts go hand in hand, of course, in that an activity is chilled if people are deterred from participating in that activity. Although an individual's decision not to engage in certain behavior may be influenced by a wide range of stimuli, in law the acknowledged basis of deterrence is the fear of punishment—be it by fine, imprisonment, imposition of civil liability, or deprivation of governmental benefit.¹⁰

Schauer said the chilling effect is a “subset of the inhibitory effect created by any regulatory enactment and creates no independent constitutional difficulties.”¹¹ The chilling effect is implicated when any Constitutional safeguard is “unduly discouraged,” including activities protected by the First Amendment.¹² First Amendment protections provide an affirmative value protecting a right to speak.¹³ Schauer said that this affirmative right has the positive social value of promoting the public exchange of ideas and information.¹⁴ Schauer said that the government must evaluate interference in the “positively advantageous” sphere of free speech, as it is a constitutionally protected realm.¹⁵

Schauer said the chilling effect is not dependent upon altering specific behaviors, rather it is based on the “comparative nature of the errors that are bound to occur” in regulating activities that are bound up with constitutionally protected activities. This comparative effect—where citizens must evaluate whether an expression or action treads too close to prohibited speech—rather than altering specific behaviors, is the real

¹⁰ Schauer, *supra* note 6, at 689.

¹¹ *Id.* at 690.

¹² *Id.* at 690.

¹³ *Id.* at 691. This would be in addition to the negative ban on government abridgement.

¹⁴ *Id.*

¹⁵ *Id.* at 692.

indicator of the chilling effect.¹⁶

Raymond Shih Ray Ku argued that in order for free expression to survive, citizens understand a “reasonable expectation of privacy” in developing their personal beliefs.¹⁷ Ku said the Fourth Amendment does not just protect privacy: it is a “means of preserving the people's authority over government.”¹⁸ With electronic surveillance, this expectation is always shifting because rare technologies quickly become commonplace before the average citizen is familiar with their existence and implementation.¹⁹

In his 2007 *New York University Law Review* article, Daniel Solove argued that the First Amendment should protect against the government gathering information on citizens’ First Amendment activities.²⁰ Solove said First Amendment protections should restrict government information gathering if there is a “discernible” chilling effect on constitutionally protected activities.²¹ Solove said, however, that it is difficult to establish an actual chilling effect because it is “hard to measure the deterrence caused by a chilling effect.” He said this is because “it is impossible to determine with certainty what people would have said or done in the absence of the government activity,” Solove argued that it is often difficult to establish an actual chilling effect.²² Often the only

¹⁶ *Id.* at 731.

¹⁷ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁸ Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1326 (2002).

¹⁹ See Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393 (2002).

²⁰ Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007).

²¹ *Id.* at 154.

²² *Id.* at 155.

evidence of a chill would be the person’s own assertions that she was chilled. If the Court accepted this claim at face value, Solove said it would allow anyone to establish a chilling effect in any situation.²³

Katherine Strandburg argued that the First Amendment’s protections for freedom of association provide a framework for regulating relational surveillance.²⁴ The term “relational surveillance” was used to refer to the computer analysis of “noncontent traffic data to map networks of associations.”²⁵ Strandburg was concerned with threats to association, as opposed to the government listening in on communication content.²⁶ Strandburg said that there is a potential chilling effect when the government uses relational surveillance to monitor citizens.²⁷ She said the First Amendment’s guarantee for freedom of association must be seen as a unique consideration in evaluating relational surveillance programs —separate from the Fourth Amendment’s protections from unreasonable search and seizure.²⁸ Strandburg said government mining of databases—containing information on communication patterns—might reveal citizens’ “exploratory activities” in Internet search patterns. She said this could mark an individual as a member of an association before they ever joined it.²⁹ Strandburg concluded that the

²³ *Id.*

²⁴ Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_Id=1136624.

²⁵ *Id.* at 741.

²⁶ *Id.* at 749, n. 9.

²⁷ *Id.* at 747.

²⁸ *Id.* at 748.

²⁹ *Id.* at 752.

First Amendment's right to freedom of association should limit relational surveillance by the government if the surveillance "amounts to disclosure of expressive associations."³⁰

In his 2007 *First Amendment Law Review* article, Matthew Lynch created a hypothetical Orwellian Act to evaluate the constitutionality of government restriction on a speaker's right to choose his or her audience.³¹ Lynch's Orwell Act is an imagined "extraordinary legislative response to public demand for greater security" in response to the 9/11 terrorist attacks. The Orwell Act would allow the government to monitor "every communication by verbal or technological means" in the name of national security.³² Lynch classified this action as an "Orwellian loophole" where the government could monitor speech between the speaker and his or her private audience.³³ He called the loophole a "widening crack between Fourth Amendment, First Amendment, and right-to-privacy protections."³⁴

Lynch identified one of the issues in chilling effect claims by plaintiffs in court cases. He said that in order for plaintiffs to successfully argue their speech was concretely chilled, they must show that they were afraid to speak out against the government because of fear of punishment.³⁵ However, this fear is invalidated as a claim if they are speaking out in court.³⁶ To prove a "chill," plaintiffs would need to show the

³⁰ *Id.* at 819-20.

³¹ See generally Matthew Lynch, *Closing the Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure*, 5 FIRST AMENDMENT L. REV. 234 (2007).

³² *Id.* at 239, 242.

³³ *Id.* at 236.

³⁴ *Id.* at 240.

³⁵ *Id.* at 267.

³⁶ *Id.* at 267.

chill resulted from actual government surveillance, not just perceived potential surveillance.³⁷ Lynch called for a new approach where “government surveillance is an act directed at speech itself, rather than its secondary effects or its time, place, and manner.”³⁸

Lynch discussed the nature of anonymous speech and how it creates new theory of relationships between speaker, the contents of the speech, and the intended audience.³⁹ Lynch used sociology studies from the 1950’s to argue that a speaker will change his or her message depending upon whom they believe will be the recipient of the communication.⁴⁰ Lynch applied the Hawthorne Effect—a psychological term referring to the result of 1920’s research on Chicago factory workers showing that when workers knew they were being watched, their work output improved—to surveillance to argue that government surveillance can subconsciously cause a speaker to change his or her communications to please the full audience.⁴¹ This includes the uninvited observer, as well as the intended audience.⁴²

Lynch concluded his article by calling on the Supreme Court to “recognize that a speaker’s choice of audience is as fundamental to speech as the speaker’s choice of words, choice of medium, and choice to speak at all.”⁴³

³⁷ *Id.* at 272.

³⁸ *Id.* at 289.

³⁹ *Id.*

⁴⁰ *Id.* at 289-90.

⁴¹ *Id.* (citing D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002)).

⁴² *Id.*

⁴³ *Id.*

III. Breathing Space

William Banks, in his 2000 *American University Law Review* article on national security surveillance, said that the idea of “breathing space” as a First Amendment concept arises from the need for privacy in group association.⁴⁴ When a group “espouses dissident beliefs,” it is more likely to be the target of government surveillance due to national security concerns.⁴⁵ Banks recognized the development of the “breathing space” concept in case law:

The idea that associational privacy provides an individual "breathing space" has often been an issue in national security surveillance case law since the late 1950s, albeit not always the basis for overturning government surveillance.⁴⁶

Banks said that any use of domestic surveillance has the potential to chill First Amendment expression.⁴⁷ Banks said this intersection of domestic security and freedom of expression is balanced by two analytic devices: 1) the courts isolate certain categories of expression as having “little or no value” such as incitements to violence and “publication of information likely to cause irreparable harm to the national security” and 2) the courts ask whether expressive interests were targeted or only an incidental by-products of government operations.⁴⁸ He referred to this latter analytic device as a “purpose or effect” analysis that creates a subjective inquiry when surveillance activities

⁴⁴ William C. Banks & M.E. Bowman, *Executive Authority For National Security Surveillance*, 50 AM. U.L. REV. 1 (2000).

⁴⁵ *Id.*

⁴⁶ *Id.* at 45.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.*

are challenged.⁴⁹

Banks argued that the First Amendment should not be a barrier to government surveillance activity unless the intention of surveillance is the chilling of protected expressions.⁵⁰ Surveillance might also be challenged when there is a “confluence of interests” protected by the First and Fourth Amendments:

Problems arise, however, at the intersection of First and Fourth Amendment interests, where protected expression may be chilled by surveillance of groups or individuals selected on the basis of advocacy of unpopular views, or where individuals are associated with a terrorist group on the basis of religious, ethnic, or national affiliation.⁵¹

He gave the example of “intrusive surveillance...alleged to have chilled the exercise of protected expressive activities.”⁵² Whether or not surveillance occurs, the existence of covert recording of individual communication can create suspicion which chills free expression.⁵³

J.L. Hill identified three political values –privacy, autonomy and self-expression— which give life to the concept of breathing space as a political value in democracy.⁵⁴ Hill argued:

Privacy provides the self shelter from the storm; it gives the nascent self the breathing space to develop, and the developed self a personal realm to exist as it is,

⁴⁹ *Id.*

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 6. 122.

⁵² *Id.* at 7.

⁵³ *Id.* at 38.

⁵⁴ J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499 (2004).

free from the prying eyes and corrosive influences of society.⁵⁵

The right to unrestricted expression in private discourse allows the private citizen to develop fully.⁵⁶ Autonomy acts as a catalyst in the development of individual choice. When citizens can privately engage in interpersonal communication on meaningful issues, they are free to explore ideas that fall outside the bounds of accepted doctrine.⁵⁷ Alternative ideas are born from these private interactions—once developed, they can be introduced into the marketplace through public self-expression. Hill identified self-expression as the soul of freedom.⁵⁸ Therefore, the political values of privacy, autonomy and self-expression enable democratic citizens to manifest their personal beliefs as political values.⁵⁹

IV. The First Amendment

The First Amendment is an important starting point in looking at constitutional protections for targets of electronic surveillance by the government. The First Amendment's protections for free speech can be endangered by federal statutes that do not adequately protect a target engaging in activities such as political expression. Statutes can also limit a target's ability or desire to express opinions due to the fear they will face repercussions in response to communicating their ideas.

The First Amendment guarantees fundamental civil liberties including protection against the establishment of religion and for the free exercise of religion, freedom of

⁵⁵ *Id.* at 575.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

speech, and freedom of the press. It also guarantees a right of people to petition the government for redress of grievances and the right to assemble for the purposes of petition or communication on national questions.

Two First Amendment legal principles are directly relevant to the government's electronic surveillance of citizen's phone communications. The first is the chilling effect of laws that restrict the First Amendment right to free expression. This concept has been applied in cases controlling potentially subversive political views such as Communism. The Court has found that citizens have a First Amendment right to engage in this kind of expression despite the possibility of related illegal activities. The second concept is the breathing space necessary to ensure free expression in the marketplace of ideas. Although breathing space has traditionally been applied to the press in libel cases, the idea is applicable to surveillance because it suggests that government should not be able to restrict true political speech in the marketplace of ideas.

The marketplace of ideas model for freedom of expression relies upon citizens being free to express political opinions that enhance the democratic process by promoting discourse. When the government takes action to prevent this type of communication, it infringes upon the breathing space citizen's need to develop their ideas without fear of retribution. As Alexander Meiklejohn suggested, the purpose of the First Amendment is to ensure that individuals can participate in the political decision making process.⁶⁰

Government regulations that restrict free speech and political discourse "chill"

⁶⁰ ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1960). *See also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), *available at* <http://digital.library.wisc.edu/1711.dl/UW.MeikFreeSp>.

citizen involvement in the democratic process.⁶¹ First Amendment protections for free speech can promote the free flow of information, but government interference in the realm of free speech can undermine this critical exchange in the political process.⁶²

Citizens have a need for privacy to ensure they can develop autonomous ideas and express their opinions without government interference or societal pressure. Although these ideas might conflict with widely accepted societal views, they are vital for promoting exchange in the marketplace of ideas. Freedom of speech is a fundamental First Amendment right that has been upheld and shaped by a body of court cases, which include decisions relating to sedition and war protests. Freedom of assembly is closely related to freedom of speech. Today citizens use telecommunication to discuss political and legal issues as well as personal matters. Communication using telecommunication devices and lines enable a highly-mobile citizenry to engage in democratic dialogue with fellow citizens who might be located too far away geographically for face to face discussion. Although the freedom of religion, press and petition clauses could be relevant to a discussion of electronic surveillance and First Amendment rights, they will be downplayed in this discussion, in part because of the scope of the research. The analysis of First Amendment cases will focus on the free speech and free assembly clauses of the First Amendment.

In this article, the constitutional issues involving electronic surveillance will be explored by reviewing the relevant and seminal First Amendment and Fourth Amendment court decisions. The First Amendment decisions will be reviewed

⁶¹ Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

⁶² *Id.* at 691-92.

chronologically, following the development of the “clear and present danger” test, as it relates to the chilling effect of government suppression of free speech. Many of these cases involve political speech made by members of organizations assembling to oppose the United States government, so the review will also highlight cases where the court rule of free assembly under the First Amendment.

The Fourth Amendment decisions involving electronic surveillance will also be reviewed, but only when a decision highlights judicial reasoning or language that suggests a chilling effect or a need for breathing space. This article will emphasize cases where the courts have suggested government restrictions on constitutional freedom create a chilling effect of activities protected under the First Amendment. The idea of breathing space for ideas to compete in the marketplace, which is closely tied to the chilling effect, as discussed previously, will also be highlighted when the Court uses the concept in its reasoning. The concepts of “chilling effect” and “breathing space” are rarely the main issues in deciding U.S. Supreme Court decisions, but their continual use has led to a widely accepted judicial doctrine often mentioned in cases involving government surveillance of subversive citizens.

Before looking at case law involving the government suppression of free speech and assembly, it is important to establish the historical climate of the era to which the case law traces its roots. This time period centers on the United States’ involvement in World War I. On June 15, 1917, Congress passed the Espionage Act of 1917.⁶³ The law allowed the government to prosecute individuals who caused “insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United

⁶³ The Espionage Act of 1917, ch. 30, tit. I, §3, 40 Stat. 219 (June 15, 1917).

States.”⁶⁴ It also criminalized promoting the success of United States’ enemies.

At the time of the Act’s passage, many U.S. citizens feared that dissent at home during wartime could undermine a U.S. victory abroad. Less than a year later, the Espionage Act of 1917 was amended by the addition of the Sedition Act of 1918, criminalizing “disloyal” language against the government. Whereas the Espionage Act criminalized actions to undermine the U.S. war effort, the Sedition Act criminalized speech and publications that criticized the government.

The Sedition Act criminalized the advocacy, teaching, defense or suggestion of any word that would “support or favor the cause of any country with which the United States is at war.”⁶⁵ The Espionage Act of 1917 and the subsequent Sedition Act of 1918 led to large number of Supreme Court cases addressing the issue of government suppression of citizen speech and association under the First Amendment. These cases will be reviewed with a specific focus on the language that supports a judicial lineage for the “chilling effect” as it relates to the marketplace of ideas, clear and present danger, free association, political speech and breathing space.

Following the passage of the Espionage Act of 1917 and the Sedition Act of 1918, the Supreme Court decided three cases that would create the “clear and present danger test,” the early standard for evaluating the necessity of government suppression of free expression. In March of 1919, the Court decided *Schenck v. United States*, *Frohwerk v. United States* and *Debs v. United States*.⁶⁶ U.S. Supreme Court Justice Oliver Wendell

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

Holmes wrote the unanimous decisions for each of the cases.

A. Schenck v. United States

In *Schenck*, for the first time the Supreme Court, in a 9-0 decision, upheld the constitutionality of the Espionage Act.⁶⁷ Schenck was the secretary of the Socialist Party, which printed and distributed 15,000 leaflets by mail encouraging opposition to the military draft. The leaflets, in passionate language, described the military draft as the worst form of despotism and a “monstrous wrong against humanity.”⁶⁸ Schenck was convicted on three counts: 1) conspiracy to violate the Espionage Act by causing and “attempting to cause” insubordination in the military and naval forces of the United States by obstructing the recruiting and enlistment effort, 2) conspiracy to commit an offense against the United States, and 3) unlawful use of the mail for transmitting messages related to conspiracy against the United States.⁶⁹

The Court, in its decision, reasoned that Schenck did not deserve First Amendment protection when criticizing the draft because his action created a clear and present danger to the United States armed forces during a time of war.⁷⁰ The Court reasoned that the intent of the Socialist Party’s document was to undermine the war effort because “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.”⁷¹ The Court acknowledged

⁶⁷ *Id.*

⁶⁸ *Id.* at 51.

⁶⁹ *Id.* at 49.

⁷⁰ *Id.* at 51.

⁷¹ *Id.* at 51.

that during “ordinary times” the defendants would enjoy constitutional protection in distributing their leaflets. During war times, however the “character of every act depends upon the circumstances in which it is done.”⁷²

The Court, in the *Schenck* decision, introduced one of the most famous clauses in First Amendment doctrine: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”⁷³ Building on this idea, Holmes established the “clear and present danger test” that would become the new standard, until it was modified by later decisions, for government suppression of free expression:

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.⁷⁴

The Court based its decision in *Schenck* on the question of proximity and degree, and said words that enjoy tolerance during peacetime can be found to be unconstitutional during times of war.⁷⁵ The Court reasoned that the purpose of the Espionage Act of 1917 was to punish “conspiracies to obstruct as well as actual obstruction.”⁷⁶ Therefore, the success of the conspiracy was not the measure of the crime.⁷⁷ Under the “clear and present danger” test, there were two tests for the protection of free speech. The first was based on circumstances, such as the nation being at war. The second was based on the

⁷² *Id.* at 52.

⁷³ *Id.*.

⁷⁴ *Id.*.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

intent of the speaker—whether or not the speaker intended to bring about action against the government. In the second tier of the test, successfully executing the intent of a plan was not a necessary criterion in abridging the target’s speech. Mere intent to commit the type of crime barred by Congress was sufficient cause to secure a conviction.

In *Schenck*, the Court upheld acts specifically designed to curb or “chill” speech believed to be in conflict with national policy. Not surprisingly the First Amendment sensitive term “chilling effect” was not mentioned by name in the decision.

B. Frohwerk v. United States

A week after the *Schenck* decision, Holmes wrote the majority opinion in *Frohwerk v. United States*, repeating its support of the “clear and present danger” test.⁷⁸ In *Frohwerk*, the Supreme Court unanimously upheld the District Court of Western Missouri’s conviction of the defendant, Jacob Frohwerk, for thirteen counts relating to the preparation and publication of anti-draft articles.⁷⁹ Frohwerk, a copy editor for a Missouri German language newspaper, had distributed twelve articles during 1917 promoting “disloyalty, mutiny and refusal of duty in the military and naval forces of the United States.”⁸⁰ He was sentenced to ten years in prison, but he appealed on First Amendment grounds that his words were protected speech.

Relying on the *Schenck* decision, Justice Holmes reasoned, “the First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language.”⁸¹ Therefore, as

⁷⁸ Frohwerk v. United States, 249 U.S. 204 (1919).

⁷⁹ *Id.* at 205.

⁸⁰ *Id.*

⁸¹ *Id.*

in *Schenck*, “a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion.”⁸² The Court decided the case on the standard in *Schenck* standard, determining if the publications were “overt acts” of conspiracy, rather than the on the basis the government asked for—Congress’ power “to punish such a conspiracy to obstruct.”⁸³ The Court found little difference between the publications in *Schenck* and the publications currently being considered in *Frohwerk*.⁸⁴

The Court reasoned that during times of war, although we do not “lose our right to condemn,” the “circulation of the paper was in quarters [neighborhoods] where a little breath would be enough to kindle a flame.”⁸⁵ Although the publication was not specifically targeting men that might be drafted, it still had the potential to trigger reader opposition to the draft.⁸⁶ The Court ruled that even though no means of conspiracy was specified, the publication still amounted to criminal conspiracy because *Frohwerk* intended to accomplish the goal.⁸⁷

As in *Schenck*, the Court applied the new test of “clear and present danger,” requiring only intent to commit conspiracy—not a successful act to carry out a plan. Again, the decision, which does not use the term chilling effect, supported the idea that the government can chill dangerous speech that would otherwise be constitutionally protected speech. Words alone were sufficient to establish a threat under *Frohwerk*.

⁸² *Id.* at 206.

⁸³ *Id.* at 206-07.

⁸⁴ *Id.* at 207.

⁸⁵ *Id.* at 208-09.

⁸⁶ *Id.* at 209.

⁸⁷ *Id.*

Instead of allowing potentially false or dangerous ideas to be tested in the marketplace, the Court upheld the government's effort to stifle speech.

C. **Debs v. United States**

The last of three cases decided in the spring of 1919, *Debs v. United States* involved the conviction of a former three-time Presidential candidate who had been spoken out against World War II. Although the Court again did not mention the “clear and present danger” test in its decision, it upheld the standard established in *Schenck* and *Frohwerk*.

On the same day it decided the *Frohwerk* case, the Supreme Court unanimously upheld the conviction of socialist political leader Eugene V. Debs under the Sedition Act of 1918, which amended the Espionage Act of 1917.⁸⁸ The government said that Debs' speech on June 16, 1918, in Canton, Ohio, was an attempt to “cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States. Debs was convicted under the Espionage Act for opposing the official government wartime initiative by obstructing the recruitment and enlistment service of the United States military.

The Supreme Court, in its opinion, highlighted Deb's sympathy for the persons honored in his speech against enlistment.⁸⁹ The Court also highlighted a 1918 Socialist Party proclamation, “Anti-War Proclamation and Program,” endorsed by Debs. The clear and present danger test was not mentioned in the opinion, and the intent of Deb's words was not analyzed. Neither did the Court, again, mention the term chilling effect. Of

⁸⁸ *Debs v. United States*, 249 U.S. 211 (1919).

⁸⁹ *Id.* at 215.

course the decision, upholding a federal statute barring the advocacy of political change, could easily have chilled antiwar and other anti-government expression.

D. Abrams v. United States

The Court experienced an important turning point in the handling of free speech cases just eight months after it decided the trilogy of cases establishing and supporting the “clear and present danger” test. *Abrams v. United States.*, is not known so much for the majority’s decision—which supported the precedence of *Schenck*, *Frohwerk* and *Debs*—but rather the dissenting opinion of Justice Holmes. Holmes, the author of the opinions in *Schenck*, *Frohwerk* and *Debs*, broke with the majority in *Abrams* in what marked an important turning point in the judicial interpretation of “clear and present danger.”⁹⁰

In *Abrams*, decided in November 1919, the Supreme Court’s 7-2 majority upheld the conviction of the New York anarchists under the Espionage Act as constitutional. Jacob Abrams, Mollie Steimer, Hyman Lachowsky, and Samuel Lipman had participated in the publication of *Der Shturm*, a newspaper that advanced the anarchist political agenda in opposition to capitalism.⁹¹ The quartet, inspired by the Russian Revolution, dropped five thousand leaflets off of a rooftop in Manhattan advocating their anarchist cause.⁹²

The men were arrested and convicted on October 25, 1918 in the United States District Court for the Southern District of New York for advocating the overthrow of the United States government.

⁹⁰ *Id.*

⁹¹ *Abrams v. United States*, 250 U.S. 616, 618 (1919).

⁹² *Id.* at 618.

The government argued that the First Amendment did not apply to the New York anarchists because it was only meant to protect the press from prior government restraints on publication. Abrams and his associates were charged after the publication and distribution of their paper. The attorney for the journalists argued that the Espionage and Sedition Acts were an unconstitutional restraint on the men's natural right of liberty of discussion.⁹³ Further, the attorney for the defendants in the case argued that the Espionage and Sedition Acts did not apply because the United States was not at war with the Soviet Union.⁹⁴

Justice John Clark wrote the opinion of the Court, holding that the New York four were guilty of conspiring to violate the Espionage and Sedition Acts.⁹⁵ The Court, relying on the clear and present danger test established in *Schenck*, held the government only needs to show that there was evidence of intent to overthrow the government.⁹⁶ The Court said that the obvious purpose of the distributed papers was to "persuade the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war."⁹⁷

The Court felt that the four defendants were not seeking to bring about administrative change or a candid discussion of the issue, but rather they were attempting to "defeat the war plans of the Government of the United States by bringing upon the

⁹³ *Id.* at 619.

⁹⁴ *Id.* at 618-19.

⁹⁵ *Id.* at 617, 621.

⁹⁶ *Id.* at 619.

⁹⁷ *Id.* at 620-21.

country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.”⁹⁸

Justice Oliver Wendell Holmes dissented from the majority opinion and was joined by Justice Louis Brandeis. Holmes differed with the Court on the application of the “clear and present danger,” the test he originated in *Schenck v. United States*.⁹⁹ In his dissent, Holmes offered a revised test, one that he said afforded greater protection for political speech. Holmes’ new standard for the clear and present danger test, even though it was part of the *Abrams* dissent, would become the standard for Supreme Court decisions on freedom of expression in the decades following *Abrams*.

Holmes’ dissent said the four New York defendants posed no true threat to the United States’ war effort. Whereas previously the standard for clear and present danger was demonstrating there was a present danger to the government, Holmes in *Abrams* specified that there must be proof of “imminent” danger. Holmes did not believe the words uttered by the four New York activists posed the same danger, or demonstrated an intent to harm the war effort, that the unrealized deeds they were advocating would.¹⁰⁰

Holmes argued that the sentiment in the pamphlets was in no way meant to attack the “form of government of the United States.”¹⁰¹ He based his new interpretation of intent, which he first established in the second tier of *Schenck’s* clear and present danger test, on the nature of *Abrams’* words, which were not a specific act intended to overthrow the government, but rather an expression. Holmes said

⁹⁸ *Id.* at 622.

⁹⁹ *Schenk*, 249 U.S. at 52.

¹⁰⁰ *Abrams*, 250 U.S. *Id.* at 626.

¹⁰¹ *Id.*

But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.¹⁰²

Even though the words were uttered during a time of war, Holmes reasoned that the “principle of the right to free speech is always the same.”¹⁰³ He argued that only a “present danger of immediate evil or an intent to bring it about” would warrant government intervention on expression.¹⁰⁴ Holmes felt that “the surreptitious publishing of a silly leaflet by an unknown man” did not pose an immediate danger to the country.¹⁰⁵ Furthermore, Holmes reasoned that there was no intent by the defendants other than helping Russia, and certainly there was no hint at resistance to the United States present in the defendant’s actions.¹⁰⁶

Holmes dedicated a large portion of his dissent to the discussion of “persecution for the expression of opinions.”¹⁰⁷ He reasoned that sweeping away all opposition through suppression of speech was a “logical” action if the government did not want to face political dissent. He wrote that under such an approach, allowing opposition indicates that the speech is impotent.¹⁰⁸ Holmes said outlawing a class of speech indirectly acknowledges its power to reach the ultimate good desired by allowing free trade in

¹⁰² *Id.* at 627.

¹⁰³ *Id.* at 627-28.

¹⁰⁴ *Id.* at 628.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 628-29.

¹⁰⁷ *Id.* at 630.

¹⁰⁸ *Id.*

ideas.¹⁰⁹ In expanding on his idea of “free trade in ideas,” Holmes used the marketplace of ideas metaphor for the first time in Court history to refer to the mechanics of free expression:

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.¹¹⁰

In the *Abrams* case, the dissenting Justices said *Schenck’s* test of danger was not met. Although only two justices supported the dissenting opinion, its impact still echoes in modern theories of free expression. The Holmes-Brandeis dissent provided a conceptual rationale for free expression that is similar to the free market in economics on which the country is theoretically based.¹¹¹ The Holmes-Brandeis dissent brought the advocacy of a free exchange of ideas by John Milton and John Stuart Mill into the 21st century judicial ideology. For example, Holmes’ statement that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” was reminiscent of Milton’s statement, “let her [truth] and falsehood grapple; who ever knew

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (emphasis added).

¹¹¹ See Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 7 (1986) (discussing how the economic principle of a marketplace is applicable to the legal argument for free speech as a method for citizens developing ideas in the public forum. Citizens in the private sphere develop ideas in a deliberative process that is integral to a healthy democracy). *Contra* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967–74 (1978).

Truth put to the worse in a free and open encounter.”¹¹² Essentially, the Holmes-Brandeis dissent recognized the chilling effect of suppressing free expression in the democratic process.

E. *Gitlow v. New York*

The *Abrams* dissent of Holmes and Brandeis did not immediately change the Supreme Court’s pattern of affirming convictions based on speech or its reliance of the “clear and present danger” as developed in *Schenck*. In *Gitlow v. New York*, the Court upheld the defendants’ convictions under a New York criminal syndicalism statute.¹¹³ However, the *Gitlow* case is notable because the Court—for the first time—said that First Amendment protections ought to be extended to state government action against speech, in addition to federal suppression of speech.¹¹⁴

In the 1925 case of *Gitlow v. New York*, decided by the U.S. Supreme Court in a 7-2 opinion, the Court upheld the conviction of a defendant under New York’s criminal anarchy law.¹¹⁵ The case was decided on the issue of whether the First Amendment’s free speech clause applied to states under the Fourteenth Amendment. Benjamin Gitlow and three conspirators were convicted of criminal anarchy under New York Penal Law, 160, 161.1.¹¹⁶

¹¹² JOHN MILTON, *AREOPAGITICA* (Oxford at the Clarendon Press 1882) (1644), available at <http://books.google.com/books?id=RGILAAAIAAJ&dq=milton+areopagitica&pg=PP1&ots=Cwsdl1fygn&sig=L2Ld0JIwAyRzYyygCTOkfRDxra8&hl=en&prev=http://www.google.com/search%3Fclient%3Dsafari%26rls%3Den%26q%3Dmilton%2Bareopagitica%26ie%3DUTF-8%26oe%3DUTF-8&sa=X&oi=print&ct=title&cad=one-book-with-thumbnail#PPR3,M1>.

¹¹³ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶

Gitlow was convicted on two counts: 1) advocating, advising and teaching the doctrine of criminal anarchy through the writings in “The Left Wing Manifesto”, and 2) printing, publishing and circulating a paper titled, “The Revolutionary Age,” which advocated the forceful overthrow of government.¹¹⁷ The Court opinion specified “there was no evidence of any effect resulting from the publication and circulation of the Manifesto.”¹¹⁸

The Court upheld the New York statute criminalizing the advocacy of the overthrow of government by force or violence, but it simultaneously extended the Fourteenth Amendment’s due process clause to include the Bill of Rights.¹¹⁹ The court clarified the clear and present danger test created in *Schenck* and expanded in *Abrams*.

In regards to the statute violating the Fourteenth Amendment’s protections, the Court said

That while liberty of expression 'is not absolute,' it may be restrained 'only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely,' and as the statute 'takes no account of circumstances,' it unduly restrains this liberty and is therefore unconstitutional.¹²⁰

However, the *Manifesto*, was found to advocate and urge “mass action which shall

¹¹⁷ *Id.* at 654. The New York Statute defined “criminal anarchy” in section 160 as “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 the government, or by an unlawful means.” Furthermore, section 161§1 of the state criminalizes the advocacy of criminal anarchy by 1) word of mouth, 2) writing, 3) advising, or 4) teaching the duties of the doctrine. Section 161§2 criminalizes the actions made in section 161§1 when they are carried out through printing, publishing or editing issues related to criminal anarchy or knowingly circulating, selling, distributing, or displaying books, papers, documents or written printed matter relating to the doctrine.

¹¹⁷ *Id.* at 655.

¹¹⁸ *Id.* at 656.

¹¹⁹ Previously, in *Barron v. Baltimore*, 32 U.S. 243 (1833), the Court held that the Bill of Rights only applied to the federal government.

¹²⁰ *Gitlow*, 268 U.S. 652 at 664.

progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government.”¹²¹ The Court ruled that the language was not “the expression of philosophical abstraction,” but rather the language of direct incitement.¹²² The Court said that a State might punish utterances that endanger the foundations of organized government or “present a sufficient danger of substantive evil,” therefore Gitlow’s conviction must be upheld.¹²³ Furthermore, the Court expanded on the clear and present danger test in saying that these types of utterances, by 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, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when 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 incipiency.¹²⁴

The Court, relying on the reasoning in *Schenck* and *Debs*, specified that the defendant’s words represented a substantive evil, and therefore created a clear and present danger to the nation.¹²⁵ Again, since the statute was not unconstitutional, the

¹²¹ *Id.* at 665.

¹²² *Id.*

¹²³ *Id.* at 667, 669.

¹²⁴ *Id.* at 669.

¹²⁵ *Id.* at 671.

Court affirmed the Court of Appeals judgment.¹²⁶

Justice Holmes, who was joined by Brandeis, again dissented, arguing that the court should adhere to the “clear and present danger” standard for evidence establishing a substantive evil.¹²⁷ Holmes and Brandeis, the justices respectively authoring and signing on to the dissent in *Abrams*, disagreed with the majority opinion in *Gitlow*. Holmes argued that Gitlow’s advocacy posed no present danger and only a few people would receive the message, with possible action taking place at an “indefinite time in the future.”¹²⁸

Relying upon *Schenck*, Holmes maintained that free speech must be extended protection under the Fourteenth Amendment. Holmes took issue with the majority labeling Gitlow’s manifesto as an incitement, writing that “every idea is an incitement” if it is believed.¹²⁹

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.¹³⁰

Holmes and Brandeis, again, provided powerful language in *Gitlow*, which establishes the framework for a chilling effect of free speech at the hand of government action. Their handling of ideas conflicted with the majority’s reasoning that ideas alone

¹²⁶ *Id.*

¹²⁷ *Id.* at 673.

¹²⁸ *Id.*.

¹²⁹ *Id.*

¹³⁰ *Id.* at 673.

could incite danger. They suggested what could only be interpreted as a marketplace model: ideas “should be given their chance and have their way.”¹³¹ This marketplace concept, which they first relied on in their *Abrams*’ dissent, is powerful support for the development of the “chilling effect” doctrine. Ideas must be allowed to compete in a market, free from government intervention that chills the natural discourse brought about by citizen exchange over true and false information.

F. *Whitney v. California*

In *Whitney v. California*, the Court did apply the “clear and present danger” test, sustaining a criminal conviction under the California Syndicalism statute.¹³² Brandeis and Holmes concurred in the opinion, again emphasizing that there was no evidence of substantive evil to create the danger needed to pass the Court’s adopted test.¹³³ *Whitney* would remain the precedent for the clear and present danger test until it was overturned in 1969 by *Brandenburg v. Ohio*.¹³⁴

In *Whitney v. California*, decided May 16, 1927, the U.S. Supreme Court in a 9-0 vote, held that California’s criminal syndicalism law—criminalizing defense, advocacy or establishment of an organization committed to violent means of effecting government change—did not violate the First Amendment.¹³⁵ The Superior Court of Alameda County in California convicted Charlotte Whitney under the California Criminal Syndicalism Act

¹³¹ *Id.*

¹³² *Whitney v. California*, 274 U.S. 357, 371 (1927).

¹³³ *Id.*

¹³⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹³⁵ *Whitney*, 274 U.S. at 359-60.

for helping to establish the Communist Labor Party.¹³⁶ Whitney was a member of the Oakland branch of the Socialist Party and she attended a convention in November of 1919 for the purpose of organizing a California branch of the Communist Labor Party.¹³⁷ Whitney claimed that she had no intention of the party becoming an instrument of a violent overthrow of the government. Whitney claimed she “took part in formulating and presenting” a convention resolution that would use legitimate political reform—the ballot—not acts criminalized by the California Syndicalism Act.¹³⁸ The District Court of Appeals affirmed the judgment.¹³⁹ Her petition to have the case heard by the Supreme Court was denied.¹⁴⁰ Whitney appealed to the Supreme Court on writ of error, but the case was dismissed for “want of jurisdiction.”¹⁴¹ The Court finally granted a rehearing.¹⁴²

Justice Edward Sanford wrote the majority opinion. The Court held that the Syndicalism Act was “not repugnant to the due process clause by reason of vagueness and uncertainty of definition.”¹⁴³ The Court said the Act “was not repugnant to the equal protection clause, on the ground that as its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political

¹³⁶ *Id.* at 359.

¹³⁷ *Id.* at 364.

¹³⁸ *Id.* at 367-68.

¹³⁹ *Id.* at 359 (citing *People v. Whitney*, 207 P. 698 (1922)).

¹⁴⁰ *Id.* at 359.

¹⁴¹ *Id.* (citing *People v. Whitney*, 269 U.S. 530 (1925)).

¹⁴² *Id.*

¹⁴³ *Id.* at 368.

conditions.”¹⁴⁴ The Court said the Act was also not a restraint of the rights of free speech, assembly, and association, because Constitutional freedom of speech does not confer an absolute right to speak without responsibility.¹⁴⁵ The Court vacated the writ of error and affirmed the appeal court decision.

Justice Brandeis, joined by Justice Holmes, wrote a concurring opinion. Brandeis said the due process clause of the Fourteenth Amendment “applies to matters of substantive law as well as to matters of procedure,” and therefore “all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states.”¹⁴⁶ He included free speech, the right to teach and the right of assembly as fundamental rights.¹⁴⁷

In regards to “clear and present danger,” Brandeis said the Court had not yet established a standard for establishing when danger is clear or “how remote the danger may be and yet be deemed present.”¹⁴⁸ He also insisted that the Court had not yet set a standard for how sufficiently substantial and evil the danger must be to justify the abridgment of speech and assembly.¹⁴⁹ Brandeis insisted an evil must be “substantial.”¹⁵⁰

Brandeis, in his concurring opinion, provided his interpretation of the Constitution framers’ intent behind guaranteeing liberty as the protection of political discussion and as a fundamental principle of the American government:

¹⁴⁴ *Id.* at 369.

¹⁴⁵ *Id.* at 371.

¹⁴⁶ *Id.* at 373.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 375-77.

¹⁴⁹ *Id.* at 374.

¹⁵⁰

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 doctrine¹⁵¹

Brandeis added that it was “hazardous to discourage thought, hope and imagination,” because it bred repression and prohibited good counsels from remedying evil ones.¹⁵² Furthermore, he added that for free speech to be suppressed, there must be reasonable ground to believe that 1) evil will be a result of the speech, 2) the danger feared is imminent and 3) the evil prevented is serious:

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.¹⁵³

He highlighted the difference between advocacy and incitement, preparation and attempt, and assembly and conspiracy.¹⁵⁴ He said that American should always be free to challenge the abridgement of speech unless an emergency justifies the government’s actions.¹⁵⁵

Brandeis said imminent danger alone cannot justify the prohibition of free speech and assembly; there must be a “probability of serious injury to the state.”¹⁵⁶ Brandeis’ concurrence is a departure from the majority views in *Whitney*, but it is an important turning point in First Amendment jurisprudence. In *Abrams*, Holmes argued that even unpopular ideas should be free to compete in the marketplace. Brandeis bolstered this

¹⁵¹ *Id.* at 375-77.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 377-78.

argument in his *Whitney* concurrence by suggesting that free speech enabled the democratic process. His concurring opinion recommended changing the clear and present danger test to a time to answer test. Whereas the majority opinion indirectly embraced the governments need to chill violent advocacy, Brandeis' concurrence supported growing sentiment for his "marketplace" model introduced in *Abrams*. The *Whitney* concurrence would gain ground in the 1950's and 1960's as the Court decided free speech cases under the First Amendment. The marketplace model advocated by Brandeis in this concurring opinion, and preceding dissents with Holmes, would not find majority support in the Court until the 1969 *Brandenburg v. Ohio* decision overturned *Whitney*.¹⁵⁷

G. Bridges v. California

Fourteen years after the *Whitney* decision, the Court would issue an opinion that began to relax the application of the "clear and present danger" test. In *Bridges v. California*, the U.S. Supreme Court, in a 5-4 vote, held that the prior restraint of pretrial coverage by journalists was unconstitutional barring a "clear and present danger to the administration of justice."¹⁵⁸ The Court specified that the working principle of the clear and present danger test is based upon a "substantive evil [that] must be extremely serious and the degree of imminence extremely high before high before utterances can be punished."

¹⁵⁷ For a full discussion of *Brandenburg v. Ohio*, see *infra*.

¹⁵⁸ *Bridges v. California*, 314 U.S. 252 (1941). *Bridges* was decided on appeal with a companion case, *Times-Mirror Co. v. Superior Court*, 310 U.S. 623 (1941). In *Times Mirror Co.*, the *Los Angeles Times* was convicted for contempt, when it published editorials on the sentencing of union members while a decision was pending. The decision was upheld by the lower appellate courts and the California Supreme Court.

In *Bridges*, a union official, Harry Bridges, sent a telegram to the U.S. Secretary of Labor, threatening a strike if a judicial motion was enforced against unions. The letter was subsequently published in local California newspapers. The petitioners said the judicial motion was an abridgement of Constitutional protections for free speech and press. The lower appellate courts upheld his conviction for contempt of court. The Supreme Court sustained the First Amendment claims of the defendants and overturned both decisions on grounds that no clear and present danger had been shown. The Bridges case was decided on the issue of whether a publisher could be held in contempt of court for editorial statements made during a pending case.

The Court, relying on the reasoning in the *Gitlow* decision, held that punishment for an out of court publication, specifically being charged with contempt relating to a pending case, is only constitutional if the clear and present danger test can be met by showing a substantive evil that is likely to result from the utterances published.¹⁵⁹ The degree of likelihood was a question pondered by the Court, as it relied on the *Schenck* “clear and present danger” test to evaluate whether the utterances were used in circumstances and of a nature that they would bring about a substantive evil.¹⁶⁰

The Court said that the body of cases establishing the clear and present danger test did not go to the outer limits of constitutional protections for expression, but rather recognized minimum protections under the Bill of Rights.¹⁶¹ The Court said that the First Amendment’s free speech and press clauses must be given as broad a scope as can be

¹⁵⁹ *Bridges*, 314 U.S. at 261, 263.

¹⁶⁰ *Id.* at 261.

¹⁶¹ *Id.* at 263.

tolerated by society.¹⁶² An out of court publication, even if it has a reasonable tendency to interfere with the orderly administration of justice, is not necessarily subject to punishment for contempt.¹⁶³ The Court referred to the relevance of the clear and present danger test in cases of espionage, criminal syndication, anti-insurrection, breach of peace and substantive evils that could destroy or invade the right of privacy associated with life or property.¹⁶⁴

Nevertheless, the "clear and present danger" language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue.¹⁶⁵

The Court said that in order to restrict free speech or press, the evil must be substantial and serious.¹⁶⁶ The Court specified that "even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression."¹⁶⁷ The working principle of the "clear and present danger" test is "that the substantive evil must be extremely serious, and the degree of imminence extremely high, before utterances can be punished."¹⁶⁸ The Court then analyzed the historical nature of the publications in the case—"publications tending to obstruct the orderly and

¹⁶² *Id.* at 265.

¹⁶³ *Id.* at 272.

¹⁶⁴ *Id.* at 262. *See* *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U. S. 616 (1919); *Whitney v. California*, 274 U.S. 357 (1927); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹⁶⁵ *Bridges*, 314 U.S. at 262.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 262-63 (citing *Schneider v. State*, 308 U.S. 147, 161 (1939)).

¹⁶⁸ *Id.* at 263.

fair administration of justice.”¹⁶⁹ The Court concluded that the Constitutional framers intended the First Amendment to give “liberty of the press... the broadest scope that could be countenanced in an orderly society.”¹⁷⁰ Furthermore, the Court reasoned “Criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case.”¹⁷¹

In regards to the publication at issue in the present case, the Court found that

judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time, but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that, the more acute labor controversies are, the more likely it is that, in some aspect, they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.¹⁷²

The Court held that the previous judgments in *Bridges* resulted in “a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil, which they are designed to avert.”¹⁷³

Even though *Bridges* used the word “outrageous,” to describe the court’s handling of the labor dispute, there is no threat of an illegal course of action.¹⁷⁴ *Bridges*, as Secretary of Labor, had an official duty to prevent strikes and was exercising the First Amendment right of petition in his duty as a United States government representative.¹⁷⁵

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 265.

¹⁷¹ *Id.* at 268.

¹⁷² *Id.* at 268-69.

¹⁷³ *Id.* at 270.

¹⁷⁴ *Id.* at 277.

¹⁷⁵ *Id.*

Where the majority opinion reversed the decisions of the lower courts, Justice Felix Frankfurter wrote the dissenting opinion, joined by Justices Harlan Stone, Owen Roberts, and James Byrnes.¹⁷⁶ Frankfurter saw the “administration of justice by an impartial judiciary” as basic to the concept of freedom, even when it was at odds with freedom of expression.¹⁷⁷

Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute, and is not predetermined. By a doctrinaire overstatement of its scope, and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society.¹⁷⁸

Frankfurter argued that *Bridges* was attempting to “overawe” a judge and deprive the state of its powers to secure citizen justice.¹⁷⁹ The dissenting opinion said that the majority opinion intimidated the fair course of justice, by allowing coercion of the courts.¹⁸⁰

In *Bridges*, the Court’s opinion fell just short of rejecting the application of the clear and present danger test as it had been historically used in the cases leading up to and including *Whitney*. In modifying the clear and present danger test to require a showing of substantial and serious harm, the Court began to embrace the line or reasoning in the Holmes and Brandeis dissents of the previous decades. This nod to the harm in chilling inconvenient or annoying speech represented at least a temporary turning point, one where the Court began to recognize the need for citizens—even those with radical

¹⁷⁶ *Id.* at 279.

¹⁷⁷ *Id.* at 280-94.

¹⁷⁸ *Id.* at 293.

¹⁷⁹ *Id.* at 279.

¹⁸⁰ *Id.* at 280.

views—to be free to advocate courses of action, as long as they did not engage in specifically prohibited acts of overthrow or conspiracy.

H. West Virginia State Board of Education v. Barnette

The cases previously reviewed in this section focus clearly on the establishment and application of the clear and present danger test. Yet, the kinds of activities that triggered prosecution under statutes prohibiting advocacy of government overthrow are closely related to another class of expression. In the early 1940's the Court would be presented with an opportunity to rule on forced patriotism through a government mandate for symbolic speech. Although the case was closely tied to the First Amendment's protection for religious freedom, the Court decided the case on the issue of free expression.

In *West Virginia State Board of Education v. Walter Barnette*, decided in June 1943, the U.S. Supreme Court held that the First Amendment's establishment clause prohibits public schools from forcing students to salute the American flag and say the Pledge of Allegiance, affirming the lower district court decision.¹⁸¹ The decision was significant because it overruled the Court's 1940 decision in *Minersville School District v. Gobitis*, involving a plaintiff's claim that his First Amendment right to free religion was abridged by a state compelling students to salute the American flag and recite the pledge.¹⁸² The Court in *Barnette* reasoned that compelling children to salute the flag and say the pledge of allegiance was a violation of the First and Fourteenth Amendments.¹⁸³ Furthermore, the Court did not see compelled patriotism as a permissible means of

¹⁸¹ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

¹⁸² Minersville School District v. Gobitis, 309 U.S. 645 (1940).

¹⁸³ *Barnette*, 319 U.S. at 637, 642.

achieving national unity.¹⁸⁴

The U.S. Supreme Court identified the issue in the case as a conflict between authority and the rights of the individual.¹⁸⁵ Even though the *Gobitis* Court held that the State may require teaching in the history and structure of government—even to inspire patriotism and love of country—the compulsion of students to declare a belief goes beyond the *Gobitis* holding.¹⁸⁶ The Court found that the flag salute— a form or utterance—was a “primitive but effective way of communicating ideas.”¹⁸⁷ The Court said that “[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.”¹⁸⁸ Therefore, the Court reasoned that involuntary affirmation violates the Bill of Rights safeguard for an individual to speak what is on his or her mind.¹⁸⁹

It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.¹⁹⁰

Not only would a compelled flag salute violate the protections guarded by the Bill of Rights, but also since forced nationalism ignores an individual's own beliefs, it is meaningless.¹⁹¹

Any credo of nationalism is likely to include what some disapprove or to omit what

¹⁸⁴ *Id.* at 640.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 631.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 632-33.

¹⁸⁹ *Id.* at 634.

¹⁹⁰ *Id.* at 624.

¹⁹¹ *Id.* at 625.

others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.¹⁹²

The *Gobitis* decision rejected a claim of religious freedom in favor of a need for national unity, but the *Barnett* case is unique because, as the Court reasoned, “The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.”¹⁹³ The Court said the *Gobitis* opinion found that “National unity is the basis of national security,” with authorities having the right to select the appropriate means for its attainment.¹⁹⁴ However, the Court added that in *Barnette*, “National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.” The Court felt it was not.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to

¹⁹² *Id.*

¹⁹³ *Id.* at 635-36.

¹⁹⁴ *Id.* at 640.

choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.¹⁹⁵

The Court added that, “[T]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”¹⁹⁶

In regards to forced patriotism, the Court added that

freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.¹⁹⁷

Additionally, the Court said that

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁹⁸

The Court’s decision in *Barnett* was significant because it addressed the underlying issue in the body of cases establishing the clear and present danger test. National unity was not a goal that could be achieved by the government suppressing dissenting views for the sake of promoting the official United States policy.¹⁹⁹ In mandating official

¹⁹⁵ *Id.* at 640-41.

¹⁹⁶ *Id.* at 641.

¹⁹⁷ *Id.* at 641-42.

¹⁹⁸ *Id.* at 642.

¹⁹⁹ Another First Amendment protection relevant to the Court’s decision in *Barnette*, is the right to protest war and the right to engage in political speech. *See* *Cohen v. California*, 403 U.S. 15 (1971) (upholding the right to wear a shirt which read, “Fuck the Draft”). The Supreme Court upheld a law prohibiting the destruction of draft cards in *United States v. O’Brien* in 1968. 391 U.S. 367 (1968). Although interfering with the draft was prohibited under the Smith Act, the Court upheld the right of students to protest the Vietnam War by wearing black armbands to school in *Tinker v. Des Moines Independent Community School District*. 393 U.S. 503 (1969). The *Tinker* holding would be weakened by the *Bethel School District v. Fraser* decision, which upheld a rule that punishing a student for speech in a public assembly. 478 U.S. 675 (1986).

government views, and compelling citizen adherence, the government was indirectly chilling the speech of citizens who objected to the policies. If citizens with opposing political views are silenced and their views criminalized through government actions, then they are robbed of the opportunity to participate in the marketplace of ideas. This undermines the democratic process revered in the United States. What is most important in the *Barnett* case is the language the Court used to describe compelled speech. It has direct relevance to the chilling effect doctrine, as it embraces a need for citizens to have breathing space to develop their ideas through political discourse.

I. Dennis v. United States

Although the U.S. Supreme Court traditionally sided with the government in the suppression of expression, the *Bridges* and *Barnett* cases represented a slight relaxation of the jurisprudence on patriotic ideals and the need to criminalize dissident speech. This departure would be short lived. In response to the communist scares of the 1940's, Congress passed The Smith Act.²⁰⁰ The Smith Act, like the Espionage and Sedition Acts of the early 20th century, criminalized advocacy and intent to overthrow the government.

The Smith Act, passed in 1940, made it a felony to:

- I. 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;
- II. 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;

²⁰⁰ Smith Act, §§ 2 & 3, 54 Stat. 671, 18 U.S.C. § 10, 11 (1946 ed.) (codified as amended at 18 U.S.C. 2385 (2000)).

III. 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.²⁰¹

The Court would decide two important cases relating to the Smith Act: 1) *Dennis* upholding the criminalization of advocacy of the overthrow of government²⁰² and 2) *Yates*, which barred the criminalization of mere advocacy and teaching of government overthrow.²⁰³ These opinions, though they updated the application of the clear and present danger test, did not depart from the Court's previous decisions in *Schenck*, *Frohwerk*, *Debs*, *Abrams*, *Whitney* and *Gitlow*.

In *Eugene Dennis, et al. v. United States*, decided June 4, 1951, the U.S. Supreme Court affirmed the decision of the Second Circuit Court of Appeals and held that the defendants' convictions for conspiracy to overthrow the government by force, by means of participation in the Communist Party, were not a violation of the First Amendment.²⁰⁴ The Petitioners were indicted in July of 1948, under the Smith Act.²⁰⁵

The Court limited its review of the case to two questions: 1) Whether sections 2 and 3 of the Smith Act violate the First Amendment or any part of the Bill of Rights and 2) Whether Section 2 or 3 of the Act violate the First and Fifth Amendments because of

²⁰¹ *Id.* at 497. Section 2 (b) of the Smith Act states: "For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them."

²⁰² *Dennis v. United States*, 341 U.S. 494 (1951).

²⁰³ *Yates v. United States*, 354 U.S. 298 (1957).

²⁰⁴ *Dennis*, 341 U.S. at 494.

²⁰⁵ 54 Stat. 671, 18 U.S.C. (1946 ed.).

indefiniteness.²⁰⁶ The Court chose not to consider whether the petitions advocated the overthrow of the Government, but instead it relied upon the affirmative decision of the Court of Appeals in this matter given the fact that it took six months to review evidence in the lower court case.²⁰⁷ Furthermore, on the issue of the petitioners' intent with regards to their membership in the Communist Party, the Court wrote that intent to overthrow the government amounted to intent to deny others of constitutional rights.²⁰⁸

Since the purpose of the Smith Act was to “protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism,” the Court held Congress' actions were not in conflict with constitutional protections for individuals.²⁰⁹ Since the Smith Act is directed at advocacy and not discussion, the Court found that “Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction.”²¹⁰ Congress intended to prevent action in the form of advocacy—the crime the petitioners were convicted of. It did not intend to limit their discussion of the issues.

Still, given the fact that the case was based on actions that contained an element of speech, the Court clarified the First Amendment issues arising out of the Smith Act's enforcement:

the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest

²⁰⁶ *Dennis*, 341 U.S. at 495-96.

²⁰⁷ *Id.* at 497-98.

²⁰⁸ *Id.* at 500.

²⁰⁹ *Id.* at 501.

²¹⁰ *Id.* at 501-02.

governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse.²¹¹

The Court added that freedom of speech is not unlimited—dissenters do not have unlimited and unqualified rights to speech—but rather speech must be weighed for its societal value.²¹² Based on previously decided cases, the Court deduced that “where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a ‘clear and present danger’ of attempting or accomplishing the prohibited crime, e. g., interference with enlistment.”²¹³ Specifically, the overthrow of 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.”²¹⁴

The Court said that the literal problem presented in *Dennis* was the meaning of the phrase “clear and present danger.”²¹⁵ The Court said that it did not mean the government has to wait for plans to be executed, it can intervene when it becomes aware of a plan involving overthrow:²¹⁶

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

²¹¹ *Id.* at 503.

²¹² *Id.*

²¹³ *Id.* at 505.

²¹⁴ *Id.* at 509.

²¹⁵ *Id.*

²¹⁶ *Id.*

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.²¹⁷

The Court rejected the contention that success or the probability of success is the criterion for clear and present danger.²¹⁸ The Court adopted a phrase from Chief Justice Learned Hand's lower court opinion, "'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.'"²¹⁹ Just because the petitioners' actions did not result in an attempt to overthrow the Government by force or violence, it does not mean that they are not guilty of advocacy.²²⁰ The Court said that "[i]t 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."²²¹

Justices Hugo Black and William Douglas dissented in separate opinions. In his dissenting opinion, Justice Black emphasized that the petitioners were not charged with attempt to overthrow the government, but rather they were charged because "they agreed to assemble and to talk and publish certain ideas at a later date," as part of the Communist Party's overall plan to forcibly overthrow the government.²²² Therefore, given The Smith Act's enforcement as a prior restraint on speech and press, Black would find the law

²¹⁷ *Id.*

²¹⁸ *Id.* at 510.

²¹⁹ *Id.* at 510 (citing *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

²²⁰ *Id.* at 510-11.

²²¹ *Id.* at 511.

²²² *Dennis*, 341 U.S. at 579 (Black, J dissenting).

unconstitutional.²²³ Black said that the clear and present danger test was ignored in the majority opinion because of “expressed fear that advocacy of Communist doctrine endangers the safety of the Republic.”²²⁴

Black argues that the judicial review of legislation waters down the First Amendment to a doctrine that protects only safe and orthodox views.²²⁵ In regards to the Communist scare, which prompted the passage of the Smith Act, Black wrote:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.²²⁶

Douglas, in his dissenting opinion emphasized that the petitioners were convicted for merely teaching the Communist doctrine.²²⁷ They did not teach, in Douglas’s words, “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.”²²⁸ He says the preceding acts would not enjoy First Amendment protection since teaching is of a different nature²²⁹ The petitioners organized people and themselves to learn the Marxist-Leninist doctrine, contained in books.²³⁰ Douglas reasoned that since the books are not

²²³ *Id.*

²²⁴ *Id.* at 580.

²²⁵ *Id.*

²²⁶ *Id.* at 581.

²²⁷ *Dennis*, 341 U.S..at 581-82 (Douglas, J dissenting).

²²⁸ *Id.* at 581.

²²⁹ *Id.* at 582.

²³⁰ *Id.*

So far as the present record is concerned, what petitioners did was to organize people to

outlawed, it cannot be a crime to teach the credo contained within them.²³¹

The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on what is said, but on the intent with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.²³²

Douglas emphasized that the majority opinion made speech due “service for deeds,” essentially criminalizing speech.

The doctrine of conspiracy has served diverse and oppressive purposes and in its broad reach can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct.²³³

Douglas argued that free speech is essential to democracy because it allows ideas to compete in the marketplace:

Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.²³⁴

He adds that free speech—full and free discussion—is the foundation of our political system and the safeguard of “every religious, political, philosophical, economic, and racial group amongst us.”²³⁵ Douglas acknowledged, in deference to the clear and

teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: 3 Stalin, Foundations of Leninism (1924); Marx and Engels, Manifesto of the Communist Party (1848); Lenin, The State and Revolution (1917); History of the Communist Party of the Soviet Union (B.) (1939).

²³¹ *Id.* at 583.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 584.

²³⁵ *Id.*

present danger test, that speech is dependant upon circumstances, but those circumstances only exist when “conditions are so critical that there will be no time to avoid the evil that the speech threatens.”²³⁶ He calls free speech the “strength of the nation,” and its halt the cause of the nation’s destruction.²³⁷ He adds that free speech is the rule, not the exception.²³⁸

Douglas concluded by adding that there is no evidence that Communism is gaining a stronghold in the United States, and therefore poses no clear and present danger.²³⁹ He describes Communism as a “bogeyman,” but recognizes it is crippled as a political force in the United States.²⁴⁰ He attributes this crippling to the positive effect of free speech and free discussion, with the American people “wanting none of it [communism].”²⁴¹ Additionally, Douglas says that the United States is resilient and the Communist “wares remain unsold.”²⁴² In regards to the First Amendment, Douglas said that Congress should not be allowed to halt free speech, except in cases of peril to the nation.²⁴³ He added that the Court should have faith in the American people to “never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.”²⁴⁴

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 588.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 588-89.

²⁴³ *Id.* at 590.

²⁴⁴ *Id.* at 591.

In *Dennis*, the majority opinion continued a tradition of judicial support for the government's need to chill speech, which could potentially endanger the smooth functioning of the United States democratic process. The Court found that the government did not need to wait for a conspiracy to be successfully executed; it could intervene prior to the critical moment and prevent danger to the populous and the republic. This, in some ways, amounts to a prior restraint on speech, in essence chilling speech believed harmful by the government. Black, in his dissent, acknowledged this prior restraint and found it to be an unconstitutional abridgment of free speech. Douglas, in his dissent, said that Communism should be free to compete in the marketplace of ideas because it was politically unviable and therefore, posed no clear and present danger. Though the majority opinion embraced the chilling effect, the dissenting opinions of Black and Douglas added weight to the theory of the chilling effect. The *Dennis* decision was followed six years later by the *Yates* decision, where the Court weakened the enforcement of the Smith Act, preventing prosecution for the advocacy of ideas alone.

J. Yates v. United States

In *Yates, et al. v. United States*, decided June 17, 1957, the U.S. Supreme Court held that people must be encouraged to do something for there to be a violation of the Smith Act.²⁴⁵ Mere belief in an idea could not be criminalized. There must be advocacy for action to be taken. *Yates* involved the 1951 conviction of Oleta O'Connor Yates and 13 other petitioners charged under the Smith Act for being members of the Communist Party USA in California. Yates claimed she was engaged in passive actions, which were not forbidden under the Smith Act's criminalization of active attempts to overthrow the

²⁴⁵ Yates v. United States, 354 U.S. 298 (1957).

government.

The Court found that evidence against five of the petitioners was insufficient for them to have been convicted by the lower court. The Court reversed the convictions by the United States District Court for the Southern District of California and remanded the case to the District Court with instructions to acquit five of the petitioners and grant new trials to the remaining nine.²⁴⁶ The Court found the convictions, which rested upon the application of the Smith Act, were “hostile to the principles upon which its constitutionality was upheld” in the *Dennis* case.²⁴⁷

The Court ruled that the indictment was not made under the Smith Act until 1951, six years after the Communist Party was founded in 1945. The statute of limitations for organizing an group to overthrow the government was just three years.²⁴⁸ The word “organize,” as it was used in the Smith Act, was strictly construed by the Court to refer only to activities related to the creation of a new organization. The Court found the definition of “organize” did not relate to acts carried out after the formation of the organization.²⁴⁹

The Court also found that the Smith Act does not prohibit advocacy and teaching of forcible overthrow of Government so long as it is taught as an abstract principle and not instigation to action:

Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here, and can constitute no basis for any

²⁴⁶ *Id.* at 327-34.

²⁴⁷ *Id.* at 300.

²⁴⁸ *Id.* at 303.

²⁴⁹ *Id.* at 303, 304-12.

finding against the defendants.²⁵⁰

The lower court had instructed the jury to convict if they found advocacy to incite the forcible overthrow of the Government.²⁵¹ The Court said that the First Amendment protected mere advocacy—“the true constitutional dividing line is not between inciting and abstract advocacy of forcible overthrow, but rather between advocacy as such, irrespective of its inciting qualities, and the mere discussion or exposition of violent overthrow as an abstract theory.”²⁵² The Court clarified that nothing in *Dennis* undermined the “distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken.”²⁵³ The Court said the interpretation of conspiracy under *Dennis* was misinterpreted by the Court of Appeals in the *Yates* case. The Court of Appeals mistakenly thought that proving an “overt act was an adequate substitute for the linking of the advocacy to the action which would otherwise have been necessary.”²⁵⁴ When the Appeals Court cited *Dennis* that “the existence of the conspiracy” creates the danger, they erred in interpreting the decision.²⁵⁵

Referencing his dissent with Justice Douglas in *Dennis*, Black wrote that he would reverse every one of the convictions and acquit the defendants because the Smith Act unconstitutionally abridged the freedom of speech, press and assembly.²⁵⁶ Black said that the trials conducted in response to Smith Act convictions were prolonged affairs some

²⁵⁰ *Id.* at 314.

²⁵¹ *Id.* at 312.

²⁵² *Id.* at 312-14.

²⁵³ *Id.* at 322.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 323 (citing *Dennis*, 341 U.S. at 510-11).

²⁵⁶ *Yates*, 225 F.2d. at 339 (Black, J., concurring in part and dissenting in part).

lasting for months due to massive collections of evidence unmanageable by jurors.²⁵⁷ Black agreed with the majority's definition of "organize," and its holding that the trial judge erred in instructing the jury about advocacy as an abstract principle under the Smith Act.²⁵⁸ He also agreed with the acquittal of five petitioners, although he thought all of the petitioners should be acquitted.²⁵⁹ Black said that he believes the "First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal."²⁶⁰ Whereas, the Court held that attendance at Communist Party meetings constituted overt action under the Smith Act, Black thought there was not enough evidence to convict since Article III, §3 of the Constitution requires the testimony of two witnesses to the same overt act or a confession in open court.²⁶¹ Black said this was an important protection because it kept people from "being convicted of disloyalty to government during periods of excitement, when passions and prejudices ran high, merely because they expressed unacceptable views."²⁶² Black said the defendants committed no overt act beyond attendance at a "constitutionally protected public assembly where they took part in lawful discussion of public questions, and where neither they nor anyone else advocated or suggested overthrow of the United States Government."²⁶³

Black felt the prosecution under the line of reasoning currently promoted

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 341.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 342-43.

²⁶² *Id.* at 343 (citing *Cramer v. United States*, 325 U. S. 1 (1945)).

²⁶³ *Id.*

encouraged an evolution towards “authoritarian government in which voices criticizing the existing order are summarily silenced.”²⁶⁴ He added, “Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes.”²⁶⁵ He concluded by discussing the Constitutional framers’ intent behind the First Amendment:

The choice expressed in the First Amendment in favor of free expression was made against a turbulent background by men such as Jefferson, Madison, and Mason -- men who believed that loyalty to the provisions of this Amendment was the best way to assure a long life for this new nation and its Government. Unless there is complete freedom for expression of all ideas, whether we like them or not, concerning the way government should be run and who shall run it, I doubt if any views, in the long run, can be secured against the censor. The First Amendment provides the only kind of security system that can preserve a free government -- one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.²⁶⁶

The majority opinion in *Yates*, protected the advocacy of “abstract principles” from government suppression. This was a significant shift from its decision in the *Dennis* case. Black, in his dissent, emphasized how free expression and assembly must be protected during periods of national political excitement.²⁶⁷ Black, who saw the Smith Act as a prior restraint in *Dennis*, argued that citizens must be free to participate in constitutionally protected assemblies for the purpose of discussing matters important to their participation in the national governance process.²⁶⁸ Both the majority opinion, and Black’s dissent, supports the development of the chilling effect as an offshoot of the marketplace of ideas model. Abstract principles—or quite simply, ideas—are best left to

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 344.

²⁶⁷ *Yates*, 225 F.2d. at 339 (Black, J., concurring in part and dissenting in part).

²⁶⁸ *Id.*

compete in the market for viability. When the government restricts their introduction to the market, it can interfere with an important political process that ensures citizens enjoy constitutionally guaranteed liberties.

K. New York Times v. Sullivan

The next case is a libel case, but it is relevant to a discussion of the marketplace of ideas as the Court struck down an Alabama law abridging freedom of expression under the First Amendment. More importantly, the Court makes use of the term “breathing space” to discuss the insular needs of the marketplace of ideas.

In *New York Times Co. v. L.B. Sullivan*, decided March 9, 1964, the U.S. Supreme Court, in a unanimous decision, held that an Alabama libel law unconstitutionally abridged the petitioner’s freedom of speech and press guaranteed by the First Amendment.²⁶⁹ The First Amendment, applied through the Fourteenth Amendment’s due process clause, protected a newspaper from being sued for libel for making false defamatory statements about the official conduct of a public official, as long as the statements were not made with knowing or reckless disregard for the truth.²⁷⁰ The Court reversed the lower court decision and remanded the case.

The *New York Times*, on March 29, 1960, published full-page advertisement titled, “Heed Their Rising Voices.” The ad solicited funds to defend Martin Luther King, Jr. on an Alabama tax evasion charge. The ad also described police actions, including actions by the Montgomery, Alabama, police force against civil rights protestors. Montgomery City Commissioner L.B. Sullivan, who was one of three police department supervisors,

²⁶⁹ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

²⁷⁰ *Id.* at 265-92.

was not named in the ad, but he interpreted the charges against the police department as defamation against him. The Ad mentioned sixty-four persons by name. Sullivan, following Alabama libel law's legal requirement that punitive damages could only be sought if a written demand for public retraction failed or was refused, sent a request that the *Times* denied. Sullivan filed suit against the *Times*. Sullivan also successfully sued Ralph Abernathy, S.S. Seay, Sr., Fred Shuttlesworth and Joseph Lowery—the four black ministers mentioned in the ad—for \$500,000 in Alabama Court.²⁷¹

Justice William Brennan wrote the majority opinion. The majority established a standard for “actual malice” in cases where press reports could be considered defamation and/or libel.²⁷² To establish actual malice, a plaintiff must prove that the publisher of the statement in question knew that the statement was false or acted in reckless disregard of its truth or falsity.²⁷³

In the opinion, the Court introduced the need for “breathing space” as a condition for free debate and expression in society. Even erroneous statements in regards to political conduct and views need to be protected because there is a public interest in both discussion and being able to acquire information. The Court said that even if there is harm in the criticism of official conduct, citizens have First Amendment protections for such speech.²⁷⁴ The criticism needs breathing space to survive.²⁷⁵ The court emphasized that the theory of the Constitution is “that every citizen may speak his mind and every

²⁷¹ N.Y. Times Co. v. Sullivan, 144 So.2d 25 (Ala. 1962), *rev'd on other grounds*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, (1963).

²⁷² *Sullivan*, 376 U.S. at 279-83.

²⁷³ *Id.* at 284-92.

²⁷⁴ *Id.* at 298.

²⁷⁵ *Id.*

newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious.”²⁷⁶

L. Dombrowski v. Pfister

The chilling effect was mentioned by name by the U.S. Supreme Court for the first time in *Dombrowski v. Pfister*, a decision which found a Louisiana Law criminalizing Communist association to be unconstitutional.²⁷⁷ Although the case is related to previous decisions involving free association by organizations dissenting from government policy, it is more significant for the Court’s recognition of the chilling effect that government suppression has on First Amendment activities.

In *Dombrowski v. Pfister*, the Supreme Court, reversed the lower plaintiff’s conviction of the appellant for distribution of communist literature.²⁷⁸ The plaintiff, James A. Dombrowski, alleged that Louisiana’s Subversive Activities and Communist Control Law and Communist Propaganda Control Law violated his First Amendment right of free expression.²⁷⁹ The law required members of communist organizations to register with the government.²⁸⁰ He complained the laws were overbroad and used in bad faith to deter civil rights efforts. The United States District Court For The Eastern District of Louisiana upheld his conviction and Dombrowski appealed the case to the Supreme Court.

²⁷⁶ *Id.* at 299.

²⁷⁷ *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

²⁷⁸ *Id.*

²⁷⁹ *Id.*; *See also* LA. REV. STAT. § 1979.

²⁸⁰ *Dombrowski*, 380 U.S. at 492-93.

The Supreme Court found that reviewing the conviction would not be adequate vindication for violated constitutional protections because in the interim there might be a “substantial loss or impairment of freedoms of expression.”²⁸¹ The court felt this would be an irreparable injury under the First Amendment.²⁸² The Court said, “the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings.”²⁸³

The Court emphasized that regardless of prosecution, the law could create a chilling effect upon the exercise of First Amendment rights, by discouraging membership and threatening exposure of those with unpopular ideas.²⁸⁴ Addressing the danger in sweeping statutes, the Court said, “Appellants' allegations and offers of proof outline the chilling effect on free expression of prosecutions initiated and threatened in this case.”²⁸⁵

The Court said that the Louisiana statute was so overly broad that it had the potential to create a danger zone where protected expressions may be inhibited.²⁸⁶ As long as the state can prosecute under the statute, the threat of prosecutions pose a real and substantial threat to protected expression.²⁸⁷ The Court held, “[e]ven the prospect of

²⁸¹ *Id.* at 485.

²⁸² *Id.* at 483.

²⁸³ *Id.* at 484.

²⁸⁴ *Id.* at 488, 494.

²⁸⁵ *Id.* at 487 (citing *N.A.A.C.P. v. Button*, 371 U. S. 433 (1963), where the Court ruled on a case involving attorney malpractice and solicitation of business. In the case, the Court addressed the potential effect of successful prosecution “The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.”)

²⁸⁶ *Id.* at 494.

²⁸⁷ *Id.*

ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.”²⁸⁸

In *Dombrowski*, the Court acknowledged the potentially harmful effect of laws criminalizing activities protected by the First Amendment. If a law remained on the books, even when charges filed under the law failed, the law still had the potential to alter citizens’ constitutionally protected activities by creating fear of official government retribution. The “danger zone” referenced by the Court is antithetical with the idea of breathing space. Citizens denied a breathing zone to engage in First Amendment expression and association free from government action could potentially chill their activities in order to escape prosecution. Any chilling of citizen expression could effect the competition of ideas in the marketplace.

M. Lamont v. Postmaster General

Another case of government suppression of subversive views involves the distribution of communist literature through the United States Postal System. In *Lamont v. Postmaster General*, the U.S. Supreme Court found the Postal Service and Federal Employees Salary Act of 1962 to be an unconstitutional abridgement of citizen’s First Amendment rights.²⁸⁹ The 1962 Act required the Postmaster General to detain unsealed mail from foreign addressees of “communist political propaganda” and deliver the held mail only when the addressee requested it through signing a notification card.²⁹⁰ Under the Act, the postal service maintained screening points where all unsealed mail from

²⁸⁸ *Id.*

²⁸⁹ *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

²⁹⁰ *Lamont*, 381 U.S. at 302-04; *see also* Postal Service & Federal Employees Salary Act of 1962, 76 Stat. 840 §305 (a) (1962).

designated countries was routed.²⁹¹ For a three-year period, the notification card contained a check box where the addressee could indicate a desire to receive communist political propaganda in the future.²⁹² The postmaster maintained a list of addressees requesting this kind of correspondence.²⁹³ Dr. Corliss Lamont sued the Post Office, arguing that the requirement to be listed was a violation of his First Amendment rights of free association.

The majority opinion, written by Justice Douglas, found that the addressee's First Amendment rights were limited by requiring him to return the card in order to receive mail.²⁹⁴ In the opinion, the Court likened the maintenance of the list to a licensing act that controlled the flow of ideas to the public.²⁹⁵ The list was found to have a deterring effect to correspondence by those with sensitive positions.²⁹⁶ The Court said the Postal Service Act "is at war with the uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment."²⁹⁷

In a concurring opinion, Justice William Brennan wrote that although there is no specific constitutional guarantee for access to publications, the Bill of Rights protects fundamental personal rights "necessary to make the express guarantees fully meaningful."²⁹⁸ Brennan argued that a right to receive is fundamental and necessary so

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 305-07.

²⁹⁵ *Id.* at 306.

²⁹⁶ *Id.* at 307.

²⁹⁷ *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

²⁹⁸ *Lamont*, 381 U.S. at 308 (Brennan, J. dissenting).

that addressees can receive ideas and be free to consider them.²⁹⁹ Brennan argued that the alternative “would be a barren marketplace of ideas” with only sellers and no buyers.³⁰⁰ Brennan cites the reasoning in 1926 Supreme Court case, *Boyd v. United States*, involving a defendant charged with failing to pay import duties on a shipment of plate glass.³⁰¹ At the district court trial, the defendant successfully argued that producing the invoice would result in self-incrimination, a violation of his constitutional rights under the Fifth Amendment. The Supreme Court upheld the *Boyd* decision, reasoning:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.³⁰²

The *Lamont* case was the first time the Supreme Court declared a federal law unconstitutional on First Amendment grounds. It was also the first time the Court used the phrase “marketplace of ideas,” although the term “market” had been used before by Holmes and Brandeis in the *Abrams* dissent, and later in Brandeis’ dissent to the *Gitlow* case. This recognition by a Court majority was significant in establishing a judicial theory around the chilling effect of government actions on free expression. In the *Lamont* decision, the Court—although not by name—began to establish a need for “breathing space” to protect free expression in the marketplace of ideas.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 309.

³⁰² *Boyd v. United States*, 116 U.S. 616, 635 (1926).

N. Ashton v. Kentucky

In the late 1960's the Court began to strengthen protections for free expression under the First Amendment. Although they did not use the term "breathing space" in these opinions, the holdings implied a stricter standard for laws that criminalized constitutionally protected activities. In *Ashton v. Kentucky*, decided May 16, 1966, the U.S. Supreme Court held that a conviction under an unconstitutionally overbroad law cannot be sustained on appeal by limiting the construction to eliminate the unconstitutional features of the law.³⁰³ The Court granted certiorari and reversed the lower court decision.

Ashton was convicted of violating the Kentucky common law crime of criminal libel—defined as "any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable."³⁰⁴ His crime involved the publication of a pamphlet naming three individuals. The pamphlet began by accusing Hazard Police Chief Bud. Luttrell of having a side job, when it was illegal for a "peace officer to take private jobs."³⁰⁵ Second, the pamphlet accused another official, Sheriff Charles E. Combs, of hiring deputies because they wanted to carry guns. The pamphlet continued to say Combs had intentionally blinded a boy with teargas and beat him up while he was handcuffed in a locked jail cell.³⁰⁶ The pamphlet also suggested that Combs "probably bought off the jury" in the related trial. Finally, the pamphlet accused the co-owner of the *Hazard Herald*, Mrs. W.P. Nolan, of withholding national aid shipments to

³⁰³ Ashton v. Kentucky, 384 U.S. 195, 198 (1966) (citing *Shuttlesworth v. Birmingham*, 382 U. S. 87 (1965)).

³⁰⁴ *Id.* at 197-198.

³⁰⁵ *Id.* at 196.

³⁰⁶ *Id.*

miners.³⁰⁷

The petitioner was charged with malice and falsity,³⁰⁸ and he was sentenced to prison and fined \$3,000.³⁰⁹ The Kentucky Court of Appeals affirmed the conviction, but in doing so, adopted a different definition of criminal libel which removed the requirement that breach of the peace be the constitutional basis for imposing criminal liability.³¹⁰ Ultimately, the Supreme Court found that the laws under which the petitioner was convicted were too vague. The Court explained, “[l]aws which touch on First Amendment rights must be carefully and narrowly drawn.”³¹¹ The majority opinion emphasized that civil and political institutions depend on free discussion. The right to speak freely and promote diverse ideas is what sets the United States apart from totalitarian regimes.³¹²

O. Stanley v. Georgia

In *Stanley v. Georgia*, decided April 7, 1969, the U.S. Supreme Court held that the First and Fourteenth Amendments prohibited a Georgia statute that criminalized the private possession of obscene materials.³¹³ In *Stanley*, law enforcement officers searched the plaintiff’s home for evidence of illegal bookmaking materials.³¹⁴ While executing the search warrant, they found reels of film containing obscene images. The film was seized

³⁰⁷ *Id.* at 197.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 196.

³¹⁰ *Id.* at 197.

³¹¹ *Id.* at 200.

³¹² *Id.* at 198-200.

³¹³ *Stanley v. Georgia*, 394 U.S. 557 (1969).

³¹⁴ *Id.* at 558.

and Stanley was convicted under Georgia law for possession of obscene materials.³¹⁵

The conviction was upheld by the Supreme Court of Georgia and appealed to the U.S. Supreme Court.³¹⁶ In the majority opinion for the U.S. Supreme Court, Justice Thurgood Marshall recognized the right to receive information, in the privacy of one's own home, as a fundamental right protected by the constitution.³¹⁷ The Court held that a state could regulate production or distribution of obscene material, but not private possession.³¹⁸ This decision, like *Lamont*, upheld the right of the plaintiff to receive information from other citizens as an important constitutional protection.

P. Brandenburg v. Ohio

The *Dennis* case was overruled in 1969 by *Brandenburg v. Ohio* allowing the court to reinterpret the clear and present danger test to more stringently require imminent action rather than the previous standard established in *Schenck*. In *Brandenburg v. State of Ohio*, the U.S. Supreme Court, in a unanimous decision, held that Ohio's criminal syndicalism statute violated the First Amendment as applied through the Fourteenth Amendment because it too abstractly prohibited the mere advocacy of violence, not the constitutionally unprotected incitement to imminent lawless action.³¹⁹ Imminent lawless action requires "intent", "imminence" and "likelihood."

Ohio Ku Klux Klan leader Clarence Brandenburg invited a Cincinnati Television station to cover a KKK rally. When coverage of the rally aired, the report revealed a

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 565.

³¹⁸ *Id.* at 567-68.

³¹⁹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

member giving a speech saying "our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race."³²⁰ The member subsequently announced plans for a July 4th march on Washington.³²¹ Brandenburg was charged and convicted for advocating "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." He argued that the statute violated his First and Fourteenth Amendment rights to freedom of speech. An Ohio Appellate Court upheld his conviction.

The Supreme Court reversed Brandenburg's conviction on grounds that the statute punished "mere advocacy" of action. The Court added, "[f]reedoms of speech and press do not permit a State to forbid 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."³²² In *Brandenburg*, the Court explained that its 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.³²³

Justice Douglas, in his concurring opinion, agreed with the Court, but said he did

³²⁰ *Id.* at 444-45.

³²¹ *Id.* at 445-46.

³²² *Id.* at 444.

³²³ *Id.* at 447. One action found not to incite action against the government is the act of burning a United States flag. In 1989, in *Texas v. Johnson*, the Supreme Court reversed the conviction of Gregory Johnson for burning a flag, determining that an idea cannot be punished simply because "society finds the idea offensive or disagreeable." This decision is seen as a protection of free expression. *Texas v. Johnson*, 491 U.S. 397 (1989).

not believe the clear and present danger test had a place in the First Amendment regime.³²⁴

Action is often a method of expression, and within the protection of the First Amendment. Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted? Suppose one rips his own Bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?³²⁵

He reiterated the "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."³²⁶ Justice Black in his concurrence agreed with Justice Douglas' concurring opinion that the clear and present danger doctrine should have no place in the interpretation of the First Amendment.³²⁷ He joined with the Court's opinion citing *Dennis*, but pointed out that the per curium opinion did not indicate any agreement on the Court's part with the clear and present danger doctrine on which *Dennis* purported to rely.

Brandenburg was the Court's last major case involving government suppression of speech that might incite others to lawless action. The *Brandenburg* test validated Justices Holmes and Brandeis' dissents in the opinions immediately following *Schenck*.

Q. Gertz v. Welch

The Court, following *Brandenburg*, continued to provide stricter standards for laws that criminalized activities that enjoyed constitutional protections, such as public discussion. In *Gertz v. Robert Welch*, decided June 25, 1974, the U.S. Supreme Court reversed the Seventh Circuit Court's opinion and held that the First Amendment permits

³²⁴ *Brandenburg*, 395 U.S. at 454.

³²⁵ *Id.* at 454-55.

³²⁶ *Id.* at 456.

³²⁷ *Id.* at 450.

states to formulate their own standards of libel for defamatory statements made upon private figures, as long as liability is not imposed without fault.³²⁸ In *Gertz*, a Chicago policeman, Nuccio, was convicted of second-degree murder.³²⁹ The victim's family retained the petitioner, Elmer Gertz, "a reputable attorney," to represent them in civil litigation against Nuccio.³³⁰ The *American Opinion*, a publication of the John Birch Society, "alleged" the murder trial was part of a "Communist conspiracy to discredit the local police."³³¹ The article said Gertz arranged Nuccio's "frame-up" and called Gertz a "communist-fronter."³³²

Gertz filed a libel suit against the publisher of the magazine, Robert Welch, and the jury of the United States District Court for the Northern District of Illinois found in Gertz's favor.³³³ Gertz claimed that the "falsehoods published by the respondent injured his reputation as a lawyer and a citizen."³³⁴ After the jury returned its verdict, the District Court decided to apply the *New York Times v. Sullivan* standard barring "media liability for defamation of a public official absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth." Gertz appealed the decision contesting the applicability of the *New York Times* standard, since

³²⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974).

³²⁹ *Id.* at 325-26.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 327.

³³⁴ *Id.*

he was not a public figure.³³⁵ The Court of Appeals affirmed this decision, which found that Gertz failed to prove “knowledge of falsity” or “reckless disregard for the truth.”³³⁶

The Supreme Court reversed and remanded the lower court decision deciding the case on the issue of “whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.”³³⁷ This led to a judicial analysis of true and false ideas, which would shape future decisions involving government restriction of free speech.³³⁸ The Court said there is “no such thing as a false idea” under the First Amendment. Although there may be no constitutional value in false statements of fact, they provide competition for other ideas within the marketplace.³³⁹ When the state punishes false opinions, it runs the risk of “inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”³⁴⁰

Relying upon the *New York Times* decision, the Court said that there must be an “allowance of the defense of truth,” which allows the propagation of speech “that matters,” however, the Court did not apply the *New York Times* standard.³⁴¹

In his dissenting opinion, Justice Brennan agreed with the Court’s holding that the petitioner was not a public official or figure, but he argued that the decision offered no

³³⁵ *Id.* at 330.

³³⁶ *Id.* at 348-50.

³³⁷ *Id.* at 332.

³³⁸ *Id.* at 339.

³³⁹ *Id.*

³⁴⁰ *Id.* at 340.

³⁴¹ *Id.* at 341.

“breathing space” for free and robust debate.³⁴² Brennan emphasized that “even a limitation of recovery to actual injury,” would do little to give First Amendment expression the “elbowroom” it needs to flourish.³⁴³ Finally, even a limitation of recovery to “actual injury” - however much it reduces the size or frequency of recoveries - will not provide the necessary elbowroom for First Amendment expression. Justice White also dissented, applying the *New York Times* standard for seditious libel as “beyond the police power of the state.”³⁴⁴

V. Breathing Space

The term “breathing space” was used by the Court in the *Times* decision. There are also references to this concept in other Court opinions that are not as closely related to this review of the chilling effect of government action. Still, these cases will be reviewed briefly to show a growing use of the term by the Court. Collectively, the cases begin to clarify the Court’s use of the term and how it should be applied in First Amendment protections.

In the 1986 case *Philadelphia Newspapers v. Hepps*, the U.S. Supreme Court expanded the idea of breathing space for “true speech” on matters of public concern.³⁴⁵ In the case, a Pennsylvania libel statute was found unconstitutional on First Amendment grounds. The Court reasoned that First Amendment expressions require breathing space.³⁴⁶ The kind of speech in question concerned the nature of the political process.

³⁴² *Id.* at 361.

³⁴³ *Id.* at 367.

³⁴⁴ *Id.* at 387.

³⁴⁵ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

³⁴⁶ *Id.* at 799.

The Court found this kind of speech clearly mattered and was at the core of First Amendment protections—even if the speech was false.

In the 1988 case of *Hustler Magazine v. Jerry Falwell*, the U.S. Supreme Court found that a parody of a public figure had First Amendment protection.³⁴⁷ The Court recognized that even falsehoods have value in political debate and restricting speech of this nature would have a chilling effect on speech that has Constitutional value. The Court cited *Philadelphia Newspapers* to reiterate that protection for free expression under the First Amendment requires breathing space.

A. Virginia v. Black

In *Virginia v. Black*, decided April 7, 2003, the U.S. Supreme Court held that a statute which prohibited cross-burning with the intent to intimidate was not unconstitutional since it banned conduct rather than expression. Although cross-burning could constitute expression, such expressive conduct was not prohibited unless it was done with the intent to intimidate. A plurality of the Supreme Court asserted that the statutory provision that any cross-burning was prima facie evidence of intent to intimidate, which was interpreted under state law to mean that cross-burning by itself could support a conviction without further evidence of intent, was an unconstitutional restraint on speech.³⁴⁸

Barry Elton Black was convicted of violating a Virginia Statute banning cross burning. The Court struck down the statute because it used the act of cross burning as prima facie evidence of intent to intimidate. The First Amendment's protection of speech

³⁴⁷ *Hustler v. Falwell*, 485 U.S. 46 (1988).

³⁴⁸ *Virginia v. Black*, 538 U.S. 343 (2003).

is not absolute and free speech and expression “may” be regulated in certain categories.³⁴⁹ The state could ban cross burning when there was the intent to intimidate.³⁵⁰

Although the *Virginia* decision struck down the cross-burning statute in part, it did create some vulnerability for First Amendment activities that had the tendency to “intimidate.” This reliance on the intent of the action was reminiscent of the Court’s opinions during the *Schenck* era when the clear and present danger test was formulated. Given the recency of this case, its influence on judicial interpretations of First Amendment protections cannot be well established.

The First Amendment cases reviewed in this section have established a clear test of clear and present danger for evaluating the government’s criminalization of constitutionally protected activities. Although some of these cases involve prosecution for libel, most cases involve the prosecution of citizens expressing views that were different from democratic ideals, or the military goals of the government during war time. In reviewing these cases, the chilling effect of government actions on the marketplace of ideas emerged as a line of reasoning used by the Court to evaluate the use of the clear and present danger test. The phrases “chilling effect”, “marketplace of ideas” and “breathing space” were not only used by the Court, but the underlying principles involving the concepts were applied first in dissents and later in majority holdings as valuable ideas for evaluating First Amendment protections.

³⁴⁹ *Id.* at 344.

³⁵⁰ *Id.*

VI. Fourth Amendment

The Fourth Amendment protects against unreasonable search and seizure, search without warrant, and search without probable cause. The amendment—which textually protects people, homes, papers and effects—was in large part a reaction to writs of assistance imposed on the colonist during the time of British rule.³⁵¹

Although the relevance of the chilling effect, marketplace of ideas, and breathing space, is clear in the First Amendment cases discussed in the previous section, the cases reviewed up to this point did not involve electronic surveillance. At first, the Court was hesitant to extend the same protections to electronic communication that were provided to letters sent through the United States Postal Service. Essentially, phone communication was seen as a sort of broadcast made for anyone with the ability to intercept the transmission. In subsequent cases, the Court changed its reasoning and recognized the privacy rights of parties involved in electronic transmissions. This reasoning would be based in part on the necessity of citizens to use phone communications as a tool for public discussion in the marketplace. Citizens now use electronic communication—specifically phone communication—to engage in political discourse and other First Amendment activities. The review will highlight the emergence of the marketplace model—and the related ideas of chilling effect and breathing space—in the Court’s opinions involving electronic surveillance.

The First Amendment protections for free expression and the Fourth Amendment protections against unreasonable search and seizure exist in a symbiotic nexus, designed to protect not only home and property, but also ideas and expression. The Courts have

³⁵¹ A “writ of assistance” is a general search warrant. *See* definitions, *supra* Chapter 1.

repeatedly examined the nature of the use of communications networks by citizens to create the current assumption that the telephone is essential to private life and public expression.

The Fourth Amendment cases have been condensed to exclusively highlight instances where First and Fourth Amendment protections collide in a discussion of the chilling effect or breathing space needed in the marketplace of ideas. Although these issues were not critical to the decisions in the cases—and often the data presented here relies on concurring and dissenting opinions—the examination of the judges’ thoughts on surveillance in regard to civil liberties is valuable for no other reason than the rarity of this type of analysis by the courts. The court opinions involving electronic surveillance address the Fourth Amendment right to privacy, yet many also hint that First Amendment protections for citizen communications exist as well.

In reviewing the Fourth Amendment protections provided in the judicial history, many threads of First Amendment theory can be found that relate to free speech and electronic surveillance. The opinions also reveal a judicial history that paints the Court’s view of wire communications (later to become electronic communications) and surveillance.

In *Olmstead v. United States*, decided April 9, 1928, the U.S. Supreme Court, in a 5-4 decision, affirmed the decision of the Ninth Circuit U.S. Court of Appeals finding that the tapping of private conversations—over telephone wires leading from the defendants’ residence to an office where a conspiracy was allegedly planned—was not an unlawful search and seizure under the Fourth Amendment.³⁵²

³⁵² National Prohibition Act, [27 U.S.C.A. § 1](#) et seq; *Olmstead v. United States*, 277 U.S. 438 (1928).

In the *Olmstead* Case, the Court upheld the conviction of plaintiffs convicted using evidence obtain by inserting small wires in the basement of the building to intercept communications. The Court found that tapping phone conversations was not an unlawful search and seizure because the telephone system was not operated by the government in the same way as the U.S. postal system. Additionally, the postal system transmitted letters—personal effects—whereas wire communications were transmitted to the “whole world.” The Court viewed electronic interception as simply hearing this transmission. The Court compared phone lines to highways.

The dissenting justices in the *Olmstead* opinion had different views that foreshadow the future judicial standard for looking at electronic surveillance and the nature of telecommunications. Justice Brandeis viewed the telephone as an instrument unimaginable to the forefathers when they wrote the Constitution. Justice Brandeis discussed the motivations of government wiretapping and said “dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”³⁵³ He predicted a day when the government might be able to reproduce documents in court without removing them from “secret drawers.” Brandeis was acknowledging the tendency of government officials to restrict speech in the name of national security—at the cost of political free expression in the marketplace.

Brandeis saw no difference between mailed letters and phone communications, emphasizing that the framers sought to protect Americans “in their beliefs, their thoughts, their emotions and their sensations.” Justice Holmes’ dissent also offers an early 20th century interpretation of phone communications: “The contracts between telephone

³⁵³ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

companies and users contemplate the private use of the facilities employed in the service.”³⁵⁴

In *Olmstead*, the Court upheld the constitutionality of warrantless wiretapping by federal agents. The case was decided in the same era as the *Gitlow* and *Whitney* cases. In *Gitlow* and later, *Whitney*, the Court had upheld the constitutionality of statutes criminalizing the advocacy of violent overthrow of the government. In all three cases, the Court yielded to the government in its judgment of criminalizing what might be understood as constitutionally protected activities. In *Gitlow* and *Whitney*, free speech was limited when it posed a danger to the nation. In *Olmstead*, private communication was not afforded Fourth Amendment protection from warrantless search and seizure when parties to the communication were engaged in conspiracy against federal statutes.

In *Lopez v. United States*, decided May 27, 1963, the U.S. Supreme Court, in a 6-3 vote, affirmed the Federal District Court of Massachusetts’ decision that the Internal Revenue Service was not guilty of unlawfully invading defendant German Lopez’s office because he gave consent for entry and the agent’s willingness to accept a bribe was “not real.”³⁵⁵ In *Lopez*, the Court upheld a Massachusetts’ conviction of a man for bribery of an IRS agent. The evidence used in the conviction was obtained through wiretapping, but the Court found that the agent’s use of a microphone only enabled him to record a conversation that he was already party to, therefore he was not trespassing in his search and seizure. Justice Brennan railed against this reasoning in his dissent:

³⁵⁴ *Olmstead v. United States*, 277 U.S. 438, 487 (1928) (Holmes, J., dissenting).

³⁵⁵ *Lopez v. United States*, 373 U.S. 427, 438-43 (1963). In *Lopez*, the defendant was charged with bribing an internal revenue service agent. The Court affirmed the lower court decision that electronic eavesdropping devices were constitutional if not planted through “unlawful physical invasion of a constitutionally protected area.”

If a person commits his secret thoughts to paper, that is no license for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words.”³⁵⁶

Brennan added that the only way to guard against contemporary eavesdropping is to “keep one’s mouth shut,” much different than conventional tactics of “lowering voices.”³⁵⁷

In harking back to the majority’s reliance on the *Olmstead* decision, the dissenting justices argued that modern life necessitates the use of the telephone as a valuable tool in “free human communication”—just as valuable as communication that takes place solely within the confines of the home. He added that electronic surveillance makes the police “omniscient,” in effect a tool of tyranny.³⁵⁸ Brennan wrote that electronic surveillance was a weapon that strikes at “freedom of communication.”³⁵⁹ Brennan said free speech is undermined if people fear to speak “unconstrainedly” in the privacy of their own home or office.³⁶⁰

In *Berger v. New York*, decided June 12, 1967, the defendant was convicted in a New York County Supreme Court on counts of conspiracy to bribe the chairman of the New York State Liquor Authority.³⁶¹ The U.S. Supreme Court, in a 6-3 vote, held that conversations, in themselves, are protected by the Fourth Amendment, and capturing conversations through the use of electronic devices was a search.

³⁵⁶ [Lopez v. United States, 373 U.S. 427, 449 \(1963\) \(Brennan, J., dissenting\) \(quoting Silverman v. United States, 365 U.S. 505 \(1961\)\)](#).

³⁵⁷ *Id.* at 453.

³⁵⁸ *Id.* at 466.

³⁵⁹ *Id.* at 470.

³⁶⁰ *Id.* (citing Donald B. King, *Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17 (1961)).

³⁶¹ *Berger v. New York*, 388 U.S. 41 (1967).

In *Berger*, the Court overturned a lower court decision upholding the conviction of a man under a New York eavesdropping statute allowing general searches, which do not name a specific place or person in the warrant.³⁶² The court likened wiretappers to eavesdroppers of the past, adding that “[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices.”³⁶³ Justice Douglas likened warrantless surveillance to British general warrants, which helped to spur the American Revolution. He added that electronic surveillance without warrant requirements amounts to an illegal dragnet putting an invisible policeman in every home. He sees this as moving America closer to a “totalitarian regime,” where “Big Brother” intrudes into the lives of everyone.³⁶⁴

In *United States v. United States District Court* (hereinafter referred to as the *Keith* case), decided June 19, 1972, the U.S. Supreme Court, in an 8-0 decision, held that government officials must obtain a warrant before electronic surveillance is initiated in matters of domestic security.³⁶⁵ In highlighting the “convergence of First and Fourth Amendment values” unique to surveillance, the majority of the Court found that protecting politically unpopular speech is a constitutional priority, especially in cases of domestic security:

³⁶² General search warrants allow an officer to conduct of a search that does not specify a particular place or person. General search warrants were used by the British and were called writs of assistance. Writs of assistance, which helped tax authorities search merchant imports for illegal and unclaimed goods. The legality of writs of assistance was affirmed in the Townshend Acts, passed by the British Parliament in 1767. *See generally* Robert J. Chaffin, *The Townshend Acts of 1767*, 27 WM. & MARY Q. 90, 90-121 (1970).

³⁶³ *Berger*, 388 U.S. at 63.

³⁶⁴ *Id.* at 68 (Douglas, J., concurring).

³⁶⁵ *United States v. United States District Court* is known as the “Keith Case” because Judge Damon Keith of the United States District Court for the Eastern District of Michigan—in a watershed decision—ordered the Government to disclose all illegally intercepted conversations to the defendants in the case.

Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect ‘domestic security.’”³⁶⁶

In *Keith*, Justice Powell said that vigorous private dissent by citizens is “essential” to a free society.³⁶⁷ The Court’s decision recognized the Fourth Amendment’s protections of privacy, as it relates to the free exercise of First Amendment rights of free speech, by recognizing citizens’ expectation of privacy in their home and communications.

The Courts have traditionally decided cases involving government electronic surveillance on the Fourth Amendment prohibition on warrantless search and seizure. In the 1965 case of *Griswold v. Connecticut*, the Court recognized the individual right to privacy as an unnamed “penumbra” right inherent in the Bill of Right’s First, Third, Fourth and Fifth Amendments. The “individual right to privacy” would quickly take hold in the Court’s language used in opinions involving government surveillance of private communications. In the 1967 *Berger* opinion, Justice Clark recognized that wiretapping techniques were spurring Congress to create statutory protections for individual privacy.³⁶⁸ In the 1967 *Katz* opinion, Justice Stewart said the telephone played a vital role in private communication.³⁶⁹ In the 1972 *Keith* case, Justice Powell said the Omnibus Crime Act of 1968 was an attempt by Congress to protect “the privacy of individual thought and expression.”³⁷⁰

³⁶⁶ *Id.* at 314.

³⁶⁷ *Id.* at 315.

³⁶⁸ *Berger*, 388 U.S. at 49.

³⁶⁹ *Katz v. United States*, 389 U.S. 347, 352 (1967) (citing [Silverthorne Lumber Co. v. United States](#), 251 U.S. 385 (1920)).

³⁷⁰ *Keith*, 407 U.S. at 301.

Although the Court has recognized a need for privacy in telephone communications, it has not acknowledged the role of the telephone in the marketplace of ideas. Privacy is not protected under the First Amendment. However, given the Court's recognition of the individual right to privacy emanating from the Bill of Rights, it could be a relevant factor in cases involving private communication on political matters.

More recently, the plaintiffs in the *ACLU v. NSA* case, filed in January of 2006, allege that the Terrorist Surveillance Program had a chilling effect on their activities protected by the First Amendment. Judge Anna Diggs Taylor, of the Eastern United States District Court of Michigan, found for the plaintiffs and based her decision in part on the chilling effect of the government program. The Sixth Circuit Court of Appeals overturned the cases finding the alleged chilling effect to be subjective.

The Supreme Court has never decided a case on the basis of the chilling effect, although District Court Judge Walker did acknowledge the chilling effect of surveillance in her holding in the *ACLU* case. As Daniel Solove pointed out in his 2007 *New York University Law Review* article, First Amendment protections should restrict government information gathering if there is a discernible chilling effect on constitutionally protected activities.³⁷¹ However, this chilling effect can be difficult to establish beyond a "person's own assertions that she was chilled."³⁷² The Sixth Circuit Court of Appeals decision in the *ACLU* case might reflect judges' hesitance to recognize a chilling effect in electronic surveillance.

VII. Does Government Surveillance of Private Communications Create a

³⁷¹ Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 154 (2007).

³⁷² *Id.*

Chilling Effect on Free Expression in the Marketplace of Ideas, as Interpreted by the Courts?

The value in protecting citizens' First Amendment rights is evident in an examination of court decisions involving politically subversive speech, as well as cases involving domestic electronic surveillance. When citizens change the contents of their communications to evade government action, the chilling effect is realized, whether or not their perception is accurate.

The judicial treatment of free speech depends upon national security concerns prevalent in the country at the time of the decision. When there are legitimate concerns to the smooth operation of government—such as the cases involving resistance to the military draft during times of war—the Court tends to permit more government restrictions on speech. For example, social activist and presidential candidate Eugene Debs was jailed for his public statements against military operations. However, when citizens' political ideas—as opposed to actions—are chilled by government restrictions on the breathing space needed in the marketplace, the Court is more inclined to side with free speech concerns. For example, the Louisiana law requiring political subversives to register with the government was invalidated, as was the requirement for communist sympathizers and supporters to register with the postmaster in order to receive mailings from certain organizations. This attention to clear and present danger seems to reflect a line of reasoning in the Court that citizens should be able to explore politically unpopular ideas, as long as they do not take actions to undermine national security.

The citizens discussing terrorism over communication networks have committed no crime beyond contemplating an alternative to Democracy. Though advocacy might be punished in a public sphere, these citizens are simply discussing issues in the private

realm of correspondence. The rationale of the Bush Administration in authorizing the TSP was to protect the country, yet the program threatened citizen involvement in the marketplace of ideas. However, scholars, politicians and judges have said for two centuries that a robust and wide-open debate of public issues is vital to the democratic process. The TSP targeted subversive political views associated with extremist ideology, which runs counter to U.S. Democracy. Although the program officially targeted terrorist and terrorist sympathizers, many of the defendants claim they were targeted due to their political associations or religious views.

The Terrorist Surveillance Program may also have acted as a regulation of communications content delivered through telephony. Citizens might assume that their telephone conversations are private as long as they don't discuss controversial topics or advocate politically unpopular ideas. This might cause some citizens to be less inclined to engage in discussions of the vital current public issues.

The Bush Administration argued that terrorism exists in a new paradigm that merits increased surveillance in order to deter internal and external threats to national security, but the founders knew of threats to liberty. Indeed, since the creation of this country there have been laws to limit speech associated with dissident viewpoints. The War on Terrorism does not so much create a new paradigmatic justification for programs such as the TSP, as it represents a new technological age that enables more sophisticated surveillance of society. Terrorism has not created a new paradigm; technology has created a new frame through which we must evaluate First Amendment protections for free expression.

How courts ultimately rule on the legality of 21st century surveillance programs

will directly influence where the line is drawn between liberty and security. If this current climate of secrecy surrounding electronic surveillance continues, then it seems, indeed, a new privacy paradigm will be advanced where surveillance programs act as an informal restraint on free expression. This seems to make a mockery of the First Amendment, which was created by men who believed that speech should be free from prior restraint. As Justice Brandeis said in *Whitney v. California*, “[t]hose who won our independence... 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.”³⁷³

Additional research is needed to investigate the feasibility of a holistic judicial approach to constitutional protections for citizens who are the targets of electronic surveillance. The Supreme Court has acknowledged a penumbra of unnamed rights emanating from the First, Third, Fourth and Fifth Amendments of the Bill of Rights. One of these unnamed rights—individual privacy rights—was recognized by the Court in the 1965 *Griswold* case involving a state law banning contraceptives. Although this “penumbra” right for privacy was recognized by the Court for its applicability to marital privacy, it has not been fully developed as protection against the electronic surveillance of communication contents. Future research is needed to determine if the Court is willing to extend the First Amendment’s right of association, the Fourth Amendment’s guarantee against unreasonable search and seizure and the Fifth Amendment’s privilege against self incrimination to protect the privacy of citizens’ communications.

Extending First Amendment protections to electronic surveillance would also create a higher standard of review for government intelligence gathering agencies that

³⁷³ *Whitney v. California*, 274 U.S. 357, 375 (1927).

target political activities of citizens. Historically, the Court has decided electronic surveillance cases on plaintiff's claims alleging a violation of the Fourth Amendment's guarantee against unreasonable search and seizure. If the government can show that the surveillance was properly authorized through judicial review, the Court often dismisses the plaintiff's claims, as the government has established that it honored the constitutional protection by obtaining a warrant. However, if the Court were to evaluate a plaintiff's claim of illegal electronic surveillance on First Amendment grounds, there would be a higher standard of review, as the Court would need to determine that the Congressional statutes governing electronic surveillance had created no prior restraint on citizen speech. Although the *ACLU* case begins to hint at this shift in constitutional philosophy, a full analysis of the final case holding will be needed before the feasibility of this type of judicial review can be determined.