1982

A Graphic Review of the Free Speech Clause

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A number of years ago, Professors Tussman and tenBroek published in this Review an excellent analysis of the equal protection clause.[1] Using Venn diagrams, they sought to disaggregate various ways of looking at equal protection claims in order to aid our understanding of what that clause might mean. Their article was not the first word ever published on the equal protection clause, of course, and certainly it was not meant to be the last. But it did impose an extremely helpful clarity on what was even then a murky, undisciplined subject, and it filled a gap in the unruly professional literature. Three decades later, students of constitutional law still find Tussman-tenBroek graphics a useful starting place.

A similar presentation of the free speech clause is the main object of this Article. Like the Tussman-tenBroek piece, it disaggregates a jumble of rival judicial doctrines that purport to define a correct way of framing questions arising under the free speech clause. My aim is to determine what is at stake among contending interpretations, and to see why great importance tends to be attached to such matters. Written principally for students, this Article, too, proceeds through a series of graphic depictions, each designed to reflect a distinct impression or interpretation of the free speech clause. To be sure, the different constructions of the clause reflected in these graphics are not exhaustive.[2] They do embrace, however, nearly all the basic interpretations that have competed most strongly for judicial favor during the past century of Supreme Court adjudications. The Article begins with the simple,

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1. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

2. Three versions that will not be reviewed here are the "bad tendency," "advocacy of illegal conduct," and "no prior restraint" versions. The first tended to characterize the Supreme Court majority position throughout the 1920's. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919). The second was put forward by Learned Hand in Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), and is well described in Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975). The third was the sole concern of the common law as summarized in 4 W. BLACKSTONE, COMMENTARIES ON THE COMMON LAW 150-54 (1st Am. ed. 1772), *discussed in* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 9-12 (1942). For an excellent recent review of contending doctrines early in this century, see Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

unqualified construction suggested by the face of the clause. Each successive depiction purports to respond to some shortcoming or some perceived difficulty in the more literal or rudimentary graphic it aims to displace.

The order of presentation will carry us through a fully developed understanding of the free speech clause. The presentation, however, is not meant to be faithful to an actual chronology of first amendment evolution. The doctrines these graphics represent did not in fact appear as they are described here, nor in this order, in the actual case law of the first amendment. Indeed, had first amendment doctrine evolved in the simple linear fashion reflected in this brief review, that progression would be so much a feature of standard casebooks, treatises, and commercial aids that its reiteration in an article would be unwarranted. It is, rather, because the case law begins in the middle, as it were, taking much of its own theory for granted, and then swings haphazardly from historical to functional or pragmatic influences, that a different, quite artificial (but more logical) presentation may be needed to clear one's perspective. It is the very fact of historical discontinuity in the burgeoning case law that provides the occasion for this review.

What follows purports to put no difficult problems to rest nor even preliminarily to examine the newer sorts of first amendment issues that are well beyond the scope of any set of introductory graphics.[3] Rather, this Article addresses only the most traditional and recurring problem of the first amendment: the extent to which government may ban, criminalize, or regulate what private citizens seek to say. I mean to give a useful account as to why, in addressing that problem, anyone needs to do more than read literally ten consecutive words in the first amendment: "Congress shall make no law abridging the freedom of speech."

The order in which this account is presented will necessarily imply that the last graphic is also best. Insofar as the first, simplest formulation of the first amendment proves inadequate to answer some problem, the success of the next graphic, so smooth and excellent in surmounting that problem, will make it appear superior. And so on with each successive change to the end. Despite that appearance of steady progress, however, the reader is urged to withhold judgment and reserve a healthy skepticism. Each successive interpretation of the free speech clause tends to be slightly more complicated. Each thereby directs judicial attention to an increasing assortment of issues. As we

3. The newer first amendment problems include: socializing communication resources in the United States; the government as partisan speaker; the regulation of space satellite companies as common carriers; and the perplexing difficulties that arise with the many blends of public-private property. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

move along, one is readily persuaded that the more complex is also the more sensitive and the more mature. The natural tendency is to think we have become more sophisticated, and therefore more correct, in our understanding. There is impressive historical evidence, however, that this logical complacency may be seriously misplaced.

In matters of constitutional interpretation, the complex is not necessarily better than the simple. Simple propositions speak bluntly and commandingly. Complex propositions full of "ifs," "unlesses," or "excepts" do not. Nicely qualified, complex formulations may be necessary and proper for statutory codes. They may be profoundly uninspiring in a constitution—the fundamental law of a nation.

Additionally, a first amendment taken literally and simply is more difficult to evade. Graphics that are more mature and intellectually pleasing are not better if they but multiply the means by which judges may find reasons to give way.[4] We may therefore need to worry more about standards of judicial review that facilitate judicial discretion and the judicial tendency to yield to intolerance than about standards that are seemingly too simplistic. This issue is not merely of rhetorical concern, moreover, because historically our judges have tended generally to honor the apparent rigor of the free speech clause most when it least mattered and least when the judges were most seriously tested. In relatively tranquil times, the words of the first amendment have been given considerable force. In times of national anxiety and widespread xenophobia, on the other hand, the same words have frequently been given little more than a dismissive acknowledgment.[5] In the critical literature, the many successful prosecutions beginning with the Sedition Act of 1798,[6] the Espionage Act of World War I,[7] and the Smith Act fol-

4. Consider Justice Black's very forceful remarks in Barenblatt v. United States, 360 U.S. 109, 143-44 (1961) (dissenting opinion):

> To apply the Court's balancing test . . . is to read the First Amendment to say 'Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling those freedoms is greater than the interest of the people in having them exercised.' . . . [U]nless we once again accept the notion that the Bill of Rights means what it says and that this Court must enforce that meaning, I am of the opinion that our great Charter of liberty will be more honored in the breach than in the observance.

See also Konigsberg v. State Bar, 366 U.S. 36, 61-65 (1961) (Black, J., dissenting); Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 736-44 (1963).

5. *See, e.g.*, Z. CHAFEE, *supra* note 2, at 563 ("The Supreme Court . . . can do nothing to keep discussion open during an emergency.").

6. Act of July 21, 1798, ch. 74, § II, 1 Stat. 596, *critically reviewed in* L. LEVY, LEGACY OF SUPPRESSION (1960) *and* J. SMITH, FREEDOM'S FETTERS—THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

7. Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217. *See also* Sedition Act of May 16, 1918, ch. 75, 40 Stat. 553, *critically reviewed in* Z. CHAFEE, *supra* note 2, at 36-140, in which the author states that in more than 2,000 prosecutions, "[a]lmost all the convictions were for expres-

lowing World War II,[8] are offered as depressing examples.

At the end of our brief graphic excursion through the free speech clause, therefore, it may be both provocative and important for the reader to look back one last time to the beginning. We shall have moved a fair distance intellectually—but not necessarily a good or reassuring distance politically. Indeed, at the end, one may privately count it heavily against the practical wisdom of *any* doctrine that answers smoothly to every kind of problem, but yields in practice to an *ancien regime* intolerant of civil liberty. There is no more durable or worthwhile problem than this in our constitutional law,[9] and even now we have very little reason to think we have mastered it. More embarrassing still, it is far from clear that we are even on the right track.

I
THE LITERAL CONSTRUCTION

In respect to freedom of speech, the first amendment is exceptionally crisp and unambiguous. Thus, it provides: *Congress shall make no law abridging the freedom of speech*. Most of the principal affirmative restrictions on government power are far more ambiguous or equivocal. For instance, the fourth amendment protects "the right of the people to be secure in their persons, houses, papers, and effects" only against "*unreasonable* searches and seizures." The fifth amendment assures each person that he or she will not be deprived of life, liberty, or property, without "*due* process." The eighth amendment prohibits only such bail or such fines as are "*excessive*" and forbids only "*cruel and unusual* punishments."

From the style of these amendments, it is quite clear that the rights or freedoms they secure are limited. Each contains an obvious negative pregnant. Fines that are not excessive, for instance, are evidently permitted. One may, likewise, even be deprived of life assuming only that the legal process was appropriate (*i.e.*, that "due" process was observed). Additionally, the necessary referents of the crucial adjectives that are not self-defining ("unreasonable," "due," "excessive," "cruel," "unusual") lie outside the words of the Constitution. They not only *permit* interpretation by external reference; they *direct* such an exercise.

The first amendment is strikingly different. On its face, it is both

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sions of opinion about the merits and conduct of the war," *id.* at p. 51; A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 664-70 (1955).

8. 18 U.S.C. § 2385 (1976), *described and reviewed in* 1 T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 104-55 (3d ed. 1967).

9. The most recent and able review of this problem is Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978), *reprinted in* J. ELY, DEMOCRACY AND DISTRUST I-41 (1980).

unequivocal and absolute. It requires no arcane learning to understand the clear and plain meaning of "Congress," "no law," "abridging," or "speech." To "abridge" means not merely to forbid altogether, but to curtail or to lessen. And the laws forbidden to Congress are not merely such as "unreasonably" abridge speech (*cf.*, the fourth amendment), nor are they laws that are "excessive" abridgments of speech. The imperative is simple, straightforward, complete, and absolute: *Congress shall make no law abridging the freedom of speech.*

None of this is to say that no difficult questions of construction arise under the first amendment. They are questions, however, that arise only in instances where the facts are not clearly within the terms of the amendment. For instance, an act of Congress making it a crime to criticize the president, as applied to a person speaking critically of the president, is plainly within the amendment and therefore plainly unconstitutional. Whether an act of Congress making it a crime to destroy a draft registration card is also within the amendment, on the other hand, may be debatable; it is contingent upon one's view of equating the tearing of a pasteboard in the course of a speech against the draft with speech.[10] Similarly, an act of Congress making it a crime to criticize any federal judge is plainly within the amendment and, accordingly, invalid. On the other hand, whether an attempt by a federal judge to silence either a witness in court or speakers outside the courtroom also raises any kind of first amendment issues is a different (and more difficult) question. The amendment says only that *Congress* shall make no law abridging the freedom of speech; on its face, the first amendment is not directed either to the judiciary or to the executive.[11]

If the source of abridgment is a law made by Congress and if what

10. It is not speech, of course, but there may be persuasive instrumental reasons for deeming it so. *See* United States v. O'Brien, 391 U.S. 367 (1968) (burning of draft cards, in the setting of an anti-war rally, given marginal first amendment protection).

11. A surprising number of commentators have concluded that, for this reason alone, the first amendment cannot be taken literally because it would leave unrestrained, incorrigible opportunities for the executive and judicial departments of the United States to suppress free speech in ways that must have been meant to be forbidden under the first amendment. It is not clear, however, whether such easy criticism is well founded. The extent of the problem depends partly upon one's view of how much of the executive power and how much of the judicial power do not depend upon acts of Congress.

Most of what the President can do may in fact be derived from enabling legislation by Congress, rather than by force of his power as provided for in article II. The same is true of our federal courts under article III. When particular uses of the executive and judicial power proceed pursuant to authorizations and enabling legislation by Congress, they are subject to the first amendment, which makes no exception for acts of Congress merely because they may also be in aid of the executive or judicial powers, as distinct from acts of Congress in aid of its own enumerated powers. The consequence may be that the actual ambit of executive and judicial power unaffected by a literal first amendment (because not consequential to any act of Congress) would be very small, confined at the outset, and not as important to restrict as that of Congress. I have dealt with this problem obliquely in a different article, however, and there is little reason to deal

the law expressly abridges is speech, however, the amendment itself appears to end the inquiry.[12] What *kind* of speech is involved (*e.g.*, whether political or commercial, private or public, obscene or religious) is, on the face of the amendment, not a question. And equally, whether the speech seems trivial rather than important, reprehensible rather than edifying, or remarkably insightful rather than fraught with danger, are also not questions. For the point, again, is that while one may always have an appropriate interest as to how this amendment came about (*e.g.*, what purposes it was meant to serve, why it was proposed, whether as approved and ratified it enacted a proposition thoughtful people would find entirely too dogmatic), it is nonetheless this amendment that did come about.[13] If one finds it too strong or ridiculous (*e.g.*, if one thinks it should be recast in terms consistent with the moderation of the fourth, fifth, and eighth amendments, or if one thinks that nothing more than a speech fetishism could account for such an

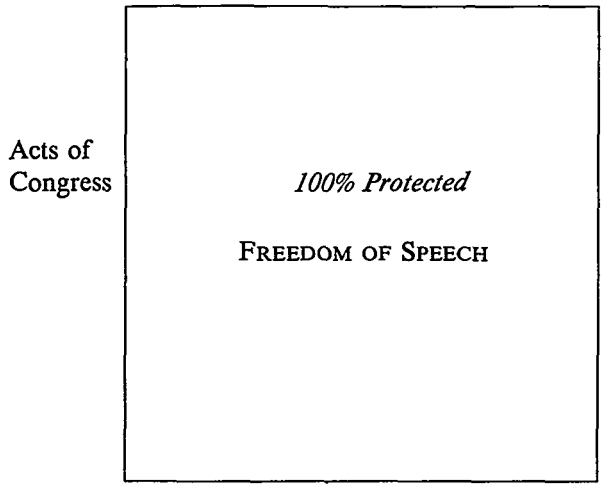
with it here. *See* Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts*, 40 L. & CONTEMP. PROB. 102 (1976).

12. The inquiry may not be ended if it is the kind of speech that the copyright clause enables Congress to confide an exclusive property right in others to control pursuant to its power under art. I, § 8, cl. 8, "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." For an opening discussion, see Nimmer, *Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970).

13. Note, for instance, how the first amendment differs from the second amendment in this respect. The first amendment does not link the protection it provides with any particular objective and may, accordingly, be deemed to operate without regard to anyone's view of how well the speech it protects may or may not serve such an objective. The second amendment expressly links the protection it provides with a stated objective ("A well regulated Militia, being necessary to the security of a free state") and might, therefore, be deemed to operate only insofar as the right it protects ("the right of the people to keep and bear arms") can be shown to be connected with that objective.

The different modes of the first and second amendments are not unique in this regard. The enumeration of powers vested in Congress, in art. I, § 8, reflects a similar difference. For instance, whatever the reasons contributing to the grant, the vesting of power in Congress to "regulate commerce among the several states" is textually not bounded by any statement of purpose or objective in respect to the exercise of that power. On the other hand, the vesting of power in Congress to secure "to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" has two textual qualifications. The first may be implied by the introductory phrase accompanying the grant of power, that this power is vested in Congress "to promote the Progress of Science and useful Arts." The second is express, in that the power is one to grant an "exclusive Right" for "limited Times," and not in perpetuity. Thus, while the Supreme Court might defer to Congress on both matters, it might also, consistent with the text, check Congress with respect to either matter. The Court might, for example, hold unconstitutional a vesting of exclusive patent or copyright that in the Court's view has no rational connection with promoting the progress of science or any useful art, or it might hold unconstitutional a vesting of exclusive patent or copyright that in the Court's view is unnecessarily long or excessive to fair protection. On the other hand, the court would regard the commerce power as plenary, as indeed it has in an overwhelming number of cases. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (congressionally approved discriminatory state tax statute sustained); Champion v. Ames, 188 U.S. 321 (1903) (act of Congress destroying, rather than enhancing, interstate commerce sustained); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

amendment), article V of the Constitution provides a mechanism for implementing the change that requisite majorities in Congress and in the states may prefer. In the meantime, we have the first amendment as it appears and, as it does appear it is in *contrast to*, rather than in similarity to, the moderation of other provisions in the Bill of Rights. A suitable graphic of the first amendment might therefore look like this:



There are no lines, no intersecting points, no shaded areas of less protected or of unprotected speech. The graphic, though singularly uninteresting, is also perfect and inviolate.

II
"THE" FREEDOM OF SPEECH

Despite the simplicity and logical force of a literal interpretation of the first amendment, it has never commanded a majority of the Supreme Court. Primarily it has failed against the pressures of irresistible counterexamples, rationalized by an uncertain early history. An "irresistible counterexample" is an instance that is plainly within the literal prohibition of the amendment, but that one is nonetheless unwilling to defend. The necessary consequence is to concede that there must be some degree of moderation contemplated by the first amendment despite first impressions to the contrary.

Possibly the best known counterexample is a variation of an instance used by Mr. Justice Holmes: a person knowingly and falsely shouting "Fire!" in a crowded theater for the perverse joy of anticipating the spectacle of others being trampled to death as the panicked

crowd surges toward the theater exit.[14] The counterexample could as well be: the mere oral statement of one person to another, offering to pay $5,000 for the murder of the offeror's spouse; a Congressman's bribe solicitation; an interstate manufacturer's deliberately false and misleading commercial advertisements; a witness committing perjury in the course of a trial; or a member of the public interrupting (by speaking) someone else already speaking at a city council meeting. The counterexample need not be more complicated than a simple, soft statement made to the president that he will be shot if he fails to veto a particular bill or fails to grant a certain pardon.

Some of these examples may be defended (*i.e.*, some persons will be willing to defend some of them as protected by the first amendment), and some may be distinguished (*i.e.*, it will be said that they do not involve speech or that, rather, they involve "speech plus").[15] Most of us, however, will recognize that this second response is a mere cavil. Lying on the witness stand is not less speech than lying about the weather (or, for that matter, than telling the truth about the weather), although it may also be perjury. The shout of "Fire!" is not less speech in the Holmes instance than the shout of "Fire!" from the mouth of an actor on the stage of the same theater, spoken as but a word in a play.[16] It is futile to argue that an appropriately tailored law that punishes any or all of these utterances does not abridge speech. It does, it is *meant* to, and one should not take recourse to verbal subterfuge, *e.g.*, that it is "speech-brigaded-with-action" or "conduct" alone that is curtailed by laws reaching these cases. These ersatz arguments prove too much; the same definitional artifices must necessarily operate to demolish the simple, compelling picture of a literal first amendment.

The objection of the irresistible counterexample thus upsets one's

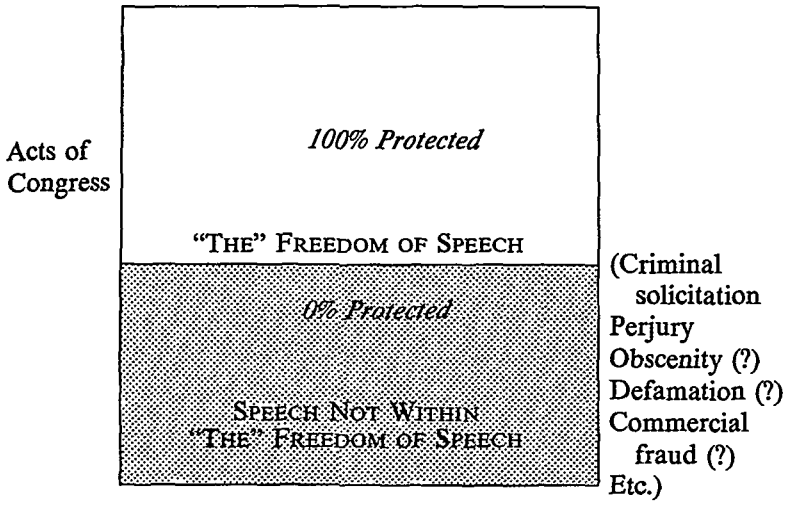
14. Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

15. In several cases, Justice Black wrote strongly and approvingly of a first amendment with no exceptions. *See, e.g.*, his opinions in New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring); Konigsberg v. State Bar, 366 U.S. 36, 56 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 140 (1959) (Black, J., dissenting). Even so, his own discernment of "speech plus" led him to vote to sustain many laws believed to be unconstitutional under the first amendment even by more conservative colleagues not sharing his "absolute" commitment to the first amendment. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576, 609 (1969) (Blaek, J., dissenting); Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting); Adderly v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131, 151 (1966) (Black, J., dissenting); Cox v. Louisiana, 379 U.S. 559 (1965); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949). *See also* Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428 (1967). Efforts at such distinctions have created difficulties for other "strong" first amendment writers as well. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80-89 (1970).

16. The point has not escaped theatrical parody. *See* T. STOPPARD, ROSENCRANTZ & GUILDENSTERN ARE DEAD, Act II, at 60 (1967).

confidence in an absolute freedom of speech, despite the singular language of the first amendment itself. And, on closer examination, even the language of the first amendment may provide *explicit* accommodation (*i.e.*, exclusion) of an indefinite number of these counterexamples. Specifically, it provides (merely) that: Congress shall make no law abridging *the* freedom of speech.

In complete fidelity to that language, a graphic depiction of the first amendment might look like this:



According to this view,[17] the first amendment is still quite different from several other amendments. When it applies, it applies absolutely—without balancing or weighing circumstances. Thus, it still stands in contrast to the fourth amendment ("unreasonable" searches and seizures), the fifth amendment ("due" process), or the eighth amendment ("cruel and unusual" punishments). Consistent with this understanding, however, is the necessity of determining whether speech abridged by a given act of Congress is not within "the" freedom of speech that Congress may make no law abridging. And here, admit-

17. This view is evidently shared by seemingly "strong" first amendment proponents such as Zechariah Chafee. *See* Z. CHAFEE, *supra* note 2, at 14, 145, 149-50 ("We can all agree that the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals. . . . [O]bscenity, profanity, and gross libels upon individuals . . . fall outside the protection of the free speech clauses as I have defined them . . . [as do criminal solicitation or even talking "scurrilously about the flag]."). *See also* Justice Holmes' opinion in Frohwerk v. United States, 249 U.S. 204, 206 (1919) ("We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder . . . would be an unconstitutional interference with speech."). Other (and much more dispiriting) early Holmes opinions are comprehensively reviewed in Rabban, *supra* note 2, at 533-40.

tedly, nothing in the language of the amendment itself is definitive or even helpful. Some external referent must be used to provide the distinction between that speech within "the" freedom of speech and that speech not within it.

It is noteworthy, however, that there is still no balancing or weighing of circumstances so far as the first amendment is concerned, whichever side of the line particular speech may lie. If it is within "the" freedom of speech, as we have already noted, it is *absolutely* protected. If it is not within "the" freedom of speech, the first amendment (by its own terms) does not affect it *at all*. Correspondingly, the first amendment imposes no special burden on Congress to justify laws abridging utterances not within "the" freedom of speech. The amendment is not directed to those utterances; it demands nothing of laws presuming to abridge such speech. Accordingly, it is inappropriate to require that any sort of "clear and present danger" be proved in respect to such speech for the very same reason that, on the other side of the line, it remains utterly irrelevant for government to try to prove some sort of "clear and present danger" to defend an abridgment.

The second graphic is thus fundamentally like the first graphic in respect to a common characteristic that continues to distinguish it from other portions of the Bill of Rights—the quality of absoluteness that makes balancing irrelevant. It differs from the first graphic only with respect to the unsettling uncertainty it introduces by compelling an unspecified external reference to settle the content of "the" freedom of speech. The proper reference is to . . . what? There is obviously no appendix attached to the first amendment that authoritatively lists the varieties of speech within and without "the" freedom of speech. And neither has anyone claimed discovery of such a lucid, uniform, and established consensus respecting "the" freedom of speech in 1789 such that, by clear convention, its content was (or is) universally obvious.[18]

To a significant extent, however, the second graphic is reflected in

18. For example, Professor Chafee concluded that the central minimum intention of the drafters and ratifiers of the first amendment was "to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America." Z. CHAFEE, *supra* note 2, at 21. The Supreme Court has accepted this conclusion. New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [There has been] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

The matter, however, did not always appear so clear. There is, for instance, a growth in the impressions of Justice Holmes on the same question who wrote in 1907:

> [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.

Patterson v. Colorado, 205 U.S. 454, 462 (1907).

the case law of the first amendment. The Supreme Court has treated speech deemed "obscene," for instance, as not within "the" freedom of speech absolutely protected by the first amendment. Rather, the case law neither absolutely protects obscene speech nor even requires any first amendment compelled justification for its criminalization.[19] And in general, the same holds true for ordinary criminal solicitation,[20] as it once did (although no longer does) for libel, "fighting words,"[21] and

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Then, by 1919, he wrote:

> It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado* . . . .

Schenck v. United States, 249 U.S. 47, 51-52 (1919).

Finally, much more emphatically in the same year, he stated:

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion.

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

Yet, in 1960, Professor Levy reluctantly concluded:

> If . . . a choice must be made between two propositions, first, that the clause [*i.e.*, the freedom of speech-and-press clause] substantially embodied the Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the known evidence points strongly in support of the former proposition. Contrary to Justice Holmes, history favors the notion.

L. LEVY, *supra* note 6, at 248 (1960).

19. Roth v. United States, 354 U.S 476, 483, 485 (1957) ("In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . We hold that obscenity is not within the area of constitutionally protected speech or press."). The principle was subsequently reaffirmed. Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."). The most recent effort to defend this distinction is Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpreting of Constitutional Language*, 67 GEO. L.J. 899, 905-06 (1979). *See also* T. EMERSON, *supra* note 15, at 401-12. A more general defense of "definitional balancing" (*i.e.*, judicially defining which kinds of speech are, and which are not, within the protection of the first amendment) is presented in Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

20. The subject is comprehensively reviewed in Greenawalt, *Speech and Crime*, 1980 AM. B. FOUNDATION RESEARCH J. 645.

21. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("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.") (emphasis added), *overruled in part*, New York Times Co. v. Sullivan, 376 U.S. 255, 268 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."). *See also* Gooding v. Wilson, 405 U.S. 518, 520 (1972) (reversing conviction of person scuffling with a police officer who had told him, "White son of a bitch, I'll kill you"; "you son of a bitch, I'll choke you to death"); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (modifying *Chaplinsky* to apply only when the willfully provocative language "rises far above public inconvenience, annoyance, or unrest," without regard to whether it "stirs people to anger"). For an impressive recent case, see Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir. 1978) (proposed Nazi march planned for neighborhood inhabited by many Jews personally victims of German concentration camps). *See also* Skokie v. National Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

"commercial speech."[22] Since none of these is within "the" freedom of speech that Congress may make no law abridging, Congress has been allowed to abridge these kinds of speech except insofar as *other* kinds of constitutional constraints lying outside the first amendment may affect the problem (*e.g.*, constraints of enumerated powers, due process, or fifth amendment standards of equal protection).

III
DETERMINING THE BOUNDARIES OF "THE" FREEDOM OF SPEECH

Even if the definitional boundary between "the" freedom of speech, which may not be abridged, and speech that may be abridged is the sole uncertainty respecting the first amendment, the picture provided by the second graphic may be somewhat incomplete. If we stipulate that Congress shall *make no law abridging* "the" freedom of speech, it remains important to secure absolute protection of whatever speech is protected. Advertently or otherwise, however, in making laws abridging unprotected speech, Congress may in fact make a law that abridges the protected freedom of speech. If it drafts a postal obscenity law too broadly, for instance, the law thus made by Congress may at once "abridge" speech that itself is within "the" freedom of speech, although no one in fact has yet been prosecuted. Or if interstate "criminal solicitation" is outlawed by Congress, the uncertainty of the offense may at once abridge (*i.e.*, curtail) solicitations within the freedom of speech said to be absolutely protected. If, in addition, the sanctions are extremely severe and/or the procedures attending enforcement of the act of Congress quite summary, then the foreseeable prohibited abridging effects are more obvious and more substantial. In brief, under the view we are now examining, when the first amendment applies, it applies absolutely. And the amendment does not merely provide that no one may be jailed or fined for utterances within "the" freedom of speech. Rather, it provides that Congress shall *make no law abridging the freedom of speech*. The amendment stands violated by the making of a law insofar as the making itself abridges "the" freedom of speech.

One way of enforcing the prohibition (to halt the immediate abridging effects from the mere making of such laws) would be to provide a citizen's right of immediate appeal to the courts, incidental to the

22. Valentine v. Chrestensen, 316 U.S. 52 (1942), *overruled in part*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760-62 (1976) ("Here, . . . [the] question whether there is a First Amendment exception for 'commercial speech' is squarely before us. . . . Our question, then, is whether this communication is wholly outside the protection of the First Amendment. . . . Our answer is that it is not.").

mere enactment by Congress of any law dealing with speech. The function of the appeal, of course, would be to determine at once whether the speech thus dealt with by Congress is in whole or in part within "the" freedom of speech protected by the first amendment, in which case the law ought at once to be judicially set aside. A less perfect procedure will require a longer delay before an act of Congress can come to the Court. By definition, during the delay that occurs after Congress has made the law and prior to its authoritative adjudication, the first amendment will stand violated. To the extent that other doctrines nonetheless operate to create such delays (*e.g.*, the case or controversy requirement of article III or ancillary requirements of standing), in fact the first amendment will not have been effective.[23] On the other hand, some speech not within "the" freedom of speech will go unpunished if the entire law, when finally adjudicated, is held wholly invalid because of the overbreadth or vagueness of only some of its provisions.[24] A modified graphic that takes both kinds of effects into account may therefore look like this:

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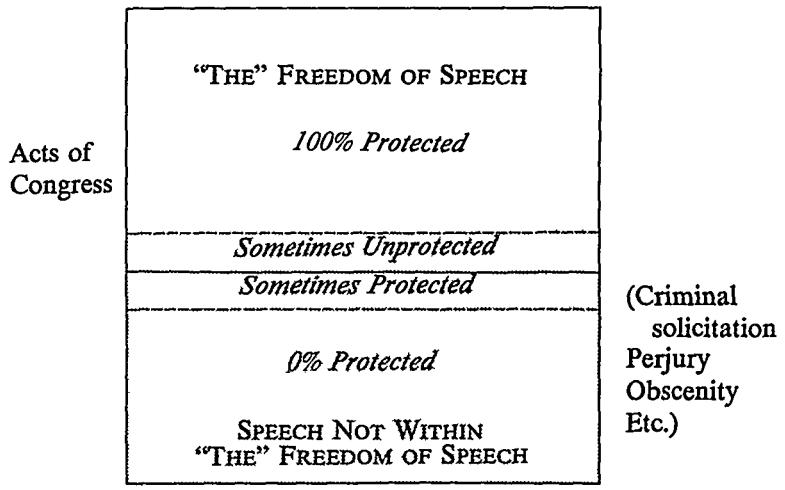
23. *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972) (allegations of present speech-inhibiting consequences of Army intelligence surveillance of dissident civilian groups held insufficient to secure ripeness or standing under article III); Boyle v. Landry, 401 U.S. 77 (1971) (allegations of chilling effect from enacted antispeech criminal statutes insufficient); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (denial of declaratory judgment sought by federal civil servants alleging they were intimidated from pursuing particular political activities by a federal statute prohibiting "any active part in political management or in political campaigns."). An exceptionally able review of this subject is provided in Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977).

24. In this respect, the Supreme Court does take the first amendment literally. It examines the law as made and holds it invalid if, as made, the law abridges speech, even though as applied the law does not contravene the first amendment because the speech involved is not protected. *See e.g.*, Gooding v. Wilson, 405 U.S. 518, 520 (1972) ("It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute."). *See also* Coates v. Cincinnati, 402 U.S. 611 (1971) (conviction reversed due to facial overbreadth of ordinance); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (conviction reversed because ordinance as drafted was unconstitutionally broad, although as subsequently construed by state supreme court it would presumably be valid as applied to the very facts of the case). The use of these doctrines thus tends to offset the inability of parties to secure a more timely adjudication of an act when first made, although at the corresponding cost of enabling some guilty (*i.e.*, otherwise punishable) parties to go free.

In one respect, the doctrines of "void-on-its-face" for first amendment overbreadth and/or vagueness are identical to the exclusionary rule disallowing evidence gained by means incousistent with fourth amendment protection against unreasonable searches and seizures. *See* Mapp v. Ohio, 367 U.S. 643 (1961). In the one case, the "criminal" goes free because the constable blundered. In the other, the criminal goes free because the legislature blundered. Still, there are grounds for distinguishing the bases of the two rules. Nothing in the text of the fourth amendment itself precludes the use of evidence, however wrongfully secured. But, since the text of the first amendment forbids Congress to make a law abridging protected speech, when the only law applicable abridges speech, it is logical for a court to hold that it cannot be invoked. For an able review of rationales addressed to these problems, see BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).



The third graphic presents a discouraging picture of a first amendment less perfect and less self-executing than the first depiction in two respects we have noted. First, consistent with its own language and consistent with a number of irresistible counterexamples, the third graphic, like the second graphic, admits that there are kinds of speech not within "the" freedom of speech. The more discouraging consequence of this observation, moreover, is that the amendment itself not only fails explicitly to list those excluded kinds of speech, but on its face, provides no clue as to what they are. Necessarily, then, courts are compelled to discover them at large with ample room to reach differing enumerations. This latitude subjects much of first amendment adjudication to fashions of judicial discretion.

Second, because the Constitution itself provides no mechanism to perfect an appeal from Congress, congressional abridgments of "the" protected freedom of speech may not be immediately challenged, which allows the literal command of the first amendment prohibiting the *making* of such laws to be defeated. The discretion of the judiciary in determining when a case may be brought and who may bring it also operates to commit the actual fate of "the" freedom of speech to judicial vagary. Much of "the" freedom of speech thus may be effectively curtailed by the intimidating presence of the outstanding act of Congress. Judicial sympathy with the unconstitutional objectives of the act also may conspire to defeat the command of the amendment by operation to impose severe restrictions on the testing of that law.

But in neither respect is the resulting situation much avoidable, insofar as it appears, substantially, to be an intrinsic problem of the first amendment exactly as it is drawn. To put the matter differently,

these shortcomings are not solely the result of a studied effort to limit the scope of the first amendment. Although they can be exacerbated by congressional or judicial hostility, they arise essentially because of the amendment's language, the inevitability of congressional error, and the limitations of judicial review.

On the bright side, however, the third graphic still has much to commend it. So long as an utterance is within "the" freedom of speech contemplated by the amendment and its prohibition is subject to judicial review, it remains fully and unequivocally protected. Passion, deference, and bias in the judiciary may make the line between "the" freedom of speech and unprotected speech discouragingly unstable, but at least they may not operate twice—once to define the boundary and still again to balance away even fully protected speech against some notion of reasonable or necessary abridgments.

IV

THE BOUNDED SCOPE OF "THE FREEDOM" OF SPEECH

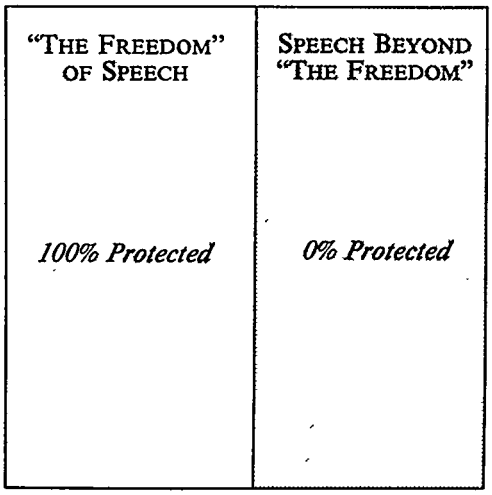
The logical force of the second and third graphics lies in their accommodation of irresistible counterexamples and almost literal consistency with the complete language of the first amendment. However, there is an alternative equally responsive to both concerns. Indeed, it may be superior to both the second and third graphics insofar as it eliminates the boundary between "the" freedom of speech (which alone is protected by the amendment) and other speech placed outside the amendment's protection. This alternative view thus forecloses any claim of judicial discretion to fix an unstable boundary and, to that extent, is superior.

This alternative falls back on the language of the first amendment to embrace the common-sense impression with which we started: *all* speech is protected from abridging laws made by Congress without exception. That the speech at issue is a fragment of perjured testimony does not make it any less speech nor remove it from the amendment. It stands initially on exactly the same footing as a political candidate's unexceptional campaign remarks, or an ordinary citizen's street corner complaints about national economic policy.

The instance of the irresistible counterexample is met, moreover, not by question-begging verbal artifices (*e.g.*, by calling it "conduct," "speech-brigaded-with-action," or "speech-acts"), but by a different and more general definition of "the freedom of speech" that Congress may make no law abridging. "The freedom of speech" that Congress may make no law abridging is a qualifying phrase, albeit not in the manner suggested in graphics two or three. Rather, "*the freedom* of speech" that Congress may not by law abridge is a reference to some

scope of freedom implied by the very term "the freedom" and, logically, therefore, a scope of freedom bounded. In short, it stands not as a synonym for complete freedom, but as a contrast with complete freedom. "The freedom" of speech that Congress may make no law abridging is therefore that degree, or that extent, of freedom of speech that Congress may make no law abridging.

This view of the amendment abandons judicial discretion to say what is and what is not the subject matter of speech protected by the amendment—although it necessarily asserts an alternative discretion to say what is the scope of "the freedom of speech" within the meaning of "the freedom" as distinct from unlimited or unqualified complete freedom. Again, and unavoidably, it compels even a conscientious and reluctant judiciary to utilize some reference external to the first amendment to determine that scope. Thus, it inevitably reintroduces instability into the first amendment, although in a different way. But the instability is another instance that cannot be helped, since the force of the irresistible counterexample will not go away and the very language of the first amendment contributes to the integrity of coping with it in this fashion (quite apart from the highly uncertain history associated with the amendment). A graphic depiction of the first amendment thus described might look like this:



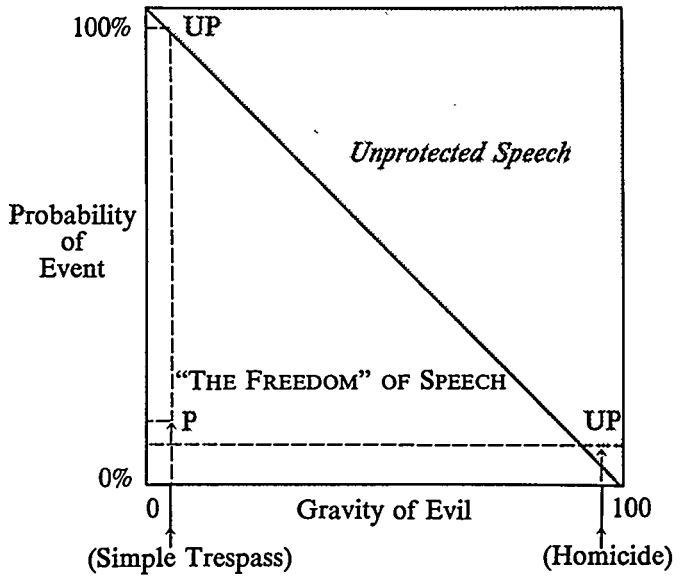
All Kinds of Speech

Note, then, these several features. First, *all* speech is encompassed by the amendment, whether it be talk about the weather, one's choice of elected representatives, or procuring heroin. Second, "the freedom" of speech refers to a latitude, rather than to a subject or a kind of speech. Third, the exclusive question in each case is merely whether

the utterances were within that latitude of freedom of speech comprising "the freedom" of speech that Congress may make no law abridging. And the irresistible counterexample is accounted for insofar as it may be expected to fall outside the latitude of "the freedom" of speech, albeit the referent for determining whether it does is not provided by the first amendment itself and necessarily, therefore, requires the judiciary to look elsewhere.

To a considerable extent, this view of the first amendment has not only characterized a substantial number of Supreme Court decisions, but also dominated the entire first amendment case law. Indeed, the main struggle has been among contending views respecting the appropriate test according to which speech is held to be either within "*the freedom*" of speech protected from abridging laws, or beyond that freedom and therefore unaffected by the first amendment. A leading example is the following formulation proposed by Judge Learned Hand and approved by a Supreme Court majority in 1951 in *Dennis v. United States*: "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."[25] Note the discrete elements of this formulation, and especially the *several* unavoidable determinations that it commits to the judiciary. Most obviously, it commits to the judiciary a textually unaided directive to rank-order all possible "evils." As well, of course, it implicitly directs a determination of what legislatures are constitutionally empowered to define as evil for purposes of criminalizing speech likely to produce that evil. The determination of what may be deemed evils and the rank-order of their gravities is imperative, because the requisite degree of probability sufficient to place particular speech beyond "the freedom" of speech forbidden to be abridged is itself dependent upon the evil's gravity. The greater evil, the less probable need be its occurrence to forbid speech generating some tendency that the evil might occur. The particular formulation looks like this:

25. 341 U.S. 494, 510 (1951).



The vertical axis is graduated from zero probability to absolute certainty. The horizontal axis is graduated from evils of zero gravity to those of absolute gravity. The diagonal line cutting across the graphic marks the boundary of that scope of speech within "the freedom" of speech that Congress may make no law abridging. All cases to the left of the line are protected. All cases to the right of the line are unprotected.

Two examples illustrate the apparent objectivity and completeness of the arrangement. The first example of simple trespass is drawn from an opinion by Mr. Justice Brandeis.[26] It supposes that a legislature has made it a crime (albeit a minor one) for persons to be on the private property of another knowing that the owner does not want them. It is assumed that the trespass law is itself valid (*i.e.*, that the legislature may protect private property in this fashion and deem officious intrusions an evil within the police power to prevent). It is assumed also that the trespass is fairly mild—trespassing on a privately owned vacant lot, for instance, as distinct from trespassing upon another's bedroom at night. The case likewise supposes the same legislature adopted a law to discourage the incident of trespass by making it a minor crime for any person to advocate, urge, counsel, incite, or teach to others the desirability of trespassing.

The law thus punishes speech. But it is not on that account either valid or invalid, for its validity requires that in each case we discount

26. Whitney v. California, 274 U.S. 357, 377-78 (1927) (concurring opinion).

the gravity of the evil (which is not the speech but rather an act of trespass) by its improbability. Since the evil (simple trespass) is a comparatively trivial evil, nothing less than virtual certainty that it would occur unless the speech were forbidden will suffice to justify proceeding against the speaker. So, if an anarchist urges a handful of half-interested citizens to trespass on a posted vacant lot in order to demonstrate their objection to a social order that sanctifies private property, the speaker cannot be convicted when it is plain no one did as the speaker urged, nor was likely to do so. All such trivial evil-inducing speech is within that latitude of "the freedom" of speech protected by the first amendment save that which actually engenders the evil to be avoided or, at least, very nearly engenders it. Most such cases are thus "P" (protected) cases on the graph. Very few will be "UP" (unprotected).

The converse is true for homicide. The killing of people being a plain instance of what legislatures may rightly consider a grave evil, speech foreseeably engendering a bare possibility of that consequence becomes at once punishable. Virtually all such speech save, perhaps, utterances one may make aloud in his bedroom with no one about is thus "UP" (unprotected). Only a harmless few are "P" (protected). Indeed, given the gravity of this evil, it is likely that in many situations even a *post hoc* showing of zero likelihood of its occurring will not save it under the first amendment. For example, the prohibition would reach a speaker who solicited another to murder his spouse when, unknown to the speaker, the solicitee was an undercover officer who acknowledged that at no time did he consider acting on the inducement.

One great (although little noted) advantage of the manner in which this particular graphic depiction addresses "the freedom" of speech is its applicability to a number of incidental issues. These are issues conventionally treated separately in the case law of the first amendment, such as those of "reasonable time, place, and manner,"[27] and issues of so-called "indirect effects."[28] In fact, the Learned Hand

27. *Compare* Edwards v. South Carolina, 372 U.S. 229 (1963) (breach of peace convictions reversed in circumstances of large-scale and somewhat boisterous racial demonstration on state house grounds), *with* Adderly v. Florida, 385 U.S. 39 (1966) (criminal trespass convictions affirmed in circumstances of smaller, less boisterous racial demonstration on jail grounds); *compare* Brown v. Louisiana, 383 U.S. 131 (1966) (breach of peace conviction reversed for silent, racial protest stand-in in public library unteroom), *with* Grayned v. Rockford, 408 U.S. 104, 116 (1972) (breach of peace conviction snstained for noisy demonstration within 100 feet of high school during school day) ("The nature of a place, 'the pattern of its normal activities, dictates the kinds of regulations of time, place, and manner that are reasonable.' "). The most recent decision in this heavily case-congested subject is Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981).

28. These are cases in which no speech is forbidden by law but where, for instance, being obliged to say something may under the circumstances indirectly inhibit one's ability or willingness to speak candidly. *See, e.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (duty to publish a reply by any candidate for office disparaged by the newspaper, held invalid); Lamont v.

formulation is quite capable of resolving virtually all free speech adjudications, as a few additional examples may make clear.

"Reasonable time, place, and manner" restrictions do not forbid particular utterances (*e.g.*, advocacy of trespass, incitement of arson or homicide, obscenity, or racial epithets) but merely restrict the time or the place of speech or regulate the manner of speaking.[29] For example, a disorderly conduct law may not apply to one who shouts his message or even amplifies his speech over loudspeakers in an auditorium,[30] but may apply to one who shouts his message on a street corner downtown or amplifies his speeeh over loudspeakers carried on a van through residential neighborhoods.[31] The Hand formulation we have been examining is adequate in responding to this problem: merely isolate the evil alleged to arise from the time, place, or manner of speaking; determine initially whether it rests within the legislative prerogative to deem it an evil; identify its relative gravity at the proper point somewhere along the horizontal axis; and finally, ascertain in the particular case the probability that the particular time, place, or manner of the speech will in fact bring about that evil. Having thus located the degree of probability at some point on the vertical axis, it is easy enough as a figurative exercise to draw the proper lines to see whether they intersect in the protected zone or the unprotected zone of the rectangle.

The same is true for controversies conventionally catalogued as instances of "indirect effects." Such a case arises when the regulation in question does not forbid or restrict speech, but *demands* that one speak under pain of punishment for failure to do so. But, paradoxically, it may still be obvious under the circumstances that "the freedom" of speech is threatened and a straightforward first amendment question presented.[32] An example is a law that requires a journalist to

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Postmaster Gen., 381 U.S. 301 (1965) (compelled indication of wanting to receive certain mail, as a condition of having such mail delivered, held invalid); Talley v. California, 362 U.S. 60 (1960) (prohibition of anonymous handbills, held invalid). Frequently, although there is no prohibition upon what may be said, it is the "indirect effect" of a "reasonable time, place, and manner" restriction that effects the speech or press abridgment. *See, e.g.*, Houchins v. KQED, 438 U.S. 1 (1978) (restriction on press access to jail of questionable condition upheld).

29. *See* cases at note 27 *supra*.

30. Terminiello v. Chicago, 337 U.S. 1 (1949) (breach of peace conviction of speaker reversed where demagogic auditorium harangue attracted angry crowd outside).

31. Feiner v. New York, 340 U.S. 315 (1951) (disorderly conduct conviction for refusing police officer's request to cease street corner harangue attracting hostile crowd at busy intersection affirmed); Kovacs v. Cooper, 336 U.S. 77 (1949) (misdemeanor conviction for "loud and raucous sounding truck" in business district upheld; dicta suggesting court would be favorable to similar restriction in residential areas).

32. *See* cases and discussion at note 28 *supra*. *See also* Baird v. State Bar, 401 U.S. 1 (1971) (ineligibility for bar from refusal to disclose membership in certain organization reversed as unduly discouraging citizens "from exercising rights protected by the Constitution"); Gibson v. Florida Legis. Investig. Comm., 372 U.S. 539 (1963) (six-month jail term and $1,200 fine for contempt in refusing to identify names of NAACP members to state legislative committee reversed).

disclose in a civil or criminal proceeding the name of some person and the exact statements that person may have spoken to the journalist. The occasion for summoning the journalist, moreover, may typically be the occasion of the journalist's own speech, such as a news article that he or she has published. Because the journalist would not have been summoned but for having spoken through the news article, the summons is a plain cost levied by law on his or her speech. Because the anticipation of having to answer under such circumstances may also operate as a disincentive to publish like stories in the future, the law curtails (*i.e.*, abridges) his or her continuing freedom to speak. And because the existence of this coercive process is a law inhibiting third parties from freely speaking to the journalist, it abridges their freedom of speech as well. Certainly, moreover, the journalist is an appropriate party to assert such contingent, third-party free speech objections.

The summoning of the journalist is thus a case arising under the first amendment, but that conclusion does not determine whether the journalist may nevertheless be summoned and made to respond.[33] The answer to that question is provided by Judge Hand's formulation: "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."[34] And, again, the same locational decisions, once made at appropriate points on the vertical and horizontal axes on our graphic, will unerringly permit us to draw the appropriate lines to see whether they intersect at a point that is protected or unprotected. How grave is the evil? In other words, what harm may ensue if the journalist is not made to answer? Is it that a murder may go unsolved, a libel plaintiff go uncompensated, a mere parking violation go undetected, or the source of atomic secrets given over to an enemy nation go undetermined? How probable is it that, without the journalist being made to answer questions (which question in particular?), the evil will occur? That question, of course, may be divided into logical lesser questions. What reasons are there for believing the journalist may know a great deal about the matter? What alternative means may be available (and at what cost) to secure that information without the journalist's assistance? Each question is necessary to determine whether summoning the journalist and making him answer is "necessary to avoid the danger." If the evil is very great (the atomic secrets case?), even a minuscule chance that the journalist's compelled testimony might help may be sufficient.

33. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972) (rejection of blanket refusal by journalist to appear before grand jury investigating possible crimes reported by the journalist in newspaper with information allegedly derived from confidential sources).

34. Dennis v. United States, 341 U.S. 494, 510 (1951).

But we have said enough, for the point is not to resolve every hypothetical. It is, rather, to demonstrate the compelling capacity of the Hand formulation to answer an immense number of first amendment disputes. It is, in brief, a very powerful formula for resolving "the freedom" of speech, and is used more frequently than is generally acknowledged because its approach figures in time, place, and manner cases and in indirect effects cases as well.

V

THE CLEAR AND PRESENT DANGER THRESHHOLD

There are nonetheless objectionable features to the Learned Hand formulation quite apart from the quintessential difficulty that it, too, compels even conscientious courts to look outside the first amendment to resolve such imponderables as what evils shall be deemed of more-or-less gravity than others in measuring the scope of "the freedom" of speech. For example, when the evil to be avoided is serious, then, as shown on the graphic, the test virtually dispenses with any probability requirement as a precondition of punishing or of preventing speech. Thus, a large (and uncertain) category of speech cases is treated not significantly differently than in the second graphic in which perjury, criminal solicitation, and obscenity were treated as kinds of speech *per se* not within "the" freedom of speech. While that apparent conformance is exceedingly helpful and comforting in one respect (*i.e.*, it reconciles those cases), in another respect it poses a severe problem.

According to that earlier graphic, "political" speech was not among the outcast kinds of speech. To the contrary, it was altogether within the 100% protected field. But the Hand approach precludes this easy (and protective?) definitional address to the first amendment. For the question according to the Hand test is not simply whether the speech in question involved politics or government in some generic, loose sense; rather, the focus is not on the speech at all, it is on the alleged evil to be avoided by outlawing the speech.

The *Dennis* case is itself an example of the resulting problem. Eugene Dennis was prosecuted under the Smith Act[35] for "conspiring" to "organize" a group (the American Communist Party) whose purposes included teaching the doctrine of the propriety of force and violence as a means to "overthrow" the government of the United States. Since the deaths of any number of persons ranks as a very grave evil, and since Congress has the right to seek to prevent that grave evil, suppression of speech under the formula is permitted by the first amendment on the most meager probability that, unless suppressed, the speech *might*

35. 18 U.S.C. § 2385 (1976).

bring about that evil.[36] For all practical purposes, then, the case is treated not much differently from one in which *X* offers *Y* $5,000 to murder his spouse. *X* may be punished although *Y* was never inclined to accept the offer and, indeed, was an undercover agent. The gravity of the evil (of spousal murder) dispenses with the need to show any probability that the danger can be headed off only by punishing the offer.

In the murder solicitation case, doubtless we are untroubled by the outcome. (But doubtless, too, because we entertain doubts as to whether (a) such speech was ever imagined to come within the first amendment and, that question aside, (b) why anyone in his right mind would want to have such speech protected by the first amendment.) In the *Dennis* case, however, many *are* troubled. It is not obvious that advocating overthrow of the government contributes *nothing* useful. Neither is it obvious that advocacy of violent overthrow, and not merely of voting to change the form of government, was never imaginably within the first amendment. Rather, so long as there is no discernible prospect of serious harm actually occurring, the freedom to state grievances passionately and angrily, protesting not merely the existing government but expressing a desperate feeling that nothing but violence exists to modify that government, may be important speech. It raises the unspoken questions. It makes visible a despair that needs to be known. It demands answers from others that more genteel suggestions and less threatening discourse may fail to stimulate.[37] It provokes to be sure. But the *Dennis* formulation ignores these central first amendment values because it permits such utterances to be treated like furtively made offers to hire a murder. It encourages and sustains their suppression virtually without evidence of any actual or imminent danger. The dissenting opinions in the *Dennis* case made effective use of this point,[38] and the history of prosecutions in the United States bears

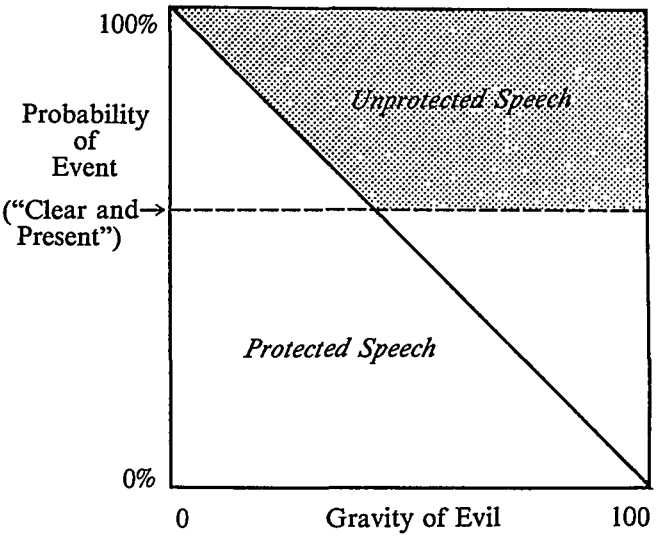
36. The point is vigorously emphasized in the Douglas dissent in *Dennis*, 341 U.S. at 582, 584 ("So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books . . . . Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions.").

37. The point was well made by Justice Douglas in *Terminiello*, 337 U.S. at 4: "[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 anger." That provocative, offensive, or gratuitous language, attention-getting by its willful offensiveness, may for that reason be highly protected as well, is elegantly defended in Justice Harlan's majority opinion in Cohen v. California, 403 U.S. 15 (1971). No doubt the classic exposition of this view in the case law is in Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 624 (1919). Exquisite reiterations appear in his dissenting opinion in Gitlow v. New York, 368 U.S. 652, 672 (1925), and the Brandeis concurring opinion in Whitney v. California, 274 U.S. 357, 375 (1927).

38. 341 U.S. at 579, 581. *See* note 36 *supra*. The shortcomings of *Dennis* in this regard are

out the complaint.[39]

A formulation to cope with this complaint would set a minimum probability below which the alleged danger feared from this kind of speech would *never* be sufficient to justify punishing the speech. It might, for instance, look like this:



Under this view, although violence itself may be passionately advocated, when the feared danger lacks clarity and imminence, such speech remains within the latitude of speech that defines "the freedom" of speech.[40] And this, of course, is the earlier, substantially more pro-

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further explored in J. ELY, *supra* note 9, at 107-08; M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 63-65 (1966); Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg—*and Beyond*, 1969 SUP. CT. REV. 41, 52-53. The *Dennis* formulation is nonetheless defended. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 32-35 (1971).

39. *See* cases and materials cited in notes 5-8 *supra*.

40. John Stuart Mill's powerful essay, *On Liberty*, contains an extraordinarily resolute anticipation of the clear and present danger test in the concrete example of "tyrannicide," a topic that in contemporary terms might embrace advocating the desirability of presidential assassination. Note the anticipation of later defenses as to why advocacy of illegal (and clearly dangerous) action is deemed defensible:

> If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered. It would, therefore, be irrelevant and out of place to examine here, whether the doctrine of Tyrannicide deserves that title. I shall content myself with saying that the subject has been at all times one of the open questions of morals; that the act of a private citizen in striking down a criminal, who, by raising himself above the law, has placed himself beyond the reach of legal punishment or control, has been accounted by whole nations, and by some of the best and wisest of men, not a crime, but an act of exalted virtue; and that, right or wrong, it is not of the nature of assassination, but of civil war. As such, *I hold that the instigation of it, in a specific case, may be a proper subject of punishment, but only if an overt act has followed, and at least a probable connection can be established between the act and the instigation.*

tective formula proposed by Mr. Justice Holmes in 1919, in *Schenck v. United States*: "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."[41] In a slightly different iteration, it is the formula reasserted quite unanimously by the Court in 1969, in *Brandenburg v. Ohio*: "[T]he 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."[42]

There is, moreover, an addition to this formulation that may help to alleviate a different kind of problem unresolved in the graphic depicting the Learned Hand formulation. Under that formulation, the "gravity" of an evil is traded off against its improbability in measuring the scope of "the freedom" of speech. Speech calculated (or likely) to

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J.S. MILL, *On Liberty*, in UTILITARIANISM, LIBERTY, & REPRESENTATIVE GOVERNMENT 78 n.1 (1910) (emphasis added).

41. 249 U.S. 47, 52 (1919) (emphasis added).

42. 395 U.S. 444, 447 (1969). The equivalent to the requirement that the danger must be "clear and present" is that the lawless action must be "imminent . . . and . . . likely." The *Brandenburg* formulation is additionally rigorous in its scienter requirement, *i.e.*, that the advocacy must be "directed to" produce the lawless action (the "evil"). The formulation thus protects the speaker to the extent that it forbids making the speaker an insurer of his audience; it holds him criminally respousible only insofar as he meant to produce the imminent lawless action likely-in-fact to be produced by his utterances. In this respect, then, it borrows the advantage of Learned Hand's original formulation in Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), and combines it with the advantage of the Holmes formulation. *See* Gunther, *supra* note 2, at 754-55. The intent requirement mitigates a problem in the clear and present danger test well illustrated in the following example by Justice Rutledge:

> It is axiomatic that a democratic state may not deny its citizens the right to criticize existing laws and to urge that they be changed. And yet, in order to succeed in an effort to legalize polygamy it is obviously necessary to convince a substantial number of people that such conduct is desirable. But conviction that the practice is desirable has a natural tendency to induce the practice itself. Thus, depending on where the circular reasoning is started, the advocacy of polygamy may either be unlawful as inducing a violation of law, or be constitutionally protected as essential to the proper functioning of the democratic process.

Musser v. Utah, 333 U.S. 95, 101-02 (1948) (dissenting opinion). In the original clear and present danger formulation, intent was an alternative standard. Thus, in his *Abrams* dissent, Justice Holmes had declared: "It is only the present danger of immediate evil *or* an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." Abrams v. United States, 250 U.S. 616, 628 (1919) (emphasis added). Currently, even when merely "private rights" such as reputation are concerned, *some* degree of scienter (at least negligence) must be established to provide recovery of money damages. The foundation case on this point is unquestionably New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The first amendment need for some kind of scienter requirement to avoid the self-censoring consequences of a strict liability standard, is self-evident.

For an excellent general review of the *Brandenburg* standard, see Comment, Brandenburg v. Ohio: *A Speech Test for All Seasons*, 43 U. CHI. L. REV. 151 (1975).

produce relatively trivial evils (*e.g.*, trespass on privately owned, vacant lots) would, as we saw, be punishable only in the rare circumstance where it induced such trespasses or, at least, was virtually certain to do so. Left undetermined by the formula, however, was the extent to which a legislature might add to the legal categories of things deemed evil and, by doing so, provide a sufficient predicate for outlawing or punishing additional forms of speech.

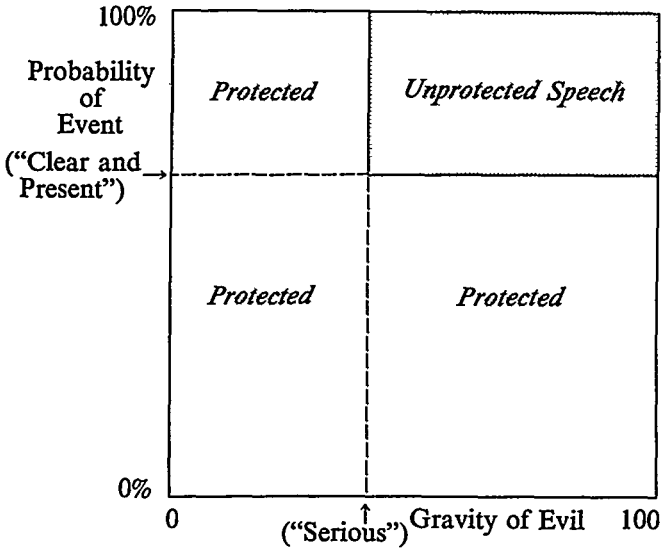
For instance, may not a legislature, acting responsibly within its police power, describe as an evil the infliction of pain and suffering on others? May it not specify mental anguish as one such kind of pain? May it not provide redress (criminal and/or civil) against those inflicting mental anguish on others? If so, then much speech not hitherto abridged may now be abridged: the speech newly forbidden must merely make the occurrence of the evil highly probable—or cause the evil to occur.[43] Frequently, the substantive evil to be avoided (mental anguish) will be not only a clear and present danger under the circumstances, to use Holmes' original formulation; rather it will be a fact. *Q.E.D.*, the speech bringing it about can be redressed both in civil and in criminal law.

Even the addition of "clear and present danger" to the formulation thus leaves the graphic dramatically incomplete. There remains virtually unlimited elbowroom for legislatures to do in two steps what they might not do in one. If a given kind of detested speech does not generate a constitutionally sufficient danger of one kind of evil to rationalize its abridgment, the legislature may simply describe as an evil something the detested kind of speech *is* likely to bring about. The speech may then, constitutionally, be abridged. For instance, the street corner distribution of Communist handbills may be too remote from any likelihood of inducing violence against the government to suppress on that account. But their distribution under the circumstances is nonetheless very likely to produce litter. Litter in the public streets is assuredly something a legislature may deem an evil. A flat prohibition of any

43. In Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), the Supreme Court upheld the right of public school students to wear black (protest) armbands on campus, despite the claim that the other children would regard the armbands as provocative and that the armbands might cause some degree of mental anguish to students whose fathers had died fighting in Vietnam. The Illinois Supreme Court adhered quite faithfully to that decision in refusing to sustain a municipal ban on armbands involved in the Nazi march, Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 373 N.E.2d 21 (1978), and was severely criticized for not sustaining the restriction on a "fighting words" and "avoidance of mental suffering" rationale. *See, e.g.*, Horowitz & Bramson, *Skokie, the ACLU and the Endurance of Democratic Theory*, L. & CONTEMP. PROB., Spring, 1979, at 328; Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DE PAUL L. REV. 259 (1979). For a related discussion, see Comment, *The Fighting Words Doctrine—Is there a Clear and Present Danger to the Standard?*, 84 DICK. L. REV. 75 (1979).

handbill distribution may, under the circumstances, be necessary to avoid the danger of that litter. The result would be no more handbills, Communist or otherwise.

The Holmes formulation, in its original terms, plainly embraces this outcome since it requires no determination of the gravity of the evil. It is not quite clear whether the Hand formulation does so. It leaves open the possibility that although a complete prohibition of handbills may be necessary to avoid the danger, the gravity of that evil still may be constitutionally insufficient to "justify such invasion of free speech." In brief, is regulation of some evils (*e.g.*, aesthetic blight, mental anguish) otherwise within the capacity of legislatures to avoid nonetheless prohibited when it curtails freedom of speech? In a later and stronger formulation of the Holmes' test, the answer was emphatic: yes. The first amendment forbids sanctions against speech except as necessary to avoid "serious" evils. The appropriate graphic looks like this:



Thus, Mr. Justice Brandeis suggested in 1927: "Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."[44] It followed that a certain degree of litter, unwelcome noise, mental perturbation, violated anonymity, and degraded reputation are withdrawn from the general police power to protect against that latitude of free speech contemplated by "the freedom" of speech.[45]

44. Whitney v. California, 274 U.S. 357, 377 (1927).

45. Thus, Justice Brandeis used the example of advocacy of a moral right or duty "to cross

At its zenith, the developed Holmes-Brandeis depiction may be the most sheltering perspective of the first amendment we have had. Its formulation is as readily applicable to "time, place, and manner" abridgments and to "indirect effects" abridgments as to direct abridgments. In this respect, it is as complete as the *Dennis* formulation. Although it demands the judiciary make a determination for which the first amendment itself supplies no textual assistance (namely, what external and immutable points of reference determine those things legislatures may declare to be serious evils and those they may not so describe),[46] it is no worse than *Dennis* in this respect. And, applied

unenclosed, unposted, waste land" as an example of an instance when such advocacy could *not* be punished—even when directed to the urging of such trespass, "even if there was imminent danger that advocacy would lead to a trespass," and even assuming that the trespassers, acting on the advocacy, could themselves be punished. *Id.* at 377-79 ("[T]he evil apprehended [must be] relatively serious. . . . There must be the probability of serious injury to the states. . . . [T]he evil apprehended [must be] so substantial as to justify the stringent restriction interposed by the legislature."). This rule was applied in Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) ("The right to use a public place for expressive activity may be restricted only for weighty reasons."); Cohen v. California, 403 U.S. 15 (1971) (reversing breach of peace conviction for exhibiting jacket with "Fuck the Draft" in a courthouse corridor before women and children, holding that the privacy interests of the unwilling and offended persons from distasteful vulgarities in such a place were insufficiently "substantial"); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[F]reedom 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 rises far above public inconvenience [or] annoyance . . . ."); Bridges v. California, 314 U.S. 252, 263 (1941) ("[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."); Schneider v. State, 308 U.S. 147, 162 (1939) (public interest in clean streets insufficient to justify antihandbilling ordinance). *See also* Time, Inc. v. Hill, 385 U.S. 374 (1967) (family who had declined to sell rights in their story involving intrusion by escaping felons into their home, who plainly wanted no attention, and who were placed in a false (but not unflattering) light by a *Life Magazine* story, recovered money damages under New York privacy statutes but were reversed in the Supreme Court). See the excellent discussion of these issues in Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326 (1966); Kalven, *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1.

There, is incidentally, a tendency to say that a statute directly abridging speech must serve a "*compelling* state interest," rather than that it must be necessary to avoid a "serious" evil. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 602 (1978). In certain respects, this different figure of speech seems to be just as good, retaining as it does the notion that something more than interests suitable to sustain the police power in general must clearly be forthcoming in first amendment cases. Because of the facile use of this phrase ("compelling state interest") in connection with other clauses in the Constitution (*e.g.*, the equal protection clause of the fourteenth amendment), however, we may come to regret the tendency to use it in connection with the free speech clause. Other clauses are not as emphatic as the first amendment, a difference that sets this clause apart. If (as seems desirable) one wants to retain a special stringency for the first amendment, it may be vital to avoid linguistic usages that tend to blur or merge its treatment with cases, doctrines, and standards drawn from less robust sections in the Constitution.

46. An excellent example is raised by the facts of Missouri v. National Org. for Women, Inc., 620 F.2d 1301 (1980), *cert. denied*, 101 U.S. 122 (1981). The NOW campaign for convention boycotts of states that had not ratified the equal rights amendment was found to be protected by the first amendment right to petition the government and was not an illegal restraint of trade or intentional infliction of economic harm. Since the NOW boycott was causing revenue losses by Missouri motel and restaurant owners as part of its efforts to influence the votes of state legislators,

with any degree of tough-minded consistency, it creates a considerably larger field of speech within "the freedom" of speech than the *Dennis*

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the issue was whether the government can forbid such economic "persuasion." It is factually correct to characterize such efforts as a "conspiracy" to induce a "secondary boycott" that has as its objective the coercion of third parties to express support for legislative changes they do not in fact desire. It is also factually correct to characterize such efforts as the peaceful communication of truthful information enabling each citizen to decide according to his own conscience whether, in these circumstances, he or she wishes to take the information into account and, indeed, in what way to take it into account.

The Supreme Court has suggested that even high-powered private propaganda, aimed at the body politic to persuade the public to influence Congress to adopt laws destructive to competition and of selfish economic advantage to the group mounting that campaign, is fully protected by the first amendment. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978). The Court has also made clear, however, that government itself may not exert duress on private parties to compel insincere expression of political support. Wooley v. Maynard, 430 U.S. 705 (1977); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *See also* Branti v. Finkel, 100 S. Ct. 1287 (1980); Elrod v. Burns, 427 U.S. 347 (1970). But none of these cases is especially instructive.

A bit closer to the point, the Court has sustained state laws that would restrict the dissemination of even truthful information when done for the purpose of stimulating an economic boycott to induce a business practice that would itself violate a valid law, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), but that issue is plainly not involved in this problem, since an insincere expression of enthusiasm for the equal rights amendment by Missouri businessmen would violate no law. In dicta, the Court has also suggested that circulating information to induce a boycott to force a change in the targeted business' own business practice may not be constitutionally prohibitable, despite the boycott's coercive effect. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment."). But this, too, is inconclusive.

Indeed, the critical question has been avoided by judicial hesitancy to find any existing law addressed squarely to the crucial issue. A fair test would suppose a statute framed in the following way:

> It shall be unlawful for any person or combination of persons to coerce or attempt to coerce any other person in respect to their vote in any election or the manner in which they choose to exercise their freedom to speak or not to speak on any political issue or candidate, including within this prohibition the truthful communication to third parties of information imparted for the purpose and with the effect of inducing a boycott of the person whose vote or expression of political belief is meant thereby to be coerced, except insofar as that person holds public office or is a candidate for public office.

Doubtless, speech may be used to coerce legislators to vote for propositions despite their views respecting the merits, under the duress of being boycotted. Whether, consistent with the first amendment, private citizens may also be coerced by economic pressure, however, has not yet been determined.

In Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553 (D. Del. 1980), a motion to dismiss a private (consumer) antitrust action was denied in an opinion disapproving the court of appeals' reasoning in the NOW case and holding that boycotts instituted to induce consumers to exert political pressure on government are neither exempt from the Sherman Act nor protected by the first amendment. *Id.* at 558 n.8. For a discussion (and reference to cases) related to this fascinating problem, see Hersbergen, *Picketing by Aggrieved Consumers—A Case Law Analysis*, 59 IOWA L. REV. 1097 (1974); Note, *NOW or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 COLUM. L. REV. 1317 (1980); Note, *Concerted Refusals to Deal by Non-Business Groups: A Critique of Missouri v. NOW*, 49 GEO. WASH. L. REV. 143 (1980); Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659 (1978); Note, *First Amendment Analysis of Peaceful Picketing*, 28 ME. L. REV. 203 (1976); Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131 (1980).

formulation, because it demands that a clear and present danger be shown in each case, rather than yielding to speculations of mere calamitous possibility as sufficient to sustain speech abridgments. Moreover, in the face of the irresistible counterexample we confronted at the outset of these graphics, we evidently can propose no test for "the freedom" of speech that is free of the criticism that, at bottom, administration even of this test remains subject to a discouraging amount of judicial subjectivism.

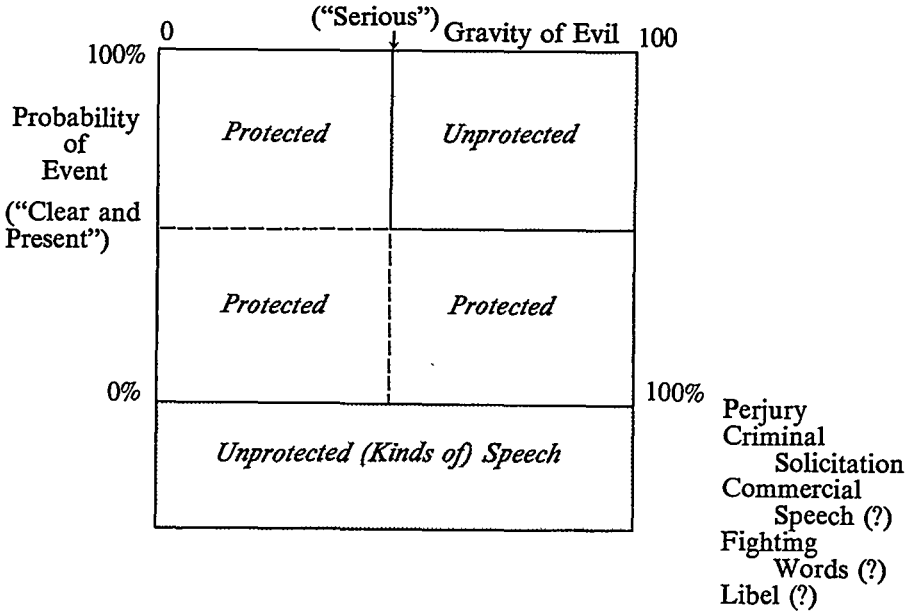
VI
RECOMBINANT GRAPHICS

The conundrum of the irresistible counterexample is a difficult one, as we have seen. In fact, it is so powerful a device that it mocks virtually every effort, including the Holmes-Brandeis graphic, to render the first amendment foolproof against the risks of discretionary interpretation. That graphic demands that in *every* case there be a showing of an actual, clear, and present danger that a serious evil imminently lurks in an utterance punishable by law. That must mean, however, that speech falling literally on deaf ears is never punishable. A villain sadistically, knowingly, and falsely shouting "Fire!" in a crowded theater escapes under cover of the first amendment if, perchance, the theater is crowded only by deaf persons reading subtitles on the screen. An offer of bribery to an honest official who testifies it never entered his mind to accept (and who, rather, at once reported the offer to the police) is not punishable, nor is the act of the lucky person who unwittingly solicits an undercover agent to murder his spouse, rather than a gun-for-hire. No successful prosecution for criminal attempt in any of these cases? That must logically follow unless we cope with the counterexample by pretending that these are not instances of speech at all but, rather, "conduct," "speech-brigaded-with-action," or some other mendacious technique, or unless we admit to the nonexclusivity of the developed Holmes formulation.

As it happens, the case law does in fact hedge[47]—even as Holmes tended to do.[48] By combining two graphics we have already set forth, moreover, we can see how the problem might be met straightforwardly:

47. *See* notes 19-22 and accompanying text *supra*.

48. *See* quotations and references at notes 17 & 42 *supra*.



The description is a composite of the second graphic (certain *kinds* of speech are wholly unprotected), plus the developed Holmes-Brandeis graphic. It handles our problem, it has an administrable logic, and it fits the syntax of the first amendment. The language of "the freedom" of speech that Congress may make no law abridging, in this view, may be a qualifying phrase that communicates two considerations rather than a single distinction. It may mean both a delimitation of *kinds* of speech entitled to that latitude of speech constituting "the freedom" of speech and a certain latitude or *scope* of speech as reported in the *Dennis* formulation or as in the Holmes-Brandeis formulation.[49] As a highly plausible matter, moreover, such an understanding of the first amendment is surely not unimaginable.

We have thus far had little to do with history in this Article,[50]

49. A very timely example is provided by the Supreme Court's most recent commercial speech case, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981). The plurality opinion bifurcates commercial speech, declaring that some is not protected at all by the first amendment and that the protected speech is subject to restriction if (but only if) three conditions are met:

> We [have] adopted a four-part test for determining the validity of government restrictions ou commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech *only* if that speech concerns lawful activity and is not misleading. A restriction on *otherwise protected* commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective.

Id. at 2892 (emphasis added).

50. *But see* notes 2, 5-8 *supra*. *See also* E. HUDON, FREEDOM OF SPEECH AND PRESS IN

partly to try to escape the obvious criticism that any such reference tends to invite. Once history is admitted to be the guide, or even a guide, to interpreting or understanding some clause in the Constitution, we are in despair for the Constitution itself. It was partly to get free of such disputes that all these other approaches were offered.[51] Reintroducing history even as a means to select among nonhistory graphics for depicting the first amendment seems a certain recipe for irony, if not for disaster.

But perhaps no such fullblooded reference to any detailed or dogmatic history of the first amendment is required here. Rather, perhaps all that is needed is the modest notion of historical reasonableness: that this last graphic we have set out is historically plausible. Good reasons can be offered to show why certain kinds of speech (*e.g.*, offers of bribery) might plainly have been in no one's mind as within "the freedom of speech" that Congress was forbidden to abridge,[52] and why it might be true also that speech well within "the freedom of speech" might sometimes, in some circumstances, also be subject to congressional regulation.[53]

Although this last graphic deals handily with the irresistible counterexample and might not be historically implausible, it is still assuredly subject to severe hazards of judicial discretion and judicial misapplication. Courts will catalogue some kinds of speech as never within the freedom of speech (*e.g.*, obscenity), thereby letting the outcome of cases turn on fatally different definitions of "obscene."[54] As to speech that survives that preliminary process of definitional winnowing, courts will also presume to catalogue degrees of evil or harms, at least to determine whether the harm sought to be avoided is too trivial to tolerate an abridgment of protected speech even when the speech produces that trivial evil. And, obviously, courts must superintend the

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AMERICA (1963); F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776 (1952); sources cited in Rabban, *supra* note 2, at 560 nn.236-41.

51. See note 18 *supra* for an example of the vigor and confidence with which mutually exclusive views have been put forth respecting the ratification of the first amendment as a repudiation, or as an absorption, of the common law of seditious libel.

52. *See* notes 17 & 19 *supra*.

53. This sort of dichotomy within the speech clause has been defended on purely prudential grounds. Thus, Professor Tribe suggests:

> In retrospect, the two-level theory may well have served a vital purpose in protecting first amendment doctrine from general erosion by walling out entirely those categories of expression that the Court was unready to protect but could not hold punishable as clear and present dangers without diluting the meaning of that phrase.

L. TRIBE, *supra* note 45, at 671.

54. The following observation is, alas, not a parody of the case law of the last 20 years, but a concise summary of it: "[T]he Court ha[s] moved from a view in which the obscene was unprotected *because* utterly worthless (*Roth*), to an approach in which the obscene was unprotected *if* utterly worthless (*Memoirs*), to a conclusion in which obscenity was unprotected even if *not* "utterly" without worth (*Miller*)." *Id.* at 661.

adequacy of legislative factfindings and of jury adjudicative fact determination to say whether a serious evil was sufficiently clear and imminent under the circumstances to sustain the punishment of (protected) speech.

VII
CORRELATING PROTECTION TO KINDS OF SPEECH

Despite their evident difficulties, the last several graphics do tend to sum up the principal contending schools of first amendment interpretation during the past several decades. At the same time, there has gradually developed still another view that does not, as did these graphics, make quite so much depend upon which side of one-or-more fixed lines a given kind of case falls. To be sure, this view also does not escape problems of judicial discretion. But by introducing finer gradations of a particular sort, it may appear both more moderate and less rigid in the measuring of protected speech. Interestingly, it complements the graphic we examined in the *Dennis* case.

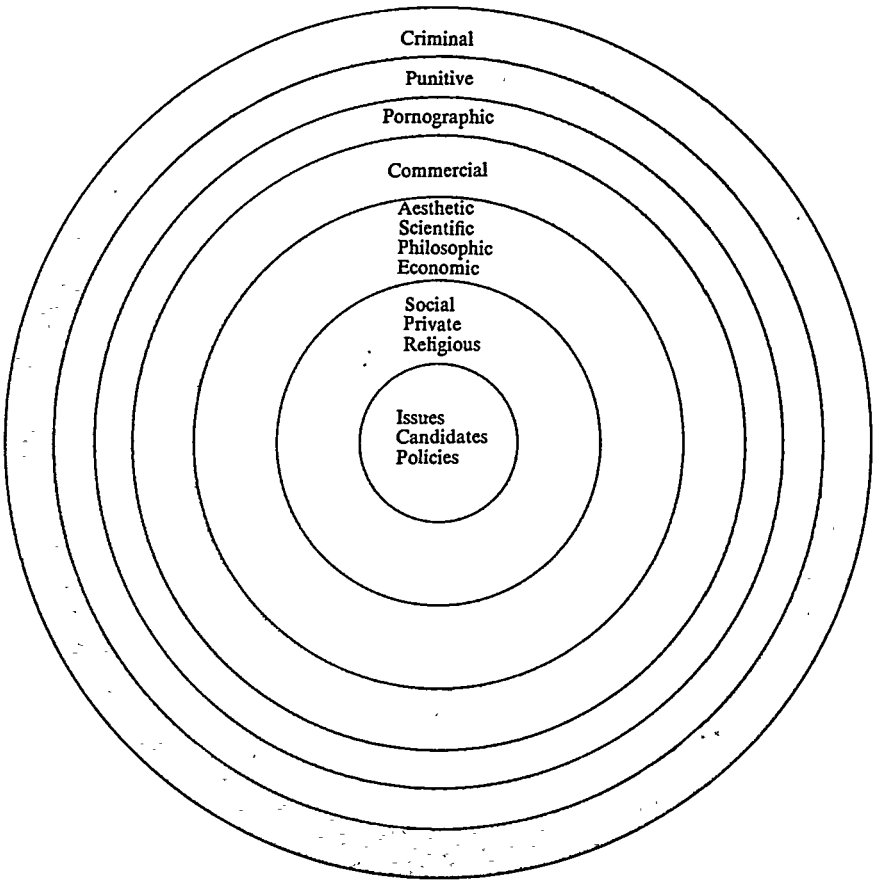
Dennis defined the principal task of the courts as graduating the kinds and degrees of evil to be balanced against the improbability of their occurrence resulting from particular speech to determine whether the degree of abridgment was unavoidable and therefore permissible. Correspondingly, an increasingly fashionable view holds that it is important to graduate the kind of speech to be invaded.[55] If it is political speech (*e.g.*, rhetoric praising or abusing candidates for office, or rhetoric exaggerating the alleged effects, provisions, merits, or demerits of existing laws), the speech is deemed of such central importance to the functions of the first amendment that even the high probability of a reprehensible evil (*e.g.*, that a far more honest and intelligent candidate will lose to a dishonest, manipulative, selfish demagogue) will not justify any recourse against the wretched slanders of the victor. If it is commercial speech, on the other hand, the evil of consumer deception may be avoided on a lesser probability of fraud than in the political speech case, although commercial speech will not, on that account alone, be treated as 100% unprotected,[56] as is obscenity or solicitation

55. Probably the leading example is the differentiated first amendment standards that must be met as a prerequisite for recovering damages for libel, *e.g.*, whether the plaintiff is a political official (or at least a "public figure") or a private figure uninvolved in government. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). For general discussions ranking speech protection according to its bearing upon government and social change, see A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUNDATION RESEARCH J. 521; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

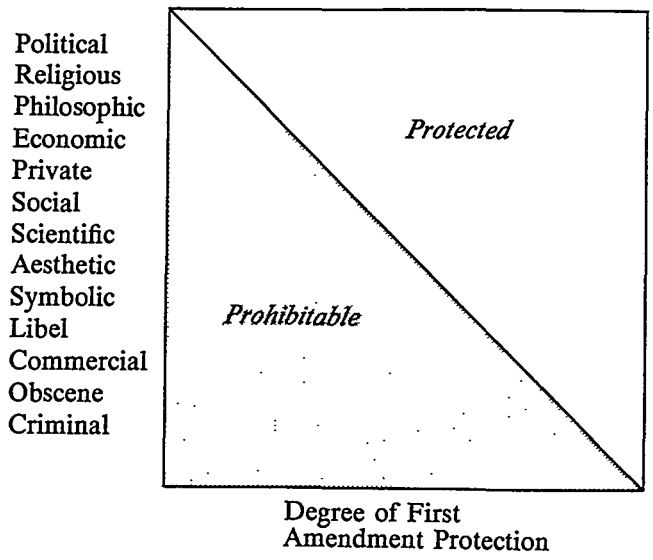
56. As previously noted (note 49 *supra*), the Court currently takes the view that some com-

of homicide. Graphics carrying these additional views of first amendment priority may look like either of the following:

Protection of the First Amendment By Subject



mercial speech is wholly unprotected while that which is protected nonetheless is subject to restriction on grounds less demanding than if noncommercial ideological communication were involved. Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2890 nn.11 & 12 (1981). For a recent helpful review and analysis on the subject, see Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979).



These are unquestionably useful and interesting variations,[57] and even our attempt to present them graphically is not quite adequate because it tends to understate their subtlety. The graphics imply a neat, concentric order of speech values, relating the proximity of speech categories to core values of political self-determination, with commensurate first amendment protection contingent upon the distance of an identifiable kind of speech from that first amendment center. Quite obviously, however, a particular speech may in fact cut across these artificial lines, readily embarrassing an attempt to say which kind of speech it was. The libelous may well be related to the political utterance, the aesthetic may be quite inseparable from the allegedly obscene. And in many instances, a criminal conviction based on a statute that aims carefully

57. The new feature emphasized in these last graphics may readily be incorporated into a composite statement that also integrates a great deal taken from several others. Such an integrated statement might read as follows: "The question in each case is whether the circumstances were sufficiently compelling to justify the degree of infringement resulting from the law, given the relationship of the speech abridged to the presuppositions of the first amendment." The last part of the formulation ("given the relationship of the speech abridged to the presuppositions of the first amendment") takes into account an implied, first amendment rank-ordering of speech. In turn, "whether the circumstances were sufficiently compelling to justify the degree of infringement resulting from the law" provides an accommodation for the Holmes-Brandeis standard. It encompasses cases where the speech is highly protected (and thus may not be abridged save on a showing of clear and present danger of a serious evil), while nonetheless accommodating a lesser standard when the speech is itself far removed from politics and policy (*e.g.*, misleading consumer solicitations redressable in private actions for fraud or restitution). Useful as well is the "degree of infringement resulting from the law," insofar as it may accommodate differences ranging from complete criminalization of certain utterances, through lesser incursions resulting from limited time, place, or manner controls, or limited civil liability to specifically damaged individuals.

only at the less protected aspect of a given speech (theoretically leaving unaffected the spcaker's prerogative to make his political or aesthetic point in a different way) should not be sustainable, because often we will know that the same point expressed differently would in fact not be the same point at all. In public places, for instance, many will be offended by the studied vulgarity of crude expressions made in exception to some important public policy. Still, neither more moderate nor more intellectual discourse may say the same thing, even half as well, as the bluntness of declaring: FUCK THE DRAFT.[58]

In effect, then, these graphics illuminate an additional perspective, but they do not reduce the margins of uncertainty, instability, external reference, and elbowroom for judicial administration in the regime of the first amendment. Perhaps, moreover, the point illustrated by these variations is that there is no sure formula for reading the first amendment in any way that (a) copes with the irresistible counterexample, (b) fits with its syntax, *and* (c) enjoys even a plausible congruence with history, to make it foolproof. Which among these graphics seems better (or merely less poor) than the rest is assuredly debatable.

VIII

STANDARDS FOR STATE LAWS VS. FEDERAL LAWS

All along, we have nominally been examining the first amendment alone. In the first graphic depiction that treated "All Acts of Congress," we were faithful to that task. In the very first irresistible counterexample of the deliberate false shout of "Fire!" in a crowded theater, however, we tacitly abandoned it. From that point on, the examples and counterexamples were indiscriminately state or federal. Indeed, most of them (*e.g.*, an antilitter ordinance) would in fact be typically state or local. Outside the District of Columbia or the territories of the United States, few would be federal. Congress should have little occasion, and very little power, to adopt run-of-the-mill police power laws. And it may be significant that, numerically, the most telling irresistible counterexamples are predominantly just run-of-the-mill police power counterexamples. Soliciting the murder of one's spouse, for instance, is what *state* governments are designed to discourage. It was not a concern for this kind of problem—or obscenity or libel—that caused a new constitutional convention to be called for Philadelphia in 1787 to amend the Articles of Confederation and to enlarge the enumerated powers of the Continental Congress.

Our graphics have thus been askew. They have worked exclusively from the text of the first amendment, yet they have propounded

58. *See* Cohen v. California, 403 U.S. 15 (1971).

analyses indiscriminately inclusive of laws not arising under the first amendment but of state and local origin. But the constitutional directive restricting *state* legislative power in respect to free speech is not on its face even remotely like the first amendment. Indeed, on its face, it acknowledges nothing special in respect to free speech at all. Rather, the protection of free speech is, at best, just textually subsumed in more general words: as an example of a "privilege or immunity" of national citizenship; as an example of "liberty"; as a subject of legal protection not to be denied "equal protection." In brief, we have indiscriminately mingled examples that typically will not all arise under the first amendment, but will more often arise, rather, under a later amendment, the fourteenth, which declares:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.[59]

Since 1925, it has been assumed nonetheless that the fourteenth amendment pulls up the first amendment's speech clause into its own provisions.[60] Indeed, it has been held not merely that freedom of speech is incorporated (or selectively absorbed) into the fourteenth amendment, but that the standard of judicial review for state or local laws affecting speech is coextensive with the standard applicable to acts of Congress. The result is that Supreme Court cases adjudicating state or local laws are fungible with those adjudicating acts of Congress; each is as valid a source of precedent for the other as it is valid for a case of its own kind.

There was, however, nothing inevitable in this development. The very different texts of the first and the fourteenth amendments do not demand this result. Mr. Justice Brandeis expressed serious misgivings in an early case presuming to wed the first and fourteenth amendments in this regard.[61] In an extremely provocative opinion, Mr. Justice Harlan did likewise, just thirty years later, suggesting a different lati-

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59. U.S. CONST. amend. XIV, § 1 (1868).

60. Gitlow v. New York, 268 U.S. 652, 666 (1925) (dictum). Stromberg v. California, 283 U.S. 359 (1931), and Fiske v. Kansas, 274 U.S. 380 (1927), reversed state convictions on free speech related grounds. Finally in 1931, the Supreme Court for the first time held a state statute invalid under the fourteenth amendment as violative of first amendment free speech standards. Near v. Minnesota, 283 U.S. 697 (1931), *reviewed in* F. FRIENDLY, MINNESOTA RAG (1981). Not until 1965 was an act of Congress actually held invalid under the free speech clause of the first amendment. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

61. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., dissenting) ("Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.").

tude of state, vis-a-vis national, authority over obscenity.[62]

Additionally, the equivocal history of the fourteenth amendment is quite compatible with these suggestions.[63] For instance, it may be eminently reasonable to hold (as it has been held) that free speech was meant to be more amply protected against the states than other kinds of "liberty" interests.[64] By itself, however, that proposition does not settle whether state laws affecting speech shall be deemed valid or invalid according to the standards applied to acts of Congress. The special protection of free speech from hostile state legislation has been agreed to by a number of distinguished justices who also believed that the latitude of state and of federal speech regulation is not identical. The states, they thought, in some cases should be bound less tightly than Congress.[65] Somewhat divergent regimes respecting freedom of speech were thus readily available under principles of federalism in the United States. A postscript may be appropriate to notice the possibilities of this path not taken.

It may be argued that by refusing to take this path, the Supreme Court has more successfully freed speech in the states by sheltering it against the passions that local assemblies might translate into laws abridging freedom of speech. By subjecting all local and state laws to the *same* rigor of review as the Court has established for acts of Congress, the courts may have made free speech in the states more robust

62. Roth v. United States, 354 U.S. 476, 503 (1957) (dissenting opinion).

63. The most recent reexamination of this endlessly discussed question, with suitable references to the principal previous writings and cases, is Curtis, *The Bill of Rights As a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980). As others have also noted, Mr. Curtis quite sensibly suggests that the privileges and immunities clause of the fourteenth amendment, as compared with the due process clause, is semantically less awkward and historically better linked as the principal clause in the association of substantive rights with protection from abridgments by state government.

64. As suggested by Chief Justice Stone in United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938):

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Coustitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

Or, as separately defined in the implications of an additional paragraph in the same footnote:

> It is not necessary to consider now whether legislation which restricts those political processes [such as freedom of speech and particularly of political criticism?] which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

65. As suggested by Justice Holmes in Gitlow v. New York, 268 U.S. 652, 672 (1925):

> The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.

than it might have been had differential standards been developed under the fourteenth amendment than under the first amendment.

But this kind of reasoning cuts both ways. It is equally arguable that had the Supreme Court *not* tied the review of acts of Congress to the standard applied to state and local laws, the Court might well have protected free speech more resolutely against Congress than it has.[66] In this light, the more serious problem is that at the moment of reviewing an act of Congress, the Court cannot help but be aware that it is simultaneously setting the standard applicable to the states as well. If the Court does not think it appropriate to bind the states very tightly, it must adjudicate acts of Congress with the same looseness it thinks appropriate for diverse state or local laws. It is simply a variation on the familiar homily that what is sauce for the goose is sauce for the gander. Because acts of Congress reach more widely than state or local laws, however, it may be a great misfortune to treat them in the same way.[67]

There are very few realistic, irresistible counterexamples that can be fielded to embarrass a near-absolute construction of the first amendment as applied to acts of Congress. In general, the amendment might therefore be applied to acts of Congress with the vigor of the developed Holmes-Brandeis formulation. In addition, the first amendment may operate collegially with the tenth amendment: it may be read to restrict the scope of enumerated powers vested in Congress even when, by itself, the tenth amendment would not be deemed to do so. This, in essence, is what Mr. Justice Harlan proposed in *Roth v. United States*.[68]

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66. Professor Tribe's observation, quoted at note 53 *supra*, respecting the prudential advantage of the Court's "two-level" address to freedom of speech might apply at least as well in this context.

67. Consider Justice Harlan's observation in Roth v. United States, 354 U.S. 476, 506 (1957) (dissenting opinion):

> The danger is perhaps not great if the people of one State, through their legislature, decide that [a given book] goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. . . . [T]hat the people of one State cannot read some [books] seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to be to be intolerable, and violative of both the letter and spirit of the First Amendment.

68. *Id.* at 506-07. This proposal encompasses two separate issues. First, it addresses the attenuation of the federal interest (*i.e.*, the commerce power or postal power may provide little foundation for legislating in respect to a variety of subjects of no national significance). Second, it assumes the states have the prerogative to experiment with a more robust regime of free speech when, indeed, the speech subject-matter that an act of Congress seeks to regulate is not of such demonstratable importance to submit it to a flat, uniform, national policy.

This is but the logical corollary of the proposition that the extent to which states may restrict speech should be at its weakest where states presume to address matters in no way peculiar to local or state concerns but rather address concerns common to the nation at large, *e.g.*, speech deemed threatening to national security. *See* Gilbert v. Minnesota, 254 U.S. 325, 334 (1920) (dissenting opinion); Z. CHAFEE, *supra* note 2, at 285-98. *See also* Pennsylvania v. Nelson, 350 U.S. 497

In that case, an act of Congress prohibited the mailing of "obscene" matter in the U.S. mails—an instrumentality over which Congress conventionally has an explicit, enumerated, plenary power. The invocation of explicit power given to Congress under article I did not, for Harlan, end the first amendment inquiry, however. He would have drawn from the first amendment a limiting principle qualifying the power of Congress in respect to the post office, much as the Court subsequently did in *National League of Cities v. Usery*.[69] There, the Court employed the tenth amendment to limit the reach of an act of Congress, otherwise valid under the commerce clause, when applied to state and local employees. Although the post office may be a federal instrumentality, the subject of obscenity control is not a federal one, at least not significantly. And the toleration of diverse regulation among states, under a somewhat more permissive reading of the fourteenth amendment,[70] would not present the same nationwide stultification of free speech as would a flat, uniform act of Congress.

In brief, the virtue of a differential first amendment/fourteenth amendment regime might be to read the first amendment for all that it is worth, confining Congress very tightly. Somewhat more (albeit not too much more) play may be left in applying the fourteenth amendment to the processes of state and of local government. If states or local communities presumed to enact speech-restricting laws *not* addressed to state or local concerns, but penalizing speech deemed contrary to the best national interests or even the best international interest of the United States, on the other hand, the Court would have a firm basis for applying a very severe version of the free speech clause through the fourteenth amendment, in the review of such legislation.[71] As a composite of the first and the fourteenth amendments respectively, a suitable graphic that would capture the federalism component of free speech analysis might look like this:[72]

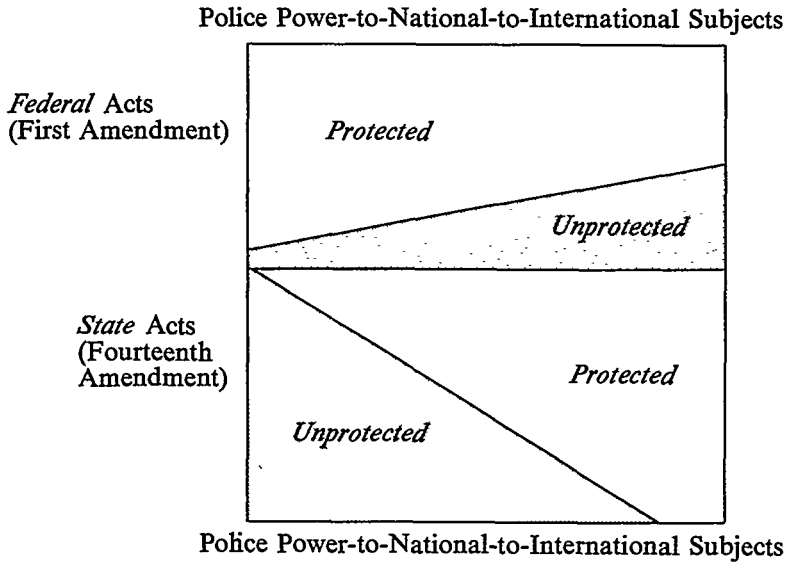
(1956) (state law presuming to protect United States from possible sedition deemed preempted); Hines v. Davidowitz, 312 U.S. 52 (1941) (state law imposing additional restrictions on aliens deemed preempted).

69. 426 U.S. 833 (1976). *Usery* was the first case in four decades holding unconstitutional an act of Congress under the interstate commerce power. The tenth amendment was found to limit the authority of the federal government to regulate wage rates of state and local government employees.

70. *See* the quotation from Mr. Justice Harlan at note 67 *supra*. Dissenting in *Roth*, Harlan nonetheless concurred in the companion case of Alberts v. California, 354 U.S. 476 (1957), upholding a state anti-obscenity statute and relying on the federalism distinction that states have greater latitude in respect to this subject than does the national government.

71. See discussion and cases at note 68 *supra* for the suggestion that the states' police powers are weakest in the face of free speech claims when the states presume to act on behalf of interests not particular to the state or local community, but on subjects of national concern or of international implication.

72. A suitable formulation of framing questions arising under the free speech clause, consis-



The graphic is essentially self-evident. The universe of speech abridgments is divided between two sources: national and state. The basis for division is the Constitution, which separately addresses restrictions on each source: the first amendment and the fourteenth amendment. The Constitution's protection of speech against acts of the national government is more substantial, since the first amendment is far more emphatic and explicit in protecting speech. The propriety of national sources of abridgment is most questionable when the speech subject to such abridgment has no unique or apparent national consequence and thus, drawing from implications of the tenth amendment, Congress' reliance upon enumerated powers may be treated skeptically. A fairly rugged application of the first amendment, however, is still to be expected even when acts of Congress deal with speech generating evils highly appropriate for congressional concern. Insofar as a uniform nationwide restriction must generally operate more suffocatingly than piecemeal local or diverse state patterns of restriction, moreover, the argument in favor of confining Congress tightly is pragmatically

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tent with our review of the subject up to that point, is suggested in note 57 *supra*. If one were to incorporate an appropriate federalism element as well, then the issue in each case might be framed as follows:

> The question in each case is whether the circumstances were sufficiently compelling to justify the degree of infringement resulting from the law, given the relationship of the speech abridged to the presuppositions of the first amendment, and the relationship of the law to the responsibilities of the level of government that has presumed to act.

It is, of course, the last phrase ("the relationship of the law to the responsibilities of the level of government that has presumed to act") that identifies the federalism component.

strengthened. A looser regime may be tolerated in respect to state legislation under the looser text (and history) of the fourteenth amendment. Overall, a flat and stale sameness of restrictions is less likely and the erosion of substantial diversity of expression across the nation is less to be feared. The propriety of state and local abridgments of speech loses its own justification, however, when subjects of national concern are at issue. Such abridgments, if made at all, must be made by Congress and not by a gratuitous gesture of state or local legislatures.

Finally, of course, the federalism graphic is not meant to be indifferent to our previous review. At both the state and national level, for instance, the imminence and seriousness of the evil to be avoided are still issues. And the subject matter of the speech may continue to make a considerable difference. Talk about local political issues, candidates, and policies may be as rigorously protected from state or local laws by the fourteenth amendment as talk about national political issues, candidates, and policies shall be protected against abridging acts of Congress by the first amendment. In these and other respects the federalism graphic does not exclude our earlier efforts. Rather, it complements them. Its addition may reflect a more mature treatment of the subject as a whole.

CONCLUSION

In a dictum that has often been derided, Mr. Justice Roberts once declared:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.[73]

It is not derision that ought to characterize such an effort, however, but sympathy and a good faith desire to make it work. Among the many clauses of the Constitution, moreover, the free speech clause appears to be one of those best suited for this view of the judicial duty. The clause is exceptional in its brevity, its clarity, and its use of concrete terms. Ostensibly, it can be taken literally. And constitutionally, it is worthy of being taken seriously.

Yet, as we have seen, laying the free speech clause beside a particular statute has left even highly conscientious judges doubtful as to whether "the latter squares with the former." We have now traced nearly a dozen quite different pictures of the free speech clause. None

73. United States v. Butler, 297 U.S. 1, 62 (1936).

was at odds with the language of the amendment. Few are foreclosed by any fair assessment of its history or its past judicial exposition. Each, moreover, is fraught with its own problems, and virtually all confide an unavoidable margin of textually uncertain discretion in our courts. What, then, may one conclude?

Toward the end of this review, some effort was made to fit together compatible ideas derived from several graphics by summarizing in words what courts should look to in determining whether "the latter squares with the former," *i.e.*, whether, as applied, a statute squares with the first or fourteenth amendment. Two composite statements were proposed in the footnotes—one summarizing a comprehensive first amendment standard and the other incorporating fourteenth amendment impacts as well.[74] In context, *i.e.*, given meaning and specificity by the discussion in this Article, each may offer some assistance. Even so, they are not the main point of this Article as they do not answer well as "substitutes" for the first amendment itself. Torn loose from the immediate context of this Article, each is too cumbersome a proposition to be worthy of comparison with the first amendment's own words, which are so much more powerful and so much less facile. Infusing our surrogate rephrasings with every advantage of rigor and clarification that may be wrung from all of our preceding discussion, moreover, provides no assurance that, if adopted by courts as the working equivalent of the first amendment, either would be treated in fact with due rigor. On their face, they most assuredly lessen the burden for those who are hostile to speech they have no interest in defending against other interests they transiently prefer.

In no sense, then, should such surrogate formulations be regarded as literal substitutes for the first amendment, *i.e.*, as replacements of the amendment's own terms. Indeed, one may rightly argue that it remains vital in every case to start with the free speech clause itself. The singular value of the clause is that it quite properly throws onto the adversary of speech the whole weight of what ought to be a very heavy burden indeed. The first amendment is difficult to improve upon in that regard; no different formulation readily occurs to us that is nearly so demanding and excellent. If, then, despite their obvious difficulties, the suggestions advanced in the footnotes[75] are useful, it is not as a displacement or substitute for the first amendment. Rather, it is as but a way of describing what one should minimally expect to encounter in the course of attempting to discharge the burden imposed by the first and fourteenth amendments.

Even when understood in this different, more subdued fashion, it

74. *See* notes 57 & 72 *supra*.
75. *Id.*

may fairly be said of our efforts that something has somehow been misreported or left out of account: that despite our best intention, too much has been given away. Surely that criticism may be true, although it is difficult to see the error in light of the problems we encountered along the full course of argument we have now pursued. Still, it is far better to think we have been unfair to the first amendment in giving too much away than to belittle that amendment, make light of it, or think we have gained an easy repose against its demands. That embarrassment should remain with us at the end. When the clause has been unraveled, its precedential applications examined, an equivocal early history acknowledged, and other plausibly helpful matters tried on for "fit," considerable doubt and uncertainty *should* remain. Two centuries removed from its original enunciation, we still see the free speech clause as "through a glass, darkly."[76]

76. 1 *Corinthians* 13:12.