FREEDOM OF SPEECH IN AMERICA: HOW FREE?

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"There is no constitutional right to have all general propositions of law once adopted remain unchanged."

Justice Oliver Wendell Holmes in Patterson v. Colorado (1907)

I. Introduction. In this presentation, I will be concerned with the problem of assessing the current significance[1] of that part of the First Amendment of the Constitution of the United States of America that reads:

Congress shall make no law . . . abridging the freedom of speech . . . .[2]

My discussion will focus first on the words Congress shall make no law, next on the word abridging, and finally on the words the freedom of speech. Then, in conclusion, I will make certain general remarks concerning the status of the freedom of speech in America today.

II. Congress shall make no law. It was James Madison's hope that not only Congress, but also the States, would be prevented by the Constitution from infringing on the right to freedom of speech.[3] His wish was not to be fulfilled until 1925, some 136 years later, when the Supreme Court held that the provision in the Fourteenth Amendment, ratified in 1868, forbidding any State to deprive any person of liberty without due process of law, signifies that the restraints of the First Amendment may also be imposed on the States.[4] Two years after that, in 1927, the Court for the first time blocked enforcement of a State law on those grounds.[5] Curiously, however, it was not until 1965, 176 years after ratification of the Bill of Rights, that an act of Congress was held to violate the First Amendment's

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guarantee of freedom of speech.[6] In part, this reflects the fact that many more State laws and local ordinances that infringe on the freedom of speech have been passed than Congressional acts that do so, but as we will see shortly, this is not the whole story.

The scope of protection of the freedom of speech under the First Amendment was also extended in 1941 to prevent courts from using their contempt power to punish speech that does not imminently threaten the administration of justice.[7] On the other hand, witnesses before grand juries and before legislative (particularly Congressional) committees continue to have essentially no protection of freedom of speech.[8]

III. Abridging. We may construe the expression abridging as essentially the same in meaning as limiting, impairing, interfering with, or infringing upon. The consensus of those that ratified the Bill of Rights was that the significance of abridging [the freedom of speech and of the press] was the common-law notion of "laying previous restraints [on speech and publications]," and not "providing subsequent punishment [for what is said or written, if judged dangerous or offensive]." Thus the Federalist-controlled Congress of 1798 was able to pass a Sedition Act that provided punishment for any kind of verbal attack on the Federal Government.[9] The passage of this Act, however, evoked the development by Madison of the theory that the First Amendment supersedes the common law on speech and press and that it protects speech and press absolutely. This point of view also came to be adopted by Jefferson, and the Sedition Act languished upon his election to the Presidency in 1801.[10] However, it was the common-law point of view of what counts as abridging the freedom of speech and press, not the Madison-Jefferson one, that prevailed upon the Supreme Court until well into the twentieth century.[11]

The turning point occurred in 1919, when Justice Holmes observed for the Court that:

> It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints although to prevent them may have been the main purpose. . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[12]

Having raised the possibility that abridging the freedom of speech could signify not only laying prior restraints on speech but also punishing potentially dangerous or offensive speech, the Supreme Court was not long in adopting that position. The first ruling to that effect was handed down in 1927.[13] However, this ruling, and almost all of the others in which convictions were overturned because the exercise of speech involved was held not to constitute a "clear and present danger" of "serious injury [to] political, economic or moral order" were based on the fact that, as Chief Justice Vinson put it in 1951:

> [T]he interest which the State was attempting to protect was itself

too insubstantial to warrant restriction of speech.[14] These words are taken from the plurality opinion of the Supreme Court which upheld the convictions of eleven Communist Party leaders of conspiracy to violate the Smith Act of 1940, which made it a criminal offense for anyone to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the United States or of any State by force or violence or for anyone to organize any association which teaches, advises, or encourages such an overthrow or for anyone to become a member of or to affiliate with any such association. The decision is important because it reveals the extent to which the Federal Government is prepared to restrict the freedom of speech in the face of widespread fear over national security. There was in fact no "clear and present danger" of the overthrow of the American Government by the Communist Party in the years immediately following World War II,[15] as is reflected by the fact that six years later, in 1957, after the passions aroused by the perception of a direct Communist threat to the Government of the United States had somewhat subsided, the Supreme Court substantially limited the Smith Act to require advocacy of unlawful action, not simply advocacy of the doctrine of forcible overthrow of government.[16]

However, Chief Justice Vinson's suggestion that the freedom of speech may be abridged if abridging that freedom is necessary to protect a substantial government interest has been used by the Supreme Court from 1950 on to uphold statutes that in dealing with such an interest incidentally, as it were, abridge freedom of speech. This principle has come to be known as "balancing," and how it works can be seen in the first ruling in which the Court applied it.[17] Section 9(h) of the Taft-Hartley Act of 1947

denied a labor union access to the National Labor Relations Board if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government. This provision was challenged as abridging the freedom of speech, and the case reached the Supreme Court in 1950. For the Court, Chief Justice Vinson rejected that challenge, maintaining that:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

In these circumstances, the government's interest in preventing political strikes and the disruption of commerce was held to be more substantial than the interests of the affected individuals. Again, I quote from Chief Justice Vinson's opinion:

> Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by

their political affiliations or beliefs.[18]

The last sentence just quoted indeed goes to the heart of the matter; the balancing principle has been used almost exclusively by the Court in deciding cases in which the issues were government regulations of the association of individuals,[19] or inquiries into their beliefs and associations, based on the notion that one's beliefs and associations provide an adequate basis for predicting one's future or intended conduct, which it is within the power of government to regulate or prohibit. The principle was used to sustain both Congressional and State legislative investigations into the associations and activities of individuals in connection with allegation of subversion,[20] and to sustain proceedings against the Communist Party and its members.[21] It was also, however, used to block state investigations of the N.A.A.C.P., the findings being that the rights of freedom of speech and association of its members outweighed the government interests claimed.[22]

The balancing principle was put to its sharpest test in 1961, when the Supreme Court used it to uphold the refusal of a State to certify an applicant for admission to the bar, on the grounds that the applicant had refused to answer any questions put by the Committee of Bar Examiners pertaining to membership in the Communist Party.[23] Since that ruling, however, the balancing principle has fallen into relative disuse, there being now no single test that the Supreme Court consistently uses in determining when freedom of speech may be abridged by the imposition of punishment or sanctions for revealing certain beliefs or for advocating certain courses of action.[24]

Does government abridge the freedom of speech when it denies employ-

ment to individuals for what they say or believe? Until 1952, the Supreme Court consistently said no, following Justice Holmes's dictum that:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.[25]

In that year, however, the Court struck down a loyalty-oath requirement for government employment based solely on the organizational memberships held by the individual, contending that:

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. . . . [W]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[26]

In the intervening years, the Court has tried to strike a balance between the interests of government in maintaining the commitment of its employees to the satisfactory performance of their duties and the constitutional rights of those employees as individuals.[27]

IV. The freedom of speech. I will not attempt an analysis of the literal meaning of the expression the freedom of speech, inasmuch as it would require an analysis of the concept of freedom, a task whose difficulty does not require comment. If we accept, for purposes of discussion, the claim that the expression literally means "the unlimited license to talk," then we may conclude that the significance of that

phrase in the First Amendment is much narrower than its literal meaning. As Justice Harlan put it in 1961:

> Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the states to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.[28]

The latter restriction embodies the balancing principle, discussed in the previous section. Here we consider the significance of the former restriction that certain forms of speech, or speech in certain contexts, are outside the scope of constitutional protection entirely. Among the forms of speech that the Supreme Court has ruled lie outside the protection of the First Amendment are libel, the use of so-called "fighting words," profanity, obscenity, and commercial advertisement.[29]

The Court has developed two main lines of argument to support the exclusion of the above-listed forms of speech from protection under the First Amendment, one historical and one conceptual. The historical argument is simply that the exclusions were already embodied in common

law or in statutes of the States that ratified the First Amendment. This argument has been used primarily to support the exclusion of libelous, profane, and obscene language from First Amendment protection.[30] The conceptual argument is that certain forms of speech in certain contexts, by their very utterance, inflict injury or are inherently likely to provoke a violent response, without their use resulting in any counterbalancing benefit to society or to the individuals involved. This argument is a particularly compelling one for excluding the use of libelous or personally abusive or threatening language from constitutional protection,[31] but it is less compelling in connection with commercial advertising and obscenity. Indeed, the Court has provided no arguments whatever for removing commerical advertising from the scope of constitutional protection.[32]

The Supreme Court's treatment of obscenity, since its first holding in an obscenity case in 1948, is difficult to summarize.[33] Oversimplifying somewhat, we can characterize the Court as having ruled that obscenity is not a constitutionally protected form of expression, and that therefore censorship of obscene materials may be practiced,[34] and that government may punish obscenity without having to demonstrate that there is any legitimate governmental interest that counterbalances the right of freedom of speech.[35] The most important basis for this holding is the finding that:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion--have the full protection of

> the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[36]

On examination, it is apparent that this argument has very little force. As the Court acknowledged in 1971:

> Wholly neutral futilities. . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.[37]

Thus the fact that a form of speech may have absolutely no socially redeeming importance cannot in and of itself be the basis for denying First Amendment protection to the use of obscene language. Its use must therefore be found to encroach upon some other governmental interest worth protecting. But the Court has determined that no such interest exists.[38] Accordingly, the conceptual argument for excluding obscenity from First Amendment protection disappears, leaving only the historical argument, which by itself can hardly be said to be compelling.[39]

However, if the Supreme Court can be faulted for its treatment of obscenity, it is to be commended for its recognition that the protection of the freedom of speech rightfully extends to the protection of expressive behavior generally.[40] As Justice Fortas said for the Court in 1966:

> As this Court has repeatedly stated, [the] rights [of free speech and assembly] are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceably and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation

of public facilities.[41]

Whatever limitations there are on non-verbal expression, those limitations are exactly comparable to those that limit speech.[42]

V. Conclusion. It should be obvious by now that the First Amendment protection of the freedom of speech does not signify what it literally means. This in itself should be neither surprising nor worrisome, since practically no utterance or inscription ever signifies what it literally means. However, I think that it is important for those Americans who cherish their constitutionally protected freedoms to have some reasonably clear idea of what the First Amendment does signify, so that on the one hand they may be free of needless worry about the imminent threat of general censorship simply because obscene speech may be censored, and on the other they may be on guard against attempts to erode protection of the freedom of speech that are made by those who wish to protect other interests. The more widely held, the more popular the interest is, the more dangerous the attempt can be.

We have also seen that legislative techniques for attacking protection of the freedom of speech have become increasingly sophisticated, and that the responses of the judiciary have succeeded in only partially repelling those attacks. For example, we have seen that the Supreme Court has declared that legislatures are permitted to regulate activity in such a way that the interests that the regulations are designed to protect counterbalance the restrictions on speech that they impose. Since the balancing of those interests is entirely subjective, the protection of the freedom of speech is at the mercy of those judges who happen to be

responsible for assessing the balance.

Attacks on the freedom of speech can come from both left and right. I have, in the paper, dwelt on the conservative attack on the freedom of speech that took place right after World War II in response to the perceived threat of a Communist takeover; that discussion is purely illustrative. Conservatives have by no means cornered the market on repression. Any group, whatever its ideology, is capable of repressing speech, as Justice Holmes observed in 1919:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate [either] that you think the speech impotent . . . or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.

To uphold the freedom of speech, one must believe in the value of that freedom even more than in the principles by which one lives. As Justice Holmes put it:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[43]

Notes

1. Following J. J. Katz and D. T. Langendoen, "Pragmatics and Presupposition," Language, 52 (1976), 10, I take "significance" to be a property of tokens of expressions in a given language, namely what those tokens signify in the contexts in which they occur. I assume that the full significance of any given token of an expression can be determined as a function of the literal meaning of the expression together with the relevant contextual factors.

2. The first ten Amendments of the Constitution (the Bill of Rights) were ratified together on December 15, 1791. I will not be concerned here with the freedom of the press, also guaranteed by the First Amendment, except insofar as decisions regarding the freedom of speech also affect the freedom of the press.

3. Madison, along with Alexander Hamilton (cf. The Federalist No. 84), was one of the Framers of the Constitution who orginally believed that a bill of rights was unnecessary because the Federal Government was not granted the powers to do what a bill of rights would proscribe. Writing to Thomas Jefferson in 1788, Madison gave this and three other reasons for not amending the Constitution with a bill of rights, including the following:

> [E]xperience proves the inefficacy of a bill of rights on those occasions when its controul (sic) is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. . . . Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince. (G. Hunt, ed., The Writings of James Madison, (New York, 1940) 5, 272-273.

Jefferson replied by attempting to answer each of Madison's objections, and included an argument in favor of such a bill "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department, merits great confidence for their learning and integrity. (J. Boyd, ed., The Papers of Thomas Jefferson, (Princeton, 1958) 14, 659.

Madison was apparently persuaded by Jefferson's arguments and in his successful campaign for a seat in the House in the first Congress, he firmly endorsed the proposal of a bill of rights. Accordingly, in June 1789, he introduced a series of proposed amendments, of which the House in August adopted seventeen, including one which Madison declared to be "the most valuable of the whole list" and which reads:

> The equal rights of conscience, the freedom of speech or of the press, and the rights of trial by jury in criminal cases shall not be infringed by any State.

This particular proposal was, however, rejected in early September by the Senate. The final wording of the Bill of Rights was worked out by a House-Senate conference committee, of which Madison was a co-chairman, on September 24 and 25, 1789.

4. In Twining v. New Jersey (1908), the Court observed:

> [I]t is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such nature that they are included in the conception of due process of law.

But it was not until Gitlow v. New York (1925) that the Court explicitly declared that States may not infringe on the freedom of speech:

> For present purposes we may and do assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

In its decision in this case, however, the Court upheld application of a State law that made it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, in the absence of any evidence regarding the effect of the circulation of the manifesto for which the defendant was found guilty, and in the absence of any contention that it created any immediate threat to the security of the State. The Court simply acceded to a state legislative determination that:

> [U]tterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil that they may be penalized in the exercise of [the legislature's] police power. . . .

Justice Holmes' dissent in this case, however, is instructive.

> If what I think the correct test [for determining the constitutionality of the State's action] is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendant's views. . . . If [moreover], 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.

For a general discussion of the Court's position on the applicability of the provisions of the First Amendment to the States, see F. Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment," Harvard Law Review, 74 (1965).

5. In Fiske v. Kansas (1927), the Court held that the application of a criminal syndicalism law to convict someone against whom the only evidence was the "class struggle" language of the constitution of the organization to which he belonged violated due process. In Hague v. C.I.O. (1939), the Court for the first time voided a local ordinance on grounds that it withheld freedom of speech contrary to due process. Over the years, numerous state laws and local ordinances have been overturned on grounds that they infringed on the freedom of speech.

In Dombrowski v. Pfister (1965), the Supreme Court went a step further and declared that a lower federal court could, under certain circumstances, issue an injunction against enforcement of a statute that on its face unconstitutionally abridges the freedom of speech when there is prosecution or threat of prosecution under that statute. Justice Brennan, for the majority, based this ruling on the contention that the mere threat of prosecution under such a statute "may deter [the exercise of constitutionally protected speech]. . . almost as potently as the actual application of sanctions." In such cases, Justice Brennan argued, courts could no longer assume that an adequate defense against criminal prosecution will "assure ample vindication of constitutional rights" because either the threat of prosecution or the long wait between prosecution and final vindication could result in a "chilling effect" on First Amendment rights.

However, in more recent decisions, the Supreme Court has sharply limited the freedom of lower federal courts to issue injunctions against state court proceedings. In Younger v. Harris (1971) and in several other cases decided at the same time, the Supreme Court held that federal injunctions against enforcement of a statute limiting speech are improper if criminal proceedings are pending in a state court, and if the prosecutions constitute "good faith attempts to enforce it," even though the statute is facially unconstitutional.

6. In Lamont v. Postmaster General (1965), the Court invalidated a provision of the Postal Services and Federal Employees Salary Act of 1962 that authorized the Post Office to detain material determined to be "communist political propaganda" and to forward it to the addresses only if he requested it after notification by the Post Office, and to destroy it otherwise. The Court held that the provision imposed on the addressee an affirmative obligation that amounted to an abridgment of the freedom of speech.

7. In Bridges v. California (1941), which overruled Patterson v. Colorado (1970) and Toledo Newspaper Company v. United States (1918), a five-to-four majority of the Supreme Court dismissed contempt of court citations that had been brought against a newspaper and a labor leader for statements about pending judicial proceedings. This ruling was subsequently affirmed in a number of decisions, including In re Little (1972), in which the Supreme Court unanimously set aside a contempt conviction of a defendant who, arguing his own case, alleged before the jury that the trial judge by his bias had prejudiced his trial and that he was a political prisoner. While agreeing that his remarks may have been disrespectful of the court, the Supreme Court noted:

> There is no indication . . . that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding.

It then went on to cite its earlier stand, in Craig v. Harney (1947) that:

> The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent and not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

8. A witness's right to remain silent before a grand jury or before a legislative committee is limited to the protection afforded by the Fifth Amendment provision against self-incrimination (and, in the case of a legislative committee, a witness may remain silent--at the risk of being cited for contempt--if he can demonstrate that the question put to him is beyond the scope of the investigation the committee is charged to undertake). This is so because the First Amendment protection of the freedom of speech is limited by the ancient rule of common-law that every citizen owes to his government a duty to give what testimony he is capable of giving (J. Wigmore, A Treatise on the Anglo-American System of Evidence, (New York, 1940) 8. 62192). In Branzburg v. Hayes (1972), the Court ruled not even to recognize an exception to this rule to grant newsmen the privilege of concealing their sources of information and of keeping confidential certain information they obtain and choose not to publish.

Even the protection afforded speech by the Fifth Amendment is of a somewhat dubious nature, since it is a recognized fact that some prosecutors who direct grand-jury investigations and some legislative investigators are motivated as much or more by a desire to expose to public censure individuals whom they dislike as by a desire to seek the truth or to promote legislation for the common good. Since the public is of the general opinion that having to plead the Fifth Amendment is tantamount to an admission of guilt, the desired result is usually achieved.

Moreover, it is easy to lose even the right not to incriminate oneself before a grand jury because witnesses may be compelled to testify against each other, and, more important, because one must explicitly claim the right or one will have been deemed to have waived it, and waiver may be found in cases in which the witness has answered some preliminary questions but desires to stop at a certain point (see Rogers v. United States (1951)). But since one may be called before a grand jury without counsel present, without information about the object of the investigation, and without information about one's role as a witness in the investigation, one can easily waive the right without realizing it by answering a seemingly innocent question put by the prosecutor.

One may also be compelled to act as a witness against oneself if immunity from prosecution is granted. Immunity can be of one of two kinds. "Transactional" immunity means that once a witness has been compelled to testify about an offense he may never be prosecuted for that offense, no matter how much independent evidence may come to light, while "use" immunity

means that no testimony compelled to be given and no evidence derived from or obtained because of the compelled testimony may be used if the person is subsequently prosecuted on independent evidence for the offense. Following enactment of a statute in 1893 granting transactional immunity to those compelled to testify against themselves before Congressional committees (upheld by the Supreme Court in Brown v. Walker (1896)), practically all immunity statutes were of the transactional kind. However, when the Supreme Court in 1964 began applying the self-incrimination clause of the Fifth Amendment to the States, it was confronted with the problem that arose because a State can grant immunity from prosecution only in its own courts. To handle this problem, the Court, in Murphy v. Waterfront Commission (1964), imposed a use-immunity restriction in its declaration that:

> [As a] constitutional rule, a state witness could not be compelled to incriminate himself under federal law unless federal authorities were precluded from using either his testimony or evidence derived from it.

Congress thereupon enacted the Organized Crime Control Act of 1970, which replaces all prior immunity statutes and which adopts a use immunity restriction only. This statute was sustained in Kastigar v. United States (1972).

Whether immunity, either transactional or use, is an adequate substitute for the Fifth Amendment protection against being compelled to testify against oneself is a problem that goes beyond the scope of this paper.

9. The Sedition Act of 1798 punished anyone who would "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute. . . . "

10. See G. Hunt, ed. The Writings of James Madison, vol. 6. New York, (1908), 341-406. However, Jefferson was perfectly willing to allow the States to prosecute the spokemen for the opposition, as he indicated in a letter written in 1803 to Governor McKean of Pennsylvania:

> The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is, by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. . . . This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one. (P. Ford, ed., Works of Thomas Jefferson, vol. 9, (New York, 1905), 449).

11. Indeed, as the Supreme Court declared in Robertson v. Baldwin (1897), the entire Bill of Rights was interpreted against its common-law background:

> The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.

Then in 1907, specifically in connection with the provisions of the First Amendment regarding speech and press, Justice Holmes maintained for the Supreme Court, in upholding a conviction for contempt of court for the publication of a document that was merely critical of a court, that:

> [T]he main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the [common] law of criminal libel. . . ." (Patterson v. Colorado (1907)).

12. Schenck v. United States (1919). In this case, the Court upheld convictions under the Espionage Act of 1917 for attempts to cause military insubordination by the circulation of leaflets. In subsequent cases, the Court continued to uphold convictions under the Act and under similarly worded State laws but over the dissents of Justice Holmes and Brandeis, who maintained that speech was being suppressed that offered no substantive threat to government or society. A significant part of Justice Holmes' dissent in Gitlow v. New York (1925) is quoted above in note 4, and Justice Brandeis' technical concurrence in Whitney v. California (1927) is interesting for its claim that the Founding Fathers had more than the common-law interpretation of the freedom of speech and press in mind when they drafted the First Amendment:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . . They recognized the risks to which all human

> institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Then, returning to the case at hand, Justice Brandeis added, echoing Justice Holmes in Schenck:

> But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.

13. In Fiske v. Kansas (1927). See note 5 for discussion.

14. In Dennis v. United States (1951). The cases include DeJonge v. Oregon (1937); Herndon v. Lowry (1937); Thornhill v. Alabama (1940); Cantwell v. Connecticut (1940); and West Virginia State Board of Education v. Barnette (1943).

The one counterexample to Chief Justice Vinson's claim is the ruling in Terminiello v. City of Chicago (1949), in which a majority of five Justices set aside a conviction for breach of the peace for a speech that actually triggered an outburst of rioting. For the majority, Justice Douglas wrote:

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to danger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute. . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance, or unrest.

The dissenters, on the other hand, focused on the disorders that actually occurred, Justice Jackson saying:

Section 9, Clause 3 of the Constitution, are, in the words of United States v. Lovett (1946), legislative acts "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial"). For the majority, Chief Justice Warren wrote that Congress could, under its power to regulate commerce, enact prohibitions generally applicable to any person who commits certain acts or who possesses certain characteristics that make him likely, in Congress' view, to initiate political strikes or other harmful deeds. It is impermissible, however, for Congress to designate a class of persons, such as members of the Communist Party, as falling under the scope of such legislation. The dissenters, on the other hand, viewed the language of the statute as expressing in shorthand the characteristics of those persons who are likely to use their union responsibilities to carry out acts harmful to commerce.

This ruling is of interest in connection with the problem of determining the significance of abridging the freedom of speech, since it would not appear to prevent Congress from passing legislation applicable to persons whose characteristics are determined on the basis of what they advocate in speech or writing.

19. The right of freedom of association (a right distinct from freedom of assembly) was first proclaimed a separate, and constitutionally protected, right, related to the freedom of speech, in N.A.A.C.P. v. Alabama ex rel. Patterson (1958).

20. In Barenblatt v. United States (1959), Uphaus v. Wyman (1959), Wilkinson v. United States (1961), and Braden v. United States (1961).

21. In Scales v. United States (1961) and Communist Party v. Subversive Activities Control Board (1961). In the latter case, the regulatory scheme by which the Communist Party and its members were required to register with the S.A.C.B. was upheld by the Supreme Court against a First Amendment challenge. It was subsequently ruled unconstitutional in Albertson v. S.A.C.B. (1965) on Fifth Amendment grounds.

22. In such cases as N.A.A.C.P. v. Alabama ex rel. Patterson (1958), N.A.A.C.P. v. Alabama ex rel. Flowers (1965), and Gibson v. Florida Legislative Investigating Committee (1963).

23. Konigsberg v. State Bar of California (1961). For the majority, Justice Harlan argued that the government interest in question outweighed the applicant's loss of freedom of association (see note 19):

> It would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions.

For Justice Black's dissenting opinion in this case, see note 17.

More recent decisions, however, have left unclear the extent to which beliefs can be inquired into for determining qualifications for admission to the bar; cf. Baird v. State Bar of Arizona (1971), In re Stolar (1971), Law Students Civil Rights Research Council v. Wadmond (1971).

24. In United States v. Robel (1967), the Court held invalid under the First Amendment a statute that made it unlawful for any member of an organization that had to register itself with the S.A.C.B. (see note 21) to work in a defense establishment, explicitly rejecting the use of the balancing principle. For the Court, Chief Justice Warren declared:

> It has been suggested that this case should be decided by "balancing" the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.

As this language suggests,the Court is now seeking to accommodate government interests and personal freedoms by requiring statutes to be drawn so as to protect legitimate government interests, while at the same time minimizing restrictions on personal freedoms. In this connection, see also Shelton v. Tucker (1960), in which the Court declared:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can more narrowly be achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Accordingly, the Court has struck down numerous laws infringing on the freedom of speech on the grounds that they are unconstitutionally "vague" or "overbroad"; cf. Cramp v. Board of Public Instruction (1961), N.A.A.C.P. v. Button (1963), Baggett v. Bullitt (1964), Interstate Circuit v. City of Dallas (1968).

25. McAuliffe v. Mayor of New Bedford (1892). Later, in 1950, a divided Court of Appeal upheld the firing of a government employee against due process and First Amendment claims, asserting:

> [T]he plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. . . . The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ. (Bailey v. Richardson (1950); affirmed by an equally divided Court (1951))

Then, in Garner v. Board of Public Works (1951), the Supreme Court ruled on the first of many State and local loyalty-oath cases that were to come before it. In sustaining the requirement that municipal employees take an oath that they had not, within a prescribed period, advised, advocated, or taught the overthrow of government by unlawful means nor been a member of an organization that advised, advocated or taught such a doctrine, the Court held that it was a "reasonable regulation to protect the municipal service by establishing an employee qualification of loyalty" and as being "reasonably designed to protect the integrity and competency of the service." Similarly, in Adler v. Board of Education (1952), the Court sustained a State loyalty oath statute that in addition required the dismissal of teachers who were members of any organization that had been listed by the State as advocating its violent overthrow. For the majority of six, Justice Minton contended:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system under reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.

The oath upheld in Adler, however, was subsequently ruled unconstitutional by a majority of five in Keyishian v. Board of Regents (1967).

Curiously, while the Supreme Court has been heavily embroiled in cases involving state and local loyalty-oath requirements for employment from 1951 on, it has never ruled on the Federal loyalty requirements initiated under President Truman's Executive Order 9835 (1947), nor has it confronted the First Amendment issues raised by Federal security standards, and the investigations of employees and prospective employees carried out under them.

26. Wiemann v. Updegraff (1952).

27. Thus in Pickering v. Board of Education (1968), Justice Marshall wrote for the Court that:

> [I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. . . . The problem [therefore] is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The Court then undertook a suggestive analysis of the problems involved. It indicated that dismissal of a public employee for criticism of his superiors would be improper, if the relationship of employee to superior was not so close, such as day-to-day personal contact, that problems of discipline or harmony among coworkers existed, or if the relationship was not so close as to raise problems of personal loyalty and confidence. Accordingly, the dismissal of a high-school teacher who had written a letter to a local newspaper critical of the administration of the school system was reversed.

More recently, in Perry v. Sindermann (1972), the Court made the general observation that:

> [I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly. . . ." Such interference with constitutional rights is impermissible.

In a companion case, Board of Regents v. Roth (1972), the Court also noted that the basis for the holding in Bailey (see note 25) "has been thoroughly undermined in the ensuing years."

Finally, we may note that while the Hatch Act of 1939, as amended 1940, which provides that federal and many state and local government employees "shall [not] take any active part in political management or in political campaigns," was sustained by the Court in United Public Workers v. Mitchell (1947), it would appear that, in the light of recent decisions, the provision would no longer be upheld.

28. Konigsberg v. State Bar of Calfornia (1961). Similarly, in Roth v. United States (1957), a leading case on obscenity discussed below, Justice Brennan declared for the majority that "the unconditional phrasing of the First Amendment was not intended to protect every utterance."

29. The first four forms are listed in Justice Murphy's dictum in Chaplinsky v. New Hampshire (1942);

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Concerning advertising, the Court ruled in Valentine v. Chrestensen (1942) as follows:

> This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, or to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.

Among the curious consequences of this position on advertising is the fact that while door-to-door solicitation for magazine subscriptions and the like may be prohibited, such solicitation for the distribution of religious literature may not: Breard v. City of Alexandria (1951) and Martin v. City of Struthers (1953).

30. The historical argument for excluding obscene language from constitutional protection is not literally accurate, however, since only libel and profanity were punishable in the States that ratified the First Amendment.

31. The significance of the notion of "libel" was extended by the ruling in Beauharnais v. Illinois (1952), in which a state law that made it unlawful to defame a race or class of people was upheld. The defendant had been convicted under this statute after he has distributed a leaflet that argued for white supremacy and that called for action to keep blacks out of white neighborhoods. For the Court, Justice Frankfurter reasoned as follows: Libel laws raise no constitutional difficulty because libel is within that class of speech that is not protected at all by the First Amendment. But if an utterance directed at an individual may be the object of criminal sanctions, no good reason appears to deny a State the power to punish the same utterances when they are directed at a defined group, "unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State." On the basis of his review of the history of racial strife in Illinois, the Justice concluded that the state ligislature could reasonably fear substantial evils from unrestrained racist utterances, and so the statute may stand.

Four Justices dissented, including Justice Black, who correctly pointed out that Justice Frankfurter's reasoning was fallacious. But the logic of the decision is not as interesting as the fact that it reveals that the freedom of speech can be as easily suppressed in the defense of liberal doctrine (racism is bad) as in the defense of conservative doctrine (the Nation must be secure against its enemies).

More recently, the Court has narrowed the significance of "libel" in a somewhat different dimension. In New York Times Company v. Sullivan (1964), the Supreme Court reversed the judgment of a lower court that a city commissioner in charge of a police department had been libeled by a paid advertisement of a civil rights group that criticized the response of a Southern community to a demonstration led by Dr. Martin Luther King, holding that:

> Like . . . the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment. The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. . . . [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials . . . . The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Even more recently, the "federal rule" on libel has been extended to include candidates for public office (Monitor Patriot Company v. Roy (1971)) and other newsworthy persons (Time, Inc. v. Hill (1967), Rosenbloom v. Metromedia, Inc. (1971)).

32. This is not to say that no such arguments are available. One can justify regulations against false advertisements on the grounds that they protect customers from potential loss. One can, perhaps, also justify restrictions on where and how advertisements are placed because where and how they are placed may infringe on other rights of the individuals who are confronted with them (see the ruling in Valentine v. Chrestensen (1942), quoted in note 29). The requirement of positive disclosure may be justified on the basis of the public's "right to know." But the issues involved are complex and deserve more consideration by the Court than they have so far received.

33. In Doubleday & Co. v. United States (1948), the Court divided four-to-four and thus upheld a state court judgment that Edmund Wilson's Memoirs of Hecate County was obscene. The landmark case on obscenity was Roth v. United States (1957), in which the Court upheld a federal conviction for obscenity, and adopted the standard that material may be considered unprotected obscenity if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Some subsequent cases, notably Redrup v. New York (1967) and Stanley v. Georgia (1969) seemed to undermine that ruling somewhat, but in fact it still stands, as the decision last April 30 in Memphis, in the case of United States v. Peraino, et al., to convict twelve individuals and five corporations for conspiracy to transport across state lines the "obscene, lewd, lascivious, and filthy motion picture" Deep Throat reveals.

It also goes almost without saying that the criteria for determining when something is unprotected obscenity are notorously hard to pin down. Thus Justice Stewart, rather than attempting to define hard-core pornography, was reduced to declaring in Jacobellis v. Ohio (1964) that "I know it when I see it, and the motion picture involved in this case is not that."

34. In Times Film Corporation v. City of Chicago (1961), the Court affirmed that a board of censors could refuse to license for public exhibition films which it found obscene. Similarly, the authority of the

Post Office to limit the distribution of obscene materials through the mails has been upheld (Rowan v. Post Office (1970), United States v. Reidel (1971)), as has the authority of customs officials to seize obscene material (United States v. Thirty-seven Photographs (1971)).

Besides obscenity, the only form of speech that is conceivably subject to censorship in America is the revelation of government secrets. But when the Court attempted to enjoin publication of the classified documents that have come to be known as the Pentagon Papers, the Supreme Court rejected the attempt (New York Times Company v. United States (1971)). The three dissenters, Chief Justice Burger and Justices Harlan and Blackmun, thought that restraining publication in this case was appropriate. Moreover, Justice Stewart thought restraint would be proper if disclosure "will surely result in direct, immediate and irreparable damage to our Nation or its people," while Justice Brennan would preclude even interim restraint until "governmental allegation and proof that publication must inevitably, directly, and immedicately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."

35. In Roth v. United States (1957), such tests as balancing and clear and present danger were held to be irrelevant. If they had been found relevant, then conviction for obscenity would not be possible, since the Court has established independently that there is no governmental interest in protecting minds from the effects of exposure to obscenity, and that there is no evidence that such exposure will incite persons to antisocial conduct (Stanley v. Georgia (1969)).

36. Roth v. United States. The wording is Justice Brennan's.

37. Cohen v. California (1971), quoting from Justice Frankfurter's dissent in Winters v. New York (1948). Compare also the dictum in Stanley v. Georgia (1969) that the right to impart and to receive "information and ideas, regardless of their social worth . . . is fundamental to our free society."

38. In Stanley v. Georgia (1969). See note 35.

39. See note 30. Moreover, as we have seen, historical considerations have not prevented the Court from altering other aspects of the significance of the right to freedom of speech and press over time.

40. The Court has also recently recognized the need to protect the freedom of speech to convey emotions, although in so doing it has undermined restrictions on the use of profanity. In Cohen v. California (1971), it overturned the conviction of someone who wore a jacket in public on which a profanity had been stencilled, holding:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their motive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

41. Brown v. Louisiana (1966). The cases date back to 1931, when the Court affirmed in Stromberg v. California that the flying of a particular flag is a constitutionally protected form of expression.

42. Thus in United States v. O'Brien (1968), the Court upheld conviction under an act of Congress prohibiting destruction of draft registration certificates, arguing that:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . . [A] governmental regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that governmental interest.

The Court has, however, had some difficulty in applying this rule in the several flag burning and flag desecration cases it has heard, sustaining some convictions (Radich v. New York (1971)) and overturning others (Street v. New York (1969)).

43. Schenck v. United States (1919).

APPENDIX: List of Cases Cited or Discussed