FIRST AMENDMENT (PROF. BAMBERGER)
UC Berkeley, School of Law (Boalt Hall)

MW 11:20-12:35
Boalt Hall 132

First Week Assignment

The casebook for this course is Volokh, *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments*, 4th Edition.

Assignment 1 (Mon 1/9 & Wed 1/11)	SPEECH AND THE FIRST AMENDMENT I. Free Speech: A General Overview (1-2) II. Restrictions Based on Communicative Impact A. Exceptions from Protection 1. Incitement (3-43)

*** A PDF of these pages is attached so it is not necessary to buy the casebook in order to complete the first day's reading*

THE FIRST AMENDMENT AND RELATED STATUTES

PROBLEMS, CASES AND POLICY ARGUMENTS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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I. FREE SPEECH: A GENERAL OVERVIEW

> And now, perhaps, I ought to have done. But I know that some spirit of fire will feel that his main question has not been answered.
>
> He will ask, What is all this to my soul? ... What have you said to show that I can reach my own spiritual possibilities through such a door as this? How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life?
>
> Gentlemen, I admit at once that these questions are not futile, that they may prove unanswerable, that they have often seemed to me unanswerable. And yet I believe there is an answer. They are the same questions that meet you in any form of practical life. If a man has the soul of Sancho Panza, the world to him will be Sancho Panza's world; but if he has the soul of an idealist, he will make—I do not say find—his world ideal.
>
> Of course, the law is not the place for the artist or poet. The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.
>
> —Oliver Wendell Holmes, Jr., Lecture to Harvard University Undergraduates

The free speech materials in this textbook are organized in what I hope will be a helpful analytical structure; the Part numbers in the book mirror (except for Part I) the numbers below.

I. Start by asking whether the speech restriction is imposed by *the government*. If the restriction is not imposed by the government, we have no state action and the U.S. Constitution doesn't apply. Recall that the First Amendment starts by saying "*Congress* shall make no law ..." and the Fourteenth Amendment, which has been read as applying the First Amendment to the states, says "No *state* shall...." Private parties can retaliate based on people's speech through private means (*e.g.*, firing an employee, boycotting a speaker, and so on) without violating the First Amendment. Part VII.A discusses this, and notes an exception; Part VII.B then discusses some statutes and state constitutional provisions that may indeed protect speech from private retaliation.

II. Ask then whether the government is restricting speech *because of its communicative content*—because of the message the speech communicates to its listeners or the consequences that flow from the communication of this message.

A-G. If the government is indeed restricting speech because of the communicative impact of the speech, ask whether the speech falls within one

of the *exceptions to free speech protection,* such as the exceptions for incitement, false statements of fact, threats, and the like. If the speech does fall within such an exception, then the restriction is generally valid (unless it impermissibly discriminates based on the content of the speech, see Part II.J).

H. Ask also whether the restricted speech is *commercial advertising,* in which case the restriction is subject to some meaningful review, but a lower standard of review than for other speech.

I. If the restricted speech falls outside one of the exceptions, and doesn't constitute commercial advertising, ask whether the restriction nonetheless passes *strict scrutiny,* a very demanding test but still one that could theoretically be met if the court concludes that the restriction is necessary enough.

J. If the restricted speech falls within one of the exceptions, ask whether the speech restriction is nonetheless unconstitutionally content-discriminatory under *R.A.V. v. City of St. Paul* (for instance, if the restriction bans libels on certain subjects but not on others).

III. If the government is restricting speech—or expressive conduct—for reasons *unrelated to its communicative impact* (for instance, because the speech is too noisy, obstructs traffic, and the like), then apply the special (fairly relaxed) test applicable to such restrictions.

IV. Ask whether the restriction may interfere with speech through means other than direct speech suppression.

A. Consider whether the government is interfering with speech by interfering with the *expressive associations* that produce speech, especially by forcing them to admit members that they don't want to admit.

B. Consider whether the government is deterring speech or association by preventing *anonymity—i.e.*, by coercing the disclosure of speakers', members', or contributors' identities.

C. Consider whether the government is interfering with speech or association by *restricting the spending of money* on such activities.

D. Consider whether the government is *compelling speech*, which may interfere with the compelled person's or entity's other speech (or may be improper even without such interference).

E. Consider whether the government is *restricting the gathering of information*, and thus blocking people from further communicating such information.

V. Ask whether the government is acting *in a special capacity,* such as employer, landlord, public school educator, and the like, rather than acting as sovereign (exercising its powers to control everyone's conduct). If so, a lower level of scrutiny may be applicable, even if the speech would be protected against the government acting as sovereign.

VI. Consider whether the *prior restraint* doctrine is applicable.

This, of course, is only a very rough outline.

II. RESTRICTIONS BASED ON COMMUNICATIVE IMPACT

A. EXCEPTIONS FROM PROTECTION—INCITEMENT

They never told the [raging] crowd to [flay] a woman's hide,
They never marked a man for death—
what fault of theirs he died?—
They only said "intimidate," and talked and went away—
By God, the boys that did the work were braver men than they!
Their sin it was that fed the fire—
small blame to them that heard—
The boys get drunk on rhetoric, and madden at a word— ...
If words are words, or death is death, or powder sends the ball,
[They] spoke the words that sped the shot—
the curse be on [them] all.
—Rudyard Kipling, *"Cleared"*

1. CURRENT LAW

a. Summary

Rule #1: *Brandenburg v. Ohio* (1969) (p. 5)—"Advocacy of the use of force or of law violation" is *constitutionally unprotected incitement* when it is

1. "directed to inciting or producing"
2. "imminent lawless action"

— which probably means action within hours or at most several days, but certainly excludes advocacy of illegal action "at some indefinite future time," see *Hess v. Indiana,* 414 U.S. 105, 108 (1973),

3. "and is likely to incite or produce such action."

Rule #2: *United States v. Williams* (2008) (p. 7)—"a proposal to engage in illegal activity," especially when focused on "a particular piece" of contraband, as opposed to "the abstract advocacy of illegality," is *constitutionally unprotected solicitation.*

Possible exception: *Dennis v. United States* (1951) (p. 44) and *Yates v. United States* (1957) (p. 53), the Communist advocacy cases, are not consistent with the *Brandenburg* test. It's not clear quite what rule they set forth, but they did allow restrictions on advocacy of concrete action (rather than just of abstract doctrine) even when the action wasn't imminent. Most scholars think that these cases are no longer good law, and *Brandenburg* now governs, but you should keep in mind that *Dennis* and *Yates* have not been formally overruled.

Policy explanation for absence of protection:

1. What's the perceived harm that justifies the suppression of speech in these cases? The risk that people will be persuaded to violate the law, and the consequent damage that this violation will cause.

2. If the likely harm is really imminent (the mob will burn someone's house down), then the cost of allowing speech is just too great.

Policy explanation for narrowness of unprotected area:

1. Advocacy of illegal conduct may persuade the public that the law (and social attitudes) should be changed.
2. A lot of important political advocacy has some element of praise—and perhaps even urging—of illegal conduct.

Policy arguments one can draw from this:

1. Even evil, dangerous speech—speech that might persuade people to do some very bad things—is protected.
2. The government generally can't restrict speech just because the speech has a tendency, even a strong tendency, to change people's views in such a way that they'll commit crimes in the future.
3. Speech that's about to lead to imminent harm might be restrictable.

b. Problem: "Abortionists Are Murderers"

John Doe is speaking in a park and says, "Abortion is murder, which means abortionists are murderers. But because the law can't touch them, it's up to each of us to save the lives of the unborn by any means necessary." Mary Moe hears Doe and is persuaded that he's right; a month later she shoots a doctor who performs abortions. Doe is indicted for murder under a statute that says

> Any person who counsels the commission of a criminal act shall be liable to the same extent as the person who actually commits the act.

Can the prosecution of Doe pass muster under the Free Speech Clause? Imagine yourself as Doe's lawyer and make the best arguments you can for his position; then imagine yourself as the prosecutor, and make the best arguments you can for the prosecution.

c. Problem: "Cop Killer"

Ice-T's "Cop Killer" contains the following lines:

I got my black shirt on
I got my black gloves on
I got my ski mask on
This shit been too long.
I got my 12-gauge sawed off.
I got my headlights turned off.
I'm about to bust some shots off.
I'm about to dust some cops off.
(Chorus:) Cop killer, it's better you than me.
Cop killer, fuck police brutality.
Cop killer, I know your family's grievin'
Fuck'em!
Cop Killer, but tonight we get even.
I got my brain on hype.

Tonight'll be your night.
I got this long-assed knife,
and your neck looks just right.
My adrenaline's pumpin'.
I got my stereo bumpin'.
I'm about to kill me somethin'.
A pig stopped me for nuthin'!
(Chorus)
Die, die, die, pig, die!
Fuck the police! [repeated several times]

Radio station KXYZ broadcasts this song; state prosecutor Elaine Smith brings charges against the DJ for inciting people to commit murder, under a statute that implements the *Brandenburg v. Ohio* test. "Hundreds of thousands of people listen to KXYZ every day in their cars," says Ms. Smith: "Some are angry, some are on drugs, some are armed; any one of them might be pulled over by the police just as he's been listening to this song. If the song provokes even a few of them to pick a fight, and causes the death of even one police officer—or for that matter one angry kid—that's one death too many."

Can the DJ be convicted, despite the Free Speech Clause? Assume for purposes of this problem that radio broadcasts get as much constitutional protection as any other medium of communication.

Cf. *Lee Sheriff Wants Sedition Charge Over "Cop Killer,"* Orlando Sentinel Tribune, July 7, 1992, at D6 (a somewhat different claim than the one being argued here); *Davidson v. Time Warner, Inc.*, 1997 WL 405907 (S.D. Tex.) (involving a lawsuit brought by the family of a police officer who was murdered by someone who had been listening to Tupac Shakur's "Crooked Ass Nigga," a song with lyrics much like those in "Cop Killer").

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

Per curiam.

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

The record shows that ... appellant[] telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who

spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.

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

In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*.... But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[2] ... "[T]he mere abstract teaching ... of the

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[1] ... "How far is the nigger going to—yeah." "This is what we are going to do to the niggers." "A dirty nigger." "Send the Jews back to Israel." "Let's give them back to the dark garden." "Save America." "Let's go back to constitutional betterment." "Bury the niggers." "We intend to do our part." "Give us our state rights." "Freedom for the whites." "Nigger will have to fight for every inch he gets from now on."

[2] It was on the theory that the Smith Act embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis v. United States*. That this was the basis for *Dennis* was emphasized in *Yates v. United States*, in which the Court overturned convictions for advocacy of the forcible overthrow of the

(Footnote continued on the next page.)

moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act ... [baldly defines] the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action ....

Justice Douglas, concurring....

I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis v. United States* rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment....

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre. This is, however, a classic case where speech is brigaded with action. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution....

e. United States v. Williams, 553 U.S. 285 (2008)

[This case discusses solicitation of crime generally, but it also deals with child pornography, a subject that isn't covered until Part II.D. Here then is what you need to know about child pornography prosecutions, and the role of this case with relation to them:

1. Child pornography—a visual depiction (such as a photograph or a video) of an actual minor engaging in sexual conduct—is constitutionally unprotected. Possessing it and distributing it are serious crimes.

2. But prosecuting people for distributing child pornography can be difficult: The government must prove an actual child (not just a young-looking adult, or an entirely computer generated image) was involved.

Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

3. Because of this, the government sometimes prefers to prosecute people for offering to provide child pornography, or asking people to provide child pornography. Such prosecutions may take place even when no actual child pornography is involved, just as prosecutions for soliciting a murder can happen even if no murder ultimately takes place, and prosecutions for soliciting the sale of drugs can happen even if the drugs used in an undercover police sale are fake.

4. The question in this case is whether such offers or solicitations are constitutionally unprotected—and this is relevant to offers or solicitations related to a wide range of criminal conduct (such as murder, drug crimes, and more) beyond just child pornography.—ed.]

Justice Scalia delivered the opinion of the Court.

[A.] [18 U.S.C. § 2252A(a)(3)(B) provides for criminal punishment of 5 to 20 years in prison for] "Any person who ... knowingly ... advertises, promotes, presents, distributes, or solicits ... in interstate or foreign commerce ... any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material ... contains ... a visual depiction of an actual minor engaging in sexually explicit conduct ...." ...

[R]espondent Michael Williams, using a sexually explicit screen name, signed in to a public Internet chat room. A Secret Service agent had also signed in to the chat room under the moniker "Lisa n Miami." The agent noticed that Williams had posted a message that read: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." The agent struck up a conversation with Williams, leading to an electronic exchange of nonpornographic pictures of children. (The agent's picture was in fact a doctored photograph of an adult.) Soon thereafter, Williams messaged that he had photographs of men molesting his 4-year-old daughter.

Suspicious that "Lisa n Miami" was a law-enforcement agent, before proceeding further Williams demanded that the agent produce additional pictures. When he did not, Williams posted the following public message in the chat room: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL —SHE CANT." Appended to this declaration was a hyperlink that, when clicked, led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals. The Secret Service then obtained a search warrant for Williams's home, where agents seized two hard drives containing at least 22 images of real children engaged in sexually explicit conduct ....

Williams was charged with one count of pandering child pornography under § 2252A(a)(3)(B) and one count of possessing child pornography .... He pleaded guilty to both counts but reserved the right to challenge the constitutionality of the pandering conviction....

[B.] The statute's definition of the material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *New York v. Ferber* ...: ... material depicting actual children engaged in sexually explicit conduct....

[T]he statute's string of operative verbs—"advertises, promotes, presents, distributes, or solicits"—is reasonably read to have a transactional connotation. That is to say, the statute penalizes speech that accompanies or seeks to induce a transfer [whether or not commercial] of child pornography—via reproduction or physical delivery—from one person to another.... [Statutory construction discussion omitted.—ed.]

[C.] Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*... [O]ffers to give or receive what it is unlawful to possess have no social value and thus ... enjoy no First Amendment protection. Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities. Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection. It would be an odd constitutional principle that permitted the government to prohibit offers to sell illegal drugs, but not offers to give them away for free.

To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality. See *Brandenburg v. Ohio*. The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it. {[T]he term "promotes" does not refer to abstract advocacy, such as the statement "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography." It refers to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer.... There is no doubt that this prohibition falls well within constitutional bounds....}[a]

[Nor does] the fact that the statute could punish a "braggart, exaggerator, or outright liar" render[] it unconstitutional.... [W]e have held that the government can ban *both* fraudulent offers, see, *e.g., Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), *and* offers to provide illegal products[. There is no basis for] forbid[ding] the government from punishing *fraudulent offers to provide illegal products*.... [I]f anything, such statements are doubly excluded from the First Amendment....

Offers to deal in illegal products or otherwise engage in illegal activity [also] do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer.... As with ... [the crime of attempt,] ... impossibility of completing the crime [of pandering and solicitation] because the facts were not as the defendant believed is not a defense. "All courts are in agreement that what is usually referred to as 'factual impossibility' is no defense to a charge of attempt." (... [A]n example [is]

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[a] [This textbook uses curly braces—{ and }—to indicate moved text.—ed.]

"the intended sale of an illegal drug [that] actually involved a different substance.") ...

Justice Souter, with whom Justice Ginsburg joins, dissenting....

[I agree that] Congress may criminalize [solicitation of child pornography and offers to provide child pornography] unrelated to any extant image. I part ways from the Court, however, on the regulation of proposals made with regard to specific, existing representations [which are inaccurately promoted as if actual children were depicted].... [A] transaction in [representations in which no actual children are depicted] could not be prosecuted consistently with the First Amendment, and I believe that maintaining the First Amendment protection of expression we have previously held to cover fake child pornography requires a limit to the law's criminalization of pandering proposals.... [Further details, which are specific to child pornography, and thus say little about the constitutional status of offers and solicitations more broadly, omitted.—ed.]

First Amendment doctrine ... tolerates speech restriction not on mere general tendencies of expression, or the private understandings of speakers or listeners, but only after a critical assessment of practical consequences.... *Brandenburg v. Ohio* unmistakably insists that any limit on speech be grounded in a realistic, factual assessment of harm.

This is a far cry from the Act before us now, which rests criminal prosecution for proposing transactions in expressive material on nothing more than a speaker's statement about the material itself, a statement that may disclose no more than his own belief about the subjects represented or his desire to foster belief in another....

2. EVOLUTION: SPEECH THAT INTERFERES WITH A WAR EFFORT

a. Problem: Advocacy in Wartime

What, if anything, is wrong with the test applied in *Schenck, Debs, Abrams,* and *Gilbert*? Why not let speech be punished if it is likely to persuade others to violate the law, and is intended to do so (intention plus likelihood, but with no imminence requirement)? Why not let it be punished even if it is just likely to persuade others to violate the law, and the speaker knows that it was likely to do so (knowledge plus likelihood)?

b. Abraham Lincoln on the Arrest of Clement Vallandigham

In 1863, Clement Vallandigham—a prominent Democratic politician and former Congressman—was arrested for making an anti-Civil-War speech, and tried before a military court on the charge of:

> Publicly expressing, in violation of General Orders No. 38 ... sympathy for those in arms against the Government of the United States, and declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts to suppress an unlawful rebellion.

The specific allegation was that Vallandigham

did publicly address a large meeting of citizens, and did utter sentiments in words, or in effect, as follows, declaring the present war "a wicked, cruel, and unnecessary war;" "a war not being waged for the preservation of the Union;" "a war for the purpose of crushing out liberty and erecting a despotism;" "a war for the freedom of the blacks and the enslavement of the whites;" stating "that if the Administration had so wished, the war could have been honorably terminated months ago;" that "peace might have been honorably obtained by listening to the proposed intermediation of France;" ... charging "that the Government of the United States was about to appoint military marshals in every district, to restrain the people of their liberties, to deprive them of their rights and privileges;" characterizing General Orders No. 38 ... "as a base usurpation of arbitrary authority," inviting his hearers to resist the same, by saying, "the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better;" ...

All of which opinions and sentiments he well knew did aid, comfort, and encourage those in arms against the Government, and could but induce in his hearers a distrust of their own Government, sympathy for those in arms against it, and a disposition to resist the laws of the land.

Vallandigham was convicted, and sentenced to be imprisoned for the duration of the war. Three days later, Lincoln changed his punishment to banishment to the Confederacy.

Vallandigham's trial excited much opposition from those who believed that the prosecution violated the freedom of speech. Lincoln's response to these criticisms was as follows:

It is asserted ... that Mr. Vallandigham was, by a military commander, seized and tried "for no other reason than words addressed to a public meeting, in criticism of the course of the Administration, and in condemnation of the Military orders of the General." ... But the arrest, as I understand, was made for a very different reason. Mr. Vallandigham avows his hostility to the war on the part of the Union; and his arrest was made because he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the rebellion without an adequate military force to suppress it.... [H]e was damaging the army, upon the existence and vigor of which the life of the nation depends....

[My critics support] suppressing the rebellion by military force—by armies. Long experience has shown, that armies cannot be maintained unless desertions shall be punished by the severe penalty of death.... Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend into a public meeting, and there working upon his feelings till he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked administration of a contemptible government, too weak to arrest and punish him if he shall desert. I think that, in such a case, to silence the agitator and save the boy is not only constitutional, but withal a great mercy....

Nor am I able to appreciate the danger ... that the American people will by means of military arrests during the rebellion lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial

by jury, and habeas corpus throughout the indefinite peaceable future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.

[In a later letter:] I certainly do not know that Mr. V. has specifically, and by direct language, advised against enlistments, and in favor of desertion, and resistance to drafting, [but that was the effect of his words] .... This hindrance, of the military, including maiming and murder, is due to the course in which Mr. V. has been engaged, in a greater degree than to any other cause; and [to Vallandigham personally] in a greater degree than to any other one man....

See Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"* 300-18 (2000), the leading work on U.S. free speech up to the 1870s.

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

Justice Holmes delivered the opinion of the Court....

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

Schenck ... was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing.... [C]opies were proved to have been sent through the mails to drafted men....

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act.

The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all

citizens and residents of the United States to retain."

It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up "You must do your share to maintain, support and uphold the rights of the people of this country."

Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution.... [I]n many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911) [(upholding an injunction against newspaper articles that urged a labor boycott)].

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute ... punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime....

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

[Note: Eugene V. Debs was the Socialist Party leader and frequent Presidential candidate; he got 6% of the vote in 1912, and then 3% in 1920 while he was in prison for the conduct described in this case.—ed.]

Justice Holmes delivered the opinion of the Court.

This is an indictment under the Espionage Act of June 15, 1917, [alleging that Eugene V. Debs] obstructed and attempted to obstruct the recruiting and enlistment service of the United States.... The defendant was found guilty and was sentenced to ten years' imprisonment....

The main theme of the speech [that Debs gave, and that formed the basis for the indictment,] was Socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech.

The speaker began by saying that he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class—these being Wagenknecht, Baker and Ruthenberg, who had been convicted of aiding and abetting another in failing to register for the draft. He said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more, but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind.

Later he added further eulogies and said that he was proud of them. He then expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States.... [Later still], he took up the case of Kate Richards O'Hare, convicted of obstructing the enlistment service, praised her for her loyalty to socialism and otherwise, and said that she was convicted on false testimony, under a ruling that would seem incredible to him if he had not had some experience with a Federal Court....

The defendant spoke of other cases, and then, after dealing with Russia, said that the master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring war and never yet had a voice in declaring peace....

The defendant next mentioned Rose Pastor Stokes, convicted of attempting to cause insubordination and refusal of duty in the military forces of the United States and obstructing the recruiting service. He said that she went out to render her service to the cause in this day of crises, and they sent her to the penitentiary for ten years; that she had said no more than the speaker had said that afternoon; that if she was guilty so was he, and that he would not be cowardly enough to plead his innocence; but that her message that opened the eyes of the people must be suppressed, and so after a mock trial before a packed jury and a corporation tool on the bench, she was sent to the penitentiary for ten years.

There followed personal experiences and illustrations of the growth of socialism, a glorification of minorities, and a prophecy of the success of the

international socialist crusade, with the interjection that "you need to know that you are fit for something better than slavery and cannon fodder." The rest of the discourse had only the indirect though not necessarily ineffective bearing on the offences alleged that is to be found in the usual contrasts between capitalists and laboring men, sneers at the advice to cultivate war gardens, attribution to plutocrats of the high price of coal, &c., with the implication running through it all that the working men are not concerned in the war, and a final exhortation, "Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves."

The defendant addressed the jury himself, and while contending that his speech did not warrant the charges said, "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone." The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting.

If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief. [The defendant's First Amendment defense has been] disposed of in *Schenck v. United States* ....

There was introduced also an "Anti-War Proclamation and Program" adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance.... This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it "was instigated by the predatory capitalists in the United States." It alleged that the war of the United States against Germany could not "be justified even on the plea that it is a war in defence of American rights or American 'honor.'" It said "We brand the declaration of war by our Governments as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage."

Its first recommendation was, "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power." Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect.... We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind.... [T]he verdict ... must be sustained....

e. Abrams v. United States, 250 U.S. 616 (1919)

Justice Clarke delivered the opinion of the Court....

[D]efendants[] were convicted of conspiring to violate provisions of the Espionage Act .... [The third count of the indictment] charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish ... language "intended to incite, provoke and encourage resistance to the United States in said war." The charge in the fourth count was that the defendants conspired "when the United States was at war with the Imperial German Government, ... unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war." The offenses were charged in the language of the Act ....

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that 5,000 of them had been printed and distributed about the 22d day of August, 1918.... The circulars were distributed, some by throwing them from a window of a building ... in New York City.... The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in the record to support the judgment upon the verdict of guilty....

The first of the two articles attached to the indictment is conspicuously headed, "The Hypocrisy of the United States and her Allies." After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our government in general, saying: "His [the President's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity." It continues: "He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.'" Among the capitalistic nations Abrams testified the United States was included.

Growing more inflammatory as it proceeds, the circular culminates in:

> The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!
>
> Yes! friends, there is only one enemy of the workers of the world and that is CAPITALISM.

This is clearly an appeal to the "workers" of this country to arise and put down by force the government of the United States which they characterize as their "hypocritical," "cowardly" and "capitalistic" enemy....

The second of the articles was printed in the Yiddish language and in the translation is headed, "Workers—Wake Up." After referring to "his Majesty, Mr. Wilson, and the rest of the gang, dogs of all colors!" it continues:

> Workers, Russian emigrants, you who had the least belief in the honesty of [the United States] Government ... must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has

> fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war.

The purpose of this obviously was to persuade the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war. It goes on:

> With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.*

It will not do to say ... that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade [listeners] not to aid government loans and not to work in ammunition factories, where their work would produce "bullets, bayonets, cannon" and other munitions of war, the use of which would cause the "murder" of Germans and Russians.

Again, the spirit becomes more bitter as it proceeds to declare that—

> America and her Allies have betrayed (the Workers). Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.
>
> *Workers, our reply to the barbaric intervention has to be a general strike! An open challenge* only will let the Government know that not only the Russian Worker fights for freedom, but also *here in America lives the spirit of Revolution.*

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

This purpose is emphasized in the next paragraph, which reads: "Do not let the Government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight.*" ...

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning

which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. [More excerpts, all focusing on the goal of "creat[ing] so great a disturbance" that the allies couldn't intervene in Russia, omitted.—ed.]

These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness ... may have been resentment caused by our Government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe....

[T]he language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, ... and, the defendants ... plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war .... Thus it is clear not only that some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty ....

Justice Holmes [joined by Justice Brandeis], dissenting....

[A.] [T]he suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike ... do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the [Espionage Act]. But to make the conduct criminal that statute requires that it should be "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." It seems to me that no such intent is proved.

I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not.

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

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more

cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime....

[B.] [B]y the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. [*Schenck*; *Debs*.] The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.

Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable.

But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime.... It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendants' words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to pro-

duce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. Taking the clause in the statute that deals with that in connection with the other elaborate provisions of the act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war.

I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity[,] ... but which ... no one has a right even to consider in dealing with the charges before the Court.

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

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

That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country....

Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the

sweeping command, "Congress shall make no law ... abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here ....

f. Gilbert v. Minnesota, 254 U.S. 325 (1920)

Justice McKenna delivered the opinion of the Court.

A statute of Minnesota [states that] ... "It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States ..." [and] ... "It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States." ...

The indictment charged that Gilbert ... under the conditions prohibited by [the law], the United States being then and there at war with ... Germany, used the following language:

> We are going over to Europe to make the world safe for democracy, but I tell you we had better make America safe for democracy first. You say, what is the matter with our democracy? I tell you what is the matter with it: Have you had anything to say as to who should be President? Have you had anything to say as to who should be Governor of this state? Have you had anything to say as to whether we would go into this war?
>
> You know you have not. If this is such a good democracy, for Heaven's sake why should we not vote on conscription of men? We were stampeded into this war by newspaper rot [*sic*] to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours....

[The freedom of speech] is not absolute; it is subject to restriction and limitation.... In *Schaefer v. United States,* commenting on [*Schenck, Debs,* and *Abrams* and defendants' contentions in those cases] ..., it was said that the curious spectacle was presented of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. [We] reject[ed] the contention, ... and the contention in the case at bar is a repetition of it....

Gilbert's speech had the purpose [the law] denounce[s]. The nation was at war with Germany, armies were recruiting, and the speech was the discouragement of that—its purpose was necessarily the discouragement of that. It was not an advocacy of policies or a censure of actions that a citizen had the right to make.

The war was flagrant; it had been declared by the power constituted by the Constitution to declare it, and in the manner provided for by the Constitution. It was not declared in aggression, but in defense, in defense of our national honor, in vindication of the "most sacred rights of our Nation and our people."

This was known to Gilbert for he was informed in affairs and the operations of the Government, and every word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted. He could have had no purpose other than that of which he was charged. It would be a travesty on the constitutional privilege he invokes to assign him its protection.

Justice Holmes concurs in the result.

The Chief Justice ... dissents [on non-free-speech grounds]....

Justice Brandeis, dissenting. [Omitted.—ed.]

3. MORE EVOLUTION: SPEECH ADVOCATING CRIME

a. Problem: Murder Advocacy Exception

Consider the following proposed free speech exception: "Speech that advocates or defends the propriety of unlawful killing shall not be constitutionally protected." Identify the kinds of speech that you think this exception will definitely cover and the kinds that you think it might cover, depending on how it's interpreted.

Then, armed with this sense of the exception's scope, go through each of the genres of policy argument discussed below, and give an argument from that genre for or against this exception, and a matching counterargument.

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

Justice Sanford delivered the opinion of the Court.

[A.] Benjamin Gitlow was ... sentenced to imprisonment [under a statute that criminalized] "advocat[ing] ... the ... propriety of overthrowing ... organized government by force or violence, or by assassination ... of any of the executive officials of government, or by any unlawful means ..." ....

The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." ... The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing.

The defendant ... arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which ... were paid for by the defendant, as business manager of the paper.... There was no evidence of any effect resulting from the publication and circulation of the Manifesto....

[The Manifesto] condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; ... and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism," based on "the class struggle" and mobilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action" [giving as examples two then-recent political strikes—ed.], for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat," the system of Communist Socialism....

[B.] The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means.

What it prohibits is language advocating ... the overthrow of organized government by unlawful means. These words imply urging to action.... It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose....

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government....:

> The proletariat revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable.... The Communist International calls the proletariat of the world to the final struggle! ...

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order.... [T]he jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end ....

[C.] That a State in the exercise of its police power may punish those who abuse [the freedom of speech and of the press] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.... And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful

means. These imperil its own existence as a constitutional State.

Freedom of speech and press ... does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state.... "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

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

That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution.

And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.

It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency....

[D.] It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, ... it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific lan-

guage used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection....

[T]he general statement in the *Schenck* case, that 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" ... was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character....

Justice Holmes[, joined by Justice Brandeis,] dissenting....

If what I think the correct [*Schenck*] test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views.

It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.

The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question....

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

Justice Sanford delivered the opinion of the Court....

[Whitney was sentenced to imprisonment under the California Criminal Syndicalism Act, which made it a felony to organize or join "any ... group ... of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism," defined as:—ed.]

> any doctrine ... advocating ... the commission of crime, sabotage (... meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change....

[The defendant was involved in founding the Communist Labor Party.] In its "Platform and Program" the Party declared that it was in full harmony with "the revolutionary working class parties of all countries" and

adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was "to create a unified revolutionary working class movement in America," organizing the workers as a class, in a revolutionary class struggle to conquer the capitalist state, for the overthrow of capitalist rule, [and] the conquest of political power ...—advocated, as the most important means of capturing state power, the action of the masses, proceeding from the shops and factories, the use of the political machinery of the capitalist state being only secondary; the organization of the workers into "revolutionary industrial unions"; propaganda pointing out their revolutionary nature and possibilities; and great industrial battles showing the value of the strike as a political weapon—commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war—pledged support and co-operation to "the revolutionary industrial proletariat of America" in their struggles against the capitalist class—cited ... numerous strikes... as manifestations of the new tendency—and recommended that strikes of national importance be supported and given a political character, and that propagandists and organizers be mobilized "who can not only teach, but actually help to put in practice the principles of revolutionary industrial unionism and Communism." ...

[A] State in the exercise of its police power may punish those who abuse [the freedom of speech] by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means .... By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest.

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

Justice Brandeis [joined by Justice Holmes, concurring in the judgment]....

[A]lthough the rights of free speech and assembly are fundamental,

they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. See *Schenck v. United States*.

It is said to be the function of the legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the Legislature of California determined that question in the affirmative. Compare *Gitlow v. New York*.... But where a statute is valid only in case certain condition exist, the enactment of the statute cannot alone establish the facts which are essential to its validity....

This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. {Compare Thomas Jefferson: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." ... Also in [Jefferson's] Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."}

They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of pu-

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

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further.

But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.... In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for

averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive.

Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime .... It might, also, punish ... an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass.

The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly....

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case.... She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court of a jury....

[T]here was evidence on which the court or jury might have found that such danger existed.... [T]here was ... testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed....

d. Policy—Search for Truth/Marketplace of Ideas

Basic argument for protection: "This speech restriction will make it harder for people to discover the truth about _____, because _____."

Basic argument for restriction: "Allowing the speech will not advance the search for truth about _____—or will even interfere with this search for truth—because _____."

1 (for protection). "[W]hen men have realized that time has upset many fighting faiths, they may come to believe ... that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Abrams v. United States* (Holmes, J., dissenting).

"If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Gitlow v. New York* (Holmes, J., dissenting).

2a (for restriction). The market doesn't function well as to this speech.

"[T]he idea of the racial inferiority of nonwhites infects, skews, and disables the operation of a market .... It trumps good ideas that contend with it in the market. It is an epidemic that distorts the marketplace of ideas and renders it dysfunctional." Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus,* in *Words That Wound* 77 (1993).

"Many people grow up to regard [the fundamental institutions of our society] not as institutions to be tested but as standards against which the correctness of new policies and institutions can be tested. When that happens, as is common, processes of critical judgment are short-circuited." Charles E. Lindblom, *Politics and Markets* 207 (1977), *quoted in* Steven H. Shiffrin & Jesse H. Choper, *The First Amendment* 14 (3d ed. 2001).

"Especially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that 'free trade in ideas' is likely to generate truth?" Laurence Tribe, *American Constitutional Law* (2d ed. 1988).

"[Advertisers] spend some sixty billion dollars per year.... Those who would oppose the materialist message must combat forces that have a massive economic advantage. Any confidence that we will know what is truth by seeing what emerges from such combat is ill placed." Steven H. Shiffrin, *The First Amendment and Economic Regulation,* 78 Nw. U. L. Rev. 1212, 1281 (1983).

2b (for restriction). We know this speech is wrong and thus doesn't advance the search for truth; no need to risk people's being deluded by it.

"[There is] universal acceptance of the wrongness of the doctrine of racial supremacy. There is no nation left on this planet that submits as its national self-expression the view that Hitler was right.... At the universities, at the centers of knowledge of the international community, the doctrines of racial supremacy are again uniformly rejected. At the United Nations the same is true. We have fought wars and spilled blood to establish the universal acceptance of this principle. The universality of the principle, in a world bereft of agreement on many things, is a mark of collective human progress. The victim's perspective, one mindful of the lessons of history, thus accepts racist speech as sui generis and universally condemned." Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* in *Words That Wound* 37 (1993).

"What do you want to sell in the marketplace? What idea? The idea of murder?" Erna Gans, a concentration camp survivor arguing against protecting Nazi speech, *quoted in* Fred W. Friendly & Martha J.H. Elliot, *The Constitution: That Delicate Balance* 83 (1984) *and* Shiffrin & Choper.

"[T]here is no constitutional value in false statements of fact[, because they do not] materially advanc[e] society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch.*

"[T]he lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' ... are no essential part of any exposition of ideas, and are of ... slight social value as a step to truth." *Chaplinsky v. New Hampshire.*

See also other examples given under *Policy—No-Value or Low-Value Speech* (p. 91).

3a (for protection). Response to 2a: Even if the marketplace doesn't do a perfect job of rejecting the bad speech, it will do a better job than the government will.

"[P]erhaps the worst umpires or referees of truth are the oppressive arms of government which will always attempt to impose an orthodoxy consonant with the frequently corrupt interests of the bureaucracy.... We maintain a strong version of the First Amendment not because the truth or usefulness of an idea ... cannot in many areas be ascertained to some degree of certainty.... [but] because we lack the capacity to distinguish areas of certainty, more or less, from areas where truth as we now see it is elusive and changeable in the future." Nicholas Wolfson, *Free Speech and Hateful Words,* 60 U. Cin. L. Rev. 1 (1991).

"If acceptance of an idea in the competition of the market is not the 'best test' [then what] is the alternative? It can only be acceptance of an idea by some individual or group narrower than that of the public at large. Thus, the alternative to competition in the market must be some form of elitism. It seems hardly necessary to enlarge on the dangers of that path." Melville Nimmer, *Nimmer on Freedom of Speech* 1-12 (1984).

3b (for protection). Response to 2b: This speech *does* help the search for truth, specifically by _____, and the marketplace *is* working.

"[M]uch linguistic expression ... conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.... [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen v. California.*

"Even a false statement may be deemed to make a valuable contribution to the public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times v. Sullivan.*

"[H]owever true [an opinion] may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.... He who knows only his own side of the case, knows little of that.... [I]f he is ... unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion....

"This is illustrated in the experience of almost all ethical doctrines and religious creeds. They are all full of meaning and vitality to those who ori-

ginate them, and to the direct disciples of the originators ... so long as the struggle lasts to give the doctrine or creed an ascendency over other creeds.... But when it has come to be an hereditary creed, and to be received passively ... there is a progressive tendency to forget all of the belief except the formularies ... until it almost ceases to connect itself at all with the inner life of the human being." John Stuart Mill, *On Liberty* (1859).

"It is this right, the right to err politically, which keeps us strong as a Nation. For no number of laws against communism can have as much effect as the personal conviction which comes from having heard its arguments and rejected them, or from having once accepted its tenets and later recognized their worthlessness." *Barenblatt v. United States* (Black, J., dissenting).

4 (for restriction). Response to 3a: We let the legal system decide what is true in various contexts, such as _____ (for instance, libel law or false advertising law); sure, there's a risk of error there, but it's a risk of error we accept because _____. Why not let courts determine historical truth or scientific truth or moral truth, too, at least within certain contexts where there's a truly broad consensus?

"[N]o forum is perfect, but that is not a justification for leaving whole classes of defamed individuals without redress or a realistic opportunity to clear their names. We entrust to juries and the courts the responsibility of decisions affecting the life and liberty of persons. It is perverse indeed to say that these bodies are incompetent to inquire into the truth of a statement of fact in a defamation case." *Dun & Bradstreet v. Greenmoss Builders* (White, J., concurring in the judgment).

e. Policy—Self-Government

Basic argument for protection: "Because we're a self-governing democracy, we as voters need to hear *all* views to decide which way we should vote. The government, even if representative of the majority's will, may not shut off the flow of ideas that could lead the majority to change its mind. In particular, this speech may help the majority decide on _____."

Basic arguments for restriction: "This speech doesn't contribute to democracy and self-government (or actually interferes with them) because _____, and thus there's no free speech problem with restricting it."

"Sometimes, speech must be restricted, because there are other countervailing interests that must sometimes prevail. The question then is *who decides* when this happens. Legislatures and juries have their flaws, but courts have theirs, and we should let the democratically selected legislature (or jury) decide in this case because _____."

1 (for protection). "The Constitution supposes that [elected officials] .... may not discharge their trusts .... Hence, they are all made responsible to their constituents, at the returning periods of election [or through impeachment].... Whether it has, in any case, happened that the proceedings of ... those branches[] evinces such a violation of duty as to justify a contempt, a disrepute or hatred among the people, can only be determined by

a free examination thereof, and a free communication among the people thereon." *Report of the Virginia Legislature's Committee on the Sedition Act* (1799) (written by James Madison).

"Nor do I see how the people can exercise on rational grounds their elective franchise, if perfect freedom of discussion of public characters be not allowed." Cooper's address to the jury, in *United States v. Cooper*.

"[T]he will of the people is the foundation of all free government[;] ... to give effect to this will, free thought, free speech and a free press are absolutely indispensable.... [It is a] constitutional right of the people to discuss all measures of their Government, and to approve or disapprove, as to their best judgment seems right; ... they have a like right to propose and advocate that policy which, in their judgment, is best, and to argue and vote against whatever policy seems to them to violate the Constitution, to impair their liberties, or be detrimental to their welfare; [and] these ... are their rights in time of war as well as in times of peace, and of far more value and necessity in war than in peace, for in peace, liberty, security, and property are seldom endangered, in war, they are ever in peril." Resolution of the Ohio Democratic Convention, June 1863, condemning the Lincoln Administration's arrest of Clement Vallandigham, a pro-Southern ex-congressman, *discussed in* Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"* 324 (2000).

2a (for restriction). This speech undermines important institutions of self-government.

"The liberty of the press is, indeed, valuable—long may it preserve its lustre! ... [But] can it be tolerated in any civilized society that any should be permitted with impunity to tell falsehood to the people, with an express intention to deceive them, and lead them into discontent, if not into insurrection, which is so apt to follow? ... The necessity [of punishing libels against the government is even greater in a republic than in a monarchy], because in a republic more is dependent on the good opinion of the people for its support .... Take away from a republic the confidence of the people, and the whole fabric crumbles into dust." *Case of Fries,* 9 F. Cas. 826, 838-39 (C.C. D. Pa. 1799) (Iredell, J., riding circuit).

"If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government." *Cooper* (Chase, J., riding circuit).

"[In the campaign finance context,] both the first amendment and the law with which it is in potential conflict are designed to accomplish the same broad purpose, namely to advance the interests of democratic self-government." Martin Redish, *Campaign Spending Laws and the First Amendment,* 46 N.Y.U. L. Rev. 900, 907 (1971) (describing the argument but ultimately not endorsing it as a justification for restricting speech).

2b (for restriction). This speech promotes nondemocratic actions, rather than actions through the institutions of self-government.

"Speech advocating forcible overthrow of the government contemplates

a group less than a majority seizing control of the monopoly power of the state when it cannot gain its ends through speech and political activity. Speech advocating violent overthrow is thus not 'political speech' as that term must be defined by a Madisonian system of government ... because it is not aimed at a new definition of political truth by a legislative majority. Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech." Robert Bork, *Neutral Principles and Some First Amendment Problems,* 47 Ind. L.J. 1, 31 (1971).

2c (for restriction): This speech promotes a certain policy, namely _____ (such as racism, Communism, violent revolution, and so on) that may not properly be implemented by a self-governing society, because _____. It is therefore no substantial burden on self-government to restrict speech that would promote such unjust laws.

"Political discourse extends only to those ideas and values that can legitimately play a role in the determination of our political obligations.... Racist and sexist values cannot participate in the shaping of political obligations because the legal obligations they generate do not have morally binding force." Alon Harel, *Bigotry, Pornography, and the First Amendment,* 65 So. Cal. L. Rev. 1887, 1887 (1992).

2d (for restriction): This speech is irrelevant to self-government.

"[Because the key principle behind the freedom of speech is preserving democracy and self-government, the First Amendment protects] only ... speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest." Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 94 (1948).

"[The government should have more power to restrict speech in these circumstances:] First, the speech must be far afield from the central concern of the first amendment, which, broadly speaking, is effective popular control of public affairs.... Second, ... [s]peech that has purely noncognitive appeal will be entitled to less constitutional protection. Third, ... if the speaker is seeking to communicate a message, he will be treated more favorably than if he is not. Fourth, the various classes of low-value speech reflect judgments that in certain areas, government is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome harms." Cass R. Sunstein, *Pornography and the First Amendment,* 1986 Duke L.J. 589, 603-04.

2e (for restriction): This speech restriction is the product of the democratic process, and courts shouldn't set it aside. (It helps if the argument also explains why this restriction should be treated this way, while other restrictions are struck down.)

"It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech." *Dennis v.*

United States (Frankfurter, J., concurring).

"[T]emperate investigations of the nature and forms of government ... are proper for public information. [But when] malicious publications ... infect insidiously the public mind with a subtle poison, and produce the most mischievous and alarming consequences, by their tendency to anarchy, sedition, and civil war[, w]e cannot, consistently with our official duty, pronounce such conduct dispunishable....

"[I]t may not be easy in every instance, to draw the exact distinguishing line. To the jury, it peculiarly belongs to decide on the *intent* and *object* of the writing.... What is the meaning of the words 'being responsible for the abuse of that liberty' [in the Pennsylvania Constitution's free press clause], if the jury are interdicted from deciding on the case? Who else can constitutionally decide on it? ... The objection, that the determinations of juries may vary at different times, arising from their different political opinions, proves too much. The same matter may be objected against them, when party spirit runs high, in other criminal prosecutions." *Respublica v. Dennie,* 4 Yeates 267 (Pa. 1805) (paragraphs reordered).

"[T]he Court strikes down the [limit on independent expenditures], strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it. Those supporting the bill undeniably included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years.... I would take the word of those who know—that limiting independent expenditures is essential to prevent transparent and widespread evasion of the contribution limits." *Buckley v. Valeo* (White, J., concurring in part and dissenting in part).

3. Response to 2a-2d: Giving the government the power to decide what does or doesn't well serve self-government is bad, because _____.

"[A conclusion that] the Legislature is invested with authority to suppress whatever discussion or publication shall be deemed subversive of the public safety or peace ... would nullify the provisions of the Constitution, and place that discretionary power in legislators, which it was the manifest intent of the Constitution to withhold from them." *A Full Statement of the Reasons ... Why There Should Be No Penal Laws Enacted ... Respecting Abolitionists* ... 10 (1836), *cited in* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37,* 89 Nw. U. L. Rev. 785 (1995).

"[A]ll sorts of different people think that all sorts of different speech is valueless or downright pernicious [citing advertising, television, *Lady Chatterley's Lover*, pornography, and Communist advocacy]. If all it takes to remove First Amendment protection from a given kind of speech is that a sufficiently large number of people finds the speech less valuable than other kinds, we may as well not have a First Amendment at all. Such an understanding of the First Amendment—according to which speech not valued by a majority receives no protection—throws all speech regulation

questions back into the political arena." Judge Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech,* 71 Tex. L. Rev 747 (1993).

3c. Rejoinder to 2c: No ideas, no matter how reprehensible or contrary to past or present enlightened opinion, may be taken off the table in a democracy, because _____; for true self-government, the majority must be able to discuss and consider implementing any policies, no matter how reprehensible they may seem, because _____.

3d. Rejoinder to 2d: This speech (for instance, art, advertising, or even pornography) *does* influence, albeit indirectly, people's attitudes to life, society, and so on, by _____, and thus does contribute to self-government.

"[T]he First Amendment ... forbids Congress to abridge the freedom of a citizen's speech ... whenever [the speech is] utilized for the governing of the nation.... [But] other activities [besides overtly political speech] ... must [also] be included within the scope of the First Amendment.... [T]here are many forms of thought and expression [i.e., education, philosophy, science, literature, arts, and information and opinion bearing on public issues] within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." Alexander Meiklejohn, *The First Amendment Is an Absolute,* 1961 Sup. Ct. Rev. 245, 255-57.

3e. Rejoinder to 2e: Those who are in power will often base speech restrictions on their own selfish desires, and not actually on the interests or the will of the majority, because _____. Elected officials may restrict criticism of themselves in order to get reelected, or restrict criticism of others in order to get those others' help in getting reelected; unelected judges may restrict speech in order to minimize criticism of themselves, the government that they serve, or the class to which they belong.

f. Policy—Alternatives to Suppressing Speech

Argument: "The government may serve its interests effectively enough by doing _____ instead of by restricting speech."

Possible supplement: "True, this might not serve the interest as effectively as speech suppression would, but it would be effective enough, because _____; and the loss of effectiveness is worth it because _____."

1. "[T]he fitting remedy for evil counsels is good ones.... If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.... Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly ...." *Whitney v. California* (Brandeis, J., concurring in the judgment). [Note, though, that this focuses on counterspeech as the only *permissible* alternative, and doesn't explicitly say that it's likely to be an *effective* alternative, though it may be read as implicitly suggesting this.—ed.]

"The breadth of this ... restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA." *Reno v. ACLU.*

2. Response to 1: These alternatives might not be as effective as the speech restriction, because _____. Counterspeech, for instance, often can't undo most of the damage done by the speech itself. If someone urges a crowd to bomb draft offices or abortion clinics, and the next day someone else "counterspeaks," some of the initial listeners won't hear the second message, and others will hear it but will be more persuaded by the advocacy of violence than by the counterspeech urging peace. The goal of preventing violence is thus best served by preventing the bad speech in the first place.

"This apotheosis of Truth [emerging from speech and counterspeech], however, shows a blindness to the deadly fact that meantime the 'power of the thought' ... might 'get itself accepted in the competition of the market,' by munitions workers, so as to lose the war; in which case, the academic victory which Truth, 'the ultimate good,' might later secure in the market, would be too 'ultimate' to have any practical value for a defeated America." John H. Wigmore, *Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time,* 14 Ill. L. Rev. 539, 550-51 (1920).

"Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with 'proven and suspected *quid pro quo* arrangements.' But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And ... Congress was surely entitled to conclude that disclosure [requirements were] only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption ...." *Buckley v. Valeo.*

g. Policy—Relative Harm (or Not) of Speech / Utility (or Not) of Restriction

Basic argument: "The speech restricted here is/isn't really that dangerous, because _____, and thus the restriction is necessary/unnecessary."

1 (for harmlessness of speech): "[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." *Abrams v. United States* (Holmes, J., dissenting).

"[Communists] *as a political party* [in the U.S.] are of little consequence.... It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success.... To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible." *Dennis v. United States* (Douglas, J., dissenting).

"[F]orbidding criminal punishment for conduct such as Johnson's will

not endanger the special role played by our flag or the feelings it inspires.... [N]obody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. Indeed, Texas' argument that the burning of an American flag 'is an act having a high likelihood to cause a breach of the peace,' and its statute's implicit assumption that physical mistreatment of the flag will lead to 'serious offense,' tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned." *Texas v. Johnson.*

2. (for harm of speech): The speech really is dangerous, because _____.

"Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further." *Whitney v. California* (Brandeis, J., concurring in the judgment, though concluding that the speech should be protected despite the harm).

"If [this speaker can make this statement] then others could lawfully do so; and a thousand disaffected [speakers] were ready and waiting to do so. Though this circular was 'surreptitious,' the next ones need not be so. If such urgings were lawful, every munitions factory in the country could be stopped by them. The relative amount of harm that one criminal act can effect is no measure of its criminality, and no measure of the danger of its criminality." John H. Wigmore, *Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time,* 14 Ill. L. Rev. 539, 550 (1920); see also Robert Bork, *Neutral Principles and Some First Amendment Problems,* 47 Ind. L.J. 1, 33 (1971).

"[T]he validity of this regulation need not be judged solely by reference to the demonstration at hand. Absent the prohibition on sleeping, there would be other groups who would demand permission to deliver an asserted message by camping ... as does CCNV, and the denial of permits to still others would present difficult problems for the Park Service." *Clark v. CCNV.*

"Mr. Vallandigham avows his hostility to the War on the part of the Union; and his arrest was made because he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it.... Long experience has shown, that armies cannot be maintained unless desertions shall be punished by the severe penalty of death.... Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?" Lincoln on Vallandigham (p. 10).

"Pornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise neutral and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social construction of male and fe-

male.... Men treat women as who they see women as being. Pornography constructs who that is." Catherine MacKinnon, *Pornography, Civil Rights, and Speech,* 20 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1 (1985).

"The train [of gunpowder] is laid, and a single spark may blow our Constitution into atoms, and scatter its blackened fragments to the winds. Unless measures are adopted to meet and repel the efforts of the abolitionists [including suppressing their proabolition advocacy], this country is inevitably doomed to be theatre of a civil ... war." *The Slave Question,* U.S. Telegraph, June 22, 1834, at 843, *cited in* Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"* 136 (2000).

"'Words are bullets' and the communists know it and use them so. Whatever guarantees of sovereignty and freedom are enjoyed by this state and its citizens are certain to vanish if the United States of America is destroyed or taken over by the communists." "The danger of communist propaganda lies ... in the fact that it is a specific tool or weapon used by the communists for the express purpose of bringing about the forcible total destruction or subjugation of this state and nation and the total eradication of the philosophy of freedom upon which this state and nation were founded." Declaration of Public Policy in support of a ban on communist propaganda, La. Rev. Stat. tit. 14, § 390 (enacted 1962).

3. Response to 1: What's more, the true effects of this sort of speech are hard to forecast, because _____, and legislative forecasts should be given at least as much deference as, and perhaps more than, judicial ones, because _____.

"To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment. We do not expect courts to pronounce historic verdicts on bygone events. Even historians have conflicting views to this day on the origins and conduct of the French Revolution .... It is as absurd to be confident that we can measure the present clash of forces and their outcome as to ask us to read history still enveloped in clouds of controversy." *Dennis* (Frankfurter, J., concurring).

"[T]he principal dissent oversimplifies the problem faced in the campaign finance context.... [T]his is a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.' Nor can we expect that mechanical application of the tests associated with 'strict scrutiny'—the tests of 'compelling interests' and 'least restrictive means'—will properly resolve the difficult constitutional problem that campaign finance statutes pose." *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377 (2000) (Breyer, J., concurring).

"It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant

dogmatism ... for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved." *Beauharnais v. Illinois.*

4. Response to 1: And the restriction really will have a good chance of effectively combating this harm, because _____.

"It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power." *Beauharnais.*

5. Response to 2: The harms caused by the speech can be prevented pretty much as well without restricting the speech, specifically by _____. See *Policy—Alternatives to Suppressing Speech,* p. 36.

6. Response to 2: The speech must be protected despite the harm it causes, because the harm of suppressing it is greater, since _____.

h. Policy—Social Costs of Suppression and Benefits of Toleration

Basic argument: "This speech restriction will actually be counterproductive, because it would lead to the following bad results: _____" (fill in the blank with something other than interference with the search for truth, the marketplace of ideas, or self-government).

Alternative formulation: "Allowing this speech will actually be beneficial, because it would lead to the following good results: _____."

1. "Those who won our independence ... knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney v. California* (Brandeis, J., concurring in the judgment).

"[T]he flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength." *Texas v. Johnson.*

"[T]oleration [of offensive speech] can help [a society] establish or prove symbolically the arrival of [a capacity of security and control]. Often, the harder something is to do the more symbolic meaning the doing of it carries. For speech that attacks and challenges community values, the act of toleration serves both to define and reaffirm those values; the act of tolerance implies a contrary belief, and demonstrates a confidence and security in the correctness of the community norm. Through toleration, in short, we create the community, define the values of that community and affirm a commitment to and confidence in those values. To think of freedom of speech in this way evokes Seneca's prescription on mercy—its primary value, when implemented by the ruler, is in what it bespeaks of the party who is merciful, his confidence and security and self-restraint in the face of challenges to that authority." Lee Bollinger, *Free Speech and Intellectual Values,* 92 Yale L.J. 438 (1983).

"[A]s to those murmurs or secret discontents [the liberty of the press] may occasion, it is better they should get vent in words, that they may come to the knowledge of the magistrate before it be too late, in order to his providing a remedy against them." David Hume, *Of the Liberty of the Press* (1742).

"This normal give and take of democratic society provides dissenters with a range of peaceful methods to achieve their goals. Dissenters can vote for candidates who share their views, petition their legislatures to change laws, and distribute literature alerting other citizens of their concerns. In addition, they can conduct peaceful protests and engage in other forms of nonviolent civil disobedience. These outlets function as a 'safety valve,' providing a range of nonviolent options for dissent and thus reducing the likelihood that a group will choose violence to achieve its goals." Mark L. Rienzi, Note, *Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence,* 113 Harv. L. Rev. 1210 (2000).

2. Response to 1: These are highly contestable sociological claims, which may not even be true here, because _____, and are in any event unprovable, because _____. Legislatures will do at least as good a job as judges at sorting them out.

"The [safety valve] argument is paternalistic; it says we are denying you what you say you want, and we are doing it for your own good. The [speech restrictions], which you think will help you, will really make matters worse. If you knew this, you would join us in opposing them.... [But in fact,] the psychological evidence suggests that permitting one person to say or do hateful things to another increases, rather than decreases, the chance that he or she will do so again the future. Moreover, others may believe it is permissible to follow suit.... Pressure valves may be safer after letting off steam; human beings are not." Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation,* 82 Calif. L. Rev. 871 (1994).

3. Response to 1: If the speech does have all these socially beneficial

side effects, or if the restriction does have all these socially harmful side effects, the legislature will have ample incentive to leave the speech alone, because _____.

i. Policy—Constitutional Tension Method

Basic argument: "The Constitution itself embodies many values, besides just free speech. Because the speech here jeopardizes [name another constitutional value] by _____, the speech is not protected by the Constitution."

1. "[T]he curious spectacle [is] presented of the Constitution of the United States being invoked to justify [speech subversive of constitutional values], and by a strange perversion of its precepts [being] adduced against itself." *Gilbert v. Minnesota* (referring to the war power clauses).

"[T]he plain fact [is] that the interest in speech, profoundly important as it is, is no more conclusive ... than other attributes of democracy." *Dennis v. United States* (Frankfurter, J., concurring).

"[Tolerating racist speech is] a reading of the first amendment that requires sacrificing rights guaranteed under the equal protection clause." Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus,* in *Words That Wound* 81 (1993).

"Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. In the cases before us, the claims on behalf of freedom of speech and of the press [to publish statements aimed at influencing pending cases] encounter claims on behalf of liberties no less precious [i.e., the administration of justice by an impartial judiciary]." *Bridges v. California,* 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting).

See also *Terminiello v. City of Chicago,* 337 U.S. 1 (1949) (Jackson, J., dissenting) (referring to the constitutional interest in preserving democracy as a reason for restricting speech that might unintentionally lead to mob violence); *Kunz v. New York,* 340 U.S. 290 (1951) (Jackson, J., dissenting) (referring to free exercise of religion as a reason to restrict speech that harshly condemns religion).

2. Response to 1: The freedom of speech is not actually in tension with any of these values, because _____.

"One [can] read the various constitutional provisions [not] as setting up abstract values, values which may be in tension with one another[,] ... [but] as simply creating particular government powers or disabilities.... [And speech] can't literally take away government power, or an immunity from government action. Antiwar advocacy may make it harder to wage war, but it doesn't actually contradict Congress's war power .... Insulting Catholicism on the streetcorner may run contrary to the spirit of religious freedom, but it isn't the government 'mak[ing a] law ... prohibiting the free exercise [of religion].' If we accept this approach, then there is no constitutional tension. We can obey the Free Speech Clause without being untrue

to any other constitutional provision." Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method,* 3 U. Chi. Roundtable 223 (1996).

3. Response to 1: That Congress has the *power* to do something doesn't mean that it has the right to restrict speech in order to do it, because _____. All federal actions must rest on one or another grant of power; the Bill of Rights is meant to constrain the federal government even when it's acting within its Article I power grants.

"When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. They especially feared that the new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech....

"The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history...." *New York Times Co. v. United States* (Black, J., concurring).

4. Response to 1: The Constitution embodies so many values that the constitutional tension method, if accepted, would justify restricting a huge variety of speech: speech that in some measure works against democracy, equality, private property, federalism, separation of powers, or what have you. Such a result would be undesirable, because _____, and the constitutional tension method should therefore be rejected.